THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-EP-004/2011

BASHAIJA KAZOORA JOHN:::::::::::::::::::::: PETITIONER

VS

1. **THE ELECTORAL COMMISSION**
2. **BITEKYEREZO MEDARD :::::::::::::::::::::::::::::: RESPONDENTS**

JUDGMENT

BEFORE: LADY JUSTICE CATHERINE BAMUGEMEREIRE

This Petition arises out of an Election of the Directly Elected Member of Parliament for Mbarara Municipality. The Election of the directly elected Member of Parliament for Mbarara Municipality took place on 18 February 2011, the same date Presidential and all Parliamentary Elections were held.

From the outset let me state that this was a highly contentious proceeding. Every fact, every issue and every ground was in contention. None the less, I will begin by highlighting the few undisputed facts.

It is an undisputed fact that the 1st Respondent carried out the voting exercise for the Member of Parliament of Mbarara Municipality.

The Petitioner's case is that the 1st Respondent did not observe the electoral laws in the conduct of this election and that this failure on the part of the 1st Respondent benefited the 2nd Respondent and affected the quality of the election for the directly elected MP of Mbarara Municipality. It is an undisputed fact that the declared winner of the election for MP Mbarara Municipality was Dr. Bitekyerezo for the directly elected Member of Parliament of Mbarara Municipality. The Petitioner's case is that the 1st Respondent defied a Court Order dated 4th February 2011. Court notes that a Judicial Review Application had been made seeking a Court Order and declaration that voters from Makenke barracks were not eligible to vote in Mbarara Municipality because they belonged to Kashari County. The effect of the Court Order was that voters from Kashari were disallowed from voting in Mbarara Municipality. It is the Petitioner's case that the 1st Respondent in total defiance and contempt of the Court Orders dated 4 February 2011, allowed voters from Makenke Barracks to vote in Lubiri Cells in Mbarara Municipality thereby influencing the outcome of the election.

As part of the scheduling conference Learned Counsel for all parties carried out an external exercise in which the impugned polling stations were agreed upon. In addition to the impugned stations being agreed upon, results for the candidates, the Petitioner, the 2nd Respondent and the other three candidates, Tusiime Michael, Kashaija Nicodemus Rutasa and Nahamya Joseph in the impugned stations were totaled up

It is an undisputed fact that the declared winner for the directly elected Member of Parliament for Mbarara Municipality is Dr. Bitekyerezo Medard.
After a painstaking exercise of verification it was established that there were 6 impugned stations which included: -

Lubiri	A-A
Lubiri	B-F
Lubiri	K-L
Lubiri	M-N
Lubiri	O-O

Lubiri P-Z

The tallied votes from the impugned stations were also agreed upon as follows: -

Name	***Votes***
Dr. Bitekyerezo Medard -	1228
Rtd Major John Kazoora -	165
Tusiime Michael	219
Kashaija Nicodemus -	9
Nahamya Joseph -	4

Following the verification of the tallied votes for each candidate, the votes of each candidate from the impugned station were deducted from the final tally and appeared as below: -

Dr. Bitekyerezo Medard	12553-1228=	11,325
Tusiime Michael	9666-219=	9,447
Rtd Major John Kazoora	8846-165=	8,681
Kashaija Nicodemus Rutaba	484-9=	4,115
Nahamya Joseph	194 – 4=	190

I will return to the agreed facts by examining the significance of the outcome of these results when I address and the issues.

The main grounds of this petition are found in paragraph five of the petition and state thus:

‘That your Petitioner (Bashaija John Kazoora) says that the declaration of the 2nd Respondent (Bitekyerezo Kab. Medard) as a Member of Parliament for Mbarara Municipality Constituency was null and void on the following grounds:

(a) That the electoral process in Mbarara Municipality was conducted not in compliance with the provisions and principles of the national electoral laws.

(b) That the 1st Respondent in total defiance and contempt of the Court Orders dated 4th February 2011 not to allow voters outside Mbarara Municipality constituency to vote from Mbarara Municipality Constituency allowed the impugned polling stations to vote within Mbarara Municipality Constituency rendering the whole exercise a nullity.

(c) That failure to conduct the election by the 1st Respondent in compliance with the provisions and principles of the national electoral laws benefited the second respondent and affected the whole exercise in a substantial manner.’

