THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT 17/2005 (AS AMENDED)

AND

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS (ELECTION PETITION) RULES

ELECTION PETITION NO. 002 OF 2011

HALIMA NAKAWUNGU::PETITIONER

VERSUS

1. **ELECTORAL COMMISSION**
2. **SUSAN NAMAGANDA::::::::::::::::::::::::::::::::::::RESPONDENTS**

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

JUDGMENT

The petitioner and the 2nd respondent contested as candidates in the just concluded Parliamentary elections held on 18/02/2011 in which the 1st respondent declared the 2nd respondent, who polled a total of 15537 votes against the petitioner's 15076, as the duly elected Woman MP for Bukomansimbi District. The petitioner was dissatisfied with and aggrieved by the results and filed this petition contending that the elections were not free and fair in that there was non-compliance with the electoral law and practice and that the non-compliance affected the results of the election in a substantial manner.

The petitioner outlined four complaints in her submissions as follows:

1) Partisan polling officials who were openly supporting and campaigning for DP and who rigged election for the 2nd respondent.

2) Deliberate invalidation of the petitioner's valid votes where the mark of choice was clear.

3) Incompetent and partisan election officials who mismanaged the elections and robbed the petitioner of victory.

4) There was alteration and falsification of results. Many agents did not sign DR Forms and or were not given copies of DR Forms which facilitated falsification.

The above complaints were among those spelt out in the petitioner's accompanying affidavit. The petitioner filed a further 46 affidavits in support of the petition and two others in rejoinder.

In their respective answers to the petition, the 1st and 2nd respondents denied all the allegations against the Electoral Commission, and contended that the election was conducted in accordance with the provisions of all the laws relating to elections. Further that if there was any non-compliance, it did not substantially affect the elections in a substantial manner. The 1st respondent filed an affidavit in support of the answer and 6 affidavits in rejoinder. Meanwhile the 2nd respondent filed the statutory affidavit in support and a further 28 additional affidavits in support of her answer.

Three issues were framed at scheduling, namely:

1) Whether the election for Woman MP for Bukomansimbi District was not conducted in compliance with the electoral law; and if so

2) Whether such non-compliance affected the results of the election in substantial manner.

3) Remedies available to the parties.

The affidavits filed in court and served on the opposite party were taken as read. Counsel for the petitioner cross-examined the respondents and some deponents of affidavits. Counsel for the respondent also cross-examined the petitioner and other deponents of their choice. All Counsel re-examined most of their witnesses.

Numerous documents and authorities were relied on by the parties in support of their respective cases.

The burden to prove the grounds of the petition is upon the petitioner. He is party who asserts the existence of certain facts upon which he seeks judgment. In absence or failure to prove those facts, then the petition fails. The petitioner, therefore, bears the burden of proof. See Section 101-103, Evidence Act, Cap.6.

The grounds to be proved, relevant to this petition are pursuant to Section 61 (1) Parliamentary Elections Act.

a) Non-compliance with the provisions of this Act relating to elections, if the court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the non-compliance and the failure affected the results of the election in a substantial manner;

b) That the person other than the one elected won the elections.

The standard of proof required is to be found under Section 61 (1) and (3) to the effect that the grounds for setting aside an election shall be proved to the satisfaction of court on the basis of a balance of probabilities.

In ***Supreme Court of Uganda Presidential Election Petition No. 1 of 2001: Col. (Rtd) Dr. Kizza Besigye Vs Museveni Yoweri Kaguta and the Electoral Commission***, the Learned Chief Justice Odoki, cited with approval the case of ***Borough of Hackney Gill Vs Reed [1874] XXXI L.J. 69,*** where Grove, J emphasized that an election should not be annulled for minor errors or trivialities thus:

> ***"An election is not to be upset for an informality or for a triviality. It is not to be upset because the clock at one of the polling booths was five minutes too late or because some of the voting papers were not delivered in a proper way. The objection must be something substantial, something calculated to affect the result of the elect ion. …… so far as it appears to me the rational and fair meaning of the section appears to be to prevent an election from becoming void by trifling objections on the ground of informality, but 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."***

If the Petitioner is to succeed, therefore, he has to prove the grounds, or any one of them, of the petition to the satisfaction of court, on the basis of a balance of probabilities.

"Proof to the satisfaction of Court" has been held by the Supreme Court of Uganda to imply that, the matter has been proved without leaving room for the Court to harbor any reasonable doubt about the occurrence or existence of the matter; See ***Supreme Court Presidential Election Petition No. 1 of 2001; Col. (Rtd) Dr. Kizza Besigye Vs Museveni Yoweri Kaguta and another (Supra):*** Judgment of Mulenga, JSC.

The Court of Appeal, too, has held that:

> ***"The Court trying an election petition under the Act (Parliamentary Elections Act 17/2005) will be satisfied if the allegations/grounds in the petition are proved on balance of probabilities, although slightly higher than in ordinary cases. This is because an election is of greater importance both to the individuals concerned and the nation at large ……. A Petitioner has a duty to adduce credible or cogent evidence to prove his allegation at the required standard of proof."***
>
> See Judgment of L.E. Mukasa Kikonyogo, Deputy Chief Justice, in ***Election Petition Appeal No. 9 of 2002; Masiko Winnie Komuhangi Vs Babihuga Winnie,*** un reported.

This court will apply the above stated principles as to the burden and standard of proof in the determination of this petition.

During the hearing and after cross-examination of several witnesses, it became clear to court that the gist of the petitioner's complaint was majorly her claim to the majority of the invalidated votes. The court's view based on Section 63 (5) of the PEA was that an order of a recount of the invalid votes would go a long way in resolving the issue. Counsel on both sides were asked to address court on the above before a final decision was made by court.

