



The Petitioner sought for declarations that;

- 25 (i) the 1<sup>st</sup> Respondent was not validly elected as District Chairperson for Gomba District,
- (ii) the election of the 1<sup>st</sup> Respondent as District Chairperson for Gomba District be annulled and the Petitioner be declared winner of the same and
- 30 (iii) that in the alternative a fresh election be conducted and
- (iv) for costs of the Petition to be provided for.

The Petition was duly served upon the Respondents and both Respondents filed answers to the Petition together with accompanying Affidavits. The 1<sup>st</sup> Respondent further filed supplementary Affidavits in support of the answer to the

35 Petition and the Petitioner filed an Affidavit in rejoinder.

At close of the scheduling conference, the Respondents' Counsel raised three preliminary points of objection, namely;

- (i) that paragraph 7 of the Petitioner's Affidavit in support of the Petition offends the law and should be expunged from the record.
- 40 (ii) that paragraph 4.1-4.2 of the Petition also offends the law and should be expunged from the record.
- (iii) that the Affidavits of Nakibuuka Hasifwa, Ntale Jamilu, Ryalikunda Denes Denesi and Ssekate Adrian offended the law on illiterate persons and should be expunged from the record.

45 The Petitioner's Counsel conceded to the objection in respect of paragraph 7 of the Petitioner's Affidavit in support of the Petition and the Affidavit was accordingly expunged from the record.

Upon hearing the parties' submissions on the other two objections, Court upheld the two objections and severed paragraph 4.1-4.2 from the Petition and also struck

50 off from the record, the Affidavits of Nakibuuka Hasifwa, Ntale Jamilu,

Ryalikunda Denes Denesi and Ssekate Adrian. As a result, the Petitioner remained with only five Affidavits in support of the Petition, which include the Affidavits of Mubiru Eliphazi, Nyombi Gerald, Muyanja Patrick, Kalugendo Samuel and Kirumira Yolenimu.

55 The Respondents opted to only cross examine the Petitioner.

The 1<sup>st</sup> Respondent called two witnesses, namely; the 1<sup>st</sup> Respondent and Kafeero Madinah, while the 2<sup>nd</sup> Respondent called three witnesses who included Aheebwa Anna, Genza Shuaib and Lukyamuzi Fred. All Respondent witnesses were cross examined by the Petitioner's Counsel.

60 **Representation.**

The Petitioner was represented by M/s Imperium Advocates, the 1<sup>st</sup> Respondent by M/s Byenkya, Kihika & Co. Advocates while the 2<sup>nd</sup> Respondent was represented by M/s MRK Advocates.

All the parties filed written submissions.

65 **Issues.**

The parties agreed upon the following issues for determination;

1. **Whether the Election of District Chairperson for Gomba District was conducted in compliance with the electoral laws and principles governing elections?**
- 70 2. **Whether noncompliance, if any, with the electoral laws and principles governing elections affected the final results of the elections in a substantial manner?**
3. **Whether the Respondents personally or by their agents/representatives, with their knowledge and consent or approval,**

75 committed any electoral malpractices, illegal practices or electoral  
offences?

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

##### Burden of proof.

80 The Petitioner's Counsel submitted that the burden of proof lies on the Petitioner  
to prove the assertions in the election Petition and that the standard of proof is on  
a balance of probabilities. That although the standard of Proof is set by the statute  
on a balance of probabilities, because of the public importance of an election  
Petition, the facts in the Petition must be proved to the satisfaction of Court.

85 In reply, the 1<sup>st</sup> Respondent's Counsel was in agreement with the Petitioner's  
submissions and submitted that Courts have acknowledged that though the stakes  
are higher in Presidential and Parliamentary elections, the standard of proof to the  
satisfaction of Court, applies to local government elections as well, because they  
are all of great public importance to the welfare of the people and their democratic  
governance.

90 The 2<sup>nd</sup> Respondent also submitted that the burden and standard of proof is  
bestowed upon the Petitioner. The parties cited the cases of **Hon. Otada Sam  
Amooti Owor versus Tabani Idi Amin and Electoral Commission, Election  
Petition Appeal No. 93 of 2016, Mugema Peter versus Mudiobole Abedi  
Nasser, Election Petition Appeal No. 30 of 2011, Kwoba Herbert versus  
95 Ssebugwawo Tadeo, Election Petition Appeal No. 108 of 2016, page 13,  
Mutembuli Yusuf versus Nagwomu Moses Musamba EP No. 13/2016, page  
14, Simon Peter Kinyera V. Electoral Commission & Taban Idi Amin  
Election Petition Appeal No. 3 of 2018 and the case of Matsiko Winfred  
Komuhangi V. Babihuga T. Winnie Election Petition Appeal No. 9 of 2002  
100 to support their submissions.**

**Determination of court.**

**S.139 of the Local Governments Act** provides that;

105 *“The election of a candidate as a chairperson or a member of a council shall only be set aside on any of the following grounds if proved to the satisfaction of the Court.”* (Emphasis by Court)

In the case of **Col. (RTD) Dr. Besigye Kiiza v Museveni Yoweri Kaguta and the Electoral Commission Election Petition No. 1 of 2001**, when addressing the question of *burden and standard of proof* in election Petitions, Odoki CJ (as he then was) held as follows;

110 *“In my view, the burden of proof in an Election Petition as in other Civil Cases is settled. It lies on the Petitioner to prove to the satisfaction of Court.... The standard of proof required in this Petition is proof to the satisfaction of the Court. It is true Court may not be satisfied if it entertains a reasonable doubt but the decision will depend on the gravity of the matter to be proved...since the legislature chose to use the words ‘proved to the*  
115 *satisfaction of the Court’, it is my view that that is the standard of proof required in an election Petition of this kind. It is a standard of proof that is very high because the subject matter of the Petition is of critical importance to the welfare of the people of Uganda and their democratic*  
120 *governance.”*

This was reaffirmed by Justice Musa Ssekaana in the case of **Byarugaba Mustafa and 2 Others Vs Ampaire Kizito Nseko and 2 others, Election Petition No. 0011/2021** where he stated that;

125 *“In this Petition, therefore like in all Election Petitions, it is the Petitioner who bears the burden of proving his/her allegations to the satisfaction of Court. It is only after the Court is duly satisfied that the grounds raised*

130 *have been proved to its satisfaction that it will invoke its powers under  
Section 142 of the Local Government Act. In order to merit an order  
setting aside the election of a Chairperson or Councilor of a Local  
Council, the evidence produced by the Petitioner must be such as would,  
in the circumstances, compel the Court to act upon it.”*

**Section 101 of the Evidence Act Cap. 6** also provides that he who alleges must prove. The burden of proof in an election contest rests ordinarily upon the contestant/Petitioner to prove to the satisfaction of Court the grounds upon which he relies to get the election nullified. This burden does not shift. The parties were in agreement on this issue and there is therefore nothing for this Court to adjudicate over in that respect.

**Whether the Petition, as filed by the Petitioner, is competent?**

140 The 2<sup>nd</sup> Respondent’s Counsel raised a preliminary objection regarding the competence of the Petition. Counsel submitted that following this Court’s Ruling in which it expunged from the record; paragraph 7 (a) – (d) of the Petitioner’s Affidavit in support of the Petition and paragraphs 4.1 and 4.2 of the Petition and the Affidavits of Nakibuuka Hafiswa, Ntale Jamilu, Ryalikunda Denes Denesi and Ssekate Adrian, the Petitioner has no valid Petition before Court capable of warranting the election to be set aside. That the Affidavits of Mubiru Eliphaz, Nyombi Gerald, Muyanja Patrick, Kalugendo Samuel and Kirumira Yolenimu are of no evidential value as would warrant setting aside an election.

150 In reply, the Petitioner’s Counsel submitted that there is no specific number of witnesses that shall in any case be required for proof of any fact as per section 133 of the Evidence Act Cap 6. That the issue on whether the Petition is tenable was handled as a preliminary point of law and Court pronounced itself on it. That since Counsel chose to cross examine only the Petitioner, the Affidavit of Muyanja Patrick having been left uncontested, is credible. That the electoral

process on the 20<sup>th</sup> day of January, 2021 included both the District Chairpersons  
155 and the directly Elected Councilors and as persons that took part in the elections  
and were voted on at the same polling station, their independent evidence  
corroborates and guides Court accordingly. That the Petition is therefore  
competently before this Court. He prayed that Court allow the Petition and grant  
the orders as sought by the Petitioner.

160 **Determination of Court.**

As submitted by the Petitioner's Counsel, the issue on competence of the Petition  
was handled as a preliminary point of law and Court pronounced itself on the  
same.

The 2<sup>nd</sup> Respondent's Counsel submitted that following this Court's Ruling  
165 where Court expunged from the record, paragraph 7 (a) – (d) of the Petitioner's  
Affidavit in support of the Petition and paragraphs 4.1 and 4.2 of the Petition and  
the Affidavits of Nakibuuka Hafiswa, Ntale Jamilu, Ryalikunda Denes Denesi  
and Ssekate Adrian, the Petition was weakened and the Petitioner has no valid  
Petition before Court capable of justifying the setting aside the election. That the  
170 Affidavits of Mubiru Eliphaz, Nyombi Gerald, Muyanja Patrick, Kalugendo  
Samuel and Kirumira Yolenimu are of no evidential value as would suffice to set  
aside an election.

