

5

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA

ELECTION PETITION NO. 0003 OF 2016

10

MUSEMA MUDATHIR BRUCE _____ PETITIONER

=VERSUS=

15

1. ABIRIGA IBRAHIM .Y.A.

2. ELECTORAL COMMISSION _____ RESPONDENTS

20

BEFORE

JUSTICE. JOHN EUDES KEITIRIMA

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JUDGE

17/05/2016

Mukwaya Deo for the petitioner.

5 The petitioner is in court, Mr. Musema Mudathir Bruce.

No representative from the 2nd Respondent

Sharon Ngayiyo- Clerk

Mr. Bautu:

My Lord Robert Bautu appears in the 2nd Respondent, Electoral Commission. There is no
10 representative in the 2nd Respondent

Mr. Mukwaya:

My lord the 1st Respondent is absent and his counsel is also absent. This matter came for
mediation on the 13th/05 due to the absence of the 1st Respondent who had been notified of the
same. The learned Registrar noted that mediation had failed because of non appearance of the 1st
15 Respondent.

My lord the matter today has come back for scheduling and the petitioner made conference notes
which are on record. We did serve the 2nd Respondent. Subject to the views of the 2nd
Respondent who is now present in court. I pray the same be adopted.

Mr. Bautu For 2nd Respondent:

20 My Lord it is true that I was served this morning about 9:00am with Petitioner conference notes,
I have also been served with the a supplementary affidavit of one Adomati Dickson. The 2nd
Respondent was aware that the matter was coming up for conferencing and have issues to raise.
We intend to raise issues as to whether the 2nd Respondent can still be a party to this case based
on the decision of her Lordship Justice Damalie Lwanga, it is dated 11/05/2016. My lord I
25 requested for a copy and I was sent a copy on my computer, I wasn't able to print out but I have

which I can avail court my lord. But the gist of that decision my lord is in respect of the matters that arose from the election of the 1st Respondent and in respect of the election petition of No. 002 of 2016- Abiriga Ibrahim –Vs- the Electoral Commission.

My lord Learned Lordship Justice Damalie Lwanga has since delivered the Ruling which is to the effect that the petitioner is the 1st Respondent was rightly nominated as a candidate and

Secondly that the 2nd Respondent in that petition No.002 of 2016 at Nakawa court was bound by the court orders and therefore the effect of denominating the petitioner was null and void. My lord that entirely affects the instant petition before you Election petition No.003 of 2016 in this court. In that the matters in contestation as regards the nomination and the qualification of the 1st Respondent have since been resolved in that Ruling. My lord with the leave of court I would request that I be will availed some time to avail court with a copy of it after.

Court: How long would it take you?

Mr. Bautu:

My lord, may be 30mins because I will drive to town and print it, I have it on my computer. But my lord I just want to echo the fact that with this Ruling now the petition against the 2nd Respondent is now mute. I will therefore pray that let this petition be dismissed against the 2nd Respondent. The matter in contestation as regards the qualification of the 1st Respondent has been resolved. But my humble prayer is the petition be dismissed against the 2nd Respondent with costs.

Mr. Mukwaya:

My lord, my learned friend fell short alluding as far as it is said that this matter has been resolved under election petition No. 002 by Lordship Justice Damalie Lwanga. With all due respect that line argument my lord is false. The 1st Respondent deponed an affidavit in reply of this petition and averred to the best of knowledge that he was duly qualified, he appendix copies of his academic qualifications and his documents as pertaining to his nomination.

This nomination took place on the 3rd/12/2015 before the judgment came out. In that regard my lord this petition actually arises from s. 61 Parliamentary Election Act & s. 60 which envisages

the end of the outcome of the Elections. The proceedings before Justice Damalie Lwanga came under s. 4 (1) (c) of the P.E.A It came as an appeal to a decision of the Electoral Commission. The point am making is that, these are two different point of actions and the law provides different circumstances of how this Hon. Court adjudicates on them. The petitioner was not party
5 to that and therefore the judgment of Lordship Justice Damalie Lwanga cannot affect the petitioner cause of action under s. 60 of the Parliamentary Election Act Nos. of 13 (5). My lord as far as the 1st Respondent deponed on oath matters within his knowledge he is enjoined with this Hon. Court to come to submit to the jurisdiction of this Hon. Court and so is the 2nd Respondent. There is no indication whatsoever in those, in the both respondent's pleadings that
10 to contained the propriety of his proceedings before this Hon. court. My lord even the standard of proof in the proceedings before Justice Damalie Lwanga is very different from the standard of proof from s. 61 & 60 under which petition is being proved. We are contesting the results of the election, we contesting the propriety of the candidate who was declared as the winner of these elections, we are not contesting the nomination of that candidate. My lord the petitioner also
15 averred this petition matters squarely within the responsibility of the 2nd Respondent as to the legality of competing the declaration forms. My lord it is well known that under s. 12 of the E.C, the 2nd Respondent is the only one with a mandate to design and bring election materials in this country unless that responsibility is assigned to another party. My lord for the 1st Respondent as we contain to come up with his own declaration forms which were then imposed by the 2nd
20 Respondent. That is an issue that ought to be clarified in this petition, as the legality of the same and that was not an issue in the judgment before Justice Damalie Lwanga.

My lord the other point is that the judgment of Lordship Justice Damalie Lwanga did not all adjudicate on the merits of the 1st Respondent for the academic qualifications. They were not determined, there was no evidence laid in respect of that. Under s. 4 (1)(c) of the Parliamentary
25 Election Act, the 1st Respondent owes to convince this Hon. Court that he is indeed the person qualified to be a member of parliament. For all intents and purposes this petition is not misplaced and nor is it affected by the judgment of Justice Damalie Lwanga. And I pray that the preliminary objection be overruled with costs.

Mr. Bautu:

My lord in a brief reply, court should note that the petition before this court is grounded on the fact that the 1st Respondent was not qualified to be elected as a member of parliament for want of academic qualifications. My lord that is true under s 61 (1)(d) of the Parliamentary Election Act. That the candidate was at the time of his/her election not qualified was disqualified for election
5 as a member of parliament. The contestation here is in respect of the academic qualifications of the 1st Respondent. My lord that issue arose before the election, there were various orders which were issued were we have alluded to in our response to the petition that enjoining the 2nd Respondent to maintain the 1st Respondent and indeed my lord the court has now pronounced itself on the academic qualifications of the 1st Respondent by saying that the 1st Respondent had
10 qualifications and therefore it would be an exercise in futility for this court to retry the same matter that has been adjudicated upon by the learned sister Judge.

My lord that is the basic ground in this petition and as stated out on ground two of the election petition No. 003 that the Respondent had been disqualified for election as a member of parliament at time the time of his election. My lord that raised contestations on the qualifications
15 of the 1st Respondent.

My lord the 2nd Respondent is saying I maintained the 1st Respondent because of those court orders and the court has gone further to absolve the 2nd Respondent saying any denomination of the 1st Respondent was null and void.

Secondly counsel has raised the other issue to do with declaration forms. My lord the
20 Parliamentary Elections Act does not provide not provide for the form and format of the declaration forms and any print of a declaration form in any form is not illegal parse. As long as the declaration form contains the exact results, therefore that cannot be a grievance under s. 61 of the Parliamentary Elections Act, because there is no illegality whatsoever in the format of the declaration forms.

25 Thirdly my lord, the 2nd Respondent is enjoined to observe the due process of the law and that is in respect of court orders which are handed down by this court. My lord the 2nd Respondent observe the petitioner by saying that he was not party to that application is not enough for the 2nd Respondent not to observe the process of the law. In any case since the petitioner does not deny knowledge of this application or petition No. 002 in Nakawa court he also could have joined it so

that he would be part of the contestation saying the 1st Respondent didn't have academic qualifications, Secondly my lord, the petitioner can also take remedy of being an aggrieved party and appeal against this decision or apply to set aside that decision, the law allows him to do so, the petitioner has not done so.