Hon. Seggona Merdard for the 2nd respondent opposed the intended recount saying that this was a matter where court was to exercise the discretion provided for in Section 63 (5) of the Act. The Petition did not in any paragraph or prayer seek for a recount, or even an examination of ballot papers and boxes as evidence. Parties were bound by their pleading and court could not grant a relief that was not prayed for whether express or implied. This court had on its record, sufficient evidence to show that the ballot boxes in issue were already tampered with and that the seals were broken. In the proceedings before court, the learned Chief Magistrate made a judicial finding that the boxes were tampered with and there could be no recount since the status quo as of 18/2/2011 was questionable.

Counsel further contended that the petitioner had failed in her pleadings to comply with Section 48 of the Parliamentary Election Act governing objections to invalid votes because a person seeking the intervention of court must submit among others the serial numbers of the invalid votes that he objected to. ; failed to send and train her agents, never applied for any record from the Electoral Commission which would have included the record book and any others that the petitioner would have wished to obtain.

Further that court cannot do a partial recount; it had to be the votes in their totality. He asked court not to issue the order.

Mr. Kamba added that the decision to apply for a recount must be done promptly and without inordinate delay after the Returning officer has declared the winning candidate, and that since Section 63 (5) was purely discretionary, the discretion had to be exercised in accordance with the law.

Mr. Serwanga, for the 1st respondent associated himself with the above submissions of both Counsel for the 2nd respondent and further stated that the Electoral Commission could not ensure that the ballot boxes brought to court in January and found to have been tampered with were safe as of petition time. Recounts had to be done promptly after elections.

Mr. Gabriel Byamugisha, for the Petitioner, did not agree. He cited paragraphs 6 (b), (e) and the prayer (c) which he said were basis for their complaint. He stated that Section 63 (5) bestowed discretion on court to order a recount whether on application or on its own motion if it forms an opinion that the ends of justice would be justified by a recount.

The Chief Magistrate's ruling shows only 6 ballot boxes had broken seals, one had no seal, and another six had seals which were loose. That was 13 out of 118.

On the provision by the Petitioner of serial numbers of the invalid votes, Counsel stated that if only those who had serial numbers were the ones allowed to apply for a recount then no one would apply for a recount. The court could order a recount in a specific area, not necessarily in totality.

A week later, court communicated its decision to the parties, that is to say, that there would be no recount; it deferred the reasons for the decision till judgment. I am now giving my reasons for the decision. I considered the submission of learned Counsel on all sides; the pleadings and law relied on. I specifically studied Annexture 5 to the Petition and Exhibit P1, the Notice of Motion in Miscellaneous Application No. 32 of 2011which was an application for the recount of votes before the Chief Magistrate, Masaka. I studied the Notice of Motion and the affidavit of the applicant/petitioner dated 22/2/2011 in support of the Notice of Motion. The gist of these

documents was that the petitioner was seeking for a recount of the votes on the basis that many validly cast votes were declared invalid during the election exercise on 18/2/2011, and that several were declared invalid even when the voter's choice could reasonably be ascertained; that this action severely affected the total percentage of the votes declared for the petitioner/ applicant. All the grounds in the application were related to the invalidated votes. So were all the averments in the affidavit in support.

At the hearing of the application all Counsel agreed to the following:

> ***"1) That if the invalid votes if counted made a difference to the status quo; we go ahead with the recount.***
>
> ***2) We recount only those votes declared invalid.***
>
> ***3) If seals on any of the boxes are missing, broken, no recount as the boxes had not been properly reserved."***

On the 25/2/2011, all 118 ballot boxes were presented to court by the Returning Officer, Bukomansimbi, and after court and the respective parties examined them, it was found that 6 (six) boxes had broken seals; one box had no seal; six boxes had seals on but the boxes had space in them; and one box had 2 seals. Because of this state of affairs the recount did not go ahead.

After a careful consideration of the above, this court formed the view that since the same parties had in the earlier proceedings agreed that once any of the boxes were found open then the

integrity of all of them was in issue, it would not be in order for the court at petition stage to order otherwise.

On the above ground alone, court decided to respect the wishes of the parties and not order a recount. In any case the petitioner had not applied for a recount in the Petition.

I will now proceed to consider the issues at hand.

During the written submissions the 2nd respondent raised a preliminary point that there was no cause of action disclosed against the 2nd respondent other than the statement in the alternative prayer that the 2nd respondent was not duly elected. It was submitted that a Petition without cause of action against the winner of an election was a nullity. Likewise a petition which had a cause of action only against the Electoral Commission was a nullity. Counsel relied on ***Besweri Lubuye Vs Electoral Commission and Anor, and Mbabaali Jude Vs Sekandi and Electoral Commission (COAU)*** but did not supply the authorities themselves. The above notwithstanding, Counsel for petitioner pointed out, quite rightly in my view, that the 2nd respondent was a statutory respondent who must be named and served as per rule 3 of the Parliamentary Elections (Election Petitions) Rules. It is the 2nd respondent's election that is being challenged as invalid, and the petitioner's prayers, if granted, would affect the 2nd respondent. She was therefore properly sued, even if it is true that she was not alleged to have been part of any of the irregularities cited. The preliminary point is therefore overruled.

The first issue is whether there was none compliance with the electoral law.

The petitioner contends in paragraph 6 (a) of the Petition that the 1st respondent failed to comply and adhere to the law and practice regulating the conduct of free and fair elections. In paragraph

6 (b) she contended that the 1st respondent performed its duty with open bias, partiality and prejudice against her party NRM. In paragraph 6 (g) she complains of recruitment of campaign agents and supporters of the 2nd respondent as polling day officials who compromised the electoral process to the prejudice of NRM and the petitioner.

