

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT GULU**

**IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT,
ACT NO. 17 OF 2005 (AS AMENDED)**

**IN THE MATTER OF THE ELECTORAL COMMISSION ACT
CAP 140 (AS AMENDED)**

AND

**IN THE MATTER OF THE PARLIAMENTARY ELECTIONS
(ELECTION PETITIONS) RULES, SI NO. 141-2
ELECTION PETITION NO. 003 OF 2011**

KIDEGA NABINSON JAMES :..... PETITIONER

VERSUS

**1. ELECTORAL COMMISSION)
2. HON. ODONGA OTTO SAMUEL) :..... RESPONDENTS**

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGMENT

The Republic of Uganda held both Presidential and general Parliamentary elections on 18/2/2011. The same were organized and conducted by the Electoral Commission, the 1st Respondent. The Petitioner Kidega Nabinson James contested together with among others the 2nd Respondent Hon. Odonga Otto Samuel in Aruu County Constituency, Pader District.

The Petitioner polled 12,653 votes while the 2nd Respondent polled 14,216 votes. The 1st Respondent declared the 2nd Respondent as the validly elected Member of Parliament for Aruu Constituency on the 19/2/2011 and gazetted him as such on 21/2/2011. The Petitioner filed an application for a recount of votes in the Chief

Magistrate's court at Kitgum which application was dismissed with costs. Subsequently, the petitioner, still being dissatisfied with the final outcome of the results, filed this petition in the High Court.

The petition was filed under **Section 60 (1) and 2 (a) and Section 61 (1) (a) of the Parliamentary Elections Act** upon the following grounds:-

- (a) That the Petitioner contends that the election was not conducted in compliance with the provisions and principles of **Articles 1, 59, 61, 68 and other relevant Articles of the Constitution of the Republic of Uganda, 1995.**
- (b) That the Petitioner contends that the election was not conducted in compliance with the provisions and principles of **Section 12, 50 and other relevant Sections of the Electoral Commission Act, Cap 140 as Amended.**
- (c) That the Petitioner contends that the election was not conducted in compliance with the provisions and principles of **Section 47, 48, 49, 50, 58, 59 and other relevant provisions of the Parliamentary Elections Act, 2005 as Amended.**
- (d) That the Petitioner contends that the election was not conducted in compliance with the provisions and principles of **the Constitution of the Republic of Uganda, 1995, the Electoral Commission Act, Cap 140 as Amended and the Parliamentary Elections Act, 2005 as Amended** and that the failure and non-compliance with the electoral laws affected the result of the election in a substantial manner.

The Petitioner sought remedies under **Section 63 of the Parliamentary Elections Act**, namely:

- (i) A declaration that the election was not conducted in compliance with the provisions and principle of the **Constitution of the Republic of Uganda, 1995, the Electoral Commission Act, Cap 140 as Amended and the Parliamentary Elections Act, 2005 as Amended** and the failure and

incompliance with the electoral law affected the result of the election in a substantial manner.

- (ii) A declaration that the Petitioner other than the 2nd Respondent was validly elected.
- (iii) An order directing a recount of the votes cast at the election and fresh tallying of the result.
- (iv) In the alternative, an order setting aside the election of the 2nd Respondent as the Member of Parliament for Aruu County Constituency.
- (v) An order directing that a fresh election for Aruu County Constituency be held.
- (vi) Costs of the petition.

Both Respondents filed affidavits in reply denying all the allegations of the Petitioner and prayed that the petition be dismissed with costs.

Evidence on record:

The evidence on record is comprised of affidavit evidence filed by all the parties pursuant to the provisions of **Rule 15 (1) of SI 141-2** and documentary evidence filed as annextures to the affidavit evidence.

The Petitioner filed an affidavit in support of his petition on 22/3/2011. It has a set of declaration of results forms.

The 1st Respondent filed an affidavit of its Chairman supporting its answer to the petition and another affidavit from the Returning Officer, a one Robert Ochen Chaga dated 27/5/2011.

