

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT 2005

AND

IN THE MATTER OF THE ELECTORAL COMMISSION ACT CAP 140

ELECTION PETITION NO.9 OF 2021

SHUKLA MUKESH BABUBHAI-----PETITIONER

VERSUS

1. ELECTORAL COMMISSION

2. SSENYONYI JOEL BESEKEZI-----RESPONDENTS

BEFORE: HON JUSTICE ISAAC MUWATA

JUDGEMENT

BACKGROUND

The petitioner, the 2nd respondent and twelve other candidates participated in an election conducted by the 1st respondent for the position of Member of Parliament Nakawa Division West Constituency, held on the 14th January 2021 wherein the 1st respondent returned, declared and published the 2nd respondent as the validly elected candidate with 31,653 votes as opposed to the petitioner's 806 votes.

Being aggrieved by the outcome of the elections and subsequent declaration of the 2nd respondent by the 1st respondent as the validly elected Member of Parliament for Nakawa West Division Constituency, the petitioner herein petitioned this court

challenging the elections on grounds that the 1st respondent failed in its duty to conduct the elections in accordance with the electoral laws and the principles governing elections.

Representation

- 5 Counsel Badru Bwango, Enock Kayondo, Mugogo Edward and Asimwe Edias appeared for the petitioner.

Counsel Kayondo Abubaker appeared for the 1st respondent.

Counsel Atwijukire Dennis, George Musisi, Derrick Ruzima and Benjamin Katana appeared for the 2nd respondent.

- 10 At the scheduling the following were the agreed facts and issues.

Agreed Facts

- i. The number of votes obtained by either party as declared by the 1st respondent.
- ii. Both parties were candidates in the election organized by the 1st respondent
- 15 iii. The 2nd respondent was returned and gazetted by the 1st respondent as the Member of Parliament for Nakawa West Constituency.
- iv. The Uganda Gazette published the 2nd respondent as the area Member of Parliament for Nakawa West Constituency.

The parties agreed to the following issues;

- 20 **1. Whether there is a valid and competent petition before this court.**
- 2. Whether there were illegal practices or any electoral offences under the law committed by the 2nd respondent particularly or his agents with his knowledge and consent or approval.**

3. Whether there was noncompliance with the provisions of the Constitution, the Parliamentary Elections Act and the Electoral Commission Act by the respondents.

4. If so, whether the noncompliance substantially affected the results.

5 5. The remedies available if any.

Burden and standard of proof.

Section 61(1) of the Parliamentary Elections Act provides for the standard of proof required for setting aside the election of a Member of Parliament. It provides that: -

10 **“The Election of a Member of Parliament can only be set aside on any of the following grounds if proved to the satisfaction of court.....”**

Hon. Justice Odoki CJ (as he was then) in his elaborate reasons for the supreme court judgement in the **Col.(Rtd) Dr. Kizza Besigye Vs Museveni Yoweri Kaguta and the Electoral Commission, (Election Petition No.1 of 2001)** had the following to say about the standard of proof required in election petitions;

15 **“..... The standard of proof required in this petition is proof to the satisfaction of the court. It is true court may not be satisfied if it entertains a reasonable doubt, but the degree of proof will depend on the gravity of the matter to be proved since the legislature chose to use the words ‘proved to the satisfaction of court’, it is my view that that is the standard of proof**
20 **required in an election petition of this kind. It is a standard of proof that is very high because the subject matter of the petition is of critical importance to the welfare of the people of Uganda and their democratic governance”**

In this petition therefore, it is the petitioner who bore the burden of proving his allegations to the satisfaction of court. It is only after the court is satisfied that the
25 grounds raised have been proved to its satisfaction that it will invoke its powers

under subsection (1) of Section 61, read together with subsection 4(c) of Section 63 of the Parliamentary Elections Act.

Section 61(3) of the Parliamentary Elections Act provides that any ground specified in subsection (1) should be proved on the basis of a balance of probabilities

The only crucial aspect of this issue which court must emphasize and bear in mind throughout the trial of an election petition is the degree of probability which must be attained before the court can regard itself as satisfied that the ground or allegation has been proved under section 61(1) and Section 61(3) of the Parliamentary Elections Act.