In her affidavit accompanying the petition, she depones to the above in paragraph 4 – 10. In paragraph 4 (g) of the said affidavit it is deponed that he 1st respondent's Retuning Officer attended secret meetings with agents of the 2nd respondent to plan to rig the elections. This is supported by the affidavit of Mpoza Manisuli sworn on 10th May 2011 and filed in court on 16/5/2011 where he deponed in paragraphs 8, 12, 13, 14 and 15 that meetings were held in various places in Masaka and Kalungu where a plot was hatched to beat Hon. Lubyayi and the petitioner and were attended by Anne Aheebwa, the 1st respondent's Returning Officer. Hon. Kiyingi another DP candidate had assured the meeting that with Anne Aheebwa's assistance victory was assured. Counsel contended that the affidavit of this witness was never rebutted or controverted.

I should point out here that the fact that an affidavit has not been rebutted does not, in any way, reduce the burden of the petitioner to prove his or her case to the satisfaction of court on a balance of probabilities.

In response, Counsel for the 1st respondent submitted that contrary to the above allegation of the petitioner, the Returning officer, Anna Aheebwa, had under paragraph 10 and 11 of her affidavit denied collusion and bias throughout the election period in favour of the 2nd respondent.

On the allegation of the Returning officer having attended secret meetings with the agents of the 2nd respondent, Counsel contended that this allegation was never proved and during cross-examination, Counsel for the petitioner never cross-examined the returning officer on the alleged secret meetings. In any case Manisuli Mpoza, who alleged to have attended the secret meetings, could not be availed for cross-examination because he was a defilement suspect on remand at Masaka Prisons. Counsel cautioned that the character of a defilement suspect swearing an affidavit to unseat a Member of Parliament should be taken into account.

I have considered the above complaint, and I find that the failure by the petitioner's Counsel to cross-examine the Returning Officer on such serious allegations left a gap in the credibility of the allegations.

A close examination of the affidavit of Manisuli Mpoza of 10/5/2011. The relevant paragraphs are:

> ***"3. I was a campaigner for Haji Lubyayi Kisiki and other NRM candidates including the petitioner in the just concluded Parliamentary elections.***
>
> ***4. That I was approached by Mr. Deo Kiyingi, asking me to support him and campaign for him.***
>
> ***5. That I was invited by the said Deo Kiyingi to his campaign planning meetings which took place in various places outside of Bukomansimbi, in Masaka town and lastly on 16/2/2011 at Kalungu.***
>
> ***8. That Deo Kiyingi convened these meetings to plan and plot how to defeat the petitioner and other NRM candidates including Idd Lubyayi and the President.***

10. That on 16/2/2011, we were picked and driven to Kalungu at night and taken to a venue around the District Headquarters.

11.That we found another group from Kyamuswa which were briefly briefed by Kalumba and Deo Kiyingi and they left.

12. That then our meeting started and Deo Kiyingi promised that he was going to unveil the master card that evening which will convince everybody that he had put everything in place.

13. That he then invited a new guest who turned out to be Ms. Ahebwa Anne, the Returning Officer, Bukomansimbi District whom I know very well.

14. That she entered into the meeting and stayed briefly and left after greeting us and on her departure, Mr. Deo Kiyingi assured us that he had properly planned with her and she had assured him and there were guarantees from her that she would hand him and his allie's victory.

15. That Deo Kiyingi told us to start celebrating our victory as we were going to the polls expecting nothing else but victory and that Hon. Lubyayi and other NRM candidates were already finished.

16. That I went and briefed Haji Lubyayi about it and given the high number of invalid votes at many polling stations which clearly affected him and the petitioner, I confirmed Kiyingi's promise.

17. That I further confirmed the same when the same Anne Ahebwa frustrated the recount exercise at Masaka Chief Magistrate's court."

The above are the paragraphs relating to the role the Returning Officer played at the so called secret meeting. Apart from the Returning Officer entering the meeting place, staying briefly and leaving after greeting them, nothing is stated regarding what she told the meeting apart from greeting them. One cannot tell what it was Kiyingi told the meeting after she left that they had planned with the Returning officer, or what assurances she had given Deo Kiyingi. In any case even if the witness had reported the details of what Kiyingi said he had planned with the Returning Officer that would be hearsay. The Returning Officer did not say anything. At least nothing has been attributed to her. I find the accusation that she attended a meeting where they hatched plans to rig elections in favour of the 2nd respondent unfounded. Kiyingi was a candidate himself and if he hatched any plans it would be for his own victory, not for other candidates who did not even attend the so called secret meetings.

Furthermore, the evidence of a self confessed "spy" has to be taken with a pinch of salt. It is inconceivable that the Returning Officer could sit in a meeting which so many people (including the likes of Manisuli) and then be party to the hatching up of a plan to rig the elections favour of some candidates. The evidence even lacks any corroboration to make it credible, coming as it is, from such a suspicious witness. Being a mole, he had to have some "news" to report to earn his pay.

The court finds that the evidence falls short of that what can satisfy court that the returning officer attended secret meetings to hatch a plan for rigging elections.

The petitioner also complained under paragraph 6 (g) and (h) of the petition and paragraphs 5 and 6 of the affidavit in support that the 1st respondent selectively recruited campaign agents sympathetic to the 2nd respondent and intentionally did so to assault the tenets of fair play thus compromising the electoral process to the prejudice of the petitioner and NRM. Further, the 1st respondent selectively recruited incompetent election officials who delivered an equally incompetent result.

