THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

ELECTION PETITION NO. 3 OF 2011

PAUL MWIRU .... PETITIONER

VERSUS

1. IGEME NATHAN SAMSON NABEETA

2. ELECTORAL COMMISSION

3. NATIONAL COUNCIL FOR HIGHER EDUCATION .... RESPONDENTS

BEFORE: HON. LADY JUSTICE MONICA K. MUGENYI

JUDGMENT

This petition was brought by Mr. Paul Mwiru, challenging the validity of the results of the parliamentary election in Jinja Municipality East Constituency held on 18th February 2011. The final result of the election in this constituency had declared Mr. Nathan Igeme Nabeta (1st respondent) winner with 8,203 votes, and the petitioner runner-up with 7060 votes. The petitioner challenged the nomination and subsequent election of the 1st Respondent on the basis of academic qualifications certified by the National Council for Higher Education (3rd Respondent) to have met the minimum academic requirements of a parliamentary election candidate in Uganda. He contends that since no consultation was made with the Uganda National Examination Board (UNEB) by the 3rd Respondent, the Certificate of Completion of Formal Education of Advanced Level Standard or its Equivalent issued by the 3rd Responded was null and void and the 1st Respondent was not duly nominated or qualified for election as a Member of Parliament. He further contends that the election was characterised by numerous election malpractices and/or illegal practices, and was not conducted in compliance with the applicable electoral laws, which non-compliance affected the elections result in a substantial manner.

It is the case for the 1st and 2nd Respondents that the election in issue was conducted in compliance with the prevailing electoral laws and the few mishaps complained of did not affect the result of the election substantially. The 1st Respondent also denies being unqualified for

election as a Member of Parliament and denies engaging in any illegal practices or election offences, or indeed consenting to their commission by other persons on his behalf. The 3rd Respondent contends that it did issue the 1st Respondent with a Certificate of Completion of Formal Education of Advanced Level Standard or its Equivalent (hereinafter referred to as a "Certificate of A' Level Completion") in accordance with the procedure provided therefore.

The following issues were framed at the trial:

1. Whether the 1st Respondent was, at the time of his nomination and election, possessed of the minimum academic qualifications for election as a Member of Parliament.
2. Whether the 1st Respondent, by himself or by his agents, committed any illegal practices.
3. Whether or not there was non-compliance with the electoral laws in the elections for Jinja Municipality East.
4. If so, whether the non-compliance affected the results in a substantial manner.
5. Remedies available.

Section 61(3) of the Parliamentary Elections Act as amended explicitly sets the standard of proof in election petitions at **proof by balance of probabilities**. It is now settled law that the burden of proof lies with the Petitioner. This was aptly stated in the case of **Mbowe vs. Eliufoo (1967) EA 240** where George CJ held as follows:

> "**In my view it is clear that the burden of proof must be on the petitioner rather than the respondent because it is he who seeks to have this election declared void.**"

I do respectfully share this view. This position has since been affirmed by Odoki CJ, who in **Kiiza Besigye vs. Yoweri Museveni Kaguta & Anor Election Petition No.1 of 2001** held:

> "**In my view the burden of proof in election petitions, as in other civil cases, is settled. It lies on the petitioner to prove his case to the satisfaction of court.**"

Against this background I now proceed to a determination of the issues. I shall address them in their order of record, save for issues 3 and 4 which shall be handled concurrently.

Issue No. 1: *Whether the 1st Respondent was, at the time of his nomination and election, possessed of the minimum academic qualifications for election as a Member of Parliament*

The 1st respondent's academic qualifications were set out in *Annexures C, D and E1* of the petitioner's affidavit dated 15th March 2011. The qualifications include a Uganda Certificate of Education (*Annex. E1*) issued by UNEB; a High School Equivalency Certificate issued by the California State Board of Education (*Annex. C*); and a Degree of Bachelor of Science in Business

Administration (International Business) issued by Oklahoma State University (*Annex. D*). The 1st respondent did confirm that he was the holder of the above qualifications in his affidavit dated 31st March 2011. See paragraphs 5 – 13 thereof. Indeed he attached the same certificates to that affidavit as *Annexures A, B and C* respectively.

It was on the basis of the foregoing academic qualifications that a Certificate of A' Level Completion was issued by the 3rd Respondent. This Certificate was the basis of the 1st respondent's nomination and subsequent election.

It is now settled law that the requirement for consultation between the 3rd respondent and UNEB stipulated in section 4(6) of the Parliamentary Elections Act is mandatory and must be undertaken. See judgment of Mpagi-Bahigeine DCJ in **Ahamed Kawooya Kaugu vs Bangu Aggrey Fred Election Petition Appeals Nos.5/2006 & 9/2006.** I am therefore in general agreement with the submission of Counsel for the Petitioner on that issue.

As to whether or not the 3rd respondent did consult UNEB, I revert to the evidence that was adduced before this court. I must point out at this stage that the petitioner did not raise the issue of forgery of academic documents in his pleadings or at all. He only alluded vaguely to it under cross examination when he questioned the inclusion of the term 'diploma' within the text of the 1st respondent's degree certificate, wondering whether the qualification was a diploma or a degree.

I shall briefly address the petitioner's concern. The offensive text of the degree is underlined below:

"Oklahoma State University

have admitted

Nathan Samson Igeme

to the degree of

Bachelor of Science in Business Administration

International Business

and all the honours, privileges and obligations belonging thereto, and in witness thereof have authorised the issuance of this *Diploma* duly signed and sealed …."

Reference to a diploma in the degree text was clarified by Ms. Farida Bukirwa, an employee of the 3rd respondent, who under cross examination testified that it is usual nomenclature in the USA for the term diploma to be included in the description of a degree. I find no reason to doubt the explanation of a technocrat in a body whose mandate it is to crosscheck academic documents for equating purposes. I do note that similar parlance in Uganda refers to degrees as 'degree

certificates'. Their reference as such certainly does not equate degrees to 'certificates' in the plain usage of the word. I shall not belabour this point further given that the authenticity of the academic documents is not in issue in this petition.

On the question of consultation, it was the petitioner's case that the 3rd respondent fraudulently and illegally issued a Certificate of A' Level Completion to the 1st respondent without due consultation with UNEB as by law required. To that end, the petitioner availed *Annex. F* to his primary affidavit – a letter from UNEB dated 4th January 2011 in which UNEB denies having been consulted by the 3rd respondent on the 1st respondent's qualifications.

