**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA**

**HOLDEN AT MUKONO**

**HCT-03-CV-EP- 006-2011**

**(ARISING FROM HCT-03-CV-EPA-002-2011)**

**KAFEERO SEKITOLEKO ROBERT:::: APPLICANT/3RD RESPONDENT**

**VERSUS**

**MUGAMBE JOSEPH KIFOMUSANA::::::::::::::::::::::::::RESPONDENT/PETITIONER**

**BEFORE: THE HON. MR. JUSTICE LAMECK N. MUKASA**

**REPRESENTATION:**

Mr.Ambrose Tebyasa of counsel for the Applicant/3rd Respondent

Mr.Godfrey Odur Ojok

Mr. Chris Bakiza - of counsel for Respondent/Petitioner

Mr. Eric Sabiti - counsel of the Returning Officer and Electoral Commission

Court clerk:

Ms. Deborah Namatovu

**RULING**:

Parliamentary Elections were held on the 18th February, 2011, where Kafero Sekitoleko Robert (the Applicant), Mugembe Joseph Kifomusana (the Respondent), Luzinda

M Hassan, Mukasa Abdallah, Nakiriza Prossy, Sebalu Robert Muyizzi, Ssemakula Habib Musa K, Ssenabulya David Kateregya and Simba K Leonard were the candidates for Nakifuma Constituency. The Applicant was returned as the validly elected Member of Parliament. On 9th March 2011, the Respondent filed a Petition under the Parliamentary Election sAct, 2005 and the Parliamentary Elections (Appeals to the High Court from Commission Petitions) Rules 1996 against the Applicant, the Returning Officer Mukono District and the Electoral Commission. On 28th March 2011 the Respondent filed an Amended Petition under the Parliamentary Elections Act, 2005 as Amended by the Parliamentary Elections (Amended) Act 12 of 2010 and the Parliamentary Elections (Interim Provisions) (Elections Petitions) Rules S.I 141-2.

On the 7th April 2011 the Applicant filed this application, brought by Chamber summons under section 95 of the Civil Procedure Act, Order 6 Rules 22 and 31 of the Civil Procedure Rules, seeking orders that:

1. The Respondent's amendment to the petition be dismissed and the amended petition be struck out.
2. Costs of the application be provided for.

When the Petition came up for mention on 18th May, 2011, Mr. Ambrose Tebyasa, for the Applicant, indicated that he also intended to raise preliminary objections against the Petition. It was agreed by counsel for the respective parties that the preliminary objections be handled together with this application.

In his submissions, at the hearing, Mr. Bakiza, for the Respondent also raised the following preliminary points of law:-

1. That the grounds of the Chamber Application were brought in the affidavit in support of the application instead of the Chamber Summons.

2. The Application is intended to defeat the purpose of Rule 26 of the Parliamentary Elections (Election Petition) Rules.
3. The Applicant has no locus to be heard on the Petition since he did not file an Answer to the Petition or if he did, it was out of time.

Counsel submitted that the Application is defective, incompetent and should be struck out.

In the premises I will first resolve the preliminary points regarding the Chamber Application. The first point of objection is that the Chamber Application lacked grounds upon which the application is made.

The application states:

> ***"This application is brought under the provisions of the law aforementioned and is supported by grounds set out in the affidavit of Kafeero Ssekitoleko Robert which shall be read and relied upon during the hearing hereof".***

In paragraph 6 of his affidavit in support the Applicant states:-

> ***"That I am advised by my lawyer Mr. Ambrose Tebyasa which advice I verily believe to be true and correct that the respondent's purported amendment is incompetent, illegal, unlawful and ought to be rejected on account of the following:***
>
> ***(a)The amendment was done without leave of Court.***
>
> ***(b) The amendment seeks to change the nature of the suit and the cause of action with a substantially different cause of action.***
> ***(c) The amendment erroneously seeks to act as an appeal or challenge against the decision for recount of the Mukono Chief Magistrate's***

***Court Vide M.A. No. 49/2011.***
***(d) The affidavit in support of the petition is purportedly amended in contravention of the law.***
***In his submission Mr. Tebyasa for the Applicant, argued the above as the Applicant's grounds for the application***."

Mr. Bakiza submitted that unlike a Notice of Motion which is a pleading between parties, a Chamber Summon is originated by Court and must contain all the grounds of the application. That there is no rule which obligates the mover of a Chamber Summon to support it with an affidavit so as to raise his grounds therein. He argued that the logic to include grounds in the body of the Chamber Summon is because such grounds include points of law to be considered by the originating court. That it is futile to include points of law in an affidavit which is evidence by the deponent subject to cross-examination. He further argued that an affidavit sworn by an applicant attracts costs.
That it would be prejudicial for the opposite party to be condemned in costs on matters which he cannot cross-examine the deponent and if he doesn't file a reply thereto the opposite party would be presumed to have accepted the grounds as deponed to by the Applicant. Counsel cited the following authorities:

Mugalula Mukiibi vs Colline Hotel Ltd [1984] HCB 35 – The Applicant applied under O.33 rule 4(now O.36) CPR for leave to appear and defend. The application was by Notice of Motion and it stated:

***" TAKE NOTICE……that on the grounds set out in the affidavit of Augustine Kasozi hereto annexed and marked "A" this Honorable Court may be pleased to allow the defendant to appear and defence the suit"***

It was held that order 45 rule 3 CPR is mandatory. If the Notice of Motion does not contain the grounds of the application, then it is defective fatally. The affidavit is a separate document containing such statements of facts in support of the grounds of the application.

Odongkara & others vs Komakech and Another [1968] EA 210 where by Notice of Motion unsupported by affidavit the plaintiff applied to amend the plaint. In the circumstances of the case court held that no affidavit in support was necessary as there was no question of evidence. It however found that the Notice of Motion was deficient because of two reasons, one being that it did not sufficiently set out the grounds on which it was made.

Also in F.D. Sebamala vs The Registered Trustees of Namirembe Diocese and another [1988-1990] HCB 114 it was held that failure to set down in general terms the grounds of the application in a Notice of Motion was a non compliance of form which renders the application defective.

In his reply Mr. Tebyasa argued that unlike Chamber Summons, for applications by Notice of Motion it is a specific requirement under Order 52 rule 3 of the Civil Procedure Rules that a Notice of Motion should contain the grounds of the application. He submitted that a Chamber Summon is a document of Court and Court does not move to state the grounds to be addressed by the parties. It is the practice for the applicant to state the grounds in the supporting affidavit.

