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**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA  
ELECTION PETITION NO. 0002 OF 2016**

**ARUMADRI JONHN DRAZU \_\_\_\_\_ PETITIONER**

10

**=VERSUS=**

15

**1. ETKA ISAAC JOAKINO**

**2. ELECTORAL COMMISSION \_\_\_\_\_**

**RESPONDENTS**

20 **BEFORE**

**JUSTICE. JOHN EUDES KEITIRIMA**

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## JUDGE

**17/05/2016:**

5 Mr. Ben Ikilai for the petitioner in this matter as well as the applicant.

Mr. Henry Odama appears jointly with Alfred Okello Oryem for the 1<sup>st</sup> Respondent.

Mr. Alfred Okello Oryem is absent and

10 The 2<sup>nd</sup> Respondent is represented by counsel Bautu Robert.

The applicant is in court.

**Mr. Odama:** My lord the 1<sup>st</sup> Respondent is being held at Kampala for swearing in process

**Court:** Would you really want to object to his application?

15 **Mr. Odama:** If it is in respect of the amendment of the 2<sup>nd</sup> Respondent I have no problem

**Mr. Bautu:** I have no objection my lord

**Court:** By the consent of the parties the amendment sought so for by applicant to amend petition No. 002 of 2016 in regard to  
20 the 2<sup>nd</sup> respondent's name is granted.

**Mr. Ikilai:** My lord in light of that am seeking court's guidance as to whether I can file amended petition right away and serve the Respondent?

**Court:** It is okay and is it possible to also seat and file a joint  
5 scheduling memorandum?

**Mr. Bautu:**

I don't know what the view my colleagues is, my view in this matter is what is being raised here generally are legal issues and that we would actually make submissions after we are have filed  
10 jointly. If they agree to that my lord then I would pray that we adopt that procedure and we have to file it in submissions in respect of what we have agreed upon this petition.

**Mr. Odama:** For the 1<sup>st</sup> Respondent we concur with our colleague's option on that matter.

15 **Mr. Odama:** Our view is that after receiving the amended pleadings then we get ourselves a date for scheduling when all the parties including Okello Oryem is in attendance.

**Mr. Ikilai:** My lord we shall first file the amended petition today and serve and I don't know how long my colleagues will need to  
20 file the response.

Signed

17/05/2016

Judge

## **JUDGMENT**

### **5 BEFORE: HON. JUSTICE JOHN EUDES KEITIRIMA**

This Petition is brought under Sections 60-63 of the Parliamentary Elections Act 17/2005 and Rule 4-6 of the Parliamentary Elections (Election Petitions) Rules SI 141-2.

The Petitioner brings this petition on the following grounds:

- 10 1. The Petitioner was a candidate in the 18<sup>th</sup> February 2016 Parliamentary Elections and is aggrieved by the 2<sup>nd</sup> Respondent's declaration of the 1<sup>st</sup> Respondent as the winner of the said elections.
- 15 2. The Petitioner contends that the election of the 1<sup>st</sup> Respondent be set aside as there was non-compliance with the provisions of the Parliamentary Elections Act, and the principles laid down therein and under the Electoral Commission Act and the Constitution and the non-compliance and or failure affected the results in a substantial  
20 manner in the following way:-
  - a. The 2<sup>nd</sup> Respondent having duly nominated the Petitioner failed to conduct the election in accordance with the electoral laws by allowing the 1<sup>st</sup> Respondent who was not a

candidate/disqualified for the election as a Member of Parliament to participate in the election for upper Madi constituency in Arua District.

5 b. The action of the 2<sup>nd</sup> Respondent by allowing the election to go on inclusive of the 1<sup>st</sup> Respondent despite their knowledge that the 1<sup>st</sup> Respondent was on the ballot paper yet he had been denominated by the 2<sup>nd</sup> Respondent affected the results in a substantial manner.

10 c. The action of the 1<sup>st</sup> Respondent in participating in the election for upper Madi constituency well knowing that he was disqualified disenfranchised the voters of upper Madi Constituency.

15 d. The actions of the 2<sup>nd</sup> Respondent in disobeying the lawful Court order of the Court of Appeal was illegal, null and void abinitio.

3. The Petitioner avers that despite the above illegalities, the District Returning Officer of Arua went ahead to declare the results in favour of the 1<sup>st</sup> Respondent and therefore neglected and failed to prevent the above abuses.

20 4. That the 2<sup>nd</sup> Respondent did know of the said illegalities concerning the 1<sup>st</sup> Respondent but failed and or refused to declare the Petitioner as the winner of the election in upper Madi Constituency Arua District.

The Petitioner now seeks for the following prayers:

- a. The election and declaration of the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent as directly elected Member of Parliament for Madi constituency be set aside.
- b. The declaration that the Petitioner was validly elected as the Member of Parliament for Upper Madi constituency Arua District.
- c. The costs of this Petition be paid by the Respondents
- d. Such other remedy available under the electoral laws as the court considers just and appropriate in the circumstances.