The Petitioner seeks from this Court the following orders:

a) A declaration that the process of conducting the election for Mbarara Municipality Constituency by the first respondent contravened the provisions and principles of the national electoral laws.

b) A declaration that the 2nd Respondent was not validly elected and or setting aside his election as the Member of Parliament for Mbarara Municipality Constituency.

c) Declaring the Parliamentary seat for Mbarara Municipality Constituency vacant and requiring fresh elections to be conducted in the Constituency.

d) An order for costs incurred by the petitioner in respect of the Petition be provided for.

This petition relied on court-framed issues after failure by both sides to arrive at a concession even on issues. Court framed the issues as follows:-

1. Whether in the conduct of the elections of the directly elected Member of Parliament for Mbarara Municipality, there was disobedience of a Court Order and if so whether it (the disobedience) amounted to contempt of court?
2. Whether such contempt of Court as mentioned above is ground for the nullification of the election for the directly elected MP for Mbarara Municipality
3. Whether the 2nd Respondent was involved in any illegal practice under the Act?
4. Whether the election for the directly elected MP of Mbarara Municipality conducted on 18 February 2011 was held in compliance with the National Electoral Laws.
5. If not whether non-compliance with the national electoral laws affected the results of this election substantially.
6. What remedies, if any, are available to the parties?

All affidavit evidence in this petition was deemed read.

Court will mention in passing that the drafting of the petition left a lot to be desired. The record showed that the petition was drawn and filed by Ajungule and Company Advocates of Kampala. It is my humble view that this petition could have been drafted better than it was. Having said that, I am alive to the Constitutional requirement for substantive Justice. This view was resoundedly upheld by Odoki C.J in **Kiiza Besigye v Electoral Commission and Yoweri Kaguta Museveni Presidential Election Petition No. 1 of 2006** where it was held and I quote;

> "***The doctrine of substantive Justice is now a part of our constitutional Jurisprudence.***"

This Court cannot overstate the importance of substantive Justice despite the need for quick wins. In keeping with the need to avoid getting bogged down by technicalities this Court decided to hear this petition in full rather than dismiss it on a preliminary objection

as was the prayer of the 2nd Respondents. In addition, this Court notes that election petitions are disputes of a special category. Election petitions tend to be emotionally charged, as was held in **Besigye v Museveni Kaguta & Anor**. **Election Petition No. 1 of 2001**;

> ***"An election petition is a highly politicized dispute, arising out of a highly politicized contest."***

Despite the politicization of election disputes this Court does not lose sight of the importance and centrality of elections. As Odoki C.J noted in **Col. Rtd Dr. Besigye Kiiza v M.Y. Kaguta E.C Election Petition No. 1 of 2001.**

> ***"Elections are the highest expression of the general will. They symbolize the right of the people to be governed only with their consent."***

Whenever people are given an opportunity to elect their leaders through elections which are regular and are free and fair, they do tend to express their will.

The Standard, Burden and Degree of Proof in Election Petitions

Section 61 of the Parliamentary Election Act otherwise referred to as the PEA sets down the degree and standard of proof expected in election petitions. S.61 of the P.E.A states and I quote,

> ***"(1) The election of a candidate as a Member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of court****(emphasis mine).****"***

While in criminal cases a Court must be satisfied beyond reasonable doubt, S.61 (1) PEA sets the degree of proof for election petitions. A petitioner must prove to the satisfaction of Court any grounds he alleges. The section does not stop at pronouncing the degree of proof, but by stipulating the degree of proof it sets apart election petitions.

To this extent I agree with the 2nd Respondent that in the **Miller v Minister of Pensions (1974) 2 all E.R 372**

> ***"That degree is well-settled. It must carry a reasonable degree of probability but not so high as it is required in criminal cases. If the evidence is such that the tribunal can say "we think it is more probable than not" the Order is discharged, but if the probabilities are equal, it is not."***

An instructive authority on this is **Chris Bigirwa Rutaremwa v Godfrey Ngobi Uni-Engineers and Co. HCT-00-CC-CS 247/2003** where Egonda Ntende J dismissed the suit because in his view, the probabilities were equal.

