

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
ELECTION PETITION NO. 05 OF 2011

ABBOT GEORGE OUMA PETITIONER

VERSUS

1. ELECTORAL COMMISSION

3. OKEYOH PETER..... RESPONDENTS

BEFORE: HON. LADY JUSTICE MONICA K. MUGENYI

JUDGMENT

This petition was brought by Abbot George Ouma, the petitioner, challenging the validity of the results of the parliamentary election in Bukhooli Island Constituency held on 18th February 2011. The petition is brought against the Electoral Commission, (the 1st Respondent) and Okeyoh Peter (the 2nd Respondent). The petitioner challenges the nomination of the 2nd Respondent prior to resigning his public office as by law required. He further contends that the election was characterised by numerous illegal practices and election offences, and that the election was not conducted in compliance with the applicable electoral laws, which non-compliance affected the election result in a substantial manner.

The specific provisions of the law purportedly flouted by the 1st respondent are article 61(1) of the Constitution of Uganda and section 12(1) of the Electoral Commission Act, which were allegedly manifested by the following acts: pre-ticking of ballot papers by agents of the 1st respondent; multiple voting in favour of the 2nd respondent with the consent of the 1st respondent; (mis)use of Government resources by agents of the 2nd respondent with the consent of the 1st respondent; participation of partisan presiding officers; voting without verification of voters' names in the register; disenfranchisement of voters by non-inclusion of their names from the register, and substitution of the petitioner's polling agents with persons unknown to him.

It is the case for the 1st and 2nd Respondents that the election in issue was conducted in compliance with the prevailing electoral laws. The 2nd respondent also maintains that he was duly nominated after effectively resigning as Headmaster of Sigulu Secondary School. The 2nd

Respondent denies engaging in any illegal practices or election offences, or indeed consenting to their commission by other persons on his behalf.

At the trial the following issues were framed:

1. Whether the 1st Respondent was duly nominated as a candidate for Bukhooli Island Constituency.
2. Whether the election for MP in Bukhooli Island Constituency was conducted in compliance with the electoral laws.
3. If not, whether the non-compliance affected the results in a substantial manner.
4. Whether or not the 2nd Respondent, personally and/ or through his agents with his knowledge, committed any illegal practices.
5. Remedies available.

The petitioner has since abandoned issue no. 4 on account of insufficient evidence to justify it. The petitioner also abandoned the allegations of multiple voting.

Section 61(3) of the Parliamentary Elections Act as amended explicitly provides for all the grounds set forth in a petition to be **proved by balance of probabilities**. Against this background I now proceed to determine the issues framed. I shall address the issues in their order of record, save for issues 2 and 3 which I shall handle concurrently.

Issue No. 1: *Whether the 1st Respondent was duly nominated as a candidate for Bukhooli Island Constituency*

It is the case for the petitioner that the 2nd respondent's nomination for participation in the February 2011 parliamentary election offended the provisions of article 80(4) of the Constitution and section 4(4)(a) of the Parliamentary Elections Act. The said provisions are materially the same. For ease of reference I reproduce article 80(4) below.

“Under the multiparty political system, a public officer or a person employed in any government department or agency of the government or an employee of a local government or any body in which the government has controlling interest, who wishes to stand in a general election as a member of Parliament shall resign his or her office at least ninety (90) days before nomination day.”

Nomination dates for the 2011 parliamentary election were 25th – 26th November 2010. Therefore a prospective candidate's resignation should have been effected on or before 27th August 2010.

A resignation is defined in **State ex rel Dwyer vs Middletown (1988) Ohio App.3d 87 at 92** quoting **Black's Law Dictionary (5th Ed. 1979) 1177** as **“a ‘formal renouncement or relinquishment’ of office made with the intention of relinquishing the office and**

accompanied by ‘an act of relinquishment’”. Thus, a resignation requires both an intent to resign, and an affirmative act of relinquishment.

