THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-CV-EP-0007/2006

MATHINA BWAMBALE …….....PETITIONER

VERSUS

1. THE ELECTORAL COMMISSION }……..RESPONDENTS

2. CRISPUS KIYONGA }

BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI

JUDGEMENT

The petitioner and the 2nd respondent together with 4 others were candidates in the elections for Member of Parliament for Bukonzo County West Constituency in Kasese District, which were held on 23/2/2006. The 1st Respondent returned the 2nd respondent as the duly elected Member of Parliament for that constituency. The 2nd respondent has since been sworn in and taken his seat as such Member of Parliament.

The petitioner was dissatisfied with the conduct and results of the election. He filed this petition in which he complained of failure by the 1st respondent to conduct the elections in compliance with the provisions and principles of the electoral laws, and that such failure affected the results in a substantial manner. He further complained that the 2nd respondent committed illegal practices and offences personally and also by his agents with his knowledge and consent or approval.

The petitioner prayed for a declaration that the petitioner was the validly elected candidate, or that the election be set aside and a new election held, plus costs of the petition.

Moses Ojakol represented the petitioner, while Christine Kaahwa represented the 1st respondent, and Peter Nkurunziza assisted by Paul Kalemera appeared for the 2nd respondent.

Each side filed numerous affidavits in support of their respective cases. A memorandum of scheduling was filed with the consent of all the parties, and so it formed part of the record. In the memorandum, it was agreed that the following issues be set down for determination by court;

1. Whether during the election of the Member of Parliament for Bukonzo County West constituency, there was non-compliance with the provisions of the Parliamentary Elections Act, 2005.
2. Whether the said elections were not conducted in accordance with the principles laid down in the provisions of the Parliamentary Elections Act.
3. Whether if there was non-compliance with the provisions of the said Act, such non-compliance affected the results of the said election in a substantial manner.
4. Whether any illegal practices and /or offences under the Parliamentary Elections Act, were committed in connection with the said elections by the 2nd respondent personally or with his knowledge and consent or approval.
5. Whether the petition is competent for failure to serve the 2nd respondent in time stipulated by law.
6. What remedies are available to the parties.

I will hereinafter in this judgement refer to the Parliamentary Elections Act 2005 as the PEA.

At the commencement of the hearing, Mr. Ojakol learned counsel for the Petitioner informed court that the petitioner had dropped the ground in paragraph 5 of the petition of the qualification of the 2nd respondent to stand for election, before resigning as a sitting member of parliament.

During the hearing of the petition, the respondents sought leave to cross-examine the petitioner and such leave was granted. That was the only deponent who was cross-examined in this petition.

I will deal with the issues in the order set out above. The burden of proof in an election petition lies on petitioner to prove the allegations to courts satisfaction. This is provided for in S. 61 Parliamentary Elections Act. The Supreme Court in *Col. (Rtd.) Dr. Besigye Kizza V. Yoweri*

Kaguta Museveni EP No. 1of 2001reiterated this when it held that where a petitioner seeks to have an election annulled, the grounds put forward lie for proof on the petitioner.

On the standard of proof, S. 61(3) PEA provides that any ground in S. 61 (1) PEA shall be proved on a balance of probabilities. Therefore proof is on balance of probabilities.

Whether during the election of the Member of Parliament for Bukonzo County West constituency, there was non-compliance with the provisions of the Parliamentary Elections Act, 2005.

This was the 1st issue. There were a number of complaints in this regard, and I will analyse each as they were presented.

Voting after the official time of closing the polls.

It was alleged that at Rusese Outside Quarter Guard polling station, there was voting outside the official voting time. In paragraph 4(1) of the Petition, it was stated that the 1st respondents' agents allowed people who were neither at the polling station, nor in the line of voters at the official time of closing to vote.

S.29(2) PEA directs that polling at each polling station commence at 7.00 o'clock in the morning and end at 5 o'clock in the afternoon. Subsection (5) thereof provides as follows:-

> "(5) If at the official hour of closing the poll in subsection (2) there are any voters in the polling station, or in the line of voters under subsection (3) of Section 30 who are qualified to vote and have not been able to do so, the polling station shall be kept open to enable them to vote, but no person who is not actually present at the polling station or in the line of voters at the official hour of closing shall be allowed to vote, even if the polling station is still open when he or she arrives".

The complaint in this regard was that at this polling station, soldiers were transported from elsewhere and brought to, and they did vote well beyond the closing time for voting. The evidence of Salima Masika in her affidavit (No. 3) in paragraph 4 was that by 4 o'clock, the ballot papers at this polling station had got finished, while "only a handful of people and or voters were still on the line".

In paragraph 6, she deposed that more ballot papers arrived at 6pm and soldiers were brought in to vote, and voting continued up to 8 o'clock at night. When she protested, she was threatened with being shot, and she left even before counting of votes.

Bwambale Jerome in his affidavit (No 4), deposed that he was at the same polling station when a lady came with more ballot papers and directed voting to continue. This was after 6pm, and that more soldiers who had not been in the queue came and voted, and that voting ended at 8pm.

It was submitted that this evidence was corroborated by the report of a group of independent election observers known at "poll watchers". The report of the poll watchers was annexed to the affidavit (No. 82) of the petitioner. In that report, in answer to question 15, whether anyone was permitted to join the queue after 5pm, the answer was "yes" and that the number was more than 20.

That report had an extra and unsigned page 12 containing "notes". In those notes it was reported in the 2nd and last paragraph thus;

> "The 200 ballot papers received were used up by 9.00am and from that time up to 4.58 there was no voting taking place due to the above mentioned problem. So it was by 4.59 that the District Registrar arrived with some few ballot papers and instructed the presiding officer to conduct voting till 1.00am. Due to the above, voting ended at 8.00pm."

In reply to the above, the 1st respondent filed the affidavit (No. 3) of one Daisy Twesigye the Registrar for Kasese District. She deposed that she was informed by the presiding officer of that polling station of the inadequacy of ballot papers as early as 10.00am. Due to the demands of the heavy schedule on voting day for both presidential and parliamentary elections, she only managed to mobilise extra ballot papers and personally delivered them to Rusese outside quarter guard polling station just before 5.00pm. She then instructed the presiding officer to ensure that all at the polling station who were eligible to and had not yet voted should be allowed to vote.

The presiding officer at that polling station was Nasur Menya. In his affidavit (No. 8), he deposed to more or less what Daisy Twesigye stated. He added that most people remained seated at the polling station when the ballot papers run out. They rejoined the line soon as they were brought by the Registrar, and voting continued till just before 8.00pm. He denied that soldiers were brought in after the closing time and these voted.

