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**IN THE HIGH COURT OF UGANDA AT TORORO**

**IN THE MATTER OF THE LOCAL GOVERNMENT ACT CAP 243**

**AND**

**IN THE MATTER OF LOCAL COUNCIL CHAIRPERSON LCIII ELECTIONS**

**ELECTION PETITION NO.0026 OF 2011**

**MAYUSI YUSUF.....PETITIONER**

**VERSUS**

**1. ELECTORAL COMMISSION }  
2. MUTAMBOH MATHEW }.....RESPONDENTS**

**BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI**

**JUDGEMNT**

The petitioner and the respondent were candidates in the Local Government Council elections for Chairperson of Buwagogo Sub County LC III, Manafwa District, which were held on 7<sup>th</sup> March 2011. The 1<sup>st</sup> respondent returned the 2<sup>nd</sup> respondent as the winner of the election with 1418 votes while the petitioner got 1387 votes. The difference in votes between the two candidates was 31 votes.

The petitioner was dissatisfied with the results of the election and he petitioned this court to find that 2<sup>nd</sup> respondent was not validly elected as the Buwagogo Local Council III Chairperson, and for orders that a fresh election be held in the sub county. He also prayed for costs of the petition.

The complaints were set out in paragraph 5 of the petition and were basically that the 1<sup>st</sup> respondent failed to conduct the election in compliance with the electoral laws, and that such non compliance and failure affected the results of the election in a substantial manner.

The areas of concern were at three polling stations of Shamukunga, Rurwa and Mwikaye polling stations. It was alleged that there was falsification of results and making false entries on the Declaration of Results (DR) forms by the Presiding Officers, intimidation and harassment of voters, violence and allowing the ineligible to vote. Details of the acts of non compliance at these

polling stations were set out in his affidavit in support of the petition. Affidavits of other deponents were filed in support of the petition.

The 1<sup>st</sup> and 2<sup>nd</sup> respondent denied the allegations. Each party filed affidavits in support of their respective cases. At conferencing the following facts agreed.

1. There were elections of LCIII Chairperson for Buwagogo Sub County held on 7<sup>th</sup> March 2011.
2. The petitioner and the 2<sup>nd</sup> respondent were the two contestants in that election.
3. The 1<sup>st</sup> respondent declared the 2<sup>nd</sup> respondent as the winner of the election, and the results of the election were published in the Uganda Gazette of 29<sup>th</sup> April 2011.
4. The 2<sup>nd</sup> respondent polled 1418 votes against the petitioner who polled 1378 votes.

The issues for determination by court were;

1. Whether there was non compliance with the electoral laws during the elections in Buwagogo Sub County.
2. Whether such non compliance and failure, if any, affected the results of the elections in a substantial manner.
3. Whether the 2<sup>nd</sup> respondent committed illegal practices or electoral offences personally or by his agents with his knowledge and consent or approval.
4. The remedies available to the parties.

## **NON COMPLIANCE**

The complaint here was two fold; 1<sup>st</sup> that there was falsification of results and 2<sup>nd</sup> that there was voter harassment and intimidation.

### **Falsification of results**

The allegation was that the results from the three impugned polling stations were not the true reflection of the will of the people of Buwagogo as they were wrongly tallied.

#### *Mwikaye Polling Station*



The evidence of falsification of results at this polling station was from P4 Wanzala Patrick. He was the agent of the petitioner at this polling station. He deposed that he witnessed the counting and announcement of results by the Presiding Officer and he annexed to his affidavit the DR form showing the results from this polling station where the petitioner got 39 votes while the 2<sup>nd</sup> respondent got 256 votes. The results tally sheet showed that the petitioner got 8 votes while the 2<sup>nd</sup> respondent got 287 votes.

