THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.39/97

CORAM:G.M. OKELLO, J.A; J.P. BERKO,JA; A. TWINOMUJUNI,J.A

THE RETURNING OFFICER KAMPALA…… 1ST APPELLANT
CHAIRMAN ELECTORAL COMMISSION…….. 2ND APPELLANT
MARGARET ZZIWA…….. 3RD APPELLANT

- VERSUS –

CATHERINE NAAVA NABAGESERA…… RESPONDENT

JUDGEMENT OF THE COURT

These three appeals were brought against the decision of the High Court (Tabaro, J)delivered at Kampala on 3rd October 1997 whereby he allowed with costs the respondent's petition against the election of the 3rd appellant. At the commencement of the hearing, the appeals were consolidated and were heard together.

The background to the cases is as follows:- The Interim Electoral Commission, authorised by section 12 of the Parliamentary Elections (Interim Provisions) Statute No.4 of 1996, had organised and conducted on 20/06/96 the elections of Women
Parliamentary representatives in all districts in the country.

The 3rd appellant, Margaret Zziwa and the respondent, Catherine Naava Nabagesera, contested in the elections, the Kampala District Women representative seat. The Town Clerk of Kampala City Council supervised the elections in Kampala District as the
Returning Officer. Margaret Zziwa was declared the winner for the Kampala District seat. That declaration was published in the Uganda Gazette of 28/06/96.

Before that publication however, the respondent who had somehow perceived her defeat, had on 25/06/96 filed in the High Court election petition No.11 of 1996 against the 1st and 2nd appellants. In that petition, she challenged the election of the 3rd appellant on a number of grounds; inter alia, non-compliance with the electoral laws. For that reason the 3rd appellant was later joined in the petition by the court as the 3rd respondent. The petition was heard by Tabaro, J. The records of appeal show that in the course of the hearing of the petition, several interlocutory issues were raised and argued by the parties. The trial Judge heard them and dismissed them in his written ru1ingS He finally allowed the petition basically on the ground that the 1st and 2nd appellants did not conduct the elections in accordance with Statute No.4 of 1996 supra. He therefore nullified the election of the 3rd appellant, and declared her seat vacant. He also ordered the 1st and 2nd appellants to pay the respondent's costs. He however, ordered the 3rd appellant to meet her own costs.
It is against the above decision and orders that these appeals were brought.

The three memoranda of appeal contain similar grounds and prayers. Below are the grounds in the memorandum of appeal filed by the 1st and 3rd appellants as these were the grounds that were argued. The memorandum of appeal filed by the 1st appellant complained that:

(a) the learned trial Judge erred in law when he proceeded to entertain, hear and determine a petition that was not competently brought before the court in that,
(i) the petition was not filed in accordance with section 90 of the Parliamentary Elections (Interim Provisions) Statute No.4 of 1996.
(ii) the petition was accompanied by a defective j affidavit and instead of dismissing the petition the learned trial Judge ordered that the said affidavit be substituted.

(b) (b) the learned trial Judge erred in law when he reduced the standard of proof required of the petitioner/respondent in proving her case.

(c) the learned trial Judge erred in law when he shifted the burden of proof from the petitioner/respondent to the appellants.
(d) the learned trial Judge erred in law and fact when he found that the appellants neither

compiled nor displayed proper voters' registers as required by the Parliamentary Elections (Interim Provisions) Statute No.4 of 1996.u

(e) the learned trial Judge erred in law when he found that voters' cards were a legal requirement for the Kampala District Women's representative elections.

(f) the learned trial Judge erred in law and in fact when he refused or failed to take into account the evidence of the appellant, Mr. Gordon Mwesigye and thereby came to an erroneous finding that the appellant allowed ineligible persons to vote.

(g) the learned trial Judge erred in fact and in law when he found that all the votes cast were invalid and declared them null and void.

(h) the learned trial Judge erred in law in failing to properly evaluate the evidence adduced thereby coming to the wrong conclusion that the voters' registers were adjusted after nominations.

(i) the learned trial Judge erred in law and in fact when he relied on the evidence of votes objected to when no such list was properly filed or relied upon by the petitioner/respondent.

(j) the learned trial Judge did not consider the various principles required by the Parliamentary Elections (Interim Provisions) Statute No.4 of 1996 before the results of an election petition could be overturned by a court of law.

The memo prayed for: -

(A) The appeal to be allowed;

(B) The Rulings, orders and judgment of the trial Judge be set aside;

(C) A declaration that the elections for Women representative held in Kampala District were valid;

(D) The 1st appellant be granted costs in this court and .the court below."

The following grounds of appeal are contained in t memorandum of appeal filed by the 3rd appellant:

"1. that the learned trial Judge erred in law when he proceeded to hear and determine an election petition that was incompetent in that,

(a) it was not filed in accordance with section 90 of the Parliamentary Elections (Interim Provisions) Statute 1996 (No.4) 1996.