Subsection (5) of section 29 of the PEA allows 'any voters in the polling station, or in the line of voters' to continue voting even after 5.00pm till they all have voted. The ballot papers run out as early as 10.00am. Extra ballot papers were brought just before 5.00pm. It would not be expected that the voters who were waiting to cast their votes would all this time, spend more than 6 hours standing in the line. It was only practical that they would sit wherever they could at the polling station as they wait for the extra ballot papers to arrive. There was no contravention of the law to allow such people to vote even after the official polling time.

The evidence that soldiers were brought from other areas came from the petitioner who conceded that he was only so told, presumably by his agents like Bwambale Jerome. Salima Masika and Bwambale Jerome both deposed that soldiers were brought in to vote. They did not know the origin of these soldiers. None mentioned their number, all of which were rather surprising, considering that they would be the ones to brief the petitioner on these matters. The declaration of results form for that polling station was annexed to the affidavit of the petitioner. Bwambale an agent of the petitioner signed it. It was not indicated anywhere on that form, as ought to have been, that there was any malpractice at that polling station.

The Poll Watchers report was not conclusive in this respect. The question asked was whether any people were allowed to join the line after 5.00pm. It was not clear whether these were people who were already in the polling station waiting for the extra ballot papers and were therefore allowed by the law to cast their votes, or these were people who came into the polling station after the closing time, and were therefore prohibited by the law from voting. The number of such people was also not stated; save only to say they were 'more than 20.'

In view of the uncertainties regarding this matter, I was not, on a balance of probabilities satisfied that at Rusese outside quarter guard polling station, there was improper voting or that unauthorised people voted outside the voting time.

Improper Assistance of Voters____

Paragraph 4(11) of the petition alleged that the agents of the 1st respondent permitted improper assistance of voters to mark ballot papers under the pretext of disability.

Section 37 PEA provides for assistance of persons with disability to vote. The assistance must be for reasons of 'blindness, illiteracy, old age or any other disability,' where the voter is 'unable to fix the authorised mark of choice on the ballot paper.'

The assistance must be voluntary, and the presiding officer has powers to refuse assistance of a voter, where he is not satisfied that it is permitted by the law. But election officials, candidate's agents, or observers are prohibited from offering such assistance to a voter. A person who pretends to be under a disability for purposes of voting as such, and one who purports to assist a voter under a disability where the voter did not voluntarily seek such assistance commits an offence.

Salima Masika in affidavit (N0. 3) and Bwambale Jerome in affidavit (No.4) both testified that the driver of the 2nd respondent came to Rusese outside quarter guard polling station and brought a lady to vote. That without checking her name in the register, he picked a ballot paper and showed her where to tick. It was deposed that the same lady did not appear disabled, or illiterate.

Sausi Amza the driver of the 2nd respondent deposed an affidavit in reply. The affidavit of Sausi Amza (No.147) was dated on 8th August 2006. It was sworn at Kasese, but rather surprisingly, it was commissioned by Bernard Muhangi Bamwine, Advocate and commissioner for oaths in Kampala. The question then was whether the affidavit was sworn at Kasese in the absence of the commissioner then delivered to him in Kampala where he merely appended his signature and stamp. It could not in practical terms happen any other way. I found that a ridiculous situation and as it destroyed the value of affidavit evidence which is meant to be taken on oath in order to be accepted in court and for other purposes. Such affidavit evidence must be made or taken in the

immediate presence of a person authorised to administer oaths, like a Commissioner for Oaths. That was not the case in respect of the affidavit of Sausi Amza, and for that reason I struck it out.

That left the depositions of Bwambale Jerome and Salima Masika uncontroverted in this respect. But as was held in the ***Basigye case*** (Supra), each affidavit in an election petition will be assessed for its probative value as evidence even if uncontroverted. It will only for the lack of affidavit evidence in rebuttal per se, be taken as the gospel truth.

The presiding officer at the polling station Nusur Menya in his affidavit (No.8) denied all these allegations. He was presumably an independent person in this matter. I found his evidence the more preferable. None of the people allegedly assisted came forward to state that they so were, and that they were not suffering under any disability, and that the assistance was not voluntary.

There were other and numerous incidents of alleged improper assistance of voters. Bwambale Silvano deposed in his affidavit (No.5) that at Kabaghobe polling station, he saw Erisa an agent of the 2nd respondent assisting people to vote. He named them as Sambe, Sawusi and Kashakura. He said that these people were not so aided in subsequent elections. Malimingi Atanace in his affidavit (No.16) was also at Kabaghobe polling station. He saw the said Erisa assisting Kabugho, Mbambu Naume, Masika Diona and James Fundwemu. He stated that these people did not need any such assistance in the earlier 2001 elections.

Muhindo Joram was the presiding officer at Kabaghobe polling station. In his affidavit (No.28) he deposed that he only allowed the clearly disabled voters to be assisted by members of their families. He categorically denied that he allowed Erisa to assist any voters as alleged by Malimingi Atanace.

I had no reasons to disbelieve this non-partisan election officer. In any event, the allegation that the persons who were assisted ought not to have so been assisted for reasons that they did not seek such assistance in earlier or in later elections is not a sound complaint. Disability is not tied to time. It can happen at any time. The law was not intended for only those with permanent disability. Such disability could be temporary, occurring at about the time of pooling.

I was not satisfied, on a balance of probabilities of any improper assistance of voters at Kabaghobe polling station.

Kaleru Misaki in his affidavit (No.18) stated that he saw the chairperson of Rwegaba assisting 2 couples to vote. It was not stated at what polling station this happened, nor was it stated why it was not proper to assist such persons. That allegation was left hanging unproven.

Gabona G. in her affidavit (No.28) deposed that at Nyamughona Catholic Church polling station she saw one Juka Biseremu an agent of the 2nd respondent guiding people who did not need assistance to vote. She named 5 such people. Paul Ruhigwa (affidavit No.26) was the presiding officer at Nyamughona polling station. He denied that he allowed people to tick for others as alleged by Gabona G.

Aloni Kigoma (affidavit No.53) stated that the chairman of LC.I Kibafu repeatedly guided voters to tick ballot papers and to vote. He named only 4. Llubangula Jackson the presiding officer thereat denied the above allegations.

