

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MASAKA  
IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT, AS AMENDED  
AND  
THE PARLIAMENTARY ELECTIONS (ELECTION PETITIONS) RULES  
AND  
IN THE MATTER OF THE ELECTORAL COMMISSION ACT  
AND  
IN THE MATTER OF THE PARLIAMENTARY ELECTIONS FOR MEMBER OF  
PARLIAMENT FOR BUKOTO SOUTH CONSTITUENCY, HELD ON THE 18<sup>th</sup> FEB.  
2011**

**ELECTION PETITION No. 0006 OF 2011**

**BIREKERAAWO      MATHIAS      NSUBUGA      .....**  
**PETITIONER**

***VERSUS***

**MUYANJA      MBABAALI      .....**  
**RESPONDENT**

**BEFORE THE HON. MR JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO**

**JUDGMENT**

Birekeraawo Mathias Nsubuga (the Petitioner herein) and Muyanja Mbabaali (herein the Respondent), together with four others, contested for the Bukoto County South Constituency of Lwengo District, in the Parliamentary elections held on the 18<sup>th</sup> February 2011; in which the Respondent was returned as the successful candidate. The Petitioner brought this action, pleading with this Court to annul the said results; and order for fresh elections, on the sole ground that the Respondent was not qualified to be so elected, as he did not have the requisite minimum Advanced Level standard of education or its equivalent; hence, his election contravened the provisions of section 4 of the Parliamentary Elections Act.

The Petitioner averred, first, that the Respondent had fraudulently presented false academic documents at the time of his nomination for election as Member of Parliament for Bukoto County South Constituency; for which reason, his election was invalid, null, and void for want of the requisite academic qualifications. Second, was that the degree certificate of Nkumba University, the Respondent presented for his nomination, had been awarded to him consequent upon his admission to the University basing on a purported Diploma in Public Administration and Management of S.I.T International College, Malaysia; which, however, had been forged.

In compliance with the strict requirement of the law that particulars of any fraud alleged in a party's pleadings must be set out therein, the Petitioner particularised the alleged acts of fraud, as follows; that: –

- (a) S.I.T International College of Malaysia, which the Respondent claimed had awarded him a Diploma in Public Administration and Management, has never offered such a course at all.
- (b) The Respondent has never, at all, been admitted or registered as a student of S.I.T International College of Malaysia, from which he purports to have attained the said Diploma in Public Administration and Management,.
- (c) Owing to the fact that Nkumba University admitted the Respondent on the basis of the forged Diploma certificate purportedly from S.I.T International College of Malaysia, his admission to Nkumba University was wrongful and unlawful as it was done without the exercise of due diligence; and accordingly, the degree certificate awarded to him was invalid.

The Petitioner averred further that when the Respondent submitted the Malaysian Diploma certificate to the National Council for Higher Education (hereinafter referred to as the NCHE) for verification as equivalent to 'A' Level standard of education, the NCHE discovered the fraud stated above and declined to equate the said certificate with the 'A' level standard; following which it directed the Vice Chancellor of Nkumba University to withdraw the degree certificate the University had awarded the Respondent. The Petitioner also averred that he brought the matter of fraudulent Diploma certificate and invalid degree certificate to the attention of the Electoral Commission which, however, upheld the Respondent's nomination; regardless.

Accordingly, then, the Petitioner sought the following reliefs and remedies from this Court; namely: –

- (i) A declaration that the Degree certificate awarded to the Respondent by Nkumba University is null and void.
- (ii) A declaration that, consequently, the Respondent does not hold the necessary or required qualifications to be elected as a Member of Parliament.
- (iii) An order nullifying the election of the Respondent as the Member of Parliament for Bukoto South Constituency; and declaring the parliamentary seat vacant.
- (iii) An order awarding costs of the petition, to the Petitioner.

The Petitioner swore an affidavit dated the 24<sup>th</sup> March 2011; which supported and accompanied the petition. He deposed therein, amongst other things, reiterating that in the Bukoto County South Constituency Parliamentary elections, the Respondent who was returned and gazetted as the duly elected candidate had presented, for his nomination, a Nkumba University degree certificate; which was illegal, null and void. He attached the following annexures to this affidavit: –

- (a) A copy of The Uganda Gazette dated 7<sup>th</sup> March 2011, in which the Parliamentary election results for Bukoto County South Constituency was published by the Electoral Commission; marked ‘A’.
- (b) A certified copy of a Bachelor of Public Administration and Management degree certificate awarded to the Respondent by Nkumba University on the 17<sup>th</sup> April 2004; marked ‘B’.
- (c) A letter from the Academic Registrar Nkumba University (Associate Prof. W. Muyinda Mande), to the Assistant Executive Director of the NCHE (Mr. Yeko W. Acato), dated the 13<sup>th</sup> August 2010; marked ‘C’.
- (d) A certified copy of a Diploma in Public Administration and Management certificate awarded to the Respondent by S.I.T International College on the 16<sup>th</sup> of August 2000; marked ‘D<sub>1</sub>’.
- (e) A certified copy of an academic transcript for the award of Diploma in Public Administration and Management; issued to the Respondent by S.I.T International College; marked ‘D<sub>2</sub>’.
- (f) A NCHE application form filled by the Respondent, for certificate of equivalence; marked ‘E’.

- (g) Correspondences between Yeko Acato of the NCHE and Dennie Yong of HELP International College of Technology, Malaysia, dated 19<sup>th</sup> to 24<sup>th</sup> August 2010; together marked 'F' and 'G'.
- (h) A letter from Narajana Jantan (The Registrar of HELP International College of Technology), to Hajah Noraihan Haji Mohamad Adnan (the Honorary Consul of the Republic of Uganda), dated the 13<sup>th</sup> December 2010; marked 'H'.
- (i) A letter dated the 3<sup>rd</sup> September 2010, from Prof. Michel Lejeune (Deputy Executive Director NHCE) to the Vice Chancellor Nkumba University; marked 'I'.
- (j) A letter from M/s Muwema & Mugerwa Advocates to the Chairperson of the Electoral Commission; dated the 17<sup>th</sup> December 2010, marked 'J<sub>1</sub>'.
- (k) A letter from Eng. Dr. Badru Kiggundu (Chairman Electoral Commission) to M/s Kamba & Co. Advocates, and M/s Muwema & Mugerwa Advocates, dated the 3<sup>rd</sup> January 2011; marked 'J<sub>2</sub>'.

Hajah Noraihan Haji Mohamad Adnan (The Honorary Consul of Uganda in Malaysia) swore an affidavit dated the 24<sup>th</sup> March 2011, which accompanied the petition, deposing in it that she obtained information in a letter from the Academic Registrar of S.I.T International College (now renamed HELP International College of Technology) copy of which was attached, marked 'A', refuting the alleged registration of the Respondent as a student of or graduation from the College; and that the College had never run a Diploma in Public Administration & Management course.

The Petitioner swore a supplementary affidavit dated the 4<sup>th</sup> of April 2011, in which he deposed that on establishing that the Respondent had applied for a certificate of equivalence from the NCHE, he caused his lawyers to write to the NCHE (a copy attached; marked 'A') requesting for copies of all the documents the Respondent had submitted in the application for a certificate of equivalence; which Mr. Yeko Acato of the NCHE did, and also informed him together with his lawyers that the Respondent's Malaysian Diploma certificate was not authentic.

On the 4<sup>th</sup> of May 2011, David Bbaale swore an affidavit in support of the petition deposing therein that in response to his inquiry by letter dated 11<sup>th</sup> November 2010 (annexed, marked 'A'), Mr. R. Nsumba Lyazi of the Ministry of Education, in his letter dated 12<sup>th</sup> November 2010, clarified that the Ministry of Education records showed that ME/22/2529, dated 29<sup>th</sup>

December 1999, is the License No. for Amka Classic Secondary School; Registration No. PSS/A/29, of May 1998, is for Apex College; and License No. ME/22/2067 is for Apas Secondary School which was subsequently registered under Registration No. PSS/A/32 on the 24<sup>th</sup> November 1998.

