

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

**IN THE MATTER OF PARLIAMENTARY ELECTIONS ACT NO. 17/2005 AS
AMENDED BY ACT NO. 12 OF 2010**

AND

**IN THE MATTER OF PARLIAMENTARY ELECTIONS PETITITONS
RULES 1996**

ELECTION PETITION NO. 001 OF 2011

TOOLIT SIMON AKECHA :::::::::::::::::::: PETITIONER

VERSUS

**1. OULANYAH JACOB L'OKORI)
2. ELECTORAL COMMISSION) :::::::::::::::::::: RESPONDENTS**

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGMENT

On 18th February 2011, Government of Uganda held both Presidential and General Parliamentary Elections throughout the country. The petitioner Toolit Simon Akecha and the 1st Respondent, Oulanyah Jacob L'Okori were candidates contesting for Omoro County Constituency in Gulu District. The elections were organized by the 2nd Respondent, the Electoral Commission. On the 19th February 2011, the Returning Officer/District Registrar Electoral Commission Gulu, an authorized

agent of the 2nd Respondent, declared the 1st Respondent as the winner upon garnering 11044 votes against the petitioner's 9088 votes. The above results were duly gazetted on 21st February, 2011. The Petitioner contested the above results and on 24th February 2011, lodged an application to the Chief Magistrate Gulu for a recount of votes as provided under **Section 55 of the Parliamentary Elections Act**.

The application was duly granted and a recount was conducted under the guidance and supervision of the Chief Magistrate on 2nd March 2011. However the recount could not serve any purpose because it was discovered that the ballot boxes had already been tampered with. The learned Chief Magistrate rightly advised that a party aggrieved by the status quo could petition the High Court for appropriate redress.

Consequently, on 17th March 2011, the Petitioner filed petition and the notice of presentation of petition was endorsed on 18th March 2011. The petition was grounded on **Section 60 (1) and (2) (a) and Section 61 (1) (a) of the Parliamentary Elections Act** upon the following reasons:-

- (a) The election was not conducted in compliance with the provisions and principles in **Articles 1, 59, 61, 68** and other relevant **Articles of the Constitution of Uganda**.
- (b) 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) 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) Failure and non-compliance with the electoral law affected the result of the election in a substantial manner.

The petition was supported by the Applicant's affidavit and three rejoinders/answers to the answers to the petition. Both Respondents filed their replies to the petition challenging both propriety and substance of the petition.

AGREED ISSUES:

During Scheduling Conference conducted at the commencement of hearing, the following issues were agreed:

- (1) Whether the petition was duly served on the 1st Respondent.
- (2) Whether the election of the 1st Respondent as MP for Omoro County was conducted in non-compliance with the Parliamentary election laws and principles governing elections in Uganda.
- (3) If so, whether the non-compliance affected the results substantially.
- (4) Whether the 1st Respondent personally or his agents with his knowledge and consent or approval committed any of the alleged illegal practices and offences in connection with the election.

(5) What are the remedies available to the parties.

Laws Applicable:

The Constitution.

In 1995 Uganda came up with a new Constitution which brought in a number of reforms, among them were electoral reforms. In **its National Objectives and Directive Principles of State Policy** the following democratic principles were agreed.

- (a) The state shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance.

- (b) All people of Uganda shall have access to leadership positions at all levels, subject to the Constitution: See **Part II of National Objectives and Directive Principles of State Policy (NODPSP)**. Further more **Part xxix of the National Objectives and Directive Principles of State Policy (NODPSP)** states inter alia, that one of the duties of a citizen is to promote democracy and the rule of law.

Article I of the Constitution provides further that power belongs to the people of Uganda. It states that the people of Uganda shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.

Article 60 of the Constitution establishes the Electoral Commission while **Article 61** provides for its functions. Among its functions are the ensuring that regular, free and fair elections are held and that the same must be done in accordance with the Constitution.

Lastly **Article 68 of the Constitution** provides for procedure for voting and declaring results at the election or referenda.

Parliamentary elections act:-

Parliamentary Election Act Section 60 provides for locus standi for presenting election petition. Parliamentary Election petitions are filed in the High Court by any candidate who loses or a registered voter in the Constituency. The same ought to be filed within thirty days after the gazetting of the results by the Election Commission.

