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**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT GULU**

**IN THE MATTER OF PARLIAMENTARY ELECTIONS ACT NO. 17 OF 2005 (AS  
AMENDED)**

10

**AND**

**IN THE MATTER OF THE PARLIAMENTARY ELECTIONS (ELECTION PETITION)  
RULES SI. 141-2**

**AND**

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**IN THE MATTER OF THE PARLIAMENTARY ELECTION HELD ON THE 18<sup>TH</sup> DAY  
OF FEBRUARY 2016 FOR ASWA COUNTY CONSTITUENCY**

**ELECTION PETITION NO. 004 OF 2016**

**HON. ACIRE CHRISTOPHER ::::::::::::::::::::::::::::::::::: PETITIONER**

20

**=VERSUS=**

1. HON. OKUMU REAGAN RONALD
2. ELECTORAL COMMISSION ::::::::::::::::::::::::::: REPONDENTS

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**BEFORE: HON. JUSTICE DAVID MATOVU**

## JUDGMENT

Hon. Acire Christopher (hereinafter referred to as “the Petitioner”) filed a petition challenging the election of Hon. Reagan Okumu (hereinafter referred to as the “1<sup>st</sup> Respondent”), as the  
5 directly elected member of Parliament for Aswa County Constituency, in Gulu District, in an election organized by the Electoral Commission (hereinafter referred to as the “2<sup>nd</sup> Respondent” on the 18<sup>th</sup> day of February 2016.

The major grounds raised in the petition were the following:

- 10 1. That the election was conducted in contravention of the electoral and other laws in Uganda.
2. That the Respondents committed electoral offences and or carried out illegal practices in the conduct of this election. The petitioner specifically pointed out the following:  
15 a. Acting in disregard of a court order issued by Gulu High court in Miscellaneous Application No. 157 of 2015.  
b. The 1<sup>st</sup> Respondent holding out to be a flag bearer of the Forum for Democratic Change (FDC) party.  
c. Use of false statements against the Petitioner.  
20 d. The 2<sup>nd</sup> Respondent failing to postpone the election when symbols assigned to the candidates were mixed up on ballot papers.
3. The Petitioner contended that the illegal practices mentioned above were committed by the Respondents and their agents with the full blessing, knowledge, consent and or  
25 approval of the Respondents and as such the Respondents are liable for the same.
4. The Petitioner also contends that the offences and illegal practices by the Respondents left a lot to be desired in the election and affected the outcome in a substantial manner.

30 The Petitioner sought for the following remedies from this court;

1. A declaration that the 1<sup>st</sup> Respondent was not validly elected as Member of Parliament for Aswa County in Gulu District.

2. An order that the election of the 1<sup>st</sup> Respondent be annulled.

3. The Respondents be ordered to pay the costs of this petition to the Petitioner.

5 In his answer to the petition, the 1<sup>st</sup> Respondent contended that the petition was not properly served upon him and it contravened Rule 4 of the Parliamentary Election (Election Petition) Rules.

The 1<sup>st</sup> Respondent denied commission of the electoral offences or carrying out any illegal  
10 practices as alleged in the petition. He also denied being contemptuous to court orders issued in Gulu High court Miscellaneous Application No. 157 of 2015.

The 1<sup>st</sup> Respondent contended that he was the flag bearer of the Forum for Democratic Change Party (FDC) and court orders only came to his knowledge after his nomination as candidate for  
15 Member of Parliament Aswa County Constituency.

The 1<sup>st</sup> Respondent denied forgery, fraudulently defacing or destroying any election document as alleged in the petition.

He further denied the use of force or violence or threat to use the same.

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The 1<sup>st</sup> Respondent denied uttering false statements against the Petitioner and contended that on the contrary it was the Petitioner who used abusive, insulting and derogatory statements in his campaign.

25 The 1<sup>st</sup> Respondent contended that he became aware that the Forum for Democratic Change (FDC) party did not have a candidate for Aswa County Parliamentary Elections, when his lawyers served the Electoral Commission with an order from the Court of Appeal, which in essence stayed the orders of the High Court in Miscellaneous Application No. 157 of 2015.

30 The 1<sup>st</sup> Respondent contended that he was not aware of what is meant by “campaigning as if he was an FDC flag bearer” as contained in the petition and whether the same was a ground to disqualify him from the elections.

The 1<sup>st</sup> Respondent was not aware of any mess up of the symbols on the ballot papers. He prayed for the dismissal of the petition with costs.

The 2<sup>nd</sup> Respondent in its answer to the Petition contended that the election for Member of Parliament Aswa County Constituency was conducted in accordance with the law and reflected the true wishes of the people of Aswa County Constituency.