10 The Petition is supported by the affidavit of the Petitioner who deposes to the said grounds.

There is also a supplementary affidavit of the Petitioner who deposes inter alia that:

- a. During the Parliamentary elections held on the 18<sup>th</sup> day of February 2016, the 2<sup>nd</sup> Respondent even made communications and issued a public notice notifying the general public that the 1<sup>st</sup> Respondent was not a duly nominated candidate for the Parliamentary election. The Petitioner attached a copy of the Public notice which was marked as "SA".
- b. That despite making the communications and issuing a public notice, the 2<sup>nd</sup> Respondent still went ahead to declare the 1<sup>st</sup> Respondent as validly elected and the

winner of Upper Madi Constituency Parliamentary elections.

In answer to the Petition, the 1<sup>st</sup> Respondent avers inter alia that:

- 5 a. The Petitioner has no legal grievance within the meaning of Section 61(1) of the Parliamentary Elections Act.
- b. That the alleged illegalities are misconceived in fact and law and that the District Returning Officer acted in accordance with the law when he declared the 1<sup>st</sup> Respondent the elected Member of Parliament for Upper Madi Okollo  
10 Constituency.
- c. The alleged irregularities and illegalities are misconceived in fact and law and that the Returning Officer acted in accordance with the law when he declared the 1<sup>st</sup>  
15 Respondent as the winner and that the results declared were the correct results of the election.
- d. The affidavit of the Petitioner in support of the Petition does not in fact support the Petition and it is incurably tainted with misconceptions of the law and facts and outright lies.
- e. The purported denomination of him as a candidate for  
20 election as Member of Parliament for Upper Madi Okollo Constituency was if at all illegal, null and void.
- f. The purported denomination of him as a candidate for election as Member of Parliament for Upper Madi Okollo Constituency was in any case overturned by the 2<sup>nd</sup>

Respondent and his candidature was reinstated prior to his election in accordance with the law and order of both the High Court and the Court of Appeal.

The 1<sup>st</sup> Respondent's answer to the Petition is supported by the affidavit of the 1<sup>st</sup> Respondent who deposes to the said grounds in answer to the Petition.

The 2<sup>nd</sup> Respondent's answer to the Petition states inter alia that:

- a. The electoral process of Upper Madi Constituency was conducted fairly and legally in compliance with the provisions of the Laws of Uganda.
- b. The 1<sup>st</sup> Respondent appeared or was published on the ballot as a result of having been duly nominated.
- c. The 2<sup>nd</sup> Respondent's agent declared the results in accordance with the law and the wish of the voters of Upper Madi Constituency.
- d. The 1<sup>st</sup> Respondent was legally nominated on the 2<sup>nd</sup> of December, 2015 and the Court of Appeal decision vide Miscellaneous Application No. 47 of 2016 allowed the 2<sup>nd</sup> Respondent to conduct the elections with all the duly nominated candidates and that the substantive appeal is still pending in the Court of Appeal.
- e. The said decision stayed all matters that related to Arua High Court Civil Suit No.24 of 2015 that had equally



purported by way of interim order to restrain the nomination of the 1<sup>st</sup> Respondent.

- f. The 2<sup>nd</sup> Respondent was obliged to conduct the elections in accordance with the Gazetted scheduled time and the law.
- 5 g. The 2<sup>nd</sup> Respondent did not in any way influence the voters of Upper Madi Constituency to vote for the 1<sup>st</sup> Respondent.
- h. The Petitioner's loss to the 1<sup>st</sup> Respondent does not imply non-compliance with the electoral principles enshrined in the laws of Uganda.
- 10 i. In the alternative but without prejudice to the above, the 2<sup>nd</sup> Respondent contends 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.
- 15 j. The 2<sup>nd</sup> Respondent admits no liability of any kind and that the reliefs sought by the Petitioner are disputed as having no merit and the 2<sup>nd</sup> Respondent prays that the Petition be dismissed with costs.

20 The 2<sup>nd</sup> Respondent's answer to the Petition is supported by the affidavit of the Chairman of the 2<sup>nd</sup> Respondent who deposes to the said grounds as raised in the answer by the 2<sup>nd</sup> Respondent to the Petition.

At the scheduling conference the following issues were raised:

1. Whether or not the 1<sup>st</sup> Respondent was a duly nominated candidate in law for the 18<sup>th</sup> February 2016 Parliamentary elections for Upper Madi Constituency.
2. Whether or not the declaration of the 1<sup>st</sup> Respondent as a winner of elections for Upper Madi Constituency by the 2<sup>nd</sup> Respondent was lawful.
3. The remedies available.

It was also agreed at the Scheduling conference that written submissions be filed. The parties filed their written submissions within the timeframe agreed. The details of their submissions are on record and which I have considered in determining this petition.

