

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBALE
ELECTION PETITION N0 005 OF 2006**

AGGREY AWORI SIRYOYI :::::::::::::::::::::::::::::::::::PETITIONER

VERSUS

1. **MUGENI STEPHEN WASIKE**
2. **ELECTORAL COMMISSION:::::::::::::::::::::::::::::::::RESPONDENTS**

BEFORE: THE HONOURABLE MR. JUSTICE J.B.A KATUTSI . J

JUDGMENT

This is an application petition brought by AGGREY AWORI-SIRYOYI who was one of the candidates at the general elections for the Samia-Bugwe North Constituency. This resulted in the return to Parliament of Mr. MUGENI STEPHEN WASIKE (1ST respondent), who received 19,752 votes as against 12,373 votes, for petitioner. Mr. SANYU EMMANUEL came third with 3,773 votes, PADDE DEOGRATIOUS WOWO came fourth with 1,755 while Mr. MAGENI WILLIAM came fifth with a paltry 997 votes.

In this petition the petitioner alleges a number of alleged malpractices and breaches of the statutory rules, governing the conduct of the election, allegedly committed by the respondents.

The first item on the complaint list, is under paragraph 6(a) of the petition and alleges that the nomination of the 1st respondent by the 2nd respondent (the electoral commission) was erroneous as he was not the person qualified to be nominated in view of the Inspector general of Government's findings dated 11th November, 2005.

(b)...the 1st respondent's nomination by the 2nd respondent was....defective in so far as the 1st respondent had not fully resigned his position as by law required.

(c)...election was marred by electoral offences by the 1st respondent or his agents with his full knowledge or sanctions to wit:

- i) Uttering defamatory statements
- ii) Intimidating and perpetuated violence meted out on the petitioner's agents and his part's sympathizers and state functionaries (sic).
- iii) Corruption and illegal practices of outright bribery which induced persons to vote in favor of this petitioner.
- iv) Political interference by state functionaries i.e the RDC, and GISO'S police and reservists.
- v) Manipulation of the electoral process at some polling stations and tally sheets which distorted results from the respective polling stations.

The petitioners lists the particulars of defects as hereunder following:

- (a) failure to resign his office i.e 1st respondents before nomination).
- (b) Non acknowledgement of the 1st respondents resignation, if any by the District Service commission
- (c) Non handing over and non existence of hand over report or
- (d) Non acceptance of resignation by the employer.

Against the 2nd respondent the petitioner complains that it failed to ensure that the entire election process in Samia-Bugwe North constituency was conducted under conditions of freedom and fairness when:

- i) The reservists, LDU'S government officials comprising of the RDC, DISO, GISO and Local Government council executive interfered with the electoral process through torture, threats of arrests, harassment, intimidation, bribery and breaking of the petitioner's supporters during the campaigns and at the polling stations aimed at preventing them from supporting the petitioner.
- ii) Interfering with voting at different polling stations.
- iii) Prevention of registered voters by the RDC and functionaries of the state.
- iv) Contrary to Section 12 (f) of the electoral Commission Act.

The 2nd respondent failed to take steps to ensure that there were secure conditions necessary.

Based on the above allegations, the petitioner prays for:

- a) A declaration that the 1st respondent was not qualified person for the nomination and participation in the parliamentary elections held on the 23rd day of February, 2006 and that the 2nd respondent failed in its duty when it nominated him and failed to invalidate his nomination which was null abinitio.
- b) A declaration that there were electoral offences committed by the 1st respondent and his agent or persons acting in his

interests with his full knowledge, compounding or sanction.

- c) A declaration that there were glaring transgressions of the law relating to the election which affected the election substantially in the petitioners disfavour.
- d) An order setting aside the election and the declaration that the petitioner the 2nd runner up was the winner there of since the nomination of the 1st respondent null and void abinitio.
- e) An order that costs...be paid to the petitioner by the respondent jointly and severally.
- f) Any further and better remedy this Honourable court may deem fit.

At the scheduling conference the following facts were admitted.

1. parliamentary elections were held on 23rd February, 2006 in Samia Bugwe North constituency, Busia District
2. Nomination of candidates was held on 12th January, 2006 and five candidates contested.
3. The Returning officer/District Registrar mr. Mwavu wasede having added up the number of votes cast as recorded on each declaration of the results forms in accordance with the Parliamentary elections Act 2005, declared that the total number of valid votes cast for each candidate were as follows:

1) Wasike Stephen Mugeni	19,752
2) Awori Aggrey Siryoyi	12,373.
3) Sanya Emmanuel	3,773.
4) Padde deogratiuous Wowo	1,755.
5) Mageni James William	997.

- 4) Prior to his nomination, the 1st respondent tendered in a letter to the Town Clerk, Busia Town Council and the latter responded to the same in his letter BTC/116 dated 25/10/2005.
- 5) Further prior to his nomination, the Inspector general of Government (IGG) had on 11/11/2005 and other previous occasions made recommendations to Busa District Service Commission through the Town Clerk Busia to dismiss or remove the 1st respondent from his post for alleged breach of the leadership code.
- 6) Some voters through their lawyer Semuyaba, Iga and Company Advocates lodged a complaint with the 2nd respondent on 15/2/2006 challenging the nomination of the 1st respondent.
- 7) The electoral commission did not invalidate the 1st respondent's nomination despite the above complaint.

The following were the agreed issues for the determination on this court.

1. Whether the first respondent was qualified for nomination as member of parliament for Samia Bugwe North constituency on 23rd February, 2006.

2. If so, whether the 1st respondent personally or with his knowledge, consent or approval committed the malpractices and electoral offences alleged in the petition and supporting affidavits.
3. Whether the 2nd respondent conducted the said parliamentary elections in accordance with the parliamentary Act, 2005.
4. In the event that there were any malpractices whether they substantially affected the results of the elections.
5. Whether the parties are entitled to the remedies sought.

