THE REPUBLIC OF UGANDA

IN COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM : HON. JUSTICE C. K. BYAMUGISHA, JA;

HON. JUSTICE A. S. NSHIMYE, JA;

HON. JUSTICE M. S. ARACH AMOKO, JA;

ELECTION PETITION APPEAL NO.36 OF 2011

MUYANJA MBABALI ========== APPELLANT

VS

BIREKERAWO MATHIAS NSUBUGA==========RESPONDENT

[An appeal from the judgment and Orders of the High Court of Uganda sitting at Masaka (Alfonse Chigamoy Owiny-Dollo J.) dated 2nd September 2011 in Election Petition No.6 of 2011]

JUDGEMENT OF HON. M. S. ARACH AMOKO, JA

This election petition appeal arises from the judgment and order of the High Court at Masaka (A.C.Owiny-Dollo, J.) in Election Petition No. 6 of 2011 nullifying the election of Muyanja Mbabali (the appellant) as Member of Parliament for Bukoto South Constituency, Lwengo District.

Background:

The background of the appeal is not in dispute. It is as follows. On the 18th February 2011, Parliamentary elections were held throughout the country. The appellant, the respondent, together with four others contested for the Parliamentary seat of Bukoto South Constituency, Lwengo District. At the

end of the voting exercise, the Electoral Commission declared the appellant the successful candidate and subsequently gazetted him as the Member of Parliament for the said constituency.

The respondent was dissatisfied with the outcome consequently, he petitioned the High Court at Masaka to have the election of the appellant annulled, alleging that the appellant was not, at the time of nomination, qualified to be so elected, in that:

- The appellant had fraudulently presented false academic documents at the time of his nomination, as such, his nomination and subsequent election was null and void for want of the requisite academic qualifications.
- The degree certificate of Nkumba University which he presented to the Electoral Commission for his nomination had been awarded to him consequent to his admission to the said University on the basis of a purported Diploma in Public Administration and Management from S.I.T International College of Malaysia which had also been forged.

Particulars of the alleged fraud were set out in paragraph 5 of the petition as follows:

i) S.I.T International College has never offered such a course at all.

ii) The appellant was never admitted or registered as a student of the said college at all.

iii) Since the appellant was admitted to Nkumba University on the basis of a forged Diploma purportedly from S.T.I International College of Malaysia, his admission to Nkumba University was thus done without the exercise of due diligence and therefore wrongful and unlawful ; and the degree certificate awarded to him by the said University was accordingly invalid.

The respondent further averred that when the appellant submitted the Diploma from Malaysia to the National Council for Higher Education (hereinafter referred to as the NCE) , for verification and equation to "A" Level, it refused to do so, after discovering the fraud and instead directed the Vice Chancellor of Nkumba University to withdraw the degree certificate from the appellant.

The respondent also averred that he brought the matter of the fraudulent documents to the attention of the Electoral Commission as well, but the Commission upheld the appellant's nomination.

The respondent sought the following reliefs from court:

i) A declaration that the Degree Certificate awarded to the appellant by Nkumba University is null and void.

ii) A declaration that, consequently, the appellant does not hold the necessary or required qualifications to be elected as a Member of Parliament.

iii) An Order nullifying the election of the appellant as the Member of Parliament for Bukoto South Constituency; and declaring the parliamentary seat vacant.

iv) An order awarding costs of the petition to the respondent.

The petition was accompanied by the affidavits of the respondent together with other affidavits deponed in support including that of Hajah Noraihan Haji Mohamad Adnan , the Honorary Consul of Uganda in Malaysia.

In his answer to the petition, the appellant denied the allegations and maintained that at the time of nomination, he had the minimum academic

qualifications required by law to be elected as Member of Parliament and that for his nomination, he presented valid academic documents namely:

- A Higher Diploma certificate in Accountancy which he had obtained from the Association of Professional Accountancy Students(APAS) on the 3RD September 1988; and
- A degree from Nkumba University.

He further contended that his admission to Nkumba University was proper, valid and lawful as it was NOT based on the Diploma from S.I.T International College of Malaysia, but it was on the basis of:

- The APAS Higher Diploma Certificate in Accountancy;
- a Higher Diploma in Business Administration from DATAPRO Business Institute; and
- Mature Age and working experience.

Lastly, the appellant contended that since the NCHE had not cancelled his degree certificate, there was no need for verification by the NHCE. His answer was also accompanied by affirmations and affidavits in support of his position, notably the one of Hon. Mwesigwa Rukutana, then Minister of State for Education and Sports.

For the foregoing reasons, the appellant prayed for dismissal of the petition with costs to him.

In the joint scheduling Memorandum filed in Court by Learned Counsel for the parties, agreed facts were that:

1. The respondent and the appellant were both nominated and they participated in the said election.

2. The appellant presented a Degree of Bachelor of Public Administration and Management of Nkumba University and a Diploma in Accountancy from APAS as his educational qualifications at the time of his nomination for the said seat.
3. The appellant does not have any Higher School Certificate awarded by any recognized school in Uganda.
4. At the time of his nomination, the appellant did not have any Certificate of Equivalency issued by the National Council for Higher Education (the NCHE).
5. The appellant was declared the successful candidate and was gazetted by the Electoral Commission on the 7th March, 2011.

The disputed facts were that:

1. At the time of his nomination, the Appellant was not academically qualified to be nominated and elected as a Member of Parliament.
2. The Appellant's nomination was partly on the basis of his purported Higher Diploma in Certificate Accountancy Studies (APAS).
3. The appellant procured his nomination on the basis of fraudulently tainted and or erroneous and invalid academic qualifications.

From the foregoing, three issues were framed and agreed upon for determination by the court, namely:

"(1) Whether the appellant's purported Diploma certificate from S.I.T International College, Malaysia, is fraudulent and invalid.

(2) Whether the appellant's admission to Nkumba University and subsequent award of the degree in Public Administration and Management was valid.

(3) Whether at the time of his nomination, the respondent possessed a minimum formal education of Advanced Level standard or its equivalent as required by law."

Counsel also summoned, with court's assistance, witnesses who were cross-examined, notably, Ambassador Yeko Acato , the Executive Director of the NHCE.

After hearing the petition, the learned trial Judge, in a long and reasoned judgment, answered the first two issues in the affirmative and the third issue in the negative. Consequently, the judge allowed the petition and made the following declarations and orders:

"(i) The Degree certificate Nkumba University Awarded the respondent is null and void.

(ii) The respondent did not have the requisite minimum qualifications to be nominated and elected as a Member of Parliament; hence, his election contravened the provisions of section 4 of the Parliamentary Elections Act.

(iii) The election, return, and gazetting of the respondent as the Member of Parliament for Bukoto County South Constituency is hereby nullified; I declare the seat vacant.

(iv) Fresh elections must be conducted by the Electoral Commission in that Constituency in accordance with the provisions of the law.

(v) The respondent shall pay the petitioner the full costs of this petition."

The appellant was aggrieved by the above decision and orders and lodged this appeal initially based on four grounds, namely that:

(1) The learned trial Judge erred in law and in fact when he held that the respondent had established a prima facie case sufficient to shift the burden of proof that the appellant had fraudulently obtained a diploma in Public Administration and Management from S.I.T International College, Malaysia, onto the appellant.

(2) The learned trial judge misdirected himself on the law relating to the evidential burden of proof of fraud which was specifically pleaded by the respondent thereby reaching a wrong conclusion that the respondent had proved fraud on the part of the appellant.

(3) The learned trial judge erred in law and in fact when he held that hearsay evidence adduced by the respondent was admissible and relied on that evidence in support of the respondent's case.

(4) The learned trial judge erred in law and in fact when he failed to properly evaluate the evidence on record thereby arriving at a conclusion that the appellant did not have the minimum academic qualifications at the time of nomination as required by law.

At the commencement of the hearing, counsel for the appellant added a 5th ground of appeal, with leave of Court. It states that:

"(5) The learned trial Judge erred in law and fact when he held and found that the Diploma award by S.I.T International College to the appellant had been proved to be fraudulent and to have been forged by the appellant."

At the hearing of the appeal before us, the appellant was represented by Mr. Mcdusman Kabega, Mr. Didas Nkurunzinza and Mr. Sam Sserwanga of M/S Tumusiime, Kabega & Co. Advocates and M/S Bitangaro & Co. Advocates, respectively.

The respondent was represented by Mr. Caleb Alaka, Mr. Julius Galinsonga and Mr. Samuel Mugiyizi from the law firms of M/S Alaka & Co. Advocates and M/S Mwema & Mugerwa & Co. Advocates, respectively.

Both parties adopted the legal arguments contained in their conferencing notes filed in on court which they supplemented with oral arguments. Mr. Kabega argued grounds 2 and 5 together and then ground 1. Mr. Nkurunzinza argued grounds 3 and 4; and Mr. Sserwanga made some additional submissions on ground 1. Counsel for the respondent followed the same order.