The Petitioner in his submissions contended that the 1<sup>st</sup> Respondent was not a candidate to participate in the election that was organized for the election to the Parliamentary seat for Upper Madi Constituency in Arua District.

The Petitioner submitted that Section 61(1) of the PEA 2005(as amended) specifies the grounds upon which the election of a Member of Parliament may be set aside. It is now settled law that the burden of proof in Election Petitions lies upon the Petitioner. He or she is required to discharge that burden by proving the allegations, made by him or her in the Petition to the satisfaction of the Court. See *Election Petition No.1 of 2001 Col.Rtd.Dr.Besigye*

*Kizza versus Museveni Yoweri Kaguta and the Electoral Commission.*

With regard to issue 1, the Petitioner submitted that the 1<sup>st</sup> Respondent was never a duly nominated candidate in law for the 18<sup>th</sup> February 2016 Parliamentary Elections for Upper Madi Constituency. The basis of his submission was that on the 1<sup>st</sup> day of December 2015, there was a restraint order issued by the Deputy Registrar of this Court vide Misc. Application No.60 of 2015 arising from H.C.C.S No.024 of 2015. The order was meant to preserve the status quo. The 2<sup>nd</sup> Respondent was aware of the order even before it went ahead to nominate the 1<sup>st</sup> Respondent. According to the Petitioner, the 1<sup>st</sup> Respondent had not yet been nominated by the time the restraining order was served upon the 2<sup>nd</sup> Respondent. That it was on the said basis that the Returning Officer one Angom Ococ Ruth wrote to the Chairperson of the 2<sup>nd</sup> Respondent in which a resolution had been passed to denominate the 1<sup>st</sup> Respondent.

The Petitioner further submitted that even if the 1<sup>st</sup> Respondent was aggrieved by the said denomination, he had the right to appeal the decision of the 2<sup>nd</sup> Respondent to the High Court as provided for Under Section 15 (2) of the Electoral Commission Act Cap 140. The Petitioner cited several authorities with regard to respect of Court orders which generally are to the effect that Court Orders should never been disobeyed even if the party knew

that the order was null or irregular. That therefore the dictates of Justice and equity as well as the circumstances of the people of Upper Madi Constituency require this Court to apply the common law and doctrines of equity in this petition by declaring the  
5 Petitioner as validly elected and order the 1<sup>st</sup> Respondent to vacate his seat as provided for under S.63 (6) (b) (i) of the Parliamentary Elections Act 17 of 2005.

The Petitioner emphasized that there was noncompliance of the Orders of the High Court and the Court of Appeal. That no  
10 evidence of renomination or nomination of the 1<sup>st</sup> Respondent had been adduced by the Respondents. That there was no evidence adduced by the 2<sup>nd</sup> Respondent to show that the 1<sup>st</sup> Respondent was ever nominated after the said Order of the Court. That this Court should take into account that even when the consequential  
15 order of renomination was obtained, the same was stayed by order dated 29<sup>th</sup> December 2015. That the Court of Appeal stayed the same on the 17<sup>th</sup> day of February 2016 and ordered elections to go on and all candidates duly nominated for Parliamentary elections as of 17<sup>th</sup> February 2016, be voted for by the voters in  
20 the said Constituency. That by 18<sup>th</sup> February 2016 when the elections were conducted, the 2<sup>nd</sup> Respondent even issued a public notice confirming that the 1<sup>st</sup> Respondent was not duly nominated candidate for the 2016 Parliamentary Elections.

With regard to issue 2 the Petitioner submitted that the declaration of the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent as the winner of the Parliamentary seat for Upper Madi Constituency was null and void abinitio since the participation of the 1<sup>st</sup> Respondent  
5 in the said election was in itself illegal and void abinitio. That the evidence adduced establishes a generalized and widespread noncompliance with the law relating to nomination, campaigns and violation of Court orders by the Respondents which this Court should condemn.

10 With regard to the remedies, the Petitioner submitted that this Court should allow the petition and set aside the election of the 1<sup>st</sup> Respondent as a directly elected Member of Parliament for Upper Madi Constituency and that instead the Court declares the Petitioner as the winner of the directly elected Member of  
15 Parliament for Upper Madi Constituency and that costs of this petition should be paid by the Respondents.

In his submissions, the 1<sup>st</sup> Respondent stated that he was a candidate on the 18<sup>th</sup> day of February 2016 elections for the directly elected Member of Parliament for Upper Madi  
20 Constituency Arua District having been duly nominated as a candidate on the 02/12/2015 and was never disqualified from participating in the elections of 18<sup>th</sup> /02/2016. That the 2<sup>nd</sup> Respondent's denomination of the 1<sup>st</sup> Respondent was done in error, which denomination was set aside by the High Court in Arua

and ordered the 2<sup>nd</sup> Respondent to re-nominate the 1<sup>st</sup> Respondent. That the 1<sup>st</sup> Respondent rightfully participated in the elections of Upper Madi Constituency after the main suit No.24 of 2015 was dismissed in favour of the 1<sup>st</sup> Respondent and another.

