

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**ELECTION PETITION APPEAL NO. 004 OF 2022**

**HON. OGWARI POLYCARP::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**OCHWA DAVID::::::::::::::::::::::::::::::::: RESPONDENT**

*(Appeal from the decision of the High Court of Uganda at Mbale  
before Kazibwe J, in Election Petition No. 04 of 2021, delivered on  
the 12<sup>th</sup> of December 2022)*

**CORAM: HON. JUSTICE F.M.S EGONDA NTENDE, JA**



**HON. JUSTICE EVA K. LUSWATA, JA**

**HON. JUSTICE OSCAR JOHN KIHICA, JA**

**JUDGMENT OF COURT**

**Introduction**

1. This appeal arises out of the decision of Moses Kazibwe Kawumi J, High Court Mbale, in Election Petition No. 4 of 2021 in which he found that the Appellant did not have the requisite academic qualifications to contest as a Member of Parliament and ordered that, fresh elections be held for Agule


 

County Constituency, Pallisa District. The Appellant filed this appeal in this court vide Election Petition Appeal No. 004 of 2022.

## **Background**

2. The Appellant and the Respondent contested for Member of Parliament for Agule County Constituency held on the 14<sup>th</sup> of January 2021 and the returning officer returned the Appellant as the validly elected Member of Parliament. The Respondent was aggrieved by the declaration and filed a petition vide Election Petition No. 004 of 2021. Before the petition was heard, the petitioner filed Miscellaneous Application No. 086 of 2021 seeking for leave to amend the petition and contest the nomination of the Appellant on grounds that the Appellant did not obtain a certificate of equivalence from National Council for High Education prior to his nomination.
3. Justice Godfrey Namundi dismissed the application on the grounds that the Applicant sought to introduce a new cause of action after the Respondent had filed an answer to the petition, and additionally, the issues to do with academic qualifications should have been raised at nomination. The petition was also subsequently dismissed on grounds that the affidavit in support of the Petition had been commissioned by an advocate without a Practicing Certificate. On appeal to the Court of Appeal, a re-trial was ordered and the file sent back to the High Court.

4. At the High Court, the matter was heard by Justice Moses Kazibwe Kawumi who allowed the petition on grounds that the nomination and subsequent election of the Appellant was illegal since he did not submit the requisite documents during nomination.
5. The Appellant being dissatisfied with the decision of the High Court filed this appeal on the following grounds;
  1. **The Learned Trial Judge erred in law and fact when he failed, refused and or neglected to hear, determine and or resolve the preliminary points of law, raised by the Appellant, hence leading to a miscarriage of justice.**
  2. **The Learned Trial Judge erred in law and fact when he set aside the Appellant's election on the ground of illegality being nominated, which ground was neither sought nor pleaded in the Petition, thereby occasioning a miscarriage of justice.**
  3. **The Learned Trial Judge erred in law and fact when he, misconstrued the provisions of Section 15 of the Electoral Commission Act, thereby occasioning a miscarriage of Justice.**
  4. **The Learned Trial Judge erred in law and fact when he denied the Appellant a right to be heard on the certificate of equivalence, thereby occasion a miscarriage of Justice.**
  5. **The Learned Trial Judge erred in law and fact in awarding a certificate of costs to two (2) counsel, in the circumstances of the Petition, thereby occasioning a miscarriage of justice.**

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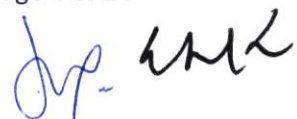


## Representation

6. At the hearing of this appeal, Mr. Caleb Alaka appeared for the Appellant while Mr. Okello Oryem and Ivan Omoloi appeared for the Respondent. Both parties filed written submissions which were adopted as their legal arguments.