5 We therefore retaliate our prayer that this matter before you is now res-judicata it would be a wastage of court's time to try a matter that is already been tried and I pray that this matter be dismissed with costs as against the 2nd Respondent.

Court:

10 Depending on how soon I access that ruling of Justice Damalie Lwanga, I will tentatively set tomorrow 18th /05/2016 at 3:00pm for Ruling.

Signed

17/05/2016

Judge

15

18/05/2015:

20 Petitioner in court

No counsel for the Respondents

Respondents absent

Sharon Ngayiyo- court clerk

COURT RULING

BEFORE JUSTICE JOHN EUDES KEITIRIMA

This is a Petition brought by Musema Mudathir Bruce who will hereinafter be referred to as “the Petitioner” against Abiriga Ibrahim Y.A. and the Electoral Commission who will hereinafter be referred to as the 1st and 2nd respondent respectively and collectively referred to as “the Respondents”.

The Petitioner is seeking for declarations that the 1st Respondent was wrongly and unlawfully declared the elected Member of Parliament for Arua Municipality and a declaration that the Petitioner was the duly elected Member of Parliament for Arua Municipality.

10 The Petitioner is represented by Mukwaya Deo who will hereinafter be referred to as “Counsel for the Petitioner”, the 1st respondent is represented by M/s Kiwanuka & Karugire Advocates who will hereinafter be referred to as “Counsel for the 1st respondent”, and the 2nd respondent is represented by Robert Bautu who will hereinafter be referred to as “Counsel for the 2nd Respondent”.

15 Before the Petition could be heard on its merits, Counsel for the 2nd Respondent raised a Preliminary Objection. The Preliminary Objection was to the effect as to whether the 2nd respondent was still a party to this suit based on the decision of her Lordship Justice Damalie .N. Lwanga vide Election Petition No.0002 of 2016. That the learned Justice held that the 1st respondent was rightfully nominated as a Candidate and that the 2nd respondent in that Petition was bound by the court orders and therefore the effect of denominating the 1st respondent was null and void. This therefore entirely affected the current Petition.

That the matter in Contestation as regards the qualification and nomination of the 1st respondent has since been resolved. Counsel for the 2nd respondent prayed that in light of the above, the Petition should be dismissed against the 2nd respondent with costs.

25 In reply Counsel for the Petitioner submitted that the 1st respondent deponed an affidavit in response to this Petition and averred that to his best of his knowledge he was duly qualified for election as Candidate for Member of Parliament. That the 1st respondent’s nomination took place on 3rd December, 2015 before the said Judgment was pronounced.

Counsel for the Petitioner further submitted that this Petition was brought under S.60 of the Parliamentary Elections Act and in respect of a cause of action that arose out of S.60 of the Parliamentary Elections Act. That the cause of action envisages the outcome of Elections.

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Counsel for the Petitioner further submitted that the proceedings before Justice Damalie Lwanga were brought under S.15 of the Electoral Commission Act cap. 140 as a result of an appeal. That therefore those were 2 different causes of action. Counsel for the Petitioner emphasized that the Petitioner was not a party to that Petition and therefore the Judgment pronounced by Justice
10 Damalie Lwanga could not affect this Petition.

That the 1st respondent was obliged to submit to the jurisdiction of this court.

Counsel for the Petitioner further emphasized that even the standard of proof in the said cases was different.

That the gist of this Petition was about the outcome of the Election but not the nomination of the
15 1st respondent.

Counsel for the Petitioner further submitted that the matters petitioned against were squarely within the domain of the 2nd respondent. This was in regard to matters of the declaration forms. That under S.12 of the Electoral Commission Act [cap.140] the 2nd respondent was the only one with the mandate to design and print electoral materials unless that responsibility was assigned to
20 another party. That the 2nd respondent had to clarify on how the 1st respondent could come out with his own declaration form endorsed by the 2nd respondent. That it was an issue that was not resolved in the said Judgment. That the said Judgment did not did not also resolve the issue of Academic qualifications.

25 Counsel for the Petitioner contended that under S.4 (1) (c) of the Parliamentary Elections Act, the 1st respondent had to prove that he was qualified to be a Member of Parliament.

Counsel for the Petitioner concluded that in all therefore this Petition was not misplaced and nor was it affected by the Judgment of Justice Lwanga Damalie vide Election Petition No. 0002 of 2016 in the High Court Central Circuit at Naguru. Counsel for the Petitioner prayed that the Preliminary Objection should therefore be overruled with costs.

5 In rejoinder, Counsel for the 2nd Respondent submitted that the Petition before this court was grounded on the fact the 1st respondent was not qualified to be elected.

That this was a ground under section 61 (1) (d) of the Parliamentary Elections Act.

That the Contestation was in respect of the academic qualifications of the 1st respondent. That the court has pronounced itself to say that the 1st respondent had the qualifications. That it would
10 therefore be an exercise in futility to retry a matter that has already been adjudicated on. That the 2nd respondent maintained the 1st respondent as a candidate because of a court order.

Counsel for the 2nd respondent further submitted in rejoinder that with regard to the declaration forms, the Parliamentary Elections Act [17 of 2005] does not provide the format of declaration forms and any print is not illegal perse as long as it contains the exact results. That there was no
15 illegality in the format of the declaration forms.

Further, that for the Petitioner to say he was not a party to the said suit was not enough to stop the 2nd respondent to respect court orders. That since the Petitioner was aware of the said Petition, he should have applied to join it. That the Petitioner could still appeal against the said Judgment. Counsel for the 2nd respondent reiterated that the matter before court was res-judicata
20 and a waste of court's time. He prayed that the matter be dismissed with costs to the 2nd respondent.

The issue to determine now is whether this Petition is res-judicata.

S.7 of the Civil Procedure act cap. 71 provides that *“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in a former suit
25 between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court”*.

This section embodies the doctrine of res judicata or the rule of conclusiveness of a Judgment. It is based partly on the maxim of Roman Jurisprudence *interest reipublica ut sit finis litium* – it concerns the state that there should be an end to law suits and partly on the maxim *Nemo debet bis vexari Pro una et eadem causa* – no man should be vexed twice over for the same cause – see
5 Mandaria vs Singh [1965] EA 118 at 121.

The rule is therefore intended not only to prevent a new decision but also to prevent a new investigation so that the same person cannot be harassed again and again in various proceedings upon the same question. The above proposition has been summarized by the court of Appeal in the case of Lt. David Kabareebe Vs Maj Prossy Nalweyiso CACA No. 34 of 2003 where it was
10 held that “*to give effect to a plea of res-judicata, the matter directly and substantially in issue in the suit must have been heard and finally decided in the former suit. It simply means nothing more than that a person shall not be heard to say the same thing twice over in successive litigations*”.

To appreciate whether the Petition in this court is res-judicata one needs to look at what it seeks
15 from this court. The Petitioner is praying for Judgment in the following terms:-

- a) A declaration that the first respondent was wrongly and unlawfully declared the elected Member of Parliament for Arua Municipality.

- b) A declaration that the Petitioner was the duly elected member of Parliament for Arua
20 Municipality. These prayers are premised on the following grounds:-
 - i. The first respondent had been disqualified for election as a Member of Parliament at the time
25 of his election by the second respondent on the premise that he lacked the minimum academic qualification of Advanced level Standard or its equivalent to be a Member of Parliament.

- ii. The first respondent was unlawfully declared as electoral Member of Parliament for Arua Municipality in as far as his name did not appear on any of the authentic declaration or result forms.

- 5 iii. The first respondent in Connivance with the second respondent initiated and forged parallel declaration forms where the 1st respondent's name appeared and as a result the 1st respondent was declared as the elected Member of Parliament based on unauthorized and illegitimate declaration forms.

- 10 iv. That in the alternative but without prejudice to the foregoing the first respondent did not attain any of the academic qualifications presented to the second respondent nor the equivalence thereof since they could not be verified by the purported awarding institutions and as such was not qualified to be a Candidate for elections as Member of Parliament.