Whereas the 2<sup>nd</sup> Respondent's Counsel had a right to cross examine the  
Petitioner's witnesses who included Nyombi Gerald, Muyanja Patrick,  
175 Kalugendo Samuel and Kirumira Yolenimu, he opted to only cross examine the  
Petitioner. Had Counsel have had any objection to the Affidavits of Nyombi  
Gerald, Muyanja Patrick, Kalugendo Samuel and Kirumira Yolenimu, they ought  
to have cross examined them and had their affidavits impeached accordingly.

In the case of **Ocen and EC v Ebil Election Petition No.1 of 2016**, Justice  
180 Masalu Musene, citing the case of **Ngoma Ngime v Electoral Commission and  
Hon Winnie Byanyima Election Petition No.1 of 2001** held that there must be

an opportunity for counsel to cross-examine the witness and where the right is not exercised, it is taken as if the witness has been cross-examined.

185 Since they opted not to, it is on that basis that Court found that the Affidavits of Nyombi Gerald, Muyanja Patrick, Kalugendo Samuel and Kirumira Yolenimu were not in contention.

I therefore find the Petition competent before this Court and I will now proceed to deal with the merits of the case.

### **Issue 1**

190 **Whether the election for district chairperson for Gomba district was conducted in compliance with the electoral laws and principles governing elections?**

The Petitioner's Counsel submitted that the 2<sup>nd</sup> Respondent failed to ensure that the Electoral Process was conducted under conditions of freedom and fairness, as  
195 people of Gomba District were not allowed to express their free will and consent through a free and fair election. Counsel submitted that the noncompliance with the electoral laws was demonstrated when firstly, the 1<sup>st</sup> Respondent was not duly nominated as candidate for Gomba District Chairperson Elections, secondly, when the declaration of results forms were not signed and thirdly, by the  
200 irregularities in the Declaration of Results forms(DR forms) of Kigoma playground and Kawooko Umea Primary school Polling stations.

Regarding the 1<sup>st</sup> Respondent not being duly nominated as candidate for Gomba District Chairperson Elections, Counsel submitted that the 1<sup>st</sup> Respondent was  
205 wrongly nominated as Kiviri Tumwehe Geoffrey, and appeared as such on various Declaration of Results Forms yet he was announced as a successful candidate under the names of **Kiviiri** Tumwehe Geoffrey, as per the Transmission of Results Form. That Kiviri is the one that was nominated instead of **Kiviiri** thus the illegality of his nomination. That if the 1<sup>st</sup> Respondent intended to change his

name, he ought to have followed the procedures under Section 36 of the  
210 Registration of Persons Act.

In reply the 1<sup>st</sup> Respondent's Counsel submitted that the issue regarding the 1<sup>st</sup>  
Respondent's name was never pleaded nor is it grounded in the Petition and Joint  
Scheduling Memorandum. That no application for amendment whether oral or  
through formal application was made by the Petitioner to introduce the ground of  
215 disparity in the names of the 1<sup>st</sup> Respondent. That the Petitioner's submissions  
cannot purport to amend his pleadings. That Paragraph 4.4 of the Petition referred  
to by the Petitioner doesn't challenge the 1<sup>st</sup> Respondent's nomination on grounds  
of names used. That even during cross examination of the 1<sup>st</sup> Respondent, no  
question was put to him regarding his names. That the 1<sup>st</sup> Respondent was just  
220 ambushed with the issue of nominations in submissions.

Without prejudice to the above submissions the 1<sup>st</sup> Respondent's Counsel  
submitted that the 1<sup>st</sup> Respondent was rightly nominated and declared winner by  
the 2<sup>nd</sup> Respondent. That the 1<sup>st</sup> Respondent's name is spelt as **Kiviiri** Tumwehe  
Geofrey and it appears as such on the Nomination Form, the Result Tally Sheet,  
225 Return Form for Transmission of Results for Chairperson Gomba District, and  
the Uganda Gazette which were agreed upon in the Joint Scheduling  
Memorandum. That the Petitioner did not adduce any documentary evidence to  
show that the 1<sup>st</sup> Respondent was nominated as Kiviri Tumwehe Geofrey and not  
**Kiviiri** Tumwehe Geofrey thus the allegation is without basis. That the Petitioner  
230 seems to impress upon Court that he sued/Petitioned against a wrong party and  
as such his pleadings should be struck out. That the misspelling of the 1<sup>st</sup>  
Respondent's name was due to a typing error that was owned up by the Returning  
Officer for Gomba District and should therefore not be a ground for annulling an  
election. Counsel prayed that this issue be resolved in favour of the 1<sup>st</sup>  
235 Respondent.

The 2<sup>nd</sup> Respondent's Counsel submitted that the election was largely conducted in accordance with the law. That in the cross examination of the Returning Officer, RW3, Anna Ahebwa no single noncompliance was ever proved by the Petitioner. That the issue of the name Kiviri or Kiviiri was not in contention. That  
240 all the Candidates and the voters fully participated in the election without any contention or confusion about the name. That the Petitioner even sued Kiviiri with whom he had participated in the election. That he cannot belatedly without amending the Petition bring new allegations.

245 **Determination of Court.**

The issue here is in respect of the disparity in the 1<sup>st</sup> Respondent's names. According to the 1<sup>st</sup> Respondent's Affidavit he states that his name is Kiviiri Tumwehe Geofrey. The Petitioner's contention is that the 1<sup>st</sup> Respondent was wrongly nominated as Kiviri Tumwehe Geofrey yet he was announced as a  
250 successful candidate under the names of Kiviiri Tumwehe Geofrey as per the Transmission of Results Form. This was confirmed by the Returning Officer during her cross examination when she confirmed that the person whose name was returned as the successful candidate and also gazetted as the winner is 'Kiviiri Tumwehe Geofrey'. The 1<sup>st</sup> Respondent's Counsel submitted that the  
255 disparity in the 1<sup>st</sup> Respondent's name was never pleaded in the Petition or in the Joint Scheduling Memorandum.

According to **Order 6 rule 7 of the Civil Procedure Rules, SI 71-1** no pleading shall, not being a Petition or Application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the  
260 previous pleadings of the party making that pleading.

In the case of **Mashate Magomu versus Electoral Commission & Another, Election Petition No. 7 of 2016, page 16**, Justice Basaza Wasswa defined an

amended pleading as a pleading that replaces an earlier pleading and that contains matters omitted from or not known at the time of earlier pleading. I have perused  
265 the Petition and the joint scheduling memorandum on record and established that the grounds upon which this Petition was premised are that the entire electoral process was marred with electoral offences and illegal practices in violation of the electoral laws but nothing is mentioned therein in respect to the 1<sup>st</sup> Respondent not being duly nominated as candidate for Gomba District Chairperson Elections  
270 on the basis of disparity of his name.

The disparity in the 1<sup>st</sup> Respondent's name was never pleaded and no application for amendment or actual amendment of the Petition was made by the Petitioner to introduce the ground of disparity in the names of the 1<sup>st</sup> Respondent. As such there is no such amended pleading on record. The attempt to amend the Petition  
275 through submissions by Counsel therefore offends Order 6 rule 7 of the Civil Procedure Rules which was illustrated in the case of **Kwijuka Geoffrey versus Electoral Commission & another EP No.7/2011, at page 20**, where Justice Elizabeth Musoke held that;

*“Parties are bound by their pleadings (Order 6 rule 7 of the Civil  
280 Procedure Rules), a party cannot prove what was not pleaded except through amendment with leave of Court. There was no such amendment in this case.”*

Analogous to the above case is the fact that the Petitioner introduced a ground of bribery in their submissions yet they had not pleaded it in their Petition. Court  
285 held that this was a very serious petition issue on which alone the Petition could succeed and stated that a party cannot prove what was not pleaded except through amendment with leave of Court.

In the instant case, the issue of the disparity in the names of the 1<sup>st</sup> Respondent would be sufficient ground for setting aside an election on the basis of ineligibility  
290 to contest. However, as discussed above, it has been established that there was no

application for amendment or amendment of the Petition made by the Petitioner to introduce the ground of disparity in the names of the 1<sup>st</sup> Respondent. Allowing the Petitioner to carry on with this ground would amount to allowing the Petitioner to prove what they never pleaded.

295 In the case of **Kasirye Zimula Fred versus Electoral Commission & Another, EPA No. 1/2018**, where the appellant sought to challenge the nomination of the Respondent, the Court of Appeal held that;

300 *‘..... the appellant ought to have challenged the said irregularities at the earliest opportunity by submitting a complaint to the Electoral Commission. Section 15 of the Electoral Commission Act allows parties aggrieved by the nominations to lodge their complaints to the Electoral Commission...Issues of nomination should be resolved before elections. It appears to us that, the appellant waived his rights to complain when he failed to bring the complaints within the stipulated period and as such*  
305 *would be estopped from doing so after the election.’*”

In the circumstances, I am bound by the holding of the Court of Appeal that issues of nomination should be resolved before elections. According to the testimony of Anne Ahebwa (RW3) who was the Returning Officer, there were no complaints made regarding the name of the 1<sup>st</sup> Respondent, despite the fact that a list of voters  
310 was displayed before voting. By the Petitioner Petitioning this Court against the 1<sup>st</sup> Respondent in the names of **Kiviiri** Tumwehe Geoffrey, as evidenced by the Petition and accompanying Affidavits, my conclusion is that the Petitioner was, at all times during and after nomination of candidates, aware of the 1<sup>st</sup> Respondent’s correct spelling of his name but chose to waive his right to bring a  
315 complaint when he noticed the name on the nomination was ‘Kiviri’ instead of ‘**Kiviiri**’. It is at that point that the Petitioner waived his right to raise such complaint and as such cannot raise the same at this stage.