All the authorities cited by Mr. Bakiza were in respect of Applications by Notice of Motion. Order 52 Rule 3 of the Civil Procedure Rules specifically requires a Notice of Motion to state in general terms the grounds of the application. It states:

> ***"Every Notice of Motion shall state in general terms the grounds on the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the Notice of motion".***

The instant application is by Chamber Summons and rule 7 of the above order only provides:

> ***"All applications by summons shall be in Chamber and, if supported by affidavit, a copy of any affidavit or affidavits relied upon shall be attached to each copy of the summons directed to be served".***

There is no statutory requirement for Chamber Summons to state the grounds upon which the summons are founded or based. Points of law could be addressed without being stated, be in the Chamber Summons or the supporting affidavit. However in the instant case the grounds were stated in the affidavit which was by reference and attachment to the Chamber Summons incorporated thereto and served together with the Chamber Summons. The procedure adopted was not at all prejudicial to Respondent. It actually put the Respondent on Notice as to the points of law to be addressed by the parties at the hearing of the Chamber Summons application. The first point of objection by the Respondent is overruled.

The second point of objection is that the application is intended to defeat the purpose of Rule 26 of the Parliamentary Elections (Election Petition) Rules. The Rule provides:

> ***"No proceedings upon a petition shall be defeated by any formal objections or by the miscarriage of any notice or any other document sent by the Registrar to any party to the petition".***

The Parliamentary Elections (Appeals to the High Court from Commission) Rules has a similar provision in Rule 14.

Mr. Bakiza argued that the above rules were, respectively, intended to ensure that as much as possible Election Petitions are heard irrespective of any irregularities since Election Petitions are public litigations intended to resolve disputes surrounding the election of potential leaders

into public offices. He cited Article 126(2)(e) of the Constitution and submitted that Election Petitions should not be thrown out on technicalities. He argued that the instant application is such "formal objections" envisaged by rule 26 above which should not defeat any proceedings upon a petition.

In his reply Mr. Tebyasa argued that rules 26 and 14, of the respective Rules are only applicable to negligible defects in Petitions already properly before Court. The said Rules do not apply where substantive law has been infringed. He argued that the application before court was substantive and not merely procedural. Counsel submitted that court can only consider the merits of a Petition which is properly before Court.

Rule 14 (also Rule 26) was considered by my brother Justice Benjamin Kabitto in Ssali Godfrey vs UEC and Kabaale Sulaiman –HCT Election Petition No. 13 of 2011. The objection raised therein was that the Petitioner had filed the Petition out of time. The Petitioner sought to rely on Rule 14 of the Parliamentary Elections (Appeals to the High Court from Commission) Rules arguing that the Rule helps to resolve all the problems that the petition faces. His Lordship held:

> ***"…….the word "formal" means a mere technicality in the format or actual preparation of the form of petition itself. The word formal does not mean a "substantive" or "fundamental" or "material act" or "action" that must be taken to comply with the provisions of the law"***

He went to hold that the failure or neglect to present the petition within the set time period, is not an irregularity that is contemplated under Rule 14. He found the Petitioner's failure of such a fundamental and material nature to be regarded merely as formality or technicality.

The principle issue for Court's determination is whether the Amended Petition is properly before Court. Article 126(2)(e) of the Constitution provides that:

> **“Substantive justice shall be administered without undue regard to technicalities”**

Courts are thereby enjoined to disregard irregularities or errors unless they have caused substantial failure of justice. Rule 26 and Rule 14 of the respective Rules are in line with that principle.

However in Utex Industries Ltd vs Attorney General SCC Application No. 52 of 1995, the Supreme Court stated that:

> ***“Regarding Article 126(2)(e)……we are not persuaded that the Constituent Assembly Delegates intended to wipe out the rules of procedure of our Courts by enacting Article 126(2)(e). Paragraph (e) contains a caution against undue regard to technicalities. We think that the article appears to be a reflection of the saying that rules of procedure are handmaids of Justice – meaning that they should be applied with due regard to the circumstances of each case.”***

In Bakaluba Peter Mukasa vs Nambooze Betty Bakireke SCEP Appeal No. 04of 2009, Justice Katureebe, JSC had this to say:

> ***“ Rules of procedure are very important but they are not an end in themselves. They are often referred to as the hand maidens of justice but are not justice themselves. Rules form the procedural frame work within which a fair hearing is conducted. ……”***

Rule 26 must be read in its entirety. It provides:

> ***“……any formal objection or by the miscarriage of any notice or other document sent by the Registrar to any party…….”***

My considered view is that the rule relates to formal objections in relation to documents sent by the Registrar of the court. The Amended Petition was filed by the Petitioner, as a form of pleadings. The rule does not extend to objections as to the procedure of coming before court. For any proceedings upon a petition to be saved by Rule 26 or Rule 14, as the case may be. the petition must be before Court by a proper procedure, not tainted with any illegality.

The instant application seeks to challenge the procedure by which the Amended Petition was brought before Court.

The second point of objection by the Respondent accordingly fails.

Thirdly, Mr. Bakiza raised a point of law that the applicant lacked the locus standi to file this Application. Counsel argued that the applicant did not file an answer to the petition or if he did, he did so out of time. Counsel argued that the Applicant had not filed an answer to the Amended Petition. He contended that the Applicant therefore lacked the locus standi to challenge the Amended Petition. Further that the applicant had not even filed an Answer to the initial Petition. Counsel cited Rule 8(3)(a) of the Parliamentary Elections (Elections Petitions) Rules which provides:

> ***(1) If the Respondent wishes to oppose the petition, the respondent shall, within ten days after the petition was served on him or her, file an answer to the petition.***
> ***2……***
> ***3. The answer of the respondent shall be accompanied by***
>
> > ***(a) an affidavit stating the facts upon which the respondent relies in support of his or her answer and……”***

The court file shows that the Applicant, who is the 3rd Respondent to the Petition, on 24th March 2011 filed a document entitled" 3rd Respondent's affidavit in answer to the Petition" Also filed the same day is an affidavit deponed to by Owori Michael entitled" affidavit in support to the 3rd Respondent's Reply to the Petition:.

On the 28th March 2011 the Respondent filed an Amended Petition, following which the Applicant filed the instant application on 7th April 2011. Mr. Bakiza submitted that failure to file an Answer is fatal and a respondent who fails to file one shuts himself out from opposing the petition.

