

5

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBALE
ELECTION PETITION NO 20 OF 2021

IN THE MATTER OF THE LOCAL GOVERNMENT ACT CAP 240 (AS AMENDED)

10

AND

**IN THE MATTER OF AN ELECTION PETITION AGAINST THE MBALE DISTRICT
CHAIRPERSON ELECTIONS HELD ON THE 20TH DAY OF JANUARY 2021.**

NAMAASA ALRED.....PETITIONER

15

VERSUS

1. THE ELECTORAL COMMISSION

2. MAFABI MUHAMMED

}

.....RESPONDENTS

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO ANTHONY OJOK, JUDGE

20

JUDGMENT

Introduction:

25

The petitioner was one of the candidates that contested for the National Local Government Elections that were held on the 20th day of January 2021 as candidates for the seat of LC V District Chairperson of Mbale District where nine candidates participated in the race. The Petitioner polled 15,349 Votes as against 17, 887 Votes for the 2nd Respondent. The 1st Respondent on the basis of those results, declared the Respondent as the winner of the L.C V District Chairperson for Mbale District.

30

The Petitioner being dissatisfied with the outcome of the election filed this Petition alleging that the entire election was not conducted in a free, fair and transparent manner in contravention of the established electoral laws namely; The Electoral Commissions Act, the Local Government Act Cap 243 and the Constitution of the Republic of Uganda, 1995. The petitioner seeks the following orders;

35

- i. A declaration that the electoral results from Kama G.C.S, Bukobe, Mutuufu Mosque, Mubalagaye, Wambewo TC, Bunawozi Upper, Kilayi Primary School, Bikikoso Primary School, Bunabigubo G.C.S, Lusamenta, Gumu Trading Centre, Nabibi Trading Centre, Madege

- 5 Trading Centre, Nabini Play Ground, Munjuni Social Centre, Ndoko Trading Centre polling stations are invalid, null and void *ab initio*.
- 10 ii. An order for the nullification of the electoral results from Kama G.C.S, Bukobe, Mutuufu Mosque, Mubalagaye, Wambewo TC, Bunawozi Upper, Kilayi Primary School, Bikikoso Primary School, Bunabigubo G.C.S , Lusamenta, Gumu Trading Centre, Nabibi Trading Centre, Madege Trading Centre, NKUSI, Munjuni Social Centre, Ndoko Trading Centre polling stations.
- 15 iii. A declaration that the 2nd Respondent was not validly elected as the Mbale District Local Council V Chairperson;
- iv. An order for the nullification of the election of the 2nd respondent as the District Local Council V chairperson;
- v. A declaration that the petitioner is validly elected Mable District Local Chairman V;
- vi. The Respondents pay costs of the Petition;

20 ***IN THE ALTERNATIVE:***

- i. The 1st Respondent be ordered to conduct a free, fair and credible Mbale District Local Council V Chairperson Election.
- ii. The Respondents pay costs of the Petition.

Pleadings:

25 The Petitioner filed this Petition in this Honorable Court upon the following grounds namely;

- 30 • That 1st Respondent neglected or failed to conduct the electoral process in a free and fair manner leading to facilitating and manipulating of the electoral results at several polling stations contrary to **Sections 69 & 76** of the Parliamentary Elections Act and the Local Governments Act, Cap 243.
- That the 1st Respondent's agents connived with the 2nd Respondent and procured or permitted un authorized persons to vote at various polling stations in the names absent or deceased voters.

35 The 1st Respondent on the other hand in their answer to the Petition averred that the Election was transparent, free and fair, efficient, neutral and accurate, without any manipulation or falsification.

The 2nd Respondent in his answer to the Petition averred that the principles relating to credible elections were followed and that if there was any failures and non-

5 compliance, such did not affect the result of the election in a substantial manner owing to a difference of 2,538 Votes.

Representation:

Mr. Nangulu Edmund represented the Petitioner while Mr. Wettaka Patrick and Ms. Gilda Katutu represented the 1st Respondent. Mr. Matovu Akram appeared for the 2nd Respondent. The Respondents opted not to cross examine the Petitioner's witnesses while the Petitioner cross examined some of the 2nd Respondent's witnesses and the Returning officer for the 1st Respondent.

Issues:

During scheduling, the following issues were agreed upon for court's determination;

- 15 1. Whether the election process was not conducted in a free and fair manner in accordance with the electoral laws.
2. If so, whether the non-compliance affected the election result in a substantial manner.
3. What remedies are available to the Parties?

20 **Preliminary arguments:**

Before I consider the issues agreed upon by both parties, I will first consider the two preliminary arguments raised by counsel for the Petitioner in their submissions.

In the first leg of the submissions, counsel for the Petitioner submitted that during the trial, the Petitioner's supplementary Affidavits filed on the 6th day of August 2021 in reply to the 2nd Respondent's supplementary Affidavits filed on the 28th day of May 2021 were unjustifiably struck out.