Section 61 provides for grounds for setting aside election. They include:-

- (a) Non-compliance with the provisions of the Act relating to election 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 the failure affected the result of the election in a substantial manner;
- (b) That a person other than the one elected won the election; or
- (c) That an illegal practice or any other offence under this Act was committed in connection with the election by the candidate

personally or with his or her knowledge and consent or approval;
or

- (d) That the candidate was at the time of his or her election not qualified or was disqualified for election as a Member of Parliament.

Section 63 of the Act states that election petition filed shall be heard in open court and tried expeditiously and for that purpose, court shall suspend any other matters pending before it.

Election Commission Act.

Section 12 of the Act grants powers to the commission:

- (a) To conduct elections freely and fairly.
- (b) To ensure conditions necessary for conduct of election in accordance with the Act or any other law.
- (c) To ensure compliance by all election Officers and candidates with the provisions of this Act or any other law.
- (d) To discharge such other functions as are conferred upon the Commission by this Act or any other law made under this Act or as are necessary for the proper carrying out of the purposes of this Act.

Other laws applicable:

- (a) The Parliamentary Elections (Election Petitions) Rules 1996.
- (b) The Evidence Act Cap. 6.
- (c) The Civil Procedure Act.
- (d) The Civil Procedure Rules.

REGIONAL AND INTERNATIONAL PROTOCOLS

Apart from the above municipal laws supporting conduct of electoral process, there are regional and international protocols which bind Uganda to guarantee how democratic elections are to be conducted. The following are the most relevant.

(a) The East African Community Treaty:

Article 123 of the Treaty provides for the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms.

The Treaty also provides for the establishment of the East African Court of Justice which is a judicial body which ensures the adherence to the law in the interpretation application and compliance with the Treaty. **See: Prof. Peter ANYANG'NYONG'O & Others v The Attorney General of Kenya & Others. EACJ Ref. No. 1 of 2006.**

Hon. Sitenda Sebalu v Secretary General of the East African Community & Others EACJ Ref. 1 of 2011.

(b) The SADC Treaty:

The above treaty was signed in 1992 in Namibia. The Treaty emphasized the need for democratic consolidation, the development of principles governing democratic elections, transparency and credibility of elections and democratic governance as well as ensuring acceptance of election results by all contesting parties.

The Treaty provided the following principles in the conduct of democratic elections:-

- *Full participation of the citizens in the political process.*
- *Freedom of Association.*
- *Political tolerance.*
- *Regular intervals for elections as provided in the respective National Constitutions.*
- *Equal opportunity for all political parties to access the state media.*
- *Equal opportunity to exercise the right to vote and be voted for.*
- *Independence of the judiciary and impartiality of the electoral institutions; and*
- *Voter education.*
- *Acceptance of electoral results.*
- *Challenge of the election results as provided for in the law of the land.*

African Charter on Democracy, Election and Governance:

Chapter 7 of the Charter provides for democratic elections. **Article 17** in particular provides for the state parties holding transparent, free and fair elections in accordance with the Union's Declaration on the principles Governing Democratic elections in Africa.

To that end, States parties are:

1. *To establish and strengthen independent and important national electoral bodies responsible for the management of elections.*
2. *To establish and strengthen national mechanisms that redress election - related disputes in a timely manner.*
3. *To ensure fair and equitable access by contesting parties and candidates to State controlled media during elections.*
4. *To ensure that there is a binding Code of Conduct governing legally recognized political stakeholders, government and other political actors prior, during and after elections. The Code shall include a commitment by political stakeholders to accept the results of the election or challenge them in through exclusively legal channels.*

SEE ALSO:

- (I) International Covenant on Civil and Political rights Article 1 and 2.
- (II) Universal Declarations of Human Rights 1948 Article 21.

CASE LAWS:

The principles and practices outlined in the legal and institutional frameworks mentioned above were summarised by the Supreme Court in the case of **Col. Ret. Dr. Kiiza Besigye v Yoweri Kaguta Museveni, Presidential Petition No. 1 of 2001.**

“

- *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 Electoral 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 the right of every citizen to vote freely in accordance with his free will 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 registration must be in order, only entitles 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 of 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....”

In conclusion, the above legal and institutional frame-works go to emphasize the fact that electoral governance is very important not only to the citizens of this country, but to Regional and International community. That is the very reason why we have external observers during our national elections.

Burden and Standard of Proof:

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 same Act further states in **Section 102** that.

“The burden of proof in a suit or proceeding 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 the Parliamentary Elections Act [17 of 2005] states that an election shall 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 elections in accordance with the principles laid down in those provisions and that the non-compliance and the failure affected the result of the election in a substantial manner.”