## Appellant's submissions

7. Counsel argued grounds 1, 2, 3 and 4 concurrently. Counsel submitted that the trial Judge did not determine the petition on any of the raised issues but considered the question of validity of the nomination. Counsel argued that the issue of the validity of the Appellant's nomination was res judicata, having been determined in Miscellaneous Application No. 086 of 2021.
8. Counsel relied on the decision in **Uganda Taxi Operators & Drivers Association Vs Uganda Revenue Authority Supreme Court Civil Application No. 24 of 2019** on the principle of res judicata. For res judicata to apply, there has to be a former suit or issue decided by a competent court between the same parties. That the issue of nomination of the Appellant was the subject of **High Court Miscellaneous Application No. 086 of 2021 Ochwa David Vs Ogwari Polycarp** before Justice Godfrey Namundi and a decision delivered on 26<sup>th</sup> May 2021, in which it was held that the proposed amendment sought to introduce a new or fresh cause of action which was never pleaded in the petition. That the trial Judge held that the ground regarding qualifications would call for a different set of



evidence distinct from what is envisaged in Section 61 (1) (c) of the Parliamentary Elections Act.

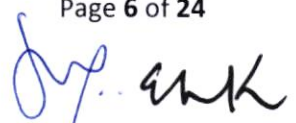
9. Counsel argued that the issues decided upon in Election Petition No. 004 of 2021 had already been determined in Miscellaneous Application No. 086 of 2021 in which it was held that allowing the ground of validity of the Appellant's nomination would have the effect of introducing a new cause of action which was never pleaded in the original petition. That the issue of validity of nomination was not pleaded and evidence was not led by both parties on the issue of certificate of equivalence. Counsel relied on the decision in **Geresom Rwambogo Vs Tereza Kyatifu Civil Appeal No. 0055 of 2009** for the proposition that court may found its decision on an unpleaded cause of action provided that evidence was led on it by both parties to the dispute.
10. With regard to the validity of the Appellant's nomination, counsel argued that under Section 15 of the Electoral Commission Act, all disputes arising prior or during nominations before voting are resolved with finality before the election date. Counsel relied on the decision in **Grace Nalubega Vs Juliet K Suubi Kinyamatama Election Petition Appeal No. 27 of 2021** and argued that nomination complaints pertaining to nomination should be submitted to the Electoral Commission for determination.

### **Respondent's submissions**

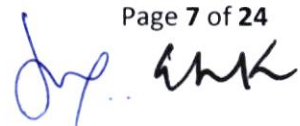




11. In reply, counsel submitted that the court, in Misc. Application No. 086 of 2021, did not rule on the petitioner's failure to submit a certificate of equivalence and as such, it is erroneous for the Appellant's counsel to plead res judicata. Counsel argued that the Appellant lacked the requisite academic qualifications for election as a Member of Parliament at the time of nomination.
12. Counsel submitted that the Respondent filed two affidavits, one of Lokaki Onoria and the affidavit of Arikod Joseph, both contesting the Appellant's failure to submit a certificate of equivalence of his academic qualifications to the Electoral Commission as required by law. Counsel argued that the Appellant did not produce any evidence to prove that he had the requisite academic qualifications or its equivalent certified by the National Council for Higher Education. The entire set of the Appellant's nomination papers were adduced into evidence through the affidavit of the Respondent and the same did not include the requisite academic qualifications.
13. Counsel further submitted that the Appellant was, with leave of court, cross examined on the matter and he testified that he submitted the equivalent qualifications but did not have a copy of the NCHE equivalent certificate. Counsel argued that the question of illegality of the nomination of the Appellant was pleaded and canvased by the parties while at the trial court. That the Appellant's contention that he was denied a right to be heard on the issue of academic qualifications is without merit.