Counsel submitted that the decision was unjustifiable because while this Court struck out the Petitioner's Affidavits in reply / rebuttal, it retained the 2nd Respondent's supplementary Affidavits filed after filing of the Rejoinder. That in that regard, the law was selectively applied to the detriment of the Petitioner.

Counsel went on submit that the Court ought to have struck out both sets of Affidavits filed after the 25th day of May 2021. Counsel concluded by inviting this court to strike out the bulk of the 2nd Respondent's supplementary Affidavits filed on the 28th day of May 2021.

35 For the 2nd Respondent, Counsel submitted that it was clear from the Petitioner's submissions that he was challenging the decisions of this Court in striking out the affidavits, contrary to **Section 145(1)** of The Local Governments Act which states that;

5 *“A person aggrieved by the determination of a lower Court on hearing an election petition may appeal to the Court of Appeal against the verdict”*

Counsel further submitted that in the instant case, this Court made determinations that certain affidavits from both sides, were not properly before Court upon which it became *functus officio*. It is therefore untenable for the Petitioner to challenge such
10 decisions in these same proceedings instead of the Court of Appeal. Counsel prayed that this submission be disregarded.

I have carefully considered the submissions on both sides and entirely agree with counsel for the 2nd Respondent. Counsel for the Petitioner by making such arguments in his submissions with a prayer to strike out the 2nd Respondent’s supplementary
15 affidavits in support of the answer to the Petition filed on 28th May 2021 was not only misconceived but a reckless abuse of court process.

This court cannot pronounce itself on a matter upon which a ruling was delivered in open court on the 20th day of August 2021 in counsel’s presence. Counsel’s only available option was to appeal the ruling rather than bring back the same in his
20 submissions. The Petitioner’s supplementary affidavits in reply to the 2nd respondents supplementary Affidavit in support of the answer to the Petition were all struck out on grounds of having different signatures of the deponents from those reflected on their national identity cards and introducing a new cause of action; the same fate befell the 2nd Respondent’s Affidavits in rebuttal.

25 The petitioner to filed supplementary affidavits when he had got opportunity of reading the respondent’s answers and accompanying affidavits and had already rejoined. The rejoinder is always the last pleading unless leave of court is sought which was not in the instant case, pleadings must come to an end.

The 2nd Respondent’s Supplementary Affidavit in support of the answer to the Petition
30 was never found with any irregularity in the signatures of the deponents or challenged by the petitioner and on that basis were never struck out. Therefore, the submissions of counsel for the Petitioner are unfounded and are treated with the contempt they deserve.

In the second leg of the Petitioner’s preliminary arguments counsel for the Petitioner
35 submitted that despite an earlier request to the 1st Respondent before filing the Petition, the Petitioner subsequently obtained certified copies of the 2nd Respondent’s nomination papers which were riddled with two aspects of illegality that is;

- The 2nd Respondent was illegally nominated because he never obtained the prerequisite statutory 50 signatures of registered voters in 2/3 of the electoral

5 areas and that the 2nd Respondent repeated the names of voters in order to obtain the required numbers.

- The 2nd Respondent forged signatures of registered voters.

10 Counsel for the petitioner relied on **Section 111 (3) (g)** of the Local Government's Act and the case of **Kasirye Zimula Fred v. Bazigatilawo Kibuuka Francis & Anor, Election Petition Appeal No. 01 of 2018**.

For the Petitioner it was submitted that evidence was led to the effect that the 2nd Respondent sub planted voters from other electoral areas in order to obtain the prerequisite statutory numbers and this was an illegality that this Court should not ignore.

15 Counsel for the petitioner further submitted that on the basis of the said evidence, issues of illegality and fraud should not be ignored especially where such illegality has far reaching effects on the results of an election.

20 It was counsel's considered submission that during cross examination the 1st Respondent's returning Officer confirmed that the said nomination forms marked Annexure "B2" of the supplementary record were indeed the forms relied upon by the 1st Respondent to nominate the 2nd Respondent. That the 2nd Respondent during cross examination denied forging any voter's signatures or sub planting any voters from other electoral areas and as such this evidence in itself was sufficient to draw the attention of this court in order to avert the travesty of justice.

25 Counsel for the petitioner relied on the case of **Fangmin v. Belex Tours and Travels Limited, Supreme Court Civil Appeal No 66 of 2013**, on the principle that;

"...the current position of the law is that while an issue or ground of illegality or fraud is not raised ...the court may upon according the parties opportunity to address the Court on it determine any such ground of fraud or illegality".

30 Counsel further cited the case of **Simba (K) Limited & 4 Others v. Uganda Broadcasting Corporation, Supreme Court Civil Appeal No. 03 of 2014** where it was held that;

"a court can decide on an unpleaded matter if the parties have led evidence or address the court in order to arrive at a correct decision in the case and finally determine the controversy between the parties".