The 2<sup>nd</sup> Respondent contended further that the orders of the High court in Miscellaneous Application No. 157 of 2015 were subsequently stayed by the Court of Appeal and as such it could not implement the orders of the High Court.

The 2<sup>nd</sup> Respondent contended that during the electoral process the Petitioner did not raise any complaints regarding utterances by the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent is not aware of any such false statements.

The 2<sup>nd</sup> Respondent contended that the 1<sup>st</sup> Respondent did not campaign or present himself as a flag bearer for Forum for Democratic Change Party and further that the Petitioner was nominated with a symbol of a table.

In the alternative but without prejudice, the 2<sup>nd</sup> Respondent contended that if there was any non compliance with electoral laws, such non compliance did not affect the outcome of the election in a substantial manner.

The 2<sup>nd</sup> Respondent prayed for the dismissal of the petition with costs.

At the scheduling conference held on 19<sup>th</sup> May 2016, the Petitioner was represented by Mr. Mulalira Faisal Umar, Mr. Bikala Rogers and Ms. Annet Kobusingye, while the 1<sup>st</sup> Respondent was represented by Mr. Geoffrey Komakech and the 2<sup>nd</sup> Respondent was represented by Mr. Peter Mulongo.

The following were the agreed facts:-

- 1. That the 2<sup>nd</sup> Respondent conducted an election for directly elected Member of Parliament for Aswa County Constituency on the 18<sup>th</sup> day of February 2016.**

2. That the 2<sup>nd</sup> Respondent returned the 1<sup>st</sup> Respondent as the validly elected Member of Parliament for Aswa County Constituency having obtained 16,859 votes as opposed to the Petitioner's 5,316 votes.

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3. The 1<sup>st</sup> Respondent's victory was gazetted on 3<sup>rd</sup> March, 2016 and he subsequently took an oath as the Member of Parliament for Aswa County in Gulu District on 18<sup>th</sup> May, 2016.

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4. There was an order of Gulu High Court in Miscellaneous Application No. 157/2015, issued on 1<sup>st</sup> December, 2015 permitting the Petitioner and 1<sup>st</sup> Respondent to get nominated by the 2<sup>nd</sup> Respondent as issues to do with the flag bearer for FDC would be concluded later.

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5. The 1<sup>st</sup> Respondent was nominated as a candidate for the position of Member of Parliament Aswa County Constituency in Gulu District by the 2<sup>nd</sup> Respondent on 2<sup>nd</sup> December, 2015.

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6. The Petitioner was nominated as a candidate for the position of Member of Parliament Aswa County Constituency in Gulu District by the 2<sup>nd</sup> Respondent on 3<sup>rd</sup> December, 2015.

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7. Gulu High Court Miscellaneous Application No. 157 of 2015 was concluded on 18<sup>th</sup> December, 2015.

8. The 1<sup>st</sup> Respondent filed a Notice of Appeal to the Court of Appeal which granted an interim order of stay of execution of the orders in Gulu High Court Miscellaneous Application No. 157/2015, which order was to lapse on 12<sup>th</sup> January, 2016.

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9. The Court of Appeal issued a final order of stay of execution of the Gulu High Court orders issued in Miscellaneous Application No. 157/2015 on the 3<sup>rd</sup> of February, 2016 vide Court of Appeal Miscellaneous Application No.

**387 of 2015 but this stay of execution was conditional upon the Applicants (who included the 1<sup>st</sup> Respondent filing a Memorandum of Appeal in the Court of Appeal by 15<sup>th</sup> February 2016.**

5 Whereas it was recorded as an agreed fact that there was no Memorandum of Appeal filed as ordered by court, Mr. Wandera Ogalo who appeared as Counsel for the 1<sup>st</sup> Respondent on 26<sup>th</sup> May 2016, told court that he personally filed the Memorandum of Appeal in the Court of Appeal and even paid the requisite Court fees before the 15<sup>th</sup> February, 2016 and the same was rejected by the Registry staff of the Court of Appeal. He further told court that he has an application  
10 pending before the Court of Appeal to determine if he actually complied with the orders of that Court or not.

I therefore find that whereas I recorded it as an agreed fact that there was no Memorandum of Appeal filed, this fact was erroneously recorded without the information from Mr. Wandera  
15 Ogalo , Counsel for the 1<sup>st</sup> Respondent.

**10. It was an agreed fact that the Petitioner and or 1<sup>st</sup> Respondent were nominated as Independent candidates and none of them had the FDC symbol which is the Key.**

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The following were the agreed issues for determination by court.