On the other hand, the 1st respondent maintained that he was duly nominated and qualified for election as a Member of Parliament, while the 3rd respondent contended that it did follow due process before it issued the Certificate of A' Level Completion to the 1st respondent. In his affidavit of 31st March 2011 the 1st respondent stated as follows:

9. **"That I submitted all my aforesaid qualifications for equation and verification by the Uganda National Examinations Board for the 2001 parliamentary elections and UNEB cleared me, which elections I won.**

10. **That I submitted the very qualifications to NCHE for the 2006 parliamentary elections and the NCHE cleared me after consulting with UNEB, which elections I also won.**

11. **That in 2010 I once again submitted the same academic qualifications to the 3rd Respondent and once again I was issued with a certificate of completion.**

12. **That on nomination day I presented both certificates of completion for 2006 and 2010 to the 2nd Respondent and was duly nominated."**

In an additional affidavit dated 24th May 2011 the 1st respondent, on the same subject, stated as follows:

38. **"That I was duly nominated and elected as the Member of Parliament for Jinja Municipality East and I am possessed with the certificate of equivalence issued to me by NCHE after prior consultation with the UNEB as confirmed by the letter of UNEB dated the 21st day of July 2010 a copy of which is attached hereto and marked 'IN 9'."**

Under cross examination, the petitioner did concede that the 1st respondent was the holder of the UCE (O' level) certificate that was annexed as *Annex. E1* to the petition therefore that qualification is not in contention presently. His only point of contention was the 2 qualifications that were obtained from the USA.

For the 3rd Respondent, Ms. Farida Bukirwa deponed an affidavit dated 28th March 2011 in which she *inter alia* stated as follows:

3. **"That the 1st Respondent before contesting for Parliamentary Election in 2006 presented his academic qualifications for equating and verification.**
4. **That NCHE wrote a letter to UNEB for verification of the 1st Respondent's qualifications.**
5. **That UNEB duly replied confirming the genuineness of the 1st Respondent's O' level.**
6. **I verily believe by my knowledge of the law that once there is proper verification by UNEB there need not be fresh consultation on the same qualifications for every new election."**

A number of questions emerge from the foregoing discourse. First, which of the 2 seemingly contradictory letters from UNEB should be believed as far as the consultation with UNEB is concerned. Tied in with this is what mode of consultation is envisaged by the Parliamentary Elections Act, and whether (if at all) the purported consultation undertaken by the 3rd respondent did comply with the mischief of that law.

For ease of reference I shall reproduce the pertinent parts of the 2 letters in issue. *Annexure F* was addressed to M/s Ruhinda Advocates and Solicitors and stated as follows:

> **ACADEMIC DOCUMENTS OF SAMSON IGEME NABETA**
>
> **The few requests made by the National Council for Higher Education (NCHE) do not include that of Samson Igeme Nabeta case of 'A' equivalency.**
>
> **The NCHE is the only body authorised to issue a certificate of equivalency to an aspiring parliamentary candidate. I am sure NCHE is in a better position to provide you with a comprehensive list of people who submitted their documents for clearance for running in the 2011 Parliamentary elections.**
>
> **I recommend that you consult the NCHE.**
>
> ***Signed:* E Zaasa Mwanje**
>
> **For: EXECUTIVE SECRETARY**

Annexure IN 9 was addressed to the Executive Director of the National Council for Higher Education and stated as follows:

PROPOSED 'A' LEVEL EQUIVALENCES FOR THOSE ASPIRING FOR PARLIAMENT AND LC V

Uganda National Examinations Board (UNEB) is generally in agreement with the basis for equating the qualifications for politicians to 'A' Level. But note the additions and changes we are proposing.

Schedule 1

a. ......

b. ......

c. .....

d. .....

e. Any person who holds a Mature Age Certificate of Makerere University or a certificate for the National Aptitude Test and holds a UCE or its equivalent Certificate and has studied for at least two continuous years in an educational institution.

f. ....

g. .....

h. ....

i. Other qualifications awarded by institutions recognised by M.O.E.S. and acceptable to the Council as equivalent to 'A' level.

NB: Our additions are the ones underlined.

Signed: M. B. B. Bukenya

EXECUTIVE SECRETARY

No witness was called from UNEB to explain the divergence in the 2 letters.

Annexure F simply states that of the few requests made to NCHE with regard to A' Level equivalence, there was none in respect of the 1st respondent. It does not include a time frame in respect of or purpose for which the few requests received were made; neither does it indicate the nature of the inquiry to which it is responding. This leaves open the possibility that the few requests that were made to UNEB could have been limited to fresh requests for document verification either for election purposes or indeed for any other purpose. In her affidavit, Ms. Bukirwa did allude to this when she stated in paragraph 12 that **'the misconception about**

UNEB's response of 4th January 2011 arises because the Petitioner's request was limited to names of persons who submitted their documents for clearance for 2011 and not those who may have done so earlier in 2006.'

Annexure F refers the inquirer in respect thereof to NCHE for **"a comprehensive list of people who submitted their documents for clearance for running in the 2011 Parliamentary elections."** I did see a list availed by the petitioner purportedly naming applicants recommended for issuance with a Certificate of A' Level Completion (*Annex E2* to the petitioner's supplementary affidavit of 11th April 2011). However, there was no indication of the origin of this list or the author thereof. There was no cover letter to enable court place its contents in proper context. It was not signed or initialled and there was nothing to indicate that it was indeed a complete or authentic list. In the circumstances I did not find it very helpful and certainly it was not conclusive on the present issue.

Conversely, *Annexure IN 9* entails proposals made by NCHE and agreed to by UNEB for purposes of equating politicians' A' Level qualifications. The letter included a post script (NB) that clarified that the underlined text represented UNEB's input to NCHE's proposals. Clearly, this post script, read together with the subject line of the letter, connotes a response by UNEB to proposals by NCHE, to whom that letter was addressed. The proposals were explicit and in respect of A' Level equivalences for Parliamentary and LCV candidates.

The question then is whether this approach by NCHE amounts to consultation with UNEB for purposes of section 4(6) of the Parliamentary Elections Act.

Mr. Kyazze, Counsel for the Petitioner addressed me on the principles governing statutory interpretation. Noting that the term 'consultation' is not defined in the Parliamentary Elections Act, Mr. Kyazze cited the case of **John Bosco Oryem vs EC & UNEB Election Petition No. 2 of 1998** where Mukiibi J. held that **'where words of a statute were clear and unambiguous they must be given their ordinary and natural meaning irrespective of the consequences'**. He submitted that the words in section 4(6) were precise and unambiguous and best declare the intention of parliament. Mr. Wakida, Counsel for the 3rd Respondent concurred with the decision in **John Bosco Oryem vs EC & UNEB** (supra) with regard to giving words their natural meaning. He cited the Oxford Advanced Dictionary meaning of the term 'consultation' and submitted that within that context due consultation was carried out by the 3rd Respondent.