The 1<sup>st</sup> respondent denied this and through the affidavit of R4 Wasike Martin the Presiding Officer at this polling station, he tendered the DR form which showed the results of the election. These corresponded with the results in the tally sheet. The DR form which the Presiding Officer tendered was signed by the agents of the petitioner including Wanzala Patrick and that of the 2<sup>nd</sup> respondent. It was certified by the 1<sup>st</sup> respondent. The DR form which was tendered by Wanzala Patrick on the other hand was not signed by the Presiding Officer and was not certified. I will however comment on non certification later.

Section 136(4) of the Local Government Act enjoins each Presiding Officer at a polling station to sign the DR form. The agents of each candidate who so desire may also sign the DR form. This is what authenticates the results at the polling station. The DR form which the petitioner presented was one whose authenticity was doubtful. It did not comply with the requirements of the law as it was not signed by the Presiding Officer. No reason was assigned why this was so. The signing of the DR form by the Presiding Officer is not optional. A DR form which is not signed by the Presiding Officer cannot be said to be evidence of the results of the election at the polling station.

Bwayo Peter and Bushele John were voters at Mwikaye polling station. They swore affidavits in support of the petition. They each deposed that they witnessed the counting and announcement of results. Each stated that the results were as claimed by the petitioner. They further deposed that they witnessed the Presiding Officer plus each of the agents of the candidates sign the DR forms. Their evidence raises doubt when the DR form which their candidate presented was not signed by the Presiding Officer.

The DR form which the petitioner presented cannot be the DR form which these two witnesses saw being filled by the Presiding Officer at Mwikaye polling station as that form, according to



these witnesses was duly signed by the Presiding Officer in their presence. The DR form which was signed by the Presiding Officer bore the results which they disputed. It was not possible to believe what they averred in their respective affidavits.

I found that the allegations of falsification of results at Mwikaye polling station were not made out and are dismissed.

#### *Rurwa polling station*

The evidence of falsification was from P3 Walira Patrick. He deposed that he was the agent of the petitioner at this polling station. He was at the polling station from early morning till the end of the entire process at that polling station. He deposed that he was present and witnessed the counting and announcement of the results. The petitioner got 174 votes while the 2<sup>nd</sup> respondent got 187 votes. 13 votes were rejected and none was spoiled. He was present and witnessed the Presiding Officer write those details on the DR forms. The Presiding Officer signed the DR forms as did this witness and the agent of the 2<sup>nd</sup> respondent by the names of Kutosi Robert. This witness retained a copy of that DR form which he tendered in court.

The results tally sheet showed the petitioner having got 54 votes and the 2<sup>nd</sup> respondent got 187 votes. The 1<sup>st</sup> respondent annexed to the affidavit of one Kutosi Robert a DR form which had results corresponding to the tally sheets. The argument being that that was the genuine DR form and it showed the true results at that polling station. In any event, that DR form was certified by the 1<sup>st</sup> respondent unlike the one tendered by Walira Patrick which was not certified.

In Kakooza John Baptist v. EC & Another EPA No. 11 of 2007 it was held that public documents which are intended to be used in judicial proceedings ought to be certified, but where the party seeking to rely on them applies to the party who has possession of the same, and the party with possession refuses or fails to avail them, the other party may be allowed to tender the uncertified copies.

The petitioner tendered a letter from his lawyers in which a request was made to the 1<sup>st</sup> respondent to avail copies of DR forms and tally sheets. The petitioner deposed that up to the time of hearing the petition, the 1<sup>st</sup> respondent had failed or refused to avail those copies. The answer to this averment was that the petitioner used the wrong procedure in seeking to secure



those forms. It was not shown what wrong procedure was used. The letter of request was addressed to the Secretary of the 1<sup>st</sup> respondent. This is the official who, according to the Returning Officer, is authorised to certify and issue such documents.

In the event that the 1<sup>st</sup> respondent refused or failed to avail the DR forms to the petitioner, court would not be inclined to reject the one tendered by petitioner, uncertified as they were.

