

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
AT MBALE**

***PARLIAMENTARY ELECTION PETITION NO 0023/2011***

**NABUYOBO MUHAMADI .....PETITIONER**

**VRS**

**ELECTORAL COMMISSION.....1<sup>ST</sup> RESPONDENT**

**MUBOGI TWAHA ..... 2<sup>ND</sup> RESPONDENT**

**BEFORE: THE HONOURABLE MR. JUSTICE PAUL MUGAMBA**

**JUDGMENT**

Nabuyobo Muhamadi, otherwise referred to in this judgment as the Petitioner, filed this petition against the Electoral Commission, in this judgment referred to as the first respondent, and Mubogi Twaha, referred to as the second respondent. The petition was filed in the wake of elections for the L.C Chairperson for Budwale Sub County, held on 7<sup>th</sup> March 2011. The petitioner and the second respondent contested in the polls which saw the latter gazetted as the winner with 1125 votes while the former was runner up with 1062 votes. The petitioner contests the validity of the results which he states were conducted in contravention and contrary to the provisions of the Constitution, the Election Commission Act and the Local Governments Act.

Material to this petition are its paragraphs, 6,7,8 and 9 which I shall lay out for reference. They read as follows:

“IN THE ALTERNATIVE and without prejudice to the foregoing, the petitioner shall contend that the election of the 2<sup>nd</sup> respondent was invalid on the ground that the election was not conducted in accordance with the principles laid down in the Constitution, the Electoral Commission Act and the Local Governments Act and that such non- compliance affected the result in a substantial manner in that:-

- a) Contrary to S. 12 (i) (e) of the Election Commission Act (sic), the 1<sup>st</sup> respondent failed to ensure that the said entire electoral process in Budwale Sub-county was conducted under conditions of impartiality, freedom and fairness when the presiding officers in several polling stations allowed multiple voting in favour of the 2<sup>nd</sup> respondent .
  - b) In Wadada polling station, the presiding officer, Mugoya Simon deliberately falsified, altered the declaration of results forms urged by the 2<sup>nd</sup> respondent and/or his polling agents.
  - c) In Wadada polling station the presiding officer, Mugoya Simon recorded on the declaration forms, results different from those that he counted and announced at the polling station.
  - d) In a number of polling stations, the presiding officers allowed the agents of the 2<sup>nd</sup> respondent to vote for people who had died and even the presiding officers ticked the same in the register to prove that such deceased had voted
  - e) In Wadada polling station the 2<sup>nd</sup> respondent's voting/polling station, only 100 (one hundred) ballot papers were issued to the polling station but the presiding officer recorded that 164 (one hundred and sixty four) ballot papers were issued.
  - f) In some polling stations the results on some declaration of results forms were changed to reflect different figures exceeding votes counted at the polling station
  - g) The 1<sup>st</sup> respondent relied on falsified/altered/fake declaration of result forms to declare the 2<sup>nd</sup> respondent the winner.
  - h) The presiding officer of Wadada polling station unfairly misled the agents to sign the declaration forms before voting commenced
7. Your petitioner avers that the 2<sup>nd</sup> respondent directly and greatly benefited from the above non-compliance with the law in that the numerous malpractices and violations of the law were of a substantial nature and affected the final outcome of results in a substantial manner in view of the margin of 63 (sixty three) votes with which the 2<sup>nd</sup> respondent purportedly won the election.

8. Your petitioner further avers that illegal practices and/or offences were committed by the 2<sup>nd</sup> respondent personally with his knowledge and consent or approval namely:-

- a) Contrary to S. 152 (b) and 153 of the Local Governments Act the 2<sup>nd</sup> respondent ferried his supporters and openly encouraged them to vote more than once at certain polling stations and to vote for the dead persons
- b) That the 2<sup>nd</sup> respondent connived with the 1<sup>st</sup> respondent's agents/ employee/ presiding officers to cheat and indeed cheated votes in 2<sup>nd</sup> respondent's favour at Wadada Polling station where the 2<sup>nd</sup> respondent got 33 votes but the presiding officer declared that the 2<sup>nd</sup> respondent polled 133 votes.