- 15 v. That whereas the first respondent's name appeared on the ballot papers, his nomination or candidacy for the Parliamentary seat of Arua Municipality had been cancelled by the second respondent on 3rd February, 2016 and the same could not be restored by an interim order from this court.

- 20 vi. The respondent jointly and severally blatantly failed, refused neglected or ignored compliance with the Provisions and Principles of the Parliamentary Elections Act, 2005, and as such the elections were not free and fair in as far as the non compliance affected the result of the election in a substantial manner.

- 25 It is true that one of the grounds the Petitioner is seeking the first respondent to be disqualified as a Member of Parliament is that he lacked academic qualifications of Advanced level standard or its equivalent to be a Member of Parliament. This issue was canvassed in Election Petition No. 2 of 2016 in the High Court Central Circuit at Naguru. Her Lordship Justice Damalie .N. Lwanga held that the 1st respondent had been rightly nominated as a candidate for elective position of

Member of Parliament for Arua Municipality, Arua District. Her Lordship based her decision on a court order vide Misc. application No. 1018 of 2015 where Justice Wilson Masalu Musene ordered that the 1st respondent had attained the equivalent of Uganda Certificate of Advanced education UACE and at that time the 1st respondent was allowed to contest for the NRM
5 primaries for Arua Municipality. Although that order had been directed to the Chairman Electoral Commission of the NRM Political Party, the same was also directed to the 2nd respondent and it is on that basis that the 2nd respondent restored the 1st respondent as a Candidate for Arua Municipality Constituency. The trial court vide Election Petition No. 2 of 2016 also held that the decision taken by the 2nd Respondent on 3rd February, 2016 to reverse the
10 nomination of the 1st respondent was unlawful, a nullity and void ab initio.

I therefore agree with Counsel for the 2nd respondent that the court in the said Petition has pronounced itself on that matter and this court cannot retry it.

It was an issue which was substantially resolved both in M.A. 1018 of 2015 and subsequently in Election Petition 2 of 2016 in the same court. That matter is therefore now res-judicata and
15 cannot be investigated in this Petition. The Preliminary Objection in that respect is therefore upheld.

The other aspect of the Petition is that the first respondent was unlawfully declared as electoral Member of Parliament for Arua Municipality in as far as his name did not appear on any of the authentic declaration results forms.

20 In that respect I agree with counsel for the Petitioner that the issue of declaration forms is an issue that was not resolved in the Judgment vide Election Petition 2 of 2016 which now needs to be investigated. It is what therefore remains of this Petition to resolve.

The Preliminary Objections therefore partly succeeds and will be upheld in respect of the issue of academic qualifications of the 1st respondent being a matter that is now res-judicata.

25 The issue to determine now is whether the 1st respondent did not appear on any of the authentic declaration of results forms and hence whether that affected the results of the election in a substantial manner. Costs will abide the outcome of the main Petition.

JOHN EUDES KEITIRIMA

18/05/2016

Judge

5 **Court:** Ruling read in open court.

A scheduling conference in this matter will be held on 24th May 2016 at 11:00a.m

Signed

18/05/2016

Judge

10 **24/05/2016:**

Kwemaa Kefuuzi together with Deo Kizito for the petitioner

Petitioner is present in court

Robert Bautu appear for the 2nd Respondent

Sebuwufu Usama appears for the 1st Respondent

15 Mr. Bautu: We are ready to proceed my lord. There is no representative of the 2nd respondent and the 1st respondent is not in court.

Mr. Kwemaa:

My lord before we can proceed am seeking the indulgence of this court in respect of its ruling on the PO raised by counsel for 2nd Respondent. Under S. 98 Civil Procedure Act, S. 33 of the
20 Judicature Act, Article 126 (e) Constitution of Republic of Uganda, the petitioner seeks leave this court. Appeal its Ruling, where it's found that the matter of the academic qualifications of the 1st Respondent is res- judicata. I so pray my lord.

Mr. Bautu: I oppose the application for leave.

The application for leave, my lord the provisions upon which the petitioner is seeking for leave to appeal against the ruling of this court are generally wide in nature. S. 98, S.33 & Art 126 (e) are generally wide in nature. My submission is that this was not a final order for judgment and therefore the applicant for the petitioner has no right for appeal although direction petitions are only appealed as of right in the final order of Judgement of court that determines all the matters of contestation arising out of the election petition.

The Ruling that was delivered by this court was in respect of one issue to do with the academic qualifications. The other issue that is still pending before this court as ably put out by the court's ruling places to the declaration forms that issue has not yet been determined. Therefore the application for leave is misconceived. Election petitions by their nature are expeditious, and by court granting the petitioner leave to appeal against the order of this court pending the determination of the rest of the other issue will cause substantial delay. My lord my colleagues and myself have taken note that judges are assigned from different stations to expeditious handle and determine election petitions in a timely manner. Under S. 66 (1) of P.E.A, is to the effect that a person aggrieved by the determination of the High Court on hearing P.E may appeal to the Court of Appeal against the decision. This petition has not yet been determined as we stand today and therefore the petitioner or applicant's application for leave cannot arise in respect of S. 66. This was the case in *Hon. Gagawana Nelson Wambuzi against Kenneth Lubogo*, it was Election Petition appeal No. 10 of 2011, Her Lordship Justice Byamugisha as she then was dismissed the application striking out the notice of appeal with arising out of an interacted application from the High Court in Jinja allowed the application to strike out the notice of appeal to the effect to that the respondent who was the applicant the has not right of appeal against interacted. order of court in Election Petition No. 10 of 2011, my lord I moved with a copy I would like to avail court, instantly I did not know that the petitioner were going to raise this application, it's just that am armed with the authority here. On those grounds, I pray that the application for leave for appeal be dismissed with costs since P.E.A bars appeals from interlocutory orders and we pray that we proceed with the petition. I have provided my colleagues with the copy of the ruling. Counsel for 1st respondent Sebuwufu.

Mr. Usama:

My lord we oppose the application for leave. I associate myself with the submissions of learned senior colleague Robert Bautu on the matter on the authority which has been provided. Just to add my learned colleague relied on S. 98 and S. 33 of the Jud. Act Articles 126 (e), those are general provisions. A person cannot lie on those general provisions where the law is clear. In S. 5 66 P.E.A is clear, a person cannot seem to prefer to general provision of the law. An appeal is a creature of statute, there is no inherit right of appeal, S. 66 has been explained by court of appeal in the decision of Gagawana Wambuzi and the word determination used at S. 66 has been defined in the same decision. My lord with those reasons we pray that the application be dismissed with costs. We so pray.

10 **Mr. Kwemaa Kafuuzi:**

We have read the authority cited by the learned counsel for 1st Respondent and also relied upon by counsel for 2nd Respondent. We concede that that is the position of the law and we withdraw this application awaiting final resolution of the petition of this court. On the matter of costs, it is our humble prayer that costs abide the outcome of the petition, those be costs of ordinary 15 attendance.

So pray my lord.

Court:

The application for leave of appeal is thereby withdrawn since the petitioner has not wasted court's time in conceding to the withdrawal, costs will abide the outcome of the petition.

20 Signed

24/05/2016

Judge

Mr. Bautu:

We do not contest the declaration forms as attached the contestation is on the legality. The 25 clarification has now been clarified by Mr. Kiggundu. We now rely on the issue raised in the ruling we can submit on it and call it a day.

Mr. Kafuuzi:

Our contestation is that those documents were made by the 1st respondent and not the 2nd respondent. That becomes a fact with this court needs to determine. We shall need Dr. Kiggundu to appear here and be cross examined on this fact. I so pray.

5 **Mr. Bautu:**

My lord I would oppose that application first and foremost, a deponent can be examined but there must be substantial reason for that deponent to be called upon be cross examined. Counsel has ably put it that the contestation is on the declaration and court has to evaluate that evidence as presented before this court. Secondly, it's also an inconvenience on behalf of the chairman to
10 travel and come hear one issue of the declaration result form where he has preferred his evidence. When you look at the answer to the petition and the affidavit of Dr. Kiggundu especially of para. 6, the petitioner had not rejoined to that issue and hence the evidence should be admitted.