The Respondent replied to the petition denying all the adverse allegations and contentions made therein; particularly contending that at the time of the elections he had the minimum academic qualification required by law; and that for his nomination, he presented valid academic documents which were namely: a Higher Diploma Certificate in Accountancy which he had obtained from the Association of Professional Accountancy Students (hereinafter referred to as APAS) on the 3<sup>rd</sup> September 1988, and a Degree Certificate in Public Administration and Management from Nkumba University. He attached a copy of a cluster of the nomination papers; together marked 'B'.

He contended further that his admission to Nkumba University was proper, valid, and lawful; as it had been based on the APAS Higher Diploma certificate, Mature Age Entry, Work Experience, and DATAPRO Institute; and NOT on the Diploma from S.I.T. Hence, the University exercised due diligence by evaluating his APAS and DATAPRO diploma certificates for his admission. He attached a copy of his application form for the University entrance; marked 'C'. He contended also that since he had a degree certificate from his admission based on APAS diploma, which the NCHE had not cancelled, he had no need for any verification by the NCHE. He accordingly prayed that the petition be dismissed with costs, and his election be upheld.

He made an affirmation in an affidavit dated the 8<sup>th</sup> of April 2011, in support of and accompanying the reply to the petition; in which, inter alia, he emphasised that for his nomination, he had presented valid academic documents which were the APAS Higher Diploma in Accountancy, and a degree certificate of Nkumba University. He affirmed further that his admission to Nkumba University was based on his APAS Diploma in Accountancy, a Diploma in Business Administration from DATAPRO Institute, and his work experience. He contended that his qualifications were higher than Advanced Level, and were obtained in Uganda, so, verification of the certificates by the NCHE, required under section 4(13) of the Parliamentary Elections Act, was not necessary.

He also affirmed that neither APAS nor Nkumba University have cancelled their awards to him. To his affidavit were attached a copy of each of the following documents: degree certificate of Nkumba University, marked 'A<sub>x</sub>'; APAS Diploma Certificate, marked 'B<sub>x</sub>'; and his application for admission to Nkumba University, marked 'C<sub>x</sub>'. Harrison Ojambo, a former Registrar at DATAPRO Business Institute, in his affidavit dated the 8<sup>th</sup> April 2011, deposed that the Ministry of Education licensed the Institute in 2000 to award Higher Diplomas and Certificates in Business Administration. He confirmed that the Respondent was his student who obtained an authentic Diploma in Public Administration therefrom.

Martin Musoke (Returning Officer, Lwengo District), in his affidavit dated 8<sup>th</sup> of April 2011 confirmed that during nomination, the Respondent presented the original and certified copies of a degree certificate of Nkumba University, and an APAS Higher Diploma in Accountancy. Francis Mpairwe Kakuru, a Legal Officer of Kampala City Council, deposed in his affidavit dated the 8<sup>th</sup> of April 2011, that he was a former Lecturer and Principal/Registrar of APAS which had been licensed by the Ministry of Education and was a duly recognised institution. He confirmed, as former Director of APAS, that the Respondent was one of his students; and the Higher Diploma in Accountancy he had from APAS was authentic.

On the 4<sup>th</sup> May 2011, the Petitioner swore an affidavit in rebuttal of the Respondent's; pointing out that in Part II of the Respondent's application for admission to Nkumba University (annexture 'C' to the Respondent's reply and 'C<sub>x</sub>' to the accompanying affidavit), he listed the institutions he had attended, in a descending order; beginning with Nkumba University at the top. He pointed out that in the list, APAS was strangely located below the Primary School instead of between Mengo Secondary School and DATAPRO Institute; and that from the letter of the Academic Registrar of Nkumba University to Yeko Acato, (annexed; marked 'R<sub>2</sub>'), the University had admitted the Respondent on the basis of a Diploma in Public Administration and Management.

By his affidavit dated the 24<sup>th</sup> May 2011, in reply and rebuttal of the adverse depositions in the Petitioner's supplementary affidavit, and as well that of Bbaale David in support of the petition, the Respondent reiterated that it was his degree certificate and the APAS Higher Diploma, both issued by Ugandan institutions, which he had presented for his nomination (copies of the two certificates and the nomination form attached, respectively marked 'A<sub>1</sub>', 'A<sub>2</sub>', and 'B<sub>1</sub>'). He affirmed further that hitherto, when clearing various candidates, NCHE had in their letters (annexed; marked 'A<sub>3</sub>' to 'A<sub>7</sub>'), validated APAS certificates as authentic

and higher than 'A' Level certificate. He therefore raised the plea of estoppel against the NCHE for stating otherwise.

He denied that placing APAS qualification at the bottom of the list of qualification in the University entrance application was an afterthought, contending that there was no requirement that the listing of academic qualifications be in any order. He relied on the explanation given by Assoc. Prof. Wilson Muyinda Mande (Academic Registrar Nkumba University) in his letter to his (Respondent's) lawyers (copy annexed; marked 'A<sub>9</sub>') regarding the basis upon which he (Respondent) had been admitted to Nkumba University. He conceded that he had not sat for Mature Age Exams; as there was no need for it, owing to his other qualifications including Higher Diploma from APAS; and that Mr. Yeko Acato of the NCHE had, by in his letter (annexed; marked 'A<sub>10</sub>'), confirmed the existence of APAS.

Hon Mwesigwa Rukutana (then the State Minister for Higher Education) in his affidavit dated 20<sup>th</sup> May 2011, deposed that APAS had been his clients from 1981 to 2003; and was duly recognised and registered by the Ministry of Education, and offered Higher and Ordinary Diploma courses in Accountancy and Certificates in Secretarial Studies. Asasira K. Bosco, in his affidavit dated 24<sup>th</sup> May 2011, deposed that Yeko Acato of the NCHE gave him certified copy of letter of classification, and of other letters he had written in the past to other institutions that APAS had existed (annexed and marked 'K<sub>1</sub>' 'K<sub>2</sub>', 'K<sub>3</sub>', 'K<sub>4</sub>', and 'K<sub>5</sub>').

In his further affidavit, dated the 24<sup>th</sup> May 2011, Francis Mpairwe Kakuru retracted his earlier deposition that the Registration No. of APAS was PSS/A/29 ME/22/2529. He attributed this to an error on his part as he had based himself on his recollection. He stated that, otherwise, the correct Registration and Classification of APAS was No. ME/22/637. Nsubuga Kevin Charles, a Legal Assistant at the law firm representing the Petitioner, swore an affidavit on the 23<sup>rd</sup> May 2011; and attached thereto certified copies of various documents obtained from the NCHE, pertaining to the Respondent's academic qualifications, marked 'C<sub>1</sub>' to 'C<sub>10</sub>'.

Learned Counsels for the parties then filed a Joint Scheduling Notes as directed by Court. They each restated the parties' cases as contained in their respective pleadings; and agreed that Court relies on the documents attached to the various affidavits. They were also in agreement with regard to the following facts; namely that:—

- (a) Both the Petitioner and the Respondent were nominated and contested for the Parliamentary seat of Bukoto County South Constituency in the Parliamentary elections held on the 18<sup>th</sup> February 2011.
- (b) The Respondent presented a Bachelor of Public Administration and Management degree certificate of Nkumba University and a Diploma in Accountancy from APAS, during his nomination for the Parliamentary election, as evidence of his academic qualification.
- (c) The Respondent does not have any Higher School Certificate awarded by any recognised school in Uganda.
- (d) The NCHE never issued the Respondent with any certificate of equivalence for his nomination.
- (e) The Returning Officer declared the Respondent the successful candidate; following which, the Electoral Commission gazetted the return on the 7<sup>th</sup> March, 2011.