Let me from the outset restate the principles that guide this Court, being a first appellate court which are well settled and repeated in a wealth of authorities in our courts, notably, **Selle vs Associated Motor Boat Co. Ltd and Others Ltd, 1968 EA 123** , where it was stated that:

"An appeal to this court from a trial of the High Court is by way of a retrial and the principles upon which this court acts are well settled. Briefly put, they are that this Court must consider the evidence, evaluate it itself and draw its own conclusions, though

it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

(See also: **Rule 30 of the Judicature (Court of Appeal Rules) Directions S.I 13-10 and Pandya- vs- R [1952] E.A 336.**)

I shall proceed with that principle in mind, to consider the grounds of appeal.

Grounds 2 and 5:

For ease of reference, I reproduce the two grounds here, they are that:

> **"2. The learned trial judge misdirected himself on the law relating to the evidential burden of proof of fraud which was specifically pleaded by the respondent thereby reaching a wrong conclusion that the respondent had proved fraud on the part of the appellant." ; and**
>
> **"5. The learned trial judge erred in law and fact when he held and found that the Diploma Award by the S.I.T International College to the appellant had been proved to be fraudulent and to have been forged by the appellant."**

The complaints in grounds 2 and 5 concern the burden of proof and the standard of proof of fraud. Mr. Kabega submitted that in order to succeed in his claim, the respondent had to prove to the required standard of proof that the diploma from S.I.T was fraudulent and that the appellant committed the fraud directly or by implication. (See: **Kampala Bottlers Ltd vs Damanico (SCCA No. 22/92, per Wambuzi, CJ as he then was).** The required standard in cases of fraud is higher than in ordinary civil cases.

However, all the evidence adduced by the respondent was hearsay. For instance, no official from the NCHE travelled to Malaysia to collect information during their purported investigation. There is also no letter or e-mail from the NCHE to the Honorary Consul, requesting her to carry out the inquiry in Malaysia, or any evidence indicating where she took or to whom she handed over the letter from the Academic Registrar of Help International College, the successor of S.IT. There is thus no nexus between the NCHE and the Honorary Consul.

The Academic Registrar of Help International College was not also summoned to court, yet the trial judge based his decision to declare the S.I.T diploma fraudulent on the letter dated 12th December, 2010 from that Registrar.

Even the letter dated 19th August 2010 from the Assistant Registrar of S.I.T International College where it was stated that the appellant was admitted to the said College and successfully completed the diploma in issue between January 1991 and August 2000, was not put to the Academic Registrar Help International College to either accept or deny. It was the duty of the NCHE to do so, but it failed and gave no explanation for the failure.

Their investigation was thus based on e-mails only. E-mail evidence is hearsay which would also require authentication to show that it is from the person it is supposed to be from, to ensure that it is not hacked. Counsel gave the following reasons for his submissions:

Mr. Acato, from the NCHE, the witness relied upon by the respondent to prove fraud, stated at page 24 line 5 of the record of proceedings that :

"We investigated the Malaysian Diploma, we could not pass it."

Then at line 10, he stated that:

> ***"We contacted the Institution in Malaysia which allegedly awarded the Diploma. We used e-mail process from the Internet address. The communication was made by one of my assistants. We wanted to establish whether the applicant attended the Institution and obtained the award presented to us."***

On page 25 line 10, the witness went on to state that:

> ***"This correspondence from the Assistant Academic Registrar of S.I.T and we referenced it to S.I. T who came back with a capital letter No."***

However, during the course of their purported investigation in their attempt to prove the authenticity of the Diploma from S.I.T. International College of Malaysia, the NCHE officials never travelled to Malaysia.

Such evidence cannot be said to have provided the strict proof and the required standard. The trial judge therefore erred in his finding on insufficient evidence, and for that reason, his finding should not be allowed to stand(SEE ; **Kampala Bottlers Ltd vs Damanico (U) Ltd (SCCA No. 22/92** per Wambuzi C.J, as he then was).

In characteristically lengthy submissions, Mr. Alaka supported the findings of the learned trial Judge that the Diploma award by S.I.T College to the appellant had been proved to be fraudulent and to have been forged by the appellant. He advanced the following reasons for his position:

Ordinarily, by dint of section 106 the Evidence Act, in civil proceedings, when any fact is specifically within the knowledge of any person, the burden of proving that fact rests upon that person. In light of the above section of the law therefore, the facts concerning the authenticity of the appellant's documents, if at all they were authentic, which is denied, could only have been in his (appellant's) knowledge and, the duty to prove the same rested with the appellant and in requiring him to prove the same, court was not shifting the burden at all.

Secondly, the burden of proving the authenticity of impugned academic qualifications or documents rests with the one who relies on it. This position of law was settled by the Supreme Court of Uganda in the *locus classicus* case of ***Abdul Bangirana Nakendo vs Patrick Mwondha, Supreme Court Election Petition Appeal No. 9 Of 2007,*** where Katureebe JSC in his lead judgment authoritatively pointed out that:

> ***"… the duty to produce valid certificates to the Electoral Authorities lies with the intending candidate for elections. Where the authenticity of those certificates is questioned, it can only be his burden to show that he has authentic certificates."***

Given that the academic documents whose authenticity and integrity was being questioned belonged to the appellant and given that it is the same academic documents that the appellant submitted to the Electoral Commission for his nomination and election, then within the terms of S. 106 of the Evidence Act and the judgment of Katureebe, JSC, in **Abdul Balingirira Nakendo vs Patrick Mwonda (**supra**),** it was his burden to prove that the documents that were being questioned were actually authentic, which burden he miserably failed and/or ignored to discharge.

The position of the law as stated by the Supreme Court of Uganda bound the learned trial Judge and he aptly relied on the same to make the finding on page 18 of the judgment that:

> ***"One would have expected him to have spared no effort to secure, lay before court, cogent evidence of the validity of the impugned award."***

Regarding the standard of proof, Mr Alaka was brief, he submitted that according to section 63 of the Parliamentary Elections Act, 2005, it is on the balance of probabilities. (See: **Paul Mwiru V Hon. Igeme Nathan Nabeta & Others, EPA No 6 of 2011(CA).** The case of **Kampala Bottlers Ltd vs Damaniku** (supra) in his view, was a case of land, it is thus distinguishable from the instant case.

Thirdly, Mr. Alaka contended that the pleadings were very clear and the evidence was not hearsay. The respondent stated his case clearly in the petition and the correspondences annexed thereto. In particular, the respondent set out in details the particulars of the alleged fraud in paragraph 5 of the petition. The petition was supported by his affidavit to which he had attached:

- a copy of the said Degree Certificate;
- a letter from Nkumba University addressed to the Assistant Executive Director of the NCHE indicating that the appellant was admitted to the Degree course on the basis of the Diploma in Public Administration and Management;
- a copy of the Diploma from S.I.T. International College;
- a copy of an application for a Certificate of Equivalence;

- e-mail communication showing that the award of the Diploma was fraudulent;
- a letter from NCHE to Nkumba University to withdraw its Degree awarded to the appellant.

In order to prove that the said Diploma was fraudulent, the respondent had further filed the affidavit of Hajah Noraihan Mohamed Adran, the Honorary Consul of Uganda to Malaysia who stated that in 2010, she received communication from the NCHE inquiring about the existence of an institution in Malaysia known as S.I.T International College, about one of their former students, who is the appellant and; whether the college offered a course in Public Administration and Management. On the 25th October 2010, she contacted the Academic Registrar of the said institution called Madam Najarana Jantan and inquired about the issues raised by the NCHE. Madam Najarana wrote to her on the 13th December 2010, clarifying the fact that S.I.T International College had been renamed HELP International College of Technology (HITC). Madam Najarana had confirmed to her, that based on the record of the previous management of S.I.T International College, there was no documentation to support the claim that the appellant had ever been registered or graduated as a student of the same college and that there was never any record suggesting that the S.I.T International College was running a Diploma programme in Public Administration and Management. Based on that information, she had concluded and believed that the appellant never attended S.I.T International College and that the purported Diploma in Public Administration and Management was not genuine. She attached a copy of the said letter to her affidavit.

The respondent had also adduced evidence of the affidavit of Mr. Nsubuga Kevin Charles, at the material time working as a Legal Assistant with M/S Mwema & Mugerwa Advocates, the respondent's lawyers, in which the said

lawyer had submitted documents showing that the appellant's Diploma Certificate from S.I.T International College was fraudulent.

At the hearing of the petition, counsel for the respondent had requested also for some witnesses who were summoned by court. They included Ambassador Yeko Acato, PWI, who testified at p. 24 of the record of proceedings that:

> ***"…We contacted the institution in Malaysia which allegedly awarded the Diploma. We used e-mail process from the Internet address. The communication was made by one of my assistants. We wanted to establish whether the applicant attended the institution and obtained the award presented to us… the Malaysian Institution denied awarding the Diploma to the applicant and the award which they stated has never been run at the institution. We accordingly summoned the applicant to inform him of our findings. He could not defend the position. Since he had presented to us a degree certificate, we advised him to proceed for nomination as we did not have to equate it. The following day, he came back with a Diploma from APAS."***

Mr. Acato had further stated at p. 25 line 10 of the record of appeal that:

> ***"…This is correspondence from the Assistant Academic Registrar of S.I.T and we referenced it to S.I.T who came back with capital letter "NO". (Shown C4). This is a letter from the Applicant submitting a Diploma from APAS. We found that the institute had closed sometime ago. We located someone who had been principal of the college but now working in Kampala City Council. He could not answer whether the applicant had been a student of the college and had got the award of a***

Diploma; as well as the qualification used to obtain the award of Diploma. He could not satisfactorily explain or answer."