There were other such allegations from Baluku Asasio (affidavit No.61) who stated that Misaki, the NRMO Chairperson ordered one Thembo to escort him and ensure that he voted for the 2nd respondent. But he resisted any such act of intimidation and voted for a candidate of his choice.

Masereka Farijallah (affidavit No.63) deposed that he saw agents of the 2nd respondent leading voters to vote, when such people needed no such assistance. He named three such people. Thembo Byabutwa of Kaghorwe-Kalongoire (affidavit No. 68) saw agents of 2nd respondent guiding 3 voters to vote. It was not stated whether or not such people needed assistance any way, why therefore it was not proper to assist them cast their votes.

Mbyamira Geofrey (affidavit No.13) the presiding officer thereat denied the above allegations.

What I found not made out from practically each of these allegations of voters' assistance was that save for Baluku Asasio, none of the people allegedly improperly assisted, and presumably involuntarily swore any affidavit to that effect.

In the case of Baluku Asasio, he resisted such attempt and voted for a person of his choice. Court would need more that mere assertions from those who allege that the people were assisted who did not need such assistance, meaning that they did not suffer from any disability within the meaning of S.37 PEA.

There were many other affidavit filed in respect of this matter by both sides, but which I found to be of doubtful evidential value. I have not alluded to them in the judgment, as they did not affect the result of my analysis of all the evidence on record in this regard. I was not satisfied that there was improper assistance of voters contrary to S.37 PEA. That complaint is therefore to be dismissed.

Intimidation

This was another complaint of non-compliance, in paragraph 4(iii) of the petition. The complaint was that the 1st respondent failed to prevent the agents of the 2nd Respondents from chasing or otherwise interfering with the electoral process. Incidents of intimidation were set out in detail in paragraphs 6,7,8 and 9 of the petitioner's affidavit in support of the petition. S. 32(1) PEA provides for the presence of a candidate or a candidates agent at a polling station in order to safeguard the interests of the candidate, in regard to the polling process.

Masereka Eric (affidavit No.8) deposed that 2 soldiers came and sat at the roadside, at the approach to Buhatiro Primary School polling station. He phoned the petitioner, and the 2 soldiers tried to arrest him and he fled. He did not therefore monitor the elections for the petitioner as he intended.

Kamakweye Zephanus (affidavit No.12) stated that the GISO went to his home with soldiers to arrest him on 22/2/2006, one day to polling day, but he hid. On polling day, he was chased from

the polling station by the presiding officer and the police constable. He therefore did not perform his duties as an agent of the petitioner.

In regard to the 2 soldiers, it is not clear why the witness did not report to the polling officers, but rather chose to report to the petitioner instead. Were these soldiers authorised by the election officials to be where they were? Were they on duty to keep peace? Was any other person or a specific group of people, e.g. supporters of the petitioner harassed or intimidated by these 2 soldiers? All these questions remained unanswered. The one who alleged an aspect of non-compliance had to prove the same, rather than leaving it to speculation. These unanswered questions put the complaint in doubt.

Other incidents of intimidation were in paragraph 9 of the petitioner's affidavit in support of the petition. It was deposed in paragraph 9(a) of that affidavit that the 2nd respondent in company of armed soldiers visited Mithimusanju polling station and remained there for more than one hour, and that while there, the presiding officer chased away the voters.

Businge Benjamin was the presiding officer at that polling station. In his affidavit (No. 19) he denied the allegations of the petitioner and of the other deponents concerning his polling station. He deposed that the 2nd respondent came to that polling station and was there for less than 5 minutes. He did not have any soldiers with him. He denied chasing away any voters. Mary Bigambwenda a polling assistant at the same polling station in her affidavit No. 7) corroborated the affidavit evidence of Businge Benjamin in respect of what transpired at Mithimusanju polling station on polling day.

In paragraph 9(c) of the same affidavit of the petitioner, it was alleged that at Kighando Church of Uganda polling station, the agents of the 2nd respondent Kiiza Matembele and Masanga Muhindo took over the role of, and replaced the police constables. Jackson Mbusa the presiding officer at that polling station swore an affidavit (No. 23) in which he deposed that there was no change of police constables. More to that, he deposed that the two persons named were as a matter of fact agents of the petitioner, as borne out by the declaration of results form, which they signed in that behalf.

He ought to know who the agents of the respective candidates were as he was the presiding officer at that polling station. That would in my opinion answer the complaint.

Lastly in this regard, it was deposed in paragraph 9(f) of the petitioner's affidavit (No. 1) that three ballot boxes for the polling stations of Kamukubi, Nyabugando and Lyakirema disappeared from 6 pm till 3 am, when they were recovered.

Muhindo Robert was the presiding officer at Kamukubi polling station. In his affidavit (No. 17) he deposed that voting ended at 5.00p.m, but the counting of vote did not end till 10.30p.m. He had to transport the election materials including the ballot box to Karambi sub county, headquarters – 15 km away. Together with polling officials and agents, he travelled to Mpondwe police Post. The in charge Mpondwe police post organised transport for them all, including the presiding officer of Nyabugando polling station to Karambi sub county headquarters, where they arrived at 1.30a.m.

Stephen Musabali was the presiding officer at Nyabugando polling station. Counting of votes for all 3 elections i.e. presidential, parliamentary and women elections ended at 11.30p.m due to rain disruptions. He moved with all the polling officials and agents to Mpondwe police post. At Mpondwe police post the OC organised transport for them all including Kamukubi polling station officials, to Karambi sub county headquarters. They arrived at 1.30a.m. people waiting who included the petitioner.

Baguma Julius was the presiding officer at Lyakirema polling station. In his affidavit (No. 24) he stated that due to rain disruptions, voting ended late, and counting of votes for presidential, parliamentary and women elections did not end till 10.00p.m. Thereafter he walked the 2km to the sub county headquarters at Karambi where he arrived at 11.00p.m.

The above three affidavits fully explained the so-called "lost and recovered" ballot boxes.

The petitioner would appear to have been wont to cry foul whenever there was a hiccup in the electoral process. Even at the best of times, there are bond to be hiccups in the electoral process. Rain disruptions are bound to occur, resulting in late completion of vote counting. Transport will not always be available at very polling station for the immediate transportation of election materials. What is important is transparency of all processes and honestly by all concerned, plus ensuring that there are agents fully and uncompromisingly monitoring the process at very stage. In this case, the presence of agents would have easily explained the apparent hiccup where ballot boxes delayed to arrive at Karambi sub county headquarters from the three polling stations.

In the event, the complaint about voter intimidation and interference was not proved to courts satisfaction, and it is to be dismissed.