However, the following facts were in controversy; namely that: –

- (i) At the time of his nomination, the Respondent was not academically qualified to be nominated and elected as Member of Parliament.
- (ii) The Respondent's nomination was partly on the basis of his purported APAS Diploma Certificate in Accountancy Studies.
- (iii) The Respondent procured his nomination on the basis of fraudulently tainted or erroneous and invalid academic qualifications.

They also procured the Court's assistance to summon certain named witnesses for cross examination. Consequently, the issues framed for determination by this Court were thus: –

1. Whether the Respondent's purported Diploma Certificate from S.I.T International College, Malaysia, is fraudulent and invalid.
2. Whether the Respondent's admission to Nkumba University and subsequent award of the degree in Public Administration and Management, was valid.
3. Whether at the time of his nomination, the Respondent possessed a minimum formal education of Advanced Level Standard or its equivalent as required by law.

Following the cross examination of the witnesses whom Counsels had caused Court to summon for that purpose, learned Counsels for the respective parties addressed Court in very



passionate and persuasive final submissions on the evidence adduced in Court; replete with authorities on the law applicable, with regard to this matter before me; all of which I found to be of enormous use. I am obliged to state here that the skill and decorum with which Counsels conducted themselves, in pursuit of their respective client's interests, were highly commendable. I now proceed to deal with each of the issues framed for determination by this Court: –

**Issue No. 1.                    Whether the Respondent's purported Diploma Certificate from S.I.T International College, Malaysia, is fraudulent and invalid.**

In his affidavit sworn on the 24<sup>th</sup> March 2011, and which accompanied the petition, the Petitioner attached the following documents as forming the basis for his petition: –

- (a) A certified copy of a Diploma in Public Administration and Management certificate from S.I.T International College of Malaysia dated the 16<sup>th</sup> of August 2000; marked 'D<sub>1</sub>'.
- (b) A certified copy of an academic transcript for the Malaysian Diploma in Public Administration and Management, showing that the Respondent had completed the course on 4<sup>th</sup> August 2000 and graduated on 16<sup>th</sup> August 2000; marked 'D<sub>2</sub>'.
- (c) Correspondences between Yeko Acato of the NCHE and Dennie Yong of HELP International College of Technology, Malaysia, dated 19<sup>th</sup> to 24<sup>th</sup> August 2010, and together marked 'F' and 'G', in which Mr Yong in response to Mr Acato's inquiry for verification of the Respondent's Diploma award, vehemently denied that the Respondent was ever a student of S.I.T International College (now known as HELP International College of Technology), or that the College had ever offered a programme in Public Administration and Management.
- (d) A letter dated the 13<sup>th</sup> December 2010, from Narajana Jantan (The Registrar of HELP International College of Technology), to Hajah Noraihan Haji Mohamad Adnan (the Honorary Consul of Uganda), marked 'H', refuting the claim that the Respondent had ever been a student of S.I.T International College; and stating that S.I.T International College never offered a Diploma in Public Administration and Management programme.

Hajah Noraihan Haji Mohamad Adnan (The Honorary Consul of Uganda in Malaysia), in her affidavit dated 24<sup>th</sup> March 2011, which accompanied and supported the petition, deposed that

at the request of NCHE she obtained information from Madam Narajana Jantan (Academic Registrar of S.I.T International College, renamed as HELP International College of Technology), a copy of which was attached marked 'A', refuting the claim that the Respondent was ever registered as a student of, or graduated from S.I.T International College, as his name was nowhere in their records; and furthermore, that the College had never offered a Diploma in Public Administration and Administration course.

Nsubuga Kevin Charles, a Legal Assistant at the law firm representing the Petitioner, attached to his affidavit dated the 23<sup>rd</sup> May 2011, certified copies of the following documents obtained from the NCHE, pertaining to the Respondent's academic qualifications: –

- (i) The Respondent's application to NCHE for certificate of equivalence; marked 'C<sub>1</sub>'.
- (ii) E-mail correspondence between Yeko Acato of NCHE and Dennie Yong Weng of HELP International College of Technology Malaysia; marked 'C<sub>3</sub>'.
- (iii) Annexure– Respondent's Academic Transcript from S.I.T International College; marked 'C<sub>5</sub>'.
- (vi) Letter from an Assistant Academic Registrar of S.I.T International College verifying that the Respondent got a Diploma from the College; marked 'C<sub>6</sub>'.
- (vii) Letter from Francis Mpairwe Kakuru (former Registrar/Principal) on APAS letterhead, but without any address whatever; marked 'C<sub>8</sub>'.
- (viii) Letter from Nkumba University to NCHE stating that the Respondent's admission to Nkumba University had been on the basis of his Diploma in Public Administration and Management; marked 'C<sub>9</sub>'.
- (ix) Respondent's Diploma Certificate from S.I.T International College; marked 'C<sub>10</sub>'.

Ambassador Yeko Acato (Executive Secretary of the NCHE) who testified as PW1 also impugned the Respondent's Malaysian Diploma award, stating that he had established from S.I.T International College by e-mail as shown in the petition, and affidavit of Nsubuga Kevin Charles, that this claim was not authentic. The Petitioner's Counsel submitted that all this established a prima facie case that the Respondent's Malaysian Diploma certificate was invalid; and this shifted the evidential burden to the Respondent to prove the validity of that award.

In his pleading and accompanying affidavit, the Respondent made no reference to the validity of the impugned Malaysian Diploma certificate. He instead justified his nomination as having

been based on his APAS Diploma certificate and the Nkumba University degree certificate. It was when being cross examined, as DW1, that he testified that S.I.T International College, Malaysia awarded him a Diploma certificate in Public Administration and Management in 2000, following his pursuit of the course by correspondence; and that he had been linked to the institution by a Malaysian business colleague.

His Counsel argued that the communication from the College to the NCHE and the Ugandan Malaysian Consul, was inadmissible hearsay evidence which Court should reject, and therefore make a finding that the Petitioner had failed to discharge the burden of proving his assertion, in accordance with the provisions of sections 101 and 102 of the Evidence Act (Laws of Uganda, 2000 Edition), which makes it incumbent on the person who alleges a matter to adduce evidence in proof of that allegation. I do agree with learned Counsel for the Respondent that the import of the provisions of sections 101 and 102 of the Evidence Act, is to place the burden of proving a fact on the person who alleges it.

The principle of law on where the burden of proof lies, contained in the two cited sections of the Evidence Act, is extended as a special provision in section 106 of the Evidence Act, which is specific to civil proceedings. It provides as follows: –

*“106. In civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person”*

There is now a rich corpus of decisions by our Courts authoritatively supporting this proposition of the law. In ***Abdul Balingira Nakendo vs Patrick Mwendha, Supreme Court Election Petition Appeal No. 9 of 2007***, which, as with the instant case before me, was on the issue of impugned academic certificates, Katureebe JSC authoritatively pointed out that:

*“... the duty to produce valid certificates to the electoral authorities lies with the intending candidate for election. Where the authenticity of those certificates is questioned, it can only be his burden to show that he has authentic certificates.”*

There are other authorities in support of this proposition of law, which were cited by Counsel for the Petitioner. These are: ***Anifa Kawooya vs Kabatsi, Election Petition No. 1 of 2006*** (per Mukiibi J. at p.25); ***Haji Muluya Mustafa vs Alupakusadi Waibi Wamulongo, Election Petition No. 22 of 1996***, where Byamugisha J. (as she then was) at p.13 stated that since the

fact in dispute was within the knowledge of the Respondent, the Petitioner needed only to throw reasonable doubt on it); ***Rashid Bovule Iga & Manoa Achille Milla vs Olega Asaf Noah & Ors, Election Petitions No. 1&2 of 2001***, where Opio – Aweri J. at p.8 stated that the burden of proof may shift to the Respondent when a prima facie case has been established by the Petitioner; ***Babu Edward Francis vs The Electoral Commission & Elias Lukwago; Kampala Election Petition No. 10 of 2006***, per Arach – Amoko J. (as she then was).