In his submission learned counsel for the petitioner submitted that the Inspector general of Government (herein after referred to as (IGG) investigated the conduct of the 1st respondent vis-a-vis the Leadership code and passed a verdict of culpability. The IGG after so finding passed his findings to the electoral commission. Learned counsel contended that after receiving the recommendation of the IGG, the electoral commission (herein referred to as the 2nd respondent) was enjoined to disqualify the 1st respondent from participating in the elections.

Furhter on receipt of the complaint contained in exhibits P7 and P8 the 2nd respondent was enjoined to make a decision. This, it failed to do.

On resignation learned counsel for the petitioners submitted that the letter of resignation should have been addressed and forwarded to the District Service Commission who were the appointing authority. The letter written and addressed to the Town clerk could not effect an effective resignation, he contended. The Town clerk was not an appointing authority, was not authorized to receive resignation on behalf of the appointing authority nor was he authorized to accept resignation as he purported to do.

On electoral offences learned counsel submitted that the petitioner had denied the allegations in the new Vision report. Despite this denial the 1st respondent during his campaigns circulated cuttings from the New vision paper and in his answer to the petition admitted to doing so. He invited court to find that by that act alone the 1st respondent had committed an electoral offence and since this was an electoral offence the question whether it substantially affected the results did not arise. On other malpractices learned counsel for petitioner invited court to find that they had been proved and on qualitative and quantitative test to find that they had affected the results of the election in a substantial manner.

For the 1st respondent it was submitted that the petitioner had not proved his petition to the required degree of proof. The grounds on which the nomination of a candidate can be invalidated are to be found in section 4 of the Parliamentary elections Act 2005. of the four grounds there enumerated, none had been proved by the petitioner, submitted counsel. As for section 20 (3) of the Leadership Code Act, learned counsel for 2nd respondent submitted the operational words in that section are:

“ Effective from the date of dismissal or removal”

Since the findings and recommendations of the IGG were not acted upon by the authorized body i.e the District Service Commission that meant that the process was incomplete, he said. The District service Commission did not dismiss nor remove the 1st respondent from office and as such in the eyes of the law contended learned counsel, the 1st respondent was not removed or dismissed from office.

On the question of resignation learned counsel for the 1st respondent submitted that the 1st respondent forwarded his letter of resignation to the Town clerk Busia. Local Government employees are subject to the terms and conditions laid down by their respective Local Government Councils. He referred to Section 17 (3) of the Local governments Act. This provides as follows:

“ 3 The District or urban councils staff should be subjected to the general directions of the council and be responsible to the chief administrative officer or Town clerk respectively.”

On irregularities learned counsel for the 1st respondent submitted that no irregularities had been shown to have been carried out by the 1st respondent. No number of voters allegedly turned away from voting had been shown. If the margin of votes had been shown may be the quantitative test could have been applied. Not so here. Contended learned counsel for 1st respondent.

Learned counsel for the 2nd respondent associated himself with submission of the 1st respondent. He conceded that the 2nd respondent had received a complaint from voters, but said that the commission had not confirmed the irregularity complained of and could not act on mere allegations and proceeds to disqualify the 1st respondent. The commission being quasi-judicial and independent does not act on mere allegations urged learned counsel for 2nd respondent. He contended that the powers of the IGG under the law are to investigate and make recommendations to the relevant authority to enable that body to act. Under Section 58 of the Local Government Act, Local Governments are independent bodies, who can not be pushed in dismissing its staff, he concluded.

On Resignation, learned counsel for the 2nd Respondent submitted that the office of the Town Clerk is established under Section 65 of the Local Government Act. On the question of malpractice's Learned Counsel submitted that the affidavit evidence tendered by the petitioner was suspect and smacked of hearsay.

In his judgment, I will endeavour to follow the order taken by counsel in their submissions. But first to the grounds for setting aside the election. Section 61 of the parliamentary Elections Act provides inter alia as follows:

- “ (1) The election of a candidate as a member of parliament shall only be set aside on any of the following if proved to the satisfaction of the court-*
- (a) Non-compliance with the provisions of this act relating to elections, if the court is satisfied that there has been a failure to conduct the elections in accordance with the principles laid down in those provisions and that the non-compliance and the failure affected the result of the election in a substantial manner.*
 - (b)*
 - (c) That an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally with his or her knowledge and consent or approval :or*
 - (d) That candidate was at the time of his or her election not qualified or was a disqualified for election as a Member of parliament.*

RESIGNATION: Section 4 (4) of the Parliamentary Elections Act provides as hereunder following:-

“ (4) Under the multiparty political system, a public officer or a person employed in any government department or agency of the government or an employee of the local government or any body in which the government has controlling interest, who wishes to stand for election as a member of Parliament shall-

(a) In a case of a general election, resign his or her office at least ninety days before nomination day; and

(b)

As can be seen the above provisions is mandatory. There is no debate that 1st respondent as a treasurer of Busia Town Council was a person covered by the above provision of the law. He had to resign his office at least ninety days prior to nomination. I hasten to say that the period in which he had to resign is not under discussion in this petition. Petitioner is not concerned with the ninety days. His contention is that 1st respondent did not and has never resigned as the law requires.

BLACKS LAW DICTIONARY 6TH edition defines the word “*resignation*” inter alia as:

“ Formal renouncement or relinquishment of an office. It must be made with the intention of relinquishing the office accompanied by an act of relinquishment.”

THE DICTIONARY OF ENGLISH LAW vol 2.

“ resignation est juris proprii spontenea restitutio. (Resignation is a spontaneous relinquishment of ones rights.)”

