THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
HCT-05-CV-EPA-02-2011
(Arising from MBR-00-CV-EP-003-2011)

TUMUHAIRWE LUCY ::::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

1. THE ELECTORAL COMMISSION
2. TUMWEBAZE JESSICA :::::::: RESPONDENTS

BEFORE: THE HON. MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT

This appeal is against the judgment and decree of ***His Worship Phillip Odoki, Chief Magistrate*** *(hereinafter referred to as the "trial court")* entered on 16/11/2011 in ***Election Petition No.003 of 2011,*** in which the trial court dismissed the Appellant's petition with costs.

Background.

Tumuheirwe Lucy *(herein after referred to as the "Appellant")* ***Tumwebaze Jessica*** *(hereinafter referred to as the "2nd Respondent")* together with one ***Tumushabe Jackline*** and ***Kirunda Saida Namagembe***, contested for the seat of Woman Councillor for Nyamityobora Ward, in Kakoba Division, in the Mbarara Municipality in the 2011 elections, organised and conducted by the Electoral Commission *(hereinafter referred to as the "1st Respondent").* The 2nd Respondent was declared winner with 2036 of the total valid votes cast. The Appellant obtained 1935 votes, which was 39.32% of the valid

votes cast, and the other two candidates were declared to have obtained 799 votes and 150 votes respectively.

The Appellant feeling aggrieved by the declaration of the 2nd Respondent as the winner of the election petitioned the trial court, mainly contending that there was non-compliance with the electoral law, and failure to conduct the elections in accordance with the principles enshrined in the electoral laws for conducting free and fair elections. She further contended that persons who were not eligible to vote in the electoral area the Appellant sought to represent were registered in; and allowed to vote for the candidates in the said electoral area; for which she sought the following reliefs:

a) ***A declaration that the process of conducting the elections for Woman Councillor Nyamityobora Ward, Kakoba Division, Mbarara Municipality by the 1st Respondent contravened the provisions and principles of the Electoral Commissions Act and Local Governments Act (Cap 243).***
b) ***A declaration that the 2nd Respondent was not validly elected and or setting aside her election as Woman Councillor Nyamityobora Ward, Kakoba Division Mbarara Municipality.***
c) ***An Order that the votes from the impugned polling stations be severed off from the total votes.***
d) ***An Order that the Petitioner is the winner of the elections for Woman Councillor Nyamityobora Ward, Kakoba Division Mbarara Municipality.***
e) ***In the alternative and without prejudice to the foregoing, Woman Councillor Nyamityobora Ward, Kakoba Division, Mbarara Municipality seat be declared vacant and requiring fresh elections to be conducted.***

f) An order for costs incurred by the Petitioner in respect of this petition be provided for.

The Respondents opposed the petition and maintained that there was full compliance with the electoral law, and prayed that it be dismissed with costs. The trial court decided in favour of the Respondents and dismissed the petition with costs; hence this appeal in which the Appellant advanced eight grounds follows:

1. ***The learned trial Chief Magistrate erred when he framed issues wrongly which led to a mistrial.***
2. ***The learned trial Magistrate erred when he did not determine whether or not there had been non compliance with the electoral law, and whether or not the non-compliance had affected the results in a substantial manner.***
3. ***The learned Chief Magistrate erred in law and in fact when he held that there was no evidence that voters from Kashari had voted in the Municipality.***
4. ***The learned Chief Magistrate erred in law and in fact when he held that there was no breach of electoral laws.***
5. ***The learned Chief Magistrate erred in law and in fact when he held that the question whether the breach affected the results in a substantial manner did not arise.***
6. ***The learned Chief Magistrate erred in law and in fact when he did not properly interpret the decisions of the High Court in HCT-05-CV-EP-160-2010 and HCT-05-CV-EP-4-2011 and follow them.***
7. ***The learned Chief Magistrate erred in law and in fact when he condemned the appellant to pay the costs of the petition when there***

were sufficient reasons for absolving her from being ordered to pay the costs of the petition.

8. ***The learned Chief Magistrate erred in law and in fact when he did not call for the registers used in the election for examination before determining the election. Petition.***

Counsel for the parties filed written submissions and at their commencement Counsel for the 1st and 2nd Respondents raised three preliminary objections, which this court has found necessary to dispose of first before considering the grounds of appeal.

The first objection relates to procedure. Mr Paul Byaruhanga, Counsel for the 2nd Respondent, submitted that the trial proceeded under the provisions of the ***Civil Procedure Rules (CPR),*** and that an appeal from the magistrates' courts to the High Court, such as in the present case, must be from a decree properly extracted and filed with the memorandum of appeal in accordance with ***O43 r. 1 (2) CPR,*** unlike an appeal from the High Court to the Court of Appeal, where an extracted decree is not a requirement.