14. Counsel argued that as a matter of law, the scheme of drafting of the electoral laws is such that a Member of Parliament must be qualified for election at the time of his/her nomination as a candidate. Under Section 4(1) of the Parliamentary Elections Act, a person that seeks to be elected as Member of Parliament must, among others, have completed a minimum formal education of advanced level or its equivalent. Only a person duly nominated qualifies to be elected to Parliament.
15. Counsel relied on the decision in **Nakendo V Mwondha, S.C.C.A No. 09 of 2007** for the notion that Section 13 of the Parliamentary Elections Act provides that a person shall not be regarded as duly nominated for a constituency and the nomination paper of any person shall be regarded as void if the person had not complied with the provisions of Section 4 of the Parliamentary Elections Act.
16. Counsel argued that the learned trial Judge could not be faulted on his findings as the evidence placed before him proved that the Appellant lacked the requisite academic qualifications under Article 84 of the Constitution and Section 4 of the Parliamentary Elections Act. Counsel submitted that the petition pleaded the illegality matter generally but the affidavits filed subsequently were filed after the Respondent confirmed the illegality after procuring the actual nomination papers of the Appellant and confirming the unlawful nomination of the Appellant. Counsel submitted that the law cannot sanction what is illegal and once an illegality is brought to the attention of court, it overrides all questions of pleadings.

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## **Consideration of grounds 1, 2, 3 and 4**

### **Duty of this Court**

17. This is a final Appellate Court in parliamentary election matters. Section 66 (3) of the Parliamentary Elections Act provides as follows;

***"(3) Notwithstanding S. 6 of The Judicature Act, the decisions of the Court of Appeal pertaining to parliamentary elections petitions shall be final"***

The role of this court as a last appellate court in hearing appeals from the High Court is laid down under **Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions** which provides that;

***"30. Power to reappraise evidence and to take additional evidence.***

***(1) On an appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may-***

***(a) Reappraise the evidence and draw inferences of fact; and.."***

18. This Court is therefore obliged to re-appraise the inferences of fact drawn by the trial court. Furthermore, it is now settled procedural law, and indeed this Court has held in a number of cases, that in carrying out its duty in election appeals, the Court has to caution itself on the nature of evidence adduced



at the trial Court by affidavit where cross examination may not have taken place to test the veracity of testimony. Equally, when evaluating the evidence at the trial Court, regard must be had to the fact that in elections contests evidence may be partisan with witnesses having a tendency towards supporting their candidates.

### **Burden and Standard of proof**

18. The burden of proof is cast on the Petitioner to prove the assertions to the satisfaction of the court that the alleged irregularities or malpractices or non-compliance with the provisions and principles laid down in the relevant electoral laws were committed and that this affected the results of the election in a substantive manner in the election petition. Furthermore, the evidence must be cogent, strong, and credible. The standard of proof is on a balance of probabilities. In the matter of **Paul Mwiru v Hon. Igeme Nabeta & Others, Election Petition No. 06 of 2011** this court held as follows: -

***"Section 61(3) of the PEA sets the standard of proof in parliamentary election petitions. The burden of proof lies on the petitioner to prove the allegations in the petition and the standard of proof required is proof on a balance of probabilities. The provision of this subsection was settled by the Supreme Court in the case of Mukasa Harris v Dr. Lulume Bayiga when it upheld the interpretation given to the subsection by this court and the High Court."***

19. We have perused the lower court record and carefully considered the written submissions and the relevant authorities to which counsel have referred us. We have borne in mind all the aforementioned principles of the law pertaining to the determination of Election Petition Appeals as we consider the grounds of appeal

**Grounds 1, 2, 3 and 4 of the appeal.**

20. The Appellant faults the learned trial Judge for making a finding on the issue of validity of his academic documents, the same having been adjudicated upon in Miscellaneous Application No. 086 of 2021 and argues that it was res judicata. In addition, the Appellant contends that the learned trial Judge determined the petition on validity of nomination, which was never framed as an issue.
21. Miscellaneous Application No. 086 of 2021 was an application for leave to amend the petition and introduce a ground to the effect that at the time of nomination, the Appellant lacked a certificate by National Council for High Education as required by law.
22. In his Ruling, the learned Judge, **Godfrey Namundi J** held as follows;