Rule 8 of the Parliamentary Elections (Election Petition) Rules (hereafter referred as the Election Petition Rules") enjoins a respondent who wishes to oppose the Petition within ten days after the petition was served or him or her to file an Answer to the Petition and to accompany such answer with an affidavit. This is a matter of law and failure to comply with any of the above requirements goes to the root of the case and is fatal to the petition as a whole. In Benon Lubuye Kiwanuka vs Electoral Commission & Daniel Kikoola, EPA NO. 2 of 1999, Kikoola who was the winning candidate was not served with a copy of the petition as required by law. Having learnt of the petition somehow, he filed his answer to the petition in protest. The Petition was dismissed by the High Court and the dismissal was upheld by the Court of Appeal which stated;

> ***"By reason of non-service of the petition on the second respondent, no action was in existence"***

An application or any other matter can only be brought before court by a party who has the locus standi to do so and by the proper procedure.

Rule 8 (above) mandatorily require a respondent who wises to oppose the petition to file an answer within ten days after service on him and to accompany the answer with an affidavit. It presupposes that a respondent who does not file an answer does not intend to oppose the Petition and thereby shuts himself out from opposing it.

However, Mr. Tebyasa for the applicant argued, and in my view rightly so, that the Applicant had filed an answer in compliance with Rule 8(4) of the Parliamentary Elections (Appeal to the High Court from Commission) Rules (hereafter referred to only as "the Appeal Rules").

It provides:

> ***"(4) A Respondent, other than the Commission, served with the petition, may answer the petition by an affidavit within two days after the service"***

Two sets of rules have been made under the Parliamentary Elections Act. One set is the Parliamentary Elections (Appeals to the High Court from Commission) Rules – SI No. 141-1. A "petition" under these Appeal Rules "means a petition authorized by section 15 of the Act" and its form is provided for by Rule 4 thereof. An answer to this kind of petition, other than for the Commission is "by an affidavit" – Rule 8 (4).

The second set of rules are the Parliamentary Elections (Election Petition) Rules. Under these rules a "petition" means an election petition and includes the affidavit required by these Rules to accompany the petition. Its form is provided for by rule 4 of the Petition Rules. An answer to this type of petition is provided for by rule 8 thereof. It is an Answer to the Petition accompanied by an affidavit.

The initial petition before this court was specifically brought under the "Parliamentary Elections (Appeals to the High Court from Commission) Rules, 1996". The Applicant, in compliance with Rule 8(4) of the Appeal Rules, filed an affidavit in answer as legally required of him.

Amendment of Petitions is not provided for by any of the above two sets of Rules. However, Rule 12 of the Appeal Rules provides:

> ***" Subject to these Rules, the practice and procedure in respect of a petition shall be regulated, as newly as may be, in accordance with the***

***provisions of the Civil Procedure Act and the Rules made under it relating to the trial of a suit in the High Court"***

Rule 17 of the Election Petition Rules also has a similar provision save for concluding with the addition of ***"….., with such modifications as the court may consider necessary in the interests of justice and expedition of the proceedings"***

Order 6 rule 22 of the Civil Procedure Rules stipulates:

> ***" Where any party has amended his or her pleading under rule 20 or 21 of this Order, the opposite party shall plead to the amended pleading or amend his or her pleading within the time he or she then has to plead or within fifteen days of the service or delivery of the amendment, which ever shall last expire; and in case the opposite party has pleaded before the service or delivery of the amendment, and does no plead again or amend within the time above mentioned, he or she shall be deemed to rely on his or her original pleading in answer to that amendment."*** (emphasis added).

There is no mandatory requirement to plead to an amended pleading if the opposite party had already pleaded to the initial pleading. In the instant case the applicant had filed his Answer on 24th March 2011 prior to the filing of the Amended Petition on 28th March 2011. The Applicant was therefore not under any obligation to again file an Answer to the Amended Petition.

Alternatively, Mr. Bakiza argued that, if found that the Applicant had filed an Answer to the Petition; such answer was out of time. Rule 8(4) of the Appeal Rules require a respondent, other than the Commission, to answer the petition within two days after the service of the petition or him. An affidavit of service deponed to by Bangirana Deus, a law clerk with M/s Bakiza & Co. Advocates, shows that the petition was served on M/s Tebyasa & Co Advocates, the Applicant's lawyers, on 15th march, 2011. This is not

disputed. The applicant's Answer was filed on 24th March 2011, a period of nine days. This was outside the period stipulated by the Rules.

However each case is decided on it own facts. As it was pointed out by Mr. Tebyasa, the petition, in the instant case was served on the Applicant with a "Notice of Presentation of a Petition" which stated:

> ***"You are hereby required to file an answer within ten days after the Petition has been served on you"***

The Applicant's Answer was clearly filed within the ten days as communicated by Court and conveyed to the Applicant by the Respondent. The provisions of Order 8 Rules 1(1) of the Civil Procedure Rules must be appreciated. It states:

> ***"(1) The defendant may, and if so required by the Court at the time of issue of the summons or at any time thereafter shall, at or before the first hearing, or <u>within such time as the Court may prescribe,</u> file his or her defence. (emphasis added).***

I agree with Mr. Tebyasa that court has power to abridge or enlarge time. Rule 19 of the Election Petition Rules specifically provides so. The Applicant had filed his Answer within such time as the Court had prescribed, which was within 10 days after service of the petition.

Lastly Mr. Bakiza argued that he doubted the service on the Respondent and submitted that there <u>was no proper service</u>. Rule 8(4) of the Petition Rules provides:

> ***"The Respondent shall, within five days after filing the answer with the Registrar, serve a copy on the petitioner or his or her advocate"***

However the Appeal Rules lack a corresponding provision. In the circumstance recourse is made to the Civil Procedure Rules. Order 3 rule 4 which provides:

> ***"Any process served on the advocate of any party or left at the office or ordinary residence of the advocate,……shall be presumed to be duly***

***communicated and made known to the party whom the advocate represents, and unless the Court otherwise directs, shall be as effectual for all purposes as if the process had been given to or served on the party in person".***

In the instant case the Petition filed was marked "drawn and filed by: M/s Bakiza & Co. Advocates, Get-in-House, 2nd floor, suit No. 105, Plot 3 William Street, P.O Box 10103, Kampala". Mr. Bakiza was the counsel before me representing the Respondent. In the affidavit in rejoinder, Mukasa Henry of M/s Ambrose Tebyasa & co. Advocates avers:-

***"3. That on the 25th day ……I proceeded to A Get-In-House on William Street, Kampala where the offices of M/s Bakiza & Co. Advocates are located to effect service of the said Affidavits.***