Having laboured the point that the degree of proof in election is heightened it is important to note however, that the standard of proof is stipulated by law. S.61 (3) of the PEA states

> ***"(3) Any ground specified in subsection (I) shall be proved on the basis of a balance of probabilities."***

Although the standard of proof in election petitions is on the balance of probabilities, the importance of elections has meant that the degree of proof is heightened.
Election petitions are matters of national interest and tend to create an atmosphere of collective euphoria in sections of the population. Besides the nature and gravity of allegations in election petitions require more sensitivity and heightened proof.

RESOLUTION OF ISSUES:

Issue No. 1 Whether in the conduct of the election of the directly elected Member of Parliament for Mbarara Municipality there was disobedience of a Court Order and if so whether it amounted to contempt of court?

It is the Petitioner's case that the terms of the Court Order were among others to quash the 1st Respondent's decision establishing specific policy station in Lubiri Cell to cater for voters who reside in Makenke Barracks which falls under Kashari County.

Byamugisha of Ajungule and co. Advocates, for the Petitioner, argued that the 1st Respondent ought to have acknowledged that Makenke Barracks falls under Kashari

County and that the residents of this Barracks ought to have voted in Kashari County. Byamugisha further submitted that the 1st Respondent did not comply with the Court Order.

The 1st Respondent's reply to this was that there was no disobedience of a Court Order. Tabaro for the 2nd Respondent invited Court to find that the Petitioner attempted to misguide the Court into believing that the Court Order had been disobeyed. Tabaro's submission was that the order was complied with and. In his view that was the essence of the press release.

In replying to this issue, Learned Counsel for the 2nd Respondents submitted that the Court Order was clear and unambiguous. It was the 2nd Respondent's submission that the Court Order did not abolish the polling stations in Lubiri Cell. It is the case for both Respondents that no voter Register or Roll was brought to Court by the Petitioner to show that any voter who was not a resident of or originated from Lubiri cell voted from Lubiri cell. The 2nd Respondent's case was that if there was such disobedience, the 2nd Respondent could not be found in such disobedience.

The Petitioner has constantly referred to the 1st Respondent's defiance of a Court Order. This Court will now proceed to examine the said Judicial Review Ruling or Court Order. This Court takes Judicial Notice of and acknowledges the existence of a Ruling in a Miscellaneous Application from which was extracted a Court Order in the case of **Singura Robert Rwomushojwa and 2 others v the Electoral Commission HCT-05-CV-MA-0160- 2010,** otherwise referred to as **Mbarara MA 16 of 2010**. The main ground argued in the above miscellany is that the decision of the Respondent (the EC) allowing the voters in Makenke Army Barracks to vote in Mbarara Municipality was illegal particularly because they are part of Kashari County and not Mbarara Municipality. The contested areas were Polling Centres located in Lubiri Cell.

The Court in that cause took judicial notice of the official map of the administrative units and demarcations between Mbarara Municipality and Kashari County. Court noted that a perusal of leaves of the Blue Print maps indicates that Makenke Army Barracks, Makenke Cell and Makenke village are clearly outside the approved Mbarara Municipality.

As a result of the above findings, the High Court sitting in Mbarara made the following orders: -

1. That the decision of the Respondent which includes the names of voters in Kashari Constituency on the voter's Roll of Mbarara Municipality is hereby quashed.
2. The Respondent is further prohibited from allowing voters residing in Makenke Army barracks Kashari County from voting in Mbarara Municipality.
3. It is hereby declared that the decision of the Respondent to allow voters in Makenke Army Barracks to vote in Mbarara Municipality to vote in Mbarara Municipality is contrary to the law. Therefore null and void.
4. It is ordered that the Respondent pays costs of this application.

The above decision in MA 160 of 2010 formed the centre of contention in the eventual election in the directly elected Member of Parliament of Mbarara Municipality and the decision above is the main driver of this election petition.

The question in the first issue is whether the 1st Respondent complied with this Court Order? Under the Court Order, the 1st Respondent was to ensure that no voters from Kashari were registered in Mbarara Municipality. Further, the 1st Respondent was prohibited from allowing voters who dwell in Makenke Barracks from voting in Mbarara Municipality.