Mr.Usama:

15 My lord that is the position, we oppose the application. Ordinarily evidence in election petitions is by a way of affidavits and relied upon by the respective parties. It's our submission that the cross examination of Dr. Kiggundu in this matter is not necessary. Whereas counsel has made it to appeal that is a matter of fact and it is a matter of law which can be determined without cross examination, the court can evaluate the evidence on record and determine whether or not that
20 affected the result to a substantial manner. So pray.

Mr. Kafuuzi:

I think my learned friends have mixed up the issues. We saying 2 things.

1. That the issue before the court, whether the DR forms which were uttered 1st respondent where lawful. For us our thrust will be that the election was not conducted in accordance
25 with principals and laws governing elections in Uganda. That is our understanding of the issue before the court.

2. Why we find it necessary for Dr. Kiggundu to be summoned is 1st of all the, he is the only witness on the side of the respondents, is therefore the only person through whom all the evidence is necessary for the determination of this case can be adduced.

It shall be necessary for us to put Mr. Kiggundu the contested bearer forms and let him tell the court whether he knows whether they are actually the ones he made. It turns out that there is no document this contested documents are not attached to the affidavits of Dr. Kiggundu and we even don't know what documents he says. Is made or authorized to be made or accepts as having been made. We shall need Dr. Kiggundu to tell us why the DR forms used in this election of 18th February 2016 officially by EC are different from those presented by the 1st respondent and different from those used in the past elections. My lord those are matters of fact. Court can only made a finding after hearing these facts. As we conclude learned counsel has cited that it would be inconvenient to summon Dr. Kiggundu, on the contrary we believe that it shall help not only this court to determine the justice of the case in its full merits, it will also help Dr. Kiggundu himself to clear the air on these documents and create acceptability and creditability of the exercise he conducted. His presence is for the convenience of justice not about him. It not true that we did not traverse Dr. Kiggundu's statements in para. 6 of his affidavit in support of his answer. The petitioner did vide his affidavit filed in this court on 14th April 2016 on paragraph 6. My lord the para. 6 of Dr. Kiggundu's affidavits only relates to the issue of academic qualifications which this court has already made a decision about so it has nothing to do with the current matter before you. The affidavit filed before you and the one purporting to clarify does not clarify anything. This does not affect does our application and our need for Dr. Kiggundu to appear. I so pray.

Court:

As rightly put by counsel for the respondents the issue now left to be determined by this court is whether the 1st respondent did not appear on any of the authentic declaration of results forms and hence whether that affected the results of the election in a substantial manner.

The allegation made by the petitioner is that the declaration forms were made by the 1st respondent and not the 2nd respondent. This is a fact that has to be inquired into by this court. Much as the chairman of the 2nd respondent has deponed to that fact the petitioner has a right to

cross examine the deponent on his affidavit if he wants to prove that what he deposes on is false. It is all about the authenticity of the declaration forms that we used in the Election petition involving the 1st respondent and petitioner. I will therefore under Rule 15 (2) of the P.E.A (Interim Provisions) Rules S.1 141-2 summon the chairman of the 2nd respondent to be cross-
5 examined on his affidavit for purposes of assisting this court to arrive at a just decision.

That should be on the 7th June 2016 at 11:00am.

Signed

24/05/2016

Judge

10 **7/06/2016:**

Kwemana Kafuuzi for petitioner with Kizito Deo.

Sebufu for 1st Respondent

Bautu Robert for 2nd Respondent

Clerk- Ngayiyo Sharon

15 **Mr. Kafuuzi:**

This matter is coming for hearing. It was for Cross- Examination of Dr. Badru Kiggundu chairman Electoral Commission. We are informed he has not come to court. The only problem we have as counsel for the petitioner is how to proceed with the petitioner's case thereafter. As
count will recall, the issue for consideration before court is on the legal validity of the DFF's
20 with bear the names of the 1st Respondent but are distinctly different from those that were made from the Electoral Commission and do not bear his name in typed form. It would have been the case of the petitioner that Dr. Kiggundu should explain why the EC DRF's did not bear the name of the 1st Respondent. Secondly why they have codes, why they have serial members and an electronic bar at the bottom of the 1st page. It would have been the case for the petitioner that
25 these distinguishing features being unavailable on the set of DRF's were the name of the 1st Respondent was eventually typed matters the two forms distinctly different and raises of versions

as whether the results are reliable and in fact raise the question as to with of these sets were relied on by the EC to determine the election of the parliamentary race for Arua Municipality. We rest our concerns and we leave this to the guidance of court.

Mr. Bautu:

5 The 2nd Respondent's chairman has indicated he can be in this court on 13th June 2016 due to various state duties. Due to the exceptional circumstances he is unable to appear in this court. My colleagues to the petitioner concede is with regard to the DRF's that were issued. The petitioner attached 9 affidavits to their petition. The 2nd Respondents chairman evens those declaration forms and narrates the process upon which they were issued. The supplementary affidavit of the
10 chairman of the 2nd respondents is clear that affidavit para 6, 7, 8 he explains what exactly happened. That explanation has been given. The petitioner this morning have served us another affidavit in rejoinder to the 2nd respondent's affidavit who says he is a presiding officers and says he was directed by the 2nd respondent's sub-county supervisor to issue DR Forms that contain the 1st respondents names. This adds upto what we are saying. This was done to connect the
15 anomaly. In light of Article 1 and 14 of the 1995 Constitution, the 2nd Respondent was connecting error to enable the people of Arua to choose their own leader. The issue for determination is whether the DRFs comply with the Parliamentary Elections Act with as regard to their authenticity and if so whether they have an effect. I would therefore pray court considers the issue of legality.

20 **Subufu Usama for 1st Respondent**

I associate myself with the submission of counsel for the 2nd Respondent but wish to add that Dr. Kiggundu be allowed time to appear on the 13th. We also time to appear implore court that should court be inclined to proceed without Dr. Kiggundu's cross- examination this is a case where court can ably resolve the issue before it. The petitioner will not suffer any prejudice in
25 case they are directed to proceed. The new affidavit has just been served on us this morning with is all affidavit in rejoinder. The effect of the affidavit in para 6, 7, 8 agrees with the 2nd respondent's chairman.

Court:

Rule 13 of the Parliamentary Elections (Interim Provisions) Rules provides that court shall in accordance with s. 63 (2) of the statute, hear and determine the petition expeditiously and it shall declare its findings not later than 30 days from the date it commenced the hearing of the petition unless the court for sufficient reason extends the time. I find that there is no sufficient reason for
5 me to extend time to allow the chairman of the 2nd respondent to appear in court as parties seem to agree on the facts we presented. What is of issue is for the parties to submit on the legality of the facts as presented and for this court to determine whether they violated the Electoral law and the remedies available.

I will therefore direct that the petitioner files his submissions and serve the respondents by 10th
10 June 2016. The respondents are to reply to the petitioners submissions and file them by 13th June 2016. If there is any rejoinder to move by the petitioner, it should be filed by 15th June 2016. Judgment will then be delivered on 17th June 2016 at 9:00am

Signed

7/06/2016

15

Judge

20 **24/06/2016:**

Sebufu Osama for 1st Respondent & holding brief for Bautu Robert for 2nd Respondent.

The petitioner is not present

Clerk- Meka Andicia

Sebufu: The matter is coming up for judgment and we are ready to receive it.

JUDGMENT

BEFORE: HON JUSTICE JOHN EUDES KEITIRIMA

This Petition was brought under Sections 60(2) (a), 61(a), (b), (c), (d), 68 & 98 of the Parliamentary Elections Act 2005 as amended; Rules 4&5 of the Parliamentary Elections (Elections Petitions) Rules S.I 141-2.