9. Your petitioner states that the vote difference of 106 votes at Wadada Polling station between the 2<sup>nd</sup> respondent and the petitioner was obtained by the 2<sup>nd</sup> respondent through cheating and/or the irregularities caused by the 1<sup>st</sup> respondent in flagrantly changing the results actually polled by the 2<sup>nd</sup> respondent and affected the results in a substantial manner.”

Arising from the above the following issues were agreed at the scheduling conference:

- 1 Whether there was non –compliance with the electoral laws in the conduct of the election of Chairperson, Budwale Sub-County.
- 2 Whether the non-compliance if any affected the results of the election in a substantial manner.
- 3 Whether any illegal practice or any electoral offences were committed in connection with the said election by the 2<sup>nd</sup> respondent personally or with his knowledge, consent or approval.
- 4 What remedies are available to the parties.

Evidence at the hearing of this petition was derived from affidavits filed in support of the petition and from affidavits responding to the petition. Twelve affidavits were proffered in support of the petition and they were treated as exhibits as shown below:

- |    |                        |                |
|----|------------------------|----------------|
| 1  | Nabuyobo Muhamadi      | - Exhibit P.I  |
| 2  | Wamboya Amani          | - Exhibit P.2  |
| 3  | Sulaiman Mugundwa      | - Exhibit P.3  |
| 4  | Sheikh Buruhani Masaba | - Exhibit P.4  |
| 5  | Wanambwa Abu           | - Exhibit P.5  |
| 6  | Nakyoto Moses          | - Exhibit P.6  |
| 7  | Mubogi Sezi            | - Exhibit P.7  |
| 8  | Kamiyati Masaba        | - Exhibit P.8  |
| 9  | Wamboya Kalifani       | - Exhibit P.9  |
| 10 | Wamboya Siraji         | - Exhibit P.10 |
| 11 | Walumu Akim            | -Exhibit P.11  |
| 12 | Rashid Namanda         | - Exhibit P.12 |

In addition, the petitioner was cross examined on the evidence comprised in Exhibit P. I. On behalf of the 1<sup>st</sup> respondent the evidence was contained in exhibit R.I, the affidavit of Kiyimba Umar. The 2<sup>nd</sup> Respondent tendered twelve affidavits in rebuttal. They were exhibited as follows:

- |    |                               |               |
|----|-------------------------------|---------------|
| 1. | Mubogi Twaha                  | -Exhibit RR1  |
| 2  | Mugoya Simon                  | -Exhibit RR2  |
| 3  | Mugoya Simon (Supplementary)- | Exhibit RR3   |
| 4  | Namagali Yusuf                | - Exhibit RR4 |
| 5  | Wamboya Kalifani              | - Exhibit RR5 |
| 6  | Webisa Abubakali Gidima       | -Exhibit RR6  |
| 7  | Gidudu Twahira                | -Exhibit RR 7 |
| 8  | Wamugadu Saibu                | -Exhibit RR8  |
| 9  | Gizunga Zumala                | -Exhibit RR9  |
| 10 | Wayiya Muzamiru               | -Exhibit RR10 |
| 11 | Nagwere Nathan                | -Exhibit RR11 |
| 12 | Gidudu Eriabu                 | -Exhibit RR12 |

Besides their averments, Wamboya Kalifani and Mugoya Simon were subjected to cross examination by the petitioner. By consent of all parties joint written notes of the scheduling conference, inclusive of the agreed upon matters as well as issues were admitted in evidence. Counsels' joint findings on the voters' rolls/registers for Budwale Sub-county were too admitted in evidence as Exhibit JPRI.

Allegations of non-compliance with the electoral laws and procedure in the conduct of the elections in issue feature in the petition. They relate to multiple voting, individuals voting using names of deceased persons, falsification of the number of ballot papers received by the presiding officer, falsification of the results by the presiding officer, signing of the Declaration of Results forms (Form EC 9 ) before voting, as well as connivance between the presiding officer and the 2<sup>nd</sup> respondent resulting in favourable electoral results for the 2<sup>nd</sup> respondent.