(b) it was against Steven Akabway and Gordon Mwesigye in their personal capacity contrary to Statute No.4 above mentioned and it was illegal of the trial Judge to substitute parties in his judgment.
(c) the principal respondent, Margaret Zziwa was not named and served within the limitation period of seven (7) days after filing, let alone the thirty (30) days within which an election petition must be filed.
(d) it was accompanied by a defective affidavit.
In the alternative but without prejudice to the above grounds: (2 the learned trial Judge erred in law when he ordered the amendment of the petition and joining of the
appellant outside the limitation period.
(3) the learned trial Judge erred in law and fact when he held that the 1st and 2nd respondents conducted the election contrary to the electoral laws.
(4) the learned trial Judge erred in law and in fact when he held that the minor irregularities that may have been proved affected the rel1s of the elections substantially.
(5) the learned trial Judge erred in law and fact when he relied on the evidence of votes objected to without a list of such votes.
(6) the whole trial was a nullity in the absence of a specific order extending the hearing beyond one month let alone the very long adjournment when judgment was reserved.
(7) the learned trial Judge erred in law in that he failed to adequately scrutinize and evaluate the evidence adduced, thereby coming to the wrong conclusion that the appellant had not been validly elected."
The prayers in the memorandum seek that:-

"(a) this appeal be allowed.
(b) the rulings, judgment and orders of the learned trial Judge be set aside and be substituted with an order that the purported petition is premature, incompetent and bad in law.
(c) the petition be struck out.
(d) the 3rd appellant was duly elected.
(e) the petitioner be condemned in costs in this court and in the court below."

Counsel for the 3rd appellant submitted a written submission. Counsel for the 1st and 2nd appellants made a joint oral submission associating themselves to a large extent with and adopted the written submissions made by Counsel for the 3rd appellant. Counsel for the respondent was also later permitted to and he did submit a written submission. The greater portion of the submissions in this case was therefore written.

Before we proceed to consider the above grounds, there is one matter which we must deal with first. At the beginning of the hearing of this appeal, Counsel for the respondent sought to raise some legal points which he contended would dispose of the appeal, as in his view, they touched on the competence of the appeal and the jurisdiction of this court to entertain the appeal. We refused that request and reserved our reasons to be incorporated in this judgment. We now propose to give our reasons.

On 4/12/97 at 12.15 p.m., this appeal was called for further hearing. It was the turn of Counsel for the respondent to respond to the submissions made by Counsel for the appellants.
From the very start of his reply, Mr. John Matovu, learned Counsel for the respondent, sought to repeat his challenge to the competence of the appeal and the jurisdiction of this court. His argument was that the appeals were filed out of time and that therefore the court had no jurisdiction to entertain them. Counsel for the appellants strongly opposed that move basically because the court had the previous day refused the respondent leave to raise the same objection under rule 101(b) of the Rules of this court. The court had also refused to extend the time to enable the respondent to file a formal objection under r.81 of the rules of this court.

We declined Mr. Matovu’s request for leave to raise the point verbally under rule 101(b) of the Rules of this court as he did not give us satisfactory reason for his failure in the first place to raise that matter formally under rule 81 of the Rules of this court. We also refused to extend to him time to file a formal application under rule 81 supra as no good cause was shown for the initial delay.

Rule 81 reads:

“81. A person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal apply to the court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that no essential step in the proceedings has been taken or has been taken within the prescribed time.”

It was open to the respondent to raise his objection under the above rule before the appeal was called for hearing. He did not do that and gave no satisfactory reasons for the failure. Rules of courts must prima facie be obeyed. Deviation may be allowed only for good cause. No such cause was shown here.

In response, Mr. Matovu retorted that what he was raising was an illegality which could be brought to the attention of the court at any time and which the court must not condone. He cited Makula International Ltd vs. His Eminence Cardinal Nsubuga and Another (1982) HCB 11 to support his view. In his subsequent written submission, Counsel for the respondent sought to smuggle in his argument on the objection which we had rejected. His pretext was that the point he was raising was an illegality which can be brought to the attention of the court at any time and which the court can not ignore.
We have no problem at all with the principle enunciated in Makula International Ltd (supra) that a court of law cannot sanction what is illegal and that illegality once brought to the attention of the court overrides all questions of pleadings including admissions made thereon. In our view, Makula International supra is distinguishable from the case before us on their facts. In Makula’s case, there was illegality as the taxing officer awarded instruction fee that was manifestly excessive and contrary to law. In that case, though the appeal was incompetent for being time barred, the court did intervene to correct the illegality. In the instant case, there is no illegality as all the appeals are not time-barred. On the face of it, the appeals may appear to be time-barred as the record of appeal in each case appears to have been lodged after 30 days from the date when the memorandum of appeal was filed. That would appear to violate rule 31 of the Parliamentary Elections (Election Petitions) Rules 1996. (S.I. No.27 of 1996)

It is however, important to note that copy of the proceedings from High Court which is an essential ingredient in the preparation of record of appeal is prepared by the Registrar of the High Court. In practice, there is often a delay in the preparation and delivery of the same to the

appellant. A copy of the proceedings is often not ready within the time an appellant is required to lodge his appeal. No directions on how to expedite the production and delivery of the record of the proceedings have been made as provided for in rule 32 of S.I. No.27 of 1996. Application for extension of time under rule 19 of S.I. No.27 of 1996 is also not helpful as the time when the Registrar High Court is expected to prepare and deliver the copy to the appellant is not known. To ameliorate that situation and to avoid causing injustice, resort must be made to rule 36 of S.I. No.27 of 1996 supra. The rule reads

"36. Subject to such modifications as the court may direct in the interest of justice and expedition of the proceedings, any rule regulating the procedure and practice on appeal from decisions of the High Court to the Court of Appeal in civil matters shall apply to appeals under this part of these rules."

The above rule allows, subject to such modifications in the interest of justice and expedition, the application of any rules regulating the procedure and practice on appeal from the decisions of the High Court to the Court of Appeal in civil matters, to election petition appeals. The Court of Appeal Rules Directions 1996 (Legal Notice No.11 of 1996) is one such rules which regulate the procedure and practice on appeals from the decisions of the High Court to the Court of Appeal in civil matters. Application of the Court of Appeal's Rules brings into play rule 82(2) of the Rules. It ameliorates such situation like delays in the preparation and delivery to the appellant's copy of proceedings from the High Court which could otherwise cause injustice to many appellants who would thereby not be able to beat the time limit set by r.31 of S.1. 27 of 1996.