At page 26 of the record of proceedings, line 11, and the witness explained that he had confirmed that the appellant was admitted to Nkumba University basing on the Diploma in Public Administration from S.I.T International College, Malaysia. The letter from Nkumba University is found at page 153 of the record of proceedings. The letter is dated 13th August 2010, signed by Prof. W. Muyinda Mande addressed to Mr Acato to the effect that "*Muyanja Mbabaali was admitted to the degree course in September 2000, on the basis of the Diploma in Public Administration and Management."*

PW3, Wilson Muyinda, the Academic Registrar of Nkumba University had also testified at page 37 line 9-16 that:

"…With regard to Muyanja Mbabaali, we wrote to S.I.T and DATA PRO. However, the Post Office returned the letter to S.I.T and APAS as they could not be located. DATAPRO did not respond, we used the addresses on the transcript. The University could not proceed further with the inquiry as there was an injunction by Anifa Kawooya."

The appellant was served with the petition, the affidavit in support and all annextures accompanying the affidavit. However, in both the answer to the petition and the supporting affidavit, the appellant had literally run away from the Diploma in Public Administration and Management awarded to him by S.I.T International College, Malaysia and did not respond or rebut the adverse allegations against him contained in all the annextures to the affidavit of the respondent at all.

The appellant instead maintained in his answer to the petition, that his admission to Nkumba University was proper, valid and lawful as it was based on the strength on the Higher Diploma Certificate in Accountancy obtained from APAS, Mature Age entry and work experience and DATAPRO Business Institute; and NOT the Diploma in Public Administration from S.I.T as alleged.

The answer was accompanied by an affidavit affirmed by the appellant where he deponed in paragraph 6 as that:

> ***"6. In reply to paragraph 5 (c), I was admitted to Nkumba University on the strength of a Higher Diploma in Accountancy from APAS, a Diploma in Business Administration from DATA PRO Institute Entebbe, and my working experience."***

The appellant also filed a supplementary affidavit where he did not in all the 42 paragraphs mention anything concerning the impugned Diploma from S.I.T International College which the respondent alleged was fake or fraudulent.

The appellant had also stated during cross-examination that:

> ***"…I signed my response to the petition personally after reading through it. The lawyers wrote down what I had told them… when I saw the e-mail from Malaysia, I took no action."***

Then there was the appellant's own the testimony before court at pages 45 and 46 lines 21 and page 1 to 6 of the record of proceedings, respectively, where the appellant stated that:

> ***"……I learnt of the College from a Malaysian friend called Abdul Aziz who wanted a joint venture with me here. He told me***

the school belonged to a friend of his, and was one of the biggest. He took my business card and then the college wrote to me with forms through the Post Office. I had attached "O" Level and APAS. I was then admitted for a Diploma Programme in Public Administration and Management which I pursued and was awarded in 2000. I did not attend the graduation ceremony. They posted my Diploma Certificate."

Then the appellant's statement at P.45 that:

"My "O" Level certificate has Mohammed P. Mbabaali. In 1986 – 1988 I attended a course in APAS and got my first Diploma…. In the name of Mohammed Muyanja Mbabaali….."

Mr Alaka submitted that this kind of silence was canvassed in the case of **Assets Co. Ltd vs Mere Roihi & Others, [1905]** which was cited with approval in the case of **Sejjaka Ndema vs Musoke, Civil Appeal No. 12 of 1985** where Lord Lindley observed that:

"…the mere fact that he might have found out the fraud had he been more vigilant and had made inquiries which he omitted to make does not itself prove fraud on his part. But if it is shown that his suspicions were aroused and that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may properly be ascribed to him."

Mr. Alaka's then pointed out that the Diploma Certificate of the appellant from the S.I.T International University College found on page 81 of the record of proceedings bears the name Muyanja Mbabaali and wondered where the S.I.T College had left the other names which appear on the "O" Level Certificate and APAS documents, which the appellant claimed to have

submitted for admission but which had different extra names, if he had indeed used those same certificates for his admission to S.I.T International College as alleged.

Mr. Alaka further referred to page 49 of the record of proceedings lines 9-19, where the appellant stated that:

> ***"…My friend Abdulaziz had told me that the Malaysian Institute had closed. I can't remember the name of the Academic Registrar. The exams were posted and I would sit them and post them two semesters in a year. The exams would be done within a time frame at my own time and place…"***

He also referred to the testimony of Mr. Acato where the witness had stated in cross-examination at page 24 line 5-25 of the record of proceedings that:

> ***"We contacted the institution in Malaysia which allegedly awarded the Diploma. We used e-mail address from the internet address. The communication was made by one of my assistants. We wanted to establish whether the applicant attended the institution and obtained the award presented to us. The institution denied the applicant and the award which they stated has never been run at the institution. We accordingly summoned the applicant to inform him of our findings. He could not defend himself".***

He further referred to the testimony by Mr. Muyinda (PW3), the Academic Registrar of Nkumba University, where the appellant graduated with a Degree in Public Administration and Management, who had testified under cross-examination that the appellant was admitted by the Administrations

Committee of the Senate upon presentation of a Diploma in Public Administration and Management from S.I.T International College and that Nkumba University wrote to various institutions in respect of the concerned students. That in the case of the appellant, the University wrote to S.I.T, APAS and DATAPRO. However, the Post Office returned the letter to S.I.T and APAS as they could not be located. That DATA PRO did not respond. The witness testified further that the appellant wrote to say that S.I.T had closed, so he could not get a certified copy.

Mr. Alaka submitted that from the pleadings and evidence, it is clear that there was doubt raised by the respondent regarding the S.I.T Diploma, the NCHE had cast doubt on the same, the University similarly had found a problem with it, and wondered how the appellant expected the respondent to keep quiet on all this. Given the above position, the evidential burden of proof of the impugned documents lay squarely on the appellant. The learned trial Judge did not therefore misdirect himself on the law relating to the evidential burden of proof of an impugned academic document as counsel for the appellant alleged.

Regarding proof of the allegation that the Diploma award by S.I.T International College to the appellant was procured fraudulently, Mr. Alaka submitted that the learned trial Judge rightly held the same to have been creature of fraud on the basis of the evidence before him.

Mr. Alaka contended that from the time the appellant's application was submitted for the Degree Course at Nkumba University, to the time of his nomination for election to Parliament, there were many circumstances that are expected to have aroused the appellant's suspicion and the appellant testified himself at page 49 line 4 of the record of proceedings that:

"…Nkumba University wrote to me that the letter from S.I.T inquiring about the authentication of my academic documents were returned, so they wanted to know the status of S.I.T…… when I saw the e-mail from Malaysia, I took no action."

That even during the hearing, when the learned trial Judge asked the appellant why, since all the queries were raised, he had not personally followed the matter up with the College, to establish the authenticity of his award and lay the matter to rest, his reply was that he intended to do so after the case.

Mr. Alaka also attacked the appellant's character. He referred court to page 49 of the record of proceedings where the appellant had stated at lines 16 – 19 that:

"…I have called myself a Doctor. Even in my posters it appears. I was given an Honorary Doctorate by the Burk University in the Islands of Man… I did not go there. I found it in my post box." *(Sic)*

Mr. Alaka further invited court to take note of the conduct of the appellant which in his view, points to the appellant's knowledge of the doubts raised on his Diploma Award and his choice to keep quiet regarding the same evidence included:-

The three e-mails between Acato and Donnie Yong, Assistant Manager Customer Marketing Services of Help International College of Technology confirming what the Honorary Consul had communicated found on pages 86 to 88 of the record of proceedings which contained allegations which were adverse on the appellant, but against which the appellant took no action.

Mr Alaka submitted that indeed, as the learned trial Judge had observed, given the gravity of the accusation laid before court against him, one would have reasonably expected the appellant to spare no effort to secure and lay before court, cogent evidence of the validity of the impugned award.

As such, it was Mr. Alaka's submission, that in keeping quiet when his academic documents were being questioned and evidence being led to demonstrate that the same were procured fraudulently, and in choosing to do nothing about it, the only reasonable inference that could be drawn is that the appellant knew them to be fake and he feared to take any steps to verify them, for fear of knowing the truth and the same itself amounts to fraud.

Mr. Alaka submitted that it is settled law that fraud means actual fraud or act of dishonesty. He referred to the definition 4of fraud in **David Ssekajjoka Nalima vs Rebecca Musoke Civil Appeal No. 12 of 1985** per Odoki JA (as he then was) and **F.J.K Zaabwe vs Orient Bank Ltd & 5 Others SCCA No. 4 of 2006** per Katureebe JSC who relied on **Black's Law Dictionary 6th Edition, at page 660.**

I have subjected the evidence on the record of proceedings to fresh scrutiny and re-evaluation; I have also considered the law and the submissions of counsel for both parties on the two grounds.

