

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBALE
ELECTION PETITION NO. 007 OF 2016

MASHATE MAGOMU PETER

PETITIONER

VERSUS

1. THE ELECTORAL COMMISSION

1ST RESPONDENT

2. SIZOMU GERSHOM RABBI WAMBEDDE

2ND RESPONDENT

BEFORE: - HON. LADY JUSTICE P. BASAZA WASSWA

JUDGMENT

[1] The Petitioner filed this Petition against the Respondents on 31st March, 2016 under sections 60, 61, 62, and 63 of the Parliamentary Elections Act, 2005 (*the PEA*) and the Parliamentary Elections (Election Petitions) Rules, SI 141-2. By consent of all Counsel the Petition was amended by which the Petitioner sought the following declarations and Orders;

- a) A Declaration that the 2nd Respondent was not validly elected as the directly elected Member of Parliament for Bungokho North Constituency.
- b) An order of cancellation of the election returns for the Polling Stations of Lumumba, Nabweya Primary School, Nankobe TC, Madarassa Primary School, Mbiko TC and Kilulu in Bungokho North Constituency.
- c) A Declaration that the Petitioner is the dully elected Member of Parliament for Bungokho North Constituency.
- d) That fresh elections for Bungokho North Constituency be held.

e) That the Petitioner is paid the costs of this Petition.

Background

[2] The Parliamentary Elections for the seat of directly elected Member of Parliament for Bungokho North Constituency (*referred to hereafter as 'Bongokho N. C'*), in Mbale District were held on 18/02/2016. The Petitioner, the 2nd Respondent and seven (7) other candidates; Abeid Abubaker, Gimbo Alice, Gudoi Yahaya, Madoyi Sulait Mabuli, Magala M. Imani, Nagudi Mariam Wambede and Ssegawa Issa, (9 Candidates) contested in the said elections. The 1st Respondent returned the 2nd Respondent as the validly elected winner of the said seat with 13,021 votes and the 2nd Respondent was published as such in the Uganda Gazette of 3rd March, 2016. The Petitioner polled 12,642 votes while the other candidates polled; Gudoi (11,806), Nagudi (3,657), Abeid (1,329), Ssegawa Issa (1,144), Gimbo (509), Madoyi (133) and Magala (133). The Petitioner was dissatisfied with the outcome of the elections and filed this petition.

[3] At the Scheduling conference held in court on 11th May, 2016 the following were taken as the agreed issues;

Agreed issues:

1. Whether at the time of his election, the 2nd Respondent was not qualified for election as a Member of Parliament.

2. Whether there was non-compliance by the 1st & 2nd Respondents with the electoral laws, and if so, whether such non-compliance affected the election in a substantial manner?
3. What remedies are available to the parties, if any

[4] The gist of the grounds contained in the amended Petition accompanied by one (1) affidavit sworn by the Petitioner on 18th April 2016, are that;

- a) Contrary to sections 4 (1) (c), 4 (2) (c) of the PEA and Articles 80 and 246 (3) (e) of the Constitution, the 2nd Respondent was not qualified to be nominated and declared winner on the basis that he did not possess the requisite academic qualifications of a minimum of advanced level (senior six), is a Public Officer and is a Chief Rabbi leader of the Abayudaya (Black Jews) community in Uganda and South of the Sahara.
- b) The 1st Respondent wrongly and unlawfully nominated the 2nd Respondent without valid qualifications contrary to section 4 (1) (c) of the PEA
- c) The 2nd Respondent's change of name by way of a Deed Poll tantamount to an alteration and erasure which is inconsistent with section 4 (14) of the PEA.
- d) The 1st Respondent failed to conduct elections in accordance with the provisions of the Constitution and the electoral laws (sections 12 (l) (j), 24 (c) (e), 29 (2), 32 (1), 40 (1) (a) & (b), 41, 50 (4), 59, 61 (1) (a) (c), 68 (3) (4), 71, 78 (a) and 80 1 (a) & (b) of

the PEA), and section 12 (l), (f), (e), (j) of the Electoral Commission Act (*the ECA*) thus affecting the results in a substantial manner.

- e) The 1st Respondent declared results from Lumumba, Nabweya P/S, Nankobe T C, Madarassa P/S, Mbiko TC and Kilulu Polling stations that were falsified and substantially different and altered them in breach of sections 50, (d) 53 (1) 59 and 78 (a) of the PEA
- f) The DR form of Nabweya Primary School polling station recorded 24 invalid votes. The 1st Respondent and its agents manipulated the tally sheet and recorded invalid votes as 10 contrary to section 59 of the PEA.
- g) Various DR forms disclose that the people who voted exceeded those on the official voters register.
- h) The 1st Respondent declared the results on 21st and 22nd of February 2016 beyond the statutory 48 hours after close of polling in breach of section 59 of the PEA.
- i) Contrary to sections 46 (1), (2) (3) & (4) and 48 (b) of the PEA, the 1st Respondent ignored and neglected the objections / complaints filed with them at Madarasa Primary school Polling station, Nabweya Primary School Polling Station, Nankobe TC Polling station, Lumumba polling station and Kilulu
- j) The 2nd Respondent personally or through his agents committed election offences and illegal practices with his knowledge, consent and approval in connection with the

elections when he used undue influence, interfered with the electioneering activities, and obstructed voters from casting their vote for the Petitioner.