The Petition is supported by the affidavit of the Petitioner who inter alia avers as follows:

1. That the Petitioner was a former candidate in the general National Parliamentary Elections held on 18th February 2016 which were organized by the 2nd Respondent.
- 10 2. The 1st Respondent had been disqualified for election as a Member of Parliament at the time of his election by the 2nd Respondent on the premise that he lacked academic qualifications of advanced level standard or its equivalent to be a Member of Parliament.
- 15 3. The 1st Respondent was unlawfully declared as elected Member of Parliament in as far as his name did not appear on any of the authentic declarations of results forms.
- 20 4. The 1st Respondent in connivance with the 2nd Respondent initiated and forged parallel declaration forms where the 1st Respondent's name appeared and as a result the 1st Respondent was declared as the elected Member of Parliament based on unauthorized and illegitimate declaration forms.
- 25 5. That the Respondents jointly and severally blatantly failed, refused, neglected or ignored compliance with the provisions and Principles of The Parliamentary Elections Act 2005 as amended and as such the elections were not free and fair in as far as non-compliance affected the results of the election in a substantial manner.

The impugned declaration forms are attached to the affidavit of the Petitioner in support of the Petition and marked as Annexure D.

The Petitioner prays for the following remedies:

I. A declaration that the 1st Respondent was wrongly and unlawfully declared the elected Member of Parliament for Arua Municipality.

5 II. A declaration that the Petitioner was the duly elected Member of Parliament for Arua Municipality.

III. Any other remedy as this Court deems fit.

10 In answer to the Petition the 1st Respondent in his affidavit in support to his answer avers inter alia that:

i. The Petitioner has no cause of action as the 1st Respondent's nomination and subsequent election were lawful and done in accordance with the electoral laws of Uganda.

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ii. The 1st Respondent submitted his campaign program which was duly harmonized with all the other contestants and the 1st Respondent actively campaigned and participated in the campaign process together with other contestants including the Petitioner.

20

iii. That at the time of the election on 18th February 2016 the 1st Respondent was qualified to be elected Member of Parliament for Arua Municipality.

25 iv. That his declaration as a Member of Parliament was done in accordance with the law and at all material times were not based on unauthorized and/or illegitimate declaration forms as alleged.

v. That on the 18th February 2016 (Election Day) he discovered that his name was
30 missing on some declaration forms which was immediately rectified by the 2nd Respondent.

vi. That the correction of the defective Declaration Forms did not affect the result in any way.

5

vii. That the 1st Respondent's name appeared on the ballot paper for Arua Municipality Parliamentary seat.

10 viii. That the Petitioner is not entitled to the reliefs sought.

The 2nd Respondent's answer to the Petition is supported by the affidavit of the Chairman of the 2nd Respondent who inter alia avers that:

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I. The electoral process in Arua Municipality was conducted fairly and legally in compliance with the provisions of the Laws of Uganda.

II. The 1st Respondent was reinstated as a candidate for Arua Municipality constituency pursuant to various court orders.

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III. The 1st Respondent was declared as winner in accordance with the law and the wish of the voters of Arua Municipality constituency.

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IV. The 2nd Respondent denies any allegation of forgery of Declaration of Results Forms and contends that the Declaration of Results Forms were issued in accordance with the requirements for conducting elections and specifically in circumstances of the 1st Respondent having been restored as a candidate for Arua Municipality constituency.

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V. The 2nd Respondent did not influence the voters of Arua Municipality constituency to vote for the 1st Respondent.

5 VI. The Petitioner's loss to the 1st Respondent does not imply non-compliance with the electoral principles enshrined in the Laws of Uganda.

10 VII. The 2nd Respondent contends in the alternative that if there were any irregularities or non-compliance with the electoral laws, such non-compliance or irregularities did not affect the outcome of the election in a substantial manner.

VIII. The 2nd Respondent admits no liability of any kind and that the reliefs sought by the Petitioner are disputed as having no merit.

15 Earlier on when this Petition was first brought for hearing, Counsel for the 2nd Respondent raised a preliminary objection and this court ruled that the matter was res-judicata in so far as it sought declarations regarding the 1st Respondent's academic qualifications. The detail of that ruling is on record.

20 At the scheduling conference the issue framed for determination was *whether the 1st Respondent did not appear on any of the authentic declaration of results forms and whether that affected the results of the election in a substantial way*. The other issue to determine is the remedies available depending on how the above issue is resolved.

25 It was also agreed that written submissions be filed within the time frames that were given by Court. The parties complied and filed written submissions within the time frame agreed. The details of the submissions are on record and which I have used to determine this Petition.

It was the Petitioner's contention that whereas the fresh Declaration of Results Forms was authorized by the 2nd Respondent's Chairman, the same were illegal, invalid, null and void abinitio in as far as they were generated by unknown sources endorsed by the 2nd Respondent. That this was in breach of the cardinal obligations of impartiality and ensuring a free and fair

election to the detriment of the electorate and the candidates save for the first Respondent. The Petitioner also contends that this conduct amounted to non-compliance with the provisions of the electoral laws of the land and the result of the election was therefore affected in a substantial manner.

5 The Petitioner submitted that according to Article 61(1) of the Constitution and Section 12(1) of the Electoral Commission Act Cap 140 the 2nd Respondent has the sole mandate of organizing and conducting national elections in Uganda as well as to print and design electoral materials. That however for furtherance of its functions, the Commission may assign some responsibilities to any person, institution or organization. See Section 14 of the Electoral Commission Act Cap
10 140. The Petitioner also submitted that Section 28 and 29 of the Parliamentary Elections Act 2005 as amended provides that voting materials ought to be capable of being distributed by the Returning Officers to the Presiding Officers within 48 hours from the Polling day and that a list of names of the candidates as well as polling stations shall be published in the gazette for verification purposes.

15 The Petitioner contended that the 2nd Respondent carried out its mandate and designed special Declaration of Results Forms for the national elections held on 18th February 2016. That the said forms essentially conformed to the forms prescribed by law as it had special features to enable the Returning Officer to transmit the Results to the 2nd Respondent's Head Quarter at Kampala. That these special features mainly include serial numbers and bar codes. That it was evident that
20 up to the polling day no complaint was ever made as to the propriety of the voting materials and that it was on the polling day when it was realized that the 1st Respondent's name was inadvertently missing on the Declaration of Results Forms distributed by the Returning Officer of Arua District. That the Chairperson of the 2nd Respondent then immediately directed the printing of generic Declaration of Results Forms with the 1st Respondent's name and ordered that
25 they be provided to the Returning Officer, Arua District.

It is the Petitioner's contention that the generic Declaration of Results Forms printed with the 1st Respondent's name were illegal, null and void abinitio. That the Chairperson of the 2nd Respondent does not disclose the form and means of the directive and that it is not known whether the said directive was an assignment in accordance with the provisions of Section 14 of
30 the ECA or a realization of an anomaly under Section 50 of the ECA. That the recipient of the

directive is not disclosed and no candidate was notified of this directive and the implementations thereof save for the 1st Respondent. It is the Petitioner's contention that this directive was in blatant and fundamental breach of the principles of impartiality and the Commission's obligation to ensure that the election was conducted in a free and fair environment. The Petitioner refers to
5 Article 61 (a) of the Constitution and Section 12 (1) (e) of the ECA to buttress his submission. The Petitioner emphasizes that this was a glaring case of partiality by the 2nd Respondent in as far as the intention was to solely ensure that the 1st Respondent wins the election. That it was not farfetched to infer that these generic Declaration of Results Forms were actually provided by the 1st Respondent who was the aggrieved party at the time and thereafter and that the Chairman of
10 the 2nd Respondent endorsed them. The Petitioner cited the case of *Hon. Oboth Jacob versus Dr. Otiam Otaala Emmanuel C.A Election Petition No.38 of 2011* which held on the concept of a free and fair election.

The Petitioner emphasized that the 2nd Respondent cannot invoke Section 50 of the ECA because the same does not provide a license to override the principles of impartiality as well as free and
15 fairness of an election. The Petitioner cited the case of *Joy Kabatsi Kafura versus Anifa Kawooya Bangirana & Electoral Commission S.C. Election Petition Appeal No. 25 Of 2007* to support his submission.