*“if a candidate was not qualified for election- under Section 61 (1) (d), it is a sufficient cause for setting aside the election.*

*That ground therefore constitutes a distinct cause of action- just like the other grounds in the Section.*



*Considering the principles for amendment of pleadings as laid out in various authorities, a new cause of action should not be introduced by amendment of pleadings.*

*...it is clear that allowing the applicant to amend will have the effect of introducing a new cause of action that was never pleaded in the original petition. This would in my view greatly prejudice the 1<sup>st</sup> Respondent.*

*...I have perused the application the original petition and the intended amendment. Firstly, the application does not plead illegality both in the Notice of Motion and the affidavit in support. The application intends to introduce a new ground that is clearly provided under Section 61(1) (d) Parliamentary Elections Act.*

*The original petition clearly raises the grounds of illegalities under Section 61 (1) (c). The grounds of illegality would and are supported by affidavit evidence in the original petition.*

*The ground regarding qualifications would call for a different set of evidence, distinct from what is envisaged in Section 61 (1) (c)."*

23. From the above excerpt, there is clear indication that the decision of the learned trial Judge did not address the issue of whether the Appellant had the requisite academic qualifications at the time of his nomination. The issue at hand was whether introducing a new ground of validity of the Appellant's nomination would amount to introducing a new

cause of action. The learned trial Judge, in resolving the issue, declined to grant the Respondent leave to amend the petition on the basis that introducing a new ground of validity of the Appellant's nomination would amount to introducing a new cause of action.

24. The principle of *res judicata* is laid down in **Section 7** of the **Civil Procedure Act**. It provides;

*"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised and had been heard and finally decided by the court"*

25. This court in the case of **Boutique Shazim Ltd Vs Norattan Bhatia & another CA No. 36 of 2007** held that:

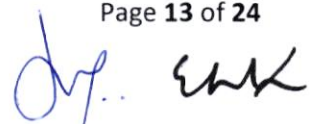
***"Essentially the test to be applied by court to determine the question of res judicata is this;***

***"is the plaintiff in the second suit or subsequent action trying to bring before the court, in another way and in the form of a new cause of action which he or she has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If the answer is in the affirmative, the plea of res judicata applies not only to points upon which the first***



***court was actually required to adjudicate but to every point which belongs to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the same time”***

26. Applying the above principles on a plea of res judicata, it is our considered view that the issue of validity of the Appellant's nomination with regard to his academic qualifications was never resolved in Miscellaneous Application No. 086 of 2021 and as such, was not res judicata in Election Petition No. 04 of 2022. Miscellaneous Application No. 086 of 2021 was limited to the competence of the application to amend the petition.
27. With regard to the nomination of the Appellant, counsel for the Appellant contended that the High Court did not have jurisdiction to consider the question of illegality of the Appellant's nomination and subsequent election, on account of the fact that the Respondent failed to submit a complaint to the Electoral Commission during the electoral process under Section 15 of the Electoral Commission Act.
28. The pertinent issue to be addressed in this appeal is whether a party's failure to challenge its opponent's nomination before the Electoral Commission under Section 15 of the Electoral Commission Act would bar it from challenging the nomination as an election petition before the High Court brought under Section 61 (1) (a) and (d) of the Parliamentary Elections Act.




**Section 15 (1)** of the **Electoral Commission Act** provides as follows;

*“15. Power of the commission to resolve complaints; appeals.*

*(1) Any complaint submitted in writing alleging any irregularity with any aspect of the electoral process at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided by the commission; and where the irregularity is confirmed, the commission shall take necessary action to correct the irregularity and any effects it may have caused.”*

29. There is a plethora of authorities of this court addressing the applicability of Section 15 of the Electoral Commission Act to pre-election irregularities. This court in the recent decision in **Grace Nalubega Vs Juliet Suubi Kinyamatama and Electoral Commission Election, Petition Appeal No. 27 of 2021** extensively discussed the issue of whether a party's failure to challenge its opponent's nomination before the Electoral Commission under Section 15 of the Electoral Commission Act would bar it from challenging the nomination as an election petition before the High Court. In that case, it was held as follows;