The 2nd Respondent filed affidavit in support of his answer to the petition.

AGREED ISSUES:

- (1) Whether the petition discloses a cause of action.
- (2) Whether the Petitioner or his advocate duly served the 2nd Respondent in accordance with the law.
- (3) Whether the election of the directly elected Member of Parliament for Aruu Constituency in Pader District was conducted in non-compliance with the electoral laws and principles governing the conduct of elections in Uganda.
- (4) If so, whether such non-compliance affected the results of the election in a substantial manner.
- (5) The remedies available to the parties.

LAW APPLICABLE:

Burden of proof:

Section 101 (1) of the Evidence Act Cap 6 states that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.”

The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

Standard of proof:

Section 61 (1) (a) of Parliamentary Elections Act [17 of 2005] states that an election shall only be set aside if proved to the satisfaction of court.

“Non compliance with the provisions of this Act relating to the elections if the court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the non compliance and failure affected the result of the election in a substantial manner.”

The phrase proved to the satisfaction of the court was discussed in **Col. Rtd. Dr. Kiiza Besigye v Museveni Yoweri Kaguta & Electoral Commission (Election Petition No. 1 of 2001)** in which **Mulenga JSC** started as follows:

“I share the view that the expression “Proved to the satisfaction of court connotes absence of reasonable doubt. the amount of proof that produces the court’s satisfaction must be that which leaves the court without reasonable doubt.”

The required standard has since been provided for by the **Parliamentary Elections Act (2005)** where **Section 61 (3)** states that:

“Any ground specified in Sub-section (1) shall be proved on the basis a balance of probabilities.”

What constitutes proof on a balance of probabilities was put beyond doubt by **Justice Musoke Kibuuka** in **Hon. Abdu Katuntu v Kirunda Kiveijinja Ali, election Petition No. 7 of 2006** where the learned Judge stated as follows:

“The subject matter of setting aside election of a Member of Parliament is of great importance to me though it may not measure to the same degree of importance as that of setting aside election petition of the President of the country. The court trying an election petition such as this one, has the duty to ensure that before issuing an order for setting aside the election of a Member of Parliament, it is duly satisfied, by the evidence before it that the allegations made, in the petition has been proved to that high degree of preponderance.”

The above standard is very crucial because the challenges in organizing and conducting elections involve the use of financial and human resources. The parties

involved are over-anxious even to the extent of telling blatant lies in order to convince court to rule in satisfaction of their emotion and not reasons.

Resolution of issues:

Issue No. I: Whether the petition discloses a cause of action.

What amounts to a cause of action was defined in **Tororo Cement Company Limited v Frokina International Limited**, **Supreme Court , Civil Appeal No. 2 of 2001** as follows:

“A cause of action means every fact which is material to be proved to enable the Plaintiff to succeed or every fact which if denied, the Plaintiff must prove in order to obtain judgment.....”

*“It is now well established in our jurisdiction that the plaint may disclose a cause of action even though it omits some fact which must be pleaded before the plaintiff can succeed in the suit. What is important in considering whether a cause of action is revealed by the pleadings are the question whether a right exists and whether it has been violated..... The guide lines were stated by the Court of Appeal for East Africa in **Auto Garage v Motokov (No.3) (1971) EA. 514.**”*

The East African Court of Justice restated the above position recently in **Prof. Peter ANYANG’NYONG’O & Others v Attorney General of Kenya & Others Ref. No. 1 of 2006** in the following terms:

*“A cause of action is a set of facts or circumstances that in law give rise to a right to sue or to take out an action in court for redress or remedy. In **AUTO GARAGE VS MOTOKOV, (NO.3) (1971) EA. 514** a decision of the Court of Appeal for East Africa, Spry V. P., described a common law cause of action at P. 519 thus:-*

“If a plaint shows that the plaintiff enjoyed a right that the right has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or effect may be amended. If on the other hand, any of

those essentials is missing, no cause of action has been shown and no amendment is permissible.