The Petitioner further submitted that nothing can become of an illegality. That the generic Declaration of Results Forms were fundamentally flawed in as far as they were introduced to the
20 Presiding Officers at 5:30 PM and hence disrupting the voting and counting of votes exercise that was already proceeding at the time. That this went to the root of the election in as far as there was inevitable distortion of the results already counted and declared at some polling stations. The Petitioner referred to paragraph 8 of the affidavit of Droti Dennis Felix. That the original Declaration of Results Forms were never withdrawn and the presiding officers were
25 faced with the dilemma of distorting the Declaration of Results Forms by writing the 1st Respondent's name and votes in ink. That therefore the disparities of what the Declaration of Results Forms were actually used to tally the results of the election cannot be trivialized. That the 2nd Respondent has never pronounced itself on how the results of the elections were transmitted to the National Tally Center at Namboole because it was obvious that the generic
30 Declaration of Results Forms could not be transmitted for lack of a serial number and bar code

that was used on search forms nationwide. That the generic forms were also flawed in as far as they did not bear any indication of a polling station, parish or even sub-county as ought to be the case on genuine declaration of results forms. The Petitioner cited the case of *Kakooza John Baptist versus Electoral Commission and Yiga Anthony-S.C Election Petition Appeal No.11 of*
5 *2007* that held on the importance of Declaration of Results Forms.

The Petitioner submitted that the law relating to Declaration of Results Forms is couched in mandatory terms and as such requires strict compliance. The Petitioner further contended that some of the generic forms contain major flaws in the contents of the number of votes and the votes counted. The Petitioner cited several stations where this occurred and the disparities in the
10 numbers. That under Section 45 of the PEA, this was a proper case where this election ought to have been postponed to rectify the details of the candidates on the Declaration of Results Forms.

The Petitioner concluded by praying that the Petition be allowed in the terms proposed.

The 1st Respondent submitted that from the onset the Petitioner in his pleadings and evidence did not challenge the results on the impugned Declaration of Results Forms and that nor were they
15 falsified. That it was not enough for the Petitioner to submit that the generic Declaration of Results Forms were illegal. That the Petitioner should have stated the law under which the impugned declaration of results forms did not comply with. It was the 1st Respondent's submission that the generic Declaration of Results Forms are authentic and are not illegal and /or void as submitted by the Petitioner. That the Declaration of Results Forms came from the
20 Electoral Commission as indicated in the affidavit of its Chairman and that this was corroborated by the Petitioner's own witness Droti Dennis Felix the Presiding Officer in charge of Enyau cell polling station in Kenya ward.

The 1st Respondent cited Section 6(1) (c) of the Parliamentary Elections Act 17 of 2005 as amended which provides for the Commission power to transmit to the Returning Officers
25 sufficient blank report books and other electronic materials. That the generic Declaration Forms were printed to address and correct an error, mistake and or an emergency.

The first Respondent cited Section 50 (1) and (2) of the Electoral Commission Act Cap 140 which gives the 2nd Respondent special powers in order to achieve the purposes of the Electoral Commission Act or any law, where in the course of an election it appears to the Commission that

by reason of any mistake, miscalculation an emergency that any of the provisions of any law relating to elections other than the Constitution does not accord with exigencies of the situation to adapt any of the provisions to such extent as the Commission considers necessary to meet the exigencies of the situation. That therefore the generic forms were made in accordance with the law. That there was nothing illegal about writing of the 1st Respondent's name and results in ink by the 2nd Respondent's presiding officers on the existing Declaration of Results Forms. The 1st Respondent contends that this was only to ensure that the people of Arua Municipality are not disenfranchised. That the 2nd Respondent also has the power to direct and assign any of its duties to any election officer Under Section 14(1) of the Electoral Commission Act Cap 140.

10 The 1st Respondent further submitted that Article 68(4) of the Constitution provides for the essential requirements of the Declaration of Results Forms which are the signing by the Presiding Officer, polling agents, the name of the polling station, number of votes cast in favour of each candidate. Further, that the generic Declaration of Results Forms are lawful and authenticated by the fact that they were all signed by all the candidates polling agents without registering any complaints. That the effect of signing of a Declaration of Results Form has been a subject of litigation and court's adjudication in the case of *Hon. Oboth Markson Jacob versus Dr. Otiam Otaala Emmanuel E.P APPEAL NO.38 OF 2011* where it was held that; ... "*the DR Forms in question are signed by the respective station presiding officers as well as a set of two agents for the appellant and also for the respondent. It follows therefore that if any of those DR*
15 *Forms were a forgery, then a party to the petition would straight away point out the forgery. None did so*". ... "*the presiding officer and the agents of the appellant and the respondent signed the respective DR Forms at each station, each agent keeping a copy of the form. There were no complaints raised to the returning officer before the announcement of the election. I conclude from all this that a proper election as is reflected in the Declaration of Results Forms*
20 *from each of these polling stations did take place and that the results were valid.*"

The 1st Respondent further submitted that use of a non-prescribed Declaration of Results Forms is not a ground for annulling an election under Section 61 of the Parliamentary Election Act 17 of 2005 as amended. That the Petitioner had to prove that non-compliance affected the result in a substantial manner. The 1st Respondent cited the case of *Sitenda Sebalu versus Sam Njuba &*
30 *E.P APPEAL NO.1 of 2008* to buttress his submission.

The 1st Respondent contended that apart from Counsel's submissions from the bar, it is not the Petitioner's evidence that the results were falsified, the Petitioner simply complains that that the 1st Respondent's name should not have been printed in ink on the original DR Forms and the new /generic DR Forms bearing the 1st Respondent's name should not have been printed and used by the 2nd Respondent. The 1st Respondent also prayed that the Court should invoke Section 43 of the Interpretation Act Cap 3 which provides that a document shall not be rendered void for mere deviation from the prescribed form where the substance is not affected.

The 1st Respondent concluded by submitting that the Petitioner had failed to discharge the burden of proving that the 1st Respondent did not appear on any of the authentic DR Forms and if so whether non-compliance if any substantially affected the result. That instead it was the 1st Respondent that had proved that he was duly elected as a Member of Parliament for Arua Municipality on authentic and lawful DR Forms and the non-compliance if any did not affect the election in a substantial manner. The 1st Respondent further contends that the Petition is incompetent and should be dismissed with costs to the 1st Respondent.

In their submission, the 2nd Respondent stated that under Section 50 (1) of the Parliamentary Elections Act, a presiding officer is mandated to fill in the necessary number of copies of the prescribed form for the Declaration of Results. Regulation 2 of the Parliamentary Elections (Interim Provisions) (Prescription of Forms) Regulations SI 141-3 and schedule therein prescribes the format of a declaration of results form. The 2nd Respondent contends that the generic Declaration of Results Forms, bearing the name of the 1st Respondent and the Petitioner conform to that format as prescribed by the law. The 2nd Respondent cited the case of *Ngoma Ngime versus EC and Winnie Byanyima-C.A NO.11/02* where it was held inter alia that all the 66 declaration of results forms that court examined contained the essential information that the law requires and were accordingly found to be valid.

The 2nd Respondent submits that in this case the Petitioner's only contention is that the forms did not bear the bar codes and serial numbers. That save for these, all information required was contained in the forms. That as per the format prescribes by the law, bar codes are a superfluous addition whose failure to appear is just a matter of appearance and does not render a declaration of results forms invalid. Further, that the Petitioner does not deny that the Declaration of Results Forms as having been signed by the respective returning officers and some of the agents of the

candidates who signified that the contents therein are true. The 2nd Respondent cited the case of *Babu Edward Francis versus the EC AND Elias Lukwago HC E.P NO.10 OF 2006* Where Justice Stella Amoko as she then was held that “when an agent signs a DR Form, he is confirming the truth of what is contained in the DR Form. He is confirming to his Principal that this is the correct result of what transpired at the polling station. The candidate in particular is therefore stopped from challenging the contents of the form because he is the appointing authority of the agent.”

