

**1. BYARUGABA MUSTAFA**

**2. KOBWEMI JOSEPH ::PETITIONERS**

**3. BAKIITE LEONARD**

1. AMPAIRE KIZITO NSEKO  
2. IRUMBA EDWARD .....RESPONDENTS  
3. ELECTORAL COMMISSION

The petitioners contend that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were wrongly nominated and returned as winners for the LC III seat for Mabaale Sub County and Mabaale Town Council by the 3<sup>rd</sup> respondent. The said election was conducted in contravention of and/or contrary to the provisions and principles laid down in the

Constitution and the Local government Act which contravention affected the elections in a substantial manner because:

- a) Mabaale Sub County and Mabaale Town Council formerly belonged to greater Mabaale Town Council, which was administratively and politically divided after Primary Elections for political parties in 2020. The two political areas did not hold primary elections for political parties contrary to the law.
- b) The 2<sup>nd</sup> respondent was wrongly nominated as flag bearer for Mabaale Town council using a party flag got during NRM primary elections in the greater Mabaale Sub-County which he used to contest and campaign as a flag bearer in Mabaale Town Council where no primary elections were held.
- c) Kirongo electoral area which belongs to Mabaale Sub-county and the same was wrongly brought by the 3<sup>rd</sup> respondent to Mabaale Town Council. This caused confusion among the voters and the campaigns during campaigns, voting and collection of signatures for nomination.
- d) Rwina LC I (Rwina polling station) found in Mukumbwa ward in Mabaale Town Council was taken by the 3<sup>rd</sup> respondent to vote from Nyanika Polling station in Kinyaruginjo sub- county which disenfranchised all the 175 voters at Rwina Polling Station.
- e) The officials of the 3<sup>rd</sup> respondent connived with the 2<sup>nd</sup> respondent and brought voters from Mutunguru LC I polling station in Kinyaruginjo sub county were brought and voted from Victory Nursery and Primary school polling station in Mabaale Town Council. This also affected the candidates who did not campaign among the voters who were outside their campaign area.
- f) Kyanika LC I in MABAale Sub-County was brought to vote from Kiranzi Primary School polling station found in Mabaale Town Council.
- g) Ms Kabahuma Sabina was elected unopposed as a female councilor to Mabaale Sub-county from Kirongo electoral area whose 470 voters were brought to Mabaale Town Council instead

The petitioners contend that the 1<sup>st</sup> and 2<sup>nd</sup> respondent's nomination forms submitted to the 3<sup>rd</sup> respondent did not meet the mandatory legal requirement of

listing names of twenty registered voters from each electoral area with a directly elected councilor

The petitioners seek that the results of the election be set aside and a re-election be ordered on ground that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not validly nominated.

The respondents denied the allegations and contended that the election was conducted under free, fair and transparent atmosphere devoid of any complaint from any stakeholder. The petitioners never lodged any complaint during the electoral process challenging the nomination of the 1<sup>st</sup> & 2<sup>nd</sup> respondent.

The parties filed a Joint Scheduling Memorandum setting out the agreed facts and issues;

### **Agreed facts**

1. That an election for L.C.III Chairperson for Mabaale Town Council and Mabaale Sub-county were held of 3.2.2021.
2. That the 1<sup>st</sup> petitioner was a candidate for Mabaale Sub-county L.C.III seat together with the 1<sup>st</sup> respondent.
3. The 3<sup>rd</sup> respondent declared and gazetted the 1<sup>st</sup> respondent as the winner for Mabaale Sub-county L.C.III Chairperson poll.
4. The 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners were candidates with the 2<sup>nd</sup> respondent for Mabaale Town Council L.C.III Chairperson seat.
5. The 3<sup>rd</sup> respondent declared and gazetted the 2<sup>nd</sup> respondent as the winner of the L.C.III seat for Mabaale Town Council.