In other words “ *resignation*” is where a person voluntarily gives up and surrenders his/her charge and preferment to those from whom he or she received the same.

Article 252 (I) of the Constitution of the Republic of Uganda provides as hereunder following:

“(1) Except as otherwise provided in this constitution, any person who is appointed or elected to any office established by this constitution may resign from that office by writing signed by that person addressed to the person or authority by whom he or she was appointed or elected.”

Clause (3) of that same article provides:

“(3) For the purpose of clause (1) of this article “office” includes the office of :-

- (a).....
- (b).....
- (c).....
- (d).....
- (e).....
- (f).....
- (g) a public officer.

Article 257 of the Constitution provides that in as far as it is relevant to this petition:

“ (1) In this constitution, unless the context otherwise requires-

(w) “ Public office” means an office in public service.

(x) “ Public officer” means a person holding or acting in any public office.

(y) “ Public service” means service in a civil capacity of the Government or of a Local Government.”

From the above I am of humble opinion that 1st Respondent was a public officer envisaged under article 252 (3) (g) of the Constitution of the Republic of Uganda.

In case I am right then I go to article 200 of the Constitution of the Republic of Uganda. It provides:

“ (1) Subject to the provisions of the constitution, the power to appoint a person to hold office in any office in service of a District, including the power to confirm appointments, to exercise disciplinary control over a person holding or acting in any such office and to remove those persons from office, is vested in the District Service Commission.”

It is an irrefragable fact that 1st Respondent addressed his resignation letter to the Town clerk Busia, Town Council who is also appointed by the District Service Commission. The Town Clerk did not stop at receiving the letter but also purported to accept the purported resignation of the 1st respondent. There is no iota of evidence to show that the Town Clerk was a person authorized by the District Service Commission to receive and accept the resignation of the town council staff. The question now is, was there any resignation by the 1st Respondent? A some what similar scenario came

before the Court of appeal for East Africa in the case of OPOLOTO V ATTORNEY GENERAL [1966] E.A 631.

SHABAN OPOLOTO, a Brigadier in Uganda Army and chief of defense staff, was discharged from Uganda Army by a letter signed by the Chairman Defence Council reading as hereunder following:

“I am to inform you of the decision made by the defense council taken under Section 1 (b) and (g) of Armed forces (Discharge) Resignations, 1966 that you be discharged from the Uganda Armed Forces with immediate effect. “

OPOLOT filed a suit against the Attorney general seeking a declaration :

(a) That his purported discharge from the Armed forces was invalid and that he is still a member of the Armed Forces and chief of defense staff.

The letter of discharge above had been signed: “ A Milton Obote” and described as the Chairman Defence Council. The prerogative powers contained in the Armed Forces (Discharge) Resignation 1966 were vested in the President. “ A Milton Obote.” Was the president but had not signed the letter as the President but as the” Chairman of Defence Council. “ In his judgment, the learned president of the court SIR CHARLES NEWBOLD said:

“we consider it may well be said that a person who purports to act in one capacity can not be said to have exercised powers vested in him in a completely different capacity.”

And later on in the same judgment he said:

“Nevertheless, while a person may pray in aid powers which were not mentioned at the time the act was performed but which in fact existed in order to give effectiveness to the act, we find it difficult to say that an act purportedly done by a person in one capacity may be regarded as effectively done by that person in another capacity.”

In this petition I am of the humble view that the power to receive and accept resignation was vested in the District Service Commission and the purported receipt and acceptance by the Town clerk of the purported resignation of the 1st respondent was with respect null and void, on the maximum *memo dat non qui habet*

But not only that: there was uncontroverted evidence to show that although the 1st Respondent purported to have resigned, he tenaciously kept hold of the reigns of office. Exhibit P9 is a letter from the Ag. Town Clerk Busia Town Council addressed to O.C Local Administration Police Busia.

It runs, as here under following in as far as is relevant to this petition:

“ RE: HAND OVER OF TOWN TREASUER’S OFFICE TO MR BWIRE ROBERT MUKANGA.

I write to request your office to provide one detective witness to hand over of office of Town treasurer to Mr. Bwire Robert Mukanga who is now the Ag. Principal treasurer.

This follows statutory resignation by the out going treasurer Mr. Mugeni Stephen Wasike letter BTC.SMU/001 dated 12//10/2005.

My office has made several efforts both formal and informally to cause the said hand over but this has been in vain.

I have therefore taken administrative decision to forcefully access the office service delivery as provided for in the public service standing orders”

From the contents of this letter can it be said that the 1st Respondent had effectively and definitively resigned his office? Put in another way: can it be said that the purported resignation was made with intention or relinquishing the office accompanied by an act of relinquishment which according to BLACKS DICTIONARY 6th edition is a sine qua non of resignation? In my humble view the 1st respondent’s heart was not with the pen.

But it seems to me that that is not the end of the 1st respondent’s ills. Section 61 (I) of the Local Government Act 2002 provides as follows:

“ (1) The terms and conditions of service of Local Government staff shall conform with those prescribed by the Public Service Commission for public service generally.”

Chapter 1 of Uganda Government Standing orders, order 1 (3) thereof provides as follows:

“ 3. It would be subversive of discipline of the public service if by voluntary resignation the Government could at any moment be deprived of the powers to dismiss a public officer for any misconduct however gross, resignation

must not be accepted if disciplinary proceedings are pending against an officer which might lead to his or her dismissal.”

It would appear to me with respect that even if the Ag. Town clerk was vested with the powers to receive and accept resignations, which of course I have already held he lacked , he was enjoined by the standing orders not to accept the resignation of the 1st respondent whom he knew clearly to be under disciplinary process!

I now proceed to examine the question of the IGG’S recommendation to have 1st respondent removed or dismissed from office.