***3. That at the chamber of Ms Bakiza & Advocates, I found the secretary who told me that the counsel in personal conduct of the matter , counsel Bakiza, was not in office and that he was the only person to sign for the same and I left the two copies of the affidavit waiting to go back for my signed copies.***

***4. That I further went back to the same offices and I was then told that Mr. Bakiza had left Uganda for Arusha and I was availed his number 0772471117 by his secretary which I called and Mr. Bakiza told me he was still out of the country.***

***5. That I then asked to be returned my copies which had not been signed since I had served the firm with their copies and I hereby return the said copies duly served on……..M/s Bakiza & Co. Advocates."***

In paragraph 7 of his affidavit in reply the Respondent contends:-

***"……there is no evidence of service of the answer by the applicant on my counsel and Annexture 'B' the 3rd Respondents answer to the petition does not show on the face of it any evidence of service on my Counsel"***

The Respondent was not competent to make the above averment since service was not claimed to have been made on him personally but on his advocate. The averments on oath in the affidavit of service are neither denied nor rebutted on oath by any body from M/s Bakiza & Co. Advocates. In circumstances where whoever was present in the firm of M/s Bakiza & Co. Advocates had indicated that the only person who could acknowledge receipt of service was Mr. Bakiza and who was at the material time out of the Country I wonder what evidence of such receipt was expected by the Respondent on the face of Answer!

The Respondents answer to the Petition indicated that he was C\o M/s Ambrose Tebyasa & Co. Advocates, Kob House Plot 90 Ben Kiwanuka Street, P.O. Box 26377 Kampala. In paragraph 7 of his affidavit in Rejoinder the Applicant contends:

> ***"…….even the amended petition was served on my lawyer Mr. Ambrose Tebyasa on 31/3/2011 and yet I had never provided any other document to the respondent's counsel on which he could have got my address of service***"

Logic dictates that the Respondent's counsel had got the Applicant's advocate's law firm as alternative avenue of service from the Respondent's Answer to the Petition following its service on the law firm. In the premises I find that there was proper service of the Applicant/3rd Respondent's answer on the Respondent/Petitioner. The same having been left at the office of his advocates.

All in all the objections raised by Counsel for the Respondent fail and I now proceed to consider the merits of the application. The application is, among other provisions, brought under order 6 rule 22 of the Civil Procedure Rules which provides:

> ***"Where a party has amended his or her pleadings under rule 20 or 21 of this order, the opposite party may within fifteen days from the date of service upon or delivery to him or her of the duplicate of the document apply to the court to disallow the amendment or any part of it, and the court may, if satisfied that the justice of the case requires it, disallow the***

***amendment or any part of it or allow it subject to such terms as to costs or otherwise as may be just".***

The Applicant is seeking the Amended Petition field by the Respondent/Petitioner on 28th March 2011 to be disallowed on the grounds spelt out in paragraph 6 of the Applicant's affidavit in support.

The first ground is that the amendment was done without leave of court. The initial petition was filed under the Appeal Rules Neither the Appeal Rules nor the Election Petition Rules provide specifically for amendment of petitions. The Amended Petition is indicated filed under the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, SI 142-2 . Statutory Instrument No. 142-2 has since ceased to be law. The current law is the Parliamentary Elections (Election Petitions) Rules S.I 141-2. Assuming the Amended Petition was filed under the current statutory instrument, Mr. Tebyasa cited Rule 24 thereof which states:

***"All interlocutory questions and matters arising out of the trial of the petition, other than those relating to leave to withdraw a petition, shall be heard and disposed of, or dealt with; by a judge and references in these Rules to the Court shall be construed accordingly".***

Counsel argued that amendment of a petition is a matter arising out of the trial of the petit on. He submitted that the above rule requires a Judge to deal with every interlocutory question on matters relating to the petition. So an amendment done without the authority of Court was incompetent. By way of analogy counsel pointed out that an amendment without leave under Order 6 rule 20 should be either within twenty one days from the date of issue of the summons to the defendant or where a written statement of defence is filed, then within fourteen days from the filing of the written statement of defence. Counsel argued that the above provisions are incompatible with either the Appeal Rules or the Election Petition Rules. Rule 8 of the Election Petition Rules requires a respondent who wishes to oppose the petition to file an answer within ten days after service of the petition on him. While Rule 8 of the Appeal Rules requires the Respondent to file an answer within two days after the service of the petition. In both Rules the period within

which to file an answer is shorter than the periods provided by Order 6 rule 20 CPR within which the plaintiff may amend pleadings without leave of Court.

Rule 24 above was considered by Hon. Justice Rugadya Atwooki in Mathina Bwambale vs EC & Krispus Kiyonga HCT-01-CV-EP-0007-2006 wherein the Registrar had granted an order for substituted service in an interlocutory application. His Lordship held that the rule is clear in that interlocutory matters in respect of election petitions, apart from those which are exempted by the rule, are to be handled by the judge. He went on to state:

> ***"Jurisdiction cannot be assumed or inferred. It is a creature of statute. In this case the law specifically removed from the ambit of the Registrars jurisdiction in respect of interlocutory matters".***

This is a right construction of the rule in light of its provision that

> ***".....and reference in these rules to the court shall be construed accordingly".***

Mr. Bakiza, on the other hand, submitted that Rule 24, above, applies in respect of interlocutory questions and matters arising out of the trial of a petition. He argued that a trial commences after the Scheduling Conference and the trial Judge is ready to set down the petition for hearing. He submitted that the amendment was before the trial of the petition and thus outside the provisions of the rule. That in view of the provisions of rule 17 the Petitioner had properly proceeded to amend the petition without leave pursuant to the provisions of Order 6 Rule 20 of the Civil Procedure Rules. Rule 17 of the Election Petition Rules or Rule 12 of the Appeals Rules make the Civil Procedure Act and the Rules thereunder applicable to practice and procedure in respect of a petition.

Mr. Tebyasa argued that "trial" the word used in Rule 24 is broader than "hearing" of the petition. He submitted that every step taken on a petition forms a segmental part of the petition's trial and the trial in the Rule means every segmental step taken which would include the amendment of a petition and therefore requiring to be allowed by a Judge.

The catch words in rule 24 are "…arising out of the trial of the petition…." Trial is wider than hearing. Any proceeding by Court in a matter before it is a process of trial. However in the instant case there was no application, interlocutory or otherwise. The Respondent proceeded to amend the Petition without Court involvement. Counsel for the Respondent contends that the Respondent had properly amended the Petition as so allowed by Order 6 Rule 20 of the Civil Procedure Rules.