Regarding multiple voting, allegations were made that the presiding officer for Wadada Polling Station himself voted twice. The allegation is borne in Exhibit P.I and Exhibit P.10. The evidence to this effect in Exhibit P.I is said to be based on information received from the deponent of Exhibit P. 12. yet in Exhibit P.12 there is no allegation that the presiding officer in issue, namely Simon Mugoya, voted twice. What is stated in Exhibit P. 12 is that Simon Mugoya was presiding officer at Wadada Trading Centre polling station and that the presiding officer aforesaid cast his vote at Buwanangadi Polling Station . Nothing there alleges the officer voted more than once; yet this affidavit is pivotal to the allegation of multiple voting on the part of the presiding officer borne in Exh . P.I. Evidence in Exhibit P.10 states that Mugoya Simon voted more than once but the allegation is denied by Simon Mugoya both in his averments and during cross-examination, where he stated that he first cast his vote at Bunawangadi Polling Station where he is registered to vote before he proceeded to Wadada Polling Station where he acted as presiding officer in the elections of the day. There is no proof the presiding officer of Wadada Polling Station,

Simon Mugoya, voted more than once during the elections in issue. It was alleged also by the petitioner in exhibit P.I that one Gidudu Twahira, the deponent of Exhibit RR7, voted more than once. But Exhibit RR7 is emphatic Gidudu Twahira voted once only and the venue was Wadada polling station. No evidence was led by the petitioner to rebut this.

Nevertheless claims by the petitioner that there were incidents of multiple voting are not wholly baseless. This is evident in Exhibit JPRI. Allegations of individuals voting twice had originally been made citing 73 cases but upon scrutiny less than 15 instances in which individuals had been registered twice and could have possibly voted twice were ascertained. Assuming they did vote, there are several matters to ponder. Did they all vote so that they added to the number of votes cast? Next, did all those persons, less than 15 in all, who by default presumably voted more than once, vote only for the 2<sup>nd</sup> respondent? Is it not possible some of these cases could have voted for someone else, perhaps the petitioner also?

Nevertheless, in as much as it is evident in Exhibit JPRI that some people voted more than once, that is manifest non-compliance with electoral laws. Further evidence of non-compliance with the laws is where persons allegedly deceased at the time of the polls "voted" post humanly. Apparent in Exhibit JPRI are 14 alleged cases. One dead individual, Wamboya Mubaraka, was registered twice and appears to have voted twice. Besides the averments in the affidavit of Sheikh Buruhani Masaba, in particular, there is no further proof that any of the deceased persons did actually vote on the occasion. Suffice it to say that evidence of the deaths was never rebutted and as such survives scrutiny. I must add that there is no indication as to who of the candidates the votes of persons allegedly dead were cast in favour of. Like I did earlier concerning votes cast by persons who voted more than once, I must recognize in the case of posthumous voting, that votes cast in such manner were so cast in non-compliance with electoral laws. Section 25 of the Electoral Commission Act relating to display of copies of the voter's rolls with attendant objections to the same was clearly offended against. Also relevant in this respect is S. 51 of the same Act pursuant to which Operation Guidelines for the Display of the National Voters' Register Exercise, 2010 were made. At stake is

the onus on the 1<sup>st</sup> respondent to rid the register of names such as those of dead persons upon receipt of information regarding the same. No evidence was led to show such information was brought to the attention of the 1<sup>st</sup> respondent.

The petitioner alleges that Simon Mugoya, presiding officer, Wadada Polling station, falsified the number of received ballot papers. The petitioner stated that at Wadada polling station a total 100 ballot papers were received but that in order that favourable results for the 2<sup>nd</sup> respondent were delivered the presiding officer had manipulated the Declaration of Results forms to show that 164 ballot papers were received in total. Exhibit P.I and Exhibit P.2 relate to this claim. Besides rebuttal of these allegations in paragraphs 8, 16 and 17 in Exhibit RR2 and in the supplementary affidavit Exhibit RR3, the presiding officer, Simon Mugoya, was cross examined. Needless to say he denied claims of any falsification. Central to the contention were the Declaration of Results forms. Also referred to was form ABP, the Accountability of Ballot Papers At the Polling Station. This was annexure "A" to Exhibit RR3 and showed a total 200 ballot papers had been received on the occasion of the elections in issue at Wadada Polling Station. The details in the said annexure "A" also gave the serial numbers of the 200 ballot papers as 00003401-00003600. A notable signatory to the document, annexure "A", amongst others, was the petitioner's agent at Wadada Polling Station indicated as Wamboya Amani. Evidence of the 200 as the correct number of ballot papers delivered at Wadada Polling station is contained also in the exhibit affidavits RRI, RR4, RR5 and RR8. That evidence is at a tangent with the contents of the Declaration Forms particularly in the column reading "Total Number of Ballot Papers Issued to Polling Station." The figure reads 164 but the words read 'ONE HUNDRED FOUR'. This is even more confusing when the column 'Total Number of Valid Votes Cast for Candidates' shows 164 'ONE HUNDRED SIXTY FOUR,' no spoilt votes and in the column 'Total Number of Unused Ballot Papers' the figure 36 and words 'THIRTY SIX' is given. Surely when 164 is added to 36 it does not remain 164 but rather it aggregates to 200. Upon cross examination RW2, Simon Mugoya, admitted to having been presiding officer at Wadada Polling Station at the material time and that he was the one who had filled in the data in both Form ABP and in the Declaration of