The phrase **“proved to the satisfaction of court”** was ably dealt with by the Supreme Court in its decision in **Col. (RTD) Dr. Kiiza Besigye v Yoweri Kaguta Museveni (Supra)** where Mulenga JSC (as he then was) stated that:

“I do 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 put beyond doubt by **Section 61 (3) of the Parliamentary Elections Act [2005]**.

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

What constitutes proof on the balance of probabilities was considered by **Hon. Justice Musoke-Kibuka** in **Hon. Abdu Katuntu v Kirunda Kiveijinja Ali, Election Petition No. 7 of 2006** (unreported). The learned Judge stated thus:

“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 allegation made, in the petition has been proved to the high degree of preponderance.”

Needless to emphasize that it is to the above degree that the petitioner has to prove this petition in order to secure judgment in his favour.

Resolution of issues:

1. Whether the petition was duly served on the 1st Respondent.

Section 62 of the Parliamentary Elections Act provides that notice in writing a presentation of petition accompanied by a copy of the petition shall within seven (7) days after filing of the petition, be served by the petitioner on the Respondent(s) as the case may be.

Similarly **Rule 6 (1) of the Parliamentary Elections (Election Petitions) Rules**, reads as follows:-

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

Rule 6 (3) of the Parliamentary Elections (Election Petitions) Rules further provides that service of a petition on a respondent shall be personal, except as provided in **Sub-rule (4) of this rule**, which reads as follows:-

“6(4) where the Respondent cannot be found within three days for effecting personal service on him or her, the petitioner or the advocate of the petitioner shall immediately make an application to the court supported by an affidavit stating that all reasonable efforts have been made to effect personal service on the respondent but without success.”

In the instant case the petition was filed on 17th March 2011. Attempts to serve the 1st Respondent personally were futile as indicated by affidavit deponed by Annet Mukite. The Respondent’s law firm was also closed. Paragraph 7 of the affidavit was evidence that the 1st Respondent was abroad at all material times and only jetted back the day after he was e-mailed with substituted service. The Petitioner applied for substituted service on 22/3/2011 under Miscellaneous Application No. 0013 of 2011. The Resident Judge delegated the Chief Magistrate to handle the application which was granted on 23/3/2011.

The 1st Respondent challenged the procedure adopted by the learned Judge in delegating the application for substituted service and application for extension of time to serve the Petitioner. Counsel for the 1st Respondent submitted that neither the Registrar nor the Chief Magistrate had jurisdiction to grant the said orders under the **Parliamentary Elections (Election Petitions) Rules 24** which states as follows:

“All interlocutory questions and matters arising out of the trial of the petition, other than those relating to leave to withdraw a petition,

shall be heard and disposed of, or dealt with, by a judge; and references in these rules to the court shall be construed accordingly.”

The learned Counsel for the 1st Respondent relied on the case of **Bangirana Anifa Kawooya v Joy Kabatsi: Masaka Miscellaneous Application No. 28 of 2009** where the above rule was interpreted by Justice Musoke Kibuka in the following terms:

“The provision of the law appears to leave no room for the registrar to claim jurisdiction in those matters. Jurisdiction is always a creature of statute. No court or judicial officer can confer jurisdiction upon himself or itself.The argument that a judge directed the registrar in the instant cases to hear and determine the application, even if it were true, would not radiate any positive effect on the impugned applications. It is only Parliament or other legislative authority that may vest jurisdiction. Jurisdiction so vested is not delegable. In light of the fact that the registrar of this court had no jurisdiction to hear and determine Miscellaneous Application No. 14 and 17 of 2009, the status of the orders of substituted service and the service itself that ensued from those orders is that of nullities in law.”

The learned Counsel further relied on the case of **Mathina Bwambale v The electoral Commission and Crispus Kiyonga, Fort Portal Election Petition No. 7 of 2006**. In that case the petitioner filed HCMA No. 74 of 2006 which was an application for substituted service. The Deputy Registrar heard it and ordered substituted service by way of an advert in the newspapers. **Justice Rugadya Atwoki** held as follows:

“Rule 24 deals with interlocutory matters. It provides as follows:-

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

*The rule is clear in that interlocutory matters in respect of election petitions apart from those, which are accepted by the rule, to be handled by the judge. Only matters relating to the withdraw of the petition are to be handled by the Registrar. The application for leave to effect service other than personal service under **Rule 6 (4)** was not one of the matters, which **Rule 24** provides as being within the competence of the Registrar, whatever the wisdom of that provision. Jurisdiction cannot be assumed or inferred. It is a creature of a Statute. In this case the law specifically removed from the ambit of the Registrars jurisdiction in respect of interlocutory matters. The Registrar therefore had no jurisdiction to enter or grant an order for substituted service...”*