1. **Whether or not this Petition is properly before this Court.**
2. **Whether the election of Member of Parliament for Aswa County Constituency was  
25 conducted in compliance with the electoral laws.**
3. **Whether the 1<sup>st</sup> Respondent personally or through his agents with his knowledge, approval or consent committed any illegal practices or electoral offences.**
- 30 4. **Whether the Respondents disobeyed any Court orders as alleged.**
5. **Whether if there was non-compliance it affected the results in a substantial manner.**

## 6. What remedies are available to the parties?

All Counsel present informed the Court that they had read the affidavits in this Petition and they were admitted in evidence as follows:-

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### For the Petitioner:-

1. The affidavit of Hon. Acire Christopher filed on 31<sup>st</sup> March, 2016 was marked as exhibit P1.
- 10 2. The photocopy of his National Identity Card and Voter location slip were collectively marked exhibit P1(a)
3. The relevant page of the gazette of 3<sup>rd</sup> March, 2016 where the results for Aswa County Constituency appear was marked exhibit  
15 P1(b).
4. The affidavit of OJOK ERICK filed on 31<sup>st</sup> March, 2016 was marked exhibit P2.
- 20 5. The photocopy of the National Identity Card for Ojok Erick was marked exhibit P2(a).
6. The photocopy of the voter location slip for Ojok Erick was marked as exhibit P2(b).
- 25 7. The affidavit of Adong Scovia filed on 31<sup>st</sup> March, 2016 was marked as exhibit P3.
8. The photocopy of the voter location slip for Adong Scovia was  
30 marked exhibit P3(a).
9. The affidavit of Odongpiny Samuel filed on 31<sup>st</sup> March, 2016 was marked as exhibit P4.

10. The photocopy of a Certificate of Completion issued by Obach Computer Bureau to Odongpiny Samuel on 15<sup>th</sup> May, 2004 was marked as exhibit P4(a).

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11. The affidavit of Lubangakene Moris filed on 31<sup>st</sup> march, 2016 was marked as exhibit P5.

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12. The photocopy of the Certificate of Training from Prime II Solutions issued to Lubangakene Moris on 19<sup>th</sup> August, 2009 was marked as exhibit P5(a).

13. The affidavit of Okidi George filed on 31<sup>st</sup> march, 2016 was marked as exhibit P6.

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14. The Transcription Certificate dated 21<sup>st</sup> march, 2016 issued by Makerere University Centre for Language and Communication Services in respect to CLCSDC/001/21/03/16/AC/01 was marked as exhibit P6(a).

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15. The Transcription Text from an Audio Recording by Makerere University in respect to CLCSDC/001/07/03/16/AC/01-A was marked as exhibit P6(b).

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16. The Transcription Certificate in respect of CLCSDC/001/21/03/6/AC/01-B was marked as exhibit P6(c).

17. The Transcription of text from an audio recording Reagan's speech as Laliya was marked as exhibit P6(d).

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18. The Certificate of Translations in respect of CLCSDC/001/21/03/16/AC/01-C was marked as exhibit P6(e).



19. The Translation of text by Adongo Scovia of Reagan's speech at Laliya was marked as exhibit P6(f).

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20. The Transcription Certificate in respect of CLCSDC/001/21/03/16/AC/01-D was marked as exhibit P6(g).

21. The Transcription of Text from audio recording saved as Jengtong was marked as exhibit P6(h).

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22. The Translation Certificate ref: CLCSDC/001/07/03/16/AC/01-E was marked as exhibit P6(i).

23. The Translation of Text transcribed from an audio recording saved as Jengtong was marked exhibit P6(j).

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24. The affidavit of Aloyo Betty filed on 31<sup>st</sup> March, 2016 was marked as exhibit P7.

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25. The photocopy of the National Identity Card for Aloyo Betty was marked exhibit P7(a).

26. The Voter Location Slip for Aloyo Betty was marked exhibit P7(b).

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27. Three(3) coloured photographs for Okello Patrick Onguti, Okumu Ronald Reagan and MP Acire Obema were marked exhibit P7(c).

28. The affidavit of Kinyera Lawrence Kabila filed on 31<sup>st</sup> March, 2016 was marked exhibit P8.

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29. The photocopy of National Identity Card for Kinyera Lawrence Kabila was marked exhibit P8(a).