In order to merit an order setting aside the election of a Member of Parliament the evidence produced by the petitioner must be such as would, in the circumstances, compel the court to act on it.

Given the public importance of elections, the degree of proof in election petitions is relatively higher than in normal civil cases. The term ‘proved to the satisfaction of the court on a balance of probabilities places a duty on the petitioner to prove their case to the level where the court is convinced that the occurrence of a fact is more probable than not. **See: Anthony Harris Mukasa v Dr. Michael Phillip Lulume Bayiga, Supreme Court Election Petition Appeal No.18 of 2007**

A petitioner has to adduce credible and/ or cogent evidence to prove their case to the satisfaction of the court. ‘Cogent’ means compelling or convincing. It has to be the kind of evidence which is free from contradictions, truthful so as to convince a reasonable tribunal to give judgment in a party’s favor.

The respondents carry no burden to discharge as long as the petitioner has not produced sufficient evidence required to show that the occurrence of the allegations is highly probable. In other words, the burden of proof on the petitioner

is very high and does not shift. **See: Akurut Violet Adome V Emurut Simon Peter EPA No.40 of 2016**

The court has a duty to look at the affidavits in support of the petition and evaluate the same against the respondents answer and supporting affidavits in order to
5 satisfy itself of the allegations made in the petition

The parties filed their written submissions which I have considered in determining this matter.

Preliminary objection

Counsel for the petitioner in his written submissions raised a preliminary point of
10 law to the effect that the evidence of 1st respondent's witness Nancy Kirungi B should be disregarded for failure to be cross examined on the same. He cited the case of **Ngoma Ngime vs E.C & Anor Mbarara High Court Election Petition No.1 of 2001** where the court held that evidence of a deponent who failed to appear in court for cross examination as ordered is of the weakest kind and cannot be relied
15 upon.

Evidence was adduced at the trial to explain why the 1st respondent's witness did not appear in court for cross examination.

Although the witness failed to appear for cross examination, the court has a duty to evaluate the evidence. The right to cross examine, notwithstanding, rule 15 (1) of
20 the Parliamentary Elections (Interim Provision) Rules provides for evidence at the trial to be by affidavit read out in open court. Under rule 15(2) cross examination of witnesses on affidavit evidence is by leave of court. This means that the rules envisage that evidence in election petitions shall be principally by way of affidavit.

All the evidence admitted has to be subjected to scrutiny and considered. This
25 evidence includes affidavit evidence, documentary evidence, oral testimony on

cross examination and re-examination. It was also the ruling of this court that if the petitioner had any queries regarding the affidavit evidence of Nancy Kirungi, then they ought to point it out in their submissions and the 2nd respondent would have to respond accordingly, however they have not pointed out the same in their
5 submissions.

The petitioner at the scheduling only sought leave to cross examine Nancy Kirungi and the respondent Joel Ssenyonji and no other witness, so the submission by counsel for the petitioner that the four other deponents never appeared for cross examination is false and misleading. The court cannot expunge evidence that has
10 not be controverted by the petitioner. However, the evidence of Nancy Kirungi B shall be given less weight in view of the concerns raised by counsel for the petitioner. The objection thereof is overruled. I now proceed to handle the issues.

Determination of the issues

1. Whether there is a valid and competent petition before this court.

15 Counsel for the 2nd respondent questioned the competence of the petition in respect of the annexures attached thereto, the objections centered on the annexures to the affidavit in support of the petition. He pointed out the following;

a) Unsealed annexures to the affidavit in support

20 Counsel for the 2nd respondent submitted that the annexures to the affidavit in support of the petition are not serially marked as required by the commissioner for Oath Act and the rules made thereunder. He argued that the sole affidavit of the petitioner has several documents that are not marked and neither are they serialized as required by Rule 8 of the Commissioner for Oath Rules.

Rule 8 of the commissioner for Oath Rules provides,

“All exhibits to affidavits shall be securely sealed to the affidavits under the seal of the commissioner and shall be marked with serial letters of identification.”

I have perused the attachments to the affidavit in support of the petition and note that its indeed true that they are neither marked nor sealed. The purpose of sealing
5 annexures and marking them is to preserve the integrity of the oath and the totality of the evidence taken thereunder. The commissioner of Oaths must indicate that he viewed all documents referred to by the deponent; this was not done.