With greatest respect to the eminence of my above mentioned brothers I do not agree that **Rule 24** specifically removed from the ambit of the Registrar jurisdiction in respect of interlocutory matters. The rule was merely directory and not mandatory. The mere use of the word shall does not make it mandatory. See **Justice Tsekooko in Mukasa Anthony v Dr. Bayiga, Election Petition Appeal No. 18 of 2007.**

It is therefore my view that the above rule did not disbar the learned Judge from ordering the Registrar to entertain the said application.

The above view finds support under **Rule 17** which states as follows:-

“Subject to these rules, the practice and procedure in respect of a petition shall be regulated, as nearly as may be, in accordance with the Civil Procedure Act and the rules made under that Act relating to the trial of a suit in the High Court; with such modifications as the court may consider necessary in the interest of justice or expedition of the proceedings.”

Thus under the **Civil Procedure Rules** added Judicial Powers of Registrars pursuant to practice Direction No. 1 of 2002, included Powers to entertain applications for substituted service.

Also **Order 50 Rule 5 of the Civil Procedure Rules** provides for powers to be delegated to Registrars and other officers by the High Court or judge. It provides as follows:-

“Whenever by or under any Act of Parliament or law for the time being in force any act, undertaking inspection, proceeding or thing is to be carried out to the satisfaction of or in accordance with the direction of the Judge of the High Court or a Commissioner appointed to exercise and adjust accounts, then and in any case that act, undertaking, inspection, proceeding or thing may be carried out or done before or by the Registrar or such other officer of the court, as the case may be shall generally or specifically direct.”

Clearly the above provision of the law neutralizes the argument that the delegation by the judge was illegal. Such delegation was proper

and done in the interest of justice and expedition of proceedings. In the instant case the judge decided to delegate to the Registrar. The Registrar being absent, the matter was handled by the Chief Magistrate. It is a known fact that in the absence of a Resident Registrar, his or her duties and functions are normally taken care of by Chief Magistrate at the Circuit.

Further more the **Judicature Act** empowers a Judge of the High Court to do anything in the interest of promoting justice and preventing abuse of court process by curtailing delays: See: **Section 17 (2) of the Act.**

In any case, it is not within my Powers to discredit or counter-mand the decision of my learned brother judge as that power only vest in appellate court. All in all, it is my conclusion that the 1st Respondent was duly served by way of substituted service. Any errors alleged could be cured in the interest of substantial justice since the 1st Respondent responded promptly to the petition against him.

Issue No. 2: Whether the election for the directly elected Member of Parliament for Omoro County was conducted in non-compliance with the Parliamentary Elections laws and principles governing the conduct of elections in Uganda.

On this issue the petitioner demonstrated through various affidavits, documentary evidence attached as annexures as well as results of the recount by the Chief Magistrate, that the election for the directly elected member of Parliament for Omoro County Constituency Gulu District, was conducted in glaring, conspicuous and obtrusive non-

compliance with the provisions of **Article 1, 59, 61 and 68 of the Constitution, and Section 29, 31, 34, 46, 47, 48, 49, 50, 51, 52, 53, 55, 68, 71, 76, 77, 78, 80 and 81 of the Parliamentary Elections Act;** and the principles laid down in those provisions.

In summary the petition alleges:

- Vote stuffing.
- Vote buying.
- Voter intimidation.
- Voting by non-registered persons.
- Rejection of valid votes as invalid.
- Non-displaying of election results.
- Intimidation by UPDF.
- Lack of freedom and transparency, unfairness.
- Pre-ticked ballot papers.
- Denial of agents to enter some polling stations.
- Preventing agents from lodging complaints.

All the above allegations were denied by both Respondents.

Ballot Stuffing:

In his affidavit dated 18th March 2011 the petitioner stated in paragraphs 14b-(f) and 16 that there was ballot stuffing. The petitioner contended that for the 27 polling stations which boxes were opened during the vote recount exercise by the Chief Magistrate eight (8) polling stations were found with a total of 512 excess ballot papers.

The 1st Respondent in his response stated inter alia, that if the computation of the excess ballot papers were removed, the petitioner could still poll 8,339, while his total would be 9,544 which would leave him in a substantial lead.