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30. The photocopy of the Voter Location Slip for Kinyera Lawrence Kabila was marked exhibit P8(b).
31. The photocopy of the Nomination Paper for Directly Elected Councilors for Labworomor Parish in respect to Kinyera Lawrence Kabila was marked exhibit P8(c).
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32. The Appointment of official agent of candidate where Kinyera Lawrence Kabila appointed Lukwiya Geoffrey was marked as exhibit P8(d).
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33. Statement under Oath by person to be nominated as Sub-County Councilor in respect of Kinyera Lawrence Kabila was exhibit P8(e).
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34. A photograph of a man holding poster of Okumu Ronald Reagan is exhibit P8(f).
35. A photograph of Okumu Ronald Reagan was marked as exhibit P8(g).
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36. The affidavit of Odongakara Geoffrey filed on 31<sup>st</sup> march, 2016 was marked exhibit P9.
37. Photographs of a person donning a blue FDC T/shirt with photograph of Reagan Okumu were marked exhibit P9(a).
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38. The affidavit of Oola John Paul filed on 31<sup>st</sup> March, 2016 was marked exhibit P10.
39. The Voter Location Slip of Oola John Paul was marked exhibit P10(a).

40. Photographs of green T/shirt with photograph and name of FDC Okumu were marked exhibit P10(b).

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41. The affidavit of Komakech Ronald filed on 31<sup>st</sup> March, 2016 was marked exhibit P11.

42. The National Identity Card for Komakech Ronald was marked exhibit P11(a).

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43. The Voter Location Slip for Komakech Ronald was marked exhibit P11(b).

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44. The affidavit of Acire Christopher in rejoinder to the 1<sup>st</sup> Respondents' answer to the Petition filed on 28<sup>th</sup> April, 2016 was marked exhibit P1A.

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45. The Court Order issued in Gulu High Court Miscellaneous Cause No. 157 of 2015 on 1<sup>st</sup> December, 2015 was marked exhibit P1A(i).

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46. The Court Order issued in Gulu High Court Miscellaneous Cause No. 157 of 2015 on 1<sup>st</sup> December, 2015 duly served upon the Returning Officer Gulu District on 2<sup>nd</sup> December, 2015 at 7:52am was marked exhibit P1A(ii).

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47. The Press release on guidelines for candidates campaign meeting for general elections 2016 issued by Electoral Commission on 21<sup>st</sup> December, 2016 was marked exhibit P1A(iii).

48. The Court Order issued in Court of Appeal Civil Application No. 388 of 2015 on 29<sup>th</sup> December, 2015 was marked exhibit P1A(iv).

49. A letter dated 14<sup>th</sup> January, 2016 from M/S Balondemu, Candia & Wandera Advocates addressed to the Chairperson Electoral Commission was marked exhibit P1A(v).

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50. A letter dated 15<sup>th</sup> February, 2016 from Hon. Acire Christopher to the Chairman Independent Electoral Commission relating to the lapse of Court Order was marked exhibit P1A(vi).

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51. The affidavit of Acire Christopher in rejoinder to the 2<sup>nd</sup> Respondent's answer filed on 28<sup>th</sup> April, 2016 was marked exhibit P1B.

52. The Nomination Paper for Acire Christopher was marked exhibit P1B(i).

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53. The Notice of Appeal challenging the decision in Gulu Miscellaneous Application No. 157 of 2015 filed in the Court of Appeal on 22<sup>nd</sup> December, 2015 was marked as exhibit P1B(ii).

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54. A letter dated 14<sup>th</sup> January, 2016 from M/S Balondemu, Candia & Wandera Advocates addressed to the Chairperson Electoral Commission was marked P1B(iii).

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55. The Court Order issued by the Court of Appeal on 4<sup>th</sup> February, 2016 was exhibit P1B(iv).

56. A letter dated 1<sup>st</sup> February, 2016 from Victoria Advocates and Legal Consultants addressed to the Chairman Electoral Commission was marked exhibit P1B(v).

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57. The Press Statement from the Electoral Commission dated 18<sup>th</sup> February, 2016 under Ref. Adm 71/01 was marked exhibit P1B(vi).

58. The FDC elections results summaries for Aswa County for the last three(3) general elections was marked exhibit P1B(vii).

5 59. The affidavit of Ocan George Bush filed on 28<sup>th</sup> April, 2016 was marked exhibit P12.

60. The letter appointing Ocan George Bush as a Presiding Officer was marked exhibit P12(a).

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61. The photocopy of the National Identity Card for Ocan George Bush was marked exhibit P12(b).

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62. The affidavit of Edilu Stephen file don 28<sup>th</sup> April, 2016 was marked exhibit P13.

63. The photocopy of the National Identity Card for Edilu Stephen was marked exhibit P13(a).

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The first Respondent's affidavits were admitted as follows:-

1. The affidavit of Reagan Okumu filed on 15<sup>th</sup> April, 2016 was marked exhibit R1.

2. The photocopy of the Nomination Paper for Okumu Ronald Reagan was marked as exhibit R1(a).

25 3. The list of Registered voters supporting the Nomination of Okumu Ronald Reagan was marked as exhibit R1(b)

4. The Court Order issued in Court of Appeal Civil Application No. 388 of 2015 on 29<sup>th</sup> December, 2015 was marked exhibit R1(c).