Premised on the foregoing, the finding of this Court is that the 1<sup>st</sup> Respondent was  
duly nominated and that the apparent disparity in the names is credibly  
320 attributable to error and not any form of infraction of the electoral laws, mischief  
or criminal misrepresentation.

### **The unsigned Declaration of Results Forms for Kigoma playground and Kawooko Umea Pri Sch Polling Stations**

The Petitioner's Counsel submitted that Annexure F to the 1<sup>st</sup> Respondent's  
325 supplementary Affidavit in support, which is the Declaration of Results Form,  
was not signed by the presiding officer, Mr Lukyamuzi Fred because his National  
Identity card bore the words, 'UNABLE TO SIGN'.

In reply, the 1<sup>st</sup> Respondent's Counsel submitted that during cross examination,  
Mr Lukyamuzi Fred testified at the time that when he was registering for the  
330 National Identity card in 2017, he had suffered an accident and was unable to  
append his signature. That this evidence was not challenged by the Petitioner's  
Counsel during cross examination. That having recovered from the said accident,  
he was able to sign. That he also testified that he signed the DR Forms in the  
presence of Kafeero Madinah and Ssekate Adrian who also appended their  
335 signatures. That there's nothing that barred him from signing on the DR Form.

In further reply the 2<sup>nd</sup> Respondent's Counsel submitted that all the Declaration  
of Results Forms were duly signed in accordance with the law. That there is no  
proof before this Court that Lukyamuzi Fred did not sign the Declaration of  
Results Form for Kigoma Playground Polling Station. That Lukyamuzi Fred  
340 owned his signature on the Declaration of Results Form annexed as 'F' to the 1<sup>st</sup>  
Respondent's supplementary Affidavit in support of the answer to the Petition  
and also explained why his National Identity Card indicated that he was unable  
to sign because at the time when the National Identity Cards were being acquired  
he had an injury. That there is no evidence that Lukyamuzi Fred was appointed

345 while still unable to sign as alleged. That if Counsel for the Petitioner wanted to dispute Lukyamuzi Fred's signature, he ought to have called for a forensic examination of Lukyamuzi Fred's signature through a handwriting expert, which was not done.

In rejoinder the Petitioner's Counsel submitted that the Affidavit of Lukyamuzi Fred cannot be relied on in as far as he is unable to sign and should be struck out. 350 Counsel further submitted that the 1<sup>st</sup> Respondent has wrongly applied the case of **Eng. Ibaale Daniel vs Abdu Katuntu and Another, Election Petition Appeal No. 41 of 2016** as the issue is not only about capacity to put a mark or to sign but the obvious error showing that Lukyamuzi Fred is unable to sign. That 355 Lukyamuzi Fred stated in cross examination that he had broken his arm but did not state which arm was broken or provide any proof whatsoever. That if Lukyamuzi Fred wanted to be able to sign, he ought to have effected a change of particulars which he has never done which makes all his activities illegal.

**Determination of Court.**

360 RW4 Lukyamuzi Fred produced his national identity Card Number CM99999107245K for examination by this Court. Court observed that in the place of the signature on the national identity card was written the words "*UNABLE TO SIGN*".

Annexure F to the 1<sup>st</sup> Respondent's supplementary Affidavit in support of the 365 answer to the Petition is a Declaration of Results form which shows that Lukyamuzi Fred appended his signature as the presiding officer of Kigoma playground polling station. The Petitioner's contention is that a person whose ID states that they are unable to sign could not have signed the DR form (Annexure F).

370 During cross examination the Petitioner's Counsel asked RW4 where he got the signature that he appended on Annexure F yet his National ID indicated that he

was unable to sign. RW4 stated that by the time registration for national IDs was being done, he was still in school and had an injury. That the people registering were in a hurry and never gave him a chance to sign. When Counsel asked for proof of the injury, RW4 stated that it happened in 2017. The Petitioner’s Counsel did not probe any further to ascertain the nature of the accident or which body part it affected.

The Petitioner sought to rely on the case of **Muyanja Simon Lutaaya vs. Kenneth Lubogo and the Electoral Commission, Election Petition Appeal No. 82 of 2016**, which cited with approval Election Petition 17/2016 Karanzi Charles versus Musoke Paul Sebulime when it held as follows;

*“in respect of the signatures of the deponents that are inconsistent with those on the National Identity Card, it is my view that such an inconsistency that is apparent on the face of the record, makes the Affidavit to be suspect and unreliable. A suspicious document is inherently unreliable and no probative value can be attached to it all by Court in respect to its contents. Such Affidavits will be ignored by the Court as they are inherently unreliable and with no probative value that a Court can attach to them in the consideration of whether or not an election ought to be set aside.”*

In the above case the Court of Appeal went ahead to hold that the trial Court was correct to expunge the 23 Affidavits in question in so far as the identity of the deponents was in doubt as signatures on Affidavits differed from the signature on the identity cards, or signatures on one document and a thumb print on another.

It was argued for the Petitioner, that signing of the Declaration of Results (DR) Forms by the presiding officer was mandatory and failure to do so invalidated the results (**Mujuni Vincent Kyamadidi v. Charles Ngabirano and the Electoral Commission, Election Petition Appeal No. 84 of 2016**).

The Petitioner’s Counsel submitted that the 2<sup>nd</sup> Respondent contravened section **136(1) and (4) of the Local Governments Act, Cap. 243**, by appointing a

400 presiding officer who could not fulfill the legal mandate to sign off on the various Declaration of Results Forms. The provisions require the presiding officer to sign on the declaration of results forms. Counsel further submitted that RW4 - Lukyamuzi Fred could not have signed on the Declaration of results Forms used by the 2<sup>nd</sup> Respondent in the declaration of results.

405 The facts of that case (Muyanja Simon- *supra*) are distinguishable from those of the instant case, in that the deponents of the 23 expunged Affidavits used signatures and thumb prints on different documents interchangeably which made it hard to ascertain their clear identities. However, in the instant case, RW4 has consistently used his signature on all the election documents and has explained  
410 why he was unable to sign on his national identity card. This cleared any confusion that could have arisen.

According to the case of **Mutembuli Yusuf vs Nagwomu Moses Musamba and the Electoral Commission, EPA No. 43/2016**, in election Petitions, the burden remains on the Petitioner throughout the trial and does not shift. The Petitioner is  
415 under obligation throughout the trial to prove the assertions raised in their Petition. The standard of proof is to the satisfaction of Court on a balance of probabilities by adducing evidence which is free from contradictions, truthful so as to convince a reasonable tribunal to give judgement in a party's favour (see **Betty Muzanira Bamukwatsa vs. Masiko Winnifred Komuhangi and 2  
420 others, EPA No. 65/2016** and **Ernest Kiiza vs. Kabakumba Labwoni Masiko, EPA No. 44/2016**).

The onus of proof was on the Petitioner to prove that Lukyamuzi Fred never broke his arm or that the broken arm was never the one that he ordinarily used for signing.

425 RW4 testified that he is the one who signed on annexure F as the presiding officer of Kigoma playground, which is what the Petitioner disputes. The Petitioner did not challenge the claim of injury and inability to sign at the time of issuing the

National Identity cards, made by RW4. The burden is on the Petitioner to adduce evidence which is truthful and free from contradictions to convince this Court  
430 that the signature on annexure F does not belong to RW4 who has owned it.

The Petitioner was not able to discharge the burden of proving that annexure F was never signed by RW4.

The case of **Dr. Bayigga Michael Phillip Lulume V Mutebi David Ronald and Electoral Commission Election Petition No. 014 of 2016** upon which the  
435 Petitioner sought to rely, does not support his case. In that case, Justice Batema quoted the case of **Karazani Charles v. Musoke Paul Sebulime & Electoral Commission, Election Petition No.17 of 2016** at Jinja, where Justice Kabiito ruled that;

440 *“In respect of signatures of the deponents that are inconsistent with those on the national identity cards, it is my view that such an inconsistency that is apparent on the face of the record makes the Affidavit to be suspect and unreliable”*

The holding in that case applies where the Petitioner has discharged their burden of proof to the satisfaction of Court. From the evidence on record and the  
445 submissions by the Petitioner’s Counsel, this burden has not been discharged to Court’s satisfaction.

The Petitioner has not convinced this Court that the impugned signature is not that of RW4 or that DR Form -annexture F tendered as evidence in Court was not signed by him.