I do agree with Learned Counsel on this position in so far as it underscores the need to accord words their literal or plain ordinary meaning, and thus preserve the objectivity of statutory interpretation. This is the gist of the literal rule of statutory interpretation. However, there is a school of thought that opines that the literal rule of interpretation is premised on the erroneous presumption that words do have a fixed meaning. That the question of what amounts to consultation is in issue in this petition is indication of the variety of 'plain, natural and ordinary' interpretations that may be attributed to a single word – in this case, the word 'consultation'.

Consequently, an absurdity limit is often placed on the literal rule of interpretation. The Doctrine of Absurdity refers to any strict interpretation of something to the point of violating common sense, and recognises that strictly literal interpretation of statutes can lead to illogical absurdities. This doctrine evolved in American Courts to have statutes interpreted contrary to their plain meaning in order to avoid absurd legal conclusions. See '**The Absurdity Doctrine', Havard Law Review, John F. Manning, Vol. 116, Article 8, June 2003, pages 2387 – 2486.**

For present purposes, I am of the view that recourse to the literal rule of interpretation tempered by an absurdity limit would yield an interpretation to section 4(6) of the Parliamentary Elections Act that is both objective and prudent. Such an interpretation would enable a logical legal conclusion that is more facilitative than intrusive of NCHE's institutional mandate.

I now revert to a consideration of what constitutes consultation under section 4(6) of the Parliamentary Elections Act. The literal meaning of the term 'consultation' is stated in the Oxford Advanced Learners' Dictionary as '**the act of discussing something with somebody or with a group of people before making a decision about it.'** The key term therein for present purposes is 'discussion'. The term 'discuss' has been defined by the same dictionary as '**to write or talk about something in detail**'; 'discussion', on the other hand, to include the acts of *dialogue* and *consultation*.

Mr. Kyazze argued at length that the consultation undertaken by the 3rd respondent was a mere verification of the 1st respondent's O' Level certificate, which in any event was never in issue. He maintained that there was never any consultation between the 3rd respondent and UNEB prior to the issuance of the Certificate of A' Level Completion in 2010, and referred this court to paragraphs 7, 12 and 13 of the 3rd respondent's Answer to the Petition, as well as paragraphs 6 and 7 of Ms. Bukirwa's affidavit. According to Counsel, the sum effect of these averments is an admission by the 3rd respondent that save for the consultation done prior to the 2006 parliamentary elections no fresh consultations were undertaken in respect of the 1st respondent's academic documents in 2010.

On this issue, the 3rd respondent's Answer to the Petition in summary states that before issuing the Certificate of A' Level Completion the 3rd respondent consulted with UNEB and the relevant issuing institutions; it specifically mentions consulting UNEB on the 1st respondent's O' Level certificate and verifying the degree certificate with the issuing University; and that once UNEB had duly verified the qualifications there was no requirement for fresh consultations for every new election. I must state that these pleadings were not clear and hardly reflected the time lines within which the actions stated were taken. In fact, paragraph 12 of Ms. Bukirwa's affidavit appears to negate any claims by her that there were fresh consultations in 2010 in respect of the 1st Respondent's academic documents.

Be that as it may, under cross examination Ms. Bukirwa did clarify the 3rd respondent's case on the question of consultation as follows:

a. In 2005 the 3rd respondent consulted UNEB on the 1st respondent's O' Level certificate, and the Oklahoma State University and the Carlifornia State Board of Education with regard to his 'foreign' qualifications.

b. Oklahoma State University confirmed that the 1st respondent was admitted to its degree course on the strength of his High School Equivalency Certificate, which in the USA is equivalent to Uganda's Mature Age Certificate.

c. In 2005 and 2010 the 3rd respondent did consult UNEB on all of the 1st respondent's academic documents. He was one of the politicians that had submitted their documents for verification in 2006. Pursuant to a workshop between UNEB, NCHE, the Ministry of Education and Sports (MOES) and other stakeholders in 2005, a set of guidelines had been formulated that *inter alia* equated Mature Entry Certificates in Uganda to Pre-entry Certificates in foreign jurisdictions, both of which certificates were equated to A' Level in Uganda.

d. In 2010 NCHE consulted UNEB to clarify whether the position agreed upon in 2005 still pertained. UNEB's response to that inquiry was contained in *Annexure IN 9* to the 1st respondent's Affidavit of 24th May 2011, and it confirmed that the earlier position still stood.

e. The witness clarified that her averment that there was no need for fresh consultations of previously verified documents was in respect of the need to re-consult UNEB on the 1st respondent's O' Level certificate in 2010, which NCHE did not think was necessary. She stated that NCHE undertook fresh albeit general consultations on A' Level equivalency because there were numerous requests for equation and NCHE did not deem it expedient to consult on each request separately.

From the above evidence, a number of positions become apparent.

1. In 2010 NCHE consulted UNEB on the A' Level status of the 1st respondent courtesy of a general inquiry on what constituted A Level equivalence.

2. The basis of NCHE's issuance of a Certificate of Completion to the 1st respondent in 2010 was the 2005 decision by NCHE, UNEB and MOES that equated Mature Entry Certificates in Uganda to Pre-entry Certificates in foreign jurisdictions, both of which were equated to A' Level in Uganda, which decision UNEB purportedly confirmed.

This position reconciles the contents of the 2 letters from UNEB referred to earlier in this judgment in so far as it clarifies that indeed in 2010 no fresh inquiry was specifically made about the 1st respondent's qualifications, NCHE having opted for a more generalist approach for the equating of politicians' academic documents. The question then is was the general inquiry conducted in respect of parliamentary candidates' A' Level status commensurate with consultation as envisaged under section 4(6) of the Parliamentary Elections Act?

The dictionary meaning of the term 'consultation' quite clearly states that consultation entails oral or written dialogue on a subject prior to taking a decision on it. Such dialogue is intended to inform a decision or assist the inquirer arrive at one. In the present case, the 3rd respondent did initiate dialogue with UNEB on the subject of '**A' Level Equivalences for those aspiring for Parliament and LC V'.** Evidence of this dialogue is contained in *Annex IN 9* highlighted earlier in this judgment.