Results Forms . His explanation for the mismatch in the Declaration of Result form concerning the total number of ballot papers issued to the polling station was that the difference between the figures and words appearing in the Declaration of Result Form is a result of a mistake and that the words should instead have read “one hundred sixty four’. He was emphatic a total 200 ballot papers were issued to the polling station. During re-examination RW2 stated that he had indicated on the Declaration of Result Forms that 164 ballot papers had been issued because he mistakenly thought he was indicating the total number of ballot papers he had issued to voters. He said the proper entry for votes issued to the polling station should have read a total 200. He reiterated that he had given out 164 ballot papers to voters and that 36 ballot papers had not been utilized. It was contended by the petitioner that the total number of votes issued to Wadada Polling Station was 100. Suffice it to say that on both the ABP form and the Declaration of Result forms the signatures of the petitioner’s agents are evident, amongst those of other candidates’ agents. This suggests endorsement of the information contained in the two forms. No evidence was adduced to support the proposition that only 100 ballot papers, or any other sum besides the 200 appearing in the ABP form, as credible.

The petition alleges also that the presiding officer, Wadada polling Station falsified the election results in order to ensure the 2<sup>nd</sup> respondent won the elections. This allegation is contained in affidavit Exhibit P.I where the petitioner states that his information was from Wamboya Amani. Indeed there is in evidence Exhibit P.2, an affidavit deponed to by Wamboya Amani. Exhibit P.2 shows that a total 100 votes were issued to Wadada Polling Station and that 64 of the votes were used up by the voters; to the end that the 2<sup>nd</sup> respondent got 33 votes, the petitioner got 27 votes, one Gidima got 04 votes while 36 ballot papers were not utilized. Exhibit P2 ballot papers were not utilized. Exhibit P2 further alleges that Mugoya Simon had falsely added 100 votes to the number of votes actually got by the 2<sup>nd</sup> respondent. Needless to say the signature of Wamboya Amani, against others, features on the Declaration of Results form showing it was appended at 5.45 p.m on the day of the elections. That was after elections had been

concluded. The evidence of Wamboya Amani is at the centre of the petitioner's allegations relating to falsification of the results. Yet the allegation is bereft of proof.

It is alleged in the petition that the presiding officer made agents sign Declaration of Results forms prior to voting. Here again the petitioner in his affidavit Exhibit P.I relies on information he received from Wamboya Amani, who in paragraph 5 of his affidavit (Exhibit P.2) reiterates the accusation. Wamboya Amani was one of the two agents for the petitioner at Wadada Polling station. That he signed the Declaration of Results forms is not contested. What is in issue is the time agents, himself in particular, signed the Declaration of Results forms. The Declaration of Results forms in issue is annexure "B" to Simon Mugoya's affidavit which is also annexed as "C" to the affidavit of the petitioner. Both show the agents to have signed the Declaration of Results forms at 5.45 p.m on 7<sup>th</sup> March 2011. What is more, affidavits RRI, RR2, RR4, RR5 and RR8 also show that the Declaration of Results forms were signed by the agents after the elections were over and counting of the votes had been accomplished. Respectfully, I find the allegation lacking proof.

In general terms the petition alluded to connivance between the presiding officer of Wadada polling station, namely Simon Mugoya, and agents of the 2<sup>nd</sup> respondent. With due respect I find no evidence of such.