5 That the District Returning Officer of Arua acted within her powers to declare the 1<sup>st</sup> Respondent the winner after obtaining the majority of the valid votes cast and therefore there was no illegality or irregularity.

With regard to issue 1, the 1<sup>st</sup> Respondent submitted that he was  
10 duly nominated candidate in law for the 18<sup>th</sup> February 2016 elections for Upper Madi Constituency. The 1<sup>st</sup> Respondent further submitted that Section 61(1) of the PEA No. 17 of 2005 as amended specifies the grounds upon which the election of a member of parliament may be set aside. That qualification and  
15 disqualification for election as a Member of Parliament are provided for under Article 80 of the Constitution and Section 4 of the PEA.

The 1<sup>st</sup> Respondent further submitted that the entire grievance of the Petitioner was based on sponsorship, nomination and election  
20 of the 1<sup>st</sup> Respondent as NRM Party flag bearer. That invariably, Section 11(2) of the PEA on sponsorship of a candidate by a political party and Section 13 of the PEA on factors which may invalidate a nomination are applicable.

The 1<sup>st</sup> Respondent states that he participated in the NRM Party primary elections on 27<sup>th</sup> and 28<sup>th</sup> October 2015 together with other candidates whereby the 1<sup>st</sup> Respondent was declared the winner of the election against Drito Martin who then challenged the result of the NRM primaries elections in Civil Suit No.24 of 2015. That out of that suit several interlocutory orders were issued back and forth and that the entire Petition is based on the interlocutory orders of the High Court. That eventually Civil Suit No.24/2015 was dismissed prior to the election of the 1<sup>st</sup> Respondent and the interlocutory orders affecting the 1<sup>st</sup> Respondent's nomination as NRM flag bearer from going to the election were vacated. That the final Decree of the Suit ordered the 2<sup>nd</sup> Respondent to ensure that the 1<sup>st</sup> Respondent participates as NRM Party flag bearer. That the Court of Appeal issued a similar order that all persons nominated as candidates for the elections must be allowed to participate. That on 28<sup>th</sup> /10/2015 the Chairman NRM Electoral Commission notified the Chairman Electoral Commission of the elected NRM flag bearer being the 1<sup>st</sup> Respondent. That the 1<sup>st</sup> Respondent then presented himself to the 2<sup>nd</sup> Respondent and was dully nominated as the NRM flag bearer candidate for Upper Madi Constituency on the 2<sup>nd</sup> day of December 2015.

The 1<sup>st</sup> Respondent further submitted that under Section 11(2) of the PEA 2005 it provides for nomination of a candidate under

multi-party political system. It provides that “*where under multi-party political system, a person is sponsored by a political organization or political party, the nomination paper shall indicate that he or she is so sponsored stating the name and address of*”  
5 *the political organization or political party.*” The 1<sup>st</sup> Respondent insists that he was duly nominated by the 2<sup>nd</sup> Respondent on 2<sup>nd</sup> /12/2015 before the 2<sup>nd</sup> Respondent was served with the Court Order to preserve the status quo. That the status quo by then to preserve was that the 1<sup>st</sup> Respondent was already nominated  
10 since 02/12/2015. That the restraining order was brought to the Registrar’s table after the nominations and that is why she could not stop the process of nomination.

The 1<sup>st</sup> Respondent further submitted that party sponsorship is not a qualification for election as Member of Parliament in Uganda  
15 and that as a matter of fact even loss of a party sponsorship does not lead to nullification of election to Parliament. The 1<sup>st</sup> Respondent cited *Constitutional Appeal no.1 of 2015, Hon. Theodore Ssekikubo & 4 Others versus Attorney General & 4 others* to buttress his submission. The 1<sup>st</sup> Respondent contended  
20 that the 2<sup>nd</sup> Respondent never had any basis to denominate the 1<sup>st</sup> Respondent from the election completely as it purported to do. That the authorities cited by the Petitioner with regard to respect of Court Orders were misplaced since the 1<sup>st</sup> Respondent did not disrespect or breach any Court order and neither did the



Petitioners pleadings plead Contempt of Court. That the 1<sup>st</sup> Respondent was not a party to the main suit and application for a restraining order to stop the NRM party from declaring him an NRM flag bearer for Member of Parliament for Upper Madi  
5 Constituency. That the order was granted on 1<sup>st</sup> December 2015 after the NRM party had already declared the 1<sup>st</sup> Respondent as NRM flag bearer and gone ahead to notify the 2<sup>nd</sup> Respondent of their duly elected candidate on 28<sup>th</sup> day of November 2015. That the 1<sup>st</sup> Respondent was never served with the restraining order at  
10 the time the 1<sup>st</sup> Respondent presented himself to the 2<sup>nd</sup> Respondent who lawfully nominated him on the 2<sup>nd</sup> December 2015.