Being armed at polling stations

In paragraph 4(vii) of the petition it was alleged that contrary to S.42 PEA, the 1st respondent allowed persons with arms to be present within 1km of polling stations in contravention of the law.

S.42 (1) PEA prohibits anyone with arms or ammunition to approach within one kilometre of a polling station, unless called upon to do so by lawful authority or where such persons is ordinarily or by virtue of his or her office entitled to carry arms. Sub section (2) thereof makes contravention of the above provision an offence, which on conviction is punishable by a sentence of a fine or imprisonment.

The 2nd respondent was at the time of elections a person entitled to armed escort, according to Stephen Nabeta the Permanent Secretary at the NRM Secretariat, being the National Political Commissioner (NPC). The 2nd respondent in his affidavit conceded that on polling day, he moved with his armed guards, but left them about 200 metres from the polling station. It was submitted that by this concession alone, it is clear there was contravention of the law.

It was not disputed that the 2nd respondent was at the time of election a person entitled to armed security guards. It was not intimated that the he was personally armed at the time of elections.

The law provides that the only persons who may be within 1km of a polling station while armed are either those called upon to do so by lawful authority, and lawful authority here refers to such authority as are in charge of the elections at the polling stations. This was the essence of the holding on this point by Eganda Ntende J, in *Musinguzi Garuya James vs. Amama Mbabazi & the Electroal Commission* E.P No.3 of 2001. The only other person authorised to bear arms within one kilometre of a polling station is one 'who is ordinarily entitled by virtue of his or her office to carry arms'.

The soldiers who were left at least 200 metres from the polling station were on lawful duty of guarding the National Political Commissioner. It is common knowledge that soldiers bear arms by virtue of their duties as such. It was not disputed that these soldiers were, at this time on lawful duty. It was therefore not unlawful for them to be carrying arms, by virtue of their being on duty. I do not find that there was therefore a contravention of S.42(1) PEA in this aspect.

It was submitted that the affidavit of Stephen Nabeta was not sufficient proof that a cabinet Minister is entitled to armed security guards. Terms and conditions of service ought to have been produced.

Stephen Nabeta in his affidavit (No.163) deposed that he was the Permanent Secretary at the NRM Secretariat. A Permanent Secretary is, under Article 174 of the Constitution the Head of a Government Department. He therefore ought to know government policy, as part of his or her functions under Article 174(3)(c) is to implement policies of the Government of Uganda.

He deposed that it as government policy that cabinet Ministers are entitled to armed security. If this was doubted, then Nabeta ought to have been summoned for cross-examination. He was not. I was satisfied that it was proved that the 2nd respondent was entitled to armed guards even on polling day.

It was alleged by Thabulanga Alex that the 2nd respondent went to Kyampara catholic Church "A" polling station with armed soldiers. The presiding officer at that polling station Llumangula

Jackson in his affidavit (No.16) stated that the 2nd respondent went to his polling station and went away after 5 minutes, and he was alone. Asaba Geofrey was the presiding officer at Kyampara Catholic church "B" polling station, which according to his affidavit (No.14) was about 5 metres only Kyampara "A" polling station. He saw the 2nd respondent at their polling station and that he went away after 5 minutes and was not accompanied by any soldiers.

This was the more convincing evidence, corroborated as it was, and coming as it did from the election officials. The complaint that the 1st respondent allowed armed people at or near polling stations in contravention of S.42(1) PEA was not proved to courts satisfaction.

There were other complaints of non-compliance, which in final submissions were not addressed. These included the complaint that there was campaigning on polling day. Thembo Christopher in his affidavit (No.11) rebutted that allegation of Baluku (affidavit No.38) that there was a poster of the 2nd respondent at Ihango polling station, and that there was campaigning thereat on polling day.

Bwahuha Wilson (affidavit 35) stated that people were shouting "bus-yellow-bus" at Kithoma/Ihango polling station. Twesigye Dennis the presiding officer thereat explained that the partisan shouting happened during the counting of voters. This was after the voting had taken place, and it was jubilation whenever a vote on favour of that particular party was announced.

Having analysed the evidence on record, I was satisfied that the allegations of non-compliance with the PEA were not made out. Consequently I find and hold that the 1st issue is answered in the negative.

Whether the said elections were not conducted in accordance with the principles laid down in the provisions of the Parliamentary Elections Act.

This was the 2nd issue. The principles are to be found in both the Constitution and the PEA. The main principle is that the elections must be free and fair. This is entrenched in the Constitution Art. 1(1), (4), and Art. 61(1)(a). The principles of universal adult suffrage by secret ballot and transparency set out in Art. 68 are also relevant.

Odoki C.J. in the Besigye case (supra) considered what constitutes a free and fair election in these words;

> 'To ensure that elections are free and fair, there should be sufficient time given for all stages of the elections, nominations, campaigns, voting and counting of votes. Candidates should not be deprived of their right to stand for elections, and citizens to vote for candidates of their choice through manipulation of the process by electoral officials. There must be a levelling of the ground so that the incumbents or government Ministers and officials do not have an unfair advantage. The entire election process should have an atmosphere free of intimidation, bribery, violence, coercion or anything intended to subvert the will of the people. The election procedures should guarantee the secrecy of the ballot, accuracy of counting and the announcement of results in a timely manner. Election law and guidelines for those participating in elections should be made and published in good time. Fairness and transparency must be adhered to in all stages of electoral process.'

The areas under consideration in this regard included allowing people to vote outside voting hours in contravention of S. 29 (2) and (5) PEA and the principle of transparency, which the law was meant to protect. This was alleged at Rusese Outside Quarter Guard polling station. I have already analysed the evidence on record regarding this polling station when dealing with the 1st issue. I found that the complaint was not made out, and dismissed it.

It was submitted that the 1st respondent permitted improper assistance of voters to mark their ballot papers under the pretext of disability, contrary to S. 37 PEA, thereby violating the principle of secrecy in Ss. 7 and 9 PEA.

It was further submitted that the principle of transparency was violated when the 1st respondent failed to prevent the agents of the petitioner from being chased away from polling stations. This contravened S.32 PEA.

There was the argument that contrary to S.42 PEA, the 2nd respondent left his armed escorts 200 metres from the polling station, and the presence of armed people at Rusese Outside Quarter Guard polling station. The presence of armed people at polling stations violated the principle of freedom.

I dealt with the complaints above when dealing with the 1st issue, and I did not find them proved. I would not therefore say that the principles laid out in the PEA in relation thereto were violated in respect of those incidences.