It is trite that court must interpret statutory provisions in such a way as not to cause an absurdity in the law. An amendment pursuant to order 6 rule 20 CPR would be within twenty one days from the date of issue of the summons to the Respondent or where an answer is filed within fourteen days of filing.

In the instant case the initial Petition was issued on 9th March 2011 and a Notice of Representation of Petition issued on 10th March 2011. Both were served on the Applicant on 15th March 2011. The Applicant filed an Answer to the petition on 24th March 2011 and I have already found that the same was served on the Respondent's Advocates on 20th March 2011. The Amended petition was filed on 28th March 2011. That is a period of 19 days from the date of issue of Petition; 18 days from the date of issue of the Notice of Representation of the petition; and 4 days from the date of filing an Answer. In the premises Mr. Bakiza argued that the Respondent was still within the time limits of Order 6 rule 20 CPR to file the Amended petition without leave of Court.

It is trite law that statutory general provisions apply subject to specific statutory provisions. Also under rule 17 of the Election Petition Rules the Civil Procedure Rules apply 'with such modifications as the Court may consider necessary in the interests of justice and expedition of the proceedings'. The provisions of Order 6 rule 20 of the Civil Procedure Rules have to be modified in conformity with the provisions of Rule 8 of Appeal Rules or Election Petition Rules, as the case may be. The Parliamentary Elections Act and the Rules thereunder are aimed at expeditious disposal of petitions. The election Petition Rules require an answer to be filed within ten days, while the Appeal Rules require an Answer to be filed within two days. In that spirit pleadings must be

closed with corresponding speed. The Civil Procedure Rules require a defendant to file a written statement of Defence within fifteen days after service of the summons – Order 8 rule 1(2). The rules then permit an amendment of the plaint within fourteen days from the filing of a Written Statement of Defence. With that and the provisions of the electoral Rules in mind the appropriate modification would be to permit an amendment of the petition within one day of service of the petition in the case of the Appeal Rules and 9 days in the case of the Election Petition Rules. The instant petition was made under the Appeal Rules, so an amendment thereof should also be under the same rules. In light of my recommended modifications above, any amendment effected more than one day after filing of the Respondents Answer had to be with leave of Court. I accordingly find that the petition was unlawfully amended without leave granted by a Judge.

The second ground is that the Amendment seeks to change the nature of the suit and cause of action with a substantially different cause of action. The initial petition was brought under the Appeal Rules. The Amended Petition is brought under the Election Petition Rules. Each of the two sets of rules provide for a distinct type of petition. The Appeal Rules provide for what I will term an "Appellate Petition" while the Election Petition Rules provide for what I will term an "Original Petition". There are futures peculiar to each of the two types of petition.

Rule 4 of the Appeal Rules provides the form of petition as follows:

> ***"(1) Every petition shall***
>
> ***(a) state the right of the petitioner to present the petition in accordance with section 15 of the Act, namely, being a person affected by an order of the Commission with regard to any alleged irregularity.***
>
> ***(b) contain a brief statement of the order understood to have been given by the Commission relating to the alleged irregularity or irregularities, confirmed or rejected by the Commission and measures taken by the Commission to correct an irregularity, if any ,and the effects of those measures, if any, relied upon by the petitioner to support the prayer in the petition."***

A petition, under the said Rules, is defined to mean ‘a petition authorized by section 15 of the ‘Act’ The ‘Act’ under the said Rules means the Electoral Commission Act.

Section 15 of the Electoral Commission Act provides:

> ***“(1) Any complaint submitted in writing alleging any irregularity with any aspect of the electoral process at any stage if not satisfactorily resolved at a lower level of authority, shall be examined and decided by the commission and where the irregularity is confirmed, the Commission shall take necessary action to correct the irregularity and any effects it may have caused.***
>
> ***(2) An Appeal shall lie to the High Court Against a decision of the Commission confirming or rejecting the existence of an irregularity.***
>
> ***(3) The appeal shall be made by way of a petition, supported by affidavits of evidence, which shall clearly specify the declaration that the High Court is being requested to make “***

Under the Appeal Rules any person affected by the order of the Commission on a complaint alleging any irregularity with the electoral process can by way of appeal petition the High court. The appeal lies against the decision of the Commission. Such decision of Commission is the cause of the action.

Rule 4 of the Election Petition Rules provides the form of petition as hereunder:

> ***Every petition shall state…….***
>
> ***“(2)(a) the right of the petitioner to present the petition in accordance with section 60 of the Act;***
>
> ***(b) the holding and result of the election together with a statement of the grounds relied upon to sustain the prayer of the petition; and***
>
> ***(3) The only grounds on which an election may be set aside are those set out in section 61 of the Act”***

As to who may present an election petition section 60 states:

> ***"(2) An election petition may be filed by any of the following persons:***
>
> ***(a) A Candidate who loses an election ;***
>
> ***(b) A registered voter in the constituency concerned supported by the signatures of not less than five hundred voters registered in the constituency.***
>
> ***(3) Every election petition shall be filed within thirty days after the day on which the results of the election is published by the commission in the Gazette."***

Under the Election Petition Rules a Candidate who loses an election or a registered voter with not less than five hundred voters signatures have a right to action. The cause of action arises on the date the results of the election is published by the Commission in the Gazette. The petition is only on the grounds set out in section 61 of the Act.

Mr. Tebyasa pointed out that the complaint under section 15 of the Electoral Commission Act stems from Article 61(f) of the Constitution which mandates the Electoral Commission to hear and determine election complaints arising before and during polling.

In his submission Mr. Tebyasa argued that the initial petition was under the appellate petition category. It was filed under the Appeal Rules. He referred to paragraphs 13 and 14 of the supporting affidavit, wherein the Respondent avers:

> ***"13. THAT on or about 7th March, 2011 my lawyers above mentioned received a letter from the 2nd Respondent declining the correction of its own errors and instead advised me to refer the matter to the Courts of law.***
>
> ***14. THAT still aggrieved by the unreasonable decision of the Respondents, which was communicated to us on the 7th March, 2011, I instructed another set of Lawyers M/s Bakiza & Co. Advocates to pursue my grievance to this Honorable Cou*****rt***".