The 1<sup>st</sup> Respondent contended that the Petitioner attempted to misuse the Court to advance his selfish interests by obtaining  
15 interim orders exparte which attempt was finally put to rest by the High Court's decision when the Petitioner's Suit No.0024 of 2015 was dismissed on the 10<sup>th</sup> day of February 2016. That the Petitioner went ahead and appealed the decision and again obtained another interim order exparte from the Court of Appeal  
20 compelling the 2<sup>nd</sup> Respondent to conduct elections on the 18<sup>th</sup>/02/2016. That the 1<sup>st</sup> Respondent participated in the elections which he won by a landslide victory.

With regard to the 2<sup>nd</sup> issue, the 1<sup>st</sup> Respondent submitted that his declaration as the winner of elections in Upper Madi Constituency

by the 2<sup>nd</sup> Respondent was lawful in accordance with Section 58 of the Parliamentary Elections Act since the 1<sup>st</sup> Respondent polled the greatest number of valid votes cast on the polling day.

With regard to issue 3, the 1<sup>st</sup> Respondent prays that this Petition  
5 be dismissed with costs to the 1<sup>st</sup> Respondent.

The 2<sup>nd</sup> Respondent submitted with regard to issue one that Section 11 of The Parliamentary Elections Act provides that nomination of a candidate shall be made on the nomination day by two registered voters tendering to the Returning officer a  
10 nomination paper in duplicate containing among others a statement on oath, statement signed by a nominated agent of a candidate accepting the appointment, a minimum of 10 names and signatures of persons supporting the nomination of the candidate and a statement on oath verifying that the candidate is  
15 among others a citizen and of adult age. Where a candidate is sponsored by a political party, the nomination shall be endorsed and bear the seal of that party. See Section 11(2) Parliamentary Elections Act.

The 2<sup>nd</sup> Respondent submits that the 1<sup>st</sup> Respondent was legally  
20 nominated on the 2<sup>nd</sup> day of December 2015. The 2<sup>nd</sup> Respondent relies on the affidavit of its Chairman Eng.Dr. Badru Kiggundu. The 2<sup>nd</sup> Respondent submits that the facts as contained in the said affidavit are not disputed by the Petitioner. That evidence

which is not disputed is deemed to have been admitted. The 2<sup>nd</sup> Respondent referred to the case of Samwiri Masa vs Rose Achieng 1978 HCB 297. The 2<sup>nd</sup> Respondent also cited Section 57 of the Evidence Act which provides that *“No fact need be proved in any proceeding which the parties to the proceedings agree to admit at the hearing...”* The 2<sup>nd</sup> Respondent invited Court to take notice of the fact that the nomination Paper filed by the 1<sup>st</sup> Respondent was valid and hence the 1<sup>st</sup> Respondent’s nomination by the 2<sup>nd</sup> Respondent was lawful.

10 The 2<sup>nd</sup> Respondent further submitted that the question the Court had to determine now is the effect of the Order in Misc. Application 60 of 2015 Hon. Martin Drito versus The National Resistance Movement. That the Petitioner’s only case was premised on the fact that that the nomination of the 1<sup>st</sup> Respondent as flag bearer for the NRM Party was unlawful on the basis that the said nomination was restrained by a Court order. The 2<sup>nd</sup> Respondent maintains that the Order in Miscellaneous Application 60 of 2015 was to restrain the NRM from declaring a flag bearer and not to stop the 1<sup>st</sup> Respondent from being  
15 nominated by the 2<sup>nd</sup> Respondent. That besides the order had been overtaken by events and therefore issued in vain. That the NRM declared its flag bearer on the 25<sup>th</sup> November 2015 as per letter contained in the Nomination document of the 1<sup>st</sup> Respondent. That the order restraining the NRM from declaring a  
20

flag bearer was issued three days later on the 1<sup>st</sup> December 2015. That consequently the restraining order was received by the 2<sup>nd</sup> Respondent after the nomination of the 1<sup>st</sup> Respondent and was of no consequence. The 2<sup>nd</sup> Respondent referred to the case of *Afro-Ugandan Bros versus Mpologoma Bros.[1987] HCB 93* and the case of *Esso Kenya Ltd versus Mark Makwata Okiya -Civil Appeal 69 of 1991* to buttress her submission.

The 2<sup>nd</sup> Respondent further contended that the said order was extracted *ex parte* as against the NRM . The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not a party to that suit. That as a result of the order in Misc. Application No.60 of 2015 being of no consequence having been overtaken by events and discharged, it followed that all actions taken pursuant to the same could not be of any consequence as well. That indeed counsel for the Petitioner in his submissions concedes that the purported denomination of the 1<sup>st</sup> Respondent was of no legal consequence. That in light of that admission, the 2<sup>nd</sup> Respondent invited court to find that the denomination of the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent was inconsequential. That therefore based on the above reasons the 1<sup>st</sup> Respondent was validly nominated.