In Davis vs. Marion County Engineer (1991) 60 Ohio St.3d 53, the Supreme Court of Ohio set the following standard regarding acceptance of resignations:

“Acceptance of a tender of resignation from public employment occurs where the public employer or its designated agent initiates some type of affirmative action, preferably in writing, that clearly indicates to the employee that the tender of resignation is accepted by the employer.”

In Uganda, Article 252 of the Constitution provides the basic framework for resignations of public offices. Article 252(1) provides that resignations from offices established by the Constitution should be in writing and addressed to the person or body that appointed the employee, otherwise referred to as the ‘appointing authority’. Article 252(2), on the other hand outlines the manner in which resignations take effect, namely either in accordance with specific terms of employment or in the absence of explicit terms, when a resignation letter is received by an appointing authority.

In the present case the 2nd respondent stated that he tendered his written resignation on 1st July 2010 to the Ministry of Public Service, and it was accepted by the same Ministry by letter dated 9th July 2010. He testified that upon tendering his resignation he immediately handed over office to a one Wanyama Lawrence Tenywa vide a letter dated 1st July 2010. Therefore, on the face of it, the 2nd respondent did tender a written resignation and the same was accepted. The question is whether the resignation was effective – tendered to the right appointing authority and duly accepted as by law required; and whether his post-resignation conduct depicted an act of relinquishment of the office he had resigned so as to lend credence to his purported resignation.

The evidence on record was not very helpful to a determination of who was the 2nd respondent’s appointing authority, to whom the letter of resignation should have been addressed. The petitioner testified that resignation is signified by a letter (of acceptance) from one’s employer, who in the present case he stated to be *either* the Ministry of Education and Sports *or* the Education Service Commission. He compounded this confusion further by testifying that a person must ask to resign and such request should be addressed to the Permanent Secretary, Ministry of Public Service. The 2nd respondent, on the other hand, simply stated that he inquired from the Ministry of Education and Sports (MOES) on how to structure his resignation letter. Presumably, pursuant to this inquiry he was advised to address his resignation to the Ministry of Public Service through the Permanent Secretary and the Commissioner for Secondary Education in the MOES, as he did.

With due respect, I do not think the foregoing discourse provides a correct representation of who the 2nd respondent’s appointing authority is. Simply put, one’s employer for purposes of resignation is the appointing authority that initially made an offer of employment, the acceptance

of which translated into an employer/employee relationship. In the present case I do not believe that the 2nd respondent could have been an employee of all 3 bodies referred to – MOES, Education Service Commission and Ministry of Public Service. A person's employment status is a question of fact, proof of which was not sufficiently discharged in the present case.

In my view, the mandate of Government Ministries is aptly reflected in the functions of Cabinet as stipulated in article 111(2) of the Constitution, namely to determine, formulate and implement Government policy. In so far as Cabinet does function through the respective Ministries represented therein, I take the view that the core function of Government Ministries is policy formulation and implementation. Such function certainly does not entail handling the appointment and resignation of professional staff such as the 2nd respondent. Therefore, for present purposes neither the Ministry of Education and Sports nor the Ministry of Public Service are the 2nd respondent's appointing authority.

On the other hand, the Education Service Commission is set up by article 167 of the Constitution to perform the functions outlined in article 168 of the Constitution. It is regulated by the Education Service Act of 2002, section 8(1)(b) of which gives the Education Service Commission the following mandate:

“To appoint persons to hold or act in any office in the Education Service; to confirm such appointments; to exercise disciplinary control over such persons, and to remove them from office.”

Article 175(a) of the Constitution defines ‘public officer’ as;

“Any person holding or acting in an office in the public service.”

Article 175(b) of the Constitution defines ‘public service’ as follows:

“Service in any civil capacity of the Government the emoluments for which are payable directly from the Consolidated Fund or directly out of monies provided by Parliament.”