- k) The entire election was flawed and characterized by acts of intimidation, harassment, beating, lack of freedom and transparency, unfairness, disenfranchisement of voters, massive rigging of votes through ballot stuffing, multiple voting, pre-ticking of ballot papers, ineligible voters and manipulation of voter's rolls.
- l) Supporters and agents of the 2nd Respondent organized gangs which included Wekobe Muzamiru and Mugulo Paul to use force, harassment, intimidation and violence against voters suspected of not supporting the 2nd Respondent.
- m) The 1st Respondent's agents, the presiding officers allowed the voting and carried out counting and tallying of votes in the forced absence of the petitioner's agents who were chased away from polling stations by the 2nd Respondent's agents.

[5] In its answer to the Petition which was supported by six (6) affidavits, the 1st Respondent contended that;

- a) It has no knowledge that the 2nd Respondent is a cultural leader or a public officer.
- b) For his nomination on 3rd December, 2015, the 2nd Respondent presented a letter of verification of results for Uganda Advanced certificate of Education conducted in 1995 at Nkoma Secondary School under index no. U0067/619 and a letter of verification of results for Uganda Certificate of Education at Mbale Secondary School

of 1997 under index U0051/290 both issued by Uganda National Examinations Board on 28th October, 1998 in the names of **Rabbi Gershom**.

- c) The 2nd Respondent presented to the 1st Respondent a notice of change of name by way of a deed poll dated 23rd June, 2010 from the names **Rabbi Gershom** to **Rabbi Gershom Sizomu Wambedde**
- d) There is no other person brought to the attention of the 1st Respondent who bears the same names or is the owner of the said academic qualifications.
- e) The election was conducted in a peaceful, free and fair manner and the electoral results of Bungokho N. C reflected the true will of the majority of voters.
- f) The allegations of the Petitioner against the 2nd Respondent were never brought to the 1st Respondent's attention during the election period regarding the said polling stations nor about the total number of votes at polling stations and at the tally center, or about counting and tallying of votes.
- g) The results were declared on 19th February 2016 and the transmission of the same was done on 21st February, 2016.
- h) The Petitioner's agents at the polling stations which included the contested polling stations, signed the DR forms thereby endorsing the result without adverse comments.

- i) If there were any irregularities or noncompliance with electoral laws, such noncompliance or irregularities did not affect the outcome of the election in a substantial manner.

[6] The gist of the 2nd Respondent's answer to the Petition, supported by thirty two (32) affidavits, is that;

- a) The 2nd Respondent is a Rabbi, religious teacher of Jewish religion commonly known as the Abayudaya in Uganda, and not a Cultural leader.
- b) The Bayudaya Community is not a cultural or traditional institution but a religious organization with people of different cultures and tribes like the Basoga, Bagisu, Bagwere, Baganda, Bamba, Langi, Banyole and others.
- c) The name Rabbi Gershom refers to the 2nd Respondent and the academic documents in those names belong to the 2nd Respondent.
- d) The name Rabbi Gershom were religious names and the 2nd Respondent was advised to add the surname Sizomu Wambedde
- e) The 2nd Respondent was qualified at the time of his nomination. He presented his "A" Level certificate / letter of verification of results issued by UNEB in the names of Rabbi Gershom, having lost his original certificates of both "O" Level and "A" Level. He also presented a Deed Poll of 2010 showing that he had changed his name from **Rabbi Gershom to Sizomu Gershom Rabbi Wambedde.**

- f) The 2nd Respondent was a student at Mbale Senior Secondary School from 1984 – 1987 for “O” Level and because of financial constraints did not go to “A” Level immediately. He did “A” Level in 1994-1995 at Mbale Progressive Academy (now Mbale Progressive Secondary School).
- g) Mbale Progressive Academy had no examination Centre number and the 2nd Respondent registered and sat “A” Level from Nkoma S.S.S examination Centre under index number 0067/619 in 1995 in the name; ***Rabbi Gershom***.
- h) It is true that by 1987, Mbale Progressive Academy (now Mbale Progressive Secondary School) was not in existence). The letter of verification of results was dated 28th October 1998 when Mbale Progressive Secondary School was in existence.
- i) The 2nd Respondent obtained a degree in bachelors of education and was a teacher at Hamdan Girls High School and was using the name ***Rabbi Gershom***.
- j) The 2nd Respondent was validly elected as a Member of Parliament for Bungokho N.C
- k) The elections were conducted in a free and fair manner in accordance with the electoral laws and if there was any noncompliance, it did not affect the results in a substantial manner.