The said decision and communication were in response to the Respondent's lawyer's letter averred to in paragraph 9:-

> ***"(9) THAT I instructed my Lawyers to articulate the problem of irregularities in the tally sheet to the 2nd Respondent with a request that the errors be collected using its powers under section 15 of the Electoral Commission Act, cap 140. A copy of the Lawyers letter dated 2nd March, 2011 is hereto attached and marked annexture "E".***

The respondent under such a petition would be as defined by Rule 3(e) of the Appeal Rules - that is

> ***"The Commission and any candidate or person whose conduct is alleged to have caused an irregularity".***

Counsel argued that it was in that context that the initial petition was filed against the three Respondents named therein. Yet under the Election Petition Rules the 3rd Respondent (Applicant) would have ceased to be candidate. The Respondent envisaged under the Election Petition Rules as per the definition in Rule 3(e) would be:

> ***"…..<u>the person of whose election a complaint is made</u> in a petition, and where the petitioner complains of the conduct of the commission or the returning officer includes the Commission or returning officer". (emphasis added)***

The 3rd Respondent (Applicant) as a Respondent to a Petition under the Election Petition Rules would be an already elected person and already published by the Commission in the Gazette as the elected Member of Parliament.

Counsel for the Applicant submitted that the Petition as originally filed related to complaints before and during the polling exercise as specified in section 15 of the Electoral Commission Act. While the Amended Petition is related to matters after the elections and based on the grounds specified in section 61 of the Parliamentary Elections

Act. Counsel further argued that the Amended Petition to be sustained, it had to retain the original character of an appeal. He submitted that the Amended Petition was instead styled in such a way as to disguise the Petition as an original petition. He pointed out that in the initial petition the Petitioner seeks an injunction restraining the Commission from gazetting the voting results and nullification of the declared election results of Nakifuma Constituency. While in the Amended Petition, the Petitioner seeks to challenge the recount ordered by the Chief Magistrate's Court, nullification of the declared election results, the Petitioner's declaration as the validly elected winner of the election or a recount of votes cast at three polling stations. He submitted that court has wide discretionary powers to allow an amendment of pleadings but that an amendment that would seek to substitute a cause of action cannot be allowed. Counsel further submitted that the Amended Petition does not only change the nature of the Petitioner's case but it also prejudices the interests and rights of the Applicant as they existed before the said Amendment. That the Amendment Petition effectively takes away the Applicant's defence as spelt out in his Answer to the initially filed petition.

Mr. Bakiza, for the respondent, argued that citing the Parliamentary Elections (Appeals to the High Court from Commission Petitions) Rules 1996 was an error. The respondent in his affidavit in reply avers:

***"(3) THAT my lawyers have advised me which advice I verily believe to be true that reference to "INTERIM PROVISIONS "Rules in the title of the application was an error which originated from the legal precedent used by my lawyers during the 2001 election petitions and such an error was not intended as the Parliamentary Interim Provisions Rules are obsolete and were amended under section 93 of the Parliamentary Elections Act 17 of 2005.***

***----------***

***.....***

***20. THAT ....., The amendment did not seek to change the cause of action which is grounded a non-compliance with the provisions of section 61 of Parliamentary Elections Act, 2005.***

***21. THAT the cause of action in my petition is grounded on non-compliance with the provisions of section 61 (1) of the Parliamentary Elections Act and it has not changed.***

***.....”***

Mr. Bakiza contends that it was an error to have cited the Parliamentary Interim Provisions Rules 1996 since they were obsolete and the error should be embraced as honest. Counsel argued that the body, pleading and spirit of the initially filed Petition was clear that the Petitioner was petitioning under the provisions of section 61 of the Parliamentary Elections Act. He cited paragraphs 2 and 3(iii) of the Petition. The Petitioner pleads:

***“2. AND your Petitioner states that the election was held on the 1st February 2011 ----- and the returning officer and the Electoral Commission has returned KAFEERO SEKITOLEKO ROBBERT as validly elected by the declaration of the voting results....”.***

In paragraph 3(iii) it is pleaded that matters complained of therein were in contravention of section 61 (1) of the Parliamentary Elections Act, 2005. In his affidavit in support of the Petition the Respondent states:

***“18 THAT I have checked with the Government Publishing Corporate (UPPC) and confirmed that the Gazzette publishing the vote results of Nakifuma Constituency, Mukono District has not yet come out .....”***

The Respondent annexed the Uganda Gazette dated 21st February 2011. Counsel argued that the Petitioner in his Petition recognises that the Polling exercise had been concluded and the Applicant returned as the elected candidate. He attributes the Petitioner’s prayer for an injunction restraining the Commission from gazetting voting results of Nakifuma Constituency to the Petitioner not being aware that the gazette had come out.

I must point out that the Petition was filed on 9th March 2011. Annexture I to the Petitioner's Amended Petition is the Gazette dated 7th March 2011 wherein the Respondent's election and declaration as the elected member of parliament was published.

A gazette publication is information to the entire world and as at the date of filing the initial petition the Respondent was by presumption aware of the publication. This presumption is strengthened by the fact that he was specifically an interested party. I must also point out that the Petition was filed under the provisions described as the Parliamentary Elections (Appeals to the High Court from Commission Petitions) Rules, 1996. The Amended Petition was filed under provisions described as the Parliamentary Elections (Interim Provisions)(Election Petitions) Rules. The prevailing provisions are the Parliamentary Elections (Appeals to the High Court from Commission) Rules and The Parliamentary Elections (Election Petitions) Rules. If any petition was brought under an obsolete law it is the Amended Petition.

I have carefully addressed my mind to the Petition and the Amended Petition before me and the provisions of the law under which they were respectively filed. The Petition as originally filed is under the Appeal Rules. The Amended Petition is filed under the Election Petition Rules. The Petitions brought under either of the Rules differ in character. I have described a Petition under the Appeal Rules as an "Appellate Petition" and the one under the Election Petition Rules as an Original Petition. The two differ in character. The amendment has the effect of changing the character of the Petition from an Appellate Petition to an Original Petition. The initial Petition read together with the Petitioner's affidavit in support thereof and the annextures to that affidavit show that the Petition was contesting what he referred to as the "unreasonable decision" of the Commission which was communicated in the letter annexture F to the affidavit in support. The Amendment has the effect of changing into a contention against the publication of the Respondent in the Uganda Gazette as the wining candidate upon the grounds spelt of in section 61 of the Parliamentary Elections Petitions Act. Thereby

changing the nature of cause of action. The initial petition is against the Respondent as a candidate while in the Amended Petition it is against him as an elected person.