There is evidence to show that the IGG wrote to the District Service Commission through the Town Clerk Busia Town Council to have 1st respondent dismissed or removed from his office. The recommendations appear to have fallen on deaf ears. Exhibit R5 is a letter from the IGG addressed to the Chairman electoral commission dated 20th February, 2006. The respondents tendered it as exhibit. The relevant parts of that exhibit in as far as this petition is concerned runs as follows:

“PETITION AGAINST MUGENI STEPHEN WASIKE (FORMER TOWN TREASURER BUSIA TOWN COUNCIL).

Mr. Stephen Wasike as a Town Treasurer Busia Town Council between 2002 and 2006. The Inspectorate of Government received and investigated 3 complaints to the tendering and constructions of roads in Busia Town Council. In all 3 instances Mr. Stephen Wasike was found to have involved himself in irregular awarding the

tenders and undertaking the construction of the roads in breach of section 8 of the leadership Code Act 2006.

In all the 3 instances the Inspectorate of Government recommended for the removal of Mr. Stephen Wasike from the office for having breached the Leadership Code, Act, 2002 as stated above. It is vital to note that all the three (3) instances were independent breaches, each warranting his removal in its own right.

Mr. Wasike was found to have breached the Leadership Code Act, 2002. That Act spells out the consequences as follows:-

A person dismissed, removed from office, or convicted for a breach of this code shall not hold any other public office whether appointive or elective for five years effective from the date of dismissal or removal.” S. 20 (3).

For avoidance of doubt, the above provision is in accordance with Articles 230 (4) Article 233, 234 and 235 of the Constitution of Uganda.”

Now speaking for myself and for avoidance of any doubt I hasten to observe that in accordance with the Constitutional Petition No 8 of 2003 FOX ODOI-OYWEROWO, JAMES AKAMPUMUZA AND THE ATTORNEY GENERAL section 20 (1) of the leadership Code Act is not inconsistent nor does it contravene Articles 230 (4) , 233, 234 and 235 of the Constitution.

Now section 20 (1) of the Leadership Code Act 2002 provides as follows:

“ Upon receipt of a report under Section 19 containing a finding of a breach of this code, the authorized person shall effect the decision of the Inspector general in writing written after receipt of the report.”

This section is couched in mandatory terms. The authorized officer has no discretion in the matter as is suggested by both learned counsel for the respondents. He or she has to comply and effect the decision of the Inspector general of Government Willy-nilly.

Exhibit P.7 is the report of the Inspectorate of Government dated 11th November, 2005 addressed to Town Clerk Busia Town Council.

“ A REPORT ON CONFLICT OF INTEREST BY THE TOWN TREASURER BUSIA TOWN COUNCIL”

“.....In view of the above findings you are directed to:

- 1. Interdict the Town Treasurer Mr. Stephen Wasike Mugeni and submit his name to the District Service commission, for dismissal for conflict of interest in the breach of section 8 (1) and (2) of the leadership Code Act, 2002 and breach of regulation 79 (4) of the Local Government Financial and Accounting regulations 1998.”*

As can be seen from the above the report was made much earlier before nomination of the 1st respondent. Talk about impunity.

Little surprise therefore that in his submission learned counsel for the 2nd Respondent equated the report of the IGG to “mere allegation” upon which the

Electoral commission was not supposed to act. On a sad note I think this is very unfortunate.

Based on the views heretofore rehearsed I am convinced and hold that the 1st respondent was not qualified for the election as a member of parliament for Samia – Bugwe North Constituency on the 23rd day of February, 2006. This takes care for the first issue.

On the second issue petitioner alleges that the election was marred by electoral offences by the 1st respondent or his agents with his full knowledge or sanction. These are said to include writing defamatory statements, intimidation and perpetuated violence meted out on the petitioner's agents and his party sympathizers.

Without much ado I say straight away that petitioner failed miserably to show intimidation, corruption-involving bribery, violence to his agents or party sympathizers. These remain sheer allegations without any foundation and substance.

I will proceed to examine the question of uttering defamatory statements which allegation appear to contain some substance. In paragraph 9 of the 1st respondents' answer to the petition, 1st respondent depones as here under following:

“ specifically the 1st respondent denies uttering defamatory and degrading statements attributed to him in paragraph 9 of the petitioners affidavit and paragraph 8 of Mr. Arobo Mathias' affidavit or any other similar statements and avers that he only showed the voters the story about the petitioner which appeared in the new Vision

news paper vol. 17 No 33 dated 07/2/2002 and 08/02/2002 in reaction to a question posed by a voter where in the petitioner was linked to killing of LCS in his home area of Busia but which he later denied.”

Now BLACKS LAW DICTIONARY 6th edition defines the word to “utter” inter alia as:

“ *...to publish or to put forth.* “ The word ‘publish’ is defined by the same dictionary as: “ To make public; to circulate , to make known to people in general. To issue, to put in circulation. Top utter, to present...”

the cuttings of the offending Newspaper issue is attached to respondents answer to the petition as “ If” and “I” and therefore are part of his answer. In annexure “If” which is on the front page and in bold letters it is reported:

“AWORI ADMITS KILLING LCS”

In annexure 1- this is to be found on the third page of the New Vision of 08/02/2002. there is a photograph of three men and on top there is a caption reading, “ *I have never killed, says Awori.*”

It is not in dispute that the new Vision news paper carried the stories complained about. There is no doubt that in their natural meaning the words used in the issue of 07/2/2002 were defamatory of the petitioner.