It was submitted that the 1st respondent failed to cancel the elections at the polling stations where there were malpractices. I agree with Ms. Christine Kaahwa for the 1st respondent that the Electoral Commission could only take action where it had information or complaints of malpractices. There was no evidence in the petition of any report of malpractices having been made to the 1st respondent and such report not having been attended to. The Electoral Commission could not manufacture complaints to work on let alone incidents of malpractices or non-compliance with the electoral law.

There were complaints of disruption of petitioners campaign rallies. Kabayirwa Edison said he was threatened with death by the agent of the 2nd respondent. He witnessed the disruption of the petitioners rally at Kisaka parish. This was controverted by Amon. Masereka Erika stated that he had to flee his home under the threat of arrest. Monday Charles said that at Kisaka rowdy youths attempted to disrupt the petitioners rally. He tried to stop them and was injured in the ensuring fracas. Evase said the GISO went to his home in an attempt to arrest him. Kalembu Bartholomew was threatened by a gang of youths wielding spears and pangas. The GISO of Karambi tried to arrest him and he fled.

This was evidence from the people who were confronted by the problems they testified about. It was therefore not difficult to believe them. No wonder the evidence in rebuttal was as scanty as it was unconvincing.

Aloni Kigoma said that the petitioner was referred to as a rebel by agents of the 2nd respondent, but Musa Mbusa denied this rebel talk.

I found that from the evidence on record, the disruption of the petitioners campaign rally at Kisaka was proved. But not so the so-called rebel talk. The disruption of a candidate's campaign rally violated the principle of freedom and fairness.

I would hold that the election was to that limited extent not held in compliance with the principles of the PEA. The 2nd issue would therefore succeed in part.

Whether if there was non-compliance with the provisions of the said Act, such non-compliance affected the results of the said election in a substantial manner.

The next issue for consideration was the effect of non compliance on the results of the elections. It was submitted that the court should adopt both a quantitative test as well as the qualitative test in determining whether the non compliance had a substantial effect on the results of the election. By quantitative test is meant the consideration of figures and numbers affecting or constituting the results of the election, while the qualitative test involves a consideration of the entire electoral process right from the campaign period leading to a determination whether the election was free and fair.

Mr. Ojakol learned Counsel for the petitioner presented three scenarios in the attempt to prove that through the quantitative test court should find that the non-compliance affected the results in a substantial manner. I will deal with each of them in the order he presented them.

The 1st scenario was tied to the results of voting at Rusese Outside Quarter guard polling station. The complaint in respect of that polling station was that people who were not in the line after the closing time were allowed to vote. It was submitted that if those results and those from Binyeswa polling station were nullified because of the complaint above, this would amount to 50% of the votes cast, and this would constitute 'substantial effect' on the results.

The simple answer in that regard is my finding, which I gave herein above in this judgement that there was no proof of the allegation that there was improper voting at Rusese Outside Quarter Guard polling station. That would dispose of the 1st scenario.

The 2nd scenario was from figures, which the petitioner worked out. They were in annextures 'C' to 'G' of the supplementary affidavit of the petitioner (No.72). The figures make beautiful reading, but as the petitioner conceded in cross examination, these were the work of a layman and no wonder their accuracy was soon discredited, even before their authenticity let alone their evidential value was ascertained.

The figures were premised on the accuracy of the tally sheets and declaration of results forms, which the petitioner in that affidavit stated he received from his lawyer, who in turn received the same from the 1st respondent.

From those forms, he noted that there were 5 polling stations which had no declaration of results forms. He sought in the figures he worked out to have the results from these 5 polling stations to be nullified. He did not state that the results from those polling stations were absent from the tally sheets which he annexed. Indeed he even gave the results from each of those polling stations in his annexture 'C'.

In answer to a question from court, he stated that he had an agent at each of the polling stations in the constituency. None reported not having signed the declaration of results form as required under S.47 PEA. There was no report from the refused to sign these forms. The declaration of results forms which he attached to his affidavit annexture 'B', each showed that his agents signed on each of the forms, save for Lyakirema Kabagobhe polling station.

During cross examination, the petitioner stated that he used the figures from the forms provided by the 1st respondent. He admitted that the figure of 793 appearing as the number of ballot papers received at Kanyasabu LC1 headquarters polling station in his annexture 'D' was in fact the number of registered voters at that station as shown in the tally sheet, (the 2nd sheet of

annexture ‘A’). That put paid to the accuracy and therefore the reliability of the petitioner’s figures.

It was argued that the errors were from the 1st respondent, but that did not save the petitioner. He could not rely on defective figures from the 1st respondent to show that he therefore would be the candidate with the biggest number of votes. If the figures were defective, then all candidates were equally affected.

The 2nd scenario therefore did not make any arithmetic sense once it was shown that the figures on which it was based were wrong. It did not make practical sense once it was shown that the results from the polling stations complained of as having no declaration of results forms were included in the final tally for the constituency.

The 3rd scenario was equally flawed. This was based on annexture ‘G’. It was premised results from what was perceived to be problem polling stations being deducted from he overall totals in the constituency. Naturally these were the areas where the petitioner would not have performed well due to the alleged irregularities. I found that the irregularities were in Kisaka polling station where the petitioner got 172 votes while the 2nd respondent got 258, a margin of 86 votes according to petitioners annexture ‘G’.

The quantitative test was not certainly helpful to the petitioner. The qualitative test was equally unhelpful, for I have held that the electoral process, much as it may have had hiccups, the evidence of non-compliance which was proved to court was the interference with the campaign rally of the petitioner at Kisaka.

There was no evidence to the satisfaction of the court that the non-compliance affected the results of the election in a substantial manner. That issue is answered in the negative.

Whether any illegal practices and /or offences under the Parliamentary Elections Act, were committed in connection with the said elections by the 2nd respondent personally or with his knowledge and consent or approval.

This was the 4th issue for courts determination. The issue whether an illegal practice or election offence was committed by the 1st respondent personally or by his agents with his knowledge and consent or approval is provided for under S. 61(1)(c) of the PEA, and is a ground under that provision, for setting aside an election.

Part XI of the PEA sets out the illegal practices while Part XII sets out other election offences. S.68 relates to bribery, which is an offence under sub-section (1) thereof. The offence of bribery under that sub section is declared under sub section (4) to be an illegal practice.