The petitioner was cross-examined on this issue and was asked to explain how she came to the conclusion that the polling day officials were DP supporters. She answered that she had prepared and presented to the Returning officer a list of 20 names for appointment as polling officials which was rejected. Counsel for the 1st respondent pointed out, and quite rightly, that the appointment of polling officials was a preserve of the Electoral Commission and not of candidates. Polling officials are meant to be impartial and appointed though a competitive process. The petitioner failed to prove during cross-examination that she knew the political party inclination of any of the polling officials because, as she stated, she never saw their party cards. The court was not persuaded that there was evidence cogent enough to support the complaint that the recruitment process for the polling day officials favoured the 2nd respondent.

Another complaint was the alleged hostility of the polling day officials, who are said to have openly campaigned at the polling stations in favour of the 2nd respondent's party symbol, the hoe, saying "***Akalulu ka nkumbi***" meaning that the vote was for the hoe. The evidence adduced to support this was the affidavits of Sendaula Aloysious, a voter at Kisaabwa (not polling agent as stated by the petitioner in the submissions). He deponed that when he reached the desk of Woman Member of Parliament, the polling official would quietly advise the voter that "***akalulu***

ka nkumbi". That he was also advised so. Kalema Stephano, a voter (and not polling agent as alleged by Counsel) also deponed that he was a registered voter at Bulenge polling station whose affidavit was a replica of Sendaula's. Lubega Umar, a registered voter at Mirembe polling station also had exactly the same story to tell in a replica of an affidavit. The same applied to Nanfuka Joweria, a registered voter at Migajju polling station.

I must say I am not impressed by these affidavits which are mass prepared with the only change being in the names of deponents and polling stations. How can people at different polling stations all perceive things in exactly the same way? Moreover no names of the "biased officials" were given. I am fortified in my view that these were cosmetic affidavits because indeed during cross-examination, Kalema Stephano and Lubega Umar told court that they were never told to vote for the hoe themselves, and that even if they had been told so, that would not have influenced their choice, yet they had deponed that when each of them reached the desk of Woman MP, the polling assistant would quietly tell them to vote for the hoe. When asked if they knew of any voter who was influenced because of being told to vote "akalulu ka nkumbi", the answer was negative. This meant that even if what was alleged was true, it had no effect on the choice of the voters.

In light of the above observations, the court's evidence available did not satisfy court that the polling officials day officials exhibited hostility and open bias and openly campaigned in favour of the 2nd respondent against the petitioner.

Another complaint related to the deliberate falsification and alteration of results of the petitioner, and in this respect the petitioner singled out Kigumba, Kyakajwiga, Misanvu (N-Z); Kyansi and Kisaba polling stations out of a total of 118. However, evidence was led on Kigumba polling

station. Nakazibwe Joyce, deponed in her affidavit that she was the petitioner's polling agent at Kigumba Primary School polling station who signed the DR Form indicating the results of the petitioner as 034 votes. The tally sheet on the other hand shows the petitioner as having 07 votes.

The petitioner's case was that she was thus robbed of 27 votes. The court notes that a comparison of the DR Form for Kigumba and the tally sheet indicates that it is not only the petitioner who was cheated of her votes at Kigumba. The 2nd respondent scored 86 as per the DR Form yet the Tally sheet indicates only 79; a shortfall of 07 votes. This was stated to be human error by the Returning Officer in cross-examination, who when further asked whether that error did not affect the end results as declared she answered in the negative. She said her office used the results on the DR Form to compute the final results declared, and not the results on the tally sheet. Since this assertion by the Returning Officer was not controverted by evidence showing that the results declared corresponded to the entries on the Tally sheet as opposed to the DR Form, the complaint appears to have no merit. In any case even if the 27 votes were to be added to the final vote, it would not make any substantial change.

Biased officiation was further alleged in paragraphs 4 (f) and (5) of the petitioner's affidavit where the petitioner complained that the Returning Officer allowed Mohamed Katerega, an ardent supporter and agent of the 2nd respondent to access the tallying computers to alter data in the 2nd respondent's favour. Again this is an allegation that was never put to the Returning Officer during cross-examination. The results which were falsified are not indicated, apart from the results at Kigumba (supra). I find no evidence to support this allegation, especially when the Returning Officer told court that all candidates were present at the tally centre. The effect on the

results is not stated either. Even the evidence of Kasozi Badru and Tumwine Livingstone who deponed they were at the Tally centre and witnessed Katerega altering results, did not help either. They did not state what results were altered, and its effect on the overall results. All the candidates and other officials were at the tally centre as stated by the Returning officer. Surely some independent evidence, other than that of the agents of the petitioner, would have helped to corroborate the evidence above deponents on what transpired at the tally centre. The complaint or its effect on results has not been proved to the satisfaction of court.

This takes me to the main complaint on which the petition revolved, that is to say, the purported invalidation of the petitioner's votes. In paragraph 6 (d) of the petition, the petitioner complains that the 1st respondent maliciously, knowingly and intentionally invalidated ballot papers ticked in favour of the petitioner. See also paragraphs 4 (c), 6, 11, 12, 17, 20 and 21 of her affidavit. The petitioner polled 15076 votes as against 15537 votes for the 2nd respondent, a difference of 461 votes. A total of 1810 votes were declared invalid accounting for 4.7% of the total valid ballot cast.

The petitioner contends that the bulk of the 1810 votes were her votes which were willfully and wrongly invalidated by partisan presiding officials at various polling stations. On the 18/2/2011, the petitioner immediately requested for a recount, vide a letter to the Returning officer (Annexture A to the petition (and paragraph 4 of her affidavit). The returning officer turned down the request on the ground that her case fell outside the provisions of S. 54 of the PEA where mandatory recount is provided for. (See Annexture 4 dated 19/2/2011).