On the 16th of February, 2 (two) days to the voting day the 1st Respondent – issued a press release which stated as follows: -

"PRESS RELEASE"

PURSUANT TO THE HIGH COURT RULING IN HCT-05-CV-MA-0160-2010: SINGURA R WROMUSHOJWA & 2 OTHERS v E.C. THE ELECTORAL COMMISSION HEREBY DRAWS THE ATTENTION OF THE VOTERS IN MBARARA DISTRICT AND GENERAL PUBLIC TO THE FOLLOWING:

A) VOTERS IN KASHARI COUNTRY, KAKIIKA SUB-COUNTY, KAKIIKA PARISH, MAKENKE CELL WILL VOTE IN THE FOLLOWING POLLING STATIONS: -

- MAKENKE I (A-J)
  ” II (K-L)
  “ III (M-N)
  “ IV (O-Z)

B) VOTERS IN MBARARA MUNICIPALITY, KAKOBA DIVISION, NYAMITYOBORA WARD, LUBIRI CELL WILL VOTE IN THE FOLLOWING POLLING STATIONS: -

- LUBIRI CELL I A-A
  “ B-J
  “ K-L
  “ M-N
  “ O-O
  “ P-Z

The Returning Officer of Mbarara Electoral District was duly put on notice and informed of these developments.

I have carefully perused and examined the arguments of the Petitioner and the Respondents regarding this Court Order and judgment Press Release.

It is my finding that the Petitioner discharged his legal burden by proving to the satisfaction of this Court that there was a Court Order which required the 1st Respondent to carryout certain functions before the Parliamentary Elections on 18 February 2011. Further, it is my considered opinion that the Electoral Commission did not do enough to give effect to the Court Order.

The Press Release purportedly issued pursuant to the Court Order was in my view ill-advised, hollow, and shallow and of no consequence. A comprehensive Court Order such as was issued in **MA-160/2010** could not be effectively interpreted by such a meaningless and in-explicative Press Release. It is no wonder that an intelligent mind reading this Press Release might believe it was intended to defeat the Court Order. Although I do not share this opinion I am still of the view that the Electoral Commission had sufficient personnel and resources to give effect to this order and should have done so, could have done so and did not.
It is trite that Court Orders are not issued in vain, have the force of law and command parties to fail not in obeying such an orders. Court Orders have the force of law and affect the jurisdiction they command. A violation of a Court Order would otherwise attract punishment.

This court will now deal with the issue whether such contempt of Court as mentioned above is ground for the nullification of the election for the directly elected MP for Mbarara Municipality

Having said that Court Orders have the force of Law, the jurisdictional reach of a Court Order must be borne in mind. The question to be asked is whether this Court Order extended beyond the Jurisdictional Reach of the six impugned polling stations in Lubiri Cells to-wit Lubiri A-A, Lubiri B-J, K-L, M-N, O-O & P-Z. The other question is whether the 2nd Respondent by failing to give effect to this Court Order did so consciously, willfully and with impunity. Indeed this Court finds that there was non-compliance with the Court Order on the part of the 1st Respondent. However, in order for this non-compliance to amount to a contempt of Court situation for which the 1st

Respondent could be hauled for the charge of contempt of court, there must be proof of conscious, willful disobedience with impunity. A contempt of Court situation in respect of a Civil Order such as the one before Court would require that the person accused be given a right of hearing since a Court Order may be capable of one or more interpretations. To find the 1st Respondent guilty of contempt would require more evidence than was provided to this court. I therefore find that the circumstances described above do not attract a contempt of Court charge.

Concerning issue No. 3 whether the 2nd Respondent was involved in any illegal practices under the Act; this issue was raised and framed by Akampumuza for the 2nd Respondent. The obvious answer to this question is a plain No. This petition is not about whether the 2nd Respondent was involved in illegal practices. It is my considered opinion that this issue ought not to have been raised or framed at all. This petition primarily concerns the grievance the Petitioner has about the conduct of elections in the impugned stations of Lubiri Cell.

Whether the elections for the directly elected Member of Parliament of Mbarara Municipality were held in compliance with the National Electoral Laws: Having found that the Electoral Commission failed to comply with the Court Order, this Court now has to find whether the elections for the directly elected Member of Parliament of Mbarara Municipality were held in compliance with the National Electoral Laws. The question which immediately follows is whether this non-compliance with the national electoral laws affected the results of this election substantially. It is the Petitioner's case that the election in Mbarara Municipality was conducted not compliance with the national electoral laws. In arguing the issue of non-compliance Learned Counsel Byamugisha for the Petitioner submitted that the Electoral Commission failed to conduct a free and fair election as envisaged under Art. 61 (a) and Art. 61 (e) of the Constitution of the Republic of Uganda. Byamugisha further submitted that the Electoral Commission did not comply with S. 19 (2) (2), of the Electoral Commission Act.