In the alternative but without prejudice to the above, the 2<sup>nd</sup> Respondent submitted that the order of court in Misc. Application No.60 of 2015 and the directions in Arua HCCS NO. 0024 Of 2015, Hon. Martin Andi Drito versus NRM were stayed by the Court of

Appeal interim order of stay of execution. That as such there was no order restraining the nomination of the 1<sup>st</sup> Respondent.

With regard to issue two, the 2<sup>nd</sup> Respondent submitted that the 1<sup>st</sup> Respondent's declaration as a winner of the election contest  
5 for the Parliamentary seat of Upper Madi Constituency was lawful.

The 2<sup>nd</sup> Respondent cited Section 58 of the Parliamentary Elections Act which mandates the Returning Officer to immediately after addition of the votes to declare elected the candidate who has obtained the largest number of votes. That the  
10 1<sup>st</sup> Respondent emerged winner with 7236 votes and the Petitioner with 3946. That the Petitioner does not contest the outcome of the election results but contests the nomination. That Court in annulling of elections must take into regard the Constitutional provisions enshrined in Article 1 and Article 1(4) of  
15 the Constitution and therefore not every anomaly in an election must lead to annulment of the said election. It may be an irregularity but not an illegality. Thus the illegality must arise from the law and in particular the PEA, which governs and regulates the nomination of the Parliamentary candidates. The 2<sup>nd</sup>  
20 Respondent referred to the recent case of *Amama Mbabazi versus Yoweri Museveni & others Election Petition 1 of 2016* to support his submission.

With regard to the third issue, the 2<sup>nd</sup> Respondent submitted that the Petition be dismissed with costs and the 1<sup>st</sup> Respondent be declared directly elected Member of Parliament for Upper Madi Constituency.

5 In rejoinder, the Petitioner submitted that much as the order was to restrain the NRM from declaring the NRM flag bearer for Member of Parliament Madi Okollo Constituency, it was even meant to stop any body from being nominated as the NRM flag  
10 bearer. That the court order attached as Annexure “C” to the affidavit drawn by M/S Okello Oryem &Co. Advocates meant that the 1<sup>st</sup> Respondent could not be presented as the NRM flag bearer for Upper Madi Constituency and later on nominated on the NRM ticket. That much as the 2<sup>nd</sup> Respondent was not a party to Misc. Application 0060 of 2015 in which a restraining order was issued,  
15 it is the position of the law that Court orders are issued in rem. The Petitioner cited Article 128(3) of the Constitution of the Republic of Uganda 1995 which enjoins all state agencies and organs whether in Court or not to give effect to Court decisions and ensure their effectiveness; and that Court orders are orders in  
20 rem and bind the whole world. The Petitioner referred to the case of *Bashaija Kazoora John Versus Bitekyerezo Medard and Electoral Commission H.C Election Petition No. 004 of 2004* and *Muriisa Nicholas versus Attorney General & 3 others Misc. Cause No.35 of 2012* to buttress his submission. That the 2<sup>nd</sup> Respondent was not

supposed to nominate the 1<sup>st</sup> Respondent as NRM flag bearer since the order was barring the declaration of an NRM flag bearer. That there was an affidavit of service of the said order deponed by Etoma Natal in the original file vide Misc. Application No. 0060  
5 of 2015 which shows that the NRM Secretary Arua received the order on 2<sup>nd</sup> December 2015 at 12:57pm while the returning officer of the 2<sup>nd</sup> Respondent Ms. Angum Ruth received it at 12:40pm prior to the nomination of the 1<sup>st</sup> Respondent whom she went ahead to nominate at 01:10pm.

10 The Petitioner in rejoinder further submitted that an electoral process that fails to follow the law is defective. The Petitioner cited the case of *Col.(Rtd) Dr.Kiiza Besigye versus Yoweri Kaguta Museveni & Electoral Commission SC Election Petition No.1 of 2001*. That therefore in the instant case a defective nomination in  
15 total disregard of a Court order is void abinitio and the 2<sup>nd</sup> Respondent being a state agency cannot shy away from the responsibility placed upon it under Article 128(3) of the Constitution by merely deposing that it was not a party to the said application. The Petitioner cited several other authorities which  
20 were to the effect that Court Orders must be obeyed.

In the alternative but without prejudice to the foregoing, the Petitioner submitted in rejoinder that the 1<sup>st</sup> Respondent in their submissions agree that court ordered for the re-nomination of the 1<sup>st</sup> Respondent but that much as the Court ordered for the re-

nomination there was an order of stay obtained which is even admitted by the 1<sup>st</sup> Respondent in his affidavit in support of the answer drawn by M/S Okello Oryem & Co. Advocates. That the Court did not declare the 1<sup>st</sup> Respondent duly nominated, it only  
5 ordered for him to be nominated which was not done. That the Court of Appeal was clear that elections proceed with the duly nominated candidates of which the 1<sup>st</sup> Respondent was not one of them. That no evidence was adduced to show that the 1<sup>st</sup> Respondent was re-nominated after Court issued the orders to  
10 warrant the 1<sup>st</sup> Respondent to effectively participate in the elections. That the 1<sup>st</sup> Respondent does not state when he was re-nominated and the minutes under which he was re-nominated by the 2<sup>nd</sup> Respondent.