35 *"...the law is clear, the court is empowered to consider an issue of fraud or illegality not raised in the Parties' pleadings at any stage even after the hearing but must be cautious and satisfy itself that the alleged illegality is sufficiently proved. If there are matters of suspicion that leave grey areas, an opportunity*

5 *should be given to the parties to address court before making a decision. This principle is based on Article 28 of the Constitution.”*

A careful reading of the 2nd Respondent’s written submissions, shows that counsel for the 2nd Respondent did not in any particular detail respond to the Petitioner’s averments in regard to the two aspects of illegality on the nomination paper.

10 Counsel for the 1st Respondent in response on the other hand raised a preliminary point of law on behalf of the 2nd respondent to the effect that the petition raised matters challenging the 1st respondent’s nomination after elections.

15 Counsel submitted that this ground of the Petition offended **Article 61(1), (f)** of the Constitution of the Republic of Uganda, 1995 which gives the Commission the mandate to hear and determine election complaints arising before and during polling.

Counsel further cited **Section 15** of the Electoral Commission Act which empowers the Commission to resolve complaints arising at any stage of the electoral process.

20 Counsel lastly submitted that issues of qualification prior to nomination of the 1st Respondent are an irregularity and ought to have been brought to the attention of the 1st Respondent for legal action before polling.

After careful perusal and giving due regard and attention to the submissions of all the parties, I shall resolve the second leg of the preliminary arguments raised in the Petitioner’s submissions as below;

25 It is an established principle in our jurisprudence that a court of law cannot sanction that which is illegal. This position was laid down by Donaldson J. in **Belvoir Finance Co. Ltd v. Harold G. Cole Ltd** [1969] 2 ALL E.R 904 at 908 cited with approval by the Supreme Court of Uganda in **Makula International Ltd v. His Eminence Cardinal Nsubuga & Another**, Supreme Court Civil Appeal No. 4 of 1982 that;

30 *“an illegality once brought to the attention of court, overrides all questions of pleading...”*

In the instant case the petitioner asked this court to look into the nomination of the 2nd Respondent which he alleged was done illegally without raising the required statutory number of 50 registered voters in 2/3 of the electoral areas.

35 I am in agreement with counsel for the Petitioner in as far as the authorities cited as being good law and the correct position of the law.

A court of law can indeed decide on an un pleaded matter if the parties have led evidence in that regard and addressed court on the matter in order to arrive at the

5 correct decision in the case. The requirement is that both parties must have led evidence on the unpleaded matter for any court to pronounce itself on the same.

In the instant case the Petitioner in his supplementary affidavits in Reply to the 2nd Respondent's Supplementary Affidavit raised the issue that the 2nd Respondent did not raise the required statutory 50 signatures of registered voters in 2/3 of the electoral
10 areas and that the 2nd Respondent forged signatures of registered voters.

At the commencement of hearing, the 2nd Respondent raised three Preliminary Objections to wit;

- a) That the Petitioner failed to disclose specific provisions of the local Governments Act alleged to have been not complied with;
- 15 b) That the Petitioner presented incurably defective Affidavits;
- c) That the Petitioner raised in his Supplementary Affidavits in Reply to the 2nd Respondent's affidavits new matters that were neither raised in the Petition nor in the supporting Affidavit;
- d) That the Petition was frivolous, Vexatious and an abuse of court process.

20 Counsel for the Petitioner, the 1st and 2nd Respondents had a fair opportunity to submit in open court on the above preliminary objections. It was submitted for the 1st & 2nd Respondents that the issue of Nomination of the 2nd Respondent was a new issue that was not captured in the Petition. As I earlier noted in this judgment; while ruling on the above preliminary objections, I struck out the Petitioner's Supplementary Affidavits
25 in Reply on the basis that they raised new matters that were not captured in the Petition. It is trite that a party is bound by their pleadings.

It follows therefore that the submissions by counsel for the petitioner on the 2nd Respondent's nomination are intended to camouflage the issue which was determined by this court. By counsel now bringing up the same in his submissions and baptizing it
30 as an "illegality" that court ought not to ignore, is untenable in law.

While I agree with the position of the law in the authorities cited by counsel for the Petitioner, I find that the submissions of Counsel for the petitioner that court can determine an unpleaded matter where evidence was led are misplaced because in the instant case, no evidence was led by both parties on the issue of nomination of the 2nd
35 Respondent.

The Affidavit evidence that counsel relies on in his submissions was struck out for introducing a new cause of action and disparities in the signatures so they never formed part of the bundle of evidence in support of the Petition.