The statement of Mr. Kabega regarding the standard of proof in cases of fraud is correct in law. The learned trial judge was alive to this and after evaluating all the evidence regarding the alleged fraudulent acquisition of the S.I.T Diploma a Certificate, he held at page 20 of his judgment that:

> ***"The purported Diploma Award by S.I.T International College was a creature of a fraudulent machination. Evidently the respondent (now appellant) was behind the forgery which was committed with his full knowledge and for his sole benefit. Indeed as was shown by evidence, he was a beneficiary of fraud for quite a while; until the moment of reckoning arrived, when he found himself without any more avenues for mischief in this regard. I am satisfied that the petitioner has proved fraud on the part of the respondent beyond a balance of probabilities; and to the standard of proof required in cases of fraud. He has fully discharged the burden of proof that lay on him; hence I resolve issue No. 1 in the affirmative."*** (the underlining is added).

The criticism that the learned trial judge lowered the standard of proof is therefore unjustified.

Regarding the burden of proof, as Mr. Alaka rightly pointed out, ordinarily, the burden of proof rests on the person making an allegation.(See: **Sections 101 and 102 of the Evidence Act and section 63 of the Parliamentary Elections Act, 2005.)** However, under section 106 of the Evidence Act:

> "**In civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person".**

On careful perusal of the judgment, I find that the learned trial judge was not only alive to this position of the law but also adressed it in great detail from page15 to 17 of the judgment where referred to and applied earlier decisions from our courts where this particular point was judicially considered, including the cases of: **Anifa Kawooya –vs- Joy Kabatsi**, **Election Petition No. 1 of 2006** (per Mukibi J.); **Babu Edward Francis –**

vs- The Electoral Commission & Elias Lukwago, Election Petition No. 10. Of 2006; and **Haji Muluya Mustapha –vs- Alupakusadi Waibi Wamulongo, Election Petiton No. 22 of 1996,** where Byamugisha J. as she then was, stated that the respondent simply had to throw a reasonable doubt on the facts in dispute since they were within the knowledge of the respondent, and the evidentiary burden of proof shifted to the respondent. I find that the respondent did raise doubts on the authenticity of the appellant's academic qualifications in his pleadings and shifted the evidentially burden of proof on the appellant.

In cases such as this one, where academic qualifications or certificates are challenged, however, the law is settled and this Court and the lower courts are bound by the unanimous decision of the Supreme Court in the case of **Abdul Balingirira vs. Patrick Mwondha** (supra) relied on by Mr. Alaka.

The facts of that case are quite similar to this one. They were briefly as follows: The appellant, Abdul Balingirira Nakendo and the respondent, Patrick Mwondha, were among six candidates who contested for the Parliamentary seat of Bukholi North Constituency, Bugiri District, during the 2006 Parliamentary Elections.

The appellant had also not attained "A" Level standard of education, so, he was nominated on the basis of a ***"Certificate of Completion of Formal Education of Advanced Level or its equivalent"*** popularly known as the "**Certificate of Equivalence**", issued by the NCHE.

The appellant was successful in the elections and was declared the winner and duly elected Member of Parliament of the said constituency. Being dissatisfied with the results, the respondent petitioned the High Court at

Jinja, seeking the nullification of the election of the appellant on grounds that the appellant was not qualified for election as a Member of Parliament due to lack of academic qualifications, notwithstanding the fact that he had been issued with a "*Certificate of Advanced Level or its equivalent*" by the NCHE. The NCHE, UNEB and Electoral Commission were co-respondents in that petition.

In his answer to the petition, the appellant also denied the allegations and maintained that he was duly qualified and had been validly nominated for participation in the elections.

The NCHE on its part, asserted that it had carried out the necessary consultations with the Uganda National Examinations Board (UNEB) as well as the Uganda Police Training School at Kibuli, where the appellant had undertaken a course, and found his papers authentic.

The Electoral Commission also denied any wrong doing, maintaining that the appellant had been duly nominated and elected to Parliament.

The learned trial Judge after evaluating the evidence, just like in the instant petition, found that the appellant's certificates were not authentic and held that the appellant lacked the requisite academic qualifications; therefore, he was not qualified to be nominated for election as a Member of Parliament. He nullified the appellant's election and ordered for a fresh election. On appeal, the Court of Appeal upheld the decision, prompting the appellant to appeal to the Supreme Court. Ground 5 which is relevant this appeal was worded thus:

"5. The learned Justices of Court of Appeal erred in law when they affirmed the trial Judge's decision of putting the burden of proof on the appellant."

In that appeal, Counsel for the appellant had also argued that the lower court had erred by shifting the burden of proof from the respondent (petitioner) to the appellant (respondent). That the petitioner was the one who had to prove that the decision of the NCHE was ultra vires. That in election petitions, the burden lies with the petitioner to prove his case.

It was thus counsel's contention that the Court erred in its finding that the appellant had failed to prove that he had acceptable post "O" Level qualifications or who the persons who had signed the two Uganda Police Force Certificates were, or why he did not go to Nairobi to get a document in proof of his attendance Course. That all these should have been proved by the respondent.

The respondent's counsel on the other hand, had opposed the appeal and supported the findings of the learned trial Judge and that of the Court of Appeal. This is what Katureebe JSC held, in the lead judgment at page 30:

"In my view, the import of Article 80 of the Constitution is that the duty to produce valid Certificates to the electoral authorities lies with the intending candidate for election. <u>Where the authenticity of those certificates is questioned, it can only be his burden to show that he had the authentic certificate.</u>

In this case the appellant indeed tried both by oral and affidavit evidence to prove the authenticity of his certificates, but failed.

<u>In my view, the question of shifting the burden of proving those certificates does not arise.”</u> (Underlining added for emphasis).

It is noteworthy that all the other Supreme Court Justices on the coram including Justice Kanyeihamba JSC, as he then was, were in full agreement with Justice Katureebe.

Similarly, in the case before us, I find that the respondent had questioned the authenticity of the appellant’s certificate that he had availed to the Electoral Commission for his nomination. He had made specific allegations of fraud against the appellant and he attached copies of the impugned documents to his affidavit in support of the petition. The petition was served on the appellant who had ample opportunity to respond to it. The respondent’s counsel had also adduced oral evidence from Mr. Acato, the Executive Director of the National Council for Higher Education (the NCHE) PW1. Based on the authority of **Abdul Balingira vs Patrick Mwhondha** (Supra). The appellant had the burden to prove the authenticity of the certificates.

I have also perused the appellant’s response to the petition, his affidavit in reply together with his supplementary affidavit filed later.

In order to controvert the allegations, he had to adduce cogent evidence to prove that he had applied, was admitted to S.I.T International College and that the college offered that course. He could have, for instance, produced a copy of the admission letter or relevant documents/e-mails and or the prospectus to prove that S.I.T College had not only admitted him for the said course but that S.I.T College offered the said course as well. It is common knowledge that even online courses are advertised for applicants to make choices. The appellant failed to do so.

Even when he was orally cross-examined in court, the record shows that the appellant still did not address the specific allegations. There were indeed serious gaps in his testimony concerning the requirements and mode of application to the college and the courses offered by the said college as the judge found.

Further, Abdul Haziz, his Malaysian business colleague who allegedly connected him to the college and informed him about the closure of the institution never filed any affidavit to corroborate the appellant's evidence concerning the College. At best, therefore, the appellant's evidence in that regard remained hearsay.

Further still, the appellant in his own oral testimony confirmed the evidence of Mr. Acato that he was told that S.I.T. College was closed when he inquired about it. But then the judge noted that the appellant had earlier on attached a copy of a letter dated August 2010 purportedly written by the Assistant Registrar of the said College on the official letter-head of S.I.T International College! When the trial judge asked him why he had not personally followed up the matter since it affected the authenticity of his Diploma, the appellant casually told the trial Judge that he would do so after the court case. This is what the judge stated at page 19 of the judgment:

> ***"When the respondent took the witness stand, he testified that the Malaysian business colleague, who had earlier linked him with the college, had informed him that the college had been closed. If it were so, that the school had been closed, then it would seriously jeopardize the worth of the letter from the assistant Registrar dated August 2010, which is on SIT International College official letterhead. Given the adverse***

communication from the two members of the administration staff of the College (one to the NCHE and the other to the Uganda's Consul), I sought to know why he had since then not personally followed up the matter with the college to establish its authenticity of this award, and lay this matter to rest. He stunned me with the response that he intended to do so after the conclusion of the court case…"

In conclusion on this ground, just like the trial judge, I do not find any direct answer to the specific allegations in paragraph 5 (i) and (ii) of the petition in respect to the Diploma from SI.T. For this reason, the finding by the learned trial judge that the appellant did not make a serious effort at addressing these specific allegations of fraud both in his answer to the petition and affidavit in support of the petition or his supplementary affidavit has a basis. The record is also crystal clear that the learned trial Judge dealt with the issue of fraud at great length and after carefully evaluating the evidence, he arrived at the right conclusion. In the premises, he cannot be faulted.