Be as it may, and basing on the peculiar circumstances of the proceedings before this court, I am reluctant to treat the omission to comply with Commissioner for
10 Oath Rules as fatal because the whole evidence in this petition has been laid before court which has a duty to determine the matter based on all the evidence before it especially after the objection was raised in the final submissions.

b) Uncertified Declaration of Results Forms

Counsel for the 2nd respondent further submitted that the eight declaration of results
15 forms attached to the affidavit in support are not certified, he submitted that it is settled law that uncertified declaration of results forms cannot be relied on as their authenticity cannot be ascertained.

Section 76 of the Evidence Act provides for proof of public documents by production of the original or certified copies. A declaration of results form (DR
20 Form) is a public document within the meaning of section 73(a) (ii) of the Evidence Act. It requires certification if it is to be presented as an authentic and valid document in evidence. **See: Kakooza John Baptist Vs Yiga Anthony and Anor EPA 11 of 2007**

The only exception to the admission of certified copies of the DR forms in this
25 case would be if the petitioner had given notice to the Electoral commission to

produce the particular declaration forms from the contested polling stations and it failed to do so. There is no evidence that the petitioner had given such notice to the Electoral Commission or applied through court for the Electoral Commission to produce at the trial the DR Forms for all the contested polling stations.

- 5 That notwithstanding, it is imperative that the court determines the evidence that is before it, just striking out this petition after witnesses have been cross examined and their lawyers have made final submissions may leave out many unresolved matters.

As for the competency of the petitioner to bring this petition, counsel for the
10 petitioner submitted that Section 60 of the Parliamentary Elections Act provides for who may challenge the results of a parliamentary Election Petition. He cited the case of **Ongole James Michael Vs Electoral Commission and Anor High Court Election Petition No.8 of 2006** where the court held that such a person must themselves have been a validly nominated candidate in possession of the requisite
15 qualifications.

Section 60 (2) (a) of the Parliamentary Election Act provides for who may present an election petition. It provides: -

“.....

(2) An election petition may be filed by any of the following persons-

- 20 **a) a candidate who loses an election.....”**

In the instant case the petitioner was a validly nominated candidate and brought the instant petition and in that sense the same is valid and competently before this court.

2. Whether there were illegal practices or any electoral offences under the law committed by the 2nd respondent particularly or his agents with his knowledge and consent or approval.

Section 61(1)(c) of the Parliamentary Elections Act provides: -

5 **“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;**

.....

10 **(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.....”**

The petitioner set out the allegations of illegal practices and commission of electoral offences in paragraph 5(d) and (e) of the petition and reechoes the same in paragraphs 16 and 17 of the affidavit in support. The illegal practices relate to the allegations that the 1st respondent allowed persons not being registered voters to cast votes and ballot stuffing by the 2nd respondent which tilted the results in his favor

20 Section 76 (f) of the Parliamentary Elections Act creates the offence of ballot stuffing. Ballot stuffing is a form of electoral fraud whereby a person who was permitted only one vote cast more than one. It could also happen where a person, instead of casting their vote in a single booth, casts it in multiple booths. Ballot stuffing can take various forms, such as casting votes on behalf of people who did not show up at the polls or for those who were long dead or voting by fictitious characters. **See Toolit Simon Akecha v Oulanyah Jacob L, Okori & EC EPA No.19 of 2011**

In the case of **Suubi Kinyamatama Vs Ssentongo Robinah Nakasirye EPA No.92 of 2016** the court held that ballot stuffing is an election malpractice that involves voting more than once at a polling station or moving to various polling stations casting votes either in the names of the people who do not exist at all or those who
5 are dead or absent at the time of voting and yet are recorded to have voted. Ideally, at the end of the polling exercise, the number of votes cast ought to be equal to the number of people who physically turned up to vote.

It is notable that during cross examination the petitioner had no direct evidence to show that there was ballot stuffing wherein he stated that he could not confirm the
10 names of the polling stations where there was ballot stuffing and neither did he state that he personally witnessed the ballot stuffing. Voting more than once is an offence under Section 31 of the Parliamentary Elections Act, and therefore, the petitioner has a higher burden than in a case of an election irregularity to prove the allegation.