5 It is my considered view that counsel for the petitioner had a fair opportunity where he presented all these arguments and court made a ruling. If indeed counsel was dissatisfied with the ruling of this court or had discovered that there was evidence to show that the nomination of the 2nd Respondent was done illegally, his only remedy would lie in filing an application for review before this court indicating the new
10 matters of evidence relating to the 2nd Respondent's nomination that were never available at the time of filing of the petition and address court on the said illegality or appealing the ruling, which ever trajectory counsel would find appropriate to him.

I therefore find that the preliminary arguments by counsel for the Petitioner are misplaced and are intended to trick this court into arriving at contradictory decisions
15 and as such are disregarded.

Burden and Standard of Proof:

In Election Petitions just as it is in civil cases the burden of proof lies upon the Petitioner to prove that each and every assertion or allegation of malpractice or non-compliance with the provisions of the law to the satisfaction of the Court. (See: Section
20 101 of the Evidence Act).

The standard of proof is on the balance of probabilities but the degree of the probability is higher than in ordinary civil suits. (See: *Katono Zedekia v. The Electoral Commission and Another Election Petition No. 0002 of 2001.*)

Resolution of issues:

25 Issue 1:

Whether the election process was not conducted in a free and fair manner in accordance with the electoral laws?

The election of District Chairperson and qualifications for one to be elected is governed by the Local Governments Act, Cap 243 particularly **section 111(3)** of the said Act.

30 Counsel for the Petitioner submitted that the 1st Respondent neglected and/ or failed to properly regulate or restrict the numbers of voters to the Voters Register, which neglect resulted in the falsification of results, multiple voting and ballot stuffing at the polling stations.

Counsel further submitted that the Results Tally Sheet that was admitted onto the court
35 record indicates at page 5 to 17 that the results of Ndoko trading centre polling station, Jewa Town Council, Mbale district were nullified because the number of voters that cast their ballots was 236 yet only 235 voters are registered at the polling station. That similarly at Lwasinzi Trading Centre, Bubyangu Parish, bubyangu sub county, Mbale

5 District the number of voters that cast their ballots at the polling station is 386 yet only 385 voters are registered to vote at the said polling station.

It was counsel for the Petitioner's submission that the electoral anomalies occurred at 15 other polling stations in Mbale District namely;

10

- Bukikoso primary school polling station the Declaration of Results Form indicated that 480 females voted at the polling station yet only 401 females are registered to vote at the said polling station, indicating an illegal excess of 79 unregistered female voters.

15

- Kilayi Primary School polling station the Declaration of Results Form indicated that 410 females voted at the polling station yet only 367 females are registered to vote at the said polling station indicating an illegal excess of 43 unregistered female voters.

20

- Bukobe polling station the Declaration of Results Form indicated that 219 males voted at the polling station yet only 189 males are registered to vote at the said polling station indicating an illegal excess of 30 unregistered male voters.

25

- Mujuni Social Centre the Declaration of Results Form indicated that 204 females voted at the polling station yet only 177 females are registered to vote at the said polling station indicating an illegal excess of 27 unregistered female voters.

30

- Mutuufu Mosque the Declaration of Results Form indicated that 318 males voted at the polling station yet only 289 males are registered to vote at the said polling station indicating an illegal excess of 29 unregistered male voters.

35

- Madege Trading Centre the Declaration of Results Form indicated that 300 females voted at the polling station yet only 280 females are registered to vote at the said polling station indicating an illegal excess of 20 unregistered female voters.

40

- Mubalagaye polling station the Declaration of Results Form indicated that 167 males voted at the polling station yet only 151 females are registered

- 5 to vote at the said polling station indicating an illegal excess of 17
unregistered.
- 10 • Nabibi Trading Centre the Declaration of Results Form indicated that 302
males voted at the polling station yet only 287 males are registered to vote
at the said polling station indicating an illegal excess of 15 unregistered
male voters.
 - 15 • Kama G.C.S polling station the Declaration of Results Form indicated that
215 males voted at the polling station yet only 203 males are registered to
vote indicating an illegal excess of 12 unregistered male voters.
 - 20 • Lusamenta polling station the Declaration of Results Form indicated that
307 females voted at the polling station yet only 296 females are
registered to vote at the said polling station indicating an illegal excess of
11 unregistered female voters.
 - 25 • Nkusi G.C.S polling station the Declaration of Results Form indicated that
132 males voted at the polling station yet only 122 males are registered to
vote at the said polling station indicating an illegal excess of 10
unregistered male voters.
 - 30 • Bunawozi Upper polling station the Declaration of Results Form indicated
that 161 females voted at the polling station yet only 157 females are
registered to vote at the said polling station indicating an illegal excess of
4 unregistered female voters.
 - 35 • Wambewo Trading Centre polling station the Declaration of Results Form
indicated that 196 females voted at the polling station yet only 194
females are registered to vote at the said polling station indicating an
illegal excess of 2 unregistered female voters.
 - 40 • Gumu Trading Centre the Declaration of Results Form indicated that 103
males voted at the polling station yet only 102 males are registered to vote
at the said polling station indicating an illegal excess of 1 unregistered
male voter.