The following authorities were cited by Mr. Tebyasa:-

- ***Eastern Bakey Vs Castelino [1955] EA 461.***
- ***Ntungamo District LC VS John K. Karazarwe [1997] 111 KALR 52.***
- ***Lubowa Gyaviira & other Vs Makerere University HCT-00-CV-MA-0471-2009,***

and many others. Of the principles which emerge from all the cited cases are the following:-

> ****'A court will not exercise its discretion to allow an amendment which substitutes a distinctive cause of action for another or to change by means of amendment, the subject matter of the suit. The court will refuse to exercise its discretion where the amendment would change the action into one of a substantially different character.***
>
> ****'No amendment would be allowed which would prejudice the rights of the opposite party existing at the date of the proposed amendment.***

In ***<u>Lubowa Vs Makerere</u> (supra)*** Justice Yorokamu Bamwine (as he then was) held:-

> ***"... I have come to the conclusion that the proposed amendment, if allowed, would prejudice the Respondent's rights to have the suit struck out on account of disclosing no cause of action against it, as pleaded in its Written Statement of Defence if proved. This would clearly run contrary to principles --- that no amendment should be allowed which would prejudice the rights of the opposite party existing at the time of the proposed amendment. .....***
>
> ***I think the intended amendment is an indirect way of trying to fill gaps in the plaintiff's case, after addressing their mind to the preliminary objection the defendant intends to raise in the suit."***

In paragraph 3 of his affidavit in Answer to the Petition the Respondent (applicant now) states:-

> ***"3. That I .... will raise preliminary objections to the competency of the proceedings before court as the instant Petition is incompetent, frivolous and bad in law as there is no decision made by the 2nd respondent which is meant to be challenged at this forum and both the 1st and 2nd respondents cannot in law be compelled to look into the declared results since the results were transmitted for gazette and were gazetted on 7/3/2011. (A copy of the gazette notice is attached marked "A")".***

My considered view is that the Amended Petition was intended to address the preliminary objections intended to be raised by the Respondent's Counsel. It is settled law that in an application to disallow an amendment court takes into account the same considerations that would be taken into account on an application for leave to amend a pleading. Considering all the above the Amended Petition cannot stand.

The third issue is that the amendment erroneously seeks to act as an appeal or challenge against the decision for recount of the Chief Magistrates Court vide M.A. No. 49/2011. In paragraph 3(b) of the Amended Petition, the Respondent pleads:

> ***"(VI) The recount ordered by the Chief Magistrate Mukono was conducted in non-compliance with the provisions of section 55 of the Parliamentary Elections Act, 2005."***

Then prays for a declaration that the recount ordered by the Chief Magistrates Court Mukono was conducted in non-compliance with the law and is null and void.

Counsel for the Applicant submitted that under section 15 of the Electoral Commission Act the High Court is only mandated to hear appellate petition from the Commission and not Appeals arising from a recount ordered by the Chief Magistrate. He argued that the Amended Petition had changed the petition's character into an appeal against the recount ordered by the Chief Magistrate and seeking its nullification. He further argued that under section 61 of the Parliamentary Elections

Act, there is no petition grounded on the decision of the Chief Magistrate. That there is no known or provided procedure to challenge a recount by the Chief Magistrate's Court and a recount by the Chief Magistrate is not a decision of the Electoral Commission to give rise to an appeal under section 15 of the Electoral Commissions Act.

A recount of votes by the Chief Magistrate is provided for by section 55 of the Parliamentary Elections Act. It provides:

> ***"(1) Within seven days after the date on which a returning officer has, in accordance with section 58, declared as elected the candidate who has obtained the highest number of votes, any candidate may apply to the Chief Magistrate for a recount."***

Subsection (2) of the section provides that such a recount shall be conducted in accordance with the directions of the Chief Magistrate. Section 58 (1) of the said Act requires each Returning Officer:

> ***"..immediately after the addition of the votes under sub-section (1) of section 53, or after any recount declare elected the candidate who has obtained the highest number of votes by completing a return in the prescribed form."***

However the recount process under section 55 operates as a temporary stay of the transmission process. Subsection (3) of section 58 states:-

> ***"Where a Returning Officer receives notice of a recount under section 55, he or she shall delay transmission of the return and report for the Constituency in question until he or she has received from the Court a certificate of the results of recount."***

It is after receipt of the transmitted return and report that the Commission seals off the electoral process in the manner provided for under section 59 of the Parliamentary Elections Act. It states:

***"(1) The Commission shall, after the election, ascertain, declare in writing under its seal and publish, the results of the election in each Constituency within forty eight hours after the close of the polling."***

The decision of the Court of Appeal in ***Ngoma Ngime Vs Electoral Commission & Another Election Petition Appeal No. 11 of 2002; followed by Hon. Justice Bamwine in HCT-O4-CV-EP-0011-2006 Nyakecho Kezia Ochwa Vs Electoral Commission & Another;*** is that a candidate who lost and/or a voter or voters has/have a right to move court for a commensurate remedy. Therefore a candidate aggrieved by the recount order results of the Chief Magistrate may file a petition under the provisions of section 60 and 61 of the Parliamentary Elections Act.

In the Amended Petition the Petitioner does not only challenge the election of the respondent, but seeks a declaration that the recount by the Chief Magistrate was null and void. The Petitioner thereby transforms the initial Petition into a challenge of the recount order of the Chief Magistrate. In the premises the Amended Petition again cannot stand.

Lastly the Respondent contends that the affidavit in support of the Petition is purportedly amended in contravention of the law. The Amended Petition is supported by an affidavit dated 28th March 2011 by Mugambe Joseph Kifomusana which is in all respects similar to his affidavit dated 9th March 2011 filed in support of the initial petition. The only changes were in paragraph 18.

In paragraph 18 of the affidavit dated 9th March 2011 the deponent avers that the Gazette publishing the vote results of Nakifuma Constituency had not yet come out. Yet in paragraph 18 of the affidavit dated 25th March 2011 the same deponent avers that the Gazette "was published on the 7th March, 2011". The words in quotes above were underlined.

Mr. Tebyasa argued that an affidavit is evidence and as such cannot be amended. He further observed that an amendment dates back to the original date of the pleading

amended. I entirely agree. The remedy would be to file a supplementary affidavit and not to purport to amend the affidavit.

In the instant case the affidavit dated 25th March 2011 was not labelled "Amended". I believe the underlining of the words "was published on the 7th March 2011" was merely for emphasis. Rule 4(8) of the Election Petition Rules mandatorily requires a petition to be accompanied by an affidavit. It was only appropriate to accompany the Amended Petition with an affidavit. In the premise I find no merit in the argument that the affidavit dated 25th March 2011 was an amended affidavit. There was no law contravened.