The parties with the guidance of court framed the following issues for determination:

- 1. Whether the petition is competently before Court.**
- 2. Whether the first and second respondents were qualified for nomination and election for the position of L.C.III Chairperson Mabaale Sub-county and Mabaale Town Council respectively.**
- 3. What remedies would be available to the parties?**

The petitioners were represented by *Counsel Kasangaki Simon* while *Counsel Wanda Peter Benjamin* appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The 3<sup>rd</sup> respondent was represented by *Counsel John Paul Baingana and Ahumuza Edward*.

The petitioners were directed to file written submissions by 31<sup>st</sup> August 2021, the respondents by 7<sup>th</sup> September 2021 and a rejoinder filed by 14<sup>th</sup> September 2021. The respondents filed their submissions within the set timelines whereas the petitioners filed their submissions grossly out of time.

The petitioners' submissions were therefore not considered by the court since they were filed out of time and the court had already started on the process of writing this judgment.

### **BURDEN AND STANDARD OF PROOF**

S.139 of the Local Government Act provides that:

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-

Odoki CJ(as he then was) in his elaborate reasons for the Supreme Court Judgment in the **Col. (RTD) Dr. Besigye Kizza v Museveni Yoweri Kaguta and the Electoral Commission Election Petition No. 1 of 2001** Supreme Court has the following to say on this important point;

*“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 .....”* at Pg 16 of the Reasons.

The same principles have been reiterated in the case of **Col. (RTD) Dr. Besigye Kizza v Museveni Yoweri Kaguta and the Electoral Commission Election Petition No. 1 of 2006** citing **Election Petition No.1 of 2001**

Odoki, CJ(as he then was) in his Judgment cited with approval the following observation of Lord Denning in the English case of *Blyth -vs- Blyth [1966] AC 643*:

*"My Lords, the word "satisfied" is a clear and simple one and one that is well understood. I would hope that interpretation or explanation of the word would be unnecessary. It needs no addition. From it there should be no subtraction. The courts must not strengthen it; nor must they weaken it. Nor would I think it desirable that any kind of gloss should be put upon it. When parliament has ordained that a court must be satisfied only parliament can prescribe a lesser requirement. No one whether he be a judge or juror would in fact be "satisfied" if he was in a state of reasonable doubt....."*

Having quoted the above, Odoki, C.J. goes on to state:

*"I entirely agree with those observations by Lord Denning. 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 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 governance."*

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 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 Councillor 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.

Similarly in the case of **Sarah Bireete and Another vs Bernadette Bigirwa and Electoral Commission. Election Petition Appeal No. 13 of 2002** (unreported) it was noted by the court of Appeal "A Petitioner has a duty to adduce credible evidence or cogent evidence to prove his/her allegation at the required standard of proof"

The respondent carries no burden to discharge as long as the petitioner has not produced sufficient evidence required to show the truth of the allegations is highly probable. In other words the burden of proof on the petitioner is high and it does not shift. See ***Akurut Violet Adome v Emurut Simon Peter EPA No. 40 of 2016***

This court has a duty to look at the affidavits in support of the Petition and evaluate the same against the respondents answer and supporting affidavits in order to satisfy itself of the allegations made in the petition.

It is trite law that the decision of Court should be based on the cogency of evidence adduced by a party who seeks judgment in his/her favour. It must be that kind of evidence that is free from contradictions, truthful so as to convince reasonable tribunal to give judgment in a party's favour. ***Paul Mwiru v Hon Igeme Nathan Samson Nabeta & 2 others EPA No. 6 of 2011***

In addition, it is incumbent upon the petitioner to prove or to produce cogent evidence to prove the allegations and not to rely on the weakness of the respondent's case. Therefore, an election petition cannot be permitted to derive strength from the weakness, if any, of the other side. See ***Odo Tayebwa v Bassajabalaba Nasser & Electoral Commission Election Petition Appeal No.013 of 2021; Jeet Mohinder Singh v Harminder Singh Jassi, AIR [2000]AIR SC 256***

### ***Whether the Petition is competently before Court?***

At the trial, the counsel for the respondents raised a preliminary objection that the petition was filed before the gazette came out. That is, the petition was filed on April 26, 2021 whereas the gazette was released on May 3, 2021.