5 Counsel for the petitioner further submitted that the anomalies are of a fundamental and substantial nature to the extent that they render the results from the said polling stations incredible, illegal, null and void.

For the Petitioner it was further submitted that the underlying principle in Electoral jurisprudence is that a Declaration of Results form is a final and authentic record at
10 the polling station. It demonstrates the true Account of the results and whatever transpired on Election day. That the Declaration of Results form has been designed with several, intentional safeguards in order to ensure that a proper electoral process is conducted. Among those safeguards is the total number of voters intended to guard
15 against voting by unauthorized person, multiple voting and ballot stuffing, that where any of the entries is inaccurately recorded, the entire Declaration of Result Form is doubtful and the result is suspect. Counsel relied on the case the case of **Ninsima Boaz Kasirabo and Anor v. Mpuuga David**, Election Petition Appeal No. 55 of 2016, where the Learned Justices on appeal held that;

20 *“Cancellation of Electoral Results from Kabukurura polling station where the Declaration of Results forms indicated 2 extra votes cast more than the Registered voters justified the cancellation of the results from the said polling station since it was proof of ballot stuffing”.*

Counsel for the 1st Respondent in reply submitted that the allegations of falsification, ballot staffing and Multiple voting made by the petitioner in paragraphs 6,7 and 8 of
25 his Affidavit in support of the petition and paragraphs 11 and 12 of his affidavit in rejoinder ought to have been raised during the counting of votes.

Counsel cited **Section 48** of the Parliamentary Elections Act which is applicable by virtue of **Section 172** of The Local Governments Act which allows candidates or their agents or any voter present at the polling station to raise any objection during counting
30 of votes.

Counsel for the 1st Respondent further submitted that the Petitioner was not personally present at respective polling stations complained of on polling day. He could only be represented by his dully appointed agents. That all the deponents who claim to have been the petitioner’s agents at the various polling stations did prove the same by way of
35 appointment letters. Alternatively, their presence could be confirmed by their signing on the Declaration of Results Forms as such.

Counsel for 1st respondent then submitted that the petitioner’s assertions of ballot staffing, multiple voting, falsification and voting by unauthorized persons are premised on hearsay, speculative, imaginative, baseless and unfounded as none of his
40 witnesses proved that they were at the respective polling stations as his agents, and

5 that the election was conducted in compliance with the Constitution of the Republic of Uganda, 1995 and the Local Governments Act and in a few instances where irregularities were discovered, the 1st Respondent remedied them by cancelling the results.

10 Counsel further submitted that **Section 115(1)** of The Local Governments Act provides that; *“The returning officer shall declare elected chairperson the candidate who has obtained the largest number of votes cast”* which meant that in an election, what matters are the number of votes cast not the gender type of the voters as the petitioner paints it.

15 Lastly Counsel submitted that in the instant case, the petitioner did not claim anywhere that he obtained the largest number of votes to be declared a winner as required by law. Indeed, on his table at page 19 of the submissions, it was conceded that even in the polling stations where there was a mismatch in gender recordings, the second respondent obtained 6,011 votes against the Petitioner’s only 70 votes meaning that it was the 2nd Respondent with the highest number of votes.

20 Counsel for the 2nd Respondent in his reply also submitted that counsel for the Petitioner must submit in line with his pleadings and not to invent a case not pleaded by the Petitioner in his petition. Counsel submitted further that the Petitioner’s pleadings are that the 1st Respondent intentionally facilitated the manipulation of the electoral results at several polling stations and that there was a mismatch in gender
25 numbers recorded on the Declaration of Result Forms. Counsel submitted that it was not pleaded that the number of votes exceeded the number of Registered voters.

Counsel cited **Section 115(1)** of The Local Governments Act to the effect that the returning officer shall declare elected chairperson the candidate who has obtained the largest number of votes cast. Counsel submitted that in an election what matters are
30 the number of votes cast not the gender type of the voters as the petitioner paints it.

It was further submitted that in the instant case, the petitioner does not claim anywhere in his petition that he obtained the largest number of votes to be declared a winner as required by law.

35 As regards the falsification of electoral results counsel submitted that such grave allegations are not backed up by any evidence since the affidavits in rejoinder referred to were struck out by this Honourable Court.

Lastly counsel submitted that the 2nd Respondent established that the impugned election was conducted in compliance with the laws Applicable as the Petitioner failed to prove the allegations pleaded in the Petition as against the respondents.