- l) The 2nd Respondent denies the Petitioner's allegations that he personally or through his agents committed election malpractices / offences with his knowledge, consent or approval.
- m) All polling agents / the Petitioner's agents signed the declaration of results forms including Mariam Magosha confirming the results garnered by each candidate, and none of the agents was chased away from the polling stations as alleged.
- n) Voting, counting of votes and declaration of results at all polling stations were conducted peacefully and transparently and there was no intimidation, harassment, beating or violence nor any ballot stuffing, pre -ticking or double / multiple voting at these polling stations.
- o) There was no falsification of results at the said polling stations as alleged by the Petitioner.
- p) Wakobe Muzamiru and Mugulo Paul were unknown to the 2nd Respondent who had no report that such persons assaulted, intimidated or harassed any voters to vote for him.
- q) It is not true that Sekandi Yazidi was an agent of the 2nd Respondent.

[7] In rejoinder, to the 1st and 2nd Respondents answers to the petition, the Petitioner filed nineteen (19) of his own affidavits, the gist of which were that;

- a) After the Presiding officers in the contested polling stations refused to listen to the Petitioner's complaints as per letters marked as annexures "A", "B" & "C" attached to

the Petitioner's rejoinder to the supplementary affidavit of Kakai Maimuna, the Petitioner complained directly to the 1st Respondent.

- b) There are two sets of DR forms signed by the same Presiding officer and of different figures signed at different times.
- c) The Polling agent of the 2nd Respondent on record is Nabutwa Samuel Wamundu which contradicts the DR form of Nabweya Primary school polling station showing the person who signed for the 2nd Respondent as a one Nabutwa James.
- d) The presiding officer at Lumumba polling station allowed one Madanda Martin to sign for the Petitioner as his polling agent when Madanda has never been appointed as his polling agent.
- e) Issa Sekadde was assaulted and beaten as per Police form 3 in case no. reference 6/18/2/2016 at Namanyonyi Police Post
- f) On the certified DR forms for Madarasa Primary Polling station the total number of ballot papers was 435 yet the total number of females (208) and males (280) who voted was recorded as 488, exceeding the total ballot papers by 53 votes.
- g) Katumba Isa the presiding officer for Mbiko TC polling station recorded on the DR form 397 as the number of votes counted yet the total number of females and males who voted was 400 votes.

- h) The register used by the presiding officer against which voter's registered names were ticked confirms a total of 212 voters. The tally sheet shows those who voted as 397.
- i) The Parish supervisors for both Nabweya Parish under Mr. Sailo Latiff Sate and Aisa Parish under Ms. Jamila Kyazike were incontrovertibly compromised.
- j) That the Petitioner's agents informed him that the 2nd Respondent was at Namanyoni S/C headquarters at night as results were being brought to the Electoral Commission sub-county supervisor and the 2nd Respondent and his brother Aaron Kintu were seated at the same table discussing with him and left after results were taken to the tally center at midnight.
- k) The 2nd Respondent and his agents disorganized the polling at Mbiko TC polling station and thus led to multiple voting and ballot stuffing.

[8] When this application came up for hearing on 1st and 2nd June, 2016 the Petitioner was represented by Mr. Mukwaya Deo and Mr. Mukasa Twaha while the 1st Respondent was represented by Mr. Joseph Kyazze and Mr. Sserunjogi Nasser while the 2nd Respondent was represented by Mr. Yusuf Mutembuli.

Issue No. 1: Whether at the time of his election, the 2nd Respondent was not qualified for election as a Member of Parliament?

[9] The Petitioner's Counsel submitted that;

- a. It is the contention of the Petitioner that at the time of his nomination and election, the 2nd Respondent did not possess the requisite "A" Level qualification as required under section 4 (1) & (2) (c) of the PEA.
- b. The letters of verification of results produced by the 2nd Respondent, whether or not are genuine, can never pass as certificates under section 4 (1) (c) of the PEA.
- c. The letters of verification of results ought to have been certified by UNEB and not the Director of studies, Mbale Progressive S.S.
- d. DW2 was not a truthful witness as to his identity and order of names. The name appearing on the deed poll is not the name appearing on the nomination papers. These were intended by the 2nd Respondent to conceal the identity or the forgery of the academic results presented.
- e. The Petitioner also contends that the 2nd Respondent is a cultural leader of the Abayudaya Community in Uganda and was therefore not eligible for nomination and election. The Abayudaya are a cultural institution with a leader and has traditions and cultures. The 3rd Schedule to Article 10 of the Constitution has nothing to do with Article 246 of the Constitution.