Ground 2 and 5 therefore would fail.

Ground 1:

The complaint in ground 1 is that the learned trial Judge erred in law and in fact when he held that the respondent had established a prima facie case sufficient to shift the burden of proof that the appellant had fraudulently obtained a Diploma in Public Administration from S.I.T International College, on the appellant.

As Mr. Alaka pointed out, rightly in my view, this issue overlaps with the issues in grounds 2 and 5 of the appeal already dealt with above since it also

arose from issue No. 1. As stated earlier in this judgment, the authority of **Abdul Balingira Nkendo vs Patrick Mwondha (supra),** is to the effect that the issue of shifting the burden of proof in cases where the authenticity of academic qualifications are questioned, does not arise. This was a petition challenging the academic qualifications of the appellant; the question of shifting the burden of does not therefore arise.

Even then, I am of the considered view that the evidence adduced by the respondent, when considered in its totality, was more than sufficient to throw doubt as to the authenticity of the appellant's academic qualifications thereby establishing a prima facie case. A *prima facie case* is one that will entitle a party to judgment if no evidence to the contrary is adduced by the opposing party.(see: **Black's Law Dictionary 6th Edition, page 11 89-90).** It was incumbent on the appellant to adduce evidence to rebut the allegations raised by the respondent. He never made any effort to do so. On the contrary, the evidence on record points to all the efforts he made to distance himself from the Diploma from Malaysia.

This ground would also fail.

Ground 3

The learned trial judge erred in law and in fact when he held that he held that hearsay evidence adduced by the respondent was admissible and relied on the evidence in support of the respondent's case.

The hearsay evidence, according to Mr. Nkurunzinza included the affidavit by the Uganda's Honorary Consul to Malaysia found at page 105 – 107 of the record of proceedings. It is dated 24th March 2011. It was filed on the same date as the petition.

His contention is that the Parliamentary Elections (Election Petition) Rules, S.1 141 – 2 provides in Rule 3 (c) that *"petition"* means an election petition and includes the affidavit required by the rules to accompany the petition.

Rule 4(8) provides that a petition shall be accompanied by an affidavit setting out the facts on which the petition is based together with a list of documents on which the petitioner intends to rely.

The Oxford Advanced Learners Dictionary defines "*an*", *'a'* and "*affidavit*" at pages 1 and 25 and the word "singular".

That it is clear under the Rules, that only one affidavit accompanies a petition. That the affidavit of the Honorary Consul is in support of the petition and not an accompanying affidavit and therefore constitutes hearsay.

Secondly, Mr. Nkurunziza complained that the judge failed to rule on the admissibility of the Honorary Consul's affidavit when an objection was raised at the trial concerning some of its paragraphs based on information. Instead the judge dealt with the objection in the judgment where he stated that, in presenting the evidence of their findings from S.I.T International College, both Ambassador Acato and the Uganda Honorary Consul did not adduce hearsay evidence.

The main contention of Mr. Nkurunziza is that the evidence of the two witnesses is only admissible to prove that they made inquiries but not as proof of what the findings of the inquiry were, in so far as the allegations of fraud in the petition are concerned. The particulars of fraud in the petition stated at page 6 of the record are averments by the petitioner. The learned

Judge could not rely on the fact of inquiries made by Mr. Acato and the Honorary Consul to establish the evidence of fraud that the College never offered any programme leading to the award of Diploma in Public Administration and that the appellant was never admitted or registered as a student at S.I.T International College.

In his judgment the judge stated that:

> ***"Given the adverse communications from the members of the administrative staff of the College (one to the NCHE and the other to the Uganda Consul…."***

In Mr. Nkurunziza's view, this indicates that the judge placed reliance on this communication as evidence to be rebutted by the appellant. He further submitted that in **Constitutional Appeal No.1 of 1997, Major General D. Tinyefunza vs Attorney General**, the Supreme Court held that where the Constitutional Court had placed reliance on newspaper reports to support the petitioner's claims that his rights were under threat, the reports were inadmissible and offended the hearsay rule.

Mr. Alaka disagreed with him. He contended on his part that the learned trial Judge did not at any point hold that hearsay evidence was admissible. He further described Mr. Nkurunza's argument that only one affidavit must accompany a petition as the most bizarre position one can take with respect to evidence in civil matters. He argued that in election matters, there is no minimum or maximum number of witnesses required to prove a given fact.

In support of his argument on this point, Mr. Alaka relied on section 133 of the Evidence Act which provides that:

"Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact."

Regarding e-mails, Mr. Alaka submitted, that the arguments by Mr. Nkurunziza in respect of e-mail exchanges between the NCHE and Help International Technology, the successor in title of S.I.T International College and the one between that institution and Uganda's Honorary Consul to Malaysia as well as the authorities cited, were based on the Stone Age era. According to him, e-mail evidence is not hearsay in light of the clear provisions of section 8 of the Electronic Transactions Act of 2011.

Mr. Alaka also asserted that there was no need for anyone to travel to Malaysia to investigate the appellant's documents as argued by Mr. Nkurunziza when the appellant himself had testified in court that he had done everything online; that is, he applied for, was admitted and pursued the Diploma in issue on-line and did not even attend the graduation ceremony in Malaysia. His Diploma Certificate was also posted to him.

Mr. Alaka repeated his earlier argument that, the said e-mails were annexed to the petition, the appellant was aware that they cast doubt about his Diploma from S.I.T International College, and in his own words, he took no action. According Mr Alaka's interpretation, the appellant conducted himself in this manner simply because he was aware that the e-mails were not hearsay but the truth.

Mr. Alaka distinguished the case of **Major General David Tinyefunza vs Attorney General (**supra**)** cited by Mr. Nkurunziza from the instant appeal,

arguing that in the instant appeal, unlike in that case, there was no reliance on newspapers.

I have had occasion to peruse the record of proceedings in light of the foregoing submissions as well. Below are my findings and conclusions.

First of all, it is true that Mr. Nkurunziza raised an objection at commencement of the proceeding in court regarding the admissibility of the affidavit of the Honorary Consul. (*see page 20 of the record of proceedings).*It is also true that the learned trial judge did not rule on the objection at that time and did so in his judgment. However, the learned trial Judge was, in my judgment, at liberty to either rule on the objection at the time it was raised or in his judgment. He chose the latter and there is nothing wrong with his decision under our rules of procedure and practice.

Secondly, the judge never held anywhere in his judgment that hearsay evidence is admissible. He actually said the exact opposite at page 17 of the judgment where he ruled that:

> ***"Contrary to the submissions made by counsel for the Respondent, in presenting to court evidence of their findings from S.I.T International College both Ambassador Acato and the Uganda Consul did not adduce hearsay evidence.***
>
> ***If that were so, then the letter from the Assistant Academic Registrar of S.I.T International College would suffer a similar fate."***

Thirdly, the affidavit of the Honorary Consul is not hearsay. She stated as follows:

"3. That in 2010, I received a communication from the National Council or Higher Education inquiring about the existence of an institution in Malaysia known as S.I.T International College and about one of their former students Muyanja Mbabaali and, whether such college offered a course in Public Administration and Management.

4. That on the 25th of October 2010, I contacted the Academic Registrar of the said Institution Madam Narajana Jantan inquiring about the above said issues raised by National Council for Higher Education.

5. That on the 13th day of December 2010, Madam Narajana Jantan wrote to me clarifying on the fact that S.I.T International College was renamed HELP International College of Technology in 2007.

6. That based on the records from the previous management of S.I.T International College, Madam Narajana Jantan confirmed to me that there was not documentation to suggest that the Respondent (Muyanja Mbabaali) had ever been registered or graduated as student of the said College.

7. That furthermore, according to Madam Najarana Jantan, there were never any records to suggest that S.I.T International College was running a Diploma program in Public Administration and Management. (A copy of the letter is hereby attached and marked Annexture 'A').

8. That based on the foregoing facts I verily believe that the Respondent has never been to the above mentioned Institution and the Diploma in Public Administration and Management that he purportedly obtained from the said institution is not genuine." (Underlining is added for emphasis)

The above quotation shows clearly that the Honorary Consul disclosed the source of her information and the copy of the letter mentioned in paragraph 5 of the affidavit from Madam Narajana Jantan, the Academic Registrar dated 13th December 2010 was attached to the said affidavit. The letter reads:

"Dear Hajah Noraihan Haji Mohamad Adnan

Re: <u>Mbabaali Muyanja</u>

We refer to your letter dated 25th October 2010 and to the tele-conversation between your goodself and our Puan Narajana Jantan.

Please be informed that HELP International College of Technology (HICT) took over from the previous management known as S.I.T International College only in 2007.

Nevertheless, based on the records that we have from the previous management we do not have any documentation to suggest that this student was a registered student of the said college nor are there any records to suggest that S.I.T International College was running a Diploma in Public Administration and Management.

We regret to note that we are unable to assist you any further on this matter since we were not in charge during the period in issue here.