The evidence on the DR form exhibit B2 of P3 Walira Patrick was that the petitioner got 174 votes while the 2<sup>nd</sup> respondent got 187 votes. This DR form was signed by the Presiding Officer of the 2<sup>nd</sup> respondent, and also by the agent of the petitioner and that of the 2<sup>nd</sup> respondent. There was no evidence to rebut the results therein contained from the Presiding Officer at this Polling Station. There was no evidence that the signature of the Presiding Officer appearing on that form was a forgery. Presiding Officers at other polling stations like Mwikaye swore affidavits deposing to what transpired at their respective polling stations. There was no evidence that the signature of Kutosi Robert the agent of the 2<sup>nd</sup> respondent appearing on that form was not genuine. Kutosi Robert did not disown it in his affidavit. I also found that the figure of 120 spoiled votes out of the 361 votes cast at that polling station shown on the DR form tendered by Kutosi Robert rather suspicious.

Kutosi Robert was the agent of the 2<sup>nd</sup> respondent at Rurwa polling station. In his affidavit he deposed that he read the petition and the accompanying affidavits, including that of Walira Patrick. He deposed in paragraph 5 that contrary to what Walira Patrick stated the petitioner got only 54 votes while his candidate got 187 votes. Quite tellingly he did not deny the signature on the DR form which Walira Patrick annexed to his affidavit, or deny that he signed that DR form.

Walimbwa Patrick deposed that he is a voter at Rurwa polling station. He annexed his voter ID card. He deposed that he went to the polling station and voted. Later in the afternoon he returned and was present when the counting and announcement of results was made by the Presiding Officer. He witnessed as the DR forms were signed by the Presiding Officer and the respective agents of the two candidates. The Presiding Officer announced that the petitioner got 174 votes while the 2<sup>nd</sup> respondent got 187 votes. There were 13 votes which were rejected and none was spoiled.



Maloba Fred was a voter at the same polling station and his voter ID was annexed to his affidavit. He voted and was present when the votes were counted and the results announced by the Presiding Officer. The results were as deposed by Walimbwa Patrick.

I found on a balance of probabilities that the petitioner polled 174 votes and the 2<sup>nd</sup> respondent polled 187 votes at this polling station. The results which the Presiding Officer sent to the Returning Officer and which were tallied in the final results were not the true results as they did not represent the will of the people at that polling station. The complaint of falsification of results at this polling station was proved by the petitioner.

#### *Shamukunga polling station*

The evidence of falsification of results was from Nandutu Irene and Bwayo Lawrence the polling agents of the petitioner at this polling station. Nandutu Irene deposed that she arrived at the polling station at 6.30 am. Voting proceeded well till the 2<sup>nd</sup> respondent and his supporters who included Mukhonde Sam 'stormed' the polling station and disrupted the voting. She reported to Mwelu Martin the Parish Election Supervisor who halted the voting and called in the Sub County Supervisor Wotti Ronald.

The sub county election supervisor Wotti Ronald went away with Mwelu Martin and they never returned. But the supporters of the 2<sup>nd</sup> respondent did, and caused further disruptions. They were allowed to vote and the Presiding Officer threatened to beat up the agents of the petitioner when they resisted signing the DR forms before voting ended. They did so under threat.

At the end of polling the Presiding Officer counted the votes in the presence of this witness and her fellow agent Bwayo Lawrence. He announced the results as follows. The petitioner polled 89 votes while the 2<sup>nd</sup> respondent polled 240 votes. 10 votes were rejected. The two agents of the petitioner demanded that these results be entered in the DR forms and they get a copy. The Presiding Officer together with the rowdy supporters of the 2<sup>nd</sup> respondent instead chased them away.