5 **The specific acts of non-compliance complained of were:**

1. Falsification of results
2. Ballot Stuffing
3. Multiple Voting
4. Voting by unauthorized persons

10 The main evidence adduced to prove the above allegations was contained in the
Petitioner's affidavit in support of the petition and rejoinder. As regards the
Falsification of results, Ballot Stuffing and Multiple voting, the petitioner deposed that
he was informed by his campaign agents and independent voters that the 1st
Respondent included false results on the declaration of results forms at various polling
15 stations particularly kama GCS, Bukobe, Mutuufu Mosque, Mubalagaye, Wambewo,
Bunawozi, Kilayi P/S, Bikikoso P/S, Bunabigubo GCS, Magikiri, Lusamenta, Gumu TC,
Nabibi TC, Madege TC, Nabini playground, Mujini Social Centre and Ndoko TC.

That during the tallying process at the tally center he made a complaint to the
presiding officer who only struck out results from two polling stations and
20 ignored/left out results from other 15 polling stations.

As regards voting by unauthorized persons the petitioner deposed that he was
informed by his campaign agents that the 1st respondent connived with the 2nd
respondent and procured/permitted unauthorized persons to vote at various polling
stations. That at Bufumbo P/S the 1st Respondent's agent allowed Namataka Sauya of
25 Rwanda Village to vote yet the same person had died before the election date;
Magombe Mutwaibu voted at Bugweri P/S yet the same person died before the election
date; Mafabi Amnon, Wanyaka Akisoferi, Wolimoli Magidu, Nafuna Monica, Naliba
Charles, Wodeya Kalisiti, all voted at Kama P/S yet the same persons were deceased;
Mutuufu Mosque Nafuuna Aidah voted yet the same person was deceased by the
30 polling date; Mujuni Social Center Mabonga Samuel and Namalwa Margret both voted
yet they were deceased by the polling date.

Wangolo George who was a polling agent at Bukobe and witness for the petitioner
deposed that throughout the polling exercise they received a total of 196 female voters
and 219 male voters and that during the computation of the results he realized that the
35 number of male voters on the ballot exceeded the number of registered voters to which
he demanded to make a complaint but he was never allowed.

Munika Peter, Nyanga Ronald, Mukwana Alex Henry, Nambafu Fredrick, Wanda
Rogers, Siibi David, Peter Pindi, Namakhanga David, Khasebe Stephen, Pande Herbert,
Mutenyo Brian and Wabusa Joshua all gave evidence in support of the petition

5 indicating that during the computation of results they realized that the number of registered voters was less as compared to those that voted.

The same evidence was reproduced in the Petitioner's Affidavit in rejoinder for which I find no reason to reproduce.

10 I have carefully considered the Petitioner's and the Respondents' evidence as regards falsification of results, Ballot Stuffing and Multiple voting and have come to the following conclusions;

15 The Petitioner's only evidence are the entries that are reflected on each and every Declaration of results Forms at the Polling Stations complained of. I have had the benefit of looking at each and every Declaration of Results Forms presented before this court and tried my best to compare it with the voters' registers in each of those areas complained of. I must express my frustration with counsel for the petitioner who did not high-light to this court the excess in the number of voters on the Declaration of Results Forms vis – a – vis the relevant voters' registers. The voters' registers all indicate the total number of registered voters at a particular polling station and do not indicate
20 the number of females and males at a given polling station.

This technically means that duty to identify the difference in numbers between the Declaration of results Forms and the Voters' registers was left to court which in my view is counsel's duty to guide court on where such falsification or multiple voting took place in order to secure a judgment in his client's favor.

25 Further still, the evidence led by the Petitioner does not in any particular material detail indicate that the excess in voters at the various polling stations complained of were voters that voted for the 2nd Respondent in a race of nine candidates. No proof was brought to court as regards to voters that voted yet the same persons were dead at the time of the election, all that counsel did was to mention that certain persons voted
30 yet they were deceased by the time voting took place; proof of death of these individuals ought to have been produced in court. Counsel went ahead and abandoned this allegation during oral highlights in open court. This court accordingly disregards this piece of evidence.

35 Nonetheless, I have had the benefit of going through some voters' registers and manually counted the numbers of males and females and compared the same to the Declaration of Result Forms. At Mutuufu Mosque the manual count indicates that there are 289 registered male voters and 328 female voters making a total of 619 registered voters as per the voters' register. However, on polling day 318 males cast their votes. This anomaly was never satisfactorily explained by the 1st Respondent.

5 At Kama G.C.S polling station the Petitioner claimed that the Declaration of Results
Form indicated that 215 males voted at the polling station yet only 203 males are
registered to vote indicating an illegal excess of 12 unregistered male voters. This
however is not the correct position, having manually counted the male registered
voters as per the register, I found a total of 217 male registered voters, which indicates
10 that the Petitioner gave court wrong figures as regards Kama G.C.S polling station.

It is my considered opinion that going through all the registers manually to ascertain
the truthfulness in each and every allegation raised by the Petitioner would in itself be
court making out a case for the petitioner and proving it for them.

Nonetheless I agree that from what I have ascertained from my manual count, indeed
15 in some areas there were discrepancies when it came to the total of gender break down
on the Declaration of results forms and the voters' registers. However, I have found no
single piece of evidence indicating that these disparities affected the total votes cast at
the polling stations.