The 2nd Respondent responded through affidavit filed by Dr. Badru Kiggundu dated 25th March 2011 and Anyanzo or David dated 20th May 2011 denying such occurrence. The Petitioner's averments were further rebutted by Oyet Francis' affidavit dated 19th May 2011 at paragraphs 5 and 6.

In *Besigye Kiiza v Museveni Kaguta (supra) Mulenga JSC* stated:

“An election petition is a highly politicized dispute arising out of a highly politicized 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 down playing his or her own. This is because most witnesses are the very people who actively participated in the election contest.”

The question to ask is in whose favour was the excess ballot papers? Who were guilty of the excess ballot papers? If the alleged excess ballot papers were deducted from both candidates, the petitioner would remain with 8,339 votes while the 1st Respondent would retain 9,544 votes which would still put him ahead of the petitioner.

In any case little reliance should be placed on the result of the recount about excess ballot papers because the recount was futile because the Chief Magistrate found that the ballot boxes had been tampered with.

INVALID VOTES:

The petitioner alleged that several of his valid votes were otherwise declared invalid. That there were 2,173 invalid votes which were declared so because the voters had ticked the petitioners photograph or symbol of the key on the ballot papers instead of the box provided for the voting. That was the basis for an application for a recount before the Chief Magistrate.

The above allegation was rebutted by Anyango's affidavit paragraph 10, Oyet's affidavit paragraph 4 and Oceng's affidavit, paragraph 4.

Under **Section 47 (b) of Parliamentary Elections Act (PEA)** a candidate is expected to be 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 safe guarding the interest of the candidate with regard to all stages of the counting, tallying or recounting process.

In the instant case, the petitioner had his agents at those polling stations which agents did sign the DR Forms signifying their acceptance of the outcome of the process. The legal position of signed DR Forms was considered by **Justice Wangutusi** in **Sadiq Nkutu v Asuman Kyafu & Another, High Court Election Petition No. 7 of 2006 (Jinja)** where he 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 these were the petitioner’s agents and what they endorsed was correct reflection of what the voters in that area decided in a declaration form there are provisions for recording mishaps. None were recorded save that the other two candidates had no agents at the Bubutya Polling Station. Ballot stuffing has not been proved.”

(Emphasis added)

In the instant case, the petitioner’s agents signed the DR Forms accepting the results of the elections without stating any mishaps. The petitioner has not disowned those agents and none of those agents have denied their respective signatures on the DR forms.

From the above analysis, this court finds that there was compliance with the law as far as vote casting was concerned. In any case even if it was not, the findings of the Chief Magistrate was to the effect that some of the votes for both candidates who had been declared valid were actually invalid and some of which had been declared as invalid were valid. Therefore the issue of declaring invalid votes did not affect the petitioner alone but affected both parties, if at all.

RESULTS FROM UNNSIGNED DR FORMS:

It is trite law that signing DR Forms by the presiding officer is mandatory and failure to do so invalidates the result. See **Article 68 (4) of the Constitution and Section 47 (5) of Parliamentary Elections Act (PEA)**.

In **Kakooza John Baptist v Electoral Commission & Another, election Petition Appeal No. 11 of 2007** the Supreme Court expressed the same view while considering **Section 47 (5) of the Parliamentary Elections Act (PEA)**.

“Clearly, the declaration of the results must be signed, at the very least by the presiding officer and [the] candidate or [their] agents must retain a copy. A signed declaration of results forms becomes the basis for immediate declaration of results at the polling station. An unsigned declaration of results cannot be validly used as a basis of declaring results.”

Upon perusing the DR forms, I do find that DR Forms from three polling stations were not signed by the Presiding Officer. They were Otumpili, where the petitioner scored 47 votes, Asoka Chapel where the petitioner scored 29 votes and Lamin Onami market where the petitioner scored 23 votes. In those stations the 1st Respondent scored 62, 94 and 162 votes respectively. The effect of the above anomalies is subject of the next issue.

Dumped Ballot Papers:

The petitioner averred in his affidavit dated 18th March, 2011 that several ballot papers were dumped at various places. This was supported by affidavit of Lakwo Benson and Komakech William Kelly.

Lakwo Benson stated that he was told by Ojok Nelson that ballot papers were found under a desk at Lakwana Primary School. He stated that Ojok Nelson was told by one Atto Lucy. Lucy too was allegedly told by children who allegedly found those ballots.