Thank you.
Yours sincerely,
Narajana Jantan

Registrar
HELP International College of Technology

Copy: YBhg Datuk Dr. Paul Chan
Dr. Lim Chooi Peng
Madam Vasantha P"

It was up to the appellant's counsel to summon the Honorary Consul for cross-examination, with leave of court, of course, if he doubted her evidence. However the record shows no such request was made. Her evidence was therefore unchallenged.

Further, whilst it is true that Rule 4(8) of the Parliamentary Elections (Election Petitions) Rules provides that:

> ***"(8) The petition shall be accompanied by an affidavit setting out the facts on which the petition is based together with a list of any documents that the petitioner intends rely on";***

It is not correct in my view to argue that the affidavit of the Honorary Consul is hearsay simply because it was filed on the same date with the petition. In my view, that fact alone cannot render an affidavit hearsay. That affidavit, to me, formed part of the affidavit evidence that the respondent adduced in support of the petition as provided by Rule 15 which provides that:

> ***"… all evidence at the trial, in favour or against the petition shall be by way of affidavit".***

When a similar argument was advanced by the appellant's counsel in the case of **Bakaluba Peter Mukasa v Namboze Betty Bakireke, Election Petition Appeal No. 4 of 2009 (SC).** Katureebe JSC, in the lead judgment stated inter alia that:

> ***"…even where there is irregularity in the pleadings or a departure from the pleadings, but as long as the opposite party had a fair notice of the case he has to answer and does answer it and adduces evidence accordingly, and has suffered no injustice, the court will not allow such irregularity or departure to frustrate the determination of the case".***

Similarly, in the instant case, the appellant had a fair notice of the case against him namely, that he had acquired his academic certificates particularly from S.I.T Malaysia fraudulently as he was never admitted to that College and the College did not in any case offer that alleged Diploma Course. He chose not to address it. He only had himself to blame, not the trial Judge.

Further, the e-mails between Mr. Acato's and the Honorary consul as well as the HELP College of Technology the successor to S.I.T International College s are also not hearsay. Mr. Acato stated that he instructed his assistant to send the e-mail. The e-mails were responded to by the addressees. Mr. Acato was produced in court and was subjected to cross-examination. His evidence was unchallenged. It was further corroborated by the e- mails from Dennie Yong, the Assistant Manager, Customer Marketing Services on pages 86 to 88 of the record where he wrote in response to inquiries by the NHCE that:

> "**We are formerly known as SIT International College and now renamed HELP INTERNATIONAL COLLEGE OF TECHNOLOGY (HICT). I had checked with our Registrar, please be informed that Muyanja Mbabali is NOT registered with us. We wish to clarify that our institution DOES NOT offer any programme in Public Administration".**

The appellant in cross-examination confirmed this when he state that:

> "***My friend Abdulaziz had told me that the Malaysia institute had closed."***

In the circumstances, the judge rightly ruled that there was no need to travel to Malaysia in this dot-com era. Indeed, as the judge observed, this argument is self defeating, if it is true that the appellant was able as alleged, to apply study, sit exams and graduate online without stetting foot in Malaysia. The appellant had also purportedly obtained a Doctorate by correspondence.

E-mail evidence is not hearsay evidence S.8 of the Electronic Transactions Act of 2011 provides that:

> "(1) **in legal proceeding, the rules of evidence shall not be applied to deny the admissibility of a data message or an electronic –**
>
> **(a) Merely on the ground that it is constituted by a data a message or an electronic record;**
>
> **(b) If it is the best evidence that the person adducing the evidence could reasonably be expected to obtain; or**
>
> **(c) Merely on the ground that it is not in its original form."**

Lastly, there was no dispute that Madame Adnan was the Honorary Consul of Uganda to Malaysia. She therefore acted in that capacity and as I stated before, her evidence was amply corroborated by other evidence on record. The authority of Tinyefunza is distinguishable. There was no newspaper evidence in the instant case.

For the foregoing reasons, I find merit in the submissions of Mr. Alaka. Ground 3 would also fail.

Ground 4:

The learned trial judge erred in law and in fact when he failed to properly evaluate the evidence on record thereby arriving at a conclusion that the appellant did not have the minimum qualifications at the time of nominations required by law.

Mr. Nkurunziza submitted that the judge did not evaluate the evidence on record properly and thus reached a wrong finding that the appellant lacked the minimum academic qualifications for a Member of Pariament which is, according to section 80 of the Constitution and section 4 of the Parliamentary Elections Act, "***a minimum formal education of Advanced Level or its equivalent".***

Mr. Alaka supported the learned trial Judge and submitted that the Judge had properly evaluated the evidence and had arrived at the right conclusion.

The principle is that a first Appellate Court, after evaluating the evidence on record, must not interfere with the findings of the trial court merely because it is doubtful that it would have arrived at the same decision had it been sitting as the court of first instance. The Court of Appeal can only interfere with findings of fact if it is satisfied that the trial judge was wrong.(***See: Bakaluba Peter Mukasa v Namboze Bakireke (supra).***

The above principles are relevant to this issue. I have carefully perused the record of proceedings containing the evidence that was adduced before the learned trial judge in its entirety and read the judgment as well.

First of all, I note the particular and systematic manner in which the trial Judge first summarized the facts before he set out to consider in details the evidence adduced from both sides as he dealt with each of the three issues framed for determination by court.

The first issue concerned the validity of the Diploma Certificate from S.I.T International College, Malaysia. I have already dealt with this issue in the preceding grounds but briefly and, for the purposes of this ground of appeal, I take note of the fact that the Judge considered the respondent's affidavit sworn on the 24th March 2011 as well as the following attachments which formed the basis of his petition:

a) A certified copy of a Diploma in Public Administration and Management certificate from S.T.I International College of Malaysia dated the 16th of August;
b) A Certified copy of an academic transcript for the Malaysian Diploma in Public Administration and Management, showing that the appellant had completed the course on the 4th August 2000 and graduated on the 16th August 2000;
c) Correspondences between Yeko Acato of the NCHE and Dennie Yong of HELP International College of Technology, Malaysia, dated 19th to 24th August, 2010,
d) A letter dated 13th December 2010, from Najarana Jantan (the Registrar of HELP International College of Technology) to Hajah Noraihan Haji Mohamad Adnan (the Honorary Consul of Uganda in Malaysia)

The judge further considered the affidavit by the said Honorary Consul dated 24th March 2011 which was also filed in support of the petition, where she deposed that upon request from the NHCE, she obtained information from the Academic Registrar of S.I.T International College to the effect that the S.I.T International College had been renamed HELP International College of Technology, S.I.T International College had never offered the course in Diploma in Public Administration and Management allegedly attended by the appellant and the appellant was never registered as a student thereat. A copy of that letter was annexed as "A" to the Honorary Consul's affidavit.

Further to the above, the judge considered the affidavit by one Nsubuga Charles, a Legal Assistant at Mwema and Company Advocates, the law firm which represented the respondent to which he had attached certified copies of the following documents obtained from the NCHE, pertaining to the appellant's academic qualifications:

i) The appellant's application to the NCHE for certificate of equivalence;

ii) E-mail correspondence between Yeko Acato of the NCHE and Dennie Yong Weng of HELP International College of Technology of Malaysia;

iii) Appellant's academic transcript from S.I.T International College;

iv) Letter from an Assistant Academic Registrar of S.I.T International College verifying that the respondent got a Diploma from that college;

v) Letter from Francis Mpairwe Kakuru (former Registrar/Principal of APAS) (on APAS letter head with no date)

vi) Letter from Nkumba University to the NCHE (stating that the admission to the said University had been on the basis of the appellant's diploma in Public Administration and Management); and

vii) The Appellant's Diploma Certificate from SIT International College.

The judge also considered the oral testimony of The Executive Secretary of the NCHE Mr. Yeko Acato who in his testimony impugned the appellant's award from S.I.T International College, stating that he had investigated the same and found that it was not genuine since the college never offered the course the appellant allegedly attended nor was the appellant's name registered in that college.

The learned judge then went on to evaluate the evidence of the appellant's side starting with the appellant's affidavit in support of his response and found that he had not made any reference to the validity of the impugned Malaysian Diploma Certificate. The judge found that the appellant had instead justified his nomination as having been based on the APAS Diploma Certificate and the Nkumba University Degree certificate. The Judge also noted that it was only when being cross-examined, that the appellant testified that the S.I.T International College, Malaysia awarded to him a Diploma Certificate in Public Administration and Management in 2000, following his pursuit of the course by correspondence; and that he had been linked to that institution by a Malaysian businessman.

At the end of the exercise, the judge concluded that the Diploma was a fraud. His conclusion, as stated earlier on in this judgment, is in my view, fully supported by the evidence on record.

Issue No.2 concerned the validity of the Degree in Public Administration and Management of Nkumba University.

It had been pleaded that Nkumba University had wrongly admitted the appellant to study for the said degree based on a forged or fraudulent Diploma purportedly from S.I.T International College in Malaysia without carrying out due diligence and thereby wrongly and unlawfully awarded the said degree to the appellant.