450 **Disparity in the names of Genza Shuaib/Swaibu for Kawooko Umea polling station.**

The Petitioner’s Counsel submitted that Mr Genza Shuaib and Genza Swaib are different persons since the name Genza Shuaib reflected on the National Identity

Card NIN CM740991009J1E is different from Genza Swaib who signed on the  
455 Declaration of Results Forms for Kawooko Umea Primary School polling station.  
Counsel submitted that on that basis, the appointment of Mr Genza Swaib, as a  
presiding Officer by the 2<sup>nd</sup> Respondent was unlawful since such a  
person/presiding officer is non-existent. That Genza Shuaib continued to sign as  
Genza Swaib well aware that this is not his name, which invalidates all the things  
460 he did while acting as the Presiding Officer at Kawooko Umea Primary Sch.  
Polling Station on the 20<sup>th</sup> day of January 2021. That if Genza Shuaib wanted to  
adopt the name Genza Swaib, he ought to have complied with section 36 of the  
Registration of Persons Act.

Counsel prayed that Court find that Genza Shuaib did not comply with Section  
465 136(1) and (4) of the Local Governments Act as he acted illegally.

In reply the 1<sup>st</sup> Respondent's Counsel submitted that the Petitioner was not  
disadvantaged, given the fact that Mr Genza Shuaib and Genza Swaib are one and  
the same person. That Mr Genza Shuaib, in his Affidavit in reply sworn, dated  
and filed in this Court on 23<sup>rd</sup> August, 2021, stated under paragraph 2, that he was  
470 rightly appointed as a presiding officer though his name was written as Swaib in  
the list of Presiding Officers. During cross examination, the witness-Genza  
Shuaib-RW5, stated that both names referred to the same person and that as a way  
of rectifying the same, he swore a Statutory Declaration for the two names (Mr  
Genza Shuaib/Genza Swaib) in 2019 and that the Statutory Declaration is in the  
475 custody of his mother. That the evidence that the two names referred to one and  
the same person and that he swore a Statutory Declaration for the same in 2019,  
was not challenged by the Petitioner. That no evidence was adduced to show that  
there was another person in existence named Mr Genza Shuaib or Genza Swaib.  
Counsel prayed that this issue be resolved in favour of the 1<sup>st</sup> Respondent.

480 In further reply, the 2<sup>nd</sup> Respondent’s Counsel submitted that the evidence on record as per his Affidavit dated 23<sup>rd</sup> August 2021 and during cross examination and re-examination shows that there was only one Genza with National Identity Card Number (NIN) CM740991009J1E. That the said Genza owned up to the name Shuaib as per the National Identity Card and that his name is sometimes  
485 written as Swaib. He stated that he had made a deed poll/declaration relating to the discrepancy in his name. That the Petitioner did not prove that Genza Shuaib also known as Swaib was not the Presiding Officer at Kawooko Umea Primary School Polling Station.

In Rejoinder the Petitioner’s Counsel submitted that the 2<sup>nd</sup> Respondent did a  
490 “*copy and paste*” on the 2 Affidavits of Lukyamuzi Fred and Genza Shuaib as seen in paragraphs 1 to 15 of the 2 Affidavits. That in paragraphs 7, 9, 10, of both Affidavits filed in Support of the 2<sup>nd</sup> Respondent’s Answer to the Petition, counsel forgot to amend and ended up showing that both Lukyamuzi Fred and Genza Shuaib worked at Kigoma Playground. That these Affidavits are incurably  
495 defective and cannot be relied on by the Court as they offend Order 19 rule 3(1) of the Civil Procedure Rules. That the appointment made by the Returning officer as the person who appointed Genza Swaibu is not legally recognized due to a wrong name, but also the Polling Station he was appointed to was non-gazetted as it shows “**Kawoko** Umea” which is non-existent within the gazetted list of  
500 Polling Stations. That this was in itself not compliant with the principles of freedom and fairness as the Polling Station is unknown and contrary to section 33(3) of the Electoral Commission Act, Cap 140.

### **Determination of Court.**

During cross examination, RW5- the said Genza Shuaib, presented his National  
505 Identity Card NIN CM740991009J1E before this Court. The Identity Card shows

that it belongs to a one Genza **Shuaib**, which are the same names in which his Affidavit was deponed.

Annexure G to the 1<sup>st</sup> Respondent's supplementary Affidavit in support which is a DR Form for Kawooko Umea Primary School, was signed by Genza **Swaib**.

510 Annexure H to the 1<sup>st</sup> Respondent's supplementary Affidavit in support, which is a list of presiding officers, showed that Genza Swaibu with National Identity Card NIN CM740991009J1E was the presiding officer for Kawoko Umea Primary School Polling Station.

515 Genza Shuaib deponed an Affidavit in reply filed in this Court on 23<sup>rd</sup> August 2021 stating, under paragraph 2, that he was rightly appointed as a Presiding Officer though his name was written as Swaibu in the list of presiding officers but his NIN was correctly indicated in that list. Further, during his cross examination, he confirmed that his name is Swaib but acknowledged that the name "*Swaibu*" as spelt on the DR form is not the same "*Shuaib*" as spelt on his 520 National ID. He stated that he swore a statutory declaration/deed poll in 2019 changing his name to Genza Swaib but did not avail the same to Court.

The Petitioner contended that usage of the names Shuaib and Swaib interchangeably was in contravention of **Section 36 of the Registration of Persons Act which** provides that;

525 *“Any person, being over the age of eighteen years or a widower, widow, divorced person or a married person, who wishes to change his or her name, shall cause to be published in the Gazette a notice in the prescribed form of his or her intention to do so”.*

530 The 1<sup>st</sup> Respondent did not do as required **s.36 of the Registration of Persons Act** or prove that he complied. Premised on the fact of that omission, the Petitioner contended that this in turn offended Section 136(1) and (4) of the Local

535 Governments Act which gives the presiding officer a mandate to sign on the DR forms. That Swaib, the person who signed on the DR forms as the presiding officer of Kawooko Umea polling station was not the legally appointed and recognized presiding officer of that polling station and that therefore Genza Swaib who signed on the DR forms of Kawooko Umea primary school polling station did so illegally.

540 Annex H which was duly certified by the 2<sup>nd</sup> Respondent on the 23<sup>rd</sup> August 2021 showed that Genza Swaibu was appointed as a presiding officer for Kawoko Umea Polling Station. This evidence is corroborated by the testimony of Genza Shuaib (RW5) and that of Anne Ahebwa who, during re-examination, confirmed that Genza Swaib was the one on the list of presiding of officers with NIN CM740191009100JIE which is the same NIN presented in Court bearing the name Shuaib.

545 During re-examination, RW5 also stated that he was in charge of the Declaration of Results Forms at Kawooko Umea and that he is the one who wrote his name as Genza Swaib in the DR form (annexture G) and that the signature therein is his.

550 In the absence of any evidence to the contrary or evidence that there was another Genza Swaib or Genza Shuaib with claim to the same identity, I am convinced by the forgoing corroborated evidence that Genza Swaibu who is named in the list of presiding officers is the same Genza Shuaib on the National Identity Card NIN CM7409910091009JIE and is also the same Genza Swaib who signed on the forms and appeared before this Court as a witness.

555 Under Paragraph 24 of her Affidavit in Reply filed and dated 23<sup>rd</sup> August, 2021, Anne Ahebwa (RW3) -the 2<sup>nd</sup> Respondent's Returning officer, stated that there was no polling station called **Kawoko** Umea Pri Sch Polling Station. That the Electoral Commission gazetted polling station is **Kawooko** Umea primary school

polling station which would imply that the 2<sup>nd</sup> Respondent appointed a presiding  
560 officer to a non-existent polling station.

Similarly, in the absence of another Polling station with similar names to that  
claimed by the Petitioner to be an unknown Polling station, the disparity in the  
spelling of the names being the omission of a second letter “o” in the disputed  
name- I am convinced that the two names referred to the same polling station  
565 which was **Kawooko** Umea Primary Polling Station.

The foregoing disparities in the names of the witness and of the polling station do  
not, in my opinion, in the context as explained amount to infraction of any  
electoral laws or non-compliance with any electoral laws.

This regarding discrepancy in the names Shuaib/Swaib issue is accordingly  
570 resolved in favor of the Respondents

**Alteration of Declaration of Results forms and uncertified DR forms.**

The Petitioner’s Counsel submitted that the votes for the 1<sup>st</sup> Respondent at  
Kawooko Umea Primary school polling station were altered by Genza Shuaib  
575 from 35 votes to 225 votes without consulting the Petitioner or his agents prior to  
changing. That the 2<sup>nd</sup> Respondent relied on a falsified copy of the Declaration of  
results Form in tallying the results. That the Returning officer confirmed that  
Annexure C” to Affidavit in support of the Answer to the Petition is a forgery of  
the Declaration of Results form yet it bears all the information as required on  
580 Form EC9 prescribed in the 7<sup>th</sup> Schedule to the Local Governments Act, Cap 243.  
That this shows that there was noncompliance with section 12(1)(f) of the  
Electoral Commission Act, Cap 140 in as far as they failed to take steps to secure  
conditions necessary for the conduct of any election in accordance with this Act  
and any other law. He prayed that Court find in the affirmative that indeed there

585 was non-compliance with the electoral laws and principles governing elections in the process of the election of Gomba District Chairperson.