The petitioner filed a total of 37 affidavits to support her invalidation claims, as follows:

1. Birabwa Harriet, No. 1, polling agent at Bwanga Trading Cente and paragraphs 5-14 that 16 votes invalidated of which at least 13 belonged to the petitioner.

2. Muyimba Robert, No. 2, polling agent at Gayaza Mosque, paragraphs 5-14. There are 42 invalid votes of which at least 39 were valid votes for the petitioner.

3. Sewanyana Alex, No. 3, polling agent at Kiryamenvu Primary School play ground polling station, paragraphs 5-14 that 22 out of 23 invalid votes were for the petitioner.

4. Gwantamu Edward, No. 5, polling agent at Kyamabaale polling station, paragraphs 5-14 invalids 73 of which 71 belonged to the petitioner.

5. Luswata L., No. 6, polling agent at Masindaalo polling station, paragraphs 5-14 that all the 17 invalids belonged to the petitioner.

6. Kawooya Tony, No. 7, polling agent at Bunyeenya play ground that 20 out of 21 invalids were for the petitioner.

7. Nasazi Prossy, No. 8, polling agent at Kisaka play ground, paragraphs 5-14 that 24 out of 27 invalids belonged to the petitioner.

8. Namatovu Joe at Butenga Sub-county polling station complains of all 18 ballots that were wrongly invalidated.

9. Nakintu Theopista at Serinya Primary School polling station complains of all 19 votes wrongly invalidated.

10. Nanono Irene at Misanvu D-Z polling station complains of 20

out of 20 invalids to have belonged to the petitioner.

11. Nakazibwe Prossy at Bukomansimbi Primary School pooling station complains of 13 votes cast for the petitioner having been invalidated.

12. Kyakuwa Augustine at Kyankoole Catholic Church complains of 17 out of 20 invalid votes to belong to the petitioner.

13. Mukasa Kato at Butenga Muslim Primary School polling station complains of 31 out of 34 invalid votes as valid votes belonging to the petitioner.

14. Nakimbugwe T. of Makoomi T.C. polling station complains of 22 out of 22 invalids as valid votes belonging to the petitioner.

15. Burusha Francis of Mijuunwa polling station complains of 13 out of 17 invalids as valid votes belonging to the petitioner.

16. Nakintu Josephine Butenga Primary school polling station complains of 29 out of 30 invalids as valid votes belonging to the petitioner.

17. Nabukeere Mwamini complains of 64 out of 68 ballots at Mbale Kinoni polling station wrongly invalidated to fail the petitioner.

18. Nakalema Maria complains of 22 ballots at Mpalampa polling station.

19. Ssebatta Emmanuel complains of 26 votes at Kigungumika primary school polling station.

20. Nalwadda Maria complains of 31 out of 32 invalids as valid votes for the petitioner at Makuukuulu Primary School polling station.

21. Nakabuubi Mary Franck complains of 34 out of 38 invalids as valid votes for the petitioner at Kitoma Kabigi polling station.

22. Ssendi Peter complains of 19 out of 20 invalids as valid votes for the petitioner at Kyaziiza polling station.

23. Nakaweesi Leokadia complains of 22 out of 23 votes as valid votes for the petitioner Kikondeere Primary school polling station.

24. Jjunju Livingstone at Kasota Primary school complains of 18 out of 21 votes as valid votes for the petitioner.

25. Nakayiwa Aisha of Kyakatebe polling station complains of 28 out of 30 ballots as valid votes for the petitioner.

26. Kanantebya Emmanuel complains of 32 out of 34 ballots as valid votes for the petitioner at Kawoko play ground polling station.

27. Nabukeera Imelda complains of 13 votes out of 16 ballot papers as valid votes for the petitioner at Busagula Primary school polling station.

28. Nayiga Jameo complains of 32 out of 36 votes as valid votes for the petitioner at Mbale play ground polling station.

29. Nassolo Margaret complains of 13 votes out of 17 votes as valid votes for the petitioner at Kavule Trading centre polling station.

30. Lukyamuzi Paul complains of 36 votes out of 39 votes as valid votes for the petitioner Kakuukuuku polling station.

31. Nsamba Mike complains of at least 18 votes out of 19 votes as valid votes for the petitioner at Makuukuulu Catholic Church polling station.

32. Nasaasira Annet complains of 30 votes out of 34 votes as valid votes for the petitioner at Makuukuulu Catholic Church polling station.

33. Nakku Gertrude complains of all the 19 votes as valid votes for the petitioner at Kigangazi play ground station.

34. Nakiwala Jane complains of 54 votes out of 56 invalid votes as valid votes for the petitioner at Mulindwa play ground polling station.

35. Ssessimba Abdul complains of 28 votes out of 31 votes invalidated as valid votes for the petitioner at Meeru Primary School polling station.

36. Ssekimpi Diriisa complains of 16 votes out of 17 invalidated votes as valid votes for the petitioner at Mukoza polling station.

37. Bbuye Mustafa complains of 19 out of 29 votes invalidated as valid votes for the petitioner.

As further evidence of deliberate invalidation, Ndawula Muganga Badru, the Sub-county election supervisor of the Petitioner in Kibinge Sub-county swore an affidavit in rejoinder dated

10/6/2011 in response to an affidavit by the 1st respondent's election supervisor, Sheibah Nabatanda who had denied deliberate invalidation of the petitioner's votes in Kibinge.

Ndaula deponed that at Kiryassaka polling station, the presiding officer had maliciously invalidated 40 votes and the petitioner had scored 70 votes. Surprisingly, police was called and they checked and the invalid votes dropped from 40 to 01 and the petitioner's result changed from 70 to 109 (DR Form No. 69).