On the particulars of non-compliance, learned Counsel for the Petitioner stated that the E.C failed to compile, revise and update the voters' register. In addition, that the Electoral Commission failed to ensure that only persons registered by place of origin and place of residence were allowed to vote in the impugned stations.

Regarding the voting process, Learned Counsel of the Petitioner submission was that the E.C did not inform the voters of the impugned stations, in good time, where they should vote And finally that the E.C did not publish its decision on the demarcation of boundaries in the Uganda Gazette and the Media. Learned Counsel particularly noted that the E.C press release issued on 16th February, two days to polling day, was not gazette, as required by the Electoral Commission Act.

In reply to this issue, Tabaro for the 2nd Respondent submitted that the Petitioner did not prove to the satisfaction of Court that there was non-compliance with the Law. Counsel of the 1st Respondent noted that no voter's register or roll was brought to Court to prove that specific voters from Kashari voted in Mbarara Municipality. Referring to the Affidavits of John Kazoora, Tumuhimbise Leuben and Twinomugisha David, the 1st Respondents noted that none of the witnesses had cited instances of non-compliance or even named the number of people who were not allowed to vote. Relying on the 1st Respondent's witness, the Returning Officer Kamusiime Dan, Counsel of the 1st Respondent noted the witnesses' evidence that only registered voters of Mbarara Municipality were allowed to vote and that he (Returning Officer) did not receive any complaints from his election Officers or from the Petitioners and his agents, regarding malpractices or irregularities.

In replying to the issue of non-compliance the 2nd Respondents' case is that the main gist of the non-compliance is the Court Order. Learned Counsel for the 2nd Respondent contended that no single voter complained about their polling stations following a Press Release issued by the Electoral Commission in pursuance of the Court Order. It was the 2nd Respondents' opinion that the Press Release clarified and categorized the voters who were allowed to vote in Kashari and those who were to vote in Mbarara Municipality. This Court has combed carefully through the availed affidavit evidence and the

submissions of Learned Counsel. This Court finds that non-compliance with the electoral laws is not restricted to a particular law such as the Parliamentary Election Law alone. This is an issue of what forms sources of law in regard to electoral petitions. Non-compliance with Electoral Laws includes all national Laws enacted and recognized as enabling the handling of elections in the Republic of Uganda. It's needless to mention that a Court Order in respect of a particular matter has the force of law and is a source of law. This means the Electoral Commission Act and such other sources of law as govern the conduct of free and fair elections in this country apply.

Further still, non-compliance with the National Electoral Laws in this case must take into account the effect of a Court Order which has the force of Law. The effect of the Court Order as Counsel for the 2nd Respondent rightly pointed out was to cause the 1st Respondent to honor and obey this said Court Order. Although the 2nd Respondent would invite Court to believe that the 1st Respondent obeyed the Court Order to the letter, this Court does not hold this view. This Court finds that by failing to honor the Court Order, the 1st Respondents affected the result of this election in the impugned stations of Lubiri Cell which include Lubiri A-A, Lubiri B-J, Lubiri K-L, Lubiri M-N Lubiri O-O and Lubiri P-Z.

If the 1st Respondent had given effect to this Court Order it would have been necessary for the 1st Respondent to ensure that all persons living within Makenke Barracks voted either in areas of their origin or their residence. This was not done and the shallow and lame manner in which the Press Release was issued ensured that some soldiers from Makenke Barracks voted in Lubiri Cell. The Petitioner produced evidence of solders voting in Lubiri Cell record by still and video evidence adduced properly before this court. The Respondents argued that no evidence was led to show that the military personnel from Makenke Barracks voted in Lubiri. Both Respondents claimed the affidavit, still and video evidence adduced by the Petitioner. In my view, the Respondents did not deny the relevance of the video evidence and only objected to its admissibility. It is my considered view that video evidence which was Annexture "A" to Twinomugisha David's affidavit clarifying video dated 14th June 2011. I find that the

evidence of the Petitioner, Kazoora and that of Twinomugisha supports the view that they witnessed soldiers and civilians from Makenke Barracks voting in Lubiri Cell. This evidence is un-rebuttable and lends credence to the view that if the Court Order had been fully effectuated, this scenario would not have arisen.