To fortify his objection, Mr Paul Byaruhanga relied on ***Kotak Ltd. v. Kooverji (1967) EA 348,*** where no certified copy of the order was attached to the memorandum of appeal, though a certified copy of the ruling had been filed. Hamlyn, J. held (at p.349 paragraph H) that:

> ***"Though the point raised by counsel for the respondent is a technical one, I consider it to be one of substance, for the relevant order is mandatory; "shall be accompanied" says the rule …"***

Based on the above authority, Mr. Byaruhanga argued that the decree attached to the memorandum of appeal as *Annexture "A"*, though signed by

the proper authority, is not certified, and that such certification would be similar to the certification indicated on the proceedings.

Mr. Ngaruye – Ruhindi, Counsel for the Appellant, responded that the question is whether or not there is a decree being appealed against, and that the court should be able to find one on the record of the lower court annexed to the memorandum of appeal, even though it is a photocopy. Further, that even if no decree had been extracted, the omission would not defeat the appeal and that, in any case, it is not the duty of the unsuccessful party to extract the decree.

After due consideration of the arguments on the point, this court's takes the view that, indeed, the duty to extract a decree in the magistrates' courts lies with the court, in accordance with ***O.21 r.7 (3) CPR.*** It provides as follows:

> ***"In a magistrate's court, the decree shall be drawn up and signed by the magistrate who pronounced it or by his or her successor."***

This position is well supported in ***Mbakana Mumbere v. Maimuna Mbabazi, HCT-01-CV-CA-003-2003 per Lameck N Mukasa, J.;*** where the learned Judge; citing the decision in ***Banco Arabe Espanol v. Bank of Uganda (1996) HCT 12*** in which the court, after holding that the decree was not properly extracted as required by law, reiterated the position in ***Kibuuka Musoke William & A'nor v. Dr. Apollo Kaggwa, App. No.46 of 1992*** that:

> ***"…It is clear from the above provisions that the extraction of a formal decree embodying the decision complained of is no longer a legal requirement in the institution of an appeal. An appeal by its very nature is against the judgment or a reasoned order. The extraction of the decree was therefore a mere technicality which the***

old Municipal law put in the way of intending appellants and which at times prevented them from having their cases heard on merits.

Such a law cannot co-exist in the context of the 1995 Constitution Article 126 (2) (2) (e) where the courts are enjoyed to administer "substantive justice without undue regard to technicalities."

Under ***Section 2 of the Civil Procedure Act (CPA),*** a "decree" is defined as:

"***the formal expression of an adjudication which, as far as regards to court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit and may be either preliminary or final ."***

Clearly, a decree is simply a summary of the court's decision as to the rights of the parties in controversy.

Further, ***Section 25 CPA*** provides that the court, after the case has been heard, shall pronounce judgement, and on that judgement a decree shall follow. Furthermore, ***O 8 r. 6 CPR*** provides that the decree shall agree with the judgment and shall specify clearly the relief granted or other determination of the suit. It is in view of these legal stipulations that this fully endorses the position in ***Mbakaina Mumbere case (supra)*** that an appeal against a decree is, in the real sense, an appeal against the judgment. See also ***Kahangwa Parick v. Mwenzire Eliasafu, Civ. App No.14 of2000.per*** *Musoke-Kibuuka J.*

The effect is that lack of a properly extracted decree is a mere technicality that would not be a ground to strike out a memorandum of appeal duly filed in court; a position in keeping with the spirit and letter of ***Article 126(2) (e)***

of the Constitution that substantive justice is done without undue regard to technicalities. The first objection lacks merit and it is overruled.

The second objection relates to the incomplete record of appeal. It was submitted for the 2nd Respondent that the pleadings, i.e.; the petition, response to petition, and affidavits were not filed with the memorandum of appeal nor served.

In reply the Appellant's Counsel argued that it is not a legal requirement that for one to file an appeal to the High Court against a decision of a magistrate one has to file the petition, response and affidavits with the memorandum of appeal.

The provisions of ***O.43 r.1 CPR*** are instructive on the point of contention. It states as follows:

> ***"Every appeal to the High Court shall be preferred in the form of a memorandum signed by the appellant or his or her advocate and presented to court or to such officer as it shall appoint for that purpose."***

The rule does not seem to me to suggest that the record of appeal be filed in the manner which Counsel for the Respondent pointed out. It would appear correct that filing all pleadings with the memorandum of appeal is only required in appeals to the Court of Appeal under the provisions of ***Rule 83 (1)*** of the ***Judicature (Court of Appeal Rules) Directions S.1 No.13-10,*** which govern appeals in the Court of Appeal. However, ***O.43 r. 10 (2) CPR,*** imposes a duty on the court from whose decree the appeal is preferred to send, with all practicable dispatch, all material documents in the suit or such papers as may be specially called for by the High Court. In the circumstances, this objection is untenable, and it is overruled.