1st respondent depones that he circulated the offending Newspaper cutting in reaction to the question posed by the voter. He wants us to believe that during his campaigns he anticipated that a voter would ask him about a story that appeared in the New Vision newspaper in February, 2002 and in anticipation of that question

he carried newspaper cuttings of that story. I am pretty sure that even the devil himself or herself could break his or her ribs with laughter at such a suggestion. I am constrained to hold that the only purpose for which the 1st respondent circulated the newspaper cutting was to besmirch petitioner's reputation and character. This was clearly an electoral offence.

This brings me to the third issue. Sector 15 (1) of the electoral Commission Act provides as here under the following:

“ (1) Any complaint submitted in writing alleging any irregularity with any aspect of the electoral process at any stages 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.”

Exhibit “P1” is a letter written by Semuyaba, Iga and Company Advocates and addressed to the Chairman and Secretary Electoral Commission respectively on behalf of their clients numbered 8. The relevant part reads as follows:

“ By annexures A and b hereto, Mr. Mugeni Stephen Wasike was found guilty of impropriety conduct in contravention of the Leadership Code Act Cap 168 of the Laws of Uganda and irregular and unsanctionable conduct respectively. He is therefore not a man of un-blemished reputation to be legible to contest for the sacred office of representing a multitude of people including our clients according to them,....”

“ By the premises, we are duly instructed by our clients to move the electoral commission to cancel forthwith the candidature of Mr. Mugeni Stephen Wasike for Samia –Bugwe North parliament seat.”

I have already herein above reproduced the contents of the exhibit “R5” a letter addressed to the Chairman electoral Commission and confirming what Semuyaba, Iga and Company Advocates had written to the same body. Submitting on behalf of the Electoral Commission, learned counsel who appeared for the Electoral Commission said the commission could not act on “ *mere allegations*”. I would with respect hold that in failing to act on the complaint addressed to it by Semuyaba, Iga and Company Advocates on behalf of their 8 clients, the electoral Commission failed in their statutory duty.

The sum total of my judgment is that I give the following declarations.

- a) 1st respondent was not a qualified person for nomination and participation in the Parliamentary elections held on the 23rd day of February, 2006.
- b) The 2nd respondent failed in its duty when it nominated the 1st respondent despite the complaint in writing of registered voters in Samia-Bugwe North Constituency.
- c) The 1st respondent committed an electoral offence when he made defamatory publication during his campaigns.
- d) An order setting aside the election is hereby made.

Petitioner’s prayer for a declaration that as the 2nd runner up was the winner of the election is with respect untenable. To do so would be to disfranchise the people of

Samia-Bugwe North Constituency an act that would be repugnant to justice and good conscience. There will be fresh nomination and election for the people to choose their representatives in parliament.

Since Petitioner failed to prove the malpractice's alleged in his petition he will only be entitled to 2/3 of his taxed costs to be paid by the respondents jointly and severally.

I order accordingly.

KATUTSI J.B.A
JUDGE

20/07/2006:

Court as before

Kidiya Herbert clerk

Judgment read

KATUTSI J.B.A
JUDGE

20/6/2006.

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBALE
ELECTION PETITION N0 005 OF 2006

AGGREY AWORI SIRYOYI :::::::::::::::::::::::::::::::::::PETITIONER

VERSUS

- 1. MUGENI STEPHEN WASIKE**
- 2. ELECTORAL COMMISSION::::::::::::::::::::::::::::RESPONDENTS**

22/06/2006.

Semuyaba with Kamba for Petitioner

Byomugisha Guma for 2nd respondent

Kiryowa with Makada for 1st Respondent

Wamalo clerk.

Semuyaba: This is coming for scheduling. We are ready for scheduling.

Kiryowa: Not ready because we have just received an affidavit in rejoinder about 10 minutes ago. There were some new matters raised therein which we would like to discuss with our clients. Apply for short adjournment.

J.B.A Katutsi

Judge

Byamugisha: For the 2nd respondent I apologise that I am not ready. I got instructions to represent the 2nd respondent. I received instruction only on 20th June 2006. I need time to peruse the documents. Pray for an adjournment.

J.B.A KATUTSI

Judge

Semuyaba: We oppose the application. We have not introduced any new matter. Respondent said he handed over the officer.

J.B.A KATUTSI
JUDGE

Court: I am constrained to grant an adjournment a very short one though scheduling adjourned to 28/6/2006.

J.B.A KATUTSI
JUDGE

28/6/2006:

Court as before

Wamalo clerk.

Byomugisha Guma:

Scheduling conference.

Petitioners documents:

1. Complaint to electoral commission from Semuyaba Yiga & co., dated 15/2/2006. marked P.1.
2. Letter by Semuyaba /Yiga & co. dated 17/2/2006 marked Exh. P.2
3. Letter by I.G.G. to the Chairman of electoral commission dated 20/2/2006 Marked Exh P.3
4. Letter by Mugeni Steven- 1st respondent dated 12/10/2005 to Town clerk Busia Marked P.4

5. Letter by Town clerk Busia Town council to 1st respondent dated 25/10/2005 marked exh P.5
6. Uganda gazette dated 27/2/2006 marked Exh. P.6
7. Letter by the I.G.G to town clerk Busia Town council dated 11/11/2005 marked exh P.7.
8. Letter dated 10/3/2004 by the I.G.G to the Chief Administrative Officer Busia District marked 10/3/2004. Marked Exh P.8
9. Hand over of Treasurers office dated 20/12/2005 marked IDI.
10. Letter by Secretary district Service Commission to Town Clerk Busia T.C DATED 17/2/2006 ,marked ID2
11. letter by Town Clerk to O/c local Administration Police marked Exh. P.9
12. letter dated 20/12/2005 by Town Clerk to Secretary District Service Commission marked Exh P.10.
13. Letter by Town clerk to secretary District service Commission dated 06/4/2006. Marked Exh. P.11
14. Letter for Town clerk to 1st respondent dated 01/11/2005 marked exhibit P.12.