The provision of section 106 of the Evidence Act is an extension of the provisions of sections 101 and 102; and treats a Respondent who is being challenged over a fact in his or her possession as the person asserting the truth of that fact, and must therefore prove it. Once the person contending that a document is invalid establishes a prima facie case, it shifts the evidential burden and necessitates proof to the contrary by the person in possession of that special knowledge and who asserts the fact of the document. This shift of evidential burden, encapsulated in section 106 of the Evidence Act, is only an ephemeral duty; the discharge of which shifts the burden back to the person contending otherwise to prove the adverse assertion in accordance with the provisions of sections 101 and 102 of the Evidence Act.

Discharge of the evidential burden makes it incumbent on the person who asserts to the contrary, to convincingly, and on a balance of probabilities, prove the assertion by controverting, or negating the facts which were adduced in discharge of the evidential burden, if he or she is to succeed. In the matter before me, it was the Respondent who submitted his Malaysian Diploma certificate together with the academic transcript to the NCHE for verification and equating with an ‘A’ Level Standard of education of Uganda. Alongside this was the letter from one Nara Jantana, named as the Assistant Academic Registrar of S.I.T International College, dated the 19<sup>th</sup> August 2010, certifying the validity of the award.

In the exercise of its statutory duty to establish the validity of this award, the NCHE sought and obtained information from the Malaysian college that they had no record either of the Respondent’s admission, or of any award to him. Worse still, the information from the college was emphatic that in fact it had never offered the course the Respondent purports to have been awarded a Diploma in by that college. Contrary to the submissions made by Counsel for the Respondent, in presenting to Court evidence of their findings from S.I.T International College both Ambassador Acato and the Ugandan Consul did not adduce hearsay evidence.

If that were so, then the letter from the Assistant Academic Registrar of S.I.T International College would suffer a similar fate. In any case, it is permissible for the affidavit of the Consul, which accompanied the petition, to contain deposition founded on information as this was part of the Petitioner's pleadings. With regard to the evidence adduced by Yeko Acato, at the very least, it adduced evidence of receipt of damning official communication that contrary to the Respondent's claim, his name was nowhere in the College records. Proof of that communication was certainly admissible as direct evidence.

Ambassador Acato testified in Court that when the NCHE confronted the Respondent with their findings from the Malaysian college, he offered no defence. All this sufficiently established a prima facie case; and shifted the evidential burden to the Respondent to negative the findings with cogent contrary evidence. In a bid to discharge this evidential burden, all that the Respondent had was the letter from the Assistant Academic Registrar of the College certifying that he had indeed obtained the impugned award from the College; which was however controverted by the Registrar of the College.

Wilson Muyinda Monday (the Academic Registrar of Nkumba University) testified as PW3, and stated that the Respondent was admitted to the University, by the Admissions Committee of Senate, on the strength of his Diploma in Public Administration and Management from S.I.T International College of Malaysia, APAS Higher Diplomacy in Accountancy, Diploma in Business Management from DATAPRO Institute, and 'O' level certificate from Mengo SSS. He stated further that when Nkumba University made attempts to establish the validity of this award, on being alerted by the NCHE that this diploma certificate was impugned, hence the degree certificate should be cancelled, it failed to access the College as their mails were returned to them by the Postal services.

When the Respondent took the witness stand, he testified that the Malaysian business colleague, who had earlier linked him with the college, informed him that the college had been closed. If it were so, that the school had been closed, then, it would seriously jeopardize the worth of the letter from the Assistant Registrar dated August 2010, which is on S.I.T International College official letterhead. Given the adverse communication from two members of the administration staff of the college (one to the NCHE and the other to Uganda's Consul), I sought to know why he had since then not personally followed the

matter up with the college to establish the authenticity of this award, and lay the matter to rest.

He stunned me with the response that he intended to do so after the conclusion of the Court case! I wondered whether the Respondent really understood the full enormity of the accusation levelled against him; with its probable ramifications. One would have expected him to have spared no effort to secure, and lay before Court, cogent evidence of the validity of the impugned award. He explained in cross examination that his dealings with the college had been by correspondence, right from the despatch of his application forms to him by post; and similarly with the exams, which he did at his pace and place of choosing.

I need not say anything about the quality of the award that would result from such an uncontrolled mode of examination; as it is not in issue in this trial. My take on the Respondent's failure to prove the validity of the award, and thereby discharge the evidential burden which lay on him, is that this was not owing to any difficulty in doing so. In the '*dot com*' era of our present time, he simply had to submit his registration particulars to the college by electronic mail, as the NCHE had effectively done. This course of action he was unable to take as he was cognisant of the futility of doing so. He had failed to defend himself before the NCHE, and to help Nkumba University access the Malaysian College. He knew there was nothing he could do to validate the award he has shamelessly laid claim to.

The purported Diploma award by S.I.T International College was a creature of a fraudulent machination. Evidently, the Respondent was behind the forgery which was committed with his full knowledge, and for his sole benefit. Indeed, as was shown by evidence, he was a beneficiary of the fraud for quite a while; until the moment of reckoning arrived, when he found himself without any more avenues for mischief in this regard. I am satisfied that the Petitioner has proved fraud on the part of the Respondent, beyond a balance of probabilities; and to the standard of proof required in cases of fraud. He has fully discharged the burden of proof that lay on him; hence I resolve issue No. 1 in the affirmative.

**Issue No. 2.                    Whether the Respondent's admission to Nkumba University, and subsequent award of the degree in Public Administration and Management, was valid.**

Although in Part II of his application to Nkumba University, (attached and marked 'C', to his reply to the petition), the Respondent listed S.I.T International College Diploma award as one of his academic attainments), he was categorical that his admission to the University had NOT been on the strength of the Malaysian award; but rather on his APAS and DATAPRO Business Institute Diploma awards of Uganda, as well as Mature Age and Work Experience. He reiterated this position in his affidavit of 8<sup>th</sup> April 2011 which accompanied the reply; to which the Nkumba University application form was attached, and marked 'C<sub>x</sub>'.

However, during cross examination, he retracted this and stated that this had been a mistake as he had intended to state that his admission to Nkumba University had been based **NOT ONLY** on the Malaysian award. The problem with this change of position is that it was not preceded or accompanied by an amendment to the pleadings. The age old need for amendment of pleadings, whenever a party to a suit seeks to state a different position, cannot be over emphasised. It serves the cardinal principle in adversarial litigation that the opposite party must have adequate notice of what the case of the other party is; so as to prepare for it.

For a party to change position in an unceremonious manner is unacceptable as it amounts to an ambush which usually occasions a miscarriage of justice when allowed. This is quite pertinent in the instant case where the Petitioner contends that the validity of the Nkumba University degree award would spring from the validity of the Malaysian award which he asserts was the basis on which the Respondent was admitted to the University. Be it as it may, I think not much turns on this since the retraction is an admission by the Respondent that the Malaysian award was one of the certificates he presented to the University, albeit alongside Ugandan awards, which is clearly intended to ensure that the Respondent is secure in case, as I have found, the Malaysian award turns out to be invalid.

In response to the NCHE which had sought certification of the Respondent's Nkumba University degree certificate, and the basis for his admission to the University, the Academic Registrar of the University (Associate Prof. W. Muyinda Mande), wrote to the Assistant Executive Director of the NCHE (Mr. Yeko W. Acato), on the 13<sup>th</sup> August 2010, authenticating the Nkumba degree certificate (enclosing certified copies of the award and the academic transcript); and stating clearly that the Respondent had been admitted to the degree course in September 2000, on the basis of a Diploma in Public Administration and Management which he had.