Sempijja Nuru, the petitioner's Sub-county election supervisor for Kitanda Sub-county deponed an affidavit in rejoinder to the one sworn by Lukyamuzi, the 1st respondent's election supervisor for the same sub-county wherein he had denied any deliberate invalidation of the petitioner's votes. Sempijja deponed that at Kagologolo Primary School polling station, 24 votes meant for the petitioner had been maliciously invalidated and police intervened and the number dropped to 6. The petitioner had scored 79, and her score rose to 97.

Junju Haruna, the petitioner's sub-county supervisor for Butenga sub-county also swore an affidavit deponing that at Mulindwa Play ground 56 votes for the petitioner were invalidated but he failed to have this rectified.

I have studied the 37 affidavits and the 3 affidavits in rejoinder mentioned above. All the 37 affidavits are similar, word for word. One of them is reproduced below for effect.

> ***"AFFIDAVIT IN SUPPORT OF THE PETITION.***
>
> ***I, Luswata L. of C/O Byamugisha, Kanduho and Co. Advocates, Total Deluxe House, Suites 2 & 3, 1st Floor, Plot 29/33 Jinja Road, P O Box 21161, Kampala do solemnly swear and state on oath that:***

1. ***I am a male adult Ugandan of sound mind.***

2. ***I was the petitioner's polling agent at Mizindaalo polling station, where too I vote from.***

3. ***Voting commenced and ended in my presence.***

4. ***When all was done the polling officials set down to sort and count the ballot papers for the (3) three different categories of candidates.***

5. ***What is awkward and weird is that under my watchful eye, the polling official at my polling station chose to invalidate very many ballot papers apparently ticked in favour of the petitioner.***

6. ***I together with other people tied to protest and object but to no avail.***

7. ***The polling official particularly invalidated all genuine and valid ballot papers so long as a ballot paper:***

    a) ***Bore a tick which looked like a "v".***

    b) ***Bore a thumbprint which stretched from the box for the symbol to the box for the mark of choice.***

    c) ***Bore a tick or thumbprint in the box for the bus symbol.***

    d) ***Bore a tick in the box for the candidate's photograph.***

8. ***I believe this was arbitrary as the 1st respondent had never said that the above mentioned cases had the effect of invalidating a vote.***

9. ***The action of the polling official looked glaringly designed to fail the petitioner.***

10. ***Particularly, the polling official selectively invalidated the petitioner's votes where the mark of choice appeared in the box for the bus symbol or the petitioner's face but did not query those where the mark of choice happened to be in the 2nd respondent's photo or in the hoe symbol.***

11. ***I was shocked to see that altogether total number of 17 ballot papers were invalidated of which all 17 ballots meant for the petitioner were maliciously, deliberately and heartlessly invalidated.***

12. ***Upon seeing this injustice, I quickly notified the petitioner, who in turn assured me and many others who had witnessed the same scenario that she had instructed her lawyers to explore a possibility of petitioning the Chief Magistrate for a recount, which never yielded fruit.***

13. ***I am offended that this kind of injustice was done across the board against all NRM candidates whose supporters had ticked in the bus symbol.***

14. ***I swear this affidavit confirming that the petitioner was denied victory at my polling station because of maliciously invalidating her votes which were valid and faultless.***

15. ***Whatever is hereinabove stated is true and correct to the best of my knowledge and belief."***

It appears from looking at the affidavits that 37 copies of the above affidavit were printed and signed by the 37 witnesses, the only difference in each being the name of the deponent, the polling station, and the alleged number of invalidated votes. This makes the affidavits very suspicious, and leads one to the irresistible conclusion that the evidence is cosmetic and/or manufactured. It is very difficult to believe that different people at 37 different polling stations all perceived exactly the same irregularities regarding the invalidated votes. No attempt was made in any of the affidavits to indicate how many votes were invalidated because they had a small "v", how many invalidated because the tick was in the bus and so on and so forth. The total number of invalidated votes was 1810, representing 4.75% of the total votes cast. The petitioner wants court to believe that almost all the invalidated votes were hers. This is nothing more than wishful thinking. Lining up 37 of her polling agents to depone that over 90% of the votes cast were the petitioner's, without any other evidence to corroborate that fact, cannot persuade court enough to order a re-election.

The affidavit evidence of Ndaula Muganga Badru, and Sempijja Nulu, in rejoinder to the assertion by the 1st respondents sub-county election supervisors in Kibinge, where policemen are alleged to have interviewed and the invalid votes were reduced tremendously in favour of the petitioner. In the case of Ndaula's allegations as to what happened in Kiryassaka, his evidence was an afterthought. Why did he not swear an affidavit along with the earlier ones filed in April being a whole election supervisor; he did not have to wait for June to reveal what happened. Secondly there no affidavit from any of the agents of the petitioner who were there at the polling station and who would not have failed to witness such an important and damning event? That makes Ndaula's affidavit very suspicious. Sempijja's affidavit stands on similar shaky grounds

when he depones on police intervention at Kagologolo to the benefit of the petitioner when there is no supporting affidavit from any of the agents on the ground.