J.B.A KATUTSI

JUDGE

Respondents documents

1. Exh P.6 on record marked R.I.
2. Nomination form dated 12/1/2006 marked Exh R2.
3. Uganda gazette dated 14.2.2006 marked Exh. R3.
4. Letter for Semuyaba to IG.G. Dated 17/2/2006 marked R.4
5. Reply by I.G.G. Dated 20/2/2006 marked Exh. R.5

6. Parliamentary elections 2006 tally sheet directly elected MPS results for Samia Bugwe North Constituency marked Exh. R.6
7. Return form for transmission of results for directly elected MPS 2006 for Samia Bugwe North Constituency marked R.7.
8. Parliamentary election 2006 polling stations and polling day officials and list for Busia District marked Exh. R.8.
9. Letter from Town Clerk Busia Town council dated 25/10/05 marked R.9.
10. Extract from New vision marked IDI.

J.B.A KATUTSI
JUDGE

Areas of agreements

Agreed areas as agreed and signed by parties.

Put on record.

J.B.A KATUTSI
JUDGE

Petitioners affidavits already on record

Respondents affidavits also on record.

J.B.A KATUTSI
JUDGE

Issues:

These appear on the agreed and signed documents already submitted.

J.B.A KATUTSI
JUDGE

Respondents will orally cross examine the petitioner and other 2 or 3 deponents.

J.B.A KATUTSI
JUDGE

Court: Hearing fixed for 04/07/2006.

J.B.A KATUTSI
JUDGE

04/07/006:

Byomugisha-Guma for 2nd Respondent

Semuyaba assisted by Kamba Hassani for Petitioner

Kiryowa assisted by Makada for the 1st respondent.

Petitioner and 1st respondent present.

Wamalo clerk.

Semuyaba: Briefly the pleadings on record are:

- 1 Petition.
- 2 Reply by 1st and 2nd Respondent
- 3 Amended reply by 1st respondent
- 4 Attendant affidavits. I will lead court through the Petitioner's evidence.

PW1 Petitioners affidavit.

PW2: The affidavit Wandera Shedrack.

PW3: Wangira Fred.

PW4: Munialo Mathew.

PW5 Barasa George William

PW6 Aribu Mathias

PW7 Owera Rogers.

Semuyaba: The Petitioner rejoined the affidavit sworn on behalf of the 1st respondent. These are

1. Affidavit of petitioner in rejoinder dated 28.4.2006 and filed same day.
2. Affidavit by the same Petitioner in answer to affidavit by electoral Commission.

Semuyaba: There is an affidavit after the amended reply by 1st respondent. The affidavit by petitioner is dated 21/1/2006.

Voter Sulaiman Mwanje's affidavit filed on 22/6/2006.

Semuyaba: The above are the affidavits to be relied on in this petition. That is the close of our side.

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Kiryowa: I apply to be permitted to cross examine the petitioner.

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JUDGE

Court: So be it.

J.B.A KATUTSI
JUDGE

Petitioner under cross examination s/s:

- I was a member of the 7th Parliament.
- The Parliamentary elections Acxt 2005 came into being on 21/11/2005.

- The Act required an employee of Local Government etc to resign 90 days before nominations.
- Nominations were on 12/1/2006.
- In accordance with the law the 90 days would expire around 20/2/2006.
- We were five candidates in my Constituency.
- I pulled 12,373 votes
- 1st Respondent got 19,752 votes.
- Tally sheets were distorted.
- These are attached to my petition (Not attached).
- 1st respondent did not resign his position in accordance with the law.
- I saw a letter of purported resignation
- This is my exhibit P.4 .
- There is also exhibit P5 on purported acceptance of 1st respondent's resignation.
- Resignation and handover simultaneously.
- 1st respondent alleged that I killed people in my constituency.
- I was told by ...people who have sworn affidavit.
- Yes the New vision made similar allegations
- I personally did not witness any voting but my people did.
- At Marach I witnessed RDC trying to confuse people.
- The RDC had brought people who were not on the register to vote.
- My agents told me money was being dished.

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Re- examination: The News paper clippings against one a lot of votes.

J.B.A KATUTSI

JUDGE

Wandera: Shedrack, aged 58 years retired Public officer, of Tita village Busitema Busia District s/s:

I swore an affidavit in support of the Petition.

I was an authorized agent of Mr. Owori. I completed Senior 4 . people know the chairman L.C. I of Angalena as Gehesa. He is not chairman of Nakora. I was aware that what he was doing was wrong. I did not report to the authorities. Mr. Mugeni –1st respondent was not present. I did not report to the Electoral Commission. I did not record it.

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JUDGE

XX by Byomugisha:

- I was not briefed on any duties.
- I did not record what I saw on the declaration of results form before signing.
- I did not sign the declaration form

J.B.A KATUTSI

JUDGE

Re-Ex: Nil.

J.B.A KATUTSI

JUDGE

Aroba Mathias, aged 53 years farmer and retired police officer of Buyala village Busitema Busia s/s:

I am a brother of East African School certificate. I was an agent for UPC and Aggrey Owori. I saw people being turned away by the presiding officer and Grace Adikinyi etc. In all I recorded 36 people who were turned away purportedly that their names were not on the register. I asked to check the register but was refused to do so.

I signed the declaration form. I did not state any complaint. The Presiding officer did not allow me to do that. I did not look at the news paper Mugeni was waving. He did read the news paper.

J.B.A KATUTSI

JUDGE

Re-Examination: Nil.

J.B.A KATUTSI

JUDGE

Baraza George William aged 39 years, Butanda Burumi Busia s/s:

I did not report the anomalies to police. I did not report to the Presiding officer.