The Petitioner contended in rejoinder that as to whether the issue  
15 of this ground not being a ground for setting aside an election, the Petitioner relied on his earlier submissions in regard to Court orders, Ss 14 & 33 of the Judicature Act and specifically the Judgment in *Stanbic Bank & anor. Versus The Com.General URA - Misc.Application No.0042 of 2010 arising from Civil Suit No.0479b*  
20 *of 2010 at page 41*. The Petitioner implored Court not to allow an illegality like the one in the instant case. The Petition also cited the case of *Makula International ltd versus Cardinal Nsubuga & Another (1982) HCB 11* for the proposition that an illegality once



brought to the attention of Court overrides all forms of pleadings. The Petitioner reiterated his earlier prayers.

## **RESOLUTION**

5 **ISSUE 1: WHETHER OR NOT THE 1<sup>ST</sup> RESPONDENT WAS DULY NOMINATED CANDIDATE IN LAW FOR THE 18<sup>TH</sup> FEBRUARY 2016 PARLIAMENTARY ELECTIONS FOR UPPER MADI CONSTITUENCY.**

10 The gist of the Petitioner's submission on this issue is that by the time the 1<sup>st</sup> Respondent was nominated by the 2<sup>nd</sup> Respondent, there was a restraining order from court exempting the 1<sup>st</sup> Respondent from standing as a candidate for the 18<sup>th</sup> February 2016 Parliamentary Elections for Upper Madi Constituency which the 2<sup>nd</sup> Respondent ignored. The said order is vide Misc. Application No.0060 of 2015 arising from H.C.C.S No. 024 of 2015. 15 There is no contention as to the validity of the nomination papers per se.

In his affidavit in support to the answer to the Petition by the 2<sup>nd</sup> Respondent, the Chairman of the 2<sup>nd</sup> Respondent averred that the 20 1<sup>st</sup> Respondent was legally nominated by the 2<sup>nd</sup> Respondent on the 2<sup>nd</sup> day of December 2015 and that the Court of Appeal decision Vide Miscellaneous Application No.47 of 2016 allowed the

2<sup>nd</sup> Respondent to conduct the elections with all the duly nominated candidates.

Apparently the restraining order which the Petitioner relies on is Annexure C to the affidavit of the 1<sup>st</sup> Respondent in answer to the  
5 Petition. The said Restraining order clearly shows that it was received by the NRM legal Department on the 4<sup>th</sup> of December 2015 apparently after the 1<sup>st</sup> Respondent had been duly nominated as the NRM flag bearer for the Parliamentary Election for Upper Madi Constituency. Annexure A to the affidavit of the  
10 1<sup>st</sup> Respondent in answer to the Petition clearly shows that the 1<sup>st</sup> Respondent was on 28<sup>th</sup> October 2015 presented to the 2<sup>nd</sup> Respondent as the NRM flag bearer for the elective position of Member of Parliament for the Constituency of Upper Madi.

Section 13 of the Parliamentary Elections Act No.17 of 2005 as  
15 amended lists factors which may invalidate a nomination. Where there are no factors invalidating a nomination as cited, the said nomination is deemed to be valid. By the time the restraining order was served on the NRM party, the 1<sup>st</sup> Respondent had been duly nominated by the said party as its flag bearer.

20 The 2<sup>nd</sup> Respondent had clearly followed the provisions of Section 11 of the Parliamentary Elections Act [17 of 2005] as the evidence on record reveals.

The restraining order was therefore overtaken by events. An injunction sought for purposes of restraining the 2<sup>nd</sup> Respondent from nominating the 1<sup>st</sup> Respondent as NRM flag bearer for the Parliamentary seat for Madi Constituency ceased to exist by  
5 effluxion of time. It had been overtaken by events and even the 2<sup>nd</sup> Respondent could not administratively de-nominate the first Respondent as they appear to have attempted to do so without strictly following the provisions under Section 13 of the Parliamentary Elections Act No.17 of 2015 OR unless they had  
10 received a valid Court Order before the 1<sup>st</sup> Respondent had been nominated. There is also no evidence from the NRM party that they never presented the 1<sup>st</sup> Respondent as their Party flag bearer for the Parliamentary Elections of Upper Madi Constituency. Indeed in his letter dated 3<sup>rd</sup> December 2015 to M/S Odama & Co.  
15 Advocates and copied to the 2<sup>nd</sup> Respondent which is annexure C to the 1<sup>st</sup> Respondent's affidavit in answer to the Petition the Deputy Registrar who issued the impugned restraining order explains that the order had no retrospective effect. It was meant to preserve the status quo.