Bwayo Lawrence the co agent of Nandutu Irene deposed similarly and corroborated her evidence in material particulars. Mwelu Martin was the election supervisor for the parish. He deposed that Nandutu Irene reported to him that the 2<sup>nd</sup> respondent and his supporters were causing



disruptions at the polling station. He came to the polling station and saw one Mukhonde Sam, a supporter of the 2<sup>nd</sup> respondent distributing ballot papers to other supporters. He confiscated a booklet of 50 ballot papers from him and halted the polling exercise. He called in the Sub County Election Supervisor Wotti Ronald.

When Wotti Ronald arrived Mwelu explained the irregularities at the polling station including the non eligible voting, threatening and intimidating voters, etc. He handed over the booklet of ballot papers which he confiscated from Mukhonde Sam to Wotti Ronald. Wotti Ronald promised to handle the matter with the Presiding Officer and directed Mwelu to the sub county headquarters, where he immediately transferred him and assigned him duties in Bukewa parish.

The petitioner in paragraph 27 of his affidavit in support deposed that he requested the RO to provide him the DR forms and results tally sheets for the three impugned polling stations, but none was availed. Later the RO gave the petitioner a copy of the tally sheet and referred him to the 1<sup>st</sup> respondent.

He instructed his lawyers to seek the same, and they did so but neither the RO nor the 1<sup>st</sup> respondent availed them. Copies of the letters from the lawyers were tendered in evidence, and they were not denied. The tally sheet which the RO provided showed that at Shamukunga polling station the petitioner got 39 votes while the 2<sup>nd</sup> respondent got 290 votes.

Salim Kazindo was the RO of Manafwa District where Buwagogo subcounty is situate. He deposed that voting was regular proper and fair at the polling stations in the subcounty. He averred that there was no comment or complaint at the back of the DR forms for Shamukunga polling stations showing that the agents of the petitioner were coerced into signing before close of polling.

That was rather obvious as those who had the means of coercion, if this indeed happened, obviously could not expose the same so forthrightly by giving the opportunity of those being coerced to also indicate this on the DR form.

The RO only tallied the results which he received them from his agents in the field. If the falsification was done in the field as was alleged at Shamukunga polling station, what the RO therefore received and tallied were the falsified results. His averments in paragraph 5(a) of his



affidavit that the petitioner received 39 votes and the 2<sup>nd</sup> respondent got 290 votes at Shamukunga polling station are of little help in resolving this issue.

Bukuwa Stephen Katenya was the Presiding Officer at Shamukunga polling station. He denied that allegations of voter harassment and intimidation, violence, multiple voting or the ineligible voting at his polling station. He denied any coercion and that the DR forms were duly signed by all the agents of the candidates after the counting and announcement of results. What was not answered was the question why the two agents of the petitioner did not have at least one copy of the DR form, and why the RO refused to show or even avail the same even after being so requested by the petitioner and his lawyer. Interesting that months later these forms properly filled and certified surfaced, but none from the petitioner who so repeatedly and assiduously sought them.

Wanokoli Michael was the election constable at Shamukunga polling station. He denied any voter intimidation, harassment and violence or coercion during his watch at his polling station. The constable did not mention the incident between Mwelu and Wotti Ronald which led to the transfer of the former. Certainly that was some chaos as Wotti Ronald the Sub County Election Supervisor admitted in his affidavit. The constable was only trying to fall in line with the depositions of his bosses to show that all went according to the book.

Wotti Ronald was the Sub County Election Supervisor. Nandutu Irene reported two complaints to him about Shamukunga polling station. He only mentioned one about the non eligible voting. He did not disclose the second complaint or how he dealt with it, if at all.

Wotti Ronald conceded that Mwelu Martin called him to sort out problems at Shamukunga polling station where there were allegations of the non eligible voting, voter harassment and intimidation. He deposed that he 'hastily rushed' to the scene and that there was no one in possession of ballot papers or a complete booklet, and none was handed to him as alleged by Mwelu.