30 5. The Court Order issued in Court of Appeal Civil Application No, 387 of 2015 on 4<sup>th</sup> February, 2016 was marked exhibit R1(d).

6. The Deduction schedule for FDC members of Parliament for month ending 30<sup>th</sup> September, 2014 was marked exhibit R1(e).

7. List of people who were allegedly claiming for money from Petitioner was marked as exhibit R1(f).
8. Letter dated 2<sup>nd</sup> February, 2016 from Odongpiny Wilfred to the Returning Officer Electoral Commission under ref: serious Complaints was marked exhibit R1(g)
- 5 9. Letter dated 21<sup>st</sup> December, 2015 form Electoral Commission to the Inspector General of Police was marked exhibit R1(h).
10. Photocopies of NRM Membership Cards were marked as exhibit R1(i).
11. The affidavit of Arach Margaret Komakech filed on 29<sup>th</sup> April, 2016 was marked as exhibit R2.
- 10 12. The affidavit of Wokorach Simon filed on 29<sup>th</sup> Aril, 2016 was marked as exhibit R3.
13. A photocopy if Passbook for Wokorach Simon a member of UWMFO UGANDA was marked exhibit R3(a).
14. The affidavit of Openy James filed on 29<sup>th</sup> April, 2016 was marked exhibit R4.
15. The affidavit of John Oola filed on 29<sup>th</sup> April, 2016 was marked exhibit R5.
- 15 16. The affidavit of Ocaya Francis filed on 29<sup>th</sup> April, 2016 was marked R6.
17. The affidavit of Okello Kenneth Latim filed on 29<sup>th</sup> April, 2016 was marked as exhibit R7.
18. The affidavit of Julyeri Lalam filed on 29<sup>th</sup> April, 2016 was marked exhibit R8.
19. The affidavit of Sarah Opira filed on 29<sup>th</sup> April, 2016 was marked exhibit R9.
- 20 20. The affidavit of Ogik Charles filed on 29<sup>th</sup> April, 2016 was marked exhibit R10.
21. The affidavit of Oyet John Bosco filed on 29<sup>th</sup> April, 2016 was marked exhibit R11.
22. The Passbook for UWMFO UGANDA in names of Oyet John Bosco was marked exhibit R11(a).
23. The affidavit of Latigo Alfonse Apoli filed on 29<sup>th</sup> April, was marked as exhibit R12.
- 25 24. The Account Statement for UWMFO Uganda relation to Latigo Alfonse Apoli was for the period 30<sup>th</sup> November, 2013 to 6<sup>th</sup> November, 2014 was marked exhibit R12(a).
25. The Passbook for Latigo Alfonse as Member of UWMFO UGANDA was marked as exhibit R12(b).
26. The Passbook page for Latigo Alfonse showing his Account No. 200200004489 was marked as exhibit R12(c).
- 30 27. The affidavit of Simon Ogwete filed on 29<sup>th</sup> April, 2016 was marked as exhibit R13.
28. The Passbook page of Ogwete Simon as a member of UWMFO UGANDA was marked as exhibit R113(a).

29. The affidavit of Santo Ouma filed on 29<sup>th</sup> April, 2016 was marked exhibit R14.
30. The affidavit of Otto Francis filed on 29<sup>th</sup> April, 2016 was marked exhibit R15.
31. The 2<sup>nd</sup> Respondent relied on one(1) affidavit filed by Benson Obete the Returning Officer of the 2<sup>nd</sup> Respondent for Gulu District, this affidavit was filed on 7<sup>th</sup> April, 2016 and was marked as exhibit RR1.

The Petitioner filed an affidavit in rejoinder on 23<sup>rd</sup> May, 2016.

When the Petition came up for hearing on 26<sup>th</sup> May, 2016 the Petitioner was cross-examined on the contents of his affidavits, so was Mr. Lubangakene Moris, Adong Scovia and Odongping Samuel. Court will refer to their evidence in the course of resolving the issues and will not reproduce their evidence in this Judgment.

The evidence of Ocan George Bush filed as exhibit P12 and its annexures P12(a) and P12(b) was expunged from the Court record since this witness was not available for cross examination.

The 1<sup>st</sup> Respondent was also cross examined on the contents of his affidavits.

Court expunged the evidence of Otto Francis exhibit R15 as he was not available for cross examination.

The Returning Officer for Gulu District in the February, 2016 elections Mr. Benson Obete was cross examined by Counsel for the Petitioner.