It is not in dispute that the 2nd respondent served in a civil capacity in a public school; had his services remunerated by funds from the Consolidated Fund, and thus held an office in the public (education) service. Both the petitioner and the 2nd respondent invariably referred to the supervisory role of the Ministry of Education and Sports in Sigulu Secondary School, including the Ministry's role in posting teachers to the school. *See Annex OP8 to the 2nd respondent's affidavit of 30th May 2011.* This suggests the school was a public as opposed to private school. Further, under cross examination the 2nd respondent did concede that he was a public servant whose salary, like other public servants, was directly remitted to their bank accounts by EFT (electronic funds transmission). This, in my view, denotes payment from the Consolidated Fund. Indeed, an undisputed pay roll on record does categorise the 2nd respondent together with other

Education Service officers. *See Annextures A, B and C to the petitioner's affidavit of 26th May 2011.*

I do therefore find that the 2nd respondent was a public officer in the Education Service within the precincts of section 8 of the Education Service Act. Accordingly, the Education Service Commission was his rightful appointing authority, and it is to this Commission and not the Ministry of Public Service that the 2nd respondent's resignation should have been addressed.

The resignation of public officers is provided for in detail in the Uganda Public Service Standing Orders, 2010 as adopted by the respective Service Commissions. In the case of the Education Service Commission, section 29(2) of the Education Service Act provides as follows:

“Until the Commission makes standing orders under this Act, any standing orders in force in the public service immediately before the coming into force of this Act shall, with the necessary modifications, continue to apply to the Education Service as if made under this Act.”

I am not aware that any Standing Orders have been made by the Education Service Commission to date. The current Public Service Standing Orders are an amendment of the Standing Orders that were in force immediately before the commencement of the Act, and therefore are applicable under section 29(2) thereof.

Clause 10 of Chapter (A-n) of the Standing Orders reads as follows:

“A public officer holds office by virtue of the Constitution. The power to remove a public officer from the Public Service is vested in the President and the relevant Service Commissions. It therefore follows that a public officer can not remove himself/ herself from the service, legally divest himself/ herself of all his/ her official duties and responsibilities by merely intimating that s/he wants to resign his/ her office at once.”

Clause 11 of the same Chapter reads as follows:

“A public officer who wishes to resign from a public office shall apply to the Government by giving a notice of 30 days. The officer shall not leave office until his/ her application to resign has been approved in writing indicating the date the officer may leave.”

In my view, the foregoing provisions of the Standing Orders provide the procedure for the resignation of a public officer. Such officer should apply to the President, Government *or* the relevant Service Commission, and should not leave office until his/ her application is approved in writing indicating the effective date of resignation.

Clause 16 (b) of the same chapter of the Standing Orders warrants mention. This clause designates ‘*the responsible Permanent Secretary*’ as the authority permitted, *on behalf of Government*, to accept resignations for ‘all pensionable officers below the level of Permanent Secretary *in Ministries and Departments.*’ In my view, this clause is applicable to persons employed in Government Ministries and Departments. It is inapplicable to the present circumstances in so far as a school, though part of the public service, does not fall within the category of ‘Government Ministry or Department’. In any event, in the present case the 2nd respondent’s resignation was addressed to the Permanent Secretary of the Ministry of Public Service, who is not the responsible Permanent Secretary for the Education Sector.

In the present case, not only did the 2nd respondent apply to the wrong office; he did not give notice of resignation and left office prior to receiving formal approval of his resignation. This was in contravention of the provisions of the Standing Orders and rendered his purported resignation ineffective.

The question of a resignation addressed to the wrong person or body was similarly dealt with in **Wasike Stephen Mugeni vs Aggrey Awori Siryoyi Election Petition Appeal No. 5 of 2007**. In that case the appellant had addressed his resignation to the Town Clerk of Busia Town Council rather than the District Service Commission. The Supreme Court upheld the decisions of the lower courts that tendering of a resignation to the wrong authority or person rendered a resignation ineffective.