A closer look at the 37 affidavit reveals that the petitioner could go to any extents in order to put forward evidence that she was the winner of the elections. Affidavit No. 22 in the volume of affidavits filed in court on 8/4/2011 is allegedly sworn by one Maria Nakalema. She deponed that she was the petitioner's polling agent at Mpalampa L.C. I polling station, and that she was shocked to see that 25 ballot papers were invalidated out of which at least 22 ballots meant for the petitioner were maliciously, deliberately and heartlessly invalidated. To court's surprise, another Nakalema Solome Mary swore a supplementary affidavit in reply on 6/5/2011. She deponed that she was commonly known as Nakalema Maria, and on polling day she was the 2nd respondent's agent at Mpalampa L.C. I polling station, not the petitioners. She denied the signature on the affidavit filed by the petitioner and referred court to her signature on the Declaration of Results Form for Mpalampa L.C. I polling station. She was the only Maria acting as agent at that polling station on that day.

A look at the DR Form for Mpalampa L.C. I Open Ground polling station reveals that Nakalema Maria was an agent for the 2nd respondent, and not the petitioner. The signature on the DR Form is very similar to the one of Nakalema Maria, the agent for the 2nd respondent as seen from her affidavit. The signature on the Maria Nakalema, the alleged petitioner's agent, is strange to the DR Form. There is no other Maria for any other candidate portrayed on the DR Form.

From the above scenario the court came to the irresistible conclusion that 37 affidavits were printed out and names of agents of the petitioner in the 37 polling stations inserted, with imagined high figures of petitioner's votes stated as invalidated indicated on each, respectively.

The petitioner then must have set out to get signatures for the affidavits, and even manufactured some signatures like in the case of Maria Nakalema. Maria's case is the one that betrayed the petitioner. The 2nd respondent asked to cross-examine the 'Nakalema Maria' posing as the petitioner's agent and indeed no such Nakalema Maria appeared. On the other hand the real Nakalema Maria was availed by the 2nd respondent for possible cross-examination. The offer was not taken up.

The above shows how far the petitioner was ready to go to prove her fictitious case. The court did not believe the exaggerated figures of the petitioner's allegedly invalidated votes, for the above reasons. In fact Musoke Kibuuka so aptly observed in ***Musa Anthony Hamis Vs Dr. Lulume Bayiga M. Philip HCT EP No. 15 of 2006*** that:

> ***"It is a pity that in election petitions such as this one, truth is often the first victim to be sacrificed".***

There is no cogent evidence to prove the petitioner's assertion that all the invalidated votes she lays claim to be belonged to her.

I would not go so far as to ask for the production of serial numbers of the invalidated votes, as both Counsel for the respondents contend, because insisting on this would make it impossible to ever have a recount on basis of wrongly invalidated votes. Some evidence from some independent source other than the agents and sub-county supervisors of the petitioner would have gone a long way to corroborate what these agents state in their mass produced affidavits. Bamwine J as he then was, observed in ***S. Sebagala Vs Tito Damulira & Another HC EP No. 11 of 2002 reported [2003] KALR 411,*** that matters concerning the validity of an election

deserve the most difficult enquiry possible so that a party who emerged victorious is not denied his victory on flimsy grounds. Therefore, although it may be difficult to record serial numbers of the individual ballot papers annulled especially where the annulled votes are as high as 1810, and taking into account that elections in some areas are held in a highly charged atmosphere, the person alleging wrongful invalidation of votes needs to do better than the petitioner in this case.

The court had occasion to call for the Final Results Tally Sheet in respect of Presidential Elections in Bukomansimbi District. The Returning Officer tendered the same in court as Court Exhibit No. 1. It revealed the same pattern of high numbers of invalidated votes. In this respect they were 2271 (two thousand two hundred and seventy one votes). Inspite of the claims by the petitioner that the 1st respondent performed its Constitutional and statutory mandate with glaring and abhorable bias, partiality, malafide, and prejudice against "**everything NRM in nature**", (paragraph 6 (b) of the petition), the NRM Presidential candidate managed to win Bukomansimbi District with 22,389 votes reflecting 59.42% of the total valid votes cast for candidates. The high numbers of invalid votes at different categories of elections in Bukomansimbi in my view reflects more on the level of voter education in the district, and the need to address it by the 1st respondent. It would not, however, go to show that one party was victimized over the other.

Another factor that the court has taken into account is the signing of the DR Forms. Almost 100% of the DR Forms were signed by both the petitioners and 2nd respondents' agents. Even the eight polling stations where the presiding officers did not sign the DR Forms, the agents signed. Apart from the Forms not signed by the presiding officer, the signature by the candidates' agents on the rest of the DR Forms meant that they confirmed the contents of the results and data as given on the DR Form and that their candidates were bound. Stella Amoko J, as she then was,

had this to say in ***Babu Edward Francis Vs Electoral Commission and Elias Lukwago HCEP No. 10 of 2006 (Kampala).***

> ***"When an agent signs a DR Form, he is confirming the truth of what is contained in the DR form. He is confirming to his principal that this is the correct result of what transpired at the polling station. The candidate in particular is therefore stopped from challenging the contents of the form because he is the appointing authority of the agent.***
>
> Byamugisha JCA had this to say***, in CA No. 11/02, Ngoma Ngime Vs EC and W. Byanyima at page 2 on this point:***
>
> ***All the 66 declaration of results forms that I have examined contained the essential information that the law requires. The agents of each candidate signed the forms. None of them deponed an affidavit to say that the information contained in these forms is not correct …. if the agents of the appellant were not satisfied with the results that were declared, they could have declined to sign the declared of results forms. They did not."***

By the petitioner's agents signing the DR Forms, they confirmed that the votes stated therein to be invalid were actually invalid. There is no cogent evidence that any complaints were made by the petitioner's agents at the polling stations as required under S. 48 of the PEA. If the petitioner did not appoint capable agents who would stand up to the task, it is the petitioner herself to blame for failing to identify capable and competent agents. The issue is answered in the negative.

The last issue is whether, if there was any non-compliance with the electoral law, whether such non-compliance affected the results in a substantial manner.