From the above provisions of the law, commission of an act of bribery constitutes both an illegal practice, as well as an offence under the PEA. The provision prohibits the influencing voters to vote or refrain from voting for any candidate by giving money, gifts, alcoholic beverage or any other consideration. The only exception is to be found in subsection (3), which accepts the provision of refreshments or food at a candidates campaign planning and organisation meeting.

Oder JSC (RIP) in *Col. (Rtd.) Dr. Besigye Kizza* (Supra) at page 475 of the certified edition (Vol 1) set out the ingredients of bribery as follow:

(i) That a gift was given to a voter.

(ii) The gift was given by a candidate or by his agent.

(iii) It was given with the intention of inducing the person to vote.

The gift or money or other consideration must be given to a voter. A voter is defined in S.1 of the PEA to mean “a person qualified to be registered as a voter at an election who is so registered and at the time of an election is not disqualified from voting”.

Blacks Law Dictionary (6th Edn) Page 192 defines “ Bribery at elections” as the offence committed by one who gives or promises to give or offers money or valuable inducement to as elector, in order to corruptly induce the latter to vote in a particular way or to abstain from voting, was a reward to the voter for having voted in a particular way or abstained from voting.

From my reading of S.61 PEA, which details the grounds for setting aside an election, under sub section (1)(c) thereof, it does not require a multiplicity or any number of illegal practices or offences under the Act to set aside an election. The provision is in any event drafted in the singular; it reads 'an illegal practice or any other offence', meaning that even a single proven illegal practice or other offence would suffice to set aside an election under the Act.

In *Tirwome Spencer Patrick* (Supra) the court found that the 1st Respondent voted more than once in the election, at which he was returned as the Member of Parliament. That contravened S.77 (b) of the PEA, which prohibits voting more than once at an election. The court set aside the election for that single election offence. See also Maniraguha J. (RIP) in *Patick Mutono Lodoi & Another v. Dr. Stephen Malinga* Mbale EP No. 6 of 2001.

In the instant case, the alleged illegal practises and offences are set out in paragraph 11(d) of the Petition, and the evidence is in paragraph 7(a) – (g) of the petitioner's affidavit in support of the petition (No.1). It is to be noted that the complaint in paragraph 7 of the petition is that the illegal practices or election offences were committed by the 2nd respondent personally, and not by his agents or others. I will therefore restrict the analysis of the evidence in this regard only to those incidents where this is alleged.

I agree with Nkurunziza learned Counsel for the 2nd respondent that a party must be bound by their pleadings. The petitioner will also be bound by his pleadings as presented in the petition. No evidence in respect of matters not pleaded can be relied on.

O. 6 r. 7 of the Civil Procedure Rules prohibits parties from departing from their pleadings. During cross-examination, the petitioner confirmed that what was in the petition represented his complaint regarding election. He explained how he was asked by his Counsel to carry out extensive investigations to identify the grounds for putting in the petition and he did so.

However, many of the affidavits relate to matters, which were not specifically pleaded, but relating to the issue of illegal practices. These will not be considered by court. See *Interfreight*

Forwarders (U) Ltd. V. E.A.D.B. C.A. No. 33/92 at page 11, per Oder JSC. See also Okello J.A. in *Amama Mbabazi V. E.C. & An.*

I will deal with them chronologically as they are set out in the petition. In paragraph 7(a) it is alleged that there was a display of posters at polling stations on polling day.

Kiberu Misaki (affidavit No. 18) stated that he saw the 2nd respondent moving in a motor vehicle with posters displayed thereon when he visited Katone, a polling station, and therefore a prohibited area for display of posters. This was contrary to S.81 PEA.

That section lists five prohibited activities. These are to;

a) canvass for votes;

b) utter any slogan;

c) distribute leaflets for or on behalf of any candidate;

d) organise or engage in public singing or dancing; or

e) use any band or any musical instrument.

The petitioner therefore had to prove that the 2nd respondent carried out any of these activities within 100 metres of any polling station.

Kaleru Bisaka alleged that he saw 2nd Respondent at 10 a.m. at Kakone Trading Centre. The witness did not say this was a primary school, and therefore a polling station. He did not even say that the motor vehicle was within 100 of the primary school.

Baluku Steven said that he saw the 2nd respondent in a dark blue pajero displaying three posters at Kyempara polling stations. This evidence was rebutted by 2nd Respondent, in his by affidavit (No. 166). He asserted that he never drove a blue Hilux, but used UDS 119 Cream personal Pajero, and that it did not have any porters displayed. It would have been so easy to disprove or rebut the colour of the vehicle used by the 2nd respondent, if it was other than as he stated in his affidavit.

I was not satisfied that there was any contravention of any of the five activities prohibited under S. 81(1) PEA by the 2nd respondent on polling day.

In Paragraph 7 (b) of the petition, it was alleged that the 2nd respondent used Government resources contrary to S. 25 PEA. There was the evidence of Muhesi who alleged that the 2nd Respondent used a Government motor vehicle in his campaigns. There are other affidavits in the petition in that respect.

None of them gave the motor vehicle registration number. Muhesi did not even describe it, but only stated that it was a Government motor vehicle. The 2nd Respondent denied the allegations in paragraph 7 (b), in his answer to petition and in his affidavit. He categorically denied using a Government motor vehicle during the campaigns. He gave details of the motor vehicles, which he used during campaigns and none of them was a Government motor vehicle.

There was a complaint that the 2nd respondent used human resources of escorts during the campaigns. I wondered how the presence of armed escorts could be said to be use of resources in contravention of S. 25 (1) PEA.

I have already dealt with the issue of escorts and body guards of the 2nd respondent elsewhere above in the judgement. I was not satisfied that there was an offence committed by the 2nd respondent in that respect. This would also answer the complaint in paragraph 7(c) of the petition.
Paragraph 7 (d) of the petition was an allegation of bribery contrary to S 68 PEA. I have already set out the ingredients, which must be proved by the petitioner.

The complaint was that the 2nd Respondent gave money to women at Butakoma with a view to influencing them to vote for him. There was the evidence of Sikiryamura Bruno (No. 23). He stated that the 2nd Respondent met a group of women at Buhakiro and that on way to Mithimusanju, he branched to Butakoma where he bribed Yosia Kamadu on 19/5/2006. There was a supplimentary affidavit to correct date of 19/2/2006, but the witness maintained the rest of

the evidence. The witness talked of money being given to women of Buhakiro, but the petition mentions Butakoma, and the two are not one and the same place.

There was the evidence of Mukundi Serina (No. 26) who deposed that 5 women of Butokoma village of Buhakiro parish were bribed by 2nd Respondent. In her supplimentary affidavit (No.70), she attempted to prove that these were voters.