He deposed that there was 'no chaos whatsoever'. But he averred that Mwelu was causing confusion at the polling station, and he instructed him to proceed to Bukewa parish where he had been posted. Confusion means disorder. Chaos means confusion, bedlam, disorder,



pandemonium. To say that Mwelu was causing confusion but deny that there was chaos is a contradiction. It is an admission of chaos at the polling station.

Masaba Francis was a voter at that polling station. He annexed his voter ID card. He deposed that he voted and in the evening he was present when the votes were counted and the results announced. The Presiding Officer announced that the petitioner got 89 votes while the 2<sup>nd</sup> respondent got 240 votes.

I was not impressed by the denials of the 1<sup>st</sup> respondents agents that there was no vote results falsification at Shamukungu polling station. There was no doubt that there was chaos at that polling station. Those present at the counting and announcement of results testified to results different from those which the RO tallied. The complaint that there was results falsification at Shamukungu polling station was proved to courts satisfaction.

#### **Voter intimidation, harassment and violence.**

The allegation in this regard was restricted to Shamukungu polling station where it was alleged that the 2<sup>nd</sup> respondent and his supporters harassed and intimidated the supporters of his opponent such that some were beaten and others were chased away and did not vote for the candidate of their choice.

Nandutu Irene and Bwayo Lawrence were agents of the petitioner at this polling station. They deposed in their respective affidavits that the 2<sup>nd</sup> respondent arrived at that polling station at about 10.00 am, in company of his supporters including Makhonde Sam, and they disrupted polling. They picked ballot papers from the Presiding Officer, distributed them among themselves and started casting those ballot papers into the ballot box. The supporters of the petitioner were threatened with beating.

Wananda David was a voter at that polling station and a supporter of the petitioner. He was in the queue waiting to cast his vote when the 2<sup>nd</sup> respondent arrived with his supporters who demanded for ballot papers so they could vote. He and other supporters of the petitioner were intimidated and many including his wife felt so intimidated, they ran away without voting. He resisted the threats and harassment and for his efforts Mweru William one of those who came in the company of the 2<sup>nd</sup> respondent beat him up. He eventually ran away without voting.

Marofu Martin was another supporter of the petitioner who was chased away from Shamukunga polling station by one of the supporters of the 2<sup>nd</sup> respondent. He witnessed the arrival of the 2<sup>nd</sup> respondent with his supporters including Makhonde Sam who identified him as a supporter of the petitioner and chased him away from the polling station.

Mwelu Martin was a parish election supervisor, and according to the posting instructions, he was posted at another parish of Bulewa. He was however at this polling station and he witnessed the chaos at Shamukunga polling station, he rang the Sub County Election Supervisor one Wotti Ronald and reported to him the goings on at that polling station. The said Wotti Ronald indeed came and eventually left after discussing with the Presiding Officer. I have dealt with the averments of Wotti Ronald earlier in this judgment.

Kutosi Robert the agent of the 2<sup>nd</sup> respondent deposed that there was no voter intimidation. Obviously the supporters of his candidate could not have been intimidated as the claim was that the victims were the supporters of the petitioner.

The police constable equally denied voter intimidation. I have already dealt with his depositions. The same may be said of the RO and the Presiding Officer. these were all agents of the 1<sup>st</sup> respondent. Their averments would be taken with caution as they had to support their employer. In any event, any decision for the petitioner would be a condemnation of their efficacy at their post.

The 2<sup>nd</sup> respondent in his affidavit deposed that he read all the affidavits in support of the petition. He did not deny that he was at Shamukunga polling station about 10.00am on polling day with his supports including Makhonde Sam and Mweru Simon. These are some of the agents who were identified as having intimidated, beaten and chased away some of the supporters of the petitioner.

On a balance of probabilities I was satisfied that there was voter intimidation and harassment at Shamukunga polling station. That complaint was proved to courts satisfaction.