J.B.A KATUTSI

JUDGE

Kiryowa: We are ready with our side. We pray that we put in another affidavit without reading them

Mr. Kamba: We are objecting to five affidavits which we pray should be expunged on two grounds. But we can submit on them at the stage of submission.

J.B.A KATUTSI

JUDGE

Kiryowa: I am tendering in affidavits as follows: The deponents are:

- 1 1st respondent – Steven Mugeni
- 2 Mwavu Ozede Moshe
- 3 Bucunju Peter Wekide
- 4 Musama Abdu
- 5 Anina Esther
- 6 Baraza Humprey
- 7 Benesa Godfrey
- 8 Barasa Agajo
- 9 Ojambo Justine
- 10 Opandu.

- 11 Ovado Nio
- 12 Wanyama Zacharia
- 13 Munku Godfrey

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JUDGE

Byomugisha: For 2nd Respondent we have.

1. Richard Browns Kabuyuza.
2. Mwavu Wasede Mose.

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JUDGE

Court: Affidavits afore mentioned put as evidence.

J.B.A KATUTSI
JUDGE

Byomugisha: This now is for submission.

Semuyaba: I will follow the order of the issues as framed.

Issue No 1: This issue has two legs.

(a). IGG Report- the effect of the orders

Whether there was proper resignation by the 1st Respondent. As regards (a) above see paragraph 6 of the petitioner's affidavit. Breach of the leadership code. The I.G.G had investigated and passed a verdict of culpability. See paragraph 5 and 13 of the affidavit in support. There is also a letter directing the Electoral Commission of the findings of the I.G.G Invite court to examine exhibits R5, we contend that in light of the contents of this exhibit the electoral commission was enjoined to examine the nomination of 1st respondent and disqualify him from participating in the election. See electoral petition 15/2002 ***Ochieng Peter v Bwire Steven Adel & anor Election*** See S. 15 of electoral Commission Act refers. See Exh. P7 & P.8. electoral commission was enjoined to make a decision. See Article 61 F of the Constitution. Having received complaint in Exh. D7 & 8 the Commission was enjoined to take a decision. This they failed to do. The election of 1st respondent should be reversed on this leg.

Kikonda Butema Farms Ltd v IGG at page 23.

Kaira Amos & anor v Arua Municipal Council & IGG.

Resignation: The letter should be addressed to the District Service Commission.

The Town clerk was not an appointing authority and therefore could not take letters addressed to the commission on resignation. See Article 252 (1) 200 (1) of the Constitution this is a District service Commission. ***A.G V Magwa general Tinyefunza*** on this leg two to election of 1st respondent. Should be nullified. See Strouds Judicial Dictionary. Public Service standing orders. He did not resign and therefore could not be nominated for elections.

J.B.A KATUTSI
JUDGE

Kamba: Electoral offences and irregularities substantial effect of the above.

Test: 1. Quantative and
2. Qualitative tests.

Section 73 of the Parliamentary elections Act.

News paper reports had been denied by Owori. Clement on legal and slander refers page 114. Clear for the affidavits about that respondent and doubts the truthfulness of the News paper. Leaflets were widely supplied. This is admitted by the 1st respondent. The effect of this single offence . see Spencer Twiromwe. The question of substantially does not arise when it comes to offences. 1st respondent should be found guilty of electoral offence.

Irregularities:

Let court look at the affidavits and decide on whether they affected the results

Now to the affidavit of the 1st Respondent.

1. Affidavit of Richard Brian Kabayiza.
2. First of all there is no answer by the 2nd respondent. There is only an affidavit in support of answer to the petition.

The answer filed in court on Attorney general 20/4/2004 is drawn under rule 8 of Parliamentary elections .

Rules- it is mandatory to file an answer to Petition within 10 days if he wishes to oppose. A fee must be paid at filing. There is no answer by the said Respondent on record. If the answer was to be there and it is the one filed in court on 20/4/2006 then still in view of the rules holt the answer and the affidavit of Brian Kabayinza would be ineffectual for non payment of fees. **See Garuga v Ammambabazi.** A pleading filed without payment of fees cannot be looked at by the court.

This court should expunge five affidavits in see proof of the amended 1st Petition viz:

1. Buanafu peter Wekide filed on 16/6/2006.
2. Musana Abdu sworn on 01/06/2006.
3. Opada filed on 01/06/06.
4. Nickodemus
5. Okuku godfrey-reasons are :

two told:

Illiterates protection Act. Section 2 thereof.

Verification of signatures of Illiterates.

The affidavits in question are followed by certificates of translation

The affidavits are signed- which offends S. 2 of the Act. No thumb prints as the law requires and therefore a nullity under the law.

Secondly: the affidavits contain obvious false hoods and are misleading.

Refer to **NORDGLIMT [1982] 2 All E.R. 531. Bitana v Kananura [1977]**

HCB 34. For the above reasons the affidavits referred to cannot stand in the eyes of justice.

Remedies: Several remedies were prayed for (read out).

See Parliamentary elections Act.

Prayer (d) in Petition. If court finds that 1st respondent's election was null and void abnatio should declare the manner up as validly elected.

Costs: see Rule 27 of the parliamentary election Rules 2005. These should be –Sc de *Impressa v Irene Nabwire of 2000*. Pray that the Petition be allowed with costs.

J.B.A KATUTSI

JUDGE

05/06/2006:

Court as before

Wamalo clerk.

Kiryowa: we oppose the petition on the ground that the petitioner has not proved his petition to the required degree of proof –balance of probabilities.