I have had the benefit of looking at all the Declaration of Results Forms of the polling
20 stations of the 15 polling station complained of having unregistered voters voting on
the polling station and it is my finding that the total number of valid votes when added
to the total number of invalid votes correspond to the total number of ballot papers
counted and also the total number of female and males that voted that day.

For instance;

- 25 • At Mutuufu Mosque Polling Station the number of males that voted on that
polling day was **318 + 282 females** which was equivalent to **600 votes** that
corresponded with the ballot papers counted as indicated on the Declaration of
Results Form.
- 30 • At Bukikoso Primary School Polling Station the number of **males** that voted on
the polling day was **315+480 females** which was equivalent to **795 votes** that
corresponded with the counted ballot papers as indicated in the Declaration of
Results Form.
- 35 • At Magikiri Mosque the number of **males** that voted on the polling day was
197+200 females which was equivalent to **397 votes** corresponding to the
number of ballot papers counted as indicated in Declaration of Results Form,
- At Mujuni Social Centre the number of **males** that voted on the polling day was
131+204 females which was equivalent to **335 votes** counted as the number of
ballot papers as indicated in Declaration of Results Form.

5 There were no excess votes as per the samples indicated above. The Declaration of Results Form is therefore a self-accounting document in itself.

The only polling station that had extra unexplained number of votes seven in number was Bukobe Polling station. This court was also not availed with the declaration of results form and voters' register for Nkusi G.C.S. Therefore, from the 15 polling stations complained about, only one station had extra votes and those were 7 in number.

During polling each candidate was represented by a polling agent and the Declaration of results forms were dully signed by the said candidates' agents including those of the petitioner.

Section 132(3) of The Local Government Act provides;

20 *"a candidate may be present in person or through his or her representative or polling agents at polling station, and at the place where the returning officer tallies the number of votes for each candidate or conducts a recount, for purposes of safeguarding the interest of the candidate with regard to all stages of the counting, tallying or counting process."*

Section 136(4) of the same Act provides;

25 *"the declaration of results shall be signed by the presiding officer and the candidates or their agents present who wish to do so, 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."*

30 Section 132(1)(4) of the same Act provides for the vote counting and recording procedure and process where the votes cast each candidate should be recorded both in figures and words and thereafter agents countersign the DR Forms in confirmation.

35 The petitioner was not personally present at the respective polling stations complained of on the polling day. He could only be represented by his dully appointed agents. All the deponents who claim to have been the petitioner's agents at the various polling stations did not prove the same by way of appointment letters. Alternatively, their presence could have been confirmed by their signing on the Declaration of Results Forms as such which was lacking. The results garnered by each candidate are deduced from the DR Forms.

In the case of **Adoa Hellen & Electoral Commission v. Alaso Alice**, EP Appeal No.57/2016, where the Court of Appeal held that;

5 *“From the provisions of section 47 of the Parliamentary Elections Act, it is evident*
that the most important thing in vote counting is the number of votes cast in favour
of each candidate. The trial judge having found that there was no alteration of
results, it is our considered view that it was erroneous for him to nullify the entire
10 *election. The trial judge’s finding that the total number of ballot papers at the end of*
the day exceeded the ballot papers that had been issued is, in our view, an
irregularity which did not affect the actual votes cast. Moreover, no evidence was
adduced to suggest that at the time of when voting started, there were any ballot
papers already in the ballot boxes at the polling stations.”

15 Also in the case of Hon. Gagawala Nelson Wambuzi v. Electoral Commission and
Kenneth Lubogo HCT-03-CV-EP-0008/2011, Hon. Lady Justice Flavia Senoga Anglin
held that;

20 *“when an agent signs a declaration of results form, he is confirming the truth of*
what is contained therein. He is confirming to the 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”.

25 Further that;

30 *“even an agent who refuses to sign a declaration form but does not state the*
reasons for not signing as prescribed on the form is also estopped from claiming
that there were irregularities at the polling station when he had an opportunity to
complain but did not”.

It is this court’s conclusion that the election as carried out for Local Council V
Chairperson for Mbale was carried out in a free and fair manner. There were no
alterations/tampering on the results recorded for each candidate and nor was the
35 same proved by the petitioner to the satisfaction of this court. The petitioner also chose
to abandon the other allegations the same are accordingly disregarded as they have no
evidence supporting them. This issue is therefore resolved in the negative.

Issue 2:

40 Whether the non-compliance affected the election result in a substantial manner?

Counsel for the Petitioner cited the case of Rtd. Col Dr. Kiiza Besigye v. Kaguta
Museveni Election Petition No. 01 of 2001 for the definition of the phrase substantial

5 manner defined to mean that the effect must be calculated to influence the result in a significant manner. He further stated that in order to assess the effect, the Court has to assess the whole process of the election to determine how it affected the result and then assess the degree of that effect.