Yet, in his letter of 12<sup>th</sup> April 2011 in reply to M/s Mayanja Nkangi & Co. Advocates (annexed, and marked 'A9' to the Respondent's affidavit dated 24<sup>th</sup> May 2011 in reply to the Petitioner's supplementary affidavit), Prof Muyinda Mande stated that the Respondent had been admitted to pursue the degree programme at the University basing on a whole range of considerations which he listed as; Work experience, Diploma in Publication from S.I.T, Diplomacy in Accountancy from APAS, and Diploma in Business Studies from DATAPRO. One would have expected him to have paid similar if not greater attention in responding to the NCHE which he knows very well the law has mandated to ensure compliance with higher education standards; and would have made a similar list.

In his application to the NCHE, dated the 10<sup>th</sup> August 2010, for verification of his academic award and issue of certificate of equivalence, it was the Diploma in Public Administration award which the Respondent entered in the application and sought to be equated with the 'A' Level Standard, as the academic award he had obtained after completion of secondary education; and which he attached to the application. It was only by letter to the Executive Director NCHE, dated 17<sup>th</sup> September 2010, that he belatedly submitted his APAS Diploma certificate for consideration; explaining that this was so because since the College had been closed he had been of the mistaken view that the certificate might not be taken as valid.

One would rightly wonder whether the Academic Registrar, Nkumba University, took the letter from the NCHE regarding the admission of the Respondent seriously. To his full knowledge, and this he admitted, it is the NCHE which is charged with the statutory duty of ensuring standards for higher education in Uganda. He could not have treated their official inquiry lightly and replied them basing on his recollection as if from the golf course while headed for the 9<sup>th</sup> hole. He must have had the application form before him from which he made the reply. He was aware that the Respondent had listed the range of academic qualifications while seeking admission.

He no doubt consciously established that the basis for the admission of the Respondent to the University had been the Diploma certificate said to have been awarded by S.I.T International College of Malaysia, owing to the relevance of the Diploma award to the course the Applicant was seeking to be admitted for. In fact on the basis of this, Prof. Michel Lejeune (Deputy Executive Director of the NHCE) in a letter dated the 3<sup>rd</sup> September 2010 to the Vice Chancellor Nkumba University, following an earlier meeting between them, requested that



the Respondent's and Hon Anifa Kawooya's degree award be withdrawn for want of authenticity of the certificates upon which they were admitted to the University.

It is at this point that I must address myself to the entries the Respondent made in the University entry application as the courses he had pursued after 'O' Level. He admitted what is quite evident; that the ink used for entering the word APAS in the University entry application is manifestly different from the one used in entering the names of the other institutions. His explanation was that the first pen he was using had run out of ink, and he had to use another; other than that he had omitted to include APAS in the listing of the institutions, and did so later by inserting it at the bottom of the list.

Had that been his explanation, I would have thought nothing much about it, as I believe this can and indeed does happen often. However, here, APAS is entered twice; namely under Part II (a) where the institutions are listed, and II (b) where provisions are made for particulars of the results of the awards of those institutions. In part II (b), the word APAS appears again in different ink from 'S.I.T Diploma' and 'DATAPRO B/INSTITUTE'. This is curious. What I fail to understand is why the Respondent's pen would treacherously run out of ink each time he was writing the word 'APAS'! The truth of the matter seems to be that the inclusion of APAS was an afterthought.

His contention that there was no requirement that he enters the institutions he had attended in any order is not borne out by the instruction in the application form to the contrary; which was quite plain and clear. In light of the fact that the initial exclusion of APAS is apparently not isolated to the University entrance application, as this was repeated while seeking to have his Diploma awards equated with 'A' Level, the logical conclusion one can make is that the insertion of the APAS award in the University entrance form was an afterthought necessitated by the realisation that the Malaysian award had failed to pass the stringent scrutiny it was subjected to by the NCHE. It must have been fraudulently done recently to plug the gaping hole left by the futile reliance on the Malaysian award.

After making the finding that the Malaysian award was invalid, I need to consider the validity of APAS and DATAPRO awards for admitting the Respondent to Nkumba University.

**(i) APAS Diploma Certificate.**

The Respondent contended in his reply to the petition that he obtained a Higher Diploma Certificate in Accountancy from the Association of Professional Accountancy Students (APAS) on the 3<sup>rd</sup> September 1988. He reiterated this in his affidavit of 24<sup>th</sup> May 2011. While the NCHE's found the APAS Diploma award invalid, owing to its having been granted by an institution which had not been registered by the Ministry of Education, the Respondent contended that NCHE was estopped from adopting that position as it had, before, in its letters to various institutions with regard to various candidates (annexed; marked as 'A<sub>3</sub>' to 'A<sub>7</sub>'), validated APAS certificates as authentic and higher than 'A' Level certificate.

Hon Mwesigwa Rukutana (at the time the State Minister for Higher Education) deposed in his affidavit dated 20<sup>th</sup> May 2011 that while in private legal practice as an Advocate of the High Court of Uganda, APAS, which was his client from 1981 when it was founded uptill its closure in 2003, was duly recognised and registered by the Ministry of Education; and offered Higher and Ordinary Diploma courses in Accountancy and Certificates in Secretarial Studies. He stated that, however, a search for the record of licensing of APAS with the Ministry of Education under his instructions, or for a copy of the License itself at his law firm had failed to yield any results.

Francis Mpairwe Kakuru, in his letter of 21<sup>st</sup> September 2010 to the NCHE (annexed to Petitioner's supplementary affidavit and marked 'R<sub>4</sub>'), stated that APAS had been duly registered and recognised by the Ministry under PSS/A/29 ME/22/2529. In an affidavit dated 24<sup>th</sup> May 2011, Asasira K. Bosco an Advocate of the High Court of Uganda deposed that he had with Peter Nkuruziza and another person met Yeko Acato of the NCHE who retrieved, from his archives, copies of classification letter and other letters he had written to other institution that APAS had existed; and handed over to them certified copies of these documents (annexed and marked 'K<sub>1</sub>' 'K<sub>2</sub>', 'K<sub>3</sub>', 'K<sub>4</sub>', and 'K<sub>5</sub>').

However, Mr. R. Nsumba Lyazi of the Ministry of Education, in his letter of 12<sup>th</sup> November 2010 (annexed as 'R<sub>3</sub>' to the supplementary affidavit of the Petitioner) rebutted this and clarified that from their records, Registration No. PSS/A/29, of May 1988, is of Apex College; License No. ME/22/2529, of 29<sup>th</sup> December 1999, is of Amka Classic Secondary School; Registration No. PSS/A/29 of May 1998 is of Apex College; while Apas Secondary School was licensed under No. ME/22/2067, and later registered under No. PSS/A/32 of 24<sup>th</sup> November 1998. Ambassador Yeko Acato (PW1) admitted in cross examination that he had,

in earlier correspondences, cleared APAS certificates; but this had been on the mistaken belief that they were valid. Otherwise he has since discovered the contrary.

The adverse communication from the Ministry of Education evoked a response from Francis Mpairwe Kakuru who, in an affidavit dated the 24<sup>th</sup> May 2011, retracted the information in his letter regarding the Registration No. of APAS. He blamed the error on Apas Secondary School which had given him their Registration No. instead; and that, otherwise, the Registration and Classification of APAS was No. ME/22/637. During cross examination, he testified as PW4 and stated that APAS was established in 1981; and the Respondent was his student there from 1986 to 1988 when he was the Principal/Registrar. He retracted his statement in his affidavit of 8<sup>th</sup> April 2011 – which he admitted drafting – that he had been a Director of the school, as having been an oversight.

He testified that to qualify for admission to a course leading to an award of Higher Diploma at APAS, one needed a minimum of one Credit, and one Pass. He testified further that APAS closed in 2003, and he remained in custody of some of the documents; and that although it closed, it still issues correspondences from his office! He admitted authoring the letter dated 4<sup>th</sup> May 2011, on APAS letterhead; and revealed that he did so from his office at the Kampala City Council. He attributed the wrong information in that letter, regarding APAS Registration No., to Apas Secondary School which had supplied him with their own Registration No. instead; thus necessitating his swearing an affidavit in rectification.