Rule 82(2) supra, allows the exclusion of the time taken in the preparation and delivery to the appellant of the copy of the proceedings when computing the time within which to lodge the appeal. The relevant rule reads.

> "82(2) where an application for a copy of the proceedings in the High Court has been made in writing within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery to the appellant of that copy."

Once a request for a copy of the proceedings in the High Court is made in writing within thirty days after the date of the decision against which it is sought to appeal, the time certified by the Registrar of the High Court, as having been taken for the preparation and delivery to the appellant of that copy, would be excluded when computing the time within which the appeal should be lodged. In the instant case, the record of appeal in each case indicates that the request for a copy of the proceedings in the High Court was made in writing and within thirty days after the decision against which it is sought to appeal. The first and second appellants made their request on 6/10/97 while the 3rd appellant made hers on 3/10/97.

Sub-rule 3 of the said rule 82 sets conditions to be fulfilled before an intending appellant can take advantage of sub-rule 2. These conditions are clearly set out as:

(1) the request must be in writing;

(2) it must have been written within thirty days after the decision against which it is desired to appeal;

(3) its copy must be served on the respondent; and
(4) the appellant must retain proof of its service on the respondent.

The sub-rule 3 reads:

“3 An appellant shall not be entitled to rely on sub-rule (2), unless his or her application for the copy was in writing and a copy of it was served on the respondent, and the appellant has retained proof of that service.”
In the instant case, the records of appeal show in each case, that the request for the copy was made in writing and within thirty days from the decision appealed against. The request was also copied to the respondent. There is proof of service in appeal No.39A, and 39C. We note that there was no complaint from the respondent against the 2nd appellant that it had not served the respondent with a copy of the written request.

The certificates of the Registrar of High Court show that the preparation of the copies of the proceedings and their delivery to the appellants took up to 7th November 1997. In term of rule 82(2) above, the period from the date of the decision against which the appeal is sought up to the 7th November 1997 must be excluded when computing the time within which the appellants must lodge their appeal. The record of appeal shows that all the appellants lodged their appeals within three weeks as from the 7th November 1997. To be specific, as earlier stated the first appellant lodged his appeal on 13/11/97. This was in six days time. The 2nd appellant lodged his on 25/11/97 which was in eighteen days time. The 3rd appellant lodged hers on 14/11/97, which was in seven days time. It is beyond argument therefore, that all these appeals were lodged within time, whether one goes by rule 31 of S.I. No.27 of 1996 or by rule 82(1) of the Rules of this court. We are satisfied that there was no merit in the request sought by Counsel for the respondent.

In his written response to the submissions of Counsel for the appellants, learned Counsel for the respondent raised another general issue relating to the jurisdiction of this court to entertain this appeal. It was that the appeal contains several grounds which are not appealable for two reasons namely,

(a) that the grounds are against interlocutory orders.
(b) that they lack the necessary leave of the High Court to appeal against such orders.

Counsel for both parties argued the points. We therefore deem it appropriate to deal with them at this stage.

Mr. John Matovu, learned Counsel for the respondent, submitted that under section 96(1) of Statute No.4 of 1996, no appeal lies against an interlocutory order. His contention was that once a matter does not form the basis of the decision of election petition, then even if it was ruled upon and a party is aggrieved by that ruling, he can not appeal against it because it is an interlocutory matter, no matter whether the appeal was brought before or after the trial. He cited Zziwa vs Nabagesera Misc. application No.9/96 (CA) (unreported). Mr. Matovu contended in the alternative that should the court find that the interlocutory orders could be appealed against under section 96(1) of Statute No.4 of 1996, then it should hold that such appeal could not lie under section 78 of the Civil Procedure Act. He went on to state that such appeal would require leave

of the High Court, which leave had not been sought or obtained. He pointed out that grounds 1 (a) -d and 2 in appeal No.39 C of 1997, grounds 1-4 in appeal No.39 B of 1997 and grounds a (i) and (ii) were against interlocutory orders against which no appeal lie. He submitted that these grounds were misconceived and prayed that the appeal be struck out.
Mr. Kihiika, learned Counsel for the 1st and 2nd appellants contended, and rightly in our view, that complaints against orders made in the course of a hearing can be considered when appealing against the final decision whether a right of appeal against the interlocutory orders exists or not. He relied on NOBLE BUILDERS (U) LTD vs. SIETCO - CA NO.31 OF 1995 (SC) (unreported) -

Mr. Blais Babigumira, learned Counsel for the 3rd appellant shared the same view of Mr. Kihiika.

He emphasised that a party who does not appeal against an interlocutory decision/order can argue such grounds on appeal against the final decision. He cited UDE vs. NIC AND ANOR - CA NO.28 OF 1995 (SC) (unreported); NOBLE BUILDERS (U) LTD vs. SIETCO (U) LTD (supra). The learned Counsel distinguished Margaret Zziwa vs. Catherine Naava Nabagesera - CA No.34 of 1996 from the instant case in that in Zziwa's case, the appeal was not against the final decision on the petition. He dismissed Jeninah Ntabgoba vs. Kwera Stella Ngirabakunzi - CA No.41 of 1997 cited by Counsel for the respondent as irrelevant. He argued that the learned Counsel for the respondent in Ntabgoba's case above, did not avail himself to the provision of rule 36 of S.I. No.27 of 1996 and rule 82 of the rules of the court. He further pointed out that there was no evidence before the court that Counsel for the appellant in that case had applied for a copy of the proceedings in the High Court and had served copy of that request on the respondent. Further that there was also no evidence that the appellant in that case had retained proof of service of the copy of the request on the respondent.