20 I do not agree with the Petitioner's submission that the 2<sup>nd</sup> Respondent was aware of the restraining order before the nomination of the 1<sup>st</sup> respondent which was done on the 2<sup>nd</sup> December 2015 when the Order was served on the 2<sup>nd</sup> Respondent. According to Annexure B to the amended Petition, it

clearly shows that the Returning Officer had nominated the 1<sup>st</sup> Respondent before the restraining officer was served on her. The letter shows that the 1<sup>st</sup> Respondent had left the nomination Centre before he was even aware of the restraining order! The  
5 restraining order was not meant to act retrospectively. The returning officer therefore could not denominate the 1<sup>st</sup> Respondent as the Court Order had been overtaken by events. An interlocutory order that was served on the returning officer was meant to maintain the status quo pending the determination  
10 of the substantive suit. Once the status quo has changed an interim injunction serves no purpose. The interim injunction in form of a restraining order could therefore not be used as a basis of denominating the 1<sup>st</sup> Respondent. The only purpose it could have served was to stop the nomination of the 1<sup>st</sup> Respondent if it  
15 was served on the Returning officer before the nomination was done. The 2<sup>nd</sup> Respondent could therefore only denominate the 1<sup>st</sup> Respondent under the provisions of Section 13 of the Parliamentary Elections Act [17 of 2005] or with a substantive court order issued by the Judge. The denomination of the 1<sup>st</sup>  
20 Respondent by the 2<sup>nd</sup> Respondent was therefore inconsequential in as far as it was based on the impugned restraining order issued by the Deputy Registrar. In any case the Civil Suit upon which the restraining order arose was eventually dismissed prior to the election of the 1<sup>st</sup> Respondent and by implication the interlocutory  
25 orders that had purported to stop the nomination of the 1<sup>st</sup>

Respondent and the denomination of the 1<sup>st</sup> Respondent based on the said order were inconsequential.

The Chairman to the 2<sup>ND</sup> Respondent's affidavit in support to the 2<sup>nd</sup> Respondent's answer to the petition was not rebutted by the  
5 Petitioner. The said affidavit was to the effect that the 1<sup>st</sup> Respondent had been validly nominated. Where facts are sworn to in an affidavit and these are not denied or rebutted by the opposite party, the presumption is that such facts are accepted.

The Court of Appeal Order in Miscellaneous Application 47 of  
10 2016 allowed all candidates duly nominated for Parliamentary Elections as of 17<sup>th</sup> February 2016 in Upper Madi Constituency to be voted for by the voters in the said constituency. The 1<sup>st</sup> Respondent had been duly nominated on the 2<sup>nd</sup> December 2015 and hence the said Court of Appeal order did not restrain the 1<sup>st</sup>  
15 Respondent from being voted for. I do not see how the Petitioner was prejudiced in any way unless he wants to say that he would have been guaranteed of a win if the 1<sup>st</sup> Respondent had not participated in the election. Unfortunately for the Petitioner the rules of the game allows all parties to participate when they are  
20 duly nominated

I therefore find that the 1<sup>st</sup> Respondent was duly nominated as a Parliamentary Candidate for Upper Madi Constituency for the 18<sup>th</sup> February 2016 Elections.

**ISSUE 2: WHETHER OR NOT THE DECLARATION OF THE 1<sup>ST</sup> RESPONDENT AS A WINNER OF ELECTIONS FOR UPPER MADI CONSTITUENCY BY THE 2<sup>ND</sup> RESPONDENT WAS LAWFUL.**

5 Section 58(1) of the Parliamentary Elections Act [17 of 2005] provides that “Each returning officer shall, immediately after the addition of the votes under subsection (1) of section 53, or after any recount, declare elected the candidate who has obtained the largest number of votes by completing a return in the prescribed  
10 form.”

It is not in dispute that the 1<sup>st</sup> Respondent polled the greatest number of valid votes cast on the polling day. The 1<sup>st</sup> Respondent polled 7236 votes against the 2<sup>nd</sup> runner up who is the Petitioner in this case and polled 3,946 votes as the evidence on record  
15 shows.

The Petitioner does not challenge the outcome of the election results but contests the nomination of the 1<sup>st</sup> Respondent. Having resolved that the 1<sup>st</sup> Respondent was legally nominated, it goes without saying that the declaration of the 1<sup>st</sup> Respondent as a  
20 winner for Upper Madi Constituency by the 2<sup>nd</sup> Respondent was lawful since the 1<sup>st</sup> Respondent polled the highest votes.

**ISSUE 3: REMEDIES AVAILABLE TO THE PARTIES.**

The Petitioner is not entitled to any of the remedies sought in this Petition as against the respondents since he has failed to prove any of the grounds raised in the petition.

The 1<sup>st</sup> Respondent is declared the rightful elected Member of  
5 Parliament for Upper Madi Constituency.

The petition is therefore dismissed with costs to the Respondents.

**Hon. Justice John Eudes Keitirima**

**17/06/2016**