He testified further that APAS started operating in 1981, got a provisional licence in 1983 (which he saw in the Director's office), then got a full licence in 1989. Edward Ssebukyu, the Assistant Commissioner for Private Schools and Institutions at the Ministry of Education testified as PW2. He came along with two Registers for Tertiary and Secondary Schools. Book One covered the period 4<sup>th</sup> May 1954 to 21<sup>st</sup> June 1999, while Book Two covered the period 3<sup>rd</sup> November 1997 to 18<sup>th</sup> August 2006. He testified that Association of Professional Accountancy Students was granted a provisional licence on the 14<sup>th</sup> June 1990 under Licence No. ME/22/637.

He testified that Registration No. PCS/A/23 belongs to another institution, and has been entered in another book he had not come with. He was emphatic that before an institution has been granted a provisional license, it cannot award any certificates. He conceded that where an institution is known to be operating in accordance with the law, it may be allowed to

operate and registration done even after two years; but that any certificate issued by the institution without first being registered is not valid.

He was again emphatic that APAS could not legally issue a Diploma before 14<sup>th</sup> December 1990 when it was licensed. Counsel for the Respondent requested that Court should allow them to inspect the registers during Court break. This the Court obliged, but on condition that the registers would not leave the possession of PW2. When Court resumed, PW2 was recalled and testified that there was an entry as No. 23 at the bottom of the first page of Book One, but with Nos. 1 to 22 on top of it in the same page totally blank, devoid of any entry whatever.

This uncharacteristic entry in No. 23 read '*Association of Professional Accountancy P.O. Box 92 Kila.*' Below it was the entry *ME/22/637* and *PCS/A/23* but without a date. He pointed out several anomalies in the entry. Some of these anomalies are the Registration No. having been entered under the column meant for Boys School or Girls School, or Mixed School; and the name of the school is entered in the column for name and address of owner of school. He was of the view that this entry was not made by the Senior Education Officer as it would have started from the top and entries made in their right columns.

There has been much argument on whether the award the Respondent got from APAS was an Ordinary or Higher Diploma. There may be no need to rake one's brain over that issue; as it must first be decided whether or not the award was legal. From the Ministry of Education Licensing Record Book, which I carefully scrutinised, APAS was licensed not on the 14<sup>th</sup> June 1990; but after. This is because its licensing Serial Number ME 22 followed by its No. 637 (hence ME 22/637) comes after the endorsement in the Register that it was '*OPENED 14<sup>th</sup> JUNE 1990 FOR ENTRY*'; and the Serial No. before that endorsement was ME 21, followed by the Licence No. of the school. For instance Fort Portal Institute of Commerce whose Licence No. was entered as ME 21/58.

From the 14<sup>th</sup> June 1990 endorsement, several schools were licensed under Serial No. ME 22. APAS was the 637<sup>th</sup> school licensed since then. This would logically place the licensing of APAS way after the 14<sup>th</sup> June 1990 as it would be inconceivable that all the 637 schools could have been licensed on the same day unless; there was a mass licensing of pending schools. However, there was no evidence adduced in Court that such a thing happened. Therefore, the only evidence that placed the licensing of APAS earlier than June 1990 was from Francis Mpairwe Kakuru (PW4) and Hon Mwesigwa Rukutana who both place the

registration in the 1980s. PW4 however suffered from severe want of credibility as his testimony and statements were littered with inconsistencies, retractions, and unfortunate outright deliberate falsehoods.

Here was an Advocate of the Courts of Judicature who had the audacity to take the witness stand and tell Court that from his public office he has been writing letters on the letterhead of an institution whose demise took place some 20 years past. Worse still he had the guts to lie in Court that the erroneous Registration No. he quoted in his letter which he retracted was given to him by Apas Secondary School. This could not have been so, as the Registration No. of Apas Secondary School is far different from that which he quoted in his affidavit, and maintained in cross examination. That registration number, wherever he got it from, has nothing to do with either APAS which ceased operations in 2003, or Apas Secondary School.

Similarly, for Hon Mwesigwa Rukutana to append his signature to his deposition that APAS was his client from 1981 when it was allegedly founded is most unfortunate. I am constrained, albeit with utmost respect, to jolt the good Minister into recalling that in 1981 he and I were (depending on whether it was before April or after June of that year) either 1<sup>st</sup> or 2<sup>nd</sup> year students pursuing law at Makerere University. The law firm Mwesigwa Rukutana & Co Advocates, which he mindlessly deposed as having acted for APAS in 1981, could only have been a wishful dream then; although it fortunately later came true! In the face of the written record to the contrary, I am unable to place any reliance on his recollections.

The Education Act is clear that registration and classification of educational institutions come after and not before licensing. There is no way that APAS could have been registered before 1990 when it got its provisional licence. In fact, from the evidence, validation of the operations of APAS may well never have gone beyond the provisional licence which I verily believe took place sometime after 14<sup>th</sup> June 1990. The registration entry which Counsel for the Respondent stumbled upon in the Register Book, quite probably with the relief of a 'eureka', after futile searches to locate it including those carried out at the behest of Hon Rukutana as the Minister in charge of Higher Education, was most dubious and highly suspect to say the least.

There is every reason to believe this to be a primitive and crude work of some one bent on fraudulently smuggling information into the official record, with the criminal intent of validating what is a helpless and precarious situation. Even in the tradition of the peoples of

the Middle East, Asia Minor, and Near East, whose style of writing runs from the right to the left, their writings or entry of record is done from top to bottom of the page; and not the other way round. Thus, in no way could the surprising entry in the Register of the Ministry of Education deceive even an ordinary person on the Soroti Gateway bus; and far less, fool any reasonable tribunal.

The doctrine of estoppel cannot apply against NCHE which is not a party to the petition. I found Ambassador Acato's admission that he had earlier issued letters certifying the validity of APAS awards, but that it was in the erroneous belief that it was the case, a gentlemanly retraction; for which he deserves commendation. It would be absurd to hold that even age old official positions cannot change; whatever the circumstance. Even the Pope of the Catholic Church with his infallibility, does shift positions which at first are zealously adhered to. The historic clash between Galileo and the Catholic Church over whether it is the Sun that circles the Earth, or it is the converse which is correct, offers a fine example of this.

The Education Act 1970, which was the law applicable at the time APAS was in operation, provided in section 22 that anyone desirous of establishing a private school had first to apply to the Chief Education Officer for approval after satisfying the stringent conditions laid out therein, and permission would be granted in accordance with the provisions for licensing and classification laid down respectively in sections 23 and 24 of the Act. Section 31 of the Act provided as follows: –

**“31.** *Any person who,*

- (a) establishes or maintains any school which is not classified and registered in accordance with the provisions of this Act;*
- (b) .....*;
- (c) .....*;
- (d) .....*,

*commits an offence and shall be liable on first conviction to a fine not exceeding six thousand shillings and on second or subsequent conviction, to a term of imprisonment not exceeding six months.”*

Since the law made any operation of an educational institution outside the provision of the law illegal, there was no way that such an institution could award a valid certificate. Nothing that results from an illegal enterprise can have the force of law. That is the point made by

PW2 when he stated that APAS could not award any valid certificate before 1990. It follows that the APAS Diploma award given to the Respondent on the 3<sup>rd</sup> September 1988, whether it was Higher or Ordinary Diploma, has no legal value. It is invalid, null and void.

**(ii) DATAPRO Institute Diploma Certificate.**

In the Respondent's affidavit dated the 8<sup>th</sup> of April 2011, he affirmed that his admission to Nkumba University had been on the strength of the Diploma in Business Administration from DATAPRO Institute, in addition to the APAS Diploma in Accountancy, and his work experience. Harrison Ojambo, a former Registrar at DATAPRO Business Institute, in his affidavit dated the 8<sup>th</sup> April 2011 deposed that the Institute was licensed in 2000 by the Ministry of Education to award Higher Diplomas and Certificates in Business Administration. He confirmed and certified that the Respondent was his student at the Institute, and obtained an authentic Higher Diploma in Business Administration therefrom.