The third objection relates to the lack of and/ or absence of a seal on memorandum of appeal. Counsel for the 2nd Respondent, whose submissions Counsel for the 1st Respondent associated with; relied on ***Yona Yakuze v. Victoria Nakabembe [1988-1990] HCT 138*** where similar preliminary objection was raised, and Byamugisha Ag. J., (as she then was) held that:

> ***"This memorandum of appeal did not bear any court seal. It could not therefore be ascertained when it was presented to court. Consequently it did not appear as a court document..."***

Mr. Paul Byaruhanga maintained the view that the appeal is essentially a strenuous fault finding exercise on procedure and that this appeal should, on the above preliminary objection, be dismissed with costs.

In response, Mr. Ngaruye -Ruhindi submitted that it is not a legal requirement that the memorandum of appeal be sealed. Citing provisions of *O **43 r.1 CPR,*** Counsel argued that the only requirement is for the appellant or his or her advocate to sign.

It would appear correct, in my view, that the requirement to seal a memorandum of appeal only exists under ***Rule 86 (3) of the Judicature (Court of Appeal Rules)Directions*** *(supra)* which stipulates that the form of the memorandum of appeal shall be substantially in ***Form F*** thereto, which has provision for the signature and seal of the Registrar. There is, however, no such similar provision in under ***Appendix F, Form I*** made under ***O.43 r.1*** of the ***Civil Procedure Rules,*** for the signature of the Registrar or seal of the court. It is only required under *CPR* that the memorandum of appeal be presented and stamped as received by an officer designated to receive memorandums of appeal, or for such purpose as appointed by court. Therefore the this preliminary objection is also unsustainable, and it is

overruled. All the objections are dismissed with costs as against both Respondents.

Consideration of the grounds of the appeal will be in the order in which they were presented in the memorandum and arguments of Counsel.

Ground 1.

The learned trial Chief Magistrate erred when he framed issues wrongly which led to a mistrial.

The Appellant's main complaint of this ground is that there appears to have been no agreement on facts and issues at trial, and that even from the record of proceedings, the submissions of Counsel and the judgment, it is clear that the issues were not settled before Counsel started arguing the cases for their respective clients. The Appellant also faults the trial court's choice of words in framing of issues in that all Counsel for the parties drafted their "*Issue No.2*" as follows:

> ***"If so whether the elections were conducted in compliancy (sic) with the electoral laws."***

The trial court framed the issue differently (at page 9 of the record of proceedings) as follows:

> ***"If so whether it constituted as breach of the electoral laws."***

Mr. Ngaruye submitted that framing the issue differently led the trial court (at page 19 of the judgment) to rule that the issue was irrelevant. Further, that had the trial court guided the parties to agree on issues for determination or framed the issues and put them across to the Counsel during conferencing, they all would have focused on the same thing, and that had the trial court gone by the issue as framed by the parties in their written submissions, it would not have come to the decision that the issue it had framed was irrelevant.

Mr. Ngaruye – Ruhindi further submitted that in the instant case there was a material proposition that there had been non-compliance with the electoral laws and a failure to conduct the elections in accordance with the principles for conducting a free, transparent and fair election, while the opposite side was saying that there had been compliance and no such alleged failure.

Citing ***Section 139 of the Local Government Act*** which sets pre-condition for setting aside an election, Mr Ngaruye - Ruhindi submitted that the provision does not feature the word "breach" because there can be a breach which does not necessarily amount to a failure to conduct the elections in accordance with the provisions of the Act, or which does not amount to non-compliance with the provisions of the Act relating to elections.

Counsel contended that mixing voters from one area with others from another different electoral area in a different constituency is altogether a very serious matter, which causes confusion because it becomes difficult to determine those who are genuinely from the electoral area and those from out.

Counsel maintained that because the issue was badly framed the trial court only focused on whether or not there was evidence that people from Kashari County came and voted from Nyamityobora Ward, Kakoba Division in Mbarara Municipality; instead of focusing on the broader issue of whether or not mixing voters originating from or residing in Kashari Constituency with those originating or residing Mbarara Municipality would not compromise a free and fair election.

In reply Mr Paul Byaruhanga, whose submissions Counsel for the 1st Respondent fully adopted, argued that under ***O 15 CPR*** court has the discretion in as far as framing of issues is concerned, and that while it is the duty of the court to frame issues in consultations with the parties or their

advocates at the beginning of the trial as provided under the said rules; court is not bound by those issues and may amend, strike out some of them and add new ones at any time before passing of the judgment.