Counsel submitted that under the Local Government Act, Cap. 243, Section 138 (4) thereof, it is provided that;

*"An election petition shall be filed within fourteen days after the day on which the results of the election have been notified by the Electoral Commission in the Gazette."*

Counsel submitted that the Gazette Notice in which the petitioners were published is dated 3<sup>rd</sup> May 2021 which is the date that would ordinarily trigger the instant Petition NOT 26<sup>th</sup> April 2021 the date of filing.

Counsel cited the case of Anifa Kawooya Bangirana vs. Joy Kafura Kabatsi; Misc. Appl. No. 066 of 2016, where Hon. Justice Elubu was faced with the same scenario while dealing with a Parliamentary Petition under Section 60 (3) of the Parliamentary Election Act, 2005 before the publication of results. He held that;

*“Section 60 (3) of the Parliamentary Election Act, 2005 specifies the manner in which to challenge a parliamentary election may be commenced. It stipulates that every election petition shall be filed within 30 days after the day on which the result of the election is published by the Electoral Commission in the gazette.*

*The wording of the Section 60 (3) is clear and unambiguous. Publication in the gazette is, therefore, the trigger to the process and before such publication is made no petition can be competently sustained. Since publication is the basis of lodging the action, a petition filed before such time is incompetent and a nullity. In the instant case, the results of the election were gazetted on March 23, 2016. The instant petition was filed on March 21<sup>st</sup> 2016 before the gazette date. Therefore the petition was premature and incompetent.”* (Emphasis mine)

Counsel submitted that on the strength of Section 138 (4) of the Local Government Act an authority of Anifa Kawooya Bangirana vs. Joy Kafura Kabatsi (supra) the petition filed before the Gazette notice is incompetent and a nullity. Counsel prayed that the court find that the filing of the petition was premature and incompetent hence ought to be dismissed with costs.

The respondents further argued that the petition was incompetent owing to the fact that it fused issues of two electoral areas. That from the gazette and admitted facts it is clear that Mabaale Sub-county and Mabaale Town Council are two and distinct electoral areas.

Counsel cited Section 12 of the Local Government Act, Cap. 243 defines “An electoral area” to mean;

*“one of the areas into which a distinct city, municipality, town division or sub county is divided for the purpose of election and representation”.*

Counsel submitted that the petition before the court had two electoral areas yet the Rules do not envisage two petitions in one unless consolidated.

Counsel cited Section 172 of the Local Government Act, Cap. 142 incorporates the Parliamentary Election Act with necessary modification in election matters. That Rule 13 of the Parliamentary Election (Interim Provisions) (Appeals to the High Court from Commission) Rules SI 141-1, provides thus;

*“Where more petitions than one are presented in relation to the same irregularity, the court may direct that some or all of the petitions be dealt with as one petition.”*

Counsel concluded that the law does not envisage different electoral areas filing a joint petition. Counsel prayed that the court find that the petition is incompetent for having filed one petition in respect of two electoral areas.

### **ANALYSIS**

The petitioners filed this matter before the results of the elections were published in the gazette.

Section 138 (4) Local Government Act, Cap. 243 provides that;

*“An election petition shall be filed within fourteen days after the day on which the results of the election have been notified by the Electoral Commission in the Gazette.”*

I therefore concur with the respondents’ counsel that the Gazette Notice in which the petitioners were published dated 3<sup>rd</sup> May 2021 this would mean that it is the date that would ordinarily trigger this petition NOT 26<sup>th</sup> April 2021 which was the date of its filing.