The appellant had denied the allegation and pleaded that:

> ***"7. ……his admission to Nkumba University was proper, valid and lawful as it was on the strength of the Higher Diploma Certificate in Accountancy obtained from Association of Professional Accountancy Students (APAS), Mature age entry and work experience and DATAPRO BUSINESS INSITITUTE and not the Diploma in Public Administration from SIT as alleged. (see annexture "c").***
>
> ***8…….he was rightly admitted, studied and was deservedly awarded a Bachelors Degree by Nkumba University which exercised due diligence in evaluating his Diploma from APAS and DATAPRO."***

The learned trial Judge in dealing with this issue evaluated:

- the appellant's application to the Nkumba University (annexture "C" to his reply to the petition);
- the appellant's reply to the petition and the accompanying affidavit plus his supplementary affidavit;
- the oral testimony of the appellant during cross-examination in court;
- the letter from the Academic Registrar of Nkumba University, Associate Prof. W. Muyinda Mande to the Assistant Executive Director of the NCHE, Mr. Yeko W. Acato, dated 13th August;
- a letter from the same Professor dated 12th April 2011 in reply to M/S Mayanja Nkangi and co. Advocates (annexture "A9" to the appellant's affidavit dated 24th May 2011 in reply to the respondent's affidavit);
- the appellant's application to the NCHE dated 10th August 2010, for verification of his academic qualifications; and
- The letter of Prof. Michael Lejeune (Deputy Executive Director, NCHE dated 3rd September 2010 to the UC, Nkumba University.

He found inter alia that, the appellant's assertion that his admission to the said University had been on the strength of his APAS and DATAPRO Business Diploma awards as well as Mature Age and Work experience; and **"NOT"** on the strength of the Malaysian Diploma, was retracted by the appellant during cross examination where he stated that this had been a mistake, because his intention was to say that the admission to Nkumba University was "NOT ONLY" based on the Malaysian award. The judge rejected this change of position in the unceremonious manner without amending the pleadings contrary to our Rules of procedure. He was right because under the law, parties are bound by their pleadings. The procedure for amendment of pleadings is also well settled.

The judge noted that even if the appellant's retraction were to be accepted, which was not the case, the judge found that the retraction actually amounted to an admission by the Appellant that the Malaysian diploma, which the judge had declared to be invalid, was actually one of those certificates which the appellant had presented to Nkumba University to secure his admission to the said University. Which means the admission to Nkumba University was based on an invalid Diploma from Malaysia. Therefore the Nkumba University Degree which the appellant had relied on as a basis for his nomination was itself invalid.

The Judge also considered the response by the then Academic Registrar Nkumba University, Professor W. Muyinda Mande to the Executive Director of the NCHE, Mr. Yeko Acato, who had sought the verification of the degree certificate and the basis of the appellant's admission to the University. The letter is dated 13th August 2010, and the judge found that the Professor had stated clearly in that letter that the appellant had been admitted to the degree course in September 2000 on the basis of a Diploma in Public Administration and Management from Malaysia only. I note that this letter was written before the elections which took place in February 2012.

The judge then compared that letter with the one by the same Professor On 12th April 2011, which was written after the elections, in reply to M/S Mayanja Nkangi & Co. Advocates, where the Professor was more detailed and had replied that: *the appellant was admitted to Nkumba University based on work experience, Diploma in Publication from S.I.T, Diploma in Accountancy from APAS and Diploma in Business Studies from DATAPRO.* The judge observed that, one would have expected the Professor to treat the request from the NCHE more seriously, since to his full knowledge the

Professor admittedly knew that it is the NHCE that had the statutory mandate to ensure compliance with standards in higher education in Uganda and to have made a similar if not more detailed list in his response to the request from the NCHE.

I have read both letters and I find that the observations by the judge is justified in light of the clear provisions of the law. I also share the view that the professor was at pains to give so much detail in his latter correspondence for the purpose of this case. It is indeed very detailed. The Professor added more details in the letter dated 12th April 2011 addressed to Mayanja Nkangi & co. Advocates, the Professor included:

> ***"work experience (Director Medical Stores, National Chamber of Commerce in Charge of Investments for Rwanda, Burundi and Congo, Chairman BIM Consultancy I.T Company, Executive Director Southern Investments and Executive Director INTREPCO Ltd); Diploma in Public Administration from S.I.T. Diploma in Accountancy from APAS and Diploma in Business Studies from Datapro, normally any Diploma is sufficient for admission to a degree course.)"***

The judge then took a very close look at the appellant's application for verification of his academic qualifications and issuance of a certificate of equivalence which the appellant submitted to the NCHE, dated 10th August 2010 particularly, the attachments. He found that it was the Malaysian Diploma award which the appellant had indicated in the application and which he had sought to be equated with "A" Level Standard as the academic qualification he had obtained after "O" level and he had even attached a copy to the application. The judge noted that it was only by a letter to the Executive Director NCHE, dated 17th September 2012, that the appellant

belatedly submitted his APAS Diploma Certificate for consideration by the NCHE, claiming that APAS had been closed and he was of the mistaken view that the certificate might not be taken to be valid.

At this point the judge addressed the entries made on the Nkumba University Entry application form (page 101 - *Annexture CX to his affidavit in reply)* and found that the ink used to enter the word **"APAS"** on the said form was manifestly different from the one that had been used in entering the names of the other institutions. The judge stated that this fact was put to the appellant in cross-examination and he had admitted it but explained that he had run out of ink while filing the form and had to use another pen. The judge however found that the word **"APAS"** had been entered twice on the application form; namely, under Part II (a) where institutions are listed and Part II(b) where provision is made for particulars of the results of the awards from those institutions. He concluded that the only plausible explanation why the appellant's ink treacherously ran out of ink every time he wrote the word **"APAS"** was that the inclusion of **"APAS"** was an afterthought.

I have reproduced the document to illustrate the point. This is what it looks like, with the information hurriedly filled in black ink using a fountain pen. Part II is entitled: "**EDUCATION BACKGROUND & EMPLOYMENT STATUS".** Part II (a) says: **"Give all schools and colleges attended"**. The columns look like the one below:

"(a)

Schools/college <u>(most recent first)</u>	**From**	**To**	**Post held e.g**
1. <u>SIT International</u>	1999	2000	Diploma

College			
2. DATA PRO Institute	1996	1998	Diploma
3. Mengo Senior School	1971	1974	"O" Level
4. Loitokitoki M. School	1972		Certificate
5. Kikungwe P. School	1962	1970	PLE
6. APAS	1986	1988	Diploma

Part II (b) Results of Examination sat ('O' and 'A' Levels) (Please attach photocopies of results certificates/slips)

'O' Level subjects	**Results**	**'A' Level subjects**	**Results**
1. English	7	SIT Diploma	'A' Level equ. (sic)
2. Bible knoedge (sic)	9		
3. History	8	DATA PRO	'A' Level eq. (sic)
4. Geography	9	B/Institute	
5. Luganda	6		
6. Mathimatics (sic)	9	APAS	Diploma
7. SSP Biology	9		
8. Phyisical science (sic)	9		
9.			

10.			

(The underlining under '**APAS**' is added for emphasis.)

Indeed **"APAS"** was written in a different handwriting in both columns. The explanation by the appellant is found on page 47 where the appellant stated during cross-examination that:

> ***"…when I was writing APAS the first pen had run out of ink so I used another pen."***

"APAS" also appears last under part (a) where instructions to applicants were clearly to indicate all the schools/colleges attended with the most recent first. It is clear from the above column that if it was not an afterthought, as the Judge found**, "APAS"** would have appeared after DATAPRO.

"APAS" is also last among the courses indicated in Part (b) and under the wrong column because it is an agreed fact that the appellant had no "A" level qualifications and that the certificates had also not been equated to "A" Level by the NCHE, which is the only statutory mandated to do so. That information is therefore misleading.

The contention by the appellant that there was no requirement that an applicant to the University should enter the names of the schools/colleges attended while filling the application form is not therefore borne out by the plain and clear instructions on column reproduced above.

Why list APAS last it indeed it was the basis of his application as alleged? Why did Nkumba University not consider the S.I.T Diploma which was

indicated as No. 1 on the list? Clearly, the appellant had no plausible explanation to these questions. That being so, the Judge in my view drew the right inference that the appellant was by insisting on the APAS Certificate, running away from the S.I.T Diploma after realizing that the NCHE at unearthed information that it never existed.

It follows from the fore going, therefore, that the learned trial judge had a basis for his finding that:

> "**In light of the fact that the initial exclusion of APAS is apparently not isolated to the University entrance application, as this was repeated while seeking to have his Diploma awards equated with "A" Level, the logical conclusion one can make is that the insertion of APAS award in the University entrance form was an afterthought necessitated by the realization that the Malaysian award had failed to pass the stringent scrutiny it was subjected to by the NCHE. It must have been done recently to plug the gaping hole left by the futile reliance on the Malaysian award."**

The judge then proceeded to consider the validity of **APAS** and **DATAPRO** awards which was included by the Professor on his list of the basis for admitting the appellant to Nkumba University.