The pertinent question here, as we understand it, is whether interlocutory decision/orders in election petitions can be made grounds of appeal against the final judgment. The law which

governs appeals in election petitions is section 96 of Statute No.4 of 1996. Sub-section (1) thereof reads:

> "(1). A person aggrieved by the determination of the High Court on hearing an election petition may appeal to the Court of Appeal against the decision."

That provision had earlier been judicially considered by this court in the case of Margaret Zziwa vs Catherine Nabagesera, Civil Appeal No.34 of 1996 (unreported). There, the court held that the above provision envisaged an appeal against a decision determining an election petition rather than a decision from an interlocutory matter. We agree with that.

In that case, the 3rd respondent had sought leave of the trial court to appeal against an interlocutory order. The trial court refused to grant the leave. The appellant appealed against that refusal. Subsequently, the appellant moved the trial court for review citing rule 24 of S.I. No.27 of 1996, 0.42 of the Civil Procedure Rules and section 101 of the Civil Procedure Act. The trial Judge vacated his earlier order staying the proceeding and gave no reasons whether or not 0.42 of the CPR applied. Against that order, the appellant appealed.

At the hearing of the appeal, it was argued by the respondent that the order appealed against was an interlocutory order against which no appeal lies. This court upheld that argument saying, "We agree with Mr. John Matovu that the order appealed from is an interlocutory order from which no appeal lies at this stage" (emphasis is ours)
It seems to uc1ear from the above quotation, that e court was saying that before the final decision on the petition before the High Court, appeal does not lie against interlocutory orders/decisions made in the course of the hearing. By using the phrase at this stage, the court left no doubt that after the final decision on the case; it could entertain grounds of appeal challenging the interlocutory orders/decisions made in the course of the hearing.
That was the holding of this court in Edward Kamana Wesonga vs Interim Electoral Commission and 2 others - Civil Application No.22 of 1996 - CA. (unreported) . In that case, the applicant sought leave to appeal out of time against an order of the High Court striking out his election petition. At the hearing, an objection was raised that this court had no jurisdiction to entertain the application which arose from an interlocutory order

against which no appeal lies. Reliance was placed on Margaret Zziwa vs. Catherine Naava Nabagesera (supra). The court overruled that objection saying, that the order striking out the election petition was a final order as it determined the rights of the parties. It distinguished Margaret Zziwa's case (supra) from that case in that in Zziwa's case, the order was interlocutory as the petition was still pending before the High Court. The rights of the parties to the petition had not yet been determined. In Wesonga's case, the order was final as it determined the rights of the parties to the petition.

In UDB vs. NIC AND ANOR (supra) the question was whether the appellant in appeal against the final decision could argue any grounds of appeal related to interlocutory orders made in the course of the hearing. The court held that in appeal against a final decision, appellant can argue grounds of appeal related to interlocutory orders made in the course of the hearing. That was the view held also in Noble Builders (U) Ltd (supra)

In that case, the High Court gave judgment in favor of the plaintiff and dismissed the defendant's counter claim. There were also several interlocutory orders made in the course of the hearing. The defendant was not satisfied with the decision and he appealed. His memorandum of appeal included grounds related to the counter claim and the several interlocutory orders. The plaintiff/applicant applied by Notice of Motion to strike out the appeal. His argument was inter alia, that the interlocutory orders were not appealable or that if appealable must be with leave of the High Court. Leave was neither sought nor granted.

The court rejected that argument. It held that failure to extract a decree in respect of the counter claim or to obtain leave in respect of the interlocutory orders made in the course of the hearing would not be a ground for striking out the entire appeal. In coming to that condition, the court followed its earlier decision in J. Hannington Wasswa and others vs. Maria Ochola and 3 others - CA No.5 of 1995 (SC) (unreported). In that

case, where the situation was similar to the one before us, the court held that it was not necessary to file separate appeals, one against interlocutory orders made in the course of the hearing and another one, against the final decision. The court observed that,

"To hold otherwise might lead to a multiplicity of appeals upon incidental orders made in the course of the hearing when such matters can more conveniently be considered in an appeal from

the final decision."

The above passage wrapped up the matter succinctly. In the circumstances, we find in the instant case, that there is no merit in the point raised by Counsel to the respondent. We hold that the grounds of appeal related to the interlocutory orders/decisions made in the course of the hearing were properly included in the memorandum of appeal against the final decision of the High Court on the petition.

We now turn to consider the merits of the appeal. The memorandum of appeal raises several grounds as we have indicated in earlier part of this judgment. However, the main reason why the petition as filed in the first place was the respondent's complaint that the 1st and the 2nd appellants conducted the elections contrary to law. The learned trial Judge upheld the petition on this ground alone. The appellants complained on appeal that the trial Judge erred in law when he found that the 1st and the 2nd appellants conducted the elections contrary to law. We find this a central ground on which this appeal succeeds or fails. We therefore propose to deal with it first. This is covered in the memorandum of appeal in grounds d, e and g of appeal No.39 A, in appeal No.39 B it is found in ground **7,** and in appeal No.39 C it is covered in grounds 3 and 4.

Mr. Kihiika in agreement with Mr. Babigumira, contended that the trial Judge's finding that the 1st and 2nd appellants conducted the election contrary to the law was based on the premise that only one register of voters was permissible under the Statute. That the Electoral College should have been updated and (incorporated into the national voters' register in order to comply with section 18 of Statute No.4 of 1996. That failure to do so amounted to non-compliance with the law.