The above description sets out the parameters of actions in tort and suits for breach of statutory duty or breach of contract. However a cause of action created by a Statute or other legislation does not necessarily fall within the same parameters. Its parameters are defined by the Statute or legislation which creates it.”

(emphasis mine)

In the instant case the petition is grounded under **Section 60 (1) and 2 (a) and Section 61 (1) (a) of the Parliamentary Elections Act (PEA) and Rule 15 of the Parliamentary elections (election Petitions) Rules.**

The Petitioner contended that:

- (i)** The election was not conducted in compliance with the provisions and the principles of **Articles 1, 59, 61, 68 and other relevant Articles of the Constitution of the Republic of Uganda.**
- (ii)** That election was not conducted in compliance with the provision and principles of **Section 12, 50 and other relevant Sections of the electoral Commission Act Cap. 140 as Amended.**
- (iii)** The election was not conducted in compliance with the provisions and principles of **Section 47, 48, 49, 50, 58, 59 and other relevant provisions of the Parliamentary Elections Act 2005 as Amended.**
- (iv)** The election was not conducted in compliance with the provisions and principles of the **Constitution of the Republic of Uganda, 1995, the electoral Commission Act, Cap. 140 as Amended and the Parliamentary Elections Act, 2005 as Amended** and that failure and non-compliance above affected the result of the election in a substantial manner.

The Petitioner filed affidavit in support of the petition as required by **Rule 15 of the Parliamentary Elections (election Petitions) Rules.** In their submissions, Counsel

for the 2nd Respondent attacked the merits of evidence in the Petitioner's affidavit that there was a total In terms of evidence generally; that the Petitioner was his sole witness in the whole of Aruu Constituency.

After perusing the petition and the grounds as stated in the affidavit I do agree that the Petitioner has established a cause of action as required by **Section 60 and 61 (1) (a) of the Parliamentary Elections Act (PEA).**

The cause of action was created by the above Act and the Constitution.

The Petitioner went further by outlining the electoral laws which the Respondents allegedly flawed. In conclusion therefore, I find that the Petitioner has complied with all the requirements of law and principles as laid down in the case of **Prof. Peter ANYANG'NYONG' & others v The Attorney General of the Republic of Kenya & Others (Supra).**

Therefore the 1st issue is answered in the positive.

Issue No. 2: Whether the Petitioner or his advocate was duly served by the 2nd Respondent in accordance with the law:

Section 62 of the Parliamentary Elections Act states as follows:-

“Notice in writing of a presentation of petition accompanied by a copy of the petition shall within 7 days after filing of the petition, be served by the Petitioner on the Respondent.”

Rule 6 (1) of the Parliamentary Elections (Election Petitions) Rules states as follows:

“Within 7 days after filing the petition with the Registrar, the Petitioner or his advocate shall serve on each Respondent notice in writing of the petition, accompanied by the copy of the petition.”

Rule 6 (3) on the other hand provides that service of a petition on a Respondent shall be personal.

If personal service is not possible, recourse is in **Rule 6 (4)** which states that where service in a personal way fails within three days, an order of substituted service has to be sought from court. In **Election Petition Appeal No. 3 of 2006, Mbabali Jude v electoral Commission**, the Court of Appeal held inter alia that the requirement of service is a statutory one but whether service was done is a matter of fact.

It must be noted that elections are about the right to self determination and an inquiry into the propriety and quality of elections is of great public and international interest. That is all the reason the election petition (Election Petitions) Rules provide for among other things, form of the petition, mode of presentation of petition and mode of service.

The purpose of service is to enable the Respondents to be aware of the case against them, to afford them opportunity to defend and to ensure that their right to be heard under **Article 28 of the Constitution** is not flaunted and to ensure that substantive justice is achieved by hearing both parties to avoid miscarriage of justice.