In resolving the issues in the parties' arguments, it should be pointed out here that the purpose of framing of issues in a trial as governed under ***O 15 r. 1 CPR*** is to enable court to make decisions on matters over which the parties are in disagreement. It is stipulated under the same provision that issues arise when a material preposition of law or facts is advanced by one party and denied by the other. The question which then arises is; at what time should the framing of issues arise? Considering a similar issue, the Court of Appeal in ***Crane Insurance Co v. Shelter (U) Ltd [1997] HCB 48*** held that:

> ***"It is the duty of the trial Judge to frame the issues after consultations with the parties or their advocates at the beginning of the trial as provided under Order 13 rr 4 and 5 of the CPR (****now Order 15****). However, the Judge is not bound by these issues and he may amend the issues, strike out some of them and add new ones any time before passing of the Decree."***

Taking guidance from the above authority, it is clear that the trial court in the instant case was at no fault in as far as the preferred manner of framing of the issue was concerned. Court acted well within the court's discretion to frame the issue, and there is no good reason for this court to interfere with such a choice.

Regarding the use of the word "breach", which does not feature under ***Section 139 of the Local Governments Act,*** to "non-compliance" as used by the Act, it too does not seem to hold any substance as it is purely a practical question of semantics. The word "*compliance"* is a noun whose adjective is

"compliant". The ***Oxford English Mini-Dictionary (7th Ed) Oxford University Press, London, 2008, page 109*** describes *"to be compliant"* to mean**:**

"Meeting the rules or standards. Excessively obedient."

Logically to be non-compliant, or non-compliance would mean failing to meet the rules or standards, and in the instant case, would mean failure to meet the rules or standards set under ***Section139 of the Local Governments Act***.

On the other hand, the term *"breach"* is a verb; and according to the ***Oxford English Mini-Dictionary (supra) (at page 61)*** is defined to mean:

> "***Make a hole in. Break a rule or agreement or an act of breaking a rule or agreement."***

"Break" as defined (at page 61, (*supra)*) means: *"failure to obey"*. ***"Obey"*** **(**at page 378 *(supra*)) is described to mean: *"Behave in accordance with the law."* It is evident from the foregone break-down of the word ***"breach"*** as used by the trial court, and ***"non-compliance"*** as used under the ***Local Governments Act,*** that they denote the same thing, but only that they have to be applied and construed contextually. *Ground 1* of appeal therefore fails.

Ground 2.

<u>The learned trial Magistrate erred when he did not determine whether or not there had been non compliance with the electoral law, and whether or not the non-compliance had affected the results in a substantial manner.</u>

The Appellant's Counsel submitted for that the trial court did not determine that there had been non-compliance, or whether the non-compliance had affected the results of the election in a substantial manner, and yet those are issues which arise from the wording of ***Section139 of the Local Governments Act (supra)***. Further, that if the issue of non-compliance is

alleged and the court decides to ignore it, the court will fail to administer justice, and that it is exactly what happened in the instant case when the court framed issues badly and later lamented that "*Issue No.2"* was irrelevant and that "*Issue No.3"* does not arise.

Counsel further submitted that it had been alleged that seven polling stations, Lubiri A-A, B-J, K-l, M-M, O-o, P-Z and Lubiri 04 were composed of voters from Makenke Army Barracks, which is in Kashari Constituency, and these persons did not originate nor reside in Mbarara Municipality, but in Kashari County. That by registering them, let alone allowing them to cast votes for persons contesting in Mbarara Municipality, was one element of non-compliance with electoral law in that it was itself a failure to conduct elections in accordance with principles of fairness and transparency to allow a person to get registered to vote for a person who territorially does not represent him - which is a transgression.

Counsel was, however, quick to add that it may be possible that in the registers for the impugned polling stations there could be genuine voters i.e. persons who originate or reside in Lubiri Cell in the Mbarara Municipality, who are genuine voters, but that to have a mixture of voters from the Municipality and strangers from Kashari County creates confusion, because once they appear on the register it would be difficult for a Presiding Officer to distinguish who is a genuine voter and who is not, and it would be difficult to turn anybody away as long as he/she is on the register.

To buttress his argument, Counsel relied on a *Results Tally Sheet(* "*Annexture 6"* to the affidavit of the Appellant) showing the impugned seven polling stations for Lubiri Cell with a total of 5,048 voters, and Mr Ngaruye - Ruhindi argued that it is inconceivable that only one Cell would have that number of registered voters, and that the genuine Lubiri

Cell has only 654 registered voters, which is realistic and that the extra 4,394 voters from the fictitious Lubiris A-A, B-J, K-L, M-N, O-O and P-Z were from the Makenke Barracks in Kashari County, and that the trial court decided to close its eyes to such realities.

Relying on ***Section 139 of the Local Governments Act (supra),*** Counsel for the 2nd Respondent replied with the argument that there are only four instances in which this petition could be set aside, and that the relevant electoral laws can only be in ***Part X*** thereof. Further, that the issue of compliance with electoral laws, which must mean ***Part X*** of the ***Local Governments Act (supra),*** depends on the evidence adduced at the trial, and that the Appellant failed to prove any non- compliance with ***Part X*** of the ***Local Governments Act(supra)***in the conduct of the elections.