In reply the 1<sup>st</sup> Respondent's Counsel submitted that the issue of alteration/change of votes is not grounded in the Petition, this Court having severed and expunged paragraph 4.1 and 4.2 from the Petition for not disclosing particulars. That upon  
590 expunging paragraph 4.1 and 4.2 from the Petition, any subsequent cross examination and submission on the same was futile because it no longer constituted part of the record. That to allow the Petitioner fall back on those paragraphs at this stage would occasion great injustice and prejudice to the 1<sup>st</sup> Respondent who would have been denied an opportunity to cross examine the  
595 Petitioner on those allegations if he so wished. Counsel prayed that this issue be disregarded by Court since it arises out of an expunged paragraph in the Petition. Without prejudice to the above submission, the 1<sup>st</sup> Respondent's counsel submitted that the elections at Kawooko Umea Primary school polling station were conducted in compliance with the electoral laws and principles where the  
600 1<sup>st</sup> Respondent got 225 votes while the Petitioner got 57 votes. That the Petitioner's annexures cannot be relied on to annul an election because they are not certified copies and annexure D2 as attached is incomplete. That as such, there's no evidence to support the Petitioner's allegations. That annexure D2 attached to the Affidavit in support of the Petition should be disregarded because  
605 it did not prove that there was any alleged alteration of votes by the presiding officer neither did it show that the 1<sup>st</sup> Respondent's or his agents connived with the presiding officer. That no complaint was ever made to the officials of the 2<sup>nd</sup> Respondent or recorded in the DR Form regarding any alleged alteration of votes by Ntale, a polling agent for the Petitioner. That the Petitioner's counsel  
610 consented to expunging of the evidence of Male Yazid from the Court record, consequently he did not appear for cross examination and as such his evidence cannot be relied on.

Regarding the crossings on the certified DR Form, the 1<sup>st</sup> Respondent's Counsel submitted that the crossings did not in any way affect the outcome. That it was  
615 cured by the presiding officer counter-signing in the presence of both polling agents for the Petitioner and the 1<sup>st</sup> Respondent. That the crossing on annexure G, attached to the 1<sup>st</sup> Respondent's supplementary Affidavit in support was a human error, was minor and did not put the Petitioner to any disadvantage. That the presiding officer owned up to the errors by counter-signing on the DR Form  
620 (Annexure G). That the Petitioner is estopped from challenging the contents of the certified copy of the DR Form for Kawooko Umea Primary school Polling station, in so far as the Petitioner was the appointing authority for Ntale Jamilu, the polling agent. He prayed that this issue be resolved in favour of the 1<sup>st</sup> Respondent.

625 The 2<sup>nd</sup> Respondent's Counsel submitted that the Petitioner failed to prove that the results at Kigoma Playground Polling Station and Kawooko Umea Pri. Sch. Polling Station were altered or falsified as alleged. That indeed Annexure "F" and "G" to the 1<sup>st</sup> Respondent's Supplementary Affidavit were certified copies. That the testimony of Mr. Genza was not controverted in any material manner.  
630 That the Petitioner did not avail any other certified results nor did he tender in evidence of any authentic original Declaration of Results Forms and his mere allegations are insufficient to invalidate the results. That Kateregga Ali and Katumba Andrew were never Presiding Officers at any Polling Station. That the Petitioner failed to prove that the election for LCV District Chairperson for  
635 Gomba District was not conducted in compliance with the electoral laws and principles governing elections as evidence on record shows that the election was conducted entirely in accordance with the electoral laws and principles governing elections. Counsel prayed that Court find that the elections were conducted in accordance with electoral laws and principles governing elections in Uganda.

640 In Rejoinder the Petitioner’s Counsel prayed that Court find that indeed there was noncompliance with Electoral Laws and principles in the Election for District Chairperson for Gomba District.

**Determination of Court.**

**Alteration of Declaration of Results Forms.**

645 One of the Petitioner’s contentions is in respect of the 1<sup>st</sup> Respondent’s alleged alteration of results at Kawooko Umea Primary school polling station without consulting the Petitioner or his agents prior to making the changes. The 1<sup>st</sup> Respondent’s Counsel however submitted that the issue of alteration/change of votes is not grounded in the Petition, this Court having severed and expunged  
650 paragraph 4.1 and 4.2 from the Petition for not disclosing particulars.

In a ruling of this Court dated 26<sup>th</sup> August 2021, at page 6, this Court upheld the Respondents’ preliminary objection in respect of paragraphs 4.1 and 4.2 of the Petition and severed them from the Petition as well as expunging them from the record. The impugned paragraphs stated as follows;

655 *‘4.1. THAT contrary to Section 151(1)(a) of the Local Government Act, the 2<sup>nd</sup> Respondent’s officials connived with the 1<sup>st</sup> Respondent and his agents to forge and alter results on the Declaration of Results Forms.*

660 *4.2. THAT contrary to Section 153(1) of the Local Government Act, Cap 243, on the polling day during the polling exercise, the 2<sup>nd</sup> Respondent’s election Officers in connivance with the 1<sup>st</sup> Respondent and his agents impersonated other persons who are dead and who are dead and who migrated by voting on their behalf.’*

In the case of **Mashate Magomu Peter versus The Electoral Commission & another Election Petition No. 7 of 2016**, Justice Basaza Wasswa held that;  
665

*“Although the Shah Hemraj Bharmat (supra) case was in respect of a defence struck out, and not in respect of a withdrawal of pleadings as in the present case, the principle is the same; once a pleading ceases to be on the Court record, it cannot be restored in a judgment.” (Emphasis by Court)*

670 In the instant case, the ground the basis of which the Petitioner is making submissions on alteration of results was paragraph 4.1 as stated above, which according to the ruling of this Court delivered on 26<sup>th</sup> August 2021 was severed from the Petition and expunged from the record. The implication of expunging the said paragraph from the record is that it could not therefore be relied on  
675 anymore. The principle is that once a pleading ceases to be, it cannot be restored in submissions or even considered in a judgment.

Upon expunging paragraph 4.1 and 4.2 from the Petition, any subsequent cross examination and submission on the same was futile because it no longer constituted a part of the record.

680 Submitting on the basis of a severed or expunged paragraph or pleading is tantamount to abuse of Court processes bordering on contempt of Court.

As rightly stated in the case of **Mashate Magomu** (supra), it would occasion great injustice and prejudice to the Respondents who would have been denied an opportunity to cross examine the Petitioner on those allegations, if they so  
685 wished.

It follows that since the issue regarding alteration of results arises out of the expunged paragraphs of the petition, it is accordingly disregarded by Court.

Be that as it may, in respect of Kawooko Umea Pri Sch polling station, the Petitioner’s Counsel submitted that 190 votes were added to the 1<sup>st</sup> Respondent  
690 through the cancellation and modification of 35 votes to 225 on the Declaration of Results Form which is attached as Annexure G to the 1<sup>st</sup> Respondent’s

695 supplementary Affidavit and annexure D2 to the Petition. Annexure D1 to the Petition is in respect of the same polling station but shows that the 1<sup>st</sup> Respondent had polled 35 votes while in D2, 35 was crossed out and replaced with 225. The crossings/alterations was countersigned against by the presiding officer of Kawooko Umea Primary School Polling Station

As rightly submitted by the Petitioner, in the case of **Betty Muzanira Bamukwatsa vs. Masiko Winnifred Komuhangi, the Returning Officer, Rukungiri and the Electoral Commission, (supra)** the Court of Appeal found  
700 that the alteration of the Return form under the guise of correcting errors and ascertaining results in the absence of the candidates and their agents raised concerns regarding fairness and transparency.

The need to counter-sign as a measure to cure crossings was emphasised by Hon. Justice Batema in the Case of **Dr. Bayigga Lulume vs Mutebi David & Another, EP No. 14/2016**, where in the jurat, the name Kampala was crossed out  
705 and substituted with Jinja. He stated as follows at page 4 & 5 that;

*‘‘Yes, it is possible that the deponent never appeared before any Commissioner for Oaths, where the deletion or crossing is not countersigned against. Court is unable to tell whether oath was taken at Jinja or  
710 Kampala...’’*

Corrections per se on DR forms ought not to be a critical issue if done and acknowledged by countersigning against the correction, preferably by the presiding /returning officer and the respective parties’ agents. They ordinarily imply a mistake was made and that the presiding or returning officer corrected  
715 the error.

In the instant case the crossings/alterations on Annexure G to the 1<sup>st</sup> Respondent’s supplementary Affidavit was countersigned against by the presiding officer of Kawooko Umea Pri School in the presence of both polling agents of the Petitioner and the 1<sup>st</sup> Respondent. All the parties through their  
720 respective agents, acquiesced to the alterations.

### **Uncertified Declaration of Results Forms.**

Annexure G to the 1<sup>st</sup> Respondent's supplementary Affidavit has a bar code S0IXK10002E and was certified by the 2<sup>nd</sup> Respondent on 23<sup>rd</sup> August 2021.

725 I have scrutinized all the DR forms filed and relied on by the Petitioner in this matter and found that they are all not certified by the Electoral Commission.

In the case of **Mashate Magomu Peter versus The Electoral Commission & another Election Petition Appeal No. 47 of 2016**, the Court of appeal held that;

730 *“The position of the law is that documents must be proved by primary evidence except as provided in S.64 of the Evidence Act Cap. 6 of the laws of Uganda which is to the effect that a person wishing to rely on uncertified documents is required to give notice to the party in possession of the original. DR forms are public documents. A party wishing to rely on them ought to have them certified as per S.75 and 76 of the Evidence Act.*

735 *Without certification such documents cannot prove any fact they seek to prove. See Kakooza John Baptist vs EC and Anthony Yiga Election Petition Appeal No. 11 of 2011 (SC). The exception in S.64(1) above refers to a scenario where the party seeking to rely on uncertified documents is required to give notice to the party in possession of the original requesting*

740 *for certification and they refused or failed to do as requested. On proving this, Court accepts the uncertified copies.”*

In the instant case, the Petitioner relied on annexures C, D1 and D2 to the Petition which are not certified. The Petitioner did not adduce evidence of any notice or letter requesting for the certified copies or even notify the Commission. As such,

745 the Petitioner cannot be covered under **S.64 of the Evidence Act Cap. 6.**

The Petitioner's DR forms marked as annexures C, D1 and D2 to the Petition cannot therefore be relied on and are accordingly rejected.