Komakech William Kelly, the Speaker of Gulu Municipal Council, stated that he picked one ballot paper for Serial No. 0048577 for Omoro County MP Elections. After that he called the petitioner.

The 2nd Respondent denied the authenticity of those ballot papers.

Sections 101 – 103 of the Evidence Act require that he who alleges any fact must prove them.

It was upon the petitioner to establish that those dumped ballots were authentic electoral materials. In the first place, the affidavit of Lakwo Nelson is full of hearsay evidence. This is because neither Ojok Nelson nor Atto Lucy swore any affidavits. Secondly, the details of particulars of Okot Alex or Rubengakere who allegedly recovered the ballots should have been made clear and also the time the ballots were picked to establish whether the ballots were removed before or after they were counted. One also wonders why such a report was not even made to the Police.

On the other hand Denis Ayungi the 1st Respondent's polling agent at Lakwania Primary School swore an affidavit stating that there was no

such incident reported at the polling station where the petitioner scored 84 votes and the 1st Respondent 105. That after polling, all voting materials were packed and sealed in Black Metal Boxes in the presence of the voters and the agents of the candidates. The witness stated further that Rwot Kweri of Wilalo on 4/3/2011 well after the election brought to him 86 Ballots ticked in favour of 1st Respondent. All those meant that election material may not have been safeguarded properly after the poll but that affected all the parties equally assuming those deponents were to be believed. As to whether the same affected the results of the election is subject of the next issue.

Pre-Ticked Ballots:

The above incident relates to Mzee Tookwiny Kamilo. It was averred on behalf of the petitioner by Joyce Akumu in her affidavit dated 18/3/2011 paragraphs 3 – 5. The said Mzee Tookwiny did not depone any affidavit in support of the allegations made.

According to the 1st Respondent, Margaret Aol who was a Polling Assistant who was said to have ticked ballots for Mzee Tookwiny Kamilo was permitted to help illiterate persons on how to vote.

Aol in her affidavit however denied preticking the ballot. To establish the above point, Mzee Tookwiny Kamilo the complainant, should have deponed affidavit to show that his ballot papers were pre-ticked by the Polling Assistant. Short of that I would consider the affidavit of Akumu only hearsays. I therefore find that the petitioner has failed to prove that there was pre-ticking of ballots.

The involvement of UPDF:

It was contended by the petitioner that the Army personnel voted contrary to **Section 34 (5) of the Parliamentary Election Act**. The Armed Forces with knowledge of and approval of the 1st Respondent intimidated supporters of the petitioner in order to induce them to vote for the 1st Respondent or to prevent them from voting altogether contrary to **Section 80 (1) of Parliamentary Election Act**. The petitioner was informed by his agent Okello Justine Opoka that UPDF soldiers voted in Loyo-Ajonga polling station where their names were not in the Voters' Register. His affidavit in support of the petition was attached. Olanya Kennedy, Mike Allan the Presiding Officer of Loro-Ajonga market confirmed in paragraph 7 of his affidavit that he personally sent away 6 UPDF soldiers whose names he could not find on the Register.

The petitioner further alleged through Okello Justine Opoka that UPDF soldiers were transported four times on a blue Dyna Truck, Reg. UAH 330 B to vote at Loyo-Ajonga market polling station from areas outside Lalogi Sub-county and all of them voted. However, according to the affidavit of Olanya Kennedy, those soldiers who voted were on the Voters' Register. The issue is based on two affidavits against each other. Olanya Kennedy deponed that he chased away 6 soldiers whose names he could not get in the Register. He also deponed that the soldiers who voted were on the Voter's Register.

If it was the intention of the 2nd Respondent to rig through the UPDF soldiers in favour of the 1st Respondent I do not think the presiding officer would have chased away the 6 UPDF soldiers whose names

were not in the Register. It is likely that those soldiers who were transported were those whose names were in the Register. It is also apparent that during the election process Okello Justine Opoka suffered from misconduct and had to undergo disciplinary measures by being thrown out of the voting area for about half an hour before he was readmitted. Olanya confirmed that the UPDF who voted were those whose names were on the Register as they too had the right to vote. He stated that the voting went on well, closed without incident or comment and all the agents signed Dr Forms and they kept copies. As a matter of fact the DR form shows that the results were read and signed at 500 p.m. Akello Justin Opoka signed the DR Form as the Petitioner's agent and did not anywhere state that he had a complaint. In terms of the decision in **Shaban Sadiq Nkulu** (Supra) I conclude that there was no evidence sufficient to prove the allegation of involvement of the army. Thus there was no proof of noncompliance with the law as stated above.