Annex IN 9 discusses the question of A' Level equivalences, raised by the 3rd respondent and provides UNEB's feedback on the subject. This, to my mind depicts dialogue and thus consultation between the 2 bodies. The 1st Respondent was a parliamentary candidate without an A' Level qualification from Uganda that would otherwise have had him automatically qualify for nomination. He was therefore one of the aspiring MPs affected by and therefore in reference in the consultation represented in *Annex IN 9*. The generalist nature of the consultation notwithstanding, had the response from UNEB been such as would disqualify the 1st respondent from nomination on the basis of non-equivalent academic documents, he would have been so disqualified and the 3rd respondent would not have issued him with a Certificate of A' Level Completion. To that extent therefore, his qualifications were in issue in the consultation between the 3rd Respondent and UNEB stipulated in *Annex IN 9*, and were thus a subject of this fresh consultation (alongside those of other politicians in that category).

In my view, to conclude otherwise would be to suggest that NCHE should have undertaken separate consultation in respect of each of the affected parliamentary and LCV candidates. There is no guess as to how many such candidates there would be in any given election. NCHE's mandate is not restricted only to politicians' equation requests, and the body is best placed to determine the most diligent method of work to expeditiously address its work load and concurrently fulfill its mandate. I do also note that a general inquiry as was adopted in this case is objective and principle-based, and would negate the possibility of subjective and possibly divergent feedback from UNEB in respect of similar qualifications. For this court therefore to interfere with the internal work methods of NCHE by an unduly restrictive interpretation of section 4(6) of the Parliamentary Elections Act would be, in my view, to endorse an illogical conclusion.

This appears to have been the approach adopted in **Gole N. Davis vs Loi Kiryapawo Election Petition 19 of 2007**, where Katureebe JSC held as follows:

> "**If NCHE equates valid qualifications then the courts may not interfere with its decision … the court is not questioning the criteria or method used by NCHE for equating the qualifications. That would be the preserve of the statutory body, NCHE."**

In the present case, the authenticity of the 1st respondent's High School Certificate of Equivalence and university degree is not in issue. The method of consultation adopted by NCHE

is what is in issue. I do respectfully agree with the decision in the **Gole vs Kiryapawo case** (supra) that such method is a preserve of NCHE. In the premises, I find that UNEB was duly consulted by the 3rd respondent on the 1st respondent's academic qualifications.

However, having consulted UNEB, did NCHE heed the advice provided?

Annex IN 9 provided the different qualifications that could be equated to A' Level for purposes of elections. During the trial I was addressed quite extensively on paragraph (e) thereof – '**Any person who holds a Mature Age Certificate of Makerere University or a certificate for the National Aptitude Test and holds a UCE or its equivalent Certificate and has studied for at least two continuous years in an educational institution.'** With due respect, I do not find paragraph (e) applicable to the 1st respondent. In fact, under cross examination, he stated quite clearly that the provision was inapplicable to him. I am not aware that there is a National Aptitude test in Uganda neither was any evidence adduced to that effect. Nonetheless, use of the term 'the' in reference to a National Aptitude Test suggests a local (known) test rather than a foreign aptitude test. In my view, the paragraph that was applicable to the 1st Respondent's circumstances was paragraph (i) – '**Other qualifications awarded by institutions recognised by M.O.E.S. and acceptable to the Council as equivalent to 'A' level.'**

No evidence was adduced to prove that MOES was consulted on institutions recognised by it for purposes of paragraph (i) above. However, under cross examination Ms. Bukirwa stated that upon receipt of foreign qualifications NCHE crosschecks with the accrediting institutions. She stated that in the instant case, pursuant to NCHE's inquiry, the USA Council for Higher Education and Accreditation confirmed the status of Oklahoma State University which awarded the 1st Respondent's university degree. She further testified that NCHE's consultation with Oklahoma State University confirmed that the 1st Respondent was admitted to the University on the strength of his High School Equivalency Certificate, which in the USA is the equivalent of Uganda's Mature Entry Certificate. This certificate was issued by the California State Board of Education.

It would appear that NCHE did not consult MOES on whether it recognised the issuing bodies of these qualifications, but rather relied on a verification process that it had undertaken in respect of the 1st respondent's qualifications in 2005, as described in Ms. Bukirwa's testimony above. The question is whether by so doing NCHE did comply with UNEB's advice.

UNEB, rightly or wrongly, delegated its consultative role to MOES with regard to institutions recognised for award of other qualifications. UNEB's mandate is restricted by section 1 of the

UNEB Act, Cap 137 to oversight of primary, secondary, technical and related examinations in Uganda, and standards in respect thereof; or, where such examinations are organised in Uganda by another body (with UNEB's consent), similar oversight of the same. Clearly, the examinations over which UNEB has mandate are pre-university/ pre-college examinations *within Uganda*. Mature entry or pre-entry qualifications obtained *outside Uganda*, which are the issue presently, do not fall within its mandate. Therefore, having been referred to MOES by UNEB was NCHE justified in relying on its own verification? I take the view that it was justified. A look at NCHE's mandate is instructive in this regard.

NCHE is set up by the Universities and Tertiary Institutions Act No. 7 of 2001, and its mandate includes the determination of the equivalence of academic and professional qualifications obtained elsewhere for recognition in Uganda. *See section 5(k) of the Act*. To that extent it is the body mandated to equate academic qualifications and verify the issuing bodies thereof. It follows therefore that it would have been superfluous of NCHE to purport to refer the question of recognition of institutions to MOES, well knowing that this is its function in the Education sector. I do therefore hold that having verified the accreditation of Oklahoma State University, as well as the status of the High School Equivalency Certificate in the USA and the issuer thereof, the 3rd respondent duly discharged its consultation duty. There was no need for fresh verification of the same institutions and certificates.

Accordingly, I do answer the first issue in the positive, and find that the 1st respondent was possessed of the minimum academic qualifications for nomination and election as a Member of Parliament.

Issue No. 2: *Whether the 1st Respondent, by himself or by his agents, committed any illegal practices*

The gist of the petitioner's case on this issue is that the 1st respondent personally or through his agent with his knowledge, consent and approval, committed numerous election offences and illegal practices. The election offences and illegal practices complained of in the petition included ballot stuffing; assault of rival agents; bribery, and issuance of gifts allegedly intended to entice or influence voters to vote for him. The 1st respondent denied commission of the alleged election offences or illegal practices, either in person or through his agents with his knowledge and consent.

Bribery is defined in section 68 of the Parliamentary Elections Act to include influencing voter(s) by way of gift, money or other consideration; while assaults and ballot stuffing are defined as election offences in sections 76 and 80 respectively. Proof of the commission of illegal practices or election malpractice is a matter of fact that must be sufficiently proved as such. I shall evaluate the totality of the evidence adduced before this court to determine whether the alleged offences were indeed committed as pleaded or at all.