In addition to this, Declaration of results Forms are documents of the 2<sup>nd</sup> Respondent and they have the mandate to ascertain which is authentic. In her

750 testimony RW3 Anna Ahebwa, the Returning Officer of the 2<sup>nd</sup> Respondent stated that the authentic documents of the 2<sup>nd</sup> Respondent have bar codes.

According to annexure H to the 1<sup>st</sup> Respondent's supplementary Affidavit Kateregga Ali who signed as Presiding Officer of Kawooko Umea Pri Sch. Polling station in annexure D1 to the Petition is not listed as a duly appointed  
755 Presiding Officer. This was confirmed by RW3 in her cross examination and in the testimony of RW5. During her cross examination, RW3 Anna Ahebwa, the returning officer of the 2<sup>nd</sup> confirmed to this Court that Annex D1 is not authentic because the presiding officer is not known to the 2<sup>nd</sup> Respondent. She also confirmed to this Court that the crossings on annexure G to the 1<sup>st</sup> Respondent's  
760 supplementary Affidavit were for owning up the declaration forms by the presiding officer and that it is an authentic document of the 2<sup>nd</sup> Respondent.

The record shows that the 2<sup>nd</sup> Respondent relied on annexure G to the 1<sup>st</sup> Respondent's supplementary Affidavit which RW3, the returning officer of the 2<sup>nd</sup> Respondent confirmed to be authentic. On that basis, it is not true that they  
765 relied on a falsified copy of the Declaration of results Form in tallying the results. In respect of Kigoma playground polling station, the Petitioner's Counsel submitted that the Returning officer confirmed that Annexure C to Affidavit in support of the Answer to the Petition is a forgery of the Declaration of results Form yet it bears all the information as required on Form EC9 prescribed in the  
770 7<sup>th</sup> Schedule to the Local Governments Act, Cap 243.

**Section 75 of the Evidence Act**, commands all public officers to provide certified copies of public documents at a fee while **Section 76** provides that such documents may be used to prove contents in a public document.

As earlier noted in the testimony of RW3, the Returning Officer of the 2<sup>nd</sup>  
775 Respondent, authentic documents of the 2<sup>nd</sup> Respondent have bar codes.

In this particular instance, Annexure F to the 1<sup>st</sup> Respondent's supplementary Affidavit with a bar code S0IXP10002E and certified by the 2<sup>nd</sup> Respondent on 23<sup>rd</sup> August 2021 is a Declaration of Results Forms in respect of Kigoma

playground polling station. However, annexure C to the Petition is also a  
780 Declaration of Results Form with a similar bar code in respect of Kigoma  
playground polling station.

Although the different documents reflect similar bar codes but disparate results,  
this Court relied on certified copies which the Respondent filed. That  
notwithstanding, the fact that the allegedly forged document had a similar bar  
785 code as the certified one cannot be overlooked. Whereas this is a pointer to the  
fact that the 2<sup>nd</sup> Respondent, in this regard, fell short in taking steps to fully secure  
conditions necessary for the conduct of the election in accordance with the  
electoral laws or any other law, no evidence was adduced to prove that the  
Respondents procured or condoned the forgery.

790 In his re-examination, the Petitioner stated that he was not inside the tally room  
where the results in annexure G were crossed out from. That this was a violation  
of electoral laws.

I have addressed myself to the law applicable to tallying of results provided for  
under **Section 53 (1) of the PEA**. Under the terms of that provision, the law does  
795 not make it mandatory for tallying to be done in the presence of the candidate or  
their agents. It is the discretion of the candidates and or their agents to be or not  
to be present at the tallying centre. There was therefore no infraction of the  
electoral laws in this respect.

Premised on the forgoing findings, the conclusion of this Court is that the election  
800 for District Chairperson Gomba District was conducted in compliance with the  
electoral laws and principles governing such elections.

Issue no. 1, is accordingly answered in the affirmative.

## **Issue No.2**

805 **Whether the noncompliance, if any, with the electoral laws and principles  
governing elections affected the final results of the elections in a substantial  
manner.**

The Petitioner's Counsel submitted that in determining the substantiality effect, the Court is required to invoke both the quantitative and qualitative test to the  
810 circumstances of the case.

Regarding the quantitative aspect, Counsel submitted that this is a case where the Petitioner got 16,745 votes and the 1<sup>st</sup> Respondent got 16,796 votes making a difference of 51 votes.

That should this Court find that the appointment of the two presiding officers was  
815 illegal and inconsistent with the Law their Declaration of Results Forms should be struck off the main tally of the Election Results for Gomba District Chairperson for being unreliable and the Petitioner would be declared as the winning Candidate.

Counsel also submitted that regarding the qualitative approach, the presiding  
820 officers at the Polling stations of Kawooko Umea Primary School and Kigoma Playground who failed to duly certify on the Declaration of results forms and also changed the results the Declaration of results Form, were in gross noncompliance with the electoral laws.

The Petitioner further submitted that using the qualitative method, and analysis  
825 of the different Declaration of Results Forms which were signed by a non-existent person and a person unable to sign on the national identity card, the results of these two polling stations should not have been relied upon by the 2<sup>nd</sup> Respondent in tallying. That the invalid nomination of the 1<sup>st</sup> Respondent who was later declared as a winner in the name Kiviiri Tumwehe Geofrey, yet the nominated  
830 person was Kiviri Tumwehe Geofrey was an error that was conceded to by the 2<sup>nd</sup> Respondent's Retuning Officer and was against the will of the people. That the Election as held, was in noncompliance with Article 1(4), Section 12(1) (e) and (f), section 135(1) and section 111(3) of the Local Governments Act, Cap

243. That this non-compliance substantially affected the final result in a  
835 qualitative manner. He prayed that this Honorable Court finds in its satisfaction  
that the election for Gomba District Chairperson was held in noncompliance with  
the electoral laws and principles governing elections which affected the final  
results of the elections in a substantial manner.

In reply, the 1<sup>st</sup> Respondent's Counsel submitted that even though there were  
840 human errors in some instances, these did not affect the final results. Counsel  
submitted that the name of the 1<sup>st</sup> Respondent is Kiviiri Tumwehe Geoffrey and  
that the same has never been in dispute. That the signatures of Mr Fred  
Lukyamuzi and the identity of Mr Genza Swaib, have been explained above and  
this could not warrant annulment of an election as the Petitioner needed cogent  
845 evidence. That the 1<sup>st</sup> Respondent got 225 votes at Kawooko Umea Pri. School  
polling station and that the presiding officer was Genza Swaib and not Kateregga  
Ali and the Declaration of Results Form was signed by both polling agents for  
the Petitioner and 1<sup>st</sup> Respondents and no complaints were recorded.

The Respondent further submitted that the 1<sup>st</sup> Respondent's votes for Kigoma  
850 playground polling station were not altered as the 1<sup>st</sup> Respondent got 322 votes  
and the Petitioner got 49 votes as per annexure F, attached to the 1<sup>st</sup> Respondent's  
supplementary Affidavit in support and the polling agents for both parties,  
namely; Kafeero Madinah and Ssekate Adrian signed to confirm the results. That  
the Petitioner relies on a Declaration of Results Form that was not gotten from  
855 the Electoral Commission nor did he take any steps to get a certified copy. That  
there was no person called Katumba Andrew deployed at Kigoma playground as  
a presiding officer as in annexure F (DR Form) and annexure H (list of presiding  
officers) attached to the 1<sup>st</sup> Respondent's supplementary Affidavit in support,  
which shows that the only presiding officer at Kigoma playground was Mr  
860 Lukyamuzi Fred.

On the substantiality test, he submitted that Court cannot rely on the Petitioner's Declaration of Results Forms to find that non-compliance, if any, affected the results.

865 In further reply, the 2<sup>nd</sup> Respondent's Counsel submitted that there were no irregularities or malpractices proved by the Petitioner as would suffice to affect the result of the election in a substantial manner. That if it was to be the case that there was any noncompliance, which is denied, such noncompliance was not to a magnitude so as to affect the results in a substantial manner.

870 In rejoinder the Petitioner submitted that the original Declaration Forms given to the agents of the Petitioner, were presented in Court and the serial numbers were the same, to wit Serial Number SOIXP10002E for Kigoma Playground and SOIXK10002E for Kawooko Umea. That the Returning Officer had not provided the list of the Presiding Officers before the Election to the candidates to be able to verify their identity. That Counsel cannot claim that Male Yazid's evidence  
875 was expunged from the record and thus Annexure C becomes expunged. That the Declaration of Results Forms attached to the Affidavit of the Petitioner are reliable to be able to evaluate the degree of non-compliance with the principle of freedom, fairness and transparency in as far as the results for the different polling stations in question were concerned. That the discrepancies in results on these  
880 two polling stations, affected the results of the elections both quantitatively and qualitatively.