In interpreting **Section 62 and Rule 6 (1) of the Parliamentary Elections Act and Parliamentary (Election Petitions) Rules** respectively **Justice Tsekooko JSC** in **Mukasa Anthony Harris v Dr. Bayiga Michael Phillip Lulume, Election Petition appeal No. 18 of 2007** held that the above provisions are not mandatory but directory.

In the instant case, service was said to have been effected on the 2nd Respondent through the Speaker of Parliament after failing to serve him because he was said to be moving around his Constituency before taking off to Nairobi.

Counsel for the 2nd Respondent contended that the above service did not constitute due service in law.

It was the contention of the Petitioner that during the material time the 2nd Respondent was hiding and dodging service and later raised the issue as a defence.

I have perused the submissions of both Counsel. I have also perused the affidavits of both parties in relation to the issue. There is evidence to show that the 2nd Respondent during the material time was touring his Constituency before traveling to Nairobi. In that case no personal service was possible. I also agree that at that point it was also impossible to determine whether there was failure after three days for an application for substituted service to be made.

In those circumstances recourse to service through the office of the Speaker was not misplaced the most honourable action in favour of the 2nd Respondent. In any case this is a scenario where **Article 126 (2) (e) of the Constitution of the Republic of Uganda** would be invoked to allow the matter to proceed on its substance. After all since the 2nd Respondent has already responded to the petition.

For the above reasons this issue is answered in the positive.

Issue No.3: Whether the election of the directly elected Member of Parliament for Aruu Constituency in Pader district was conducted in non-compliance with the electoral laws and Principles governing the conduct of elections in Uganda:

It is the Petitioner's case that the election for the directly elected Member of Parliament for ARUU County Constituency was NOT conducted in compliance with the electoral laws and principles governing the conduct of elections in Uganda. In particular, that in the conduct of the election the 1st Respondent flaunted the provisions of: **Articles 1, 59, 61 and 68 of the Constitution; Sections 12 and 50 of the Electoral Commission Act and Sections 47, 48, 49, 50, 58 and 59 of the Parliamentary elections Act (PEA)**, and the principles laid down in those provisions in two ways namely:

- (a) The 1st Respondent relied on unsigned declaration of Results Forms to determine the winner of the elections and in doing so, failed to ascertain the winner of the elections and disenfranchised voters; and
- (b) The 1st Respondent failed to properly count the votes when it declared a candidate other than the petitioner who was the actual winner of the election,

namely the 2nd Respondent to be the winner of the election. This was the subject of **Miscellaneous No. of 2011 at Kitgum Chief Magistrates Court, Kidega Nabinson James v electoral Commission and Odonga Otto**. The above application was dismissed because the Chief Magistrate ruled that he did not have jurisdiction to hear the application.

The Petitioner pleaded in paragraphs 4-7 of the petition that in the conduct of the election, the 1st Respondent flaunted the provisions of **Articles 1, 59, 61 and 68 of the Constitution, Section 12 and 50 of the electoral Commission Act (ECA) and Sections 47, 48, 49, 50, 58 and 59 of the Parliamentary elections Act (PEA)** and the principles laid down in those provisions. Those provisions require among other requirements that declaration of results forms that are not signed by the presiding officer must be disregarded and not added to the final result that ascertains and determines the winner of the election.

Article 68 (4) of the Constitution as well as **Section 47 (5) of the Parliamentary Elections Act** are quite clear. They are Constitutional and Statutory law and mandatory.

In a nutshell, the petition is based on:

- (1) Declaration of results based on unsigned Declaration of Results Forms (DRF).
- (2) Invalidation of the Petitioner's votes.

The 1st Respondent filed affidavits in response to the petition **Dr. Badru Kiggundu's** affidavit was to the effect that the elections of the Member of Parliament for Aruu County was carried out in accordance with the electoral laws and principles. Robert Ochen Chagara deponed inter alia that the Petitioner's agents did sign DPF.