At the trial the petitioner presented numerous affidavits in support of the petition, in addition to his own affidavits dated 15th March 2011 and 11th April 2011 respectively. The petitioner attested to having been told about the commission of numerous illegal practices by the 1st respondent and agents thereof. He availed affidavit evidence which highlighted the following illegal practices:

i. Makhoha Bright and Kiregeya Ali attested to Shs. 500,000/= given by Nkendembi Siraji and a one Osuman to Pentagon Association.

ii. Abuze Christine Monica and Nakanwagi Edith attested to shs. 3,000,000/= given by 1st respondent to the women of Napier Market to boost their income through SACCOs.

iii. Jomba Farouk and Muganda Abu Baker attested to shs. 5,000/= transport fare to voters to go and vote given by Badilu Matovu alias Alelenge.

iv. Athieno Hope Faith, Oguttu James and Birali Mugole attested to the installation of electricity by 1st respondent.

v. Isah Matege attested to an attack/ assault on him by 1st respondent's supporters, Ayub Bageya; Farouk Wesige; Ali Egulwa alias Emmanuel, and Wycliffe Ofwono.

vi. Mutagubya Robert attested to an attack/ assault on him by 1st respondent's supporters including a one Najibu Wakita.

vii. Mutebi Mohammed attested to shs. 700,000/= given by 1st respondent to deponent as Chairperson of Kirinya Road Development Agency (KDA); and shs. 2,000/= bribe to everyone on Kirinya Road at the time.

viii. Luyinda John Paul and Olobo Morris attested to shs.2,000,000/= contribution given by 1st respondent to Church in exchange for votes.

ix. Bamu Godfrey and Bamurenkaki Godfrey attested to a welding machine given by 1st respondent to Busoga Workshop on Oboja Road.

x. Kalema Emmanuel and Lwada Abdalla attested to a welding machine given by 1st respondent to Accurate Garage.

xi. Maguzi Daniel attested to a welding machine given by 1st respondent to Badiru Kiyaga Motor Garage through Mutebi Mohammed.

xii. Bizitu Moses attested to bribery by a one Mulwanyi David and Kimera Richard, agent to 1st respondent.

Given the non-availability of Muwonge Bashir and Mudiba Mohammed for cross examination on the day fixed for hearing, Counsel for the Petitioner conceded to the expunging of their affidavits from the court record and they were so expunged. Further, during the cross examination of a one Olobo Morris the authenticity of his affidavit came into question. While Mr. Olobo testified that he took oath in Jinja and indeed the Commissioner for Oaths before whom he took oath was a one Jacob Osillo of P. O. Box 1985 Jinja; the affidavit he signed was stated to have been sworn at Kampala on 21st March 2011.

Section 6 of the Oaths Act Cap 19 provides for every commissioner for oaths before whom an affidavit is made to state at what place and on what date the affidavit is made. To that extent Mr. Olobo's affidavit does appear to violate a statutory provision of the law. However, I am also mindful of the provisions of Article 126(2)(e) of the Constitution that enjoin this court to administer substantive justice without undue regard to technicalities.

Indeed in **Suggan vs. Roadmaster Cycles (U) Ltd [2002]EA 25** where an affidavit was not dated, Mpagi – Bahigeine DCJ held as follows:

> **"It is trite that defects in the jurat or any irregularity in the form of the affidavit cannot be allowed to vitiate an affidavit in view of Article 126(2)(e) of the 1995 Constitution, which stipulates that substantive justice shall be administered without undue regard to technicalities."**

The question then is whether stating a wrong place of oath goes to the substance of the issue at hand or is indeed a mere technicality. The decision in **Suggan vs. Roadmaster Cycles (U) Ltd** (supra) would appear to equate defects in the form rather than substance of an affidavit to technicalities as opposed to substantive issues.

Be that as it may, in **<u>Kiiza Besigye vs Museveni & Anor</u> (supra)** the Supreme Court adopted a liberal approach towards defective affidavits in election petitions, holding that election petitions are very important matters therefore courts should take a liberal view of the affidavits so that a petition is not defeated on technicalities. Indeed, in **<u>Kiiza Besigye vs Electoral Commission & Yoweri Kaguta Museveni Presidential Election Petition No. 1 of 2006</u>** Odoki CJ, citing article 126(2)(e) of the Constitution, held:

> **"The doctrine of substantial justice is now a part of our constitutional jurisprudence. … Courts are therefore enjoined to disregard irregularities or errors unless they have caused substantial failure of justice."**

Nonetheless, in **<u>Kakooza John Baptist vs Electoral Commission & Anor Election Petition Appeal No. 11 of 2007</u>,** Kanyeihamba JSC upheld the decision of Okello JA (as he then was) who, rejecting an affidavit that had been signed *prior* to being sent to a Commissioner for Oaths, held as follows:

> **"To condone such an unsworn statement seeking to pass as an affidavit would undermine the importance of affidavit evidence which is rooted in the fact that it is made on oath."**

I do agree that an oath goes to the very heart of an affidavit.

In the present case however, under cross examination the deponent stated that he did take oath prior to signing his affidavit albeit in a different place from the one stated therein. I do accept the deponent's explanation that reference to Kampala rather than Jinja could have been a typographical error. In my view, though this error connotes an anomaly in the affidavit, it is a defect in form not substance given that the deponent testified to having taken oath *prior* to making the affidavit as required by section 5 of the Oaths Act. The anomaly in the affidavit is encompassed by the liberal approach to defective affidavits in election petitions, which was adopted by the Supreme Court in **<u>Kiiza Besigye vs Museveni & Anor</u> (supra).** I do therefore decline to expunge Mr. Olobo's affidavit from the record.