Court has carefully read all the affidavits in this case and the detailed submissions filed by the Advocates and will proceed to resolve the issues in this Petition.

The burden of proof in an Election Petition lies upon the Petitioner who is to prove all allegations in the Petition to the satisfaction of the Court. See Court of Appeal Election Appeal No. 6 of 2011 Paul Mwiru Vs Hon. Igeme Nathan Nabeta & Others.

**Issue1: Whether or not this Petition is properly before this Court.**

The issue was framed in a bid to handle the objections set out in paragraphs 3 and 4 of the 1<sup>st</sup> Respondent's answer to the Petition.

It appears the objection about failure to effect service upon the 1<sup>st</sup> Respondent as required by Rule 6(3) of the Parliamentary Elections (Election Petition) Rules was abandoned, as Court did not find any submissions on this aspect.

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Counsel for the 1<sup>st</sup> Respondent submitted that all pleadings relating to contempt of Court offended Order 6 Rule 18 of the Civil Procedure Rules and ought to be struck out. He argued further that these pleadings are scandalous, unnecessary embarrassing and delay the fair hearing of this Petition.

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Counsel for the 1<sup>st</sup> Respondent further contended that the Petition did not disclose a cause of action with regard to the false statements allegedly made by the 1<sup>st</sup> Respondent. Counsel referred Court to the decision in Presidential Election Petition No. 01 of 2006 **RTD COL. DR. KIZZA BESIGYE VERSUS ELECTORAL COMMISSION AND YOWERI KAGUTA**

15 **MUSEVENI** the judgment of Odoki Chief Justice as he then was.

Counsel contended that some of the affidavits in support of the Petition are so defective and he singled out the one filed by the Petitioner in rejoinder on 28<sup>th</sup> April, 2016.

20 The submissions of Counsel for the Petitioner on this issue were brief and he referred to the Provisions of Section 60 of the Parliamentary Election Act as the basis for filing of this Petition which he contended was rightly before this Court.

Counsel for the 2<sup>nd</sup> Respondent conceded that the Petition was properly before the Court.

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Court observes that the fourth issue for determination in this case was whether the Respondents disobeyed any Court Orders as alleged and since all Counsel submitted in detail on this issue, Court finds that it cannot be disposed off at this stage and the same will be handled later in this Judgment.

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With regards to a cause of action, an Election Petition has a statutory character; it is no ordinary suit the cause of action upon which it is based is statutory. See case of **KASIBANTE MOSES VERSUS KATONGOLE SINGH MARWAHA P. & ANOTHER** Election Petition No. 23 of



2011. A glance at the instant Petition clearly discloses a cause of action in the perimeters of Section 60 of the Parliamentary Elections Act. Court therefore finds a cause of action disclosed in this Petition.

5 Finally, with regards to the alleged defective affidavits, Counsel for the 1<sup>st</sup> Respondent did not mention the particular affidavit he referred to as defective, except the one filed by the Petitioner in rejoinder on 28<sup>th</sup> April, 2016 which he attacked extensively.

10 Court to a certain extent agrees with Counsel for the 1<sup>st</sup> Respondent regarding certain paragraphs in this affidavit in rejoinder.

However, instead of striking out the entire affidavit, Court will only rely on those paragraphs that do not offend the rules of evidence. See case of **RTD COL. DR. KIZZA BESIGYE VERSUS YOWERI KAGUTA MUSEVENI** Election Petition No. 1 of 2001.

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In the final analysis, Court finds this Petition to be properly before it and therefore determines the first issue in the negative.

20 **Issue 2: Whether the election of the Member of Parliament for Aswa County Constituency was conducted in compliance with the electoral laws.**

For some reason Counsel for the Petitioner decided to combine this issue with the fourth issue.

25 **Whether the Respondents disobeyed any Court orders.**

Counsel for the Petitioner contended that the 2<sup>nd</sup> Respondent failed and or refused to allocate the Petitioner the party symbols for the FDC party which contravened Section 17(1)(a) of the Parliamentary Elections Act.

30 Counsel argues that since the Petitioner was declared the FDC flag bearer by Court in Miscellaneous Cause No. 157 of 2015 he should have been given the party symbol.

On his part Counsel for the 1<sup>st</sup> Respondent submitted that contempt of Court is not an illegal practice or an offence under the Parliamentary Elections Petition and as such cannot be the basis for setting aside an election. Counsel argued further the orders issued by the High Court in Miscellaneous Cause No. 157 of 2015 were stayed by the Court of Appeal.

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Counsel for the 2<sup>nd</sup> Respondent argued that upon nomination of candidates it was difficult for the 2<sup>nd</sup> Respondent to continue altering the nomination status on the basis of mutating Court Orders.