[10] Counsel for the 1st Respondent submitted in reply, that;

- a. The allegations of the Petitioner are premised on mere speculation.
- b. No evidence was adduced to controvert the 2nd Respondent's explanation that he sat "O" & "A" Level as Rabbi Gershom, lost his original certificates in 1998, reported the loss to Police, and local authorities, went to UNEB that issued the said letters of verification of results through his former School; Mbale Progressive S.S.
- c. No evidence was adduced by the Petitioner that the contents of the Letters of verification of results are different from the contents of the original record of the same student held by UNEB.
- d. Section 36 of the Registration of Persons Act, 2015 was not yet law and cannot apply retrospectively. The applicable law was the Births and Deaths Registration Act Cap. 309 which only applied in respect of a complete change of name and not an addition or adoption of more names. The 2nd Respondent only adopted added names and did not change his original name.
- e. A change of the order of names is not a ground for invalidation of a nomination.
- f. The Petitioner's allegations that the 2nd Respondent was a cultural leader were speculative. The provisions of Article 246 (1) of the Constitution and section 3 of the Institution of Traditional or cultural Leaders Act 2011 are cited out of context.

[11] The 2nd Respondent's Counsel submitted that:

- a. The Petitioner has failed to prove that the 2nd Respondent did not have the minimum qualifications of "A" level.
- b. The Registration of Persons Act, 2015 does not apply to the 2nd Respondent who changed his name in 2010.
- c. The 2nd Respondent is not a cultural leader but a spiritual leader of the Abayudaya congregation.

[12] In rejoinder, the Petitioner's Counsel reiterated his earlier submissions and added that;

- a. The standard of proof in parliamentary election petitions is provided under section 61 (3) of the PEA.
- b. Even if forgery was not pleaded, the court is not precluded from making an inference to that effect once there is evidence.

Decision of Court:

[13] From the outset, I must point out four (4) important observations and positions taken by this court;

- i.* The Petitioner amended his petition without leave of court and at the trial sought under 0.6 rule 22 of the CPR that the same be allowed and put on the court record.

By consent of all Counsel, the amended Petition was allowed whereupon the Petitioner's Counsel withdrew the Petitioner's original petition which had been replaced by the amended one. In an unprecedented manner, in the Petitioner's affidavits in rejoinder to the Respondents' answers to the Petition, the Petitioner surprisingly attached as annexures thereto, the affidavits in support of his original Petition. ***These include his own affidavit dated 31/03/2016 and the affidavits dated 11/03/2016 of Nagami Jalia, Magosha Mariam, Jamani Aramanzan and the affidavit dated 18/05/2016 of Mugulo Mubarak.*** These affidavits, in my view, had since been replaced by the said amended petition that is accompanied by fresh affidavits. It is a cardinal principle of pleadings that "*Parties are bound by their pleadings*" See **Amama Mbabazi vs Musinguzi Garuqa Election Petition No. 12 of 2002.** The Petitioner is bound by his amended petition and the accompanying affidavit filed therewith.

Rule 4 (8) of The PEA rules S. 1 141-2 prescribes the form of a petition filed in the High Court to mean that *it shall take the form prescribed therein and **shall be accompanied by an affidavit** setting out the facts on which the petition is based together with a list of any documents on which the Petitioner intends to rely. (This requirement is also emphasized as a footnote at the bottom of Form A in the schedule to those Rules and is mandatory. (Emphasis added)*

A corresponding requirement is imposed on a Respondent under Rule 8 (3) (a) of the PEA Rules, S.I 141-2. *This Rule makes it mandatory that when filling an answer to a petition, a Respondent shall accompany his / her answer to the petition with an affidavit stating facts upon which the Respondent intends to rely.*

In Amama Mbabazi & Anor vs Musinguzi Garuqa James (supra), Okello JA, stated in reference to Rule 8 (3) (a) of the PEA rules, *that an affidavit accompanying the Respondent's answer to the Petition is an essential requirement to the validity of the answer. An answer, which is not accompanied by an affidavit, would be void.*

Black's Law Dictionary 9th ed. at pages 1270 & 1271 defines amended pleadings and supplemental pleadings as follows;

An amended pleading is:

"A pleading that replaces an earlier pleading and that contains matters omitted from or not known at the time of the earlier pleading". (Emphasis added)

Supplemental pleading

"...unlike an amended pleading, a supplemental pleading merely adds to the earlier pleading and does not replace it". (Emphasis added)

It is clear from the authorities and rules cited and these definitions, that by replacing his original petition and its accompanying affidavits with the amended petition, it was no longer open to the Petitioner to fall back to his original petition nor its accompanying affidavits. If the Petitioner desired to do so, he ought to have sought the leave of court by way of a fresh oral or written application to re-amend his petition. This was not done. No such leave was sought nor granted. ***On this basis, I have rejected all the said affidavits filed in support of the earlier petition as they were an integral part of the original petition which was replaced.*** I am guided for this position by the case of **Shah Hemraj Bharmal & Brothers vs Santosh Kumari 1961 EA at 679 (CA –K)** where it was held that;

“As the judge had struck out the defence of undue influence early in the trial there was no such issue before the court, accordingly, it is not open to the judge to restore it in his judgment”.