***“With respect, we do not find the case of Abdul Balinqira Nakendo v Patrick Mwondha (supra) that we were referred to very helpful to the Appellant's case. In that***





*case the supreme court invoked Article 86(1) of the Constitution to arrive at the decision that the High Court does have jurisdiction to entertain any question as to whether a person has been validly elected a Member of Parliament In so doing, the apex court considered the possibility of the National Council for Higher Education (NCHE) granting a certificate of equivalence in error, to hold that if the High Court was furnished with evidence that the decisions of such an administrative body had been irrationally arrived at, the court was clothed with the jurisdiction to declare so.*

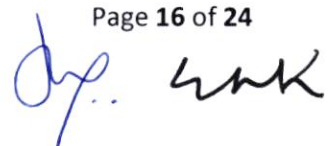
*However, as observed by this Court in Jack Odur Lutanywa v Electoral Commission & Another (supra), the Supreme Court did not address itself to the corresponding constitutional functions of the Electoral Commission as stipulated in Article 61(1)(f) of the Constitution in coming to its decision, neither indeed were they in issue in that case. That notwithstanding, the apex court did recognize that where NCHE's issuance of a certificate of equivalence was after the nomination found to have been premised on falsehoods, then the High Court was justified to interrogate the validity of a nomination premised on the invalid certificate of equivalence.*

*.....Consequently, to the extent that the invalidity of the candidate's qualifications would have been realized after the election rather than at the time of the*

***nomination, the Nakendo case illuminates the pertinent point that a challenge to an elected person's nomination on account of their academic qualifications may only ensue under section 61(1) of the Parliamentary Elections Act where the invalidity of the qualifications was not readily apparent to the party challenging them at the time of the nomination.***

30. We agree with the interpretations made by the learned Justices in the above case and we also find, that a party to whom the invalidity of the qualifications was not apparent at the time of nomination, may contest the nomination through an election petition to the High Court. Section 15 of the Electoral Commission Act does not oust the inherent powers and jurisdiction of the High Court to determine complaints of electoral irregularities.
31. This court, in **Namboowa Rashiida Vs Bavekuno Mafumu Godfrey Kyeswa and Electoral Commission Election Petition Appeal No. 69 of 2016** had this to say;

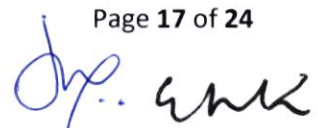
*“We agree with the trial Judge’s position that the Petitioner should have filed her complaints with the Electoral Commission which has quasi-judicial powers to solve such disputes. However, it should be noted that, that is merely an administrative procedure which does not oust the unlimited original jurisdiction of the High Court in all matters provided for under Article 139 of the Constitution. We are of the view that the intention of Parliament in enacting Section 15 of the Electoral Commission Act was not to limit the inherent powers*





*and jurisdiction of the High Court to determine and resolve complaints of electoral irregularities where no such complaint had been lodged with the Electoral Commission. Indeed, if the legislature had intended that for a person to qualify to file an Election Petition he or she needed to have first lodged a complaint of election malpractices with the Electoral Commission, it would have expressly stated so under Section 138 (3) of the Local Government Act.”*

32. The above articulation of the law in conformity with Article 139 of the 1995 Constitution which grants the High Court unlimited original jurisdiction in all matters including electoral irregularities. It was therefore not an error for the learned trial Judge to inquire into the validity of the Appellant's nomination after completion of the electoral process.
33. The Respondent filed two affidavits prior to the hearing of the petition deposed by Lokaki Onoria and Arikod Joseph and both raised the contention of the Appellant's failure to submit a certificate of equivalence of his academic qualifications to the Electoral Commission at the time of nomination. The Respondent brought the illegality of the Appellant's nomination to the attention of court in paragraph 3 of the petition and in four subsequent affidavits in support and this was only done after procuring the actual nomination papers of the Appellant. The Appellant was cross examined with leave of court on whether he had the requisite academic qualifications for nomination as Member of Parliament, being



a minimum of A-level Certificate or its equivalent from National Council for Higher Education.