The 2nd Respondent on his part averred inter alia that the elections for Member of Parliament for Aruu Constituency was conducted in compliance with the provisions of the **Electoral Commission Act Cap 140 as Amended; the Parliamentary Elections Act, 2005 as Amended, and the Rules made there-under**, and the Constitution of

Uganda and other laws relating to elections. In the alternative and without prejudice he contended that if there was non compliance the same were in favour of the Petitioner such as intimidation of 2nd Respondent.

Kisakye JSC in Sitenda Sebalu v Sam Njuba, Election Petition Appeal No. 6 of 2009 observed that the Petitioner must satisfy the court that there was a failure to conduct the election in accordance with the electoral laws and the principles laid down in those laws. The learned Justice held that **Section 59 of the Presidential Election Act** was similar in wording with **Section 61 of the Parliamentary elections Act** and observed as follows:-

As **Odoki JSC** rightly held in **Rtd. Col. Dr. Kiiza Besigye v electoral Commission and Museveni, Presidential election Petition No. 1 of 2006**.

“.... Section 59 of the Presidential Elections Act 161 of 2005 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....

.....courts are therefore enjoined to disregard irregularities or errors unless they have caused substantial failure of justice the fundamental or primary consideration in an election contest should be whether the will of the people has been affected.”

The “principles” were summarized by **Mulenga JSC** in **Col. Rtd. Dr. Kiiza Besigye v Yoweri Kaguta Museveni: Presidential Petition No. 1 of 2001** as follows:

“

- *The Election must be free and fair.*
- *The Election must be conducted with transparency.*
- *The decision must be a reflection of the majority.”*

A free and fair election though not defined by our laws, is not difficult to discern. It entails freedom of candidates and their agents to lawfully solicit for support from the electorate without hindrance or interference; it entails equal opportunity for

candidates to access the electorate, as well as the electorate to choose between competing candidates.

For those attributes to be attained, the public and private campaign meetings must be unhindered, voter, only entitled voters and exclude persons not entitled to vote. Voting must be in accordance with the procedure laid down by law and the candidates must have an opportunity to observe the proceedings of voting and counting votes either in person or by their appointed agents.

“...it is therefore obvious that in assessing whether the election was or was not conducted in accordance with the principles, the court must consider the entire electoral process, not the polling exercise on polling day alone”

It is in light of the above principles that I proceed to analyse the two irregularities complained of:

(a) Unsigned DR Forms:

Article 68 (4) of the Constitution provides as follows:-

“The presiding officer, the candidates or their representatives and in the case of a referendum, the sides contesting or their agents, if any, shall sign and retain a copy of a declaration stating:

(a) the polling station

(b) the number of votes cast in favour of each candidate or question,

and the presiding officer shall there and then, announce the results of the voting at that polling station before communicating them to the returning officer.”

Section 47 (5) of Parliamentary Elections Act provides as follows:-

“The presiding officer and the candidates or their agents, if any, shall sign and retain a copy of a declaration stating:-

(a) *The polling station.*

(c) *the number of votes cast in favour of each candidate;*

and the presiding officer shall there and then announce the results of the voting at that polling station before communicating them to the returning officer.”

The above provisions of the law have been clearly interpreted by the Supreme Court in a number of cases. In **Joy Kabatsi Kafura v Anifa Kawooya Bangirana & Electoral Commission; Election Petition appeal no. 25 of 2007 Mulenga JSC** (as he then was) said this:

*“I am of the view that signing the DR forms by the presiding officer is mandatory, and failure of a presiding officer to sign a declaration of results form under **Sub-Section (5) of Section 47** does by itself invalidate the results of the polling station. In my view a candidate would then rely on the results shown on the duly signed DR forms.”*

In **Kakooza John Baptist vs Electoral Commission and Another, Election Petition Appeal No. 11 of 2007, Katureebe JSC** expressed the same view thus:

*“Clearly, the declaration of the result must be signed, at the very least by the presiding officer and [the] candidates or [their] agents must retain a copy. A signed declaration of results **form becomes the basis for the immediate declaration of results at that polling station. An unsigned declaration of results cannot be validly used as a basis for declaring results.**”* (Emphasizes mine)

The Petitioner claimed that he received copies of DR forms from his agents and 90 of them were not signed by the presiding officer.