Although the **Shah Hemraj Bharmal (supra)** case was in respect of a defence struck out, and not in respect of a withdrawal of pleadings as is 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.*

Also in **Macharia vs. Wanyoike & Ors. [1972] EA at 264 (K)** it was held that;

“A pleading does not contain the material facts required if it only refers to them”.

In the present case, the Petitioner's said affidavits in rejoinder only referred to the earlier affidavits of; inter alia; ***Mariam Magosha and Jamani Aramanzan*** that were no longer on the court record. During cross-examination of the Petitioner (PW 1), he admitted that he did not have on record, original affidavits of ***Mugulo Mubarak, Magosha Mariam and Jamani Aramanzani***. The affidavits in rejoinder of the Petitioner that only refer to the affidavits of other people including ***Mugulo Mubarak, Magosha Mariam and Jamani Aramanzani***, which are no longer part of the court record, except as annexures, cannot therefore be said to contain the facts that they purport to contain. This position is embodied ***in O. 19 rule 3 (1) of the CPR*** that provides that *affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her own belief may be admitted, provided that the grounds thereof are stated.*

- ii. The amended petition and the numerous affidavits in support thereof (*including the Petitioner's affidavits in rejoinder*), were poorly drafted and offended a number of the rules governing the preparation of pleadings and or affidavits. These documents were argumentative, repetitive, unnecessarily lengthy and difficult to comprehend. Some affidavits had annexures attached thereto which were not referred to anywhere in the body of the affidavits. For example; the Petitioner's affidavit dated 18th April 2016 in support of the amended Petition was nothing-more- than "a

repetition or extension of the amended petition". It was referred to as an affidavit but was in fact a poorly drafted supplementary petition, in substance.

- iii. Repetitions were also manifest in the 2nd Respondent's pleadings although these were not gross.
- iv. At the trial the Petitioner sought to rely on a video recording and what he referred to as a transcription of the said recording. I rejected both, for the reasons I gave in my short interim ruling at pages 31-32 of the court proceedings.

These anomalies notwithstanding, save for (i) above, I have tried my best to sieve out what is relevant from the sea of paragraphs and repetitions. I bore in mind that when adjudicating cases, courts are enjoined under **Art. 126 (2) (e) of the Constitution and section 33 of the Judicature Act**, not to pay undue regard to the form, but rather to the substance of the matters in controversy between parties. During the trial I also took into account the said constitutional provision and Rule 26 of the PEA rules S. I 141-2 which prohibit the defeat of proceedings upon a petition by any formal objections.

[14] With that backdrop, I now turn to determine issue No. 1.

The Petitioner's attack on whether the 2nd Respondent is qualified to be a Member of Parliament is two (2) pronged. First he asserts that the 2nd Respondent is not academically qualified contrary to Article 80 (1) (c) of the Constitution. Second he asserts that the 2nd Respondent is a traditional or cultural leader contrary to Article 80 (2) (c) of the constitution.

The Petitioner's second assertion is on the basis that the 2nd Respondent is a leader of the

Jewish community in Uganda known as the Abayudaya. The onus to prove these allegations on a balance of probabilities is upon the Petitioner. I shall determine each prong separately.

[15] Allegations of lack of academic qualifications

The Petitioner did not attack the validity of the academic qualifications presented by the 2nd Respondent to the 1st Respondent, for his nomination. The Petitioner stated categorically in his amended Petition (see paragraph 7 (b) & (c) thereof) and his accompanying affidavit that; I quote:

“...UNEB clearly endorsed on the letter of verification of results dated 28th October, 1967 (sic) of O’ Level against index No. 0051 / 290 year of sitting 1987 and A’ Level against index No. U0067/619 year of sitting 1995 (sic) confirms a one Rabbi Gershom as the registered owner (sic) of these qualifications...” (Underlining mine)

What the Petitioner contends is that ***the said academic qualifications presented by the 2nd Respondent do not belong to him.*** The Petitioner also contends that the Deed poll presented by the 2nd Respondent was an alteration and erasure contrary to section 4 (14) of the PEA and that the averment of the 2nd Respondent in EXB P. 2 (the Oath Authenticating statement) stating his name as ***Sizomu Gershom Rabbi Wambedde*** was different from the arrangement of the names in the deed poll as ***Rabbi Gershom Sizomu Wambedde.***

Section 4 (14) of the PEA provides that:

“The Commission shall not accept for the purpose of this section a statutory declaration or affidavit as evidence of an academic qualification required by this section”

It is trite law that in Parliamentary election petitions, the burden of proof lies upon the Petitioner **(see sections 101 – 103 of the Evidence Act, Cap. 6)** who must prove any ground under section 61 of the PEA on the basis of a balance of probabilities. See **section 61 (3) of the PEA.**

I carefully read the pleadings and affidavits of the Petitioner and I carefully listened to his testimony in court but I found no evidence that supported his assertion that the ***academic qualifications presented by the 2nd Respondent do not belong to him.***

In paragraph 26 of the Petitioner's affidavit dated 23/05/2016, in rejoinder to the 1st Respondent's amended answer to the Petition, he stated; I quote:

“The plausible explanation is that the 2nd Respondent never possessed any “A” Level qualification of his own therefore never lost any documents or qualification. The 2nd Respondent could not have approached UNEB in the last 18 years because the qualifications are not his and would never be his as they do pose identity challenges that would not go unchallenged by UNEB”

From this extract like the rest of his averments on this point, it is clear to me that the Petitioner's evidence is no more than conjecture. He failed to discharge his burden of proof.