On the question of hand-over as an act of relinquishment of office, having found that the purported resignation of the 2nd respondent is not sustainable at law, it does follow that any purported hand-over arising there from is not legally recognised. In any event, the hand-over of 1st July 2010 was undertaken prior to receipt by the 2nd respondent of formal acceptance of his purported resignation and therefore cannot be deemed to be effective hand-over of office.

In the premises, I do answer the first issue in the negative and find that since the 2nd respondent’s purported resignation was not effected in accordance with prevailing laws, he was not duly nominated as a candidate for Bukhooli Island Constituency. My finding on this issue would determine the entire petition, but for completion I shall proceed to consider issues 2 and 3 as well.

Issues No. 2 and 3: *Whether or not there was non-compliance with the electoral laws in the elections for MP Bukhooli Island Constituency, and if so, whether the non-compliance affected the results in a substantial manner.*

Article 61 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. Section 12(1) of the Electoral Commission Act spells out the mandate of the Electoral Commission with regard to the organisation and supervision of an election.

In the present petition, the petitioner specifically pleaded pre-ticking of ballot papers and the participation of non-registered voters in the election as incidences of non-compliance with electoral laws. To that extent, the legal provisions that the 1st respondent is alleged to have flouted include sections 12(1)(e) and 19(2) of the Electoral Commission Act, Cap 140; and sections 29(4), 34(3), 34(3a) and 76(j) of the Parliamentary Elections Act.

The petitioner deposed 3 affidavits in support of the petition – the affidavit accompanying the petition dated 18th March 2011; an affidavit in rejoinder dated 3rd May 2011, and a supplementary affidavit in rejoinder dated 26th May 2011. The gist of his evidence in each affidavit is as follows.

1. Affidavit accompanying petition

- There was pre-ticking of ballot boxes in Bugoma, Rabachi, Bulagaye, Syabalubi, Sigulu and Bumalenge polling stations.
- The presiding officers in Bugoma Academy, Rabachi, Bulagaye, Bumalenge and Buloba polling stations were partisan, having participated in the NRM primaries and their partiality adversely impacted on the notion of a free and fair election.
- The 2nd respondent's brother, a one Sam Onyango, used a Government motorcycle reg. No. LG 0051-07 to ferry voters to Sigulu polling station and the said unregistered persons were allowed to vote despite their names not appearing on the voters' register; when the petitioner's agent, a one Hasede Moses protested Onyango's ferrying of voters, the said Onyango caused his arrest.
- Several voters were disenfranchised owing to the omission of their names from the voters register.
- Before the petitioner could collect all the evidence he required for a recount of the votes, he was arrested by police for allegedly causing chaos in the constituency.
- Failure by the 1st respondent to comply with the electoral laws and manage the electoral process affected the result of the election in a substantial manner.

2. Affidavit of rejoinder

- Onyango Sam was an agent of the 2nd respondent, and he used a Government motorcycle Reg. No. LG 005107 to campaign for him.
- Onyango Sam also took possession of a motorcycle Reg. No. UG 3476M belonging to Sigulu Health Centre II, which he also used to ferry voters on Election Day.

- All the averments of Dr. Kiggundu for the 1st respondent are false; the election in Sigulu Island was not transparent, free or fair; and the results do not reflect the will of the people of Sigulu Constituency.
- In Bugoma Academy Primary School all the petitioner's agents were chased away and replaced by persons like a one Ojhiambo John, who was not known to him.

3. Supplementary affidavit of rejoinder

- Reiterated averment that elections in Sigulu Island were not free and fair, and attached the voters registers for Rabachi and Bulagaye polling stations.
- Raised issue of multiple voting by voters, which the petitioner has since abandoned.