Whether non-compliance with the National Electoral Laws affected the results of this election substantially?

In submitting on the issue of substantially, Learned Counsel for the Petitioner referred to S.61 (1) (a) of the Parliamentary Elections Act which he quoted thus:

> ***"Non-compliance with the provisions of this act relating to elections, if the Court is satisfied that there has been a failure to conduct the elections in accordance with the principles laid down in those provisions and that the failure affected the result of the election in a substantial manner….."***

Learned Counsel further relied on the case of **Joy Kabatsi Kafura v Anifa Kawooya Bangirana & Anor Election Petition Appeal No. 25/2007** in which Mulenga JSC, as he then was, in a dissenting judgment stated

> ***"An election process encompasses several activities from nomination of candidates through to the final declaration of the duly elected candidate. If any of the activities is flawed through the failure to comply with the applicable Laws it affects the quality of the electoral process and subject to the gravity of the flaw, it is said to affect the election results."***

Submitting on the issue of substantiality, Counsel referred to the case of **Kizza Besigye v Yoweri Kaguta *Election supra*** in which Odoki CJ held:

> **"In order to assess the effect, Court has to evaluate the whole process of the election to determine how it affected the result and then assess the degree of the effect. In this process of evaluation, it cannot be said that numbers are not important just as conditions which produce those numbers. Numbers are useful in making adjustments for irregularities. The crucial point is that there must be cogent evidence, direct or circumstantial to establish not only**

the effect of non-compliance or irregularities but to satisfy the court, that the effect on the result was substantial."

Learned Counsel for the Petitioner submitted that the crucial point in **Kiiza Besigye v Yoweri Kaguta** is that there must be cogent evidence to establish not only the effect of non compliance and irregularities but to satisfy Court that the effect on the result was substantial. The opinion of Counsel for the Petitioners is their both the quantitative and qualitative tests can be used in the evaluation process. His submission was that in the **Amama Mbabazi & EC v Musinguzi Garuga James Election Petition Appeal No. 12 of 2002** the Court applied the qualitative test and found evidence that there had been extensive non-compliance with the principles and provisions laid down in the Parliamentary Elections Act or that despite a whopping vote margin of 12,456 votes, the extensive difference in the roles polled, the qualitative test was applied.

In replying to this issue, Tabaro of the 1st Respondent equally quoted S.61 (I) (a) of the PEA and **Kiiza Besigye v Yoweri Kaguta** Election Petition No. 1 of 2001. His submission is that the Petitioners' evidence points to an ascertainable number of voters in Lubiri Cell. The quantification of votes cast, he contends is at the Centre of this argument. Counsel invited Court to bear in mind that at the beginning of the hearing, the number of votes that each candidate in this election garnered in the impugned polling stations was deducted from the total number of votes of each candidate. An adjustment was made with the impugned results deducted and the candidates polled thus: Dr. Bitekyerezo Medard 11,325, Rtd Major John Kazoora 8,681. This result showed a vote margin of 2,644 votes. It is the contention of the 1st Respondent that the Petitioner stood no chance of winning given that he was merely a 2nd runner-up.

Counsel for the 2nd Respondent adopted the substantiality test. 2nd Respondents noted that there were 99 polling stations in Mbarara Municipality. Learned Counsel relied on the scheduling exercise to prove that no substantial effect could arise given the vote numbers and vote margins of the two candidates. Distinguishing the case of **Amama Mbabazi & EC v Garuga Musinguzi** Learned Counsel for Respondent observed that whereas there were acts of violence, bribery of voters and extensive non-compliance with the principles & provisions laid down in the Act, in the case now before Court there is no single

evidence pointing to such illegal practices and offences. His submission is that the qualitative test is not appropriate in the circumstances. Learned Counsel of 2nd Respondent is of the opinion that the qualitative test is what represents the true will of the people of Mbarara Municipality expressed in their majority vote.

Substantiality vis-a-vis Qualitative Argument.

It is the duty of this Court to find whether the Petitioner has proved to the satisfaction of Court that failure to conduct the elections in accordance with the principles laid down affected the result of the election in a substantial manner.