All in all the application is allowed. The respondent's Amended Petition is struck out. In effect the matter reverts to the Petition filed on 9th March 2011.

With regard to that Petition of 9th March 2011 the 3rd respondent who is the Applicant in the instant application, raised three grounds of objection spelt out in paragraph 3, 4 and 5 of his affidavit in answer. That the Petition is incompetent frivolous and bad in law as:

1. There is no decision made by the 2nd Respondent which is meant to be challenged and both the 1st and 2nd respondents cannot in law be compelled to look into the declared results since the result were transmitted for gazette and were gazetted on 7th March 2011.
2. The Petitioner had earlier on presented an application for a second recount in court vide MC No. 52 of 2011 which was dismissed with no appeal being preferred against the ruling, and for the reason the 1st and 2nd respondents had/have no powers to handle the election of Nakifuma County in an administrative or official manner after a court decision or record.
3. There is no decision from Electoral Commission, the subject to this petition under the Appeal Rules.

I have already made the following findings:-

1. The Petition filed on 9th March 2011 was filed under the Appeal Rules.
2. As such it is Petition which appeals against the decision of the Commission.

3. The respondent of such petition would be the Commission and candidate or person whose conduct is alleged to cause an irregularity which is the subject to the Commission's decision.

The issues for court's determination are:-

(i) Whether there was a decision of the Commission to be challenged under the provisions of section 15 of the Electoral Commission Act.

(ii) Whether the Commission has the mandate to examine an irregularity or decision of the recount order of the Chief Magistrate's Court.

(iii) Whether a Petitioner under the Appeal Rules can be sustained where the election results have been published in the Gazette.

Section 15 of the Electoral Commission Act mandates the Commission to examine and make a decision on any complaint alleging any irregularity with any aspect of the electoral process.

The Commission's mandate in this regard arises from Article 61(f) of the Constitution. The appeal by any party aggrieved by the Commission's decision confirming or rejecting the existence of an irregularity is to the High Court – See Article 64 (1) of the Constitution, Section 15 (2) of the Electoral Commission Act.

The Petition before me does not plead any decision of the Commission made upon any complaint alleging any irregularity. If considered in light of the purported Amended Petition, the Petitioner's appeal or petition is against the Returning Officer's (1st Respondent) and the Electoral Commission (2nd Respondent) failure or refusal to correct errors discovered in the tally sheets at the Polling Stations of Kyajja/Namanyama/Bulaga, Galabi and Kyambogo after conducting a recount ordered by the Chief Magistrate.
Annexture "C" to the 3rd Respondent's Answer to the Petition is an order of recount by the Chief Magistrate dated 25th February 2011 in respect to Misc. Appl. No. 0049 of 2011. Annexture B is the Chief Magistrates' Ruling dated 2nd March 2011 in yet another application for recount – Misc. Appl. No. 0052 of 2011. In her ruling the learned Chief Magistrate dismissed the application seeking for the 2nd recount.

It is this ruling which gave rise to the Petitioner's complaint to the Commission vide his lawyer's letter dated 2nd March 2011, annexture E to affidavit in support of the Petition. In its response also dated 2nd March 2011, annexture F to the affidavit in support of the petition, the Commission states:-

> ***"Further to your ref. 042/889/11 dated 2nd March 2011 and lodged with us by way of a copy, today 2nd March 2011, on the above captioned, we hereby inform you that the results for the said electoral area have since been declared and recourse to courts of law is advised".***

The Electoral Commission thereby declined to examine and/or make a decision on the complaint. As I will show later, I believe the Commission rightly declined to make a decision. So there was no decision which could give rise to an appeal to the High Court under section 15(2) of the Electoral Commission Act.

Section 58 of the Parliamentary Elections Act, subsection I require each Returning Officer to immediately after any recount to declare the elected candidate who has obtained the largest number of votes and transmit the same to the Commission. Then section 59 requires the Commission after the election to ascertain, declare in writing under its seal and publish the result of the election within forty eight hours after the close of polling. There is no legal provisions in any of the electoral statutes which mandates the Commission to examine any decision or order of the Chief Magistrate, upon an application for recount.

Lastly the Petition was filed 9th March 2011. It is now an admitted fact that the election results for Nakifuma Constituency were published by the Commission in the Uganda Gazette of 7th March 2011. Under Rule 3 of the Appeal Rules a respondent to a Petition under the said Rules can only be the Commission, a candidate or a person whose conduct is alleged to have caused the irregularity which was the subject of the anomalies. Mr. Tebyasa argued that a petition against a gazetted winner of an election can only be by Petition under the Petition Rules, pursuant to sections 60 and 61 of the Parliamentary Election Act.

About the election process in ***Nyakecho Vs Electoral Commission (supra)*** Justice Bamwine (as he then was) stated:-

> ***" .. the Parliamentary Elections process is a progressive one. The Act contains clearly marked and self-contained segments of the electoral process, to use the words of my brother Musoke-Kibuuka, J,*** in ***Byanyima Winnie Vs Ngoma Ngime Civil Revision No. 0009 of 2001, (unreported). In practical terms, once one segment is completed, the process moves on to the next segment. Those segments are the sets of election activities such as the nomination of candidates, campaigning, voting, counting votes and announcing of the results and election petitions....."***

I agree with Mr. Tebyasa that once one segment is completed there is no going back to it. Thus once the Commission has completed its mandate as regards the election process by ascertaining, declaring and publishing the results of the election then it ceases to have any mandate to revisit the results. Any complaint against a winner who has been so published in the Gazette would be against the elected person in line with the respondent's definition in Rule 3 (e) of the Election Petition Rules that it means "the person of whose election a complaint is made in a petition.." As at the filing of this petition the 3rd respondent had ceased to be a "candidate" and became a "person of whose election a complaint is made in a petition". The only proper procedure was to file a petition under the Election Petition Rules.

In the final result I make the following orders:-

1. The preliminary objections to the Application raised by the respondent are overruled.
2. The application to disallow and strike out the Amended Petition is allowed and the Amended Petition is struck out.
3. The Petition is struck out for failure to disclose any decision of the Electoral Commission appealed against and being incompetent under the provisions of the Parliamentary Elections (Appeals to the High Court from Commission) Rules.
4. The Petition is accordingly dismissed with costs.

**LAMECK N. MUKASA**

**JUDGE**

**6/06/2011.**