He testified during cross examination, as PW5, that he joined the Institute in January 2000; and that in compliance with the directive of the Ministry of Education, the Institute did not pass out any student until after it was granted a license. He stated further that the Respondent studied at the Institute before he (PW5) joined it; and was awarded both a Certificate and a Diploma after the Institute was granted a license. He was emphatic that the Institute did not offer Higher Diploma but rather Ordinary Diploma. He tendered handwritten statements of results of the Respondent in various courses contained in a file which he stated was the entire record. He tendered in evidence the following documents: –

- (i) Statement of results in Certificate Business Management course for the 1996 to 1997 period; marked **PE2**.
- (ii) Statement of results in Business Management course for the 1997 to 1998 period; marked **PE3**.
- (iii) A letter from the Ministry of Education dated 19<sup>th</sup> December 2000 (marked **PE4**) which notified the proprietors of the Institute that they had been granted a provisional license to operate the Institute effective from 10<sup>th</sup> December 2000 to 10<sup>th</sup> December 2001 under License No. ME/22/3160.

In the Respondent's application for University entry, attached to his affidavit supporting his reply to the petition, one of the academic qualifications he listed was DATAPRO Diploma award. From his academic transcript issued by Nkumba University in September 2003, a

copy of which was attached to that affidavit, he was enrolled at the University in September 2000 and completed the three year course in 2003. He could therefore not have relied on any award from DATAPRO Institute (if indeed there was ever one) for the admission and enrolment in the University since, from the testimony of PW5, the Ministry of Education had, before licensing the Institute in December 2000, forbidden it from issuing any award to students until it was granted a licence.

It is also glaringly manifest that whereas the Respondent adduced in Court, copies of the Diploma certificates awarded by APAS, S.I.T International College of Malaysia, and the degree certificate of Nkumba University, there was only mention of the DATAPRO award. All that there was from DATAPRO Institute was the handwritten record of results which I found most laughable. Here was an institution offering, amongst others, a course in Computer Studies; and as revealed by PW5 in his testimony, it had some desk-top computers which it used for training its students. I found it rather strange that it had no typed records; yet even in the period just before the computer age, it was unthinkable that institutions of the status of DATAPRO would keep their records by the handwritten method.

**(iii) Mature Age Entry and Work Experience.**

For Mature age as consideration for admission, PW3 (Nkumba University's Academic Registrar) testified during cross examination that at the time the Respondent applied to be admitted to the University for a degree course, the requirements for admission were either 2 principal passes at 'A' level, or a qualification from a course of two years minimum after 'O' level and equated with 'A' level, or Mature age entry through passing exams set by Makerere University. In the alternative, the relevant Department or Faculty could assess the Applicant and recommend admission.

At the top of the front cover of the Respondent's University entry application form, to the left, there is a hand written note instructing the Head of Department/Dean to '*Admit on condition that Candidate presents Certificates*'. On the right hand side of that page is another hand written note, seemingly in response to the one on the left, stating that: '*The Applicant can be admitted as a Mature age entrant although he has not taken such education. Given nearly 30 years of work experience after "O" level and some courses studied, he can be admitted for a degree course.*'



It is clear from the testimony of PW3 (the Academic Registrar Nkumba University) that for one to be admitted to the University on the Mature Age consideration, one had to first pass the Makerere University exams for that purpose. This, the Respondent did admit he never sat for; contending that he did not have to, as he had other qualifications. PW3 tendered in Court the University's Prospectus of the time the Respondent was admitted thereto. It was marked **Exhibit P1**. At page 97 thereof, it was provided that to be admitted to a three year Bachelor degree programme, an Applicant had to possess an 'O' level Pass or its equivalent, and a minimum of 2 Principal Passes at 'A' level or Certificate in a relevant field of study.

He explained that although the Prospectus was silent on Mature Age entry, it accepted the one approved by Makerere University. He identified the handwritten note on the application form, recommending the Respondent for admission on Mature Age owing to his 30 years work experience after 'O' level and courses studied, as Dan Sentamu's note. He conceded that the Respondent did not present any certificate showing that he had passed Mature Age exams. The Respondent himself admitted that he had not done any Mature Age entry exams; and yet PW3 was clear that for admission based on mature age, Nkumba University relied on the one conducted by Makerere University.

There is therefore no evidence that age played any decisive part, or any at all, in the Respondent's admission to Nkumba University. I should add here that the policy and practice regarding Mature Age entry is not just about age and work experience. It is both age and a tested ability to pursue a course at the University. This is determined through special exams set by the University which the Applicant falling under this category has to sit. The over 30 years work experience of the Respondent could only have benefitted him if it usefully prepared and enabled him to pass the Mature Age entry exams. Otherwise, age or work experience was of no value as a consideration for University entry.

A copy of the application form, certified and identified by PW3 (the Academic Registrar of Nkumba University), was put in evidence by the Respondent. The document must have been all that there was in the records of the University regarding the admission of the Respondent. Part VI thereof, which provides that it is 'FOR OFFICIAL USE ONLY', is not filled in. The part, where an endorsement of the Admission Committee's Decision would have been, is blank. It is only the handwritten recommendations appearing on the first page of the application form which is evidence of official process of admitting the Respondent into the University.

It is however quite clear that the notes on the cover page about the Respondent's age and 30 years of work experience were only recommendations to, and for consideration by, a higher authority. The notes were made when the application form was at an inchoate stage of the admission process. Nowhere did the Admission Committee, which PW3 referred to in his testimony, make any endorsement on the form. In the end it is questionable under what consideration and which authority the Respondent was admitted to Nkumba University. Certainly, it was not on the Mature Age or work experience; as with the Diploma awards he had in his possession.

Accordingly, it is my considered finding that the admission of the Respondent to Nkumba University was unlawful; and the award to him, of the degree in Public Administration and Management, was not valid. I therefore resolve Issue No. 2 in the negative.

**Issue No. 3.            Whether at the time of his nomination, the Respondent possessed a minimum formal education of Advanced Level Standard or its equivalent; as required by law.**

The Respondent presented the Nkumba University and the APAS awards as the basis of his qualification for nomination; and was indeed nominated on the strength of these documents as was up-held by the Electoral Commission following a complaint against it. I have found that the Diploma award purportedly from Malaysia was a forgery, and the APAS award invalid owing to it having been given by an institution which by law had no such authority to do so. These two documents could therefore not legally be the basis of admitting the Respondent for a University degree course, or any other.

PW1 testified that when the NCHE confronted the Respondent with the denial by the Malaysian College of the award to him, he offered no defence. PW3 testified that when the University inquired from the Respondent about proof of the validity of the Malaysian Diploma award, his response in writing was that the College had closed down, so he was unable to have the award certified. Further action by the University was stalled by the Court order of injunction obtained by Hon. Anifa Kawooya against the University. I was myself at a loss as to what the Respondent was up to when he told me that he intended to travel to Malaysia, after resolution of this petition, to pursue the issue of verification of the award.

PW3 explained that the letter from the NCHE to the Vice Chancellor of the University, advising that the Respondent's degree award be revoked, was acted upon; but the revocation, as the Vice Chancellor explained to the NCHE in his letter, could only be done after due inquiry by the University in compliance with the provisions of Part IV Section 37 of the Charter of the University. He revealed that the University wrote to the institutions the Respondent claimed had awarded him the Diplomas, but the letters to APAS and S.I.T International College were returned by the Post Office; while DATAPRO Institute made no reply. Hence their effort was futile.