Without prejudice to my finding above, I have thoroughly scrutinized the documents that are attached as annexures (A – Q) to the 2nd Respondent's affidavit dated 8th April 2016, in support of his answer to the Petition. These documents are;

- i. UNEB's letters of verification of results dated 28th October, 1998
- ii. The letters of April 2016 from Mbale Progressive Secondary School and Mbale Secondary School
- iii. The Deed Poll dated 23rd June, 2010 (EXB P. 3) and the notice thereof in the Monitor Newspaper of Friday July 2, 2010. (EXBs R 2 (1) & (2))
- iv. The 2nd Respondent's Degree of Bachelor of Arts in Education dated 10/02/1999
- v. The 2nd Respondent's identification card and driving permit.
- vi. The 2nd Respondent's appointment letter of 08/01/1999 and a letter of verification from Hamdan Girls' High School dated April, 2009

I find that the said qualifications and the events shown by these documents, are well sequenced, in chronologically order and are consistent with authenticity. ***I am satisfied that the 2nd Respondent owns these documents and possesses the requisite academic minimum qualifications in compliance with Article 80 (1) (c) of the Constitution and section 4 (1) (c) of the PEA. I also find that the 2nd Respondent did***

not offend section 4 (14) of the PEA as alleged as what he presented to the 1st Respondent for nomination was his said academic qualifications. He did not present his deed poll in lieu of the said academic qualifications but as part of the relevant documents he was required to present. I also have no basis to fault the arrangements of the 2nd Respondent's names on the Nomination from (EXB P. 2) vis- a' vis the Deed Poll. In addition, I need to point out that the process under the law cited by the Petitioner, viz, section 36 of the Registration of Persons Act, 2015 is not applicable to this matter. The 2nd Respondent changed his name in 2010, five (5) years prior to the enactment of that Act which cannot be invoked retrospectively.

[16] Allegations that the 2nd Respondent is a traditional / cultural leader

It is not in dispute that the 2nd Respondent is the leader of a Jewish community known as the Abayudaya in Uganda. What is in contention is whether this community is a cultural / traditional community with the 2nd Respondent as its leader (within the meaning of Article 246 (6) of the Constitution), or whether it is a spiritual / religious community?

Article 80 (2) (c) of the Constitution provides that;

"A person is not qualified for election as a Member of Parliament if that person...is a traditional or cultural leader as defined in Article 246 (6) of this Constitution;"

Traditional leader or cultural leader is defined under **Article 246 (6) of the Constitution** to mean;

"...a king or similar traditional leader or cultural leader by whatever name called, who derives allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people led by that traditional or cultural leader"

The Petitioner averred that objective No. 2 and paragraph 5 of the constitution of the Abayudaya Congregation (a copy of which is attached to the Petitioner's affidavit in rejoinder dated 23rd May, 2016) is commensurate with Article 246 (1) (5) and (6) of the Uganda Constitution. That the Abayudaya (Black Jews) practice the tradition, culture and customs of the Jews and are therefore a cultural / traditional community.

I have carefully looked at the constitution of the Abayudaya congregation as amended and from Article I (6 & 7), II & III thereof, ***I am persuaded that the Abayudaya is a faith based spiritual congregation rather than a cultural / traditional institution. I am satisfied that the provisions of Article 246 (6) of the constitution do not apply to the 2nd Respondent.*** I agree with the contention of the 2nd Respondent that on account that the Abayudaya are not listed among the indigenous communities defined by the 3rd schedule under Article 10 (a) of the Constitution, they cannot be regarded as a traditional / cultural institution. I am further satisfied with the uncontroverted explanation of the 2nd Respondent that he derived his leadership of this congregation not from the fact of his birth or descent, but rather from his ordination as a teacher of the Jewish religion at Ziegler School of Rabbinic studies, Los Angles, USA in 2008. This source of leadership too, is inconsistent

with the definition of a cultural / traditional leader prescribed by Article 246 (6) of the constitution.

Issue No. 1 is accordingly answered in the negative. I hold that at the time of his nomination and election, the 2nd Respondent was qualified for election as a Member of Parliament.

Issue No. 2: Whether there was non-compliance by the 1st & 2nd Respondents with the electoral laws, and if so, whether such non –compliance affected the election in a substantial manner?