15 Further there is no agent who swore an affidavit to confirm to court that indeed there was ballot stuffing and people who, not being registered voters, were allowed to vote. The petitioner does not specifically allude to any polling station where these alleged illegal practices happened. It is not enough to merely harbor suspicion over one's involvement in an electoral offence and illegal practice.
20 Cogent and satisfactory evidence has to be adduced to prove that the 2nd respondent participated either personally or his agents with his consent and/or approval.

The petitioner has failed to prove this allegation to the satisfaction of court.

**3. Whether there was noncompliance with the provisions of the Constitution, the Parliamentary Elections Act and the Electoral Commission Act (Electoral
25 laws) by the respondents.**

Section 61(1)(a) provides that 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. The relevant section provides: -

(a) “Non-compliance with the provisions of this Act relating to 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 noncompliance affected the result of the election in a substantial manner”

a) Crossings on the Declaration of Results Forms

Counsel for the petitioner submitted that the doubtful entries contained in the declaration of results forms render the results therein unreliable. He argued that filling of DR Forms as required by the 1st respondent is not a mere formality but one of substance. He argued that these results ought not to have been relied upon. He cited the case of **Betty Muzanira Bamukwatsa Vs Masiko Winifred Komuhangi &Anor EPA No.81 of 2021** to support his claim.

During cross examination of the 2nd respondent, counsel for the petitioner pointed out the impugned DR form for **LC1 Meeting place (N-Z)** wherein he submitted that the crossings and material irregularities affected the result in a substantial manner.

I have looked at the impugned DR Form for **LC1 Meeting place(N-Z)** and it had alterations crossing the petitioner’s votes from 158 votes to 05 votes and further the 2nd respondent’s votes were increased from 81votes to 158 votes. While it is true that there are some alterations in the impugned DR form, the petitioner’s DR form for **LC1 Meeting place (N-Z)** is not signed whereas the 2nd Respondents DR form is signed. In my view this crossing is attributed to a correction as the DR

form in possession of the petitioner largely bears the same content as the one attached to the 2nd respondent's affidavit.

There is no evidence of disparity provided by the petitioner for example a certified copy of the results for this court to arrive at a conclusion that the statistical data from above impugned polling station was altered. Further, there is no evidence of complaints whatsoever raised by the petitioner's agent at the time of counting of votes, the agents signed the impugned DR form without any complaint and the presiding officer signed on the same confirming the results. In any case whatever crossing that may have occurred did not affect the electoral result from the said polling station.

The above notwithstanding, let's suppose that the doubted and suspicious votes of the petitioner were altered from **158 votes** to **05 votes** and the 2nd respondent was given **158 votes** instead of **81 votes**, the following scenario would emerge: -

15 **Petitioner:** **806 - 5+158 =959 votes**

2nd respondent: **31653 -158+81 =31,576 votes**

The 2nd respondent would therefore still win by a wide margin.

I find that the alleged noncompliance has not been proved, but even if it had been, it would not have affected the elections outcome in a substantial manner.

b) Unsigned Declaration Forms

20 Section 47(5) of the Parliamentary Elections Act provides that;

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

(a) the polling station;

(b) 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.”

It follows from the above cited law that signing of declaration of results forms is
5 mandatory. **See: Kakooza John Baptist Vs Yiga Anthony and Anor EPA 11 of 2007.**

In this case, the petitioner in his affidavit alludes to the fact that some of the DR forms in the final tally of the Electoral results were unsigned by the presiding officers as required by the law and that the same affected the results in a substantial manner

10 The impugned DR forms that are not signed are from the following polling stations of **LC1 Meeting place (N-Z), Kimwanyi LC1 Grounds -at trailers parking, LCII Offices at Ngoga, s Compound, Mulimira (KAN-MAR)-Bukoto Evangelic, and Kibokos place (A-B)**

I have looked at the said DR forms; they were neither certified nor marked at the
15 time of commissioning which renders them suspect. However, the same impugned DR forms attached to the respondent’s answer are signed by the presiding officer. The petitioner has not disclosed the source of his impugned declaration of results forms. There is no basis to believe the petitioner’s allegations that the forms handed to his agents were not signed by the presiding officer. I would have been
20 inclined to believe the same if the petitioner had supplied court with certified copies of the DR forms from these impugned polling stations. In the absence of that, I find it hard to believe the petitioner.