Regarding the **APAS** Diploma Certificate, the learned trial Judge evaluated the evidence adduced through:

- the affidavit of Hon. Mwesigwa Rukutana (then Minister of State Higher Education, dated 20th May 2011;

- the letter of Mr. Francis Mpairwe Kakuru dated 21st September 2010 to the NCHE (annexture R4 to the respondent's supplementary affidavit);
- the affidavit of Asasira K. Bosco, an advocate dated 24th May, 2011;
- the letter of Mr. R. Nsumba Lyazi of the Ministry of Education dated 12th November 2010 (annexture "R3" in the supplementary affidavit of the respondent);
- another affidavit from Mr. Francis Mpairwe Kakuru dated 24th May, 2011; and
- Cross-examination of Mr. Kakuru.

Hon. Rukutana, then the Minister of State for Higher Education, had deponed in his affidavit that **APAS** was his client from 1981 when it was founded till its closure in 2003. That it was duly recognized and registered by the Ministry of Education and offered Higher and Ordinary Diploma courses in Accountancy and Certificates in Secretarial Studies. He stated that he had instructed that a search for the registration records of APAS be carried out in the Ministry of Education and at his law firm for the purposes of this case, but yielded no results.

In course of evaluating the evidence of Hon. Rukutana, the judge was constrained to jolt the Honorable Minister's memory that in 1981 both he and the judge were 1st or 2nd year law students at Makerere University, therefore the law firm Mwesigwa Rukutana Advocates that purported to have acted for **APAS** in 1981was only a dream, which fortunately later on came true.

Ordinarily, this kind of statement should not form the basis of a judgment because a judge is not supposed to apply his personal knowledge to cases before him. He or she is expected to base his or her judgment on the

evidence before him only. However, in the instant case, Counsel for the appellant did not raise any objection to this observation b the trial judge before us, so I take it that it is true that the Judge and Hon. Rukutana were year-mates at Makerere University at the material time. This invariably leads to only one logical conclusion, that the Honorable Minister of State, as he then was lied to this court to save the appellant's skin when he deponed that **APAS** was his client in 1981 when it was allegedly founded. A lie from such a highly placed person cannot be taken lightly, in my view. Moreover, a sworn affidavit is not a document to be taken lightly. An affidavit which contains falsehood is suspect on that account. (See: **Bitaitana vs Kananura Melvin. [1995] KALR, PAGE 631).**

In my view, therefore, the judge was right to disregard the said affidavit.

The judge also compared the evidence of registration of **APAS** adduced by a Mr. Francis Mpairwe Kakuru dated 8th April 2011 at page 109 0f the record where he deponed that:

> ***"1. I am …. The former Principal of APAS and I depone hereto in that capacity.***
>
> ***2…..***
>
> ***3.That before I joined Kampala City Council, I was employed as a Lecturer and later Principal/ Registrar at the Association of Professional Accountancy Students (APAS).***
>
> ***4. That I am the surviving Director of the above institution my other colleague Mr. Fabian Kitambara died in the 1990's.***
>
> ***5. That it is in that spirit that I confirm and certify that Mr. MUYANJA MBABAALI MOHAMAD was one of my students and the Higher Diploma in Accountancy he obtained from that institution.***

7. That I swear this affidavit to confirm that APAS was duly recognized Institution and that Mr.MUYANJA MBABAALI MUHAMMAD'S Higher Diploma in Accountancy is authentic."

Mr. Mpairwe had written letter Ref: APAS/ACADD/DOC/12 to the Deputy Executive Director of the NCHE on the 21st September 2010 where he had stated that:

> ***"APAS was one of the few duly registered private commercial colleges since 1980's and has been legally recognized by the Ministry under <u>PSS/A/29 ME/22/2529…"</u>*** (Underlining is added).

A Mr. Asasira Bosco an advocate of the High Court also deposed that he and Mr. Nkurunziza had met Mr. Acato who had given them copies of letters he had written certifying that the **APAS** existed. Then a Mr. Nsumba Lyazi of the Ministry of Education clarified in his letter of 12th November 2010, annexed as R3 to the Supplementary affidavit of the respondent that Ministry of Education records showed that:

- "**<u>ME/22/2529</u> is the license of Amka Classic secondary school; licensed on 29th December 1999**
- **PSS/A/29 belongs Apex College; a school which was registered in May 1998**
- **There is a secondary school; Apas Secondary school which was licensed under number ME/22/2067 and registered on 24th November 1998 under number PSS/A/32."**

There is also on record an affidavit dated 24th May, 2010 Mr. Kakuru sworn, in response to the above, retracting his earlier letter and blaming Apas Secondary School for giving him the wrong information. During cross-

examination, the witness also retracted the earlier statement that he was a Director of APAS. When he was asked why he had used the APAS letter head even after the closure of the institution, Mr. Kakuru's explanation was that the APAS letterhead remained in his custody even after its closure and after he had moved to KCC. He also testified that APAS started operating in 1981, got a provisional license in 1983, then a full license in 1989.

When the judge perused the Ministry of Education Licensing Record book which was availed to court by Mr. Edward Sekunyu, the Assistant Commissioner for Private Schools and Institutions (PW2), he found that APAS was not licensed on the 14th June 1990, but after. He found that the only evidence placing APAS registration in the 80's was from Hon. Rukutana and Mr. Kakuru, which was littered with inconsistencies, retractions and unfortunate outright deliberate falsehoods which he had rejected, rightly, in my view.

The judge also referred to and applied the Education Act, 1970, which was the law applicable at the material time, to the facts and the evidence before him. That Act provided that registration and classification of educational institutions come after and not before licensing. Based on that, the judge then concluded that there was no way APAS could have been registered before the 1990's when it got only a provisional license. The judge reasoned that since the law made the operation of any educational institution outside the provisions of the law illegal, there was no way that such an institution could award a valid certificate. Therefore, certificates from an illegal enterprise cannot have the force of law. It follows that the APAS Diploma has no legal value. It is invalid, null and void. I have read the Act and the record of proceedings. I agree with the findings of the learned judge.

The learned trial Judge then proceeded to deal with the DATAPRO Institute Diploma separately. He found that the evidence from the Ministry of Education (PW5) was that the said institute had been forbidden from issuing any award to students before licensing in December 2000.The appellant had also, unlike in the case of the other institutions, adduced handwritten record of results purportedly from DATAPRO, which the judge rubbished reasoning correctly, that it was inconceivable, that in these days of computers, institutions such as DATAPRO would issue handwritten results..

The judge found that the mature entry was also a lie, as the appellant had by his own admission in cross-examination testified that he never sat any mature entry exams, yet the Academic Registrar of Nkumba University PW3 was emphatic that Nkumba University relied on the results of mature entry exams conducted by Makerere University in admissions. I agree with him. It is common knowledge that mature entry exams are set by Makerere University regularly as a precondition for entry into the University. They are written and there is no short-cut for any candidate who wishes to join the University.

The judge further ruled that the handwritten notes on the cover page of the applicant's application to Nkumba University about his age and work experience were mere recommendations. The notes read:

> ***"The applicant can be considered as a mature age entrant although he has not taken such education given nearly 30 years of work experience after "O" Level and some courses studied. He can be admitted for a degree course".***

The comments were clearly meant for the applicant to be "*considered"* and therefore a mere recommendation, as the judge found. This evidence also in

my view points to the lack of due diligence on the part of Nkumba University in processing their admissions. The judge was therefore justified in his findings here as well.

Issue number 3 was whether the appellant possessed a minimum formal education of advanced standard or its equivalent.

Again, I am satisfied that the learned trial Judge carefully and properly evaluated the evidence, addressed himself to the law as well as the authorities cited by both parties and came to the correct findings and conclusions . In particular I agree with him that once it is proved by evidence that a fraudulent certificate formed the basis of an admission to an academic institution, even when it was presented together with other valid documents, its contagious effect would have vitiated the validity of the other documents, and rendered the admission and the award resulting therefrom invalid.

In this case, all the impugned certificates from Malaysia, APAS, and DATAPRO which were the basis of the appellant's admission to the University were found invalid. In the premises, the Nkumba University Degree award cannot stand as the appellant based his admission to the University that issued the degree certificate on invalid and forged certificates and documents. Which means the appellant did not have the requisite academic qualifications to be elected as Member of Parliament.

The authority of Hon. Anifa Kawooya cited by counsel for the appellant is also distinguishable from this case. In that case, the reason for the court's decision was that, she was not given a hearing by the NCHE prior to recalling her Certificate of Equivalence. In the instant case, on the other

hand, it is clear from the evidence on court record that the appellant was given ample opportunity to defend his certificates not only by the NCHE, but by the High Court and this Court as well. He failed to do so.

Further, the temporary injunction issued by court in the Hon. Anifa Kawooya case was issued to her personally and not to other persons with similar complaints. It does not therefore apply to the applicant's case.

In view of my findings above, this ground of appeal would also fail.

In the result, I would dismiss the appeal with costs to the respondent in this court and the court below. I uphold the decision and orders of the High Court.

Dated at Kampala this……16th……day of……May……2012.

……

M. S. ARACH AMOKO

JUSTICE OF APPEAL