I do agree with counsel for the 1st respondent that, save for the averment of his arrest, the petitioner did not witness all the other averments first-hand. The petitioner conceded this fact in cross examination. His omission to disclose the source of his information, contravenes the rules of affidavit evidence and the petitioner's affidavits would, to that extent, be defective. On this issue I was referred to the case of **Uganda Journalist Safety Commission & Others vs Attorney General Constitutional Petition No. 7 of 1997**, where the Constitutional Court held as follows:

“Court should not act on an affidavit which does not distinguish between matters stated on information and belief, and matters to which the deponent swears from his own knowledge. Where averments are based on information, the source of information should be clearly disclosed and where the statement is a statement of belief, the grounds of belief should be stated with sufficient particularity so that court can judge whether it is safe to act on the deponent's affidavit. Failure to disclose the source of information will normally render the affidavit null and void, and an affidavit is not evidence unless it complies with these legal requirements.”

Indeed, the liberal approach that had been adopted in the case of **Kiiza Besigye vs. Yoweri Museveni Kaguta & Anor Election Petition No. 1 of 2001** notwithstanding; in **Kiiza Besigye vs Electoral Commission & Yoweri Kaguta Museveni Presidential Election Petition No. 1 of 2006**, Odoki CJ held:

“An evaluation of the evidence relied on by the petitioner shows that much of it was hearsay and uncorroborated. Evidence of reports received ... cannot be relied on without the persons who witnessed those incidents ... swearing affidavits to confirm the reports.”

In this case, in addition to the petitioner's affidavits, the petition is further supported by 10 affidavits deposed on various dates by Ogot Daniel, Fred Discharchi (2), Muzungu Daniel, Otieno William, Odongo Ivan Ochieng, Otieno Samson, Ojulu David, Hasede Moses and Madola Justo, which attest to the incidents that were deposed of by the petitioner. The affidavit of

Nabwire Prossy Sylvia relates in its entirety to the offence of multiple voting, which was abandoned by the petitioner, and shall therefore be disregarded.

The above deponents attested to the following incidents of contravention of electoral laws. I shall reproduce a summation of the complaints by polling station.

- a. Rabachi polling station – Ogot Daniel (petitioner's agent), Odongo Ivan Ochieng (polling assistant) and Madola Justo (another candidate's agent) raised the following issues:
 - o Vote stuffing which the presiding officer could not stop.
 - o The presiding officer himself gave more than 1 ballot paper to the 2nd respondent's voters.
 - o Unregistered persons were allowed to vote for the 2nd respondent, notable among who were a one Emuria O/C Sigulu Police Station and a one Opio Mark.
 - o Voting by persons not verified in the voters register; such voters were instructed to vote for the 2nd respondent, and the O/C Rabachi was the one identifying people to vote.
 - o On protesting, one of the polling assistants was transferred from the Verification desk to the Ink desk on the orders of the presiding officer; the presiding officer said his decision was final, and advised that complaints raised would be handled by the Returning Officer.
- b. Sigulu Island p/s polling station – Fred Discharchi (polling assistant), Otieno William (voter), Ojulu David (petitioner's agent) and Hasede Moses (agent of a presidential candidate) raised the following issues:
 - o Pre-ticking of ballot papers by the presiding officer, a one Muyomba Matthew.
 - o Ferrying of voters by a one Onyango Sam, brother to 2nd respondent on motor cycle Reg. No. LG 0051-07, which caused violence. Police intervened and arrested Hasede Moses (the petitioner's agent), who had complained of Onyango Sam's actions. The Presiding officer sided with Onyango Sam. *See affidavits of Fred Discharchi and Hasede Moses.*
 - o Voting of unregistered persons with the permission of the presiding officer. *See affidavits of Fred Discharchi and Hasede Moses.*
 - o Presiding Officer over-ruled polling agents that raised their complaints during voting. *See Hasede affidavit.*
 - o Misadvising the polling agents on the conditions pertaining to signing of declaration forms. On this issue, Fred Discharchi, a polling assistant, did depone a second affidavit in which he clarified an earlier averment he had made suggesting that he too signed the declaration forms.
 - o Ferrying of voters using Government resources. Motorcycle reg. No. UG 3476M allegedly used by Onyango Sam, a sub-county chief.