I have perused the said annextures. I have also perused certified copies from the Electoral Commission presented by the 2nd Respondent. Annextures A5, A7, A15, A17, A18 and A20 were signed by both candidates’ Agents and the presiding officers. I also compared the names and signatures of those agents and found that they were

similar in both the Petitioner's DR Forms and those DR Forms presented by the 2nd Respondent.

DR Forms of Kilunga A2; Okinga Primary School A4 and Paiula P7 School A7 were the only polling stations where the presiding officer did not sign. However in all those stations the candidates' agents signed the DR Forms. I made comparisons of the agents' names and signatures in both annexures and certified copies and found them to be similar. It is therefore my conclusion that DR forms of only three above named polling stations were not signed by the Presiding Officer for reasons not known.

Invalid Votes:

The Petitioner averred in paragraphs 9-18 of his affidavit that there were 138 polling stations in the 12 sub-counties in Aruu Constituency where he had two polling Agents at each polling station. After the polling and counting and tallying of the election results he received copies of Declaration of Results Forms from all the polling stations and reports from all his polling Agents and Supervisors. He was shocked to find out that 2,370 votes were declared invalid by the Presiding Officers at various polling stations:

Puranga Sub-County	-	720
Ogom Sub	-	371
Atanga Sub-County	-	205
Pader Trading Centre	-	150
Latanyo Sub-County	-	154
Laguti Sub-County	-	155
Acholibur Sub-County	-	135
Pajule sub-County	-	109
Lapul Sub-County	-	102
Awere Sub-County	-	125
Kilak Sub-County	-	46
Angagura Sub-County	-	91

Upon raising the declaration of 2,370 invalid votes as his concern, his Polling Agents and Supervisors confirmed to him that the 2,370 votes were mostly declared invalid because the voters ticked the Petitioner's photograph or symbol of the bus on the voters register instead of the box provided for voting. At numerous polling stations, his Polling Agents refused to sign the Declaration Forms because of various anomalies. He stated that most of the votes declared invalid were cast for the Petitioner and if the votes declared to be invalid votes were properly counted, he would have won the election.

The 1st Respondent on the other hand through the Returning officer, contended that the Petitioner could not raise the above complaints because his Agents did not raise them and also that they signed the DR forms or did not state reasons for their failure to do so.

The 2nd Respondent on his part contended inter alia, that the Presiding Officers publicly ascertained and declared invalid votes in the presence of all the agents of the candidates. He contended that it was not proper for the Petitioner to allege that all the invalid votes were his.

Section 49 of the Parliamentary Elections Act specifically deals with votes to be treated as invalid. It states as follows:

“

(1) *A vote cast is invalid if –*

(a) *The ballot paper is torn into two or more parts; or*

(b) *Where the voting is by placing a mark of choice on the ballot paper:-*

(i) *the voter marks the ballot paper with a mark other than the authorized mark of choice; or*

(ii) *Places the authorized mark of choice on the ballot paper in such a way that the choice of the voter cannot be reasonably ascertained.*

- (2) *A ballot paper shall not be taken as invalid under this section irrespective of where the authorized mark of choice is placed, so long as the voter's choice can be reasonably ascertained.*
- (3) *A vote which is invalid shall not be counted in determining the result of the elections.”*

Section 47 (3) of the Parliamentary Elections Act states as follows:

*A candidate maybe present in person or through his or her representative or Polling Agent at each polling station, and at the place where the returning officer tallies the number of votes for each candidate or conducts a recount under **Section 54** for the purpose of safeguarding the interests of the candidate with regard to all stages of the counting, tallying or recounting process.”*