10 Counsel for the Petitioner further cited the case of **Halima Nakawungu v. The Electoral Commission & Anor, Election Petition No. 02 of 2011** wherein Honourable Lady Justice Elizabeth Musoke held that; the expression non-compliance affected the result of the election in a substantial manner can only mean that the votes candidates obtained would have been different in a substantial manner if it were not for the non-compliance.

15 Counsel then submitted that what the holding in the above authority means is that to succeed the Petitioner does not have to prove that the declared candidate would have lost, it is sufficient to prove that the winning majority would have been reduced.

20 Lastly counsel submitted that the noncompliance substantially affected the election result and that the anomalies denied the Petitioner of his victory in the election. That if the 1st Respondent's Returning officer had not neglected to nullify illegally obtained electoral results from the 15 polling stations the Petitioner would have obtained 15,279 votes while the 2nd Respondent would have obtained 11,876 votes in the election with a margin of 3,403 votes between the petitioner and the 2nd respondent hence the petitioner winning the election.

25 Counsel for the 1st respondent submitted that the Respondents have in their submissions clearly showed that there was compliance with the provisions of all the laws and principles governing elections.

30 Counsel cited the case of **Morgan v. Sampson [1974] 3 ALL ER** that was cited with approval in **Besigye v. Y.K. Museveni (Supra)** for the principle that election petitions are matters of public interest that concern not only the parties but also the general body of the electorate in the affected area. They are the democratic expression of the will of the people as to whom they wish to represent them. For those reasons elections cannot be lightly set aside on trivial and flimsy grounds, the objection must be something substantial, something calculated to really affect the result of the election.

35 Counsel further cited the case of **Mbowe v. Eliufo (1967) EA 240 at 242**, where Georges CJ of the Court of Appeal of Tanzania said;

40 *“In my view in the phrase “affected the result,” the word “result” means not only the result in the sense that a certain candidate won and another lost. The result may be said to be affected after making adjustments for the effect of proved irregularities, the contest seems much closer than it appeared to be when*

5 *first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.”*

10 Counsel then submitted that the substantial effect can only be drawn and arrived at when and after a comparison and adjustments have been made from the results scored between the loser of an election/ petitioner and winner so that after adjustments the winner’s victory margin is reduced or completely closed.

15 Counsel for the 2nd Respondent in reply submitted that the general principle on determination whether any non-compliance affected the results of an election in a substantial manner was restated by the Supreme Court in **Mbabazi V. Museveni & 2 Others, Presidential Election Petition No. 1 of 2016** that for the Petitioner to succeed, the proven irregularities must be sufficient to change or place in doubt the result of the election

20 Lastly counsel submitted that the election was not a two-man contest but rather a contest among eight candidates with the least performer getting 402 votes. It was therefore very essential for the Petitioner to adduce evidence to the extent that any anomaly was to the benefit of the 2nd Respondent solely as opposed to any of the other 6 contenders, which the Petitioner has failed to prove.

25 It is the finding of this court that the difference between the winning majority by the 2nd Respondent and the Petitioner is a margin of over 2000 votes; however, the illegal voters as alleged by the petitioner is not correct. The number of extra votes were only found at Bukobe Polling Station with only 7 extra votes. All the remaining 13 polling stations had corresponding votes in term of valid votes and invalid votes being equal to the ballot papers counted and number of female and male voters who voted on the
30 polling day. This court therefore does not see any merit in counsel for the petitioner’s argument that there were illegal unregistered voters as the same is not backed up by evidence.

35 In conclusion therefore, the petitioner has not proved any non-compliance on the side of the respondents that affected the election results in a substantial manner because even if court went ahead and gave the 7 extra votes to the petitioner he would still not have emerged as the winner. To make matters worse the petitioner submitted that if there was no non-compliance the petitioner would have obtained 15,279 votes, yet in the petitioner’s affidavit in support of the petition, the petitioner was stated to have obtained 15,349 votes. So, the alleged outcome without non-compliance is even less
40 than the actual votes the petitioner is said to have obtained. I therefore resolve this issue in the negative.

5 **Issue 3:**

What Remedies are available?

Both counsel for the 1st and 2nd respondents submitted that the Petitioner failed to prove the allegation in the Petition and as such costs should be granted in their favor.

10 It is trite law that costs of any action shall follow the event unless court for good cause orders otherwise (**See: Section 27(2) of the Civil Procedure Act**) in the result the Petitioner having failed to prove the allegations in the petition, judgment is entered on in the following terms;

- 1. That the 2nd Respondent was the validly elected Local Council V District Chairperson for Mbale
- 15 2. Costs of the suit to the 1st and 2nd respondents.

.....

OYUKO ANTHONY OJOK

JUDGE

20 **8/9/2021**