Counsel went on to submit that the 1st and 2nd Respondents adduced sufficient evidence to prove that the said polling stations were intended for voters in Mbarara Municipality, Kakoba Division, Nyamityobora Ward, Lubiri Cell, by virtue of the *Press Release* dated 16th February 2011, marked as *"Annexture G"* to the Affidavit in support of the Petition sworn by the Petitioner(now Appellant) which was in implementation of the decisions in ***H.C. Misc.Appl. No.160 of 2010; and H. C. Misc. Appl. No.4 of 2011.***

Regarding the impugned polling stations, Mr. Byaruhanga argued that they were never/ not newly created in anticipation of the 2011 general election, which was erroneous and misleading position that was advanced also erroneously in ***Singura & O'rs v. Electoral Commission, H.C.Misc. Cause No.16 of 2010,*** as well as in ***Misc. Appl. No.4 of 2011.***

The Respondents argued the same impugned stations actually appeared in the *National Gazette*; not only of 2010 in preparation for general elections of

2011, but also earlier in the *Gazette* of 2005 in the wake of the 2006 general elections, and that court can take judicial notice of the same facts.

In resolving the issues raised above, it is noted that the *National Gazette* which comes into issue, is a public document which is available for all and sundry to access, and therefore, court takes judicial notice of the same as containing factual details of polling stations in question which, as a matter of fact, pre- date the elections in question.

At the heart of the petition, however, lies the allegation of non-compliance with electoral laws, in that voters from Kashari sub-county residing in Makenke Barracks whose names allegedly appeared on the voters list for the said polling stations participated in; and voted in the election under question. However, the trial court held that the Appellant failed to produce a list of voters from Kashari whose names allegedly appeared on the voters' list for the said polling stations.

It is a cardinal principle under ***Section 101 of the Evidence Act*** that whoever alleges a fact must prove the existence of such fact. There appears to be an admission from the Appellant's Counsel's submissions (at page 9, in 1st paragraph) that the Appellant could not precisely prove the voters from Kashari whose names allegedly appeared on the voters' list for the impugned polling stations. The relevant portion of the submission states:

> ***"It may be possible that in these polling stations there could be genuine voters i.e. people who originate or reside in Lubiri Cell in the Municipality who are genuine voters …."***

This quote by all means resonates quite well with the expressed view by the trial court that there was failure on part of the Appellant to furnish the necessary proof of the alleged voters from Kashari, whose names appeared on the voters' list for the said polling stations. The Appellant merely availed

copy of the *Tally Sheet ("Annexture 6")* and then proceed to argue that it is inconceivable that only one Cell could have 5,048 registered voters, which could not in the least be proof required to show the voters from Kashari, whose names appeared on the voters' list for the said polling stations, who were not supposed to vote in Mbarara Municipality. If this is the broader issue which Counsel for the Appellant argued that the trial closed its eyes to, then there was essentially no proof that would enable the trial court see it. It is settled that a court can only arrive at a decision by considering the evidence adduced before it. See ***Yuventino Okello v. Uganda,HC crim. Appeal No.152 of 1997.*** The trial court the instant case, could not make a finding that persons from Kashari voted in Mbarara Municipality on basis of the evidence which was not availed to it.

Regarding the point that the trial court ignored or failed to determine whether or not there had been non-compliance with electoral law, and whether or not the non-compliance had affected the results in a substantial manner, the criticism appears to be unjustified given that the trial court properly considered these issues. At page 19 of its judgment, the trial court considered *"Issue No.2"*, and stated that:

> ***"Since the Petitioner failed to prove that voters from Kashari voted in Nyamityobora Ward, this issue becomes irrelevant."***

Further regarding *"Issue No.3"* the trial court observed (at page 19-20 of its judgement) that:

> ***"Again flowing from the resolution of issue No.1 where I found that the petitioner failed to prove that voters from Kashari voted in Nyamityobora, the question of whether the breach affected the results in a substantial manner does not arise since there was no breach to talk about."***

From the quoted extracts of its judgment, it is evident that the trial court was alive to; and considered the two issues and assigned reasons, correctly in my view, for its decisions on them. It cannot be validly stated that the trial court ignored the particular issues in contention.