- o Delegation of the function of Presiding Officer to a one Hasande Anne, wife of Onyango Sam, which Hasande Anne perpetuated the ferrying of voters by her husband using Government resources (motor cycle reg. No. LG 0051-07); and did not verify voters existence on the voters register. All these persons allegedly voted for the 2nd respondent.
 - o Onyango Sam ordered that voter verification could be done after the voting exercise.
 - o A one Ooko Tobias, agent of the 2nd respondent, took away the voter register in the presence of a police constable.
 - o Chasing away of a polling agent by the police on the instructions of the presiding officer.
 - o A presiding officer misadvised polling agents to sign the declaration forms on the pretext that this was a precondition to having their complaints heard.
- c. Bugoma Academy polling station – Muzungu Daniel (petitioner’s agent) raised the following issues in respect of this station:
- o Unregistered persons were allowed to vote on the pretext that they were in presiding officer’s register but not that of the agents.
 - o Petitioner’s agent (the deponent) and a one Ojiambo Joseph were chased away for requesting to cross-check the presiding officer’s register.
 - o Thereafter the petitioner did not have any agent at the polling station; what appears on the declaration forms is false.
- d. Bulagaye polling station – Otieno Samson, the petitioner’s agent attested to the following discrepancies:
- o Stopped the verification of voters’ names on the voters register upon the orders of the Gombolola Internal Security Chief, a one Nanjheko Gaitano, and Onyango Sam.
 - o The Presiding Officer thus allowed unregistered persons to vote.
 - o The said GISO and sub-county chief appointed people to accompany voters and direct them on how to vote.
 - o On complaining, the deponent (polling agent) and the polling assistant at the station were advised that their grievances would be handled at a later stage.
 - o Upon conclusion of voting, the same agent and polling assistant were misadvised to sign the declaration forms as a precondition to their complaints being heard.

The respondents, in turn, presented the following evidence in rebuttal of the petitioner’s allegations.

1. Ojiambo John attempted to rebut the petitioner’s evidence in respect of Bugoma Academy polling station in his affidavit in reply dated 26th May 2011. He stated that he was the petitioner’s polling agent at Bugoma Academy polling station and attested to the fairness of the election at that polling station. He denied ever being chased away from the polling

station or replacing Muzungu Daniel there as averred by the petitioner. He further stated that Muzungu Daniel and Ojiambo Joseph were neither the petitioner's agents nor present at the polling station as alleged. Indeed he furnished a letter of appointment dated 17th February 2011 and duly signed by the petitioner as proof that he served as the petitioner's polling agent at the station. However, I do note that Muzungu Daniel did also avail court with a letter of appointment dated 18th February 2011 and duly signed by the petitioner as proof that he served as the petitioner's polling agent at the station.

2. Otieno Alex Jarius purported to discredit the petitioner's evidence in respect of Rabachi polling station when he stated in his affidavit of reply dated 26th May 2011 that contrary to the allegations of Ogot Daniel and Madola Justo, Madola Justo as an agent of a candidate for District Woman MP sat on the 3rd table at the polling station and could not have seen the presiding officer who was seated at the 1st table pre-ticking ballot papers. He further stated that the presiding officer was responsible for issuing ballot papers for the Presidential election and could not therefore have accessed, let alone pre-ticked, the ballot papers in respect of the Parliamentary election which were presumably at another table. However, I do note that pre-ticking and/ or vote stuffing was not the only issue complained of by the petitioner at Rabachi polling station. The other issues complained of at that station were unregistered voters and unverified voters.
3. A one Okoth Collins and Otieno Musa, both agents of the 2nd respondent, deponed affidavits to rebut the petitioner's evidence in respect of Bulagaye and Sigulu Island polling stations. Okoth Collins purported to counter the allegations of Otieno Samson, the petitioner's agent, by stating that the election at that polling station was not interfered with by the GISO or sub-county chief. Otieno Musa similarly sought to counter all the allegations of non-compliance stipulated by Fred Discharchi, Ojulu David and Hasede Moses in respect of Sigulu Island polling station. It comes down to the evidence of one set of agents against that of an opposing set of agents.
4. Indeed, just like the evidence of Hasede Moses corroborates that of Fred Discharchi in supporting the petitioner's allegation of non-compliance with electoral laws in Sigulu Island polling station; similarly, the affidavits of a one Mujomba Matthew and Onyango Sam do corroborate the contention of the 2nd respondent and Otieno Musa that the election in Sigulu Island polling station was free and fair.