There is no evidence how she came by this information, yet she deposed that these were matters within her knowledge. It is most unsatisfactory to claim that information of the voter registration number of someone else came to ones knowledge without disclosing how this came about in an affidavit. Such evidence is not reliable in the least for failure to disclose the source of information.

The affidavit of Sikiryamba (No. 71) gives voter registration numbers for 3 women. A comparison of the names in the affidavit of Mukundi Selina (No. 70) shows that Kabugho Zeresi was voter registration No 00064269, while that of Sikiryamba (No. 71) shows the same person as voter No 00064296. While two registration numbers are different yet they purport to refer to same person. The two affidavits or at least one of them was not telling the truth on its face.

There is no evidence how Sikiryamba obtained the voter registration numbers of these women, yet he deposed from knowledge. That evidence could not be relied on to establish that these persons were indeed voters. In his answer the 2nd Respondent denied the allegations. He denied committing the offence of bribery. He deposed that he never met Butokoma women's group as alleged.

It is to be noted that none of these persons or women who were allegedly bribed swore an affidavit to that effect. The evidence of bribery was too sketchy to satisfy court that the offence was committed in respect of the women of Butakoma.

In paragraph 7 (e) of the petition, it was alleged that the 2nd respondent gave gifts of soap and salt to Kabyonga of Rwenguba parish in contravention of S. 68 PEA.

There was no evidence that Kabyonga is a voter. There was no evidence that the 2nd respondent gave these gifts to any body else. The 2nd respondent denied this allegation in paragraph 7 (e) of the petition in his answer thereto and in his of affidavit in support.

There was the affidavit of Kabyonga Matete 36 who rebutted evidence of Kaleru Misaki. He denied that the 2nd respondent ever visited his home, or gave him any salt or soap. This was the person to whom gifts were allegedly given. He was not called for cross-examination.

Remegio Bwambale (No. 102), Mbusa Stephen (No.112), Kiti Herezon (No. 28), Baluku Downazi (No. 75), were all referred to by Kaleru Misaki as people who were visited by the 2nd respondent, giving them salt and soap. They each in their respective affidavits rebutted the evidence of Kaleru Misaki.

In a case where there is an allegation of bribe giving, and the alleged giver denies offering the same, and at the same time the one allegedly given also denies receiving or even being offered the bribe, it will not be said that there was proof of the offence of bribery for purposes of an election petition. In this case I found that there was no proof that the 2nd respondent offered gifts of soap and salt and cash to Kabyonga or any other person as a bribe in respect of the election. As noted earlier, there was no proof in any event that any of these people were voters.

In paragraph 7(f) of the petition, it was alleged that the 2nd respondent through his agents gave money, soap and sugar to voters with a view of influencing them to vote for him.

This paragraph (f) was under the general paragraph 7 which reads as follows:-

> '7 Your petitioner further avers that the 2nd respondent personally committed the following illegal practices and or offences'.

There were then set out in detail under paragraphs (a) to (g) of which (f) is the one now under consideration, detailing the illegal practices allegedly committed by the 2nd respondent personally.

S.61 (1)(c) PEA provides that for an illegal practice or offence to constitute a ground for setting aside an election it must have been committed either personally by the candidate, or by another person 'with his knowledge and consent or approval'. It would not be sufficient, to my mind to allege in the pleadings and in this case, in the petition that agents of the petitioner committed the illegal practice or offence without adding that this was done with his knowledge and consent or approval as the statute provides.

Paragraph 7(f) falls short of the requirements of the pleadings under S.61(1)(c). There is no pleading that this was done with the knowledge and consent or approval of the 2nd respondent. It is not enough to allege this was done by the 2nd Respondent agents. This would be relevant if this was a matter of principal/agent relationship, where the acts of agent bind the principal.

The Supreme Court dealt with the matter of agency in election petitions the *Besigye case (supra).* The majority of the court held that law of agency does not apply strictly with regard to election petitions. Specific proof must be shown by evidence that there was knowledge and consent or approval by the candidate.

In the Indian case of *Charan Lal Sahu & Others V. Singh and Others* [1985] LRC (Const) 31 it was that pleadings have to be precise, specific, and unambiguous so as to put the respondent on notice. There was need for specificity and to allege consent of the candidate in the pleadings. In that case, which was in respect of the election of the President of India in 1985, the word 'connivance' was used and court rejected this, saying that what was used in the statute 'consent' must be used. That is a persuasive authority though not binding on this court. In this case, the words of the statute ought to be used, that this was with the 'knowledge and consent or approval of the respondent'.

In the premises, I will not deal with allegations in that paragraph 7 (f) as it does not form part of the petition in law.

From the observations it was not proved to courts satisfaction that the 2nd respondent committed any illegal act or offence. The 4th issue is therefore answered in the negative.

Whether the petition is competent for failure to serve the 2nd respondent in time stipulated by law.

An application by way of notice of motion was filed in court in which the competence of the petition was disputed for the reason that the 2nd respondent was not served with the presentation of the petition as required by the law. I decided that in view of the time limitation, and for convenience the matter, which was really a preliminary point of law would be dealt with during the hearing of the petition. It was set down as one of the issues for determination by the court.

It was submitted that the 2nd Respondent was never served with notice of presentation of petition in accordance with the law. Service of notice of the presentation of the petition in court is a statutory requirement. It is provided for under S. 62 PEA, which reads as follows;

> '62. Notice in writing of the presentation of the petition accompanied by a copy of the petition shall, within seven days after the filing of the petition, be served by the petitioner on the respondent or respondents, as the case may be.'

That provision is in mandatory terms, and it is reproduced in the Parliamentary Elections (Election Petitions) Rules S.I. No 141-1, in rule 6(1). The rule restates the need for the petitioner or his or her advocate to serve the respondent(s) with a copy of the petition within 7 after filing the same in court.

Rule 6(3) provides that service of the petition on the respondent must be personal save as provided in the immediately following rule 6(4), which provides for substituted service where personal service cannot be effected within 3 days. That rule reads as follows;

> '(4). Where the respondent cannot be found within three days for effecting personal service on him or her, the petitioner or the advocate for the petitioner shall immediately make an application to the court supported by an affidavit, stating that all reasonable efforts have been made to effect personal service on the respondent but without success.'

It is clear that when there has been failure to effect personal service, the petitioner must immediately make application to court supported by affidavit stating that personal service has failed.