A point raised by Counsel for the 2nd Respondent (at page 9 of the submissions for the Appellant) that the figures are imaginary, and that they are not backed by evidence produced at the trial, and that no procedure has been taken for introducing new evidence on appeal. This court is certainly alive to the position of law that for any new matter of evidence to be admitted on appeal, the party seeking to adduce such new and fresh evidence must do so with prior leave of the appellate court. See ***Kabu Auctioneers& Court Bailiffs v. F.KMotors, SCCA No.19 of2009; Attorney General v. Ssemwogerere & O'rs[2004]2 EA 7(SCU).***

However, the record of the trial court shows that Mr Byaruhanga's contention is wrongly grounded. The figures (at page 9 of the submissions for the Appellant) referred to are from an extract of the *Tally Sheet,* which is part of "*Annexture E*" to the affidavit of the Appellant in the lower court. It cannot be regarded as a piece of fresh and new evidence that would require leave of this court to adduce. That notwithstanding, this ground of appeal entirely fails.

Ground 3.

The learned Chief Magistrate erred in law and in fact when he held that there was no evidence that voters from Kashari had voted in the Municipality.

The Appellant's Counsel criticised the trial court for holding that there was no evidence to prove that voters from Kashari voted in the Municipality, yet the Appellant deposed in paragraph 6 of her affidavit in support of the

petition, that the 1st Respondent allowed voters from Kashari Constituency to vote in Mbarara Municipality, and that this evidence was not controverted. Further, that paragraph 9 of the affidavit of Richard Begumisa, and paragraphs 8 and 19 of the affidavit of Baabo Richard read together with the decision of this court in ***High Court Misc.Appl. No.160 of 2010 and Election Petition No.004 of 2011*** corroborate that fact.

In reply, the 2nd Respondent, whose argument the 1st Respondent adopted, supported the decision of the trial court that the Appellant did not produce a list of persons from Kashari whose names appeared on the voters' list of the said polling stations, and that such names should not just be in one's imagination.

It is called for to first clarify on the ruling of this court in ***High Court Misc. Appl. No.160 of 2010*** and ***Election Petition No. 004 of 2011*** which appear to have been taken out of context, particularly given the views expressed by the Appellant. In ***High Court Misc. Appl. No.160 of 2010*** this court specifically ordered that:

> ***a) The decision of the Respondent which includes the names of the voters' roll of Mbarara Municipality is hereby quashed.***
>
> ***b) The Respondent is further <u>prohibited from allowing voters residing in Makenke Barracks, Kashari County from voting in Mbarara Municipality</u>.(underlined for emphasis).***
>
> ***c) It is hereby declared that the decision of the Respondent to allow voters in Makenke Army Barracks to vote in Mbarara Municipality is contrary to law and is therefore null and void."***

Let it be known that the decision in the case above concerned specifically the fate of the registered voters residing in Makenke Barracks, which is geographically and administratively located in Kashari County, in so far as their voting rights based on the principle of *"residence"* and *"origin"* were concerned. Under order (b) of the decision the EC was specifically prohibited from allowing voters residing in or originating from Makenke Barracks, Kashari County from voting in Mbarara Municipality.

It is evident that in compliance with the said court orders the EC issued a *Press Release* dated *16th Feb/2011 Ref: ADM 72/01("Annexture G"* to Appellant's petition) to the effect that:

> ***"Pursuant to the High Court Ruling in HCT-05-CV-MA-160-2010 Singura R Rwomushojwa and 2 others v The Electoral Commission Delivered in Mbarara District, The Electoral Commission hereby draws the attention of the voters in Mbarara District and the General Public to the following;***
>
> ***A) Voters in Kashari County, Kakiika Sub-county, Kakiika parish, Makenke Cell will vote in the following polling stations:***
>
> ***Makenke I [A-J];***
>
> ***Makenke II [K-L];***
>
> ***Makenke III [M-N]; and***
>
> ***Makenke IV [O-Z];***
>
> ***B) Voters in Mbarara Municipality, Kakoba Division, Nyamityobora Ward, Lubiri Cell will vote in the following polling stations;***
>
> ***Lubiri Cell I [A-A]***
>
> ***Lubiri Cell I [B-J]***

Lubiri Cell I [K-L]

Lubiri Cell I [M-N]

Lubiri Cell I [O-O]

Lubiri Cell I [P-Z]

The Returning Officer of Mbarara Electoral District is hereby informed accordingly."

The effect of *"Annexture G"(above)* was that all those persons eligible and registered to vote in the respective polling stations mentioned therein were directed where they would cast their votes from. It is hence rather futile for the Appellant to have even based her petition on the same polling stations whose fate was already duly clarified.

Regarding the results from the impugned polling stations with the initial registered voters as against those who voted, it should be noted that the results of the polling stations referred to are the same as those that were annexed to the Appellant's petition as supporting documents. Counsel for the Appellant had earlier on submitted (at page 9 of his submissions on *Ground 2*) that it is inconceivable that only one cell would have 5,048 registered voters, and that the genuine Lubiri Cell has only 654 registered voters which is realistic. Further, that 4, 394 voters from the fictitious Lubiris A-A, B-J, K-L, M-N, O-O and P-Z were from the Makenke Barracks of Kashari County.