What is remarkable about these impugned DR forms is that all his agents signed the copies of the respondents further confirming the results obtained by all the
25 candidates. **In Babu Edward Francis Vs EC &Erias Lukwago HC EP.No.10 of 2006**

High Court Kampala, Civil Division the court had this to say about agents signing DR forms;

“When an agent signs a DR Form, he is confirming the truth of what is contained in the DR Form. He is confirming to his Principal that this is the correct result of what transpired at the polling station. The candidate in particular is therefore estopped from challenging the contents of the form because he is the appointing authority of the agent”

The DR forms in question are signed by the respective polling station presiding officers as well as a set of two agents for the petitioner and also for the 2nd respondent. It follows therefore that if any of these DR forms were a forgery, then the agents would have straight away pointed it out but they did not.

In **George Patrick Kassaja vs Fredrick Ngobi Gume EPA 68 of 2016** it was held that **“It is trite that signed declaration of results forms are proof that the agents were satisfied with what transpired at the time of voting. Consequently, the candidate whose agents sign a DR form is estopped from challenging the contents of the form because he or she is the appointing authority of his or her agents”**. Failure by the presiding officer to sign some of the DR forms cannot be used as a ground, where the agents signed.

The petitioner is on record having stated in cross examination that his agents signed the Declaration of Results Forms and is thus estopped from raising these issues as his agents duly signed the said DR forms.

If there was any noncompliance with the electoral laws, then the petitioner has failed to adduce cogent evidence to prove the allegations to the satisfaction of court. It is safer to infer that the crossings relating to the valid votes casts, or

rejected or ballot papers counted or spoilt are corrections which conform to the votes of the parties.

4.If so, whether the noncompliance substantially affected the results

Section 61(1)(a) provides that 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

(a) **“Non-compliance with the provisions of this Act relating to 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 noncompliance affected the result of the election in a substantial manner.”**

Noncompliance with the electoral laws per se cannot overturn an election. The noncompliance must be so significant as to substantially affect the results of the election. **See: Sarah Opendi &Anor vs Ayo Jacinta EPA 59&61 of 2016**

The law on the substantiality test to nullify an election has been set by the Supreme Court in **Col.(Rtd) Dr. Besigye Kiiza Vs Museveni Yoweri Supreme Court Presidential Election Petition No. 1 of 2001** on the following principles: -

- a) **The effect of noncompliance must be calculated to influence the result in a significant manner;**
- b) **To assess the effect of noncompliance, the court has to evaluate the whole electoral process to determine how the result was affected, and then assess the degree of that effect;**
- c) **Numbers are useful and so are the conditions that produced those numbers;**

d) There must be cogent evidence whether direct or circumstantial to establish both the effect of the non-compliance and the substantiality thereof; and

e) The substantiality test is whether the votes a candidate obtained would have been different in a substantial manner, if it were not for the noncompliance substantially.

Hence to succeed, the petitioner should prove that the noncompliance was such that the winning majority would have reduced enough to put the victory in doubt.

In the instant case, the petitioner testified that Nakawa West Constituency has approximately 165 polling stations, the petitioner only contested results from 8 polling stations. It is worth noting that with the declared results in the constituency, the difference in votes obtained by the 2nd respondent- the eventual winner and the petitioner is 30,847 (Thirty-Eight Hundred Forty-Seven) votes which is overwhelming.

Alternatively, even if all the valid votes cast in the 8 polling stations were in favor of the petitioner, the winning margin would still remain huge to upset the victory of the 2nd respondent. No irregularities have been proved in this case but even if they had been, the irregularities as alleged by the petitioner could not have affected the results of the entire constituency in a substantial manner.

In conclusion therefore, I am unable to set aside or declare void the election in this case for the reasons that the petitioner has failed to adduce cogent evidence to prove to the satisfaction of court the grounds to set aside the election as laid out in section 61 of the Parliamentary Elections Act. The petition is accordingly dismissed with costs to the respondents.

In view of the foregoing I uphold the victory of the 2nd respondent as the validly elected Member of Parliament for Nakawa West Constituency

I so find.

JUDGE

5 **14/10/2021**

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