To my mind, where the petitioner has failed to effect personal service within 3 days, then he or she must apply to court, 'immediately', which period cannot be beyond four days, for other means of service under rule 6(4). In other words, the petitioner cannot wait and make such application after the expiry of seven days after filing the petition, which is the period allowed by the law within which to effect service.

Under rule 6(5), if court is satisfied with the application, it may direct service in any of the ways prescribed by O. 5 of the Civil Procedure Rules, which includes substituted service. Under this rule, court can direct appearance to be within seven days, and I believe this period runs from the date of the order unless court directs otherwise.

There is provision for enlargement of time under Rule 19 of the rules. In invoking this provision of the law, court must be mindful of fact that time for service is appointed by the parent Act, and so that time has to be adhered to.

It was not disputed that the petition was filed on 26/4/2006. That means the seven days prescribed by the PEA and the rules for service were to expire on 2/5/2006. Personal Service had to be effected on the 2nd respondent by this date. One Ekanya Robert a process server deposed an affidavit, which showed that up to 3/5/2006 he had failed to effect personal service on the respondent.

By that time the petitioner ought to have filed an application under rule 6(4) seeking leave to serve the 2nd respondent through other means. He did not. Instead on 3/5/2006 Counsel for the petitioner sought to serve present Counsel for 2nd respondent.

With respect that was not in compliance with the law, which provides for personal service strictly, and makes alternative provision in the event of personal service failing. The requirement to effect service personally makes practical sense. This is meant to avoid situations like indeed happened in this case, where Counsel declined service for lack of instructions.

There is an affidavit sworn by 2nd respondent in regard to the notice of motion, where in paragraph 5 it was deposed that it was on 17/5/2006, he saw a notice to file a petition advertised in 'The Monitor' newspaper. He could not therefore have given instructions to Counsel before he was aware of the presentation of the petition.

The petitioner filed HCMA No. 74/2006 on 11/5/2006, which was an application for substituted service. The Deputy Registrar of this court heard it that day and ordered substituted service by way of advertisement in the newspapers. As a result the petitioner advertised the presentation of the petition in 'The Monitor' newspaper of 17/5/2006.

Rule 24 deals with interlocutory matters. It provides as follows;

> '24. All interlocutory questions and matters arising out of the trial of the petition, other than those relating to leave to withdraw a petition, shall be heard and disposed of, or dealt with, by a judge; and references in these rules to the court shall be construed accordingly.'

The rule is clear in that interlocutory matters in respect of election petitions apart from those, which are excepted by the rule, are to be handled by the judge. Only matters relating to the withdraw of a petition are to be handled by the Registrar. The application for leave to effect service other than personal service under rule 6(4) was not one of the matters, which rule 24 provides as being within the competence of the Registrar, whatever the wisdom of that provision. Jurisdiction cannot be assumed or inferred. It is a creature of statute. In this case the law specifically removed from the ambit of the Registrars jurisdiction in respect of interlocutory matters.

The Registrar therefore had no jurisdiction to entertain or grant an order for substituted service, which related to the petition and was of an interlocutory nature as rule 24 preserves that jurisdiction to a Judge.

There is another aspect to this matter, which to me is equally fundamental. Rule 6(4), which I reproduced above, specifies that where there is failure to effect personal service within three days, the petitioner must apply for orders to effect service by other means. I stated above that this has to be done before the expiry of seven days from the date of filing the petition, meaning that

after the expiry of the three days, the petitioner has only four more days within which to file his application for substituted or other service.

The petition was filed on 26/4/2006. The seven days expired on 2/5/2006. The application for substituted service was filed on 11/5/2006, at least nine days after such expiry. This was way out of the time stipulated in rule 6(4) of applying for substituted service 'immediately' after the failure to effect personal service within three days of filing the petition. The application for substituted service ought to have been rejected on that account.

The Registrar could not extend time under rule 19, and in any event, there was no application for such. The order for substituted service therefore amounted to a nullity. Consequently, the purported service through the Monitor Newspaper of 17/5/2006 was null and void.

It was submitted that court ought to exercise its inherent jurisdiction to validate the petition at this stage, since 2nd respondent filed well over 100 affidavits in support of his answer to the petition, and defended the petition spiritedly. There was therefore no prejudice to the 2nd respondent. It was argued that the petition should be heard and determined on its merits, in accordance with the provisions of Article 126(2)(e) of the Constitution, which enjoins courts to administer justice without undue regard to technicalities.

The case of ***Besweri Kibuuka V. Electoral Commission & Another*** C.A. E.P. No. 8 of 1998 was referred to and court was urged to find and hold that the petition was competently before court considering that the trial of the same was at a very advanced stage.

In the cited case of ***Besweri Kibuuka*** (supra), the Constitutional Court was dealing with a reference from the High Court in an election petition. In the proceedings in the High Court, one of the parties sought an adjournment to a date available to court, but which date would have resulted in High Court not being able to determine the petition within 3 months as prescribed by the Local Government Act.

The High Court sought to know whether it had powers to extend time in light of the statutory provisions in respect of the elections under Local Government Councils. The Constitutional Court held that the High Court had such powers and referred the matter back for the High Court to handle the application for extension of time.

The application for extension of time came before Ntabgoba P.J. and he dismissed the same plus the petition for the reason that that 2nd respondent was not served with notice to file the petition as required by the law, notwithstanding that he filed an answer to the petition after learning of its existence, and in spite of the numerous appearances and proceedings in court prior to the dismissal.

There was an appeal from that decision of Ntabgoba P.J. to the Court of Appeal *Besweri Lubuye Kibuka V. Electoral Commission & An.* E.P. No. Non-service and its effect were dealt with on appeal. In dismissing the appeal, court held that by reason of non-service, no action was in existence. No waiver could give existence to a nullity.

That is the position of the law, and the decision in any event binds me. I would therefore decline to validate the petition, as there is nothing to validate, the proceedings before the Registrar having been a nullity. There was no service of notice of presentation of the petition and a copy of the same on the 2nd respondent as required by the law. That is a mandatory requirement and failure to comply with the same rendered the petition a nullity. The 5th issue is therefore answered in the negative. This issue alone would dispose of the petition.

The 6th and last issue was on the remedies available to the parties. In view of my findings on the issues, which were set down for determination by court, which I found to be answered in favour of the respondents, this petition does not succeed. It is accordingly dismissed with costs to the respondents.

I was asked to order certificate for two Counsel for the 2nd respondent. I did not find that there was such a need and I decline to do so.

RUGADYA ATWOKI

JUDGE

15/9/2006.