THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO. 70 OF 2021

[Coram: Egonda-Ntende, Madrama, Luswata JJA]

OTHIENO OKOTH RICHARD:::::::::::::::::::::::::: APPELLANT

VERSUS-

1. **OCHAI MAXIMUS**
2. **THE ELECTORAL COMMISSION:::::::::::::::::: RESPONDENTS**

JUDGMENT OF HON JUSTICE EVA.K. LUSWATA

A brief Background

1] The appellant, 1st respondent, Ms. Akichere Gloria Oburu, Mr. Alira David, Mr. Pecho Kisika Opili, Mr. Aluk George, Mr. Okello Peter Jabweli, Mr. Okongo Leo and Mr. Owori Peter were candidates for the position of Member of Parliament for West Budama County North Constituency, Tororo District for Parliamentary elections which were conducted by the 2nd respondent on 14/01/2021. The appellant polled 9,856 votes while the 1st respondent polled 10,981 votes and as a result, the Returning Officer of the 2nd respondent declared the 1st respondent as the duly elected member of Parliament of the Constituency. The appellant filed a petition in the High Court to challenge the election results. Hon Justice Cornelia Kakooza Sabiiti heard and dismissed the petition on 28/10/2021.

2] The appellant being dissatisfied with the judgment and orders of the High Court, appealed to this court on the following grounds:

1. **The learned trial judge erred in law, when she declined to strike off the 1st respondent's answer to the petition filed on 31st March 2021, and as well as the 15 affidavits in support of the 1st respondent's answer to the petition filed on the 31/3/2021, the said documents having been allegedly commissioned by advocates who were not commissioners for Oaths in accordance with the Commissioner for Oaths (Advocates) Act, Cap5 and The Oaths Act Cap19.**
2. **The learned trial judge erred in law and fact, when she held that the 1st respondent's 14 additional affidavits filed on 18/8/2021;**

a) **Had proper oaths/affirmations administered by court officers, with a seal of Chief Magistrate Court of Mukono**
b) **Were curable;**

3. **The learned Trial judge erred in law and fact, when:**

a) **She entertained the respondent's preliminary objection, regarding disparities/differences in the signatures of PW2, PW3, PW5, PW7, PW9, PW10, PW11, PW12, PW15, PW19, PW21, PW23, PW25, PW27, PW29 and PW31, on their affidavits and National Identity cards, at the stage of written submissions:**
b) **She failed to observe the rules of natural justice and proceeded to resolve and hold that the signatures of PW2, PW3, PW8, PW9, PW11, PW15, PW19, PW21, PW27 and PW31 were suspect and unreliable without first calling the said witnesses for cross examination**
c) **She held that the affidavits of PW23 (Opio Christopher) and PW25 (Osinde Boniface) whose National Identity cards indicated that they (PW23 and PW25) were unable**

to sign, yet they signed the affidavits, were unreliable and suspicious;

4. **The learned trial judge erred in law and fact by applying and relying on the decision of Hon. Kipoi Tonny Nsubuga Vs Ronny Waluku Wataka and 2 others Election Petition Appeal No. 7 of 2021, yet the same was never determined on merits and was dismissed for want of prosecution;**
5. **The learned trial judge erred in the law and fact, when she held that the BVVM Machine printout was in dispute and could not be the basis to say that the 2nd respondent failed to rely on the verified results as contained in the print outs.**
6. **The learned trial judge erred in the law and fact, when she held that the 1st respondent conducted the election of Kisoko Sub county-directly elected member of parliament, in accordance with the electoral laws;**
7. **The learned trial judge erred in law and fact, when she held that the petitioner failed to prove that noncompliance with the electoral laws, by the 2nd respondent, did not affect the outcome of the election in a substantial manner;**
8. **The learned trial judge erred in the law and fact, and failed to properly evaluate evidence, while resolving issue no. 3, when she held that the petitioner did not adduce evidence to prove that the 1st respondent committed electoral offences personally or through his agents with his knowledge, consent, or approval, as pleaded in the petition**
9. **The learned trial judge erred in the law and fact, and failed to properly apply the principles governing single witness evidence, when in particular, she held that:**

a) **The evidence of PW10 regarding allegations of bribery needed independent corroboration**

b) The evidence of PW24 regarding incidents at country chief's residence required corroboration

10. The learned trial judge erred in the law and fact, when she relied on the 2nd respondent's witness affidavits that had averments framed in a general denial form and in a similar fashion

11. The learned trial judge erred in the law and fact, when she awarded costs to the respondents

3] The appellant PROPOSED to ask this honourable court:

a) To allow the appeal and set aside the judgment of the High Court in Election Petition No. 70 of 2021
b) To allow the appeal with costs and of the Court below
c) To allow the petition in the High Court as prayed, or in the alternative prayers.

Representation

4] At the hearing of this appeal:

- The appellant was represented by learned counsel, Enoch Tumwesigye
- The 1st respondent was represented by learned counsel, Mr. Sebastian Orach, Mr. Sekandi Gonzaga Kironde and Mr. Ronald Tusingwire.
- The 2nd respondent was represented by learned counsel, Mr. Patrick Wetaka and Ms. Hilda Katutu

5] At the hearing of 29/3/2022, all counsel indicated that they intended to adopt their conferencing notes and lists of authorities as their submissions in this appeal. They were so adopted and a summary of those submissions will be reproduced here. Both counsel chose to argue some grounds of appeal in clusters. The Court will similarly resolve the appeal in that manner.

6] Before considering the merit and arguments in support of the grounds raised by the appellant, I find it pertinent to comment on the grounds generally.

7] **Rule 86(1) of the Judicature Court of appeal Rules** provides as follows:

Contents of Memorandum of Appeal:

> *"A memorandum of Appeal shall set forth concisely and under distinct heads without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the court to make."*

8] In this appeal, the appellant framed ground 6 follows:

> **The learned trial judge erred in the law and fact, when she held that the 1st respondent conducted the election of Kisoko Sub county - directly elected member of parliament, in accordance with the electoral laws;**

9] The 6th ground appeared to be misplaced. The record indicates that the petitioner and 1st respondent contested for the position of Member of Parliament for West Budama County North and not Kisoko Sub County. Indeed, the petition and judgment of the lower