The learned Counsel submitted that the above finding was wrong. In their view, the Statute envisages two registers of voters: one, the national voters' register under section 18 of Statute No.4 of 1996 and another one is the register of Electoral College under rule 4(1) in the 3rd schedule to Statute No.4 of 1996. The schedule is an extension of section 37 of the same Statute. It provides for the election of Women representatives. It was the argument of the learned Counsel that no where in the Statute is it stated that the Electoral College register should be incorporated in the national registers. In holding so, they argued, the learned trial Judge went against the principle of statutory interpretation by adding words into a Statute when it is clear. Reliance was placed on Registered Trustee of Kampala Institute vs. DAPCB CA - No.27 of 1993 (SC)

(unreported)

Mr. Kihiika emphasized that even if the learned trial Judge had found the situation created by sections 18 and 37 of the Statute No.4 (supra) to b absurd, he had to give effect to the plain meaning of the Statute. He cited Samuel W. Muyonga vs Muldi Mutonje CA No.29 of 1996 (SC) (unreported). Because of the wrong interpretation, Mr. Kihiika contended, the trial Judge came to the wrong conclusion that the 1st and 2nd appellants did not compile voters' register under section 37 of Statute No.4 of
1996.

It was further contended by Messrs Kihiika and Babigumira that voters' card was not a legal requirement in the election of Women representative under section 37 of Statute No.4 of 1996. In their view, voters' card only refers to the national voters registers under s.18 of the Statute. They contended that the trial Judge was wrong in holding that voters' card was a legal requirement in the election of Women representative. They prayed that the court finds that the 1st and 2nd appellants complied with Statute No.4 of 1996, that all the votes that were cast were proper, that the registers compiled were done within the law and that voters' card was not a legal requirement in the election of Women representative.

In response, Mr. Matovu, learned Counsel for the respondent, contended that all persons who are entitled to vote in Parliamentary elections, which include for Women representative, must appear on the national voters' registers provided for under section 18 of statute No.4 of 1996. He argued that the register under rule 4(1) in the 3rd schedule to the Statute must be prepared from the national voters' register with the only difference that, voters in the register under rule 4(1) in the 3rd schedule must be members who fall within the Electoral College as stipulated under rule 3(1) of the 3rd schedule.

Mr. Matovu referred to the definition of voters' card in section 3 of Statute No.4 of 1996 which also refers to the national voters' registers. He further referred to Article 59 (1) and 2 of the Constitution which prescribe the rights of those entitled to vote. He then submitted that one could not qualify to vote in the Women representatives elections without being on the national voters' register. In his view, this is only evidenced by a voters' card which contain the particulars of the

voter and his location. It was the contention of the learned Counsel, that being a member of LC II, III and Women Council was only evidence of eligibility but not qualification to vote in the Women representative election because that would not show whether one is of voting age, or a Ugandan citizen as required by the Constitution or a registered voter as is defined in section 3 of Statute No.4 of 1996.

He emphasized that there was only one definition of national voters' register as stated earlier in section 18 of Statute No.4 of 1996. In his view, neither the Commission nor the Returning Officer could modify clear provision of the Constitution or Statute as that would clearly be ultra vires, Only Parliament has that power. He pointed out that in the procedure to vote, a voter must produce a voter's card before voting. That procedure, he argued, was reiterated in rule 7 in the 3rd schedule. He emphasised that only those who appear on the national voters' register and fall within the electoral college as stated earlier under rule 3(1) of the 3rd schedule to Statute No.4 of 1996 can be included in the register of electoral college and be allowed to vote on the polling day if he/she carried his/her voters' card. He contended that as that was not done in the instant case; the irregularity was a major one. He prayed that grounds 3 & 4, of appeal No.39 C, and ground d, e -g of appeal No.39 A be dismissed.

We think that there is no serious dispute over the fact that Statute No.4 of 1996 envisages two voters registers - one, the national voters' register provided for under section 18 and another one, the Electoral College register provided for under rule 4(1) in the 3rd schedule. The third schedule is in turn provided for in section 37 of the Statute. In our view, the dispute is centered on the manner the second register, the Electoral College register, is to be prepared. Counsel for the app1lants contended that the Electoral College register under rule 4(l) in the 3rd schedule must be prepared from the list of the Electoral College provided in rule 3(1) in the 3rd schedule. This comprises all councilors at LC II and III level within the district and all members of Women Council at parish and sub county level.

On the other hand, Counsel for the respondent is of the view, that only LC II and III Council and Women Council at parish and sub county level who appear on the national voters' register should be entered on the electoral college register as these are the only persons entitled to vote in any national or Local Government election in Uganda.

In our view, the answer to the above dispute lies in the interpretation of the relevant provisions of Statute No.4 of 1996 and of the rules in the third schedule to the Statute. These are sections 18 and 37 of the Statute and Rules 3 and 4 in the third schedule. Section 18 reads: -

"18(1). The Commission shall compile, maintain and update on a continuing basis, a national voters register in this Statute referred to as the voters' register which shall include the names of all persons entitled to vote in any national or local government election or referendum.

(2) The Commission shall maintain as part of the voters register a voters' roll for each constituency under this Statute.

(3) The Commission shall also maintain as part of the voters' roll for each constituency a voters' roll for each polling division within the constituency established under section 33 of this Statute."

Section 37 reads:

"37(1) as required by paragraph (b) of clause (1) of Article 78 of the Constitution, there shall be one woman representative in Parliament for every district.

(2). There shall be the following representatives of special groups in Parliament for the purposes of paragraph (c) of clause (1) of Article 78 of the Constitution:

(a) For the Uganda People Defence Forces, there shall be ten representatives.