### **Determination of Court**

885 An election can only be set aside for non-compliance with electoral laws where that non-compliance has had a substantial effect upon the results. This position is echoed under **See section 61 (a) of the Parliamentary Elections Act and**

**section 139 of the Local Governments Act** and was reaffirmed by the Supreme Court in the case of **Dr. Kiiza Besigye v. Electoral Commission & Anor, Supreme Court Presidential Election Petition Appeal No. 1 of 2006**, in the dictum of Odoki CJ (as he then was) at p. 103 when he held that;

890 *“In determining the effect of the irregularities on the result of the election, the Court should consider whether there has been substantial compliance with the law and principles and the nature, extent, degree and gravity of non-compliance. The Court should also consider whether the irregularities complained of*  
895 *adversely affected the sanctity of the election. The Court must finally consider whether after taking all these factors into account the winning majority would have been reduced in such a way as to put the victory of the winning candidate in doubt.”*

In the case of **Rehema Muhindo versus Winfred Kiiza and Electoral Commission, EPA No. 29/2011**, the Court of Appeal held that;

900 *“It is well settled that non-compliance with electoral law per se, however, is not enough to overturn an election. Rather the non-compliance must be so significant as to substantially affect the results of the election – Section 61 (1) PEA, 2005. While the learned judge considered the effect of each*  
905 *category of non-compliance as against the entire process of the election as was stated by Odoki, Chief Justice:*

*‘In order to assess the effect, the Court has to evaluate the whole process of the election.’*

In that case the Justices of the Supreme Court used both the qualitative and quantitative approaches.

In Besigye vs. Museveni (supra)-the Justices further held that

*“The quantitative approach takes a numerical approach to determining whether the non-compliance significantly affected the results. In this case,*

915 *at least 13,426 votes (over 7%) have been rendered doubtful where the*  
*margin of victory was only 1,484 votes (less than 1%). Under the*  
*quantitative test, therefore the non-compliance appears to have affected*  
*the results substantially. On the other hand, the qualitative approach looks*  
920 *at the overall process of the election especially the transparency of*  
*registration, chaos at polling stations, voter information, the process of*  
*counting, tallying and declaring the results; and the ability of each voter*  
*to cast their vote. Under this approach, the Electoral Commission failed to*  
*properly count, tally and declare the winner, in addition to its improper*  
*invalidation of votes. Considering the effect of both modes of assessment*  
925 *(qualitative and quantitative) the Court is satisfied that the results of the*  
*election were substantially affected by failure of the Electoral commission*  
*to conduct the elections properly under both qualitative and quantitative*  
*approach.”*

Non-compliance with electoral laws per se is not enough to overturn an election.  
The non-compliance must be so significant as to substantially affect the results of  
930 the election.

In the instant case, this Court will apply the above test to establish whether the  
non-compliance with electoral laws as established in Issue no.1 affected the  
results of this election in a substantial manner.

The issue in respect of the discrepancy in the names of the 1<sup>st</sup> Respondent was  
935 effectively dealt with and Court will not delve into it again.

In her testimony, RW3 the returning officer of Gomba district stated that  
Katumba Andrew who signed as the presiding officer of Kigoma playground  
polling station (according to Annexure C to the Affidavit in support of the  
Petition) and Katerega Ali who signed as the presiding officer of Kawooko Umea  
940 Pri Sch polling station (according to Annexure D1 to the Affidavit in support of

the Petition) were not known to the 2<sup>nd</sup> Respondent. This was confirmed through Annexure H to the 1<sup>st</sup> Respondent's Affidavit in support which is a list of presiding officers of Gomba district. According to that list, Katumba Andrew and Katerega Ali were not listed as presiding officers in Gomba district.

945 Furthermore, in the instant case, the irregularities raised by the Petitioner in respect of this election were in respect of only two polling stations, namely; Kawooko Umea Pri Sch polling station and Kigoma playground polling station. Regarding Kiwooko Umea Primary School Polling station, regard was had as to whether there existed another polling station with a similar name in Gomba  
950 district that could have caused confusion. No such evidence was adduced, which gives credence to RW3's testimony that it was a typo. In the opinion of this Court, this typo did not prejudice the Petitioner in a way that could have substantially affected the results of the election.

Another of the alleged irregularities was in respect of similarity of bar codes on  
955 an authentic DR and a forged one. This did not prejudice the Petitioner in anyway because in any case, the Petitioner had more votes on the authentic one.

The other irregularities were raised in respect of uncertified DR forms. Regarding Annex G the certified DR form for Kawooko Umea Pri School was signed by Genza Swaibu. During their cross examination, both the 1<sup>st</sup> Respondent (RW1)  
960 and the 2<sup>nd</sup> Respondent's returning officer (RW3) confirmed that both the candidates' agents signed on that form. Indeed, Annexure G shows that Mawanda Alex signed for the 1<sup>st</sup> Respondent while Ntale signed for the Petitioner. DR forms that are unsigned by the Presiding Officer are not invalidated as long as they are signed by the candidates' agents. - see **Achieng Sarah Opendi and Electoral Commission vs. Ayo Jacinta, EPA No. 59 and  
965 61/2016**, in which the Court of Appeal held that;

970           *“In the circumstances, DR forms (which had not been signed by the presiding officers, but signed by candidates’ agents are not contested by any of the candidates or their agents) should not have been invalidated, but rather should have been included in the tallying of results.”*

Save for the negligent acts of the 2<sup>nd</sup> Respondent’s part, which culminated into duplication of bar code numbers on DR Form exhibited as Annexes F and C and irregularities regarding spelling of the names of the 1<sup>st</sup> Respondent, 975 Kiwooko/Kiwoko Polling Station and of RW5 – Shuaib/Swaib and tendering of forged DR Form by one of the 1<sup>st</sup> Respondent’s Agents there was no noncompliance by the Respondents with the electoral laws and principles governing elections.

This Court therefore finds that the irregularities as pointed out in this particular 980 instance did not affect the final results in a substantial manner.

### **Issue No. 3**

**Whether the Respondents personally or by their agents/representatives with their knowledge and consent or approval committed any electoral 985 malpractices, illegal practices or electoral offences?**

The Petitioner’s Counsel submitted that there was an admission that ‘Annexure C’ to the Affidavit in support of the 1<sup>st</sup> Respondent was a forged document yet it was given to the 1<sup>st</sup> Respondent by election officers from the 2<sup>nd</sup> Respondent at the Polling station. That the change in the results by a presiding officer which was 990 within his knowledge as the agent of the 2<sup>nd</sup> Respondent amounted to failure to furnish proper election returns contrary to Section 150 of the Local Governments Act.

That there was contravention of section 36 of the Registration of Persons Act, 2015, when Genza Shuaib/ Genza Swaibu knowing that he was Genza Shuaib  
995 vide National Identity Card number CM740991009J1E, went ahead to hold out as Genza Swaibu which he well knew was not his name and had not complied with the legal requirements.

That these actions were well within the knowledge of the Electoral Commission which had a copy of his national identity card and through its Presiding Officer  
1000 who has known his name since time immemorial and also holds a national identity card indicating the correct name.

Counsel further submitted that the Returning officer of the 2<sup>nd</sup> Respondent confirmed in cross examination that there was a wrong name of the presiding officer and a non-gazetted Polling station to which the presiding officer was  
1005 designated to appear contrary to Section 105(1) (a) of the Local Governments Act and Section 12(1) (e) of the Electoral Commission Act, Cap 140. Counsel prayed that Court find that the actions of interfering with Declaration Forms and changing of Results in noncompliance with sections 136(1) and (4), section 151(c) of the Local Governments Act, Article 1(4), and Article 67(1) of the 1995  
1010 Constitution of the Republic of Uganda, and Section 12(1) (e),(f) and (j) of the Electoral Commission Act, were done with the knowledge and approval of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who were acting through their agents and election officers respectively.

The 1<sup>st</sup> Respondent's Counsel submitted that the 1<sup>st</sup> Respondent got his DR Form  
1015 (annexure C) from Male Yazid not the 2<sup>nd</sup> Respondent as can be seen from his Affidavit in support of the answer to the Petition.

That Genza Shuaib swore a statutory declaration to remedy discrepancy in his name. That an election being of general importance, the Petitioner needed independent witnesses to corroborate his evidence. That the reasons advanced by

1020 the Petitioner for setting aside the election or being declared the winner are too trivial to overturn the will of the people of Gomba District.

In further reply the 2<sup>nd</sup> Respondent's Counsel submitted that the Petitioner has failed to avail any evidence to show that there were any electoral offences, malpractices or illegal practices committed by the Respondents or by their  
1025 agents/representatives with their knowledge, consent or approval. That the allegations were not corroborated by any independent evidence. That no complaints were ever recorded with the Uganda Police or even the Electoral Commission. That the allegations were simply hearsay and not supported by any cogent evidence, contrary to Order 19 Rules 1 and 3 of the Civil Procedure Rules,  
1030 SI 71-1.