Justice Stephen Musota, JA in ***Electoral Commission vs Serebe Appollo Kagoro Election Petition No. 5 of 2020*** page 14 held:

*Furthermore, he ought to have filed the petition within fourteen days after the day on which the results of the election had been notified by the electoral commission in the gazette. There was no proof of gazette of the results at the time when Election Petition No. 5 of 2018 was filed. Therefore the petition was not only premature but also incurable defective. See also **Zawedde Aidah vs Attorney General & EC Constitutional Petition No. 001 of 2014**(decided 4<sup>th</sup> May 2021)*



In ***Civil Procedure and Practice in Uganda page 497, 2<sup>nd</sup> Edition***, learned authors noted that; *“Lodging a petition prematurely will result in striking out the petition since the cause of action is derived from the declaration of the results in the gazette. A petition which is filed before the results are gazette is a nullity”* See also ***Musitwa Herbert Mulasa v Electoral Commission and Haji Jakira Mohamed Ssali Court of Appeal Election Application No. 5 of 2006***

In the same vein, this petition was filed prematurely which made it incurably defective and on this ground alone it is struck off.

Secondly, the respondents’ counsel also contended that the petitioners having filed a joint petition this was fatal and irregular. This court agrees with the respondents’ counsel that joint petition for two different electoral areas in a joint petition is an abuse of the process of the court may cause confusion and it was never envisaged that two electoral areas would ever be combined and challenged in the same petition. The two constituencies were totally different and could not be joined in the same petition and to allow this would be to set a bad precedent of encouraging an irregularity.

Joint petition can be filed by two or more persons who contested in the same election for the same constituency or by a losing candidate and voters with the requisite mandatory signatures in the same electoral area or constituency. A right to file a joint petition depends on four circumstances. These are:

1. *The person filing a joint petition or joining as petition must come under concurrent right which exists in each of them simultaneously.*
2. *That both must be entitled to come before the same forum.*
3. *The cause of action which is the third factor to be taken into account must be identical.*
4. *There must be identical reliefs sought.*

The petitioner ought to have filed separate petitions to clarify the nature of their complaints and thereafter seek leave of court to have them consolidated if at all it was possible and permissible in the circumstances. The court would have struck off this petition for misjoinder. Election petitions are filed under a special procedure set out under the electoral laws and in absence any law allowing such

joinder of election petition of two different electoral areas, the same would be incompetently before the court. The petition would have been struck off on this ground as well.

This petition is therefore incompetently before this court. I shall however proceed to determine the merits in the other issues raised to ensure finality of the matter.

***Whether the first and second respondents were qualified for nomination and election for the position of L.C.III Chairperson Mabaale Sub-county and Mabaale Town Council respectively.***

The petitioners contend that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not validly nominated for the election, for the position of Mabaale Sub-county and Mabaale Town Council L.C.III Chairperson in the just concluded general elections within the meaning of Section 111 (4) of the Local Government Act, Cap 246. They stated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's nomination forms submitted to the 3<sup>rd</sup> Respondent did not meet the mandatory legal requirement of listing names of twenty registered votes from each electoral area with a directly elected councilor"

Paragraphs 9 to 11 of PA-1 and PA-2 re-echo the petitioners' contentions that the respondents were wrongly nominated for the elections.

Counsel for the respondents submitted that the issue of nomination was misplaced as it ought to have been handled before the elections by the 3<sup>rd</sup> respondent under **Section 15 of the Electoral Commission Act, Cap 140**. That for the Petitioners to bring this issue after the elections meant that they waived their rights to complain when they failed to bring the complaint within the stipulated period and as such, they were estopped from doing so after the election. Counsel cited ***Kasirye Zzimula Fred vs Bazigatirawo Kibuuka Francis Amooti and Electoral Commission, Election Petition Appeal No. 01 of 2018***.

### **ANALYSIS**

The petitioners contend that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not qualify to be nominated because they are not residents within the area and this violates section 111(4) of the Local Government Act.

The law provides for the requirements before one can qualify for election as chairperson of a municipality, town division or sub county.