[17] For the Petitioner, his Counsel submitted that;

- a. The Petitioner contends that the 1st Respondent failed to comply with the electoral laws when it nominated the 2nd Respondent who was not qualified at the time of his nomination.
- b. There is need for compliance, as a statutory requirement under section 36 of the Registration of Persons Act, 2015, in cases of change of order of names.
- c. The 1st Respondent nominated the 2nd Respondent when he was a cultural leader without proof of resignation from the post of cultural leader 90 days before nomination.

- d. The Parish Supervisors of the contested polling stations never accepted any complaints tendered by the agents of the Petitioner.
- e. The results on the DR forms from the Polling stations of Lumumba, Nabweya Primary School, Nankobe TC, Mbiko TC and Lubembe were falsified. At Lumumba Polling station the votes for the 2nd Respondent were altered from 04 votes to 141 votes. At Nabweya Primary School polling stations the DR forms had inconsistencies. This was evidence of forgery.
- f. The DR forms from Nabweya Primary School, Mbiko TC, Lumumba, Nankobe TC, Kilulu, Madarassa Primary School and Lubembe Primary School ought to be severed from the final Tally sheet because they were falsified and the results therefrom affected the result of the election in a substantial manner.
- g. The 2nd Respondent interfered with the electoral process through torture, intimidation and harassment and beating the Petitioner's supporters and agents on 17/02/2016 and 18/02/2016.

[18] In reply, the 1st Respondent's Counsel submitted that;

- a. Rules 4 (8) and 15 of the PEA Rules require evidence in support of the Petition to be adduced by affidavit in support of the Petition that must be filed together with the petition or before the answer to the Petition is filed. No affidavits as required by law were filed with the amended petition. The Petitioner ingeniously sneaked in photocopies of the affidavits that were withdrawn with the original petition and

disguised them as annexures to his affidavit in rejoinder. This offends rule 15 of the Rules.

- b. No evidence was led by the Petitioner to prove his allegations.
- c. The copies of the DR forms relied on by the Petitioner are not certified copies and court cannot rely on photocopies of DR forms yet no attempt had been made by the Petitioner to apply for certified copies.
- d. No forgery of DR forms or falsification of results nor intimidation, violence or disenfranchisement of voters has been proved.
- e. There is no Police report indicating violence or intimidation of voters during the campaign period.

[19] The 2nd Respondent's Counsel submitted that:

- a. The Petitioner having withdrawn his original petition together with the supporting affidavits cannot introduce the same affidavits under disguise of annexures and rely on them.
- b. The Petitioner has failed to prove that there was falsification of results.
- c. It is trite law that once an agent signs a DR form, he confirms the results thereon and his principal cannot turn around to disown it.
- d. Court only relies on certified copies of DR forms.
- e. No voters came to court claiming that they were intimidated or harassed or were denied an opportunity to vote.

- f. No evidence was adduced to the effect that those who intimidated or caused any violence were agents of the 2nd Respondent nor that he consented or approved or had knowledge of what they did or of the persons alleged to have done so.

Decision of court.

[20] The Petitioner's allegations of noncompliance by the 1st & 2nd Respondents of the electoral laws are five (5) in number. I shall determine the merits of these individually.

[21] Allegations that the 1st Respondent failed to comply with the electoral laws when it nominated the 2nd Respondent who was not qualified at the time of his nomination.

These allegations have been discussed under issue No. 1 and were rejected.

[22] Allegations that the results on the DR forms from the Polling stations of Lumumba, Nabweya Primary School, Nankobe TC, Mbiko TC, Kilulu and Lubembe were falsified

The Petitioner averred that the DR form of Nabweya Primary School polling station recorded 24 invalid votes but the 1st Respondent and its agents manipulated the tally sheet and recorded invalid votes as 10 contrary to section 59 of the PEA. He also averred that Various DR forms disclose that the people who voted exceeded those on the official voters register.

For its part, the 1st Respondent averred in the affidavit of **Jude Mwasa** a legal Officer of the 1st Respondent, and the supplementary affidavits of **Kakayi Agnes, Hasulube Awali, Katumba Issa, Mabberi Umar, Mafabi Amidu, and Kakai Maimuna**, that the allegations of the Petitioner and other deponents as to what transpired at the polling stations of **Nabweya Primary School, Madarassa Primary School, Mbiko T / C, Nankobe T /C, Kilulu and Lumumba**, are false. The 1st Respondent averred further that the Petitioner's agents signed the DR forms without adverse comment including Magosha Mariam, the Petitioner's agent at Nabweya Primary School. It is not true that there was over voting at Nabweya Primary school as the total number of valid votes was 638 and the invalid votes were 10 out of a total of 657 registered voters.

I have scrutinized all the DR forms filed and relied on by the Petitioner in this matter and I find that not a single DR form is certified by the Electoral Commission. It is settled that a DR form is a public document within the meaning of **Section 73 (a) (ii) of the Evidence Act, Cap 6** and therefore requires certification as provided for under **section 76 of the Evidence Act**, if it is to be presented as an authentic and valid document in evidence.