His explanation for the University's failure to take further action was that there was an injunction obtained by Hon Anifa Kawooya restraining the University from taking any adverse action on her award; otherwise the University would certainly revoke an award given to any student who it is later proved had gained admission to the University by duping it. It was thus submitted for the Respondent that since the University has not recalled its award to the Respondent, he has a valid University degree on the basis of which alone he fully qualified for nomination to contest for the Parliamentary elections.

I am afraid I am not persuaded by that argument which I find erroneous and untenable. This Court is certainly seized with full powers to inquire into such matters as the validity of a certificate presented for nomination in a Parliamentary election; and to make appropriate declarations thereon. Once the Court finds that such certificate was invalid for whatever reason, it will no doubt pronounce itself on the matter; and what is then left for the awarding institution to do is merely the formality of giving effect to that pronouncement; in fact a coup de grace of sorts.

The Parliamentary provisions that the NCHE establishes the truth of awards by institutions outside Uganda and East Africa, even if such awards is made by such world renowned Universities as Harvard, Yale, Oxford, Cape Town, or Monash of Australia, and under what considerations admissions to them was determined, could not have been intended by Parliament to allow Ugandan institutions to admit students irrespective of whether or not their qualifications for such admissions was a result of some mischief. If that were so, then it would render the law absurd. Parliament could never have intended that the law be the victim of any absurdity.

That to me is the position of law as pronounced by the Supreme Court in ***Gole Nicholas Davis vs Loi Kageni Kiryapawo, S.C. Election Appeal No. 19 of 2007*** where Katureebe JSC expressed the view, with which the other Justices of the Court agreed, supporting the decision of Kasule J (as he then was) on the matter, in ***Gole Nicholas Davis vs Loi Kageni Kiryapawo, Mbale H.C. Election Petition No. 12 of 2006***, that once it is proved by evidence that a fraudulent certificate formed the basis of an admission to an academic institution, even when it was presented together with other valid documents, its contagious effect would have vitiated the validity of the other documents, and rendered the admission and the award resulting therefrom invalid.

This is precisely the effect of the impugned Diploma award from S.I.T International College of Malaysia on the Nkumba University award since it had a 'direct nexus', to use the words of Mulenga JSC in the ***Gole Nicholas Davis vs Loi Kageni Kiryapawo*** case (supra), as it was at the very core of, if not the sole basis for the Respondent's admission to Nkumba University, owing to its relevance to the course the Respondent had applied for, as prescribed in the University Prospectus. Accordingly then, even if the APAS and DATAPRO Diploma awards were valid, the contagious effect of the fraudulent Malaysian award on them was fatal.

The views expressed by Kanyeihamba JSC, in ***Joy Kabatsi Kafura vs Anifa Kawooya Bangirana & Anor, S.C. Election Petition Appeal No. 25 of 2007***, that it is not enough to prove that an award presented for nomination as evidence of qualification is tainted with fraud, but it must also be proved that as a consequence of that finding the awarding institution has recalled or revoked it, was obiter since the matter was not a ground of appeal therein. Mulenga JSC, in his judgment in the same case, rebuked Counsel for making it a ground of appeal in the Supreme Court when it had not been a ground of appeal in the Court of Appeal from which that appeal to the Supreme Court emanated; and accordingly declared it incompetent.

Secondly, Justice Kanyeihamba's expression was made per incuriam as it was so done on the 11<sup>th</sup> day of November 2008; well after the decision of Katureebe JSC in the ***Gole Nicholas Davis vs Loi Kageni Kiryapawo*** case (supra), delivered eight months earlier on the 6<sup>th</sup> of March 2008; and with which the Hon Kanyeihamba and the other members of the Court fully agreed. Therefore, Justice Kanyeihamba's views cannot overrule the Court's decision in that earlier case; in which Kiryapawo was, in fact, only saved by the Petitioner's failure to prove

that the impugned certificate had been a basis for her admission to the institute whose award she had relied on for nomination. The case before me is, therefore, distinguishable from that one.

Here it was admitted by all, including the Respondent himself, that the Malaysian Diploma award in Public Administration and Management enabled him to be admitted to Nkumba University to pursue a degree programme in Public Administration and Management. The Malaysian award was therefore a deadly infectious virus which had the effect of destroying the worth of any, and all, other qualifications and considerations that had been the basis for admitting the Respondent to Nkumba University. The Nkumba University degree award to the Respondent having been based on such admission was itself invalid; hence it was null and void right from the time it was issued to the Respondent.

It follows that at the time the Respondent presented the Nkumba University degree award to the Electoral Commission for nomination to contest the Parliamentary elections, for which he has now been challenged, the tainted Nkumba University degree award did not qualify him for the nomination. In similar vein, the APAS award was not available to him either, for nomination, although this was not on the grounds of any proven fraud; but rather, owing to its having been granted by an institution which had no legal authority to do so at the time it awarded him the Diploma.

Furthermore, even if the APAS award had been valid, it would have been of no use for nomination as it had not been equated with an 'A' Level Standard qualification by the NCHE. For the reasons given hereinabove, I find that the Respondent lacked the minimum academic qualification to be nominated for the Parliamentary election when the Returning Officer for Lwengo District allowed him to be nominated to contest the Parliamentary elections for Bukoto County South Constituency in which he emerged victorious as the elected Member of Parliament. In the result, I allow the petition; and make the following declarations and orders:

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- (i) The Degree certificate Nkumba University awarded to the Respondent is null and void.
- (ii) The Respondent did not have the requisite minimum qualifications to be nominated and elected as a Member of Parliament; hence, his election contravened the provisions of section 4 of the Parliamentary Elections Act.

- (iii) The election, return, and gazetting of the Respondent as the Member of Parliament for Bukoto County South Constituency is hereby nullified; and accordingly, I declare the Parliamentary seat vacant.
- (iv) Fresh elections must be conducted by the Electoral Commission in that Constituency in accordance with the provisions of the law.
- (v) The Respondent shall pay the Petitioner the full costs of this petition.

### **OBSERVATION**

This is one of those cases that provoke deep thoughts as to the efficacy of the rule requiring the NCHE to equate certificates with the ‘A’ level qualification. The NCHE has no powers to examine those in possession of the certificates they are requested to equate with the ‘A’ level qualification. Theirs is to shop around to inquire as to whether a particular certificate would or not pass the requisite test. This lack of primary examining powers has opened up the otherwise well intended process to grave abuse; as some aspiring candidates without the formal ‘A’ level qualification have gone to great length to obtain the required equivalent academic awards; a good number of which sadly fall by the wayside.

In my considered opinion, the intention of Parliament would be served better if there was in place some method for specially examining those who lack the formal ‘A’ level qualification; the way Mature Age entry exams are conducted. This would certainly help determine the ability of such aspiring candidate to meet the requirements of the Constitution and Parliamentary Elections Act as it would centre on establishing whether such a person measures up to the challenges of being an MP. It would certainly rid us of the endemic acts of forgeries and other malpractices which have bedevilled this country in the name of availing the NCHE with certificates to be equated with the ‘A’ level qualification.

I would venture to add that such examination could focus more on the competence (both in writing and spoken form) of such intending aspirants (some of whom may be self educated and quite erudite) to properly use the official language of Parliament, and their general knowledge and exposure; so as to establish their capability not only to follow Parliamentary proceedings but to participate effectively therein. I daresay some of these people may turn out to be better legislators and or national leaders than the ones we send to Parliament through the existing procedure of determination of qualification.

I have therefore deemed it necessary to have a copy of this judgment served on such of our national policy makers and legislators like the Speakers of Parliament, Leader of Government Business, Leader of Opposition in Parliament, Minister of Justice and Constitutional Affairs, Minister of Local Government, the Attorney General, and the Chairperson Electoral Commission.

A handwritten signature in black ink, appearing to read 'Alfonse Chigamoy Owiny - Dollo'. The signature is fluid and cursive, with a large, sweeping initial 'A'.

**Alfonse Chigamoy Owiny – Dollo**

**JUDGE**

**2 – 09 – 2011**