The record shows that the Petitioner had his Agents and supervisors at all the polling stations. I have perused DR Forms from various polling stations including the Sub-Counties the Petitioner mentioned. In all of them the Agents of the Petitioner signed DR Forms to confirm what actually transpired at the respective polling stations. The legal position of signed DR Forms was considered in **SHABAN SADIQ NKUTU V ASUMAN KYAFU & Another, Election Petition No.7 of 2006** where **Justice Wangutusi** stated:

“Since there is nothing to suggest that the Isikos were not Agents of the Petitioner and the Petitioner has not denied them, court can only but conclude that there were Petitioner's Agents and what they endorsed was correct reflection of what the voters in that area decided.”

DR Forms also provide for complains. The Petitioner's Agents never complained that the invalid votes declared by the Returning Officer were unfairly declared and that most of them belonged to the Petitioner.

The Petitioner relied on a hearsay report from his polling Agents that most of the invalid votes belonged to him. The Petitioner should have adduced cogent evidence from his polling Agents or other curious and attentive voters or other persons who witnessed the tallying and disagreed with the results of the tallying exercise. In a futile exercise, the Petitioner tried to shift the burden of proof on the 1st Respondent to attach DR Forms. **Sections 101-103 of the Evidence Act** categorically state that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence.

For the above reasons I am forced to find that nothing might have gone wrong during the counting, tallying and declarations of results by the Returning Officer.

Issue No.4: If so, whether such non-compliance affected the results of the election in a substantial manner.

In **Joy Kabatsi v Anifa Kawoya (supra)** the Supreme Court held inter alia that the issue of non-compliance affecting the results substantially should be premised on proved irregularities or non-compliance.

It is also important to refer to the decision of **Mulenga JSC** in **Besigye Kiiza v Museveni Kaguta (Supra)** on his issue of substantial effect:

".... To my understanding, therefore, the expression "non-compliance affected the result of the election in a substantial manner" can only mean that the votes a candidate obtained would have been different in a substantial manner, if it were not for the noncompliance substantially.... That means to succeed; the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that his winning majority would have been reduced, but such reduction however would have to be Such that would put the victory in doubt."

In the instant case the Petitioner managed to convince court that DR Forms from three polling stations were not signed. They were for Kilunga A2; Okinga PS A 4 AND Paiula P7 School A7.

In Kalunga the Petitioner scored 90 votes while the 2nd Respondent scored 60. In Okinga A4 the Petitioner scored 228 while the 2nd Respondent got 55. In Paiula the Petitioner secured 93 while the 2nd Respondent got 112.

If the three unsigned DR Forms were to be expunged from the results the Petitioner would loose 411 votes while the 2nd Respondent would loose 239. Thus Petitioner would remain with 12,242 votes instead of 12,653 while the 2nd Respondent would stand at 13,977 votes instead of 14,216 leaving a margin of 1,324 votes.

From the above analysis the use of unsigned DR Forms did not affect the result of the election in a substantial manner.

Invalid Votes

While discussing Issue No.3 I found that the Petitioner had not established the issue of invalid votes. However as contended by the 2nd Respondent, if the total invalid votes of 531 in the 19 polling stations were to be given to the Petitioner he would have 13,184 as against the 2nd Respondent 14,216 votes. That would still put the 2nd Respondent on the lead. That tallying would not put the victory of the 2nd Respondent in contempt.

Issue 5: What are the remedies available to the parties?

Section 63 (4) of the Parliamentary Elections Act provides for remedies available for the parties as follows:-

- (a) Dismissal of the petition.
- (b) Declaration that a candidate other than the one declared elected was validly elected.

- (c) Setting aside election and ordering fresh elections.
- (d) Order a recount before coming to a final decision,

Having found that the Petitioner has failed to prove his case to the satisfaction of court the only remedy at my disposal is to dismiss the petition with costs.

HON. MR. RUBBY AWERI OPIO
JUDGE
20/7/2011