The 2nd Respondent further submitted that the minimum legal requirement for a declaration of result form is that it must be signed by the presiding officer in order to be used as a basis for declaring the results at every polling station. The failure to comply with any other of the requirements prescribed by the law does not invalidate the results which have been declared as validly obtained by each candidate. The 2nd Respondent also cited a recent case of *Toolit Simon Akecha versus Jacob Oulanya and the Electoral Commission –Election Appeal No. 19 of 2011* it was held that all the impugned declaration of results forms as attached to the affidavit of the Petitioner on which they were signed by the respective presiding officers was not denied, as such were valid and reflected the outcome of the election.

The 2nd Respondent contends that the Petitioner does not dispute the results reflected in the DR Forms but only disputes the appearance. The 2nd Respondent invited Court to disregard the difference in the structural/ornamental appearance of the declaration of result forms and come to the conclusion that whereas the declaration result forms were reprinted, the results contained therein indicate the will of the people of Arua Municipality.

With regard to the errors in the computation of results as reflected in the declaration of results forms, the 2nd Respondent submitted that the errors cited were trivial and if corrected would not affect the outcome of the election. The 2nd Respondent cited the case of *Kizza Besigye versus Museveni E.P NO.1 OF 2006* where the case of *Morgan versus Simpson* was cited with approval which held to the effect that elections must not be set aside on light of trivial grounds. It is a matter of great public interest. The 2nd Respondent invited the Court to disregard the mistakes as trivial as they could not affect the outcome of the election.

The 2nd Respondent further submitted that the Petitioner merely states that the generic declaration of results forms were used in declaring the winner of the election but does not dispute the results of each of the candidates polled at the respective polling stations. That each of the declaration of results forms show that the same were signed by each of the respective agents signifying acceptance of the results. The 2nd Respondent cited the recent case of *Amama Mbabazi versus Yoweri Museveni E.P NO.1 of 2016* where Chief Justice Bart Katureebe held that “given the national character of the exercise where all voters in a country formed a single constituency, can it be said that the proven defects so seriously affected the result that the result could no longer reasonably be said to represent the true will of the majority of the voters?”.

10 The 2nd Respondent concluded by praying that the Petition should be dismissed with costs.

The Petitioner made a submission in rejoinder basically reiterating his earlier submissions. The Petitioner emphasized that the introduction of the impugned generic Declaration of Results Forms in the 18th February 2016 for Member of Parliament of Arua Municipality was not substantially and intrinsically compliant with the provisions and more so the principles of the enabling electoral laws of the country. That this was unfair to all the candidates save for the 1st Respondent in as far as the exercise turned from being a free and fair election into an imposition of one candidate who was the 1st Respondent and hence affected the result of the election in a substantial manner. That there was no amount of directive from the Chairman of the 2nd Respondent that could legitimize an illegality as there was no law permitting that. That an illegality was a nullity. That the Petitioner would have been the winner of the election if it had not been for the interference of the 1st Respondent.

RESOLUTION

The facts in this Petition are not disputed. These are that on the 18th February 2016, the 2nd Respondent organized and conducted National Parliamentary elections for Arua Municipality Constituency wherein the Petitioner and the 1st Respondent participated as candidates. It was noted on the day the said elections were held that the 1st Respondent’s name did not appear on the Declaration of Results Forms issued by the 2nd Respondent throughout the entire constituency though the 1st Respondent’s name had appeared on the ballot papers. The 2nd Respondent then

ordered that generic Declaration of Results forms be printed to reflect the 1st Respondent's names and to also include in ink the names of the 1st Respondent on the original Declaration of Results Forms that had earlier been issued.

The issue to determine now is whether the 1st Respondent did not appear on any authentic DR
5 Forms & whether that affected the results of the election in a substantial manner.

The burden of proof lies on the Petitioner who has to prove his Petition to the satisfaction of Court as required under Section 61 (1) of the Parliamentary Elections Act No.17 of 2005 as amended. The standard of proof is slightly higher than proof on a balance of probabilities but short of proof 'beyond reasonable doubt'. See *Odo Tayebwa versus Bassajjabalaba Nasser &*
10 *Electoral Commission-Election Petition Appeal No.013 of 2011.*

In trying to explain how the generic Declaration of Results Forms came to be issued in the said election, the Chairman of the 2nd Respondent in his supplementary affidavit in reply stated that the 1st Respondent's name was on the ballot paper for the election of MP Arua Municipality. That he was on the 18th February 2016 advised by his Returning Officer Arua that the 1st
15 Respondent's name was inadvertently missing on the Declaration of Results Forms. That he then directed the Printing of generic Declaration of Results Forms with the 1st Respondent's name included. The 2nd Respondent's Chairman further avers in his supplementary affidavit that the Correction of the Declaration of Results Forms did not affect the results of the election in any way but ensured a fair electoral process. The Chairman of the 2nd Respondent avers that this was
20 done in accordance with the law and hence the said generic forms were not illegal.

Article 68(4) of the Constitution of the Republic of Uganda provides that "The presiding officer, the candidates or their representatives and in the case of a referendum, the sides contesting or their agents, if any, shall sign and retain a copy of a declaration stating-

- (a) The polling station;
- 25 (b) The number of votes cast in favour of each candidate or question, and the presiding officer shall there and then, announce the results of the voting at that polling station before communicating them to the returning officer."

Article 61 of the Constitution provides for the Functions of the Electoral Commission which include-

- (a) To ensure that regular, free and fair elections are held;
- (b) To organize, conduct and supervise elections and referenda in accordance with this
5 Constitution;
- (c) -----
- (d) To ascertain, publish and declare in writing under its seal the results of the elections and referenda;
- (e) -----
- 10 (f) To hear and determine election complaints arising before and during polling;
- (g) -----
- (h) -----

There is no evidence to show that when the generic declaration of results forms were introduced at the various polling stations, any of the candidates complained to the 2nd
15 Respondent as to their introduction. It would appear that the complaint only arose after the 1st Respondent won the election and the complaint was only raised in this petition. Am sure that if the Petitioner had won the election this complaint could not have arose. The impugned generic forms that were introduced by the 2nd Respondent and which are marked as annexure D to the Petitioner's affidavit indicate that the forms were all signed
20 by the presiding officer and the agents to the candidates. This is an indicator that the Petitioner and the other candidates acquiesced to the use of those forms otherwise they had the right to out rightly reject them and formally complain to the 2nd Respondent or even refuse to sign them. Apparently this was not done and in my opinion the Petitioner by his conduct is estopped from complaining now.

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It was held in the case of *Babu Edward Francis versus Electoral Commission and Elias Lukwago-High Court Election Petition No.10 of 2006* that “When an agent signs a DR Form, he is confirming the truth of what is contained in the DR Form. He is confirming to his Principal that this is the correct result of what transpired at the polling station. The
30 candidate in particular is therefore stopped from challenging the contents of the form because he is the appointing authority of the agent”.

I therefore take it that even though the Petitioner challenges the form of the Declaration of Results Forms that was introduced by the 2nd Respondent, he does not challenge the results indicated therein as the same were authenticated by his agents.

This therefore leaves me to resolve whether the Chairman of the 2nd Respondent was right to introduce the generic Declaration of Results Forms.

Section 50 (1) of the Electoral Commission Act [Cap.140] provides that “Where, during the course of an election, it appears to the commission that by reason of any mistake, miscalculation, emergency or unusual or unforeseen circumstances any of the provisions of this Act or any law relating to the election, other than the Constitution, does not accord with the exigencies of the situation, the commission may, by particular or general instructions, extend the time for doing any act, increase the number of the election officers or polling stations or adopt any of those provisions as may be required to achieve the purposes of this Act or that law to such extent as the commission considers necessary to meet the exigencies of the situation.”

It is my considered view that this provision of the law gives the 2nd Respondent powers to improvise in case of any emergencies or mistakes to ensure that the election continues as long as the results will reflect the will of the people. It is envisaged that mistakes will always be there and I can dare say that one cannot expect a perfect election hence the justification of the said provision of the law. The 2nd Respondent can under that provision even create new polling stations! So what would stop the Chairman of the 2nd Respondent from correcting mistakes on a declaration of result form if only that is meant to ensure that the election continues as long as it reflects the will of the voters?