Court has carefully studied the evidence relating to Court Orders in this case. While delivering her ruling on 1<sup>st</sup> December, 2015 in Miscellaneous Application No. 157 of 2015 the trial Judge in my view correctly observed the following:-

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**“The apparent confusion and internal problems within the FDC party as regards Aswa County should not be allowed to affect the rights of the electorate of the National Programme slated to start tomorrow”.**

The Petitioner and 1<sup>st</sup> Respondent were both nominated by the 2<sup>nd</sup> Respondent and as matters stand now the electorate Aswa County Constituency elected the 1<sup>st</sup> Respondent as their Member of Parliament with a total of 16,859 votes as opposed to the Petitioner’s 5,316 votes.

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Upon nomination of the Petitioner and 1<sup>st</sup> Respondent the fast flowing electoral process was set in motion by the 2<sup>nd</sup> Respondent. Court takes Judicial Notice of the fact that the process entails spending large sum of money on printing electoral materials by the 2<sup>nd</sup> Respondent.

25 The final orders of the trial Judge made on 18<sup>th</sup> December, 2015 had and could only be implemented by the 2<sup>nd</sup> Respondent and they were stayed by the Court of Appeal on 29<sup>th</sup> December, 2015 and also by a subsequent order of 4<sup>th</sup> February, 2016.

Court has read an argument by Counsel for the Petitioner to the effect that since the 1<sup>st</sup> Respondent did not file a Memorandum of Appeal as directed by Court on 4<sup>th</sup> February, 2016 then on 15<sup>th</sup> February, 2016 there was no stay of execution.

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With all due respect to Counsel for the Petitioner, this Petition is limited to what transpired in the election of the Member of Parliament for Aswa County Constituency and Court would be extending its mandate too far if it decided to probe what happened at the Court of Appeal from 15<sup>th</sup> February, 2016.

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Court takes judicial notice that elections were held on 18<sup>th</sup> February, 2016 and to expect the 2<sup>nd</sup> Respondent to act on Court Orders that were mutating all the time, would be most unreasonable. Until Court receives a final order as to what happened in the Court of Appeal, it is my finding that all issues relating to Gulu High Court Miscellaneous Application No. 157 of 2015 are still

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The case of **BYANYIMA WINNIE VERSUS NGOMA NGIME AND THE ELECTORAL COMMISSION** High Court Civil Revision No. 0009 of 2001 is relevant here, once the electoral process was set in motion by nominations of the Petitioner and 1<sup>st</sup> Respondent, it was difficult to stop that process through Court Orders, more so when there was no conclusive order from the Appellate Court.

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The case of **Amama Mbabazi versus Yoweri Kaguta Museveni & others** cited by Counsel for the Petition to support an argument that the 2<sup>nd</sup> Respondent in this case should have enlarged time in the elections of Member of Parliament for Aswa County, does not hold in such a case where upto now the dispute that started at Gulu High Court Miscellaneous Application No. 157 of 2015 is still pending in the Court of Appeal.

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Counsel for the Petitioner listed several authorities relating to defiance of Court Orders and submitted that the 1<sup>st</sup> Respondent defied Court Orders during his campaign, while the 2<sup>nd</sup> Respondent refused to allocate the Petitioner a party symbol.

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In his submissions Counsel for the 1<sup>st</sup> Respondent relied upon the case of **Sitenda Sebalu vs Secretary General of the East African Community** Ref: Mo. 8 of 2012, to argue that the 1<sup>st</sup> Respondent was not obliged by Court Orders to do anything and as such he cannot be said to have defied any such Order.

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As observed earlier, Court orders in this Petition are still a subject of further litigation in the Court of appeal. Court cannot at this stage condemn any of the Respondents in this Petition to have defied any Court Order, to do so would in my view tantamount to usurping the powers of the Court of Appeal.

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Since the whole issue about non-compliance of the electoral laws in this Petition is centered around this alleged defiance of Court Orders, Court find that non-compliance with the electoral laws was not proved to the satisfaction of Court in this Petition.

10 The second issue is therefore resolved in the affirmative as the election of the Member of Parliament for Aswa County Constituency was conducted in compliance with the electoral laws and the fourth issue is answered in the negative as none of the Respondents could be said to have disobeyed any Court Orders.

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**Issues 3: Whether the 1<sup>st</sup> Respondent either personally or through his agents committed any illegal practice.**

Counsel for the Petitioner submitted that the 1<sup>st</sup> Respondent personally made false statements about the character and conduct of the Petitioner in contravention of Section 73 Parliamentary Elections Act.