In response to the petitioner's allegations on this issue, the 1st respondent presented a supplementary affidavit dated 24th May 2011 in which he made the following rebuttals to the evidence presented by the petitioner:

a. Contrary to the averments of Abuze Christine Monica and Nakanwagi Edith, the 1st respondent denied being at Napier Market on 14th February 2011 as on that date it was

another candidate scheduled to campaign there. He attached the campaign program as proof of his assertion.

b. Badru Matovu and Nakato Irene Wakabi were not his agents as claimed by Jomba Farouk and Muganda Abu Baker, neither did he consent to the actions of bribery complained of.

c. Contrary to the averments of Athieno Hope Faith, Oguttu James and Birali Mugole, the electricity connection was a government program and not a bribe. He attached a letter to that effect (*Annex IN 2*) He denied further claims by Oguttu James that he gave windows and doors to Masese Health Centre.

d. Contrary to the allegations by Isah Matege and Mutagubya Robert, Nkendembi Siraji was not his Personal Assistant and had no authority to undertake any action on his behalf; the attacks complained of were not done with his knowledge. He furnished the identity card of his Personal Assistant whose name is Mayemba Faisal NOT Nkendembi Siraji.

e. Contrary to the claims by Mutebi Mohammed, Bamu Godfrey, Bamurenkaki Godfrey, Kalema Emmanuel, Lwada Abdalla and Maguzi Daniel that he gave welding machines to a number of garages, he never delivered such machines to anyone; he never visited KDA during the campaign period; on 16th May 2010 he attended a KDA party together with other dignitaries albeit as Chief Guest, signed the Visitor's Book for that day (he attached the page copy) and together with other dignitaries present pledged shs. 700,000/= to the Association, which he paid up on 25th May 2010.

f. With regard to the claims by Luyinda John Paul and Olobo Morris that he made a contribution made to influence voters in a Church, he states that he never attended service at Jinja Christian Centre as alleged, but rather attended St. Andrew's Church on that day. This is corroborated by the affidavit evidence of Luzze Robert, the Chairman of Jinja Christian Centre who states that the 1st respondent did not make a contribution during that service. The deponent attached a list of persons that had made a contribution, which did not include the 1st respondent.

g. Contrary to the averments of Makhoha Bright, Mpaulo Ivan and Kiregeya Ali; Nkendembi Siraji and Osuman were not his agents and had no authority to undertake any action on his behalf, neither did he know of the offensive actions at the time.

h. In response to the claims by Bizitu Moses, he stated that Mulwanyi David and Kimera Richard were not his agents and he had no knowledge of their acts neither did he consent to them.

The 1st respondent filed additional affidavit evidence in support of his case.

The affidavits of Simon Kiwanuka; Irene Nawumbwe; Tagaba Zida; Babirye Rose; Buye Siraje; Mwondha Yusuf; Bukenya Daniel; Luzze Robert; Namubona Robert; Semakula Awali; Kasaijja Edison, and Wakita Najib corroborate the 1st respondent rebuttals above and exonerate him personally of the illegal practices cited in so far as they contend that he did not hold any meetings in the purported areas and so could not have offered attendees thereof money or gifts as alleged.

To that end, the affidavit of Buye Siraje specifically names the deponent and not the 1st respondent as the giver of the doors and windows offered to Masese Danida Health Centre. This evidence is corroborated by that of Mwondha Yusuf who attributes the 'gifts' in issue to Buye Siraje not the 1st respondent. Further, Kasaijja Edison states that the welding machine his garage received was part of a Government program towards 'jua kali' workers and not given by the 1st respondent. Wakita Najib corroborates this evidence when he states that he and another official delivered welding and compressor/ spraying machines to 4 garages in Jinja as part of the Government 'prosperity for all' program towards 'jua kali' workers. Both Kasaijja and Wakita attach acknowledgment slips indicating the office of the President as the donor of the machines in issue. The same point was alluded to by a one Muwereza Kalulu.

The affidavits of Kakooza Ronald; Onyango Ben; Mulwanyi David; Kimera Richard, and Wakita Najib contain explicit denials by the deponents of the allegations of election offences against them. Kimera Richard also denies having been an agent of the 1st respondent.

I find an affidavit by one Bogere Siraje Nkendembi particularly noteworthy. He was accused by Makhoha Bright and Kiregeya Ali of offering a bribe of shs.500,000/= to the Pentagon Association; and by Isah Matege of being an agent of the 1st respondent who bribed him with money after he was beaten. Mr. Nkendembi thereafter deponed an affidavit stating that he was never an agent to the 1st respondent because he was a card-holding member of the FDC party (a copy of the card was attached); he knew Matege as a fellow FDC party member and when he heard that he (Matege) had been beaten, he visited him at the police station and offered him shs.25,000/= towards his medical bills; he denied giving a bribe of shs.500,000/= to the Pentagon Association.

I am mindful of the fact that election petitions are highly polarised disputes that evoke deep sentiments in parties and witnesses alike, raising the possibility of untruthful and possibly non-

existent evidence. Mulenga JSC did allude to this in **<u>Besigye vs Museveni & Anor</u> (supra)**, when he observed thus:

> "**An election petition is a highly politicised dispute, arising out of a highly politicised contest. In such a dispute, details of incidents in question tend to be lost or distorted as the disputing parties trade accusations, <u>each one exaggerating the others wrongs, while downplaying his or her own</u>. This is because most witnesses are the very people who actively participated in the election contest."** *(emphasis mine)*

In that context, Mr. Nkendembi's evidence is poignant because as a member of the petitioner's party he would ordinarily be expected to be loyal to and support his party candidate. That he opted to depone an affidavit rebutting the allegations of the petitioner's witnesses suggests that this witness was either remarkably honest, or had switched allegiance to another political persuasion and therefore his holding a party card is irrelevant; had, within the newfound political concept of 'independence' of mind, defied convention and opted to support a parliamentary candidate from a different political persuasion; or had been otherwise influenced to so switch allegiance. Unfortunately, Mr. Nkendembi was not called for cross examination to test the authenticity of his evidence, particularly whether his apparent switch of allegiance was in exercise of his individual free will or a choice otherwise influenced by the 1st respondent.

Be that as it may, the evidence of both parties is, in its entirety, quite subjective and cannot be relied upon without testing its authenticity from a neutral and independent source. Indeed in **<u>Mbayo Jacob vs. Electoral Commission & Anor Election Petitions Appeal No. 7 of 2006</u>**, Byamugisha JA alluded to such subjectivity when she said of evidence in election petitions:

> **"Some other evidence from an independent source is required to confirm what actually happened.**"

I do respectfully agree with that position. In the present case I am faced with 2 contradictory sets of evidence: allegations by the petitioner and rebuttals by the 1st respondent. I therefore revert to documentary evidence to confirm the truthfulness of either case. I am fortified in this approach by **<u>Sarkar's Law of Evidence</u>, 1993, 14th Edition** at **p. 924**, which states as follows:

> **"In the contradiction of oral testimony which occurs in almost every case, the documentary evidence must be looked to in order to see on which side the truth lies."**

I did not find any evidence that conclusively proves that the 1st respondent *personally* committed the acts of bribery complained of. On the contrary, the documentary evidence adduced by the 1st respondent suggested otherwise. He attached a campaign program as proof that he did not go the Napier market on the day he is alleged to have offered a bribe to the market vendors as he was not scheduled to campaign there on that day. He availed a letter *(Annex IN 2)* that confirms that the electrification of Soweto area was a government program that he participated in as area MP, not an act of inducement by him to voters. A one Luzze Robert, the Chairman of Jinja Christian Centre stated that the 1st respondent did not make a contribution to the Centre as alleged by the petitioners' witnesses and attached a list of persons that did make a contribution, which did not include the 1st respondent. Furthermore, the 1st respondent contended that he fulfilled a pledge of shs. 700,000/= made to a local Association, KDA well before the campaign period commenced.