To my mind, the *Press Release (Annexture G(supra))* was actually a directive to the Returning Officer of Mbarara Electoral District, and general public as to where they would cast their votes. I have not come across any other evidence to suggest that other than those registered voters originating from and/ or residing in Lubiri Cell, other voters from Makenke Barracks voted in Lubiri Cell. Accordingly, the trial court cannot be justifiably faulted

for having found that there no evidence existed to prove that voters from Kashari County had actually voted in the Mbarara Municipality. For the foregone reasons this ground of appeal fails.

Ground 4.

<u>The learned Chief Magistrate erred in law and in fact when he held that there was no breach of Electoral laws,</u>

In this ground, Counsel for the Appellant criticised the trial court for holding that there was no breach to talk about (at page 20 lines 4-5 of its judgment); and that the issue was irrelevant (at pages 19 line 20 (supra)). Counsel also cited ***Article 61(1) (a) of the Constitution*** which enjoins the Electoral Commission to ensure that regular free and fair elections are held, and ***Articles 61(1) (c), and 63(2)(supra)*** which specifically concern the demarcation of Constituencies.

In response, Counsel for the 2nd Respondent submitted that the Constitutional provisions referred to were not applicable to the petition, and that the trial court rightly held that neither the Petition nor demarcation of boundaries; but rather that voters from Kashari County were allowed to vote in Mbarara Municipality was the relevant issue.

Article 61(1) (supra) is specific to functions of the EC, particularly, of ensuring that regular free and fair elections are held, and ***63 (2)(supra)*** gives the EC power to demarcate constituencies, and these provisions only come into play for purposes of appeals in the High Court from the decisions of the EC, and not a petition to the Chief Magistrate's Court by virtue of ***Article 64 of the Constitution.*** No appeal lies against any particular finding by the EC to the High Court as regards these provisions.

Section 19 of the Electoral Commission Act which was referred to by Counsel for the Appellant, indeed imposes a statutory duty the EC to ensure

that only persons registered in accordance with the said provision vote where they are supposed to vote from. However, in absence of proof that voters from Makenke Army Barracks, which does not fall within Mbarara Municipality were allowed to, and/or voted from Mbarara Municipality Constituency the trial court found, and correctly so in my view, that there was no breach of the law to talk about.

The position as regards the ***Singura Robert Rwomushojwa case* (*supra)*** has been clarified and it is not necessary to repeat the same. The 1st Respondent complied with the orders therein and updated the voters' register proof of which is *Annexture G (supra)*. Any contrary suggestions would certainly be erroneous. *Ground 4* of the appeal lacks merits and it fails.

Ground 5.

The learned Chief Magistrate erred in law and fact when he held that the question whether the breach affected the results in a substantial manner did not arise.

Counsel for the Appellant submitted that in its judgement (lines 3-5 of page 20) the trial court held that the question of whether the breach affected the result in a substantial manner does not arise since there was no breach to talk about. Counsel relied on ***Section 139(a) of the Local Governments Act*** and argued that the non-compliance with the electoral laws affected the results in a substantial manner, in that the *Tally Sheet* and declaration forms for Nyamityobora Ward, Kakoba Division, Mbarara Municipality show that the Appellant got 2036 of the total votes and that the 2nd Respondent got 1934 of the total votes, all of which included the results from the impugned polling stations.

Counsel cited the case of ***Kiiza Besigye v. Y.K Museveni Election Petition No.1 of 2001*** where the Supreme Court observed that***:***

> "*In* ***determining the substantiality court has to evaluate the whole process of election to determine how it affected the results and assess the degree of the effect. In the process of evaluation it cannot be said that numbers are not important just as conditions which produce those numbers."***

For their part Counsel for the 2nd Respondent argued in support of the trial court's finding, in that since the Appellant had failed to prove any non-compliance with ***Part X of the Local Governments Act (supra);*** and since no said ***Part X (supra)*** had been identified or proved to have not been complied with, it would not make sense for court to go into whether non-compliance, which did not exist, affected the results.

At the risk of repetition this court has found, as the trial court did, that there was no evidence in proof of non-compliance with electoral laws by the 1st Respondent. It would hence be futile to proceed to determine the question whether or not the non-compliance – which never existed in the first place - affected the results in a substantial manner. *Ground 5* lacks substance and accordingly fails.

Ground 6

The learned Chief Magistrate erred in law and in fact when he did not properly interpret the decisions of the High Court in HCT-05-CV-EP-160-2010 and HCT-05-CV-EP-4-2011 and follow them.