(b) For Workers, there shall be three representatives;

(c) for the Youth, representatives; and there shall be five

(d) For persons with disabilities, there shall be five representatives at least one of whom shall be a woman.

(3) The following provisions shall apply to district women representatives and special interest groups referred to in subsection (2)

(a) the third schedule to this Statute shall apply to the elections of district women representatives,

(b) ……

(c) …….

(d) ……..

(e) ……..

(4). The Minister may by statutory order made with the approval of the legislature, amend the third schedule.
Rules 3 and 4 in the third schedule reads:

"3 (1). The women representative for every district shall
be elected by an Electoral College comprising:

(a) All councilors at LC II and LC III level within the district and,
(b) all members of parish women councils and sub county women councils within the district.
(2) Except as provided expressly in these Rules, the election of the women representatives shall be conducted by the Commission in accordance with the provisions of the Statute, with such modifications as the Commission may direct.
(3) Nothing shall prevent a contesting candidate from voting."
Rule 4:-
"4 (1) For purposes of election of district women representatives, the returning officer shall prepare a register of the members of the electoral college within each parish of the district.
(2) A copy of the register prepared under sub rule (1) shall be displayed in every parish for a period of at least fourteen days preceding the polling day.
(3)Any vacancy occurring in any council referred to in rule 3 shall not affect the result of an election."
We agree with Mr. Kihiika that the primary rule of statutory interpretation is that, where the words of the Statute to be construed are clear and unambiguous, they must be given their ordinary and natural meaning irrespective of the consequences. In Craies on Statute 6th Edition at page 66, the learned author said: -
"……..if the words of the Statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the laws-givers."

With that principle in mind, we now proceed to consider the above provisions.

Section 18(1) Statute No.4 (supra) is plain and unambiguous. It admits of no strenuous search behind the ordinary natural meaning of the words used. It enjoins the Commission to compile, maintain and update on a continuing basis a national voters' register. Voters' register has been defined in section 3 of the Statute to mean the National voters' register compiled under section 18.

Section 37 above is also plain and clear. It provides for a woman representative in Parliament for every district. It also provides for representatives in Parliament of special interest groups.

It further provides for the third schedule to the Statute. The third schedule contains rules which are specially to apply to the elections of women representatives. Rule 3(1) in the third schedule spells out those who are to elect a woman representative in Parliament. Rule 4(1) in the third schedule provides for a register of those who are to elect a woman representative. The register is to bear the names of members of the Electoral College as provided for in rule 3(1).

Mr. Matovu submitted that only those members of the Electoral College who appear on the national voters' register are to be entered the register of members of the Electoral College. His reason was that these are the only people who are entitled to vote in any national (which include elections of women representatives) or local government elections or referendum in Uganda. With respect, we do not agree with that submission. The rule is clear. It says:-

"Prepare a register of members of the electoral college within each parish of the district."
It does not say that the members of the Electoral College must first be vetted against the national voters register before inclusion on their register. If that had been the intention of the legislature, it would have said it in clear terms. To read in the rule those extraneous words, would be adding non existent words to a document which is clear and unambiguous. That would go against a principle of statutory construction of which the Supreme Court observed in The Registered Trustees of Kampala Institute vs. DAPCB - Civil appeal No.21 of 1993 (SC) (unreported) that,

“It is a wrong thing to read into an act of Parliament words which are not there and in absence of a clear necessity it is a wrong thing to do so.”

The trial Judge dealt with the matter on page 442 of the record of appeal No.39 A. (page 17 of the judgment) in this way:” The Electoral College is constituted by law for the purpose of voting for a women representative for district in Parliament. Hence the election in question falls within the ambit of section 18 of the Parliamentary Elections (Interim Provisions) Statute 1996. In my humble opinion, the election is national since the Electoral College votes people registered for the national Parliament. It will be recalled that under section 18 of the Statute the envisaged. Register is for national, or local government elections, or a referendum. For this reason the members of the electoral college should have been updated and incorporated into the national voters register in order to comply with s.18 of the Statute.”

With respect, the learned trial Judge clearly misdirected himself as to the law applicable to the election of women representatives. As shown earlier in his judgment, the register envisaged under s.18 of the Statute does not apply to the election of women representatives. The election of women representatives is provided for specifically under section 37 of the Statute. This section provides for the third schedule to the Statute. As stated earlier, the schedule contains specific rules for the election of women representatives. The relevant register is provided for in rule 4(1) in the third schedule. It does not require it to be vetted against the national voters register.

On the question whether voters’ card is a legal requirement in the election of women representatives, Mr. Kihiika in agreement with Mr. Babigumira contended here and in lower court that it is not. Their argument was that voters’ cards could only be issued under section 26 of Statute No.4 of 1996 in respect of the national voters’ register. They pointed out that no voters’ cards are required for the women representatives’ elections under section 37. According to them, the Commission devised other means of identification under rule 3(1) in the 3rd schedule in place of voters’ card.

In response, Mr. Matovu cited Article 59(1) and (2) of the Constitution and submitted that under that article, the only person who can vote in any election in Uganda is a citizen who is 18 years old and above and who is registered as a voter. He argued that the only way a voter can be identified under the Statute No.4 of 1996 for purposes of any Parliamentary election is by holding a valid voters’ card. He further contended that one would not qualify to vote in the

women elections without being on the national voters' register which was only evidenced by a voters' card. Voters' card has a voter name, voter number, district code, constituency code, constituency name, sub county name, parish name and polling station. He repeated his argument that being an LC II, III and women councilor was only evidence of eligibility but not qualification to vote in women representative election as that would not show age, nationality or whether one was a registered voter. In Mr. Matovu's view, Section 58(3) and 63(1) of the Statute No.4/96 make it mandatory to produce voter's card before voting. He argued that rule 7 in the 3rd schedule reiterates that procedure. He concluded that without voters' card identification was impossible. He contended that neither the Commission nor the Returning Officer could modify the voting procedure under rule 3(2) in the 3rd as that would be ultra vires. He pointed out that modification is only possible under S.l23 by the Minister.