It was the petitioner's case that the elections were not free and fair; that there was total non-compliance with the electoral law and principles therein and that the non-compliance affected the results in a substantial manner. The petitioner contended that the difference between the 2nd respondent and the petitioner is only 461 votes, and that the invalid votes were far higher than this. Using the figures given by 37 witnesses who swore affidavits, there is a proved figure of 962 invalid votes which belonged to the petitioner and were wrongly invalidated by biased polling officials. In all the1810 votes declared invalid, the petitioner says that at least 1500 of these were hers. There was also evidence of biased officials campaigning at the polling station and influencing voters to vote for a hoe and the 2nd respondent. Such polling officials could not conduct a free and fair election. Using the qualitative test, therefore, the 1st respondent's officials could not conduct a free and fair election or have a fair result, and this affected NRM across the board, also affecting the President and Constituency MP. Indeed 2271 votes were declared invalid for President, 1810 for Woman Member of Parliament and 1692 for constituency MP.

The petitioner further complained that 8 polling stations, they did not sign the DR Forms. Those DR Forms are null and void. These are:

DR Form - No. 05 - Kalungu Kitawuluzi

DR Form - No. 06 - Bukango

DR Form - No. 16 - Bwanga

DR Form - No. 17 - Kakindu Mosque

DR Form	-	No. 43	-	Kakuukuulu
DR Form	-	No. 45	-	Mulindwa
DR Form	-	No. 83	-	Kyabiri
DR Form	-	No. 95	-	Ndalage

If all these results were to be nullified the petitioner would loose 909 as against 1039 for the 2nd respondent. That is a difference of 130 votes against the 2nd respondent. Then there is Kigumba polling station where the petitioner's 034 votes were changed to 07 hence robbing her of 27 votes. That further reduces the difference by 157 votes. Therefore before one considered invalid votes, the difference of votes between the 2nd respondent and the petitioner is reduced from 461 to 304 votes. This balance is said to be substantially reduced in favour of petitioner upon consideration of the invalid votes.

Counsel concluded that both qualitatively and quantitatively there was non-compliance and it affected the result of the election in a substantial manner. He prayed that the issue be resolved in the affirmative.

What does affected the results in a substantial manner mean? In his judgment in the Presidential Election Petition No. 1 of 2001, Mulenga J. explained the meaning of the phrase, "affected the results in a substantial manner" as follows:

> ***"Issue No. 3 in this petition relates to the application of paragraph (a) of that sub-section {58(6)}. It is centred on the meaning of the phrase "affected the result of the election in a substantial manner". The result of an election may be perceived in two senses. On one hand, it may be perceived in the sense that one candidate has won, and***

the other contesting candidates have lost the election. In that sense, if it is said that a stated factor affected the result, it implies that the declared winner would not have won but for that stated factor; and vice versa. On the other hand, the result of an election may be perceived in the sense of what votes each candidate obtained. In that sense to say that a given factor affected the result implies that the votes obtained by each candidate would have been different if that factor had not occurred or existed.

In the latter perception unlike in the former, degrees of effect, such as insignificant or substantial, have practical effect. To my understanding therefore, the expression non-compliance affected the result of the election in a substantial manner as used in S. 58 (6) (a) can only mean that the votes candidates obtained would have been different in substantial manner, if it were not for the non-compliance substantially. That means that to succeed the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that the winning majority would have been reduced. Such reduction however would have to be such as would have put the victory in doubt."

In my analysis earlier on I stated that the loss resulting from 34 of the petitioner's votes at Kigumba being recorded as 07 on the Tally sheet, did not affect the final results because the Returning Officer's uncontroverted evidence was that the total results she declared were computed from the DR Forms. Even if that was not the case, adding the 27 votes to the petitioner would only reduce the margin from 461 to 434. I agree that the unsigned DR Forms are invalid because the law states under Section 50

(4) of the PEA thus:

"The declaration of results form referred to in Sub-section (1) shall be signed by the Presiding Officer and the candidates or their agents as are present and wish to do so, ……..".

The requirement for signature by the presiding officer is, therefore, mandatory.

Failure by the Presiding Officer to sign the DR Forms rendered them invalid. I, therefore, agree that the candidate's respective votes from the 8 polling stations would have to be deducted from each candidate; and as rightly pointed out, the difference would further be reduced by 157, making a winning margin of 304 votes.

Whether this difference of 304 votes is affected by the alleged wrongly invalidated votes is another matter. There has been no credible evidence to prove that all the invalidated votes claimed by the petitioner belonged to her. As stated by Counsel for the 2nd respondent, the petitioner's story of invalidated votes was of her own making and too vague to be relied upon. And as Counsel for the 1st respondent put it, the results of the election reflected the will of the people of Bukomansimbi District. The court finds that there was no substantial non-compliance with the law governing elections and no substantial effect on the results of the election. The reduction of the margin from 461 votes to 304 is not substantial. The reduction does not in my view put the 2nd respondent's victory in doubt. This issue is also answered in the negative.

The last issue relates to the remedies available to the parties. Except for the minor irregularities like the failure by the Presiding Officers to sign DR Forms, the petitioner failed to prove the grounds of his petition to the satisfaction of court on the balance of probabilities. The petition is hereby dismissed with costs, to the 2nd respondent with a certificate of 2 Counsel in respect of the 2nd respondent. Since there are some irregularities attributed to the 1st respondent, like failure by the Presiding officers to sign DR Forms, affecting the results of the candidates, and wrong entries on the Tally sheet, the 1st respondent will meet their costs.

It is so ordered.

Elizabeth Musoke

JUDGE

10/08/2011