Whenever the question of substantiality is raised, it inevitably raises the question whether quality of an election is more important than the number of votes a candidate wins.

In Ugandan jurisprudence the most notable discussion on the question of substantiality was raised in the case of **Kizza Besigye v Yoweri Kaguta Election Petition Supra**. In the above case, Odoki CJ held;

> **"... Court has to evaluate the whole process of the election to determine how it affected the result and then assess the degree of the effect. In this process of evaluation, it cannot be said that numbers are not important just as conditions which produce those numbers."**

Substantiality in election petitions refers to a quantitative analysis. It is the process of scrutinizing the numbers in an election in order to assess whether these numbers had a considerable effect on the election result as a whole. In this case, if court found that the subtraction of the results from the six impugned stations could upset the result of the election in Mbarara Municipality that could be said to be substantial.

This in my view is the substantially test to which I will return.

Finally, Court therefore finds as follows: - That in the conduct of the election of the directly elected Member of Parliament for Mbarara Municipality, the first (1st) Respondent did not give effect to the Court Order dated 4th February, 2011.

This Court finds that in spite of failure to give effect to the Court Order; this did not amount to contempt of court. Court also finds that the 1st Respondent, by failing to give effect to the Court Order date 4th February, 2011, failed also to comply with National Election Laws.

Court finds that the Court Order in question had narrow application, affected a very limited number of polling stations in effect six polling stations in Mbarara Municipality to wit Lubiri Cell with a total vote of 1,625 votes and therefore did not impact on the rest of the 99 polling stations.

Non compliance with the order in regard to the six polling stations did not result in extensive failure of the election in the other parts of the Municipality. The effect of non-compliance with the Court Order only affected the six polling stations and therefore did not substantially affect the quality of the outcome election in the rest of Mbarara Municipality. The impact of the non-compliance in regard to the six polling stations was minimal and did not pass the substantiality test.

Out of a total of 99 polling stations, the Court Order encompassed only six of these to wit

Lubiri	
"	A-A
"	B-J
"	K-L
"	M-N
"	O-O
"	P-Z

The total number of votes cast in the impugned stations was 1625 with the candidates having polled thus: -

Name	***Votes***
Dr. Bitekyerezo Medard -	1228
Rtd Major Joh Kazoora -	165
Tusiime Michael -	219

Kashaija Nicodemus - 9

Nahamya Joseph - 4

The final tally had the votes appearing as below

Dr. Bitekyerezo Medard 12553

Tusiime Michael 9666

Rtd Major John Kazoora 8846

Kashaija Nicodemus Rutaba 484

Nahamya Joseph 194

At the core of this Petition is the underlying contention that the inclusion of the six impugned stations affected the outcome of election of the directly Member of Parliament for Mbarara Municipality. Having examined the total number of votes cast in the Constituency and compared them to the votes in Lubiri Cell, I find that the vote margin between the 2nd Respondent and the 1st Runner-up candidate taking into account the impugned stations, would not affect the outcome of this election. Even if of all the 1625 votes cast from the six impugned stations were given to either the Petitioner or the 1st Runner up, the 2nd Respondent would still retain a considerable margin.

I therefore find that the Petitioner has not proved to the satisfaction of Court that non-compliance with the Court Order substantially affected the result of the election for the directly elected MP of Mbarara Municipality. As a result, this Court finds no reason to upset the Election for the directly elected MP of Mbarara Municipality.

Finally, this Court finds that this petition would not have risen if the 1st Respondent had complied with the Court Order. The acts of the 1st Respondent by choosing to ignore, neglect or re-interpret a clear and succinct Court Order issued by this Court gave rise to a needless and expensive Court process. It is the duty of this Court to ensure that its orders are complied with. The law provides very clear procedures through which aggrieved

parties may appeal against Court Orders. In the instant case, the 1st Respondent acted outside the orders of this Court and created this situation.

Although the Petition has failed on grounds of substantiality, it is the duty of this Court to send a clear signal to all parties including institutions of the state as established by law the need for strict compliance with due process.

This Court Orders as follows: -

1. That the 1st Respondent shall suffer by way of costs.
2. That the 1st Respondent shall bear all the costs of this Petition.

Court so orders.

Catherine Bamugemeriire

Judge

7/07/2011