Issue No I:

Grounds for invalidating the nomination of a candidate are to be found in section 4 of the Parliamentary Elections Act. Of all the factors listed none of them have been proved as applicable to the first respondent. The petitioner has sought to rely on the leadership Act. S. 20 (30 thereof. Submit that the operational words under the section are: effective from the date of dismissal or removal” The findings of the

IGG perse when they have not been effected by the authorized person in case the District Service Commission – S. 32 (20 of the leadership Code Act refers, the process is not complete. The District Service Commission did not dismiss or remove the 1st respondent from office. In doing its work under Section 58 (1) of the Local government Act-service commission an independent body not subject to the direction, control etc of any other organ.

Resignation: According to the evidence of the Respondent, he depones that he resigned on 12/10/2005 and his resignation was accepted. He forwarded his letter to the Busia Town Council clerk. It is said the Town clerk was a wrong person. We submit that under S. 67 (3) of the Local Government Act, standing orders Section 61 (10) of the local Government Act local Government staff are only required. The terms and conditions are by their respective councils. 64 (4) refers.

Parliamentary elections Act as it applies to resignation. The ninety days was in applicable to the present circumstances. The Act was effective from 21/11/2005. The nomination date was 12/1/2006 less than ninety days.

Election: irregularities complained- elections were conducted in accordance with the law. No irregularities were proved to have been carried out by the 1st or 2nd respondents. No number of would be voters that were turned away was given. The quantities list could have been applicable if the number was disclosed. The margin of votes was small may be this could have a substantial effect. No evidence was adduced about tally sheets being tampered with.

Qualitative test of the election:

Petitioner stated he was only in one station character 'e'. The rest he received information from third parties. There were no witness who came out to give credibility to the allegations contained in the petition. No report was made to police. None of the agents complained and put his complaint on the declaration forms. A number of matters are left hanging.

See the case of Amama Mbabazi.

Affidavits: No payment of fees is not fatal . See the case of Mbabazi.

Illiteracy : concede that there could be a drafting error by counsel who prepared the affidavit . This does not point to deliberate lies. Be that as it may 8 out of 13 affidavits were not attached. Evidential value of those affidavits should be taken into account in resolving the dispute.

Electoral offence: petition has never sued for definition. The denial in the news paper and the apology was shown along side the other parts of the news paper. The 1st Respondent was not cross examined on the News papers issue.

Remedies: the remedy of declaring the Petitioner the winner does not arise. Pray that the petition be dismissed with costs.

J.B.A KATUTSI

JUDGE

Byomugisha:

The 2nd respondent associates itself with the submission of the 1st respondent. Our evidence is based on two affidavits:

- 1) That of Kabaiza Brain who is acting head of the legal Department in the Attorney general's chambers. It is the same Kabaiza who gives the answer to the petition. The first affidavit should read 1st respondents affidavit and not 2nd respondent
- 2) That of Mwavu who was the District Registrar of Busia.

There was a requirement to pay fees. Some amount of money was paid which was not 50,000/=. The assessment was made by the Chief Magistrate in the absence of the Chief Registrar. The underpayment does not nullify the answers of the 2nd respondent.

Nomination: Section 15 (1) of electoral commissions Act, the complaint was raised by the voters. The 2nd respondent did not confirm the irregularity in order to proceed to nullify the nomination. The IGG report regarding the conduct of the 1st respondent. See Section 20 (3) of the Leadership Code. Dismissal or removal from office had to be confirmed to the 2nd respondent in order for it to act. The electoral Commission is independent. It has quasi judicial powers in such cases. It does not act on mere allegations. The powers of the IGG under the law are to investigate and make recommendation to the relevant body to enable thatr body to act. Under S. 58 of the Local government Act Local Government are independent bodies.

See. NEWPORT CORP [1951] all E.R 839

See FOX ODOI & ANOR V Attorney General the IGG only recommends.

Resignation: The office of Town clerk is established under Section 65 of the Local Government Act. I associate myself with what was said on behalf of the 1st respondent.

Malpractices.: the affidavit of the petitioner is suspect dependent on hearsay. No irregularity was reported to any authority. No information ever reached the said respondent.

Results: the tally sheet was not contested.

Remedies: The 2nd respondent was dragged to this petition as no case was made against him or any of its officers either at nomination level or at the declaration of results. Pray for costs.

J.B.A KATUTSI

JUDGE

Reply Kamba: See Section 61 of the Parliamentary elections act.

Dismissal: The Section has three operational words: (1) Dismissal, (2) removal (3) conviction.

See THONHLL Legislation.

Drafting –Where there is a comma and it means that the two are disjunctive. As to dismissal it is conceded that there is no evidence that 1st respondent was dismissed by the district Service Commission.

Removal : 1st respondent could be said to have been removed from office. SEE *SHEIKH MWERI V A.G 2002 VOL E.A Law Reports 16*. Exhibit P12 Mr. Mugeni's office was broken into when he had refused to hand over . Section 35 of the leadership Code Act.

Conviction: William C BURTON'S thesaurus 2nd edn P121. See Section 23 of the Leadership Code. See Article 234 of the Constitution. See also office 232 of the same. It was in that spirit and the powers conferred that did not dismiss or if it failed to act on the file wrote the letter of 28/2/2006 to the electoral commission. The electoral commission had no right to review that letter

Resignation: the date of commencement of Section 80 of the constitution by adding (810 was to commence on 30/9/2005 . He had time within which to resign. He was under investigation so he could not validly tender in his resignation.

Order 3

In view of exhibits p10 & P12 the 1st respondent cannot be said to have resigned. The mischief of the two on resignation intended to cure was to level the ground so that public officers could not gain unfair advantage over there opponents not in the public office by using government facilities.

2nd respondent: quoted R 4 . the question came that last paragraph of r4 be taken to mean that the 2nd respondent is exonerated as considered the complaint? The District Service Commission is not independent of the decisions of the IGG.

J.B.A KATUTSI
JUDGE

Court: Judgment on 19/7/2006.

J.B.A KATUTSI
JUDGE