It was submitted for the Appellant that the trial court wrongly interpreted ***Kazoora v. The Electoral Commission & Bitekyerezo Medard(supra)*** and ***Singura & O'rs v. Electoral Commission (supra)*** whose deductions are that:

1. ***Lubiri Cell falls within Mbarara Municipality Constituency but that Makenke Army Barracks is in Kashari County Constituency.***

2. ***That voters from Makenke Army Barracks which had been declared to be out side Mbarara Municipality Constituency voted in Lubiri Cell at the six other fictitious polling stations A-B, B-J, K-L, M-N, O-O and P-Z.***
3. ***That there was a court order which prohibited them but which was disobeyed.***

Counsel for the Appellant went on to state that had the trial court appreciated all the above deductions from the said judgment and ruling, it would definitely have reached a different decision.

In response Counsel for the 2nd Respondent submitted that the trial court's interpretation should not be faulted especially considering the Appellant's admission (page 15, line 7 from bottom) that Lubiri Cell falls within Mbarara Municipality, and that the other polling stations are in Lubiri Cell. Further, that the word "fictitious" is the Appellant's own creation and should be ignored. Further, that the High Court orders were implemented, and that the rulings could not constitute a substitute for the required evidence

This court has already pronounced itself on the decision in ***Misc. Appl. No.160 of 2010*** , and there is no suggestion anywhere in the ruling that there existed the so-called ***"fictitious polling stations."*** What the orders simply state is that the voters in Makenke Army Barracks should vote in Kashari County, and further prohibited the EC from allowing voters residing in Makenke Army Barracks, Kashari County from voting in Mbarara Municipality. There is no order which nullified or declared the impugned as ***"fictitious polling stations"***. *Ground 6* of appeal fails.

Ground 7

The learned Chief Magistrate erred in law and in fact when he condemned the appellant to pay the costs of the petition when there were sufficient

reasons for absolving her from being ordered to pay the costs of the petition.

The law governing the award of costs by courts under ***Section 27 of the Civil Procedure Act*** stipulates that costs follow the event unless for good reason court directs otherwise. In the case of ***Gnome Ngime v. Winnie Byanyima & A'nor (supra)*** the Court of Appeal held that:

> ***"Section 27 of the Civil Procedure Act governs the ward of costs in Civil Litigation and in election Petitions...It is not in dispute that Section 27 gives wide discretion to the trial court in determining the costs of the proceedings since they follow the event.***
>
> ***The court in exercising its discretion has to do so judiciously and it ought not to exercise it against a successful party, except for some good reason connected with the case."***

The above decision is a correct statement of the law. In the instant case, the Appellant lost the petition on all the major issues she had raised. It has not been shown that the trial court exercised its discretion on wrong principles in awarding the costs. This court would, therefore, not interfere with the orders made as to costs. *Ground 7* accordingly fails.

Ground 8.

The learned Chief Magistrate erred in law and in fact when he did not call for the registers used in the election for examination before determining the election petition.

It was submitted for the Appellant that under ***O.18 r. 4 CPR***, the court is empowered to call for, and inspect any property or thing concerning the case which any question may arise. That in the instant case the issue of registers were key, and that the court should have called for the registers of the questioned polling stations to inspect and determine whether or not the

soldiers from the Army Barracks of Makenke did not vote at the questioned polling stations.

In reply Counsel for the 2nd Respondent argued that the power of court under ***O.18 r.14 CPR*** is discretionary powers, but it does not impose an obligation on the court to take over and conduct the petitioner's case, and that there was no indication that the petitioner was interested in the registers being produced for inspection. Further, that this point was never raised at the trial and cannot be legitimately raised now.

The correct position is that ***0.18 r. 14 CPR*** does not impose an obligation, but only vests court with discretionary power inspect, and certainly there is no duty on the court to take over and conduct the a party's case. Court is, however, not precluded from exercising its discretionary powers to call for, and carry out any necessary inspection where clarity is sought by such court upon a fact in issue.

In the instant case, there is no indication apparent on the trial court's record that the Appellant was ever interested in the registers being produced for inspection, and this issue cannot be legitimately raised now. The trial court in its judgment (see lines 21-25 of page 18 and lines 1-2 of page 19) held, and correctly so in my view, as follows:

> ***"What therefore the petitioner needed to do was to prove that voter A is a resident in Kashari but was maintained in the register of Nyamityobora Ward. No such evidence was produced to the court. The petitioner did not even produce the voters register use during election to show that the voters complained of (sic) in the Misc. cause before the High Court actually voted in the Municipality."***

The position of the law under S***ections 101-102 of the Evidence Act*** is that whoever desires any court to decide as to any legal right or liability

dependent on the existence of facts which he or she asserts must prove that those facts exist, and when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. The burden of proof lies on that person who would fail if no evidence at all were given on either side. The burden to avail, or cause the availing of the registers for inspection, therefore, lay with the Petitioner, and she failed to discharge it. *Ground 8* of the appeal therefore fails.

In a nut shell the entire appeal fails. It is dismissed with costs.

……..……..
BASHAIJA K. ANDREW
JUDGE
18/12/12