34. The Appellant stated, in cross examination, to have obtained the certificate of equivalence but did not produce the same before court and neither was it part of the documents submitted for nomination. The entire set of nomination papers of the Appellant were adduced into evidence and do not include the certificate of equivalence. The learned trial Judge held as follows;

*"The 1<sup>st</sup> Respondent claims to have in his possession a Certificate of Equivalence. The 2<sup>nd</sup> Respondent contends that he had the qualifications to be nominated.*

*A perusal of what he submitted shows an O' Level Certificate and verification of results for Parts II and III in Electrical Installation Craft Courses sat at Uganda Technical College, Elgon. The two Respondents failed and/or did not think it wise to avail the Certificate to the Court.*

*Only the National Council for Higher Education has the mandate to weigh the qualifications and issue a Certificate of Equivalence which must be submitted at the time of nomination. It is the finding of this court that failure to submit the Certificate of Equivalence was fatal and rendered the nomination invalid."*

35. We find no reason to depart from the findings of the learned trial Judge. The nomination and subsequent election of the



Appellant as Member of Parliament for Agule County Constituency was illegal and is thus set aside.

36. We are alive to the provisions of Section 63 (6),(a),(b)(i) &(ii) of the Parliamentary Elections Act (as amended) which provides as follows;

***“At the conclusion of the trial of an election petition the court shall determine whether the respondent was duly elected or whether any, and if so which person other than the respondent was or is entitled to be declared duly elected, and if the court determines that—***

***(a) the respondent was duly elected, the election shall be and remain as valid as if no petition had been presented against the respondent’s election;***

***(b) the respondent was not duly elected but that some other person was or is entitled to be declared duly elected—***

***(i) the respondent shall be ordered to vacate his or her seat; and***

***(ii) the court shall certify its determination to the Commission and the Speaker, and the Commission shall thereupon, by notice published in the Gazette, declare that other person duly elected with effect from the day of the determination by the court.”***

37. We are of the view that the aforementioned section grants the High Court the power to declare that a candidate other than that declared elected was validly elected. In the instant case, trial Judge found that the Appellant’s nomination and subsequent election as Member of Parliament for Agule

County Constituency was illegal and proceeded to set aside the said election and ordered the Electoral Commission to organize fresh elections. With respect to the trial Judge, this was a misdirection on his part.

38. Having found that the Appellant ought not have been nominated as a candidate for the election of Member of Parliament Agule County Constituency, he should have invoked the provisions of Section 63 (6),(a),(b)(i) &(ii) of the Parliamentary Elections Act and gone on to determine and declare who it was that had been validly elected as Member of Parliament in the stead of the Appellant. This Court, in the case of **Omara Yuventine vs Ariko Johnny De West, Election Petition Appeal No. Election Petition No.4 of 2023** (unreported), was faced with a similar situation and stated thus;

*"From our reading of the above provisions, we deduce that the High Court can declare that a candidate other than that declared elected was validly elected. We do not accept the contention of counsel for the 1<sup>st</sup> appellant that by declaring the respondent the validly elected Member of Parliament for Nansana Municipality, the trial Judge disenfranchised the voters of the constituency.*

*In the instant case, our finding under issue 1 is that the 1<sup>st</sup> appellant was nominated in error because he neither possessed the minimum academic qualifications of "A" level or its equivalent nor that he was registered voter. That means the 1<sup>st</sup> appellant should not have been among the candidates the voters of Nansana Municipality, Wakiso District voted for as*



*their Member of Parliament. When he is removed from the scene, the respondent would be the person with the highest number of votes that the people of Nansana Municipality voted for as their Member of Parliament.”*

39. We have reviewed the record of appeal and determined that the candidates who contested in the elections for Member of Parliament for Agule County Constituency held on the 14th of January 2021 were the following;

1. Aisu Godwin Isaac – 115 votes.
2. Emuge James – 104 votes.
3. Obeke Sam- 2, 430 votes.
4. Ochwa David- 6,908 votes.
5. Ogwari Polycarp- 7,190 votes.
6. Omagor Andrew Erokode – 740 votes.