With regard to the acts of his purported agents, the 1st respondent asserted that Badru Matovu, Nakato Irene Wakabi, Nkendembi Siraji, a one Osuman, Mulwanyi David and Kimera Richard were not his agents and he had no knowledge of their acts neither did he consent to them. The burden lay on the petitioner to prove otherwise. Instead, for the 1st respondent, Mr. Nkendembi furnished a FDC party card presumably as documentary proof of his converse loyalties. On the other hand, the 1st respondent did not explicitly deny that Kakooza Ronald, Onyango Ben and Wakita Najib were his agents; but faced with denials by them, neither did the petitioner effectively prove that these persons in fact committed election offences. Some form of independent evidence would have been pertinent. This leaves the petitioner's evidence contradicted and insufficiently proved.

Counsel for the petitioner addressed this court on the averments of a one Isah Matege with regard to harassment, intimidation and threats, but with due respect, as highlighted earlier in this judgment these allegations were not sufficiently proved.

Section 101(1) of the Evidence Act provides as follows:

> **"Whoever desires any court to give judgment as to any legal right ... dependant on the existence of facts which s/he asserts must prove that those facts exist."**

It is now settled law that the burden of proof in election petitioner lies with the petitioner. See **<u>Besigye vs Museveni & Anor</u>** (supra*).* Section 61(1) of the same Act provides that such proof should be *to the satisfaction of court,* and as stated earlier in this judgment, it should be discharged by balance of probabilities.

For purposes of election petitions, proof to the satisfaction of court was expounded upon by Odoki CJ in **Besigye vs Museveni & Anor** (supra). The learned Chief Justice cited with approval the following observation by Lord Denning in the case of **Blythe vs Blythe (1966) AC 643**:

> **"The word 'satisfied' is a clear and simple one and one that is well understood. I would hope that interpretation or explanation of the word would be unnecessary. It needs no addition. From it there should be no subtraction. The courts must not strengthen it; nor must they weaken it. Nor would I think it desirable that any kind of gloss should be put upon it. When parliament has ordained that a court must be satisfied, only parliament can prescribe a lesser requirement. No one whether s/he be a judge or a juror would in fact be 'satisfied' if s/he was in a state of reasonable doubt."**

With utmost respect, I quite agree with the above position. While the case under consideration by the learned Chief Justice was a presidential election petition, I do find the yardstick for the standard of proof expounded therein equally pertinent to parliamentary election petitions. Indeed, in the case of **Karokora Katono Zedekia vs Electoral Commission & Kagonyera Mondo**, Musoke-Kibuuka J. observed:

> **"Setting aside an election of a Member of Parliament is, indeed, a very grave subject matter. It is a matter of both individual and national importance. The decision carries with it much weight and serious implications. ... Parliament will continue to carry out its legislative function on matters of national importance without any representation of the constituency affected. ... Thus, the crucial need for courts to act in matters of this nature only in instances where the grounds of the petition are proved at a very high degree of probability."** *(emphasis mine)*

The foregoing authorities suggest that election petitions should be determined on a high degree of probability; and certainly in the event of reasonable doubt as to the probability of the allegations pleaded, a petition (or ground thereof) should be disallowed.

In the premises, I do find that the petitioner has not proved the allegations in issue to the required standard. I do therefore answer the second issue in the negative.

<u>Issues No. 3 and 4</u>: *Whether or not there was non-compliance with the electoral laws in the elections for Jinja Municipality East, and if so, whether the non-compliance affected the results in a substantial manner.*

The petitioner's case on the question of the election's non-compliance with cited electoral laws and the substantiality of such non-compliance is summed up in paragraph 7(a), (b), (d) and (e) of the petition as follows:

a. **"The electoral process in Jinja Municipality East Constituency was not conducted in compliance with the provisions and principles of the Constitution of the Republic of Uganda, the Electoral Commission Act and the Parliamentary Elections Act, 2005.**

b. **The failure to conduct the elections in compliance with the provisions and principles of the electoral laws affected the final result in a substantial manner and benefited the 1st respondent.**

c.…..

d. **The 2nd respondent compromised the principle of impartiality and transparency thereby failing to conduct the election in accordance with the law which affected the results of the election in a substantial manner.**

e. **The 2nd respondent incompetently computed the results of the election thereby indicating in its final tally that the petitioner had obtained less votes than the votes cast in his favour as indicated in the declaration forms and giving an unfair victory to the 1st respondent, which affected the final results in a substantial manner."**

The petitioner alleges that through the miscomputation of his final vote count by the 2nd respondent he was deprived of an additional 505 votes, which would have brought his final tally count to 7,565 votes. He further alleges that the election was non-transparent and non-compliant with prevailing electoral laws in so far as the 2nd respondent failed to account for a total of 561 issued ballot papers. He did not cite the flouted laws.

Under cross examination, the petitioner testified that 2 of his polling agents raised the question of unaccounted for ballot papers but were forced to sign the declaration forms in respect of the polling stations where the anomaly arose under duress. He stated that the presiding officer at Masese 3B did not account for the missing ballot papers.

The Returning Officer of Jinja Electoral District, Ms. Flavia Mujulizi, deponed an affidavit in support of the 2nd respondent, the gist of which was that her office did not receive any complaint from the petitioner's agents; the signing of the declaration forms by these agents signified their acceptance of the vote count, and any miscomputation that occurred did not render the petitioner the winner of the election in Jinja Municipality East. During cross examination, Ms. Mujulizi did concede that Annexures J1, K and L to the petitioner's affidavit did give a correct account of the votes cast in favour of the petitioner. She attributed these mistakes to the failure by the Presiding Officers to fill in the declaration forms in alphabetical order, as well as late (night) entry of the data. She testified that she should have cross-checked the results before she released them, but owing to the pressure prevalent at the time was unable to detect the mistakes. She further testified that this anomaly also affected the 1st respondent's results too, and clarified that the results detailed in Annexures H3, H1 and J were the correct votes cast in favour of the 1st respondent.