In Kakooza John Baptist vs the Electoral Commission and Yiga S/C Election Petition No. 11 of 2007, the Justices of the Supreme Court *opined that the courts below could not be faulted for holding that the uncertified copies of the DR Forms annexed to the affidavits of the Appellant were inadmissible in evidence.*

On the strength of the above authority, I accordingly agree with the submissions of Counsel for the 1st Respondent and ***I hold that all the uncertified DR forms presented to court by the Petitioner are inadmissible in evidence and are accordingly rejected.***

In addition, as pointed out by the 1st Respondent's Counsel, no evidence has been led by the Petitioner of any falsification. In these circumstances, I find that this allegation is devoid of merit.

[23] Allegations that contrary to sections 46 (1), (2) (3) & (4) and 48 (b) of the PEA, Parish Supervisors of the contested polling stations at Madarasa Primary school Polling station, Nabweya Primary School Polling Station, Nankobe TC Polling station, Lumumba polling station and Kilulu never accepted any complaints tendered by the agents of the Petitioner.

In support of these allegations, the Petitioner relied on the averments made in several affidavits that he withdrew when he withdrew his original Petition. As stated earlier in this judgment under [13] above, it is not open to the Petitioner to fall back on those affidavits at this stage, since the trial proceeded without these affidavits. To allow these would not only offend the rules of procedure, but would occasion great injustice and prejudice to the Respondents who would have been denied an opportunity to cross-examine the deponents of those affidavits if they so wished. For this position, I am guided by the Judgment of Katureebe JSC (as he then was), in Bakaluba Peter Mukasa vs. Namboze Betty Bakireke: Election Petition Appeal No. 4 of 2009 where he stated *that rules of procedure only form the framework within which a fair hearing is conducted, but where any injustice or*

prejudice is suffered by any irregularity in the pleadings, then a right to a fair hearing would have been denied.

The Petitioner also relied on only two letters of complaint dated 18/02/2016 and 19/02/2016 written by himself and his lawyers that he allegedly lodged with the 1st Respondent. These letters are annexed and marked as "A" & "B" to his affidavit in rejoinder to the supplementary affidavit of Kakai Maimuna. I find that the allegations contained in these letters which the Petitioner now presents to this court, are also not supported by any affidavit of the agents of the Petitioner whom he stated to be; **Ramadhan Bakuseka, George Wagwale, Jalia Nagami, and Jamani Alamanzan**. The Petitioner claims these agents of his were chased away from the stated polling stations, stoned and intimidated, but these alleged incidences were not witnessed by the Petitioner himself. **(0. 19 rule 3 of the CPR applied)**. Again the Petitioner only referred court to the affidavits of his said agents which affidavits no longer formed part of the court record and were rejected. This evidence is therefore regarded as hearsay evidence which is inadmissible.

[24] Allegations that the 2nd Respondent personally, or through his voters and with his knowledge and consent / approval, interfered with the electoral process through undue influence, torture, intimidation and harassment and beating of and obstruction of the Petitioner's supporters, voters and agents on 17/02/2016 and 18/02/2016

The Petitioner averred that supporters and agents of the 2nd Respondent organized gangs which included Wekobe Muzamiru and Mugulo Paul to use force, harassment, intimidation

and violence against voters suspected of not supporting the 2nd Respondent. The Petitioner further averred that the entire election was flawed and characterized by acts of intimidation, harassment, beating, lack of freedom and transparency, unfairness, disenfranchisement of voters, massive rigging of votes through ballot stuffing, multiple voting, pre-ticking of ballot papers, ineligible voters and manipulation of voter's rolls. He further averred that the 1st Respondent's agents, the presiding officers allowed the voting and carried out counting and tallying of votes in the forced absence of the Petitioner's agents who were chased away from polling stations by the 2nd Respondent's agents.

As stated earlier, these assertions were not supported by cogent evidence or at all. They remained allegations that were not within the personal knowledge of the Petitioner contained in his own affidavits. Again, these are not admissible in evidence.

[25] Allegations that the 1st Respondent declared the results on 21st and 22nd February 2016, beyond the statutory 48 hours after close of polling in breach of section 59 of the PEA.

No evidence was adduced to this effect. I therefore found no merit in this allegation.

[26] For the reasons I have given under [21] to [25] above, I am not satisfied that there was non-compliance by the 1st & 2nd Respondents with the electoral laws. Issue No. 2 is accordingly answered in the negative.

Issue No. 3: What remedies are available to the Parties, if any?

[27] Having found as I have under issues Nos. 1 & 2, this Petition fails. It is accordingly dismissed with costs to both Respondents against the Petitioner.

I so order,

P. Basaza Wasswa 20/7.

**P. BASAZA WASSWA
JUDGE**

20/07/2016