MULTIPLE VOTING:

The petitioner alleged that several people voted more than once contrary to **Section 31 of the Parliamentary Election Act**. The second Respondent failed to control the use of ballot papers as a result there was massive rigging of votes through multiple voting. At IDURE market polling station one Odokonyero Christopher was arrested and taken to Police with three ballot papers Serial Nos. 0040471, 0040472 and 0040473 all ticked in favour of 1st Respondent. Omony Katyto, a Polling Assistant in-charge of the station swore a counter affidavit mentioning that Acaye Godfrey was agent for FDC Presidential candidate and that he was seated at a different table not at

the table for directly elected Member of Parliament. As such Acaye could not have seen what was happening at the table for directly elected Member of Parliament. In my view there was need for independent evidence like from Police to confirm the averments of Acaye Godfrey. Acaye's affidavit may not be far from suspect more especially because DR Form from Idure market polling station does not point him as the petitioner's agent as alleged but instead it shows the agents as Lawoko Joseph and Okello Edward both of whom did not swear any affidavit in support of the allegations.

As for failure to sign DR forms by the agents I do agree with the 1st Respondent that polling agents are free to sign DR forms or not to, and their failure does not invalidate the DR forms provided it is signed by the Presiding Officer. It is therefore my conclusion that there was no satisfactory evidence adduced by the petitioner to establish multiple voting.

Issue No. 3: Whether the non-compliance affected the results of the election in a substantial manner:

In **Besigye Kiiza v Museveni Kaguta (Supra) Mulenga JSC** (as he then was) had this to say:

“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 non-compliance 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.”

The issue of non-compliance affecting the election substantially has to be premised on proved irregularities: See **Joy Kabatsi v Anifa Kawooya (Supra)**.

Ballot staffing:

The issue here is whether due to ballot staffing the reduction would put the victory of the 1st Respondent in doubt.

First of all, it must be observed that the alleged ballot staffing came up during vote recount by the Chief Magistrate who ruled that the ballot boxes had already been tampered with. How they were tampered with is beyond this petition. Be that as it may, after deducting the alleged excesses from both candidates the petitioner would remain with 8,339 votes while the 1st Respondent would remain with 9,544 leaving a difference of 1,205. The above difference does not put the 1st Respondent’s victory in doubt, in my view.

Invalid votes:

On this irregularly, the petitioner failed to establish the extent of his complaint on invalid votes although the Chief Magistrate ruled that there were invalid votes on both sides. It was the duty of the petitioner’s agents to raise this while signing the DR Forms which

they did not. The petitioner raised the above irregularly therefore as a mere afterthought.

Results from unsigned DR Forms:

DR Forms from three polling stations were not signed. They were in respect of Otumpili, Aboka Chapel and Lamin Onami Market. In Otumpili the petitioner polled 47 votes while the 1st Respondent got 62. In Aboka Chapel the petitioner got 29 votes while the 1st Respondent got 94. In Lamin Onami Market the petitioner got 23 votes while the 1st Respondent got 162.

If those results were subtracted from both candidates the petitioner would remain with 8,989 votes whereas the 1st Respondent would remain with 10,726 votes. Thus the removal of the three polling stations from the overall tally sheet would not affect the result in a substantial manner at all.

In conclusion, the issue of dumped ballot boxes, preticked ballots, involvement of UPDF and multiple voting were not proved to the satisfaction of court. It is therefore my conclusion that the petitioner has failed to prove to the satisfaction of court that non-compliance affected the results of the election in a substantial manner.

Issue No. 4: Whether the 1st Respondent personally or his agents with his knowledge and consent or approval, committed any of the illegal practices and offences in connection with the election.

The petitioner alleged the following illegal practices:

1. Holding campaign meetings 24 hours before polling day.
2. Bribery of voters with money and alcohol.
3. Forgery of petitioner's agents' signatures on DR forms.
4. Convenience with officials from Electoral Commission to make wrong returns.

Holding campaign meeting 24 hours before polling day.

Section 20 (5) of the Parliamentary Elections Act prohibits campaign meeting within twenty four hours before polling day.