The learned trial Judge dealt with this issue on pages 442 - 444 of the record of appeal. He said in part as follows,

"Mr. Kihiika in agreement with Mr. Babigumira submitted that by dispensing with voters' cards, the respondents had acted in accordance with the law because rule 3(2) of the Rules for the election of district women representatives (third schedule to the Statute) allows the Commission to give directions or directives with modifications. This argument is not tenable for the reason that rules can not be permitted to modify a Parliamentary Act especially in this case in which the Parliamentary Act is meant to effect a Constitutional requirement for the Electoral Commission to compile, maintain, revise and update the voters register. This point will become clearer herein below when the question of a voter's card and identification of voters is discussed among various issues in the case."

Then he went on:-

"For emphasis, I would reiterate the provision of S.58(3) of the Statute,

"Any person registered as a voter and whose name appears in the voters roll of a polling division and who holds a valid voters' card shall be entitled to vote at the polling station established for that polling divisions."

In absence of any other mode of registration and identification permitted or provided for under the Statute, the use of oath form must be held to be illegal. I would find that under the law in question and the fact that it is the only authorised mode of identification by the second respondent, I would find that voter's card was a legal requirement."

It is clear from the above passage in the judgment of the learned trial Judge that he was acting upon the understanding that there is only one voters' register under Statute No.4 of 1996. With respect, that is misdirection as we have already shown. There are two voters' registers under the Statute. One, the national voters' register under S.l8 of the Statute, and another one, the Electoral College register prepared under rule 4(1) in the third schedule to Statute. Voters' cards are issued under section 26 of the Statute only in respect of the national voters' register. No voters' cards are issued in respect of the Electoral College register prepared under rule 4(1) above. It would be wrong therefore, to read that requirement into the election of women representative under section 37 of the Statute, when the law does not provides for it.

Sections 58(3) and 63 (1) of the Statute provide for the production of voters' cards before voting. These do not apply to the election of women representatives as no voters' cards are issued in respect of the register relevant to their election. By the power conferred upon him by rule 3(1) in the third schedule to the Statute, the commission devised other means of identification of voters in the women representative's elections. There was an argument that rules cannot modify an Act of Parliament we agree. Bur, it should he noted that the third schedule is an extension of section 37 of the Statute. It was made by Parliament providing special procedure for the election of representatives in Parliament of this special interest group. In that regard (Parliament) deliberately gave restricted power to the Minister to amend these rules by statutory order and only upon the approval of the legislatures. The third schedule is therefore not a subsidiary legislation.

It is noteworthy, that it is a principle of statutory interpretation that courts must faithfully give effect to a provision of Statute that clearly expresses the intention of the legislature regardless its consequence. In Craies on Statute 6th Edition at page 66, the learned author said,

"Where the language of an Act is clear and explicit, we must give effect to it whatever may the consequences be for in that case, the words of the Statute speak the intention of the legislatures."

Parliament has in its power unequivocally bestowed on the Commission power to modify provisions of the Statute. It is the duty of the court to give effect to that clear provision, as that was the intention of the legislature. In the exercise of power conferred upon him by rule 3(1) in the third schedule, the Commission modified sections 58(3) and 63(1) of the Statute and devised other means of identification of voters in women representative elections.

In the circumstances, we hold that under the law, voters' cards were not a legal requirement in

the elections of women representatives.
The trial court declared the registers of Electoral College prepared by the Returning Officer under rule 4(1) in the third schedule improper because the registers were not updated and incorporated in the national voters register. Their display and the vote cast against them in the absence of voters' cards issued under section 26 of the Statute were declared by the trial court to be contrary to the law. It held consequently that the 1st and 2nd appellants conducted the elections contrary to the provisions of Statute No.4 of 1996. In view and in the light of our findings above, we hold that the 1st and 2nd appellants conducted the elections in accordance with the provisions of the Statute. Consequently the election of the 3rd appellant was proper. This ground therefore must succeed.

We looked at the whole of the evidence on record and we are satisfied that the 3rd appellant was duly elected. The trial judge held on page 447 of the record of appeals that:

"The voters, all the voters were not registered in accordance with the law and there was no legally accepted method of identifying the voters who cast their votes. In consequence all the votes cast were invalid for contravening the Statute and therefore declare them null and void."
As pointed out earlier, the above findings are wrong. They are based on a wrong construction of the Statute. All the voters were registered in accordance with the provisions of the Statute and consequently all the votes cast were valid. We find no use to consider the other grounds as this ground disposes of t the appeal.
Before we take leave of this appeal, we wish to consider a matter which an issue in this case in particular and which is important to all election petition cases in Uganda in general. The matter is: - What is he standard of proof in election petitions?
Guidance on this matter is to be found in the Parliamentary Election (Interim Provision Statute No.4 of 1996 where S.91 reads in part as follows: -
"91(1) The election of a candidate as a member of parliament shall only be set aside on any of the following grounds <u>If proved to of the satisfaction of the Court</u>

(a) Non-compliance with the provisions of this statute relating to election, if the court Is satisfied that there have been failure to conduct the election in accordance with the

principles laid down in those provisions and that the noncompliance and such failure affected the results in a substantial manner (emphasis ours) -

(b) ……..