When the Appellant is removed from the above tabulation on account of his illegal nomination, the winning candidate would be the Respondent who polled the second highest number of votes.

40. We would therefore find and declare that the Respondent Ochwa David was the validly elected Member of Parliament for Agule County Constituency.

### **Ground 5**

41. The Appellant’s counsel faults the learned trial Judge for awarding a certificate of two counsel without just cause. Counsel argued that this was a simple election petition which His Lordship disposed of on a single issue.

The Respondent, in his reply, supported the decision of the learned trial Judge of awarding a certificate of two counsel and contended that the Respondent hired two separate law firms to prosecute Election Petition No. 4 of 2021. The pleadings and evidence were voluminous in volumes 1-5 with the evidence collected from across Agule Constituency in Pallisa District.

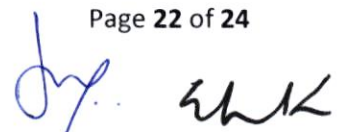
### **Analysis**

Costs in petitions are governed by **Rule 27** of the **Parliamentary Elections (Interim Provisions) Rules SI 141-2** which states as follows;

*“All costs of and incidental to the presentation of the petition and the proceedings consequent on the petition shall be defrayed by the parties to the petition in such manner and in such proportions as the court may determine.”*

The Judge awarded a certificate of two counsel under the provisions of Rule 41(1) of the Advocates (Remuneration and Taxation of Costs) Rules. The learned judge in granting a certificate of two counsel did not give reasons for doing so as is required under Rule 41(1) of the Advocates (Remuneration and Taxation of Costs) Rules which provides as follows;

***“ The costs of more than one advocate may be allowed on the basis hereafter provided in causes or matters in which the judge at the trial or on delivery of judgment shall have certified under his or her hand that more than one advocate was reasonable and proper, having regard, in the case of a***





***plaintiff, to the amount recovered or paid in settlement or the relief awarded or the nature, importance or difficulty of the case and, in the case of a defendant, having regard to the amount sued for or the relief claimed or the nature, importance or difficulty of the case.”***

We think that the Judge ought to have provided reasons as to why he was exercising his discretion to award a certificate of two. Failure to do so was a misdirection on his part. This ground succeeds.

### **Conclusion**

1. This appeal is hereby dismissed.
2. Mr. Ogwari Polycarp the Appellant, is ordered to vacate the seat of Member of Parliament for Agule County Constituency immediately.
3. Mr. Ochwa David the Respondent is declared as the winner of the election for the seat of Member of Parliament for Agule County Constituency and shall take office with effect from the date of this Judgment.
4. The Electoral Commission and the Speaker of Parliament are hereby formerly notified that Mr. Ogwari Polycarp shall, from the date of this judgment, cease to be the Member of Parliament for Agule County Constituency.
5. The Appellant shall pay the costs of this appeal and the costs of the lower court.

We so order.

Signed and delivered this.....<sup>19<sup>th</sup></sup> day of.....<sup>March.</sup> 2024



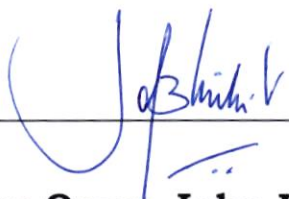
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**Hon. Justice F.M.S Egonda Ntende, JA**



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**Hon. Justice Eva K. Luswata, JA**



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**Hon. Justice Oscar John Kihika, JA**