The petitioner however did not adduce satisfactory evidence apart from making general averments. The affidavit of Acaye Silvo does not show that the 1st Respondent held any campaign meeting. On the other hand affidavit of Opoka Charles talks of the brother of the 1st Respondent a one Omona Francis gathering people at Lalogi Trading Centre giving them alcohol. This piece of evidence is more on bribery than campaign meeting.

Bribery of voters with money and alcohol.

The petitioner alleged that the 1st Respondent bribed voters with alcohol and money. He relied on the evidence of Paskal Omal, Acaye Silvo, Opoka Charles, Ocen John and Okok Andrew. They deponed that the Respondent was giving money to voters amount ranging from Shs.2,000/= – 50,000/=. Paskal Omal stated in his affidavit that on 12th February 2011 the 1st Respondent visited their SACCO offices and gave them Shs.250,000/= to buy a cow to be slaughtered on the voting day so that they could vote for him and other NRM candidates. The 1st Respondent further gave them 10 bags of cement for construction of Lwala Catholic Church. All in all the witnesses deponed that there was massive voter bribery by the 1st Respondent and his brother Omona.

The 1st Respondent denied all the allegations of bribery with 14 affidavits. The affidavits included those from polling officials, presiding officers and agents: These were from Denis Oyugi, Odongo Fred, both from Laswono P.7 School polling station. Ruping Ronald Olari, Olanya Kennedy Mike, Justine Okeny, Omoro Kalisto, Anyazo David; Wacongo Sharon, Oyet Francis, Watwon Jennifer, Oceng Isaac Otim, Piloya Fiona; Aol Margaret and the 1st Respondent's reply to the petition.

Bribery is an offence under **Section 68 of Parliamentary Elections Act (PEA)**. Evidence from a person who concedes to having been a party to the Commission of a criminal offence should be handled cautiously and indeed such evidence must be corroborated. There is need for independent evidence. Thus in **Jacob Mbayo v Electoral Commission & Taloby Sinah, Election Petition Appeal No. 7 of 2006**. Justice Byamugisha JA *“observed that where there are*

accusations and counteraccusations of illegal practices such as bribery, the court needs to look at some other independent evidence of bribery to establish what actually happened.”

In this case some of the witnesses were the petitioner’s agents (Ocen John and Okok Andrew Oyugi). Some of these witnesses benefited from the bribery. They took the money and drank Alcohol allegedly donated by the 1st Petitioner. No single report was made to the Police or Local authorities. No arrests were made. In the words of Mulenga JSC in **Besigye’s case (Supra)** there would be need for independent cogent evidence. The same position was reasserted by **Engwau JA in Electoral Commission & Bakaluba Mukasa v Betty Nambooze, Election Appeal No. 182 of 2007** which decision was reaffirmed by the Supreme Court. His Lordship held that *“bribery being a serious offence there should be cogent and independent evidence to prove it.”* The Petitioner has miserably failed to establish that there was massive bribery of voters by the 1st Respondent.

Forgery of Petitioner’s Agents’ Signatures:

Again forgery equally is a very serious offence. There was no affidavit evidence showing which agent’s signature was forged, who did the forgery, where the forged documents were. There was no independent expert evidence from handwriting expert. All in all forgery is a very serious offence that would require cogent and independent evidence which has not been established in this petition.

Connivance with Electoral Commission officials to make wrong returns:

Electoral Commission is a Constitutional body vested with powers of holding political elections in this country. It is a very august body. Any allegation which tends to reduce its integrity and confidence of the public must be substantiated. In the instant case the allegations were not backed by independent cogent evidence. The question remains nagging. Who connived with which Electoral Commission official? When and at which polling station? Why didn't the petitioner or his agents swear affidavits giving particulars of connivance to make wrong entry into the results?

The allegations were made worse by the petitioner failing to cross-examine any of the Respondents' witnesses. The only conclusion I can draw is that those allegations were as a result of the usual anxieties which accompany elections. Elections should be governed by the rule of fair play and should not be a ground for breeding conflicts by way of unfounded allegations.

CONCLUSION:

In conclusion, I find that the Petitioner has failed to prove the alleged malpractices or to visit them on the 1st Respondent by showing that they were either authorized, consented or with his knowledge. It is therefore my general conclusion that the election in Omoro County was conducted in compliance with the Laws and Practices in Uganda and in compliance with international standards and guidelines.

Issue No.5: Remedies Available:

The Petitioner has failed to prove his case to the satisfaction of court.
The petition is accordingly dismissed. In the spirit of unity the
Constituency and the parties I feel parties should bear their own costs.

HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGE

21/7/2011

/gnm.