(c) ……....

(d) ……

The relevant and important phrases in this provision are “proved to the satisfaction of the court”, “if the court is satisfied” and “affected the result in a substantial manner.”

The phrase “proved to the satisfaction of the court” was judicially considered in the Tanzanian Case of Mbowe v Eliufoo [19671 E.A. 240 where at page 241 Georges CJ had the following to say on the matter:

“There has been much argument as to the meaning of the term “proved to the satisfaction of the Court”. In my view, it is clear that the burden of proof must lie on the petitioner rather than the respondent, because it is he who seeks to have this election declared void. And the standard of proof is one which involves proof “to the satisfaction of the court”. In my view these words mean the same as satisfy’ the court. There have been some authorities on this in matter and in particular there is the case of Bater v Bater. That case dealt not with election petitions, but with divorce, but the statutory provisions are similar, i.e. the court had to be satisfied that a matrimonial offence has been proved.”

In the case of Bater v Bater [19501 2 All E.R. 458 which was cited with approval in the Mbowe Case (supra) Bucknil LJ stated:

“I do not understand how a court can be satisfied that a charge has been proved - and statutes require that the court shall be satisfied before pronouncing a decree - if at the end of the case the court has reasonable doubt whether the case has been proved. To be satisfied and at the same time to have a reasonable doubt seems to me to be an impossible state of mind.

The Mbowe case has been followed in Uganda in the cases of Clement Tibarokora vs. the Returning Officer, Rukungiri District and Anor (unreported) Election Petition No. 1 of 1981. Z.C Ilokol vs. Returning Officer and William Naburi Election Petition No. 1 0f 1996. Alisemerera Babiiha Jane Vs. Returning Officer Bundibugyo and Hon. Bikorwenda Ida Election Petition No.

MFA 1 of 1996 and Odetto Henry John vs. Okedo O'Max Election Petition NO. NP 1 of 1996 to mention but a few.

In the last mentioned of these cases i.e. Odetto Henry John v Oneda O'Max, Ntabgoba P.J. discussed the similarities between our statute No.4 of 1996 in S.91 and the Tanzanian Act) The National "Non-compliance with the provisions of this Act relating to elections, if it appears that the election was not conducted in accordance with the principles laid down in such provisions, and that such non-compliance affected the result of the election (emphasis ours)
The learned Principal Judge then went On:

"This Tanzanian provision is substantially similar to the provision in S.9l(l) (a) of our statute No.4 of 1996 except for the addition, at the end of our statutory provision, of the expression: In a substantial manner".
The learned Principal Judge then quoted with approval the discussion of Georges CJ in the case of Mbowe (supra) and Bucki1 U in Bater case already quoted in this judgment and concluded as follows:

"I must say that with the additional words in our provision "in a substantial manner", the standard of proof under our S.91 of statute No.4 of 1996 becomes a great deal higher than the standard of proof in the case of Tanzania as discussed by Georges CJ."
We respectfully agree with this conclusion.
The effect of the holding in the Mbowe case and the Uganda Cases that have followed that decision, is that grounds for setting aside an election of a successful parliamentary candidate set out in S.91 of statute No.4 of 1996 must be proved beyond reasonable doubt (emphasis ours). This is because the court cannot be said to be satisfied if there was a reasonable doubt.
Since we have already disposed of this appeal on another ground, it is not necessary here to discuss whether the trial court directed itself correctly on the standard of proof and whether it correctly applied the standard.
We accordingly allow the appeal and order as follows:

(1)The order of the lower court nullifying the elections of the 3rd appellant is set aside. The 3rd appellant was duly elected women representative for Kampala District.

(2) The respondent is to pay Eke appellant's costs of the appeal here and in the court below.
We would like to observe that Lady Justice M.Kireju who was on the panel of the Justices of Appeal who heard this appeal had died before she prepared and signed a judgment in the case. Justice J.P. Berko was assigned to replace her on the panel to make the necessary quorum. Section 12 of the Judicature Statute No 13of 1996 and 0.16 r.1O of The Civil Procedure Rules (CPR) allow that course of action.
In Adam Vassiliadis vs. Libyan Arab (U) Bank for Foreign Trade and Development Limited - Civil Appeal No.10 of 1990 (SC) unreported, Justice Seaton who was on the panel of the Justices that heard the appeal died after delivering the judgment in the case. At the time when the learned Judge died however, the application which was brought under the slip rule pending. Justice Platt was assigned to replace the late Justice Seaton on the panel to hear the application. He sat with the other two members of the panel and heard the application. Justice Platt however, did not sign the ruling as he had not participated in the hearing of the appeal.

In another case of Zaitune Kawuma vs Geoarge Mwa Lurum- Civil Application No. 3 of 1996 (sc) unreported, which was also brought under the slip rule, Wambuzi CJ who had given a dissenting judgments in the appeal, did not participate in the hearing of the application. Only the concurring members of the panel on the appeal heard the application and delivered the ruling thereon.

In the instant case, the situation is somewhat different. Lady Justice M. Kireju died before the written submissions in this case were concluded. The submissions were virtually all written. The brief verbal submission of Counsel for the 1st and the 2nd appellant relied on and adopted to a great extent the written submission of Counsel for the 3rd appellant. Justice Berko had the chance to read the record of the appeal and the submissions. He would therefore be competent to prepare and/or sign the judgment in the appeal as section 12 of the Judicature Statute supra and 0.16 r.10 CPR supra allow him to do so.
Dated in Kampala this 13th day of Feb1998.

G.M. OKELLO, J.A

J.P. BERKO, J.A.

A. TWINOMUJUNI, J.A.