I am mindful of the extremely pertinent observation made by Mulenga JSC in **Besigye vs Museveni & Anor** (supra) with regard to evidence in election petitions. The learned judge observed:

“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, each one exaggerating the others wrongs.

while downplaying his or her own. This is because most witnesses are the very people who actively participated in the election contest.” (emphasis mine)

In **Mbayo Jacob vs. Electoral Commission & Another Election Petitions Appeal No. 7 of 2006**, Byamugisha JA pointed to the need for an independent source of evidence to confirm the authenticity of either party’s allegations in an election petition. As in **Mwiru Paul vs Igeme Nabeta Election Petition No. 3 of 2011**, I do respectfully reiterate my agreement with that position. **Sarkar’s Law of Evidence, 1993, 14th Edition at p. 924** is instructive in this regard and 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.”

In the present petition however, save for letters of appointment either as polling agents or polling assistants and contested declaration forms, I did not find documentary evidence that clarifies on which side the truth lies. In the premises, I do revert to the established rules of evidence to make a determination of this issue.

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 **Besigye vs Museveni & Anor** (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 Election Petition No. 02/2001**, 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 presented, a petition (or ground thereof) should be disallowed.

In the present case, I do have doubt in my mind about the credibility of either party’s evidence on this issue. This is compounded by the fact that most of the petitioner’s evidence has been quite logically discredited, though not out rightly rebutted, by the 2nd respondent’s evidence. And furthermore, two (2) of the petitioner’s witnesses – Odongo Ivan Ochieng and Otieno Samson that were subjected to cross examination did not give a credible account of themselves. They contradicted their own affidavit evidence, contradicted each other and appeared untruthful. To that extent, I am not satisfied that the burden of proof on the petitioner has been sufficiently discharged. I was most helpfully referred to the decision in the case of **Sarah Bireete & Another vs Bernadette Bigirwa & the Electoral Commission Election Petition No. 13 of 2002** where the Court of Appeal held that **“a petitioner has a duty to adduce credible evidence or cogent evidence to prove his/ her allegation at the required standard of proof.”**

In the absence of such proof, as is the case presently, I do answer the second issue in the negative and find that there was no credible and cogent evidence of non-compliance with the electoral laws. It does follow then that the question of substantiality thereof in the third issue is similarly answered in the negative.

Issue No. 5: Remedies

The net effect of my findings above is that this petition does succeed. Accordingly, I hereby make the following declaration and orders:

1. The 2nd respondent was not qualified for nomination and subsequent election as Member of Parliament (MP) for Bukhooli Island Constituency, having failed to tender an effective resignation of his job.
2. The election of the 2nd respondent as MP of Bukhooli Island Constituency is hereby set aside, the seat duly declared vacant and a fresh election should be held.

3. Ordinarily, costs of any action should follow the event. In the present case, the entire petition could have been disposed of by the resolution of the first issue alone. To that extent, I would have awarded all costs to the petitioner.

However, I am aware that petitions are matters of national or political importance for which courts should be hesitant to award costs. The present petition posed critical governance issues that were not addressed with the diligence that they required. I therefore make no order as to costs. Each party shall bear its own costs.

Monica K. Mugenyi

JUDGE

30th June 2011