**Section 111 (4) of the Local Government Act** provides;

A person shall not qualify for election as chairperson of a municipality, town, division or subcounty unless that person—

*(a) is a citizen of Uganda;*

*(b) is ordinarily resident in the municipality, town, division, or subcounty.*

This court has pronounced itself on the issue of being **‘Ordinarily Resident’** in the case of ***Natamba Shallon v Mwesigye Jane Bikara & Electoral Commission Election Petition No. 08 of 2020*** as follows;

*“There is no specific provision in the Local Government Act that could be held to be a guide to the concerned authorities for determining in a particular fact situation if an individual is, or is not, ‘ordinarily resident of a particular place at a particular point of time. It is not possible to give a precise definition of the expression ‘ordinarily resident’ for purposes mentioned in the electoral law.*

*A person can be said to be ‘ordinarily residing’ at a particular place, if he/she has an intention to stay at that place for a considerably long time. A person actually residing in a constituency would become ordinarily resident in that constituency.*

*‘Ordinarily’ is primarily directed not to duration but to purpose, in the sense that the question is not so much where the person is found ‘ordinarily’, in the sense of usually or habitually and with some degree of continuity. The words ‘ordinarily’ and ‘resident’ have been used together and have to be construed as not to require that the person should be one who is always resident or carries on business in the particular place. Like most aspects, aspect of residence, is a question of fact and degree. **Hipperson v Newbury District Electoral Registration Officer [1985] 2 All ER 456 at 462***

*The term ‘residence’ or reside as used in the Electoral laws relating to qualification of voters or candidates ordinarily is synonymous with home or domicile. This denotes a permanent dwelling place, to which the party when absent intends to return. ‘Residence’ is not a technical term; it is a word adopted by the legislative*

*draftsperson of the Act of Parliament from the popular language of the country and is therefore to be interpreted in its popular sense. Barlow v Smith (1892) 9 T.L.R 57”.*

The 1<sup>st</sup> respondent has stated in his affidavit in support of his answer to the petition that; *“I am a resident of Dida A and Diba B villages having two homes there but I vote from Diba A which is under Mabaale Town Council though I contested in Mabaale Subcounty.”* Further, the 1<sup>st</sup> respondent adduced evidence of a letter from LC1 Chairperson Dida B under Mabaale Sub-County proving that he was a resident of the electoral area in which he contested.

This evidence has not been disputed or countered by any other evidence and in absence of any evidence to the contrary and the issue of ‘Residence’ is a question of fact, this court is satisfied that the 1<sup>st</sup> respondent is ordinarily resident in the area in accordance with the Local Government Act.

Secondly, the petitioners contended that the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted nomination papers to the 3<sup>rd</sup> respondent that did not meet the legal requirement of listing 20 registered voters from each electoral area with a directly elected councilor.

The respondents on the other hand attached evidence of nomination papers proving that they were supported by at least 20 supporters are required under Section 111(4) of the Local Government Act. This evidence was not challenged by the petitioners in anyway apart from mentioning the same.

I find it prudent to remind ourselves that the burden of proof in election petitions like in other civil matters lies on the petitioner to prove the allegations levelled against the opposite party see **S.101 of the Evidence Act**. However, unlike in ordinary civil suits the standard of proof is slightly higher. It is to the satisfaction of the court. The burden is heavy on him who assails an election which has been concluded.

I therefore concur with counsel for the respondents’ submissions that the petitioner is under a duty to prosecute the petition to the satisfaction of court. The petitioners lacked any scintilla of evidence to prove their allegation that the

respondents failed to meet the requirements under **Section 111(4) (f) of the Local Government Act.**

An election once held, is not to be treated in a light-hearted manner and defeated candidates or disgruntled voters should not get away with it by filing election petitions on unsubstantial grounds or irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered by the electorate. 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.

Bearing the foregoing in mind, the respondents were duly qualified and validly nominated and elected for the position of L.C.III Chairperson Mabaale Sub-county and Mabaale Town Council respectively.

In the result, the petitioners are not entitled to any of the remedies sought. This petition stands dismissed with costs to the respondents.

I so order.



**SSEKAANA MUSA**

**JUDGE**

**28<sup>th</sup> September 2021**