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The statements complained of were to the effect that:-

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1. The Petitioner is heavily indebted.
2. The Petitioner misappropriated money from UWMFO SACCO.
3. The Petitioner is a NRM mole
4. The Petitioner is not highly educated
5. The Petitioner indulges in acts of witchcraft.

30 These can be found in the affidavits of Ojok Erick exhibit P2, Adong Scovia exhibit P3, Rubangakene Moris exhibit P5, Okidi George exhibit P6 and that of Orach Alfred.

In his submission in reply, Counsel for the 1<sup>st</sup> Respondent contended that since the Petition and accompanying affidavits did not bring out the mens rea behind the utterances of those statements they cannot be said to be intentional or reckless. Counsel referred to the case of Presidential Election Petition No. 1 of 2006 **RTD COL. DR. KIZZA BESIGYE VS ELECTORAL**  
5 **COMMISSION & Y.K MUSEVENI** where Justice Odoki Chief Justice as he then was interpreting Section 24(5) of the Presidential Elections Act, which is similar in wording to Section 73 of the Parliamentary Elections Act.

Court carefully, heard the evidence of the 1<sup>st</sup> Respondent during cross examination and did not  
10 find any malicious or ill motive in the making of the alleged statements

Suffice to state, that during such election campaigns even brothers from the same party like the Petitioner and 1<sup>st</sup> Respondent who belong to the same FDC party undergo some degree of mental stress and certain utterances could be made against opponents.

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However, it is important for the Petitioner to prove the malicious intent on the part of the person uttering such words. Unfortunately, in this case, the Petitioner did not prove such malicious intention on the part of the 1<sup>st</sup> Respondent and no electoral offence was proved to that extent.

20 Perhaps the 1<sup>st</sup> Respondent could pursue further legal action as provided for in Section 73(2) Parliamentary Elections Act.

Counsel for the Petitioner argued that the 1<sup>st</sup> Respondent contravened the provisions of Section 17 Parliamentary Elections Act when he campaigned using a party symbol yet he was not the  
25 flag bearer.

In his submission Counsel for the 1<sup>st</sup> Respondent contended that the 1<sup>st</sup> Respondent was the Deputy President of FDC Party and had used the posters attached to the Petition for that purpose. In fact the party symbol did not appear on the ballot papers.

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For the 2<sup>nd</sup> Respondent it was submitted that they did not have evidence that the Petitioner was actually sponsored by any party and to them no offence was committed.

As noted earlier, this case rotates about the Court Orders and as observed by Court these matters are still pending in the Court of Appeal.

However, upon careful perusal of the evidence surrounding this alleged crime, Court finds that the 1<sup>st</sup> Respondent is the Deputy President of the FDC Party which is a National Party. It is therefore difficult to stop such a person from wearing an FDC Party T/shirt or using any party symbol while he is executing his duties as Deputy President of a party in any part of Uganda.

Court finds that no offence was proved to have been committed by the 1<sup>st</sup> Respondent in contravention of Section 17 Parliamentary Elections Act.

I therefore find that no electoral offences are proved to have been committed by the 1<sup>st</sup> Respondent personally or through his agents and resolve the third issue in the negative.

**Issue 5: Whether the illegal practices and non-compliance affected the outcome of the election in a substantial way.**

Court having found that there was full compliance with the law and also no illegal practices or electoral offences were committed by the 1<sup>st</sup> Respondent or his agents, this issue stands moot.

However, for emphasis the 1<sup>st</sup> Respondent won the elections for Member of Parliament for Aswa County Constituency with 16, 859 votes as opposed to the Petitioner's 5,316 votes the difference between the two was 11,543 votes. Since no evidence has been adduced by the Petitioner to the satisfaction of this Court to prove non-compliance, or any electoral offences the huge difference of 11,543 votes is not affected at all.

**Issues 6: What remedies are available to the parties?**

Counsel for the Petitioner in his submissions made five(5) prayers destined to overturn the election of Member of Parliament for Aswa County Constituency.

While Counsel for the 1<sup>st</sup> Respondent prayed that Court strikes out the Petition and alternatively dismisses the same with costs.

And Counsel for the 2<sup>nd</sup> Respondent prayed for the dismissal of the Petition with costs.

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Court has carefully considered all the above prayers and there being no evidence of non-compliance with the electoral laws in the conduct of elections for Member of Parliament for Aswa County Constituency, and there being no offence on the part of the 1<sup>st</sup> Respondent or his agents, Court finds that Hon. Okumu Reagan Ronald was validly elected as the Member of Parliament for Aswa County Constituency with 16,859 votes.

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This Petition is accordingly dismissed with costs.

Dated this 13<sup>th</sup> day of **June, 2016.**

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**Hon. Justice David Matovu**  
**Judge**