Next I must consider whether the non-compliance, if any, affected the results of the election in a substantial manner. The Oxford Advanced Learner's Dictionary, 7<sup>th</sup> Edition, describes compliance as the practice of obeying rules or requests made by people in authority. As regards this electoral process the Constitution, the Electoral Commission Act, the Parliamentary Elections Act, the Local Governments Act as well as subsidiary legislation made pursuant to those statutes must be heeded. It is manifest that in the elections for the L.C III Chairperson of Budwale sub county the process of voting had some flaws. It did not go as desired. Some people voted more than once and some people said to be dead at the time were recorded to have voted. The other cause for disquiet was data entries by the presiding officer, Wadada Polling station relating to the

number of ballot papers issued to the polling station, the number of ballot papers actually utilized by the voters and the number of votes cast in favour of the 2<sup>nd</sup> respondent

Section 139 of the Local Governments Act ,Cap 243, contains grounds for setting aside an election of a Chairman L.C III. One such ground is that it must be proved to the satisfaction of the court that there was failure to conduct the election in accordance with the law contained in the Act and that the non-compliance and failure affected the result of the election in a substantial manner. Section 139 (a) of the Act is material to this. There is no gainsaying the proposition that results of an election are cardinal to the democratic aspirations of the society involved in the exercise and that they cannot be lightly set aside except where it is clear that the anomalies being raised undermined the conduct of a free and fair election. See **Ngoma Ngime vs The Electoral Commission and Hon Winnie Byanyima , Election Petition Appeal No 11 of 2002.** Elsewhere in this judgment I have shown why I find that 200 was the total number of ballot papers issued to Wadada Polling Station, that 164 was the total number of votes cast on the occasion and that the number of votes cast in favour of the 2<sup>nd</sup> respondent was the recorded 133. Those are findings of fact on the evidence available which has been related to earlier.

But then there are those voters who voted twice as well as votes cast as if persons already deceased had cast them, an impossible feat fraudulently acted. While such votes were cast in non-compliance as envisaged in S. 139 (a) of the Local Governments Act it is hard to pontificate that they affected the results of the elections in a substantial manner given that there is no known beneficiary of the votes cast in non-compliance . Plainly put there is no evidence who the beneficiary was, the petitioner the 2<sup>nd</sup> respondent or the other contestant. Secondly, in the elections the 2<sup>nd</sup> respondent got 1125 votes against the petitioner's 1062 votes. There was a margin of 63 votes. One is constrained to refer to Exhibit JPRI for arithmetic certainty. In Exhibit JPRI the number of persons confirmed to have voted twice is less than 15, never mind that the petition initially gave the number as 73 individuals. As for the deceased appearing to have voted the number does not exceed 20 cases. Even assuming those who voted twice and those

cases of persons who voted as if the deceased persons had voted had voted as a block the number of votes involved would by no means have been in excess of 35. Then if the 35 votes in contention were to be subtracted from the total number of votes gained by the 2<sup>nd</sup> respondent still the 2<sup>nd</sup> respondent would be ahead of the runner up, who the petitioner is, by 28 votes. But I work on all this in the absence of proof that those who voted by default all voted for the 2<sup>nd</sup> respondent. Be that as it may, even if default voting could have occurred and had been proved against the 2<sup>nd</sup> respondent, which was not the case here, it would not have affected the results of the elections substantially.

As for allegations that the presiding officer at Wadada polling station made agents sign Declaration of Results forms before voting, the allegations were rebutted by evidence both on the Declaration of Results forms, by affidavit evidence and the testimony of Mugoya Simon in cross examination. Clearly I find no evidence of non-compliance because the agents signed after voting and ascertainment of the votes.

The results would by no means be affected given that all there was compliance in this respect. Similarly there was no evidence adduced to support allegations in the petition that any connivance existed between the presiding officer and agents of the 2<sup>nd</sup> respondent.

There was no substantial effect on the results of the elections even where sadly, votes were cited to have been cast irregularly .

The third issue is whether any illegal practice or any electoral offences were committed in connection with the said election by the 2<sup>nd</sup> respondent personally or with his knowledge, consent or approval. There was no evidence adduced to that effect . My answer to this issue is in the negative.

In the result I find the evidence adduced in support of the petition insufficient to cause the overturn of the election results. The petition is dismissed with costs.

**Paul Mugamba**

**Judge**

**27<sup>th</sup> July 2011.**