In this instant case, the 1st Respondent was duly nominated and appeared on the ballot paper. There was an omission to include his name on the Declaration of Results Forms. In other words all that lacked was to reflect his results on the said forms but this would only occurred after the voters had cast their votes. The only worry therefore to the Petitioner in my opinion would be whether what was reflected in the ballot papers is what was transmitted to the Declaration of Results Forms. It is my considered view that the generic Declaration of Results Forms were introduced to correct a mistake that was

discovered on the polling day which was the omission of the 1st Respondent's name on the Declaration of Results Forms. It is my considered view that the Chairman of the 2nd Respondent had the mandate under the said provisions of the law to correct that mistake in as far as it did not disenfranchise the voters of Arua Municipality Constituency.

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Section 43 of the Interpretation Act Cap 3 provides that "Where any form is prescribed by any Act, an instrument or document which purports to be in such form shall not be void by reason of any deviation from that form which does not affect the substance of the instrument or document or which is not calculated to mislead."

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It is my considered view that the generic Declaration of Results Forms that were introduced did not affect the results of the votes that had been cast and was not calculated to mislead or even benefit the 1st Respondent as the Petitioner would wish to intimate. The submission that the said forms could have even been generated by the 1st Respondent is a submission from the bar not backed by any credible evidence and definitely not

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according to the required standard of proof as required in Petitions of this nature. The chairman of the 2nd Respondent owned up the said forms and gave reasons which are convincing as to why they were introduced. This is in the supplementary affidavit of the 2nd Respondent's Chairman specifically paragraph 7. These forms were accepted by the

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Petitioner in as far as his agents at the various polling stations signed on them and hence acknowledged the results that were reflected therein. If there was any fundamental discrepancy the Petitioner or his agents had the right from the onset to reject them by raising a formal complaint to the 2nd Respondent. In the case of *Hon. Oboth MARKSON Jacob versus Dr. Otiam Otaala Emmanuel-Election Petition Appeal no.38 Of 2011* it was

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held by Justice Remmy Kasule JA "...the DR Forms in question are signed by the respective station presiding officers as well as a set of two agents for the appellant and also for the respondent. It follows therefore that if any of those DR Forms were a forgery, then a party to the petition would straight away point out the forgery. None did so".

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Similarly if the Petitioner had noticed something fundamentally wrong with the said forms he should pointed that out straight away and not wait for the 1st Respondent to be declared a winner for him to do so.

In the case of *Sitenda Sebalu versus Sam k. Njuba and Electoral Commission- Election Petition Appeal NO.1 OF 2008 Justice Byamugisha* as she then was held that “the complaint by the appellant that the presiding officer used a non-prescribed form at the polling station in question in my view could be considered a triviality which should not be used to upset the choice of the voters in choosing a candidate. As we all know an election is an exercise of great public importance”.

In the Election Petition of *Kiiza Besigye versus Museveni Election Petition No. 1 of 2001* it was held that “Elections must not be set aside on light or trivial grounds. It is a matter of great public interest.” In this instant case I find that the major complaint about the Declaration of Results Forms is about the form but not the substance. In my view the substance was whether those forms reflected the results of the votes cast in Arua Municipality Constituency and the answer is in the affirmative. In the recent case of *Amama Mbabazi versus Yoweri Museveni E.P NO.1 OF 2016* the Hon Chief Justice Bart Katureebe held that it was important for the Court to ask the question that given the national character of the exercise it can be said that the proven defects seriously affected the result and that the result could no longer reasonably be said to represent the true will of the majority of voters.

In this instant case I have already observed that the introduction of the generic Declaration of Results Forms did not affect the results of the votes that were cast in Arua Municipality Constituency. Even the witness of the Petitioner a one Droti Dennis Felix who swore an affidavit in rejoinder to the 2nd Respondent’s supplementary affidavit stated that he recorded the results on the new declaration forms as they were obtained by each candidate. There was nothing to show in his affidavit how the new forms affected the results in any way. The 1st Respondent and his party would have been grossly affected if the anomaly was not rectified and there is nothing to show that any other candidate was affected by the introduction of the generic forms unless they want to say that they would have taken advantage of the situation to be declared winners if the 1st Respondent had not appeared on the declaration form! That would have been taking undue advantage that cannot be condoned in a democracy where the wish of the majority is what is considered.

The Petitioner tried to point out that the generic Declaration of Results Forms had major flaws in the contents and number of votes and votes counted. He went on to point out the stations where this occurred and the figures involved. I think that the onus was on the Petitioner to prove how this substantially affected the outcome of the results in the said constituency. Section 61 (1) of the Parliamentary Elections Act [17 of 2005] as amended provides that “The election of a candidate as a Member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court-

a) Noncompliance with the provisions of this Act relating to elections , if court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the noncompliance and failure affected the result of the election in a substantial manner;

b) -----

c) -----

d) -----

In the case of *Kizza Besigye versus Museveni-Election Petition No.1 of 2006* the Supreme Court held that a court cannot annul an election on the basis of some irregularities that had occurred.

It is my considered view that even if there were some irregularities on how some figures were computed in some polling stations, the onus was on the Petitioner to prove to the satisfaction of this court how that affected the result of the election in a substantial manner. No candidate or agent complained that the votes counted, announced and recorded on the impugned Declaration of Results Forms as those of his/her candidate were wrongly recorded on the said forms. The above being the state of affairs, it is safe to infer that the writing of misstatements on these forms relating to total valid votes cast, or rejected or ballot papers counted or spoiled, or issued or unused are mere irregularities not affecting the results of the election in a substantial manner. See the case of *Hon.Oboth Marksons Jacob versus Dr. Otiam Otaala Emmanuel- Election Petition Appeal No.38 of 2011*.

The Petitioner had also questioned as to how the said DR forms were transmitted to the tally center when the forms had no bar codes. Again I believe that what was important is whether the 2nd Respondent received accurate results but as to how they were transmitted was not important. Again in the case of *Dr. KiizaBesigye versus Electoral Commission &YoweriMuseveni-Supreme*

Court Presidential Election Petition No.1 of 2006 Chief Justice Benjamin Odoki as he then was held that ... “some noncompliance or irregularities of the law or principles may occur during the election, but an election should not be annulled unless they have affected it in a substantial manner. The doctrine of substantive justice is now part of our constitutional jurisprudence.

5 *Article 126 (2) (e) of the constitution provides that in adjudicating cases both of civil and criminal nature, the courts shall subject to the law, apply the principle among others, that substantial justice shall be administered without undue regard to technicalities. Courts are therefore enjoined to disregard irregularities or errors unless they have caused substantial failure of justice”.*

10 So whether the results were transmitted electronically or by bus, air or water what was important is whether the National tally center received the genuine results that came from Arua Municipality Constituency.

Before I take leave of this matter, at one point the Petitioner had expressed the wish to cross-examine the Chairman of the 2nd Respondent on matters he had deposed to in his affidavit. This
15 was not possible because it was reported that the Chairman of the 2nd Respondent was busy and another date was sought to enable him appear in court. The 2nd Respondent should be alive to the fact that these petitions are given timeframes in which they should be determined and I would advise that in future some of the affidavits should be deposed by the Commissioners of the 2nd Respondent or even technocrats if they are able to explain certain facts so that it is much easy to
20 access them once they are required for cross examination. In this case it was my considered view that since the 2nd Respondent’s Chairman had owned up to the generic forms that had been introduced in the said election, there was nothing much of probative value he would have added by his physical presence in court and I don’t believe that prejudiced the Petitioner in any way as he could still prove the facts he had alleged without necessarily cross examining the Chairman to
25 the 2nd Respondent.

I therefore find that the 1st Respondent was duly elected and declared as Member of Parliament for Arua Municipality.

The petition will therefore be dismissed. However considering the circumstances that gave rise to this Petition and in the interests of Justice I will order that each party bear their own costs.

Hon. Justice John Eudes Keitirima

24/06/2016

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