In Rejoinder the Petitioner's Counsel submitted that the Petitioner was present at the Tally centre, and the Returning Officer went ahead to tally questionable results without consulting with the Candidates at the Polling Station. That Genza Shuaib confirmed that Annexure D2 was his document in his handwriting. That  
1035 it is trite Law that no specific number of witnesses shall in any case be required for proof of any fact as per section 133 of the Evidence Act Cap 6. That Court should find that credible and satisfactory evidence has been given by the Petitioner in proving his case that the non-compliance was carried out with knowledge, consent and approval of the Respondents.

1040 **Determination of Court.**

Whereas the 1<sup>st</sup> Respondent's Counsel submitted that forgery was not pleaded in the Petition and cited the case of **Ninsiima Boaz & Another vs Mpuuga David EPA No. 55/2016**, where the Court of Appeal held that the issue of falsification of declaration of results forms was neither presented nor proved by the  
1045 Respondent, that case is distinguishable from the facts at hand because unlike in that case, in the instant case, in her cross examination, RW3 who also happens to have been the Returning Officer of the 2<sup>nd</sup> Respondent confirmed that

Annexure 'C' to the Affidavit in support of the 1<sup>st</sup> Respondent was a forged document. The said Annexure 'C' was a declaration of results form for Kawooko Umea Pri Sch polling station.

According to Annexure H which is the list of presiding officers in Gomba district, Male Yazid was not the presiding officer of Kawooko Umea Pri Sch polling station. He therefore could not have been acting for the 2<sup>nd</sup> Respondent as submitted by the Petitioner's Counsel.

In his testimony RW1, the 1<sup>st</sup> Respondent stated that he had received the said document from Male Yazid, one of his agents.

The Petitioner did not adduce evidence of the 1<sup>st</sup> Respondent's involvement in the forgery of DR form- Annex C by Male Yazid. It ought to have been manifestly demonstrated by the Petitioner that the Respondents approved of, had knowledge of and or consented to the forgery of DR Form – Annex C. This was not done, not to the satisfaction of this Court.

The disparity in the names of Genza Swaibu/Shuaib was already dealt with in Issue no. 1 above. He testified that his name was Genza Shuaib as spelt on his national identity card but also testified that he is the one who signed as Genza Swaibu on the Declaration of Results Forms at Kawooko Umea. In her testimony RW3 confirmed that he submitted to them his national identity card which is in the names of Genza Shuaib but they appointed Genza Swaib as the presiding officer of Kawooko Umea Primary School Polling Station.

This Court was convinced by the corroborated evidence and testimony of the witnesses that the disparity in spelling of the names notwithstanding, Genza Swaib who is named in the list of presiding officers is the same Genza Shuaib on the National Identity Card NIN CM740191009100JIE and the same one who signed on the forms and appeared in Court as a witness RW5.

This Court was convinced that the irregularity was not, in its opinion,  
1075 underpinned by any form of criminality, that there was no infraction of the  
electoral laws or any other law with intent to undermine the electoral process.  
In the result, Issue no. 3 is answered in the negative in its entirety.

#### **Issue No.4**

#### **1080 What remedies are available to the parties?**

The Petitioner prayed that Court allow the Petition and in line with section 142(5)  
(b) (i) of The Local Governments Act, Cap. 243 declares that the 1<sup>st</sup> Respondent  
was not validly elected as the Chairperson for Gomba District.

That in line with section 142(3) (b) and 142(5) (b) (ii) of the Local Governments  
1085 Act, Cap 243 the Petitioner be declared District Chairperson Gomba district.

That in the Alternative but without prejudice to the foregoing a fresh election be  
conducted for the District Chairperson Gomba District in accordance with section  
142(3) (c) and 142(5) (c) of the Local Government Act and that,

Costs of the Petition be granted to the Petitioner in line with Section 27 of the  
1090 Civil Procedure Act Cap 71.

In reply the 1<sup>st</sup> Respondent's Counsel submitted that the Petitioner is not entitled  
to any of the prayers sought. That the 1<sup>st</sup> Respondent was validly declared as the  
winner of the elections held on 20<sup>th</sup> January, 2021. That the Petitioner's prayers  
should be disregarded and the Petition be dismissed with costs to the 1<sup>st</sup>  
1095 Respondent.

In further reply the 2<sup>nd</sup> Respondent's Counsel submitted that the Petitioner having  
failed to prove his claim to the required standard, the only remedy available is to  
dismiss this Petition with costs to the 2<sup>nd</sup> Respondent.

1100 In Rejoinder the Petitioner’s Counsel prayed that this Petition is allowed with costs to the Petitioner and declare him to be the rightly elected candidate.

**Determination of Court.**

For the remedies sought by the Petitioner to be achieved, there had to be compliance with **Section 139 of the Local governments Cap. 243** which lays out the grounds for setting aside a council election. It provides as follows;

1105 *“The election of a candidate as a chairperson or a member of a council shall only be set aside on any of the following grounds if proved to the satisfaction of the Court-*

*(a)that there was failure to conduct the election in accordance with the provisions of this part of the Act and that the noncompliance and failure*  
1110 *affected the result of the election in a substantial manner;*

*(b)that a person other than the one elected purportedly won the election;*

*(c) that an illegal practice or any other offence under the Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval; or*

1115 *(d)that the candidate was at the time of his or her election not qualified or was disqualified from election.”*

In the case of **Okello P. Engola Macodwongo & Electoral Commission V. Ayena Odongo Krispus Charles, Election Petition Appeal No. 26 & 94 Of 2016** the Court of Appeal held that elections should not be overturned on light or trivial matters since it is the expression of the democratic will of the people. This was reaffirmed in the case of **Byarugaba Mustafa and 2 others vs Ampaire Kizito Nseko and 2 others, Election Petition No. 0011/2021** where Justice Musa Sekaana held that;

1125 *“An election is a politically sacred public act, not of one person or of an official, but of the collective will of the whole constituency. Courts*

*naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election that has already been held unless clear and cogent evidence is presented in Court.”*

1130 The irregularities found to have arisen in the election process entailed disparity in the spelling of the names Kiviiri/Kiviri in reference to the 1<sup>st</sup> Respondent, disparity in reference to Kawooko/Kawoko Polling station and in the names of RW5 – Shuaib/Swaib. The other allegations of non-compliance were premised on allegations of forged or falsified DR forms.

1135 This Court was not convinced that these irregularities amounted to offences or criminal acts or omissions as would justify the annulment of the will of a majority of the people of Gomba District. They rather were acts and omissions of negligence on the 2<sup>nd</sup> Respondents Part.

1140 There was therefore no noncompliance with the electoral laws and principles governing elections that could warrant cancellation or reversal of the election held on the 20<sup>th</sup> January 2021 for Chairperson Gomba District or annulment of the result thereof as was declared by the 2<sup>nd</sup> Respondent that was proved by the Petitioner to the satisfaction of this Court.

In conclusion, the declarations sought by the Petitioner are denied and Election Petition No. 3 of 2021 is dismissed.

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### **Costs.**

1150 The award of costs is a matter of judicial discretion. This discretion, however, has to be exercised judiciously and not arbitrarily as stated under Section 27 of the Civil Procedure Act, Cap. 71.

The position as established under **Rule 27 of the Parliamentary Elections (Interim Provisions) Rules SI 141-2** is to the effect that:

“All costs of and incidental to the presentation of the Petition shall be defrayed by the parties in such manner as and in such proportions as the Court may determine”.

1155

Ordinarily, costs follow the event unless, for good reason, the Court orders otherwise. As was held by the Supreme Court in the case of **Col. (Rtd) Dr. Besigye Kizza v. Museveni Yoweri Kaguta (Supreme Court Presidential Election Petition No. 1 of 2001)**, the discretion to deny a successful party costs must be exercised judiciously and with good cause.

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In the case of **Kadama Mwogezaddembe v Gagawala Wambuzi, Election Petition No.1 of 2001**, Court found that election Petitions were matters of national and/or political importance, a factor which a Court should bear in mind while awarding costs.

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Costs are not meant to be punitive but to indemnify the successful party for the expenses incurred during litigation (see *Besigye v Museveni supra*).

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In the instant case, had the 2<sup>nd</sup> Respondents been diligent in discharging all their responsibilities in the electoral process, then the irregularities which gave rise to this Petition would not have arisen. The Petitioner has raised a red flag from which the 2<sup>nd</sup> Respondents should take learning to ensure that in future, they deliver a flawless electoral process.

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Before I pronounce myself on the final position regarding costs in the instant Petition, my mind is drawn to the now near- accepted abhorrent practice of *weaponising* costs in Election Petitions. Exorbitant costs that would be otherwise avoided, such as enlisting a battery of lawyers to handle a single Petition, are incurred with the hope that costs will be awarded to them but also that the adversary will be financially and politically emasculated and rendered unable to participate in future political contests. There would appear to be an opportunity for reform in electoral laws, with a view to possibly having a cap placed on costs and form of pleading in election petitions.

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Finally, after careful consideration of the circumstances of this case and for the reasons stated herein, I condemn the 2<sup>nd</sup> Respondents to 40% of the costs incurred by the Petitioner and a similar percentage of the costs incurred by the 1<sup>st</sup> Respondent in this Petition.

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Delivered at Mpigi this 22<sup>nd</sup> day of October, 2021.

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**RICHARD WEJULI WABWIRE**

1190 **JUDGE**

**Present in Court;**

**For the Petitioner:**

1195 **For the 1<sup>st</sup> Respondent:**

**For the 2<sup>nd</sup> Respondent:**

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