During re-examination, Ms. Mujulizi outlined the procedure entailed in handling ballot papers, stating that the ballot papers are placed in ballot boxes and the boxes sealed at the EC headquarters in the presence of representatives of all parties to an election; the sealed ballot boxes are then sent to returning officers at the districts for onward submission to presiding officers in the divisions; presiding officers then take the sealed boxes to polling stations and they are opened in the presence of the 1st five registered voters to report to the station, as well as candidates' polling agents. She testified that used, unused and spoilt ballot papers are accounted for on Accountability for Ballot Papers Form, but the petitioner did not request for the form(s) in respect of his constituency.

From Ms. Mujulizi's testimony it is clear that there was a miscomputation of votes cast for both the petitioner and the 1st respondent. The miscomputation translated into a denial of an additional 505 votes to the petitioner, and 90 votes to the 1st respondent. This corrected computation of the vote count still places the 1st respondent ahead of the petitioner. In that sense, the non-compliance with the electoral laws occasioned by the vote miscomputation did not substantially change the election result.

However, the petitioner does also allege failure by the 2nd respondent to conduct the elections in compliance with the provisions and principles of the electoral laws, as well as the compromise by the same respondent of the pivotal principles of impartiality and transparency. This allegation points to the underlying quality of the election, and whether any compromises in that regard did affect the election result substantially.

Article 61(1) of the Constitution enjoins the Electoral Commission to organise, conduct and supervise free and fair parliamentary elections. Article 68(2), (3) and (4) outlines the gist of post-voting procedure in the conduction of an election, and specifically provides for the counting of ballot papers by presiding officers; the presence of candidates either in person or through agents during the voting and counting process, as well as at the point of ascertaining the results of the poll; and the signing of a declaration (form) by presiding officers, candidates or their agents attesting to the results of a given polling station.

In the present case, clearly there was miscomputation of votes by the presiding officers, which affected the numerical result of the election. There was also evidence of high-handedness by some presiding officers, who coerced 2 of the petitioner's polling agents to endorse declaration forms they had raised issues about. Such conduct was contrary to the spirit of an election, where parties are required to concede a result voluntarily. This evidence was not rebutted by the 2nd respondent, whose witness merely stated that the signing of the declaration forms signified acceptance of the result.

With regard to the unaccounted ballots, Ms. Mujulizi testified that an Accountability for Ballot Papers Form remains with the Returning Officer and, in the instant case, the petitioner did not ask for it. She thus suggests that all the ballot papers were duly accounted for, which evidence was not undone in cross examination.

I must state from the onset that the question of substantiality of non-compliance stipulated in section 61(1)(a) of the Parliamentary Elections Act recognises that no election can be impeccable and totally free of any mistakes. This observation was similarly made in **Kiiza Besigye vs Electoral Commission & Yoweri Kaguta Museveni Presidential** (supra), where Odoki CJ held:

> **"The point to emphasize is that section 59(6) of the Presidential Elections Act anticipates that some non-compliances or irregularities of the law or principles may occur during an election, but an election should not be annulled unless they have affected it in a substantial manner…. It is significant to note that a similar provision exists in section 61(1)(a) of the Parliamentary Elections Act."**

This is echoed by Byamugisha JA in **Ngoma Ngime vs Electoral Commission & Anor Election Petition Appeal No. 11 of 2002**, where she states:

> **"An election is a highly charged exercise. The presiding officers have to count the votes cast and declare the results immediately after the close of the poll. In a situation like that mistakes are bound to occur."**

Nonetheless, the gravity and extensiveness of the mistakes made would determine the substantiality of the non-compliance complained of. In **Morgan vs Simpson & Another (1974) 3 All ER 722 at 728** Lord Denning addressed the substantiality question as follows:

> **"I suggest that the law can be stated in these prepositions:**
>
> 1. **If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. That is shown by Hackney case (1874) 2 O'M & H 77, where 2 out of 19 polling stations were closed all day and 5,000 voters were unable to vote.**
> 2. **If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election.** *(emphasis mine)* **That is shown by the Ishington case (1901) 17 TLR 210 where 14 ballot papers were issued after 8.00 pm.**
> 3. **But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated. That is shown by Gunn vs. Sharpe (1974) 2 All ER 1058 where the mistake in not stamping 102 ballot papers did affect the result."**

In my view, the first preposition addresses the overall quality of an election regardless of the numerical effect thereof. On the other hand, the second and third prepositions address scenarios where the quality of an election is substantially above board but the mistakes enshrined therein have a numerical bearing on the final election result.

After a careful review of all the evidence on record, I do find that the election in Jinja Municipality East was substantially in compliance with prevailing electoral laws. It was only laced with some mistakes by presiding officers which led to the miscomputation of the results.

These mistakes however did not affect the numerical result of the election or substantially impact on the free choice of the majority of voters. There was also breach of the election principles of fairness as exhibited by the high-handedness with which 2 of petitioner's polling agents were coerced into signing declaration forms they had raised issues about. However, an act involving only 2 of the petitioner's numerous polling agents, and in respect of only 2 polling stations out of the 55 polling stations in the constituency would not, in my view, amount to substantial non-compliance with electoral laws.

Accordingly, I do answer the third issue in the affirmative, but answer the fourth issue in the negative.

Issue No. 5: *Remedies*

Ordinarily, costs of any action should follow the event. To that extent, I would have awarded 75% costs to the 1st and 3rd respondents and 25% costs to the petitioner given that he was successful against the 2nd respondent on issue No. 3.

However, I am aware that petitions are matters of national or political importance for which courts should be hesitant to award costs. I am also mindful of the considerations of Bamwine PJ who, in **Kadama Mwogezaddembe vs Gagawala Wambuzi Election Petition No. 2 of 2001** held:

> **"There is another dimension to such petitions: ... the quest for better conduct of elections in future. ... Keeping quiet over weaknesses in the electoral process for fear of heavy penalties by way of costs in the event of losing the petition ... would serve to undermine the very foundation and spirit of good governance."**

Furthermore, in the present case very pertinent issues were diligently raised and prosecuted in a remarkably expeditious manner. A party that exhibits such judicious conduct of their case should be applauded and need not, in my view, suffer costs. Particularly so, in an election petition that by law should be expeditiously prosecuted. Consequently, in exercise of the court's discretion, I do refrain from making any order as to costs. Each party shall bear their own costs.

This petition stands dismissed.

Monica K. Mugenyi

JUDGE

28th June 2011