**WHETHER THE NON COMPLIANCE AND FAILURE AFFECTED THE RESULTS OF THE ELECTION IN A SUBSTANTIAL MANNER**

The finding of the court was that at Rurwa polling station there was falsification of results to the extent that the petitioner was credited with 54 votes rather than the 174 he actually received. At Shamukunga polling station the petitioner was credited with 39 votes rather than the 89 votes he actually got. That was a total of about 150 votes. The difference of votes between the winning candidate and the runner up was only 31 votes. To this was added the intimidation of voters at Shamukunga polling station where people were denied the right to vote by rowdy supporters of the 2<sup>nd</sup> respondent. The non compliance and failure therefore had a substantial effect on the results of the election. One need not go any further into that. The 2<sup>nd</sup> issue is answered in the positive.

**WHETHER THE 2<sup>ND</sup> RESPONDENT COMMITTED ILLEGAL PRACTICES OR ELECTORAL OFFENCES PERSONALLY OR BY HIS AGENTS WITH HIS KNOWLEDGE AND CONSENT OR APPROVAL.**

This was the 3<sup>rd</sup> issue. It was alleged that the 2<sup>nd</sup> respondent committed the electoral offence of undue influence c/s 154 of the Local Government Act. It was contended that at Shamukunga polling station the 2<sup>nd</sup> respondent with his supporters intimidated, threatened and scared away the supporters of the petitioner from casting their votes. The evidence was from Nandutu Irene and Bwayo Lawrence the two agents of the petitioner at Shamukunga polling station. They deposed that the 2<sup>nd</sup> respondent stormed the polling station with his supporters. They confronted the Presiding Officer and demanded that they vote. In the process the supporters of the petitioner were chased away, another one was beaten.

The 2<sup>nd</sup> respondent was present at the polling station during the morning time. He did not deny this in his affidavit. What was denied was that there was chaos at that polling station. I found earlier in this judgment that there evidence before court that there was chaos at that polling station. This chaos was caused by the supporters of the 2<sup>nd</sup> respondent and particularly Makhonde Sam and Mwere Simon. The supporters of the 2<sup>nd</sup> respondent must however be shown to have acted with the knowledge and consent or approval of the 2<sup>nd</sup> respondent.

The evidence from Nandutu Irene and Bwayo Lawrence was that in the afternoon when the supporters of the 2<sup>nd</sup> respondent returned to Shamukunga polling station and chased away the supporters of the petitioner, the 2<sup>nd</sup> respondent was not with them. There was no evidence that the 2<sup>nd</sup> respondent had knowledge of what his supporters were doing at that polling station or that he gave his consent or approval to whatever they were doing.

The consequences of the proof of an electoral offence are dire. One electoral offence would suffice to have the election annulled. This is borne out from the language of S.139 (c) of the Local government Act. There would have to be proof which is higher than in ordinary civil suits for court to make a finding that the electoral offence was proved to the satisfaction of court. The court in the present case was not satisfied that the 2<sup>nd</sup> respondent had knowledge of the electoral offence of undue influence or that he gave his consent or approval. That issue is decided in the negative.

#### REMEDIES

The court found that there was non compliance with the electoral laws and that the non compliance and failure affected the results of the election in a substantial manner. I therefore find and order that the 2<sup>nd</sup> respondent was not validly elected as Chairperson of Buwagogo LC III Local Government Council. The election is set aside. A fresh election is hereby ordered. The petitioner shall have the costs of the petition, and these shall be paid by the 1<sup>st</sup> respondent.

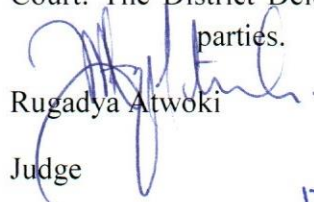


Rugadya Atwoki

Judge

04/10/2011.

Court: The District Delegate or Deputy Registrar of the court shall read this judgment to the parties.



Rugadya Atwoki

Judge

04/10/2011.

Read and explained to  
the parties in open court by  
Anguaria Mores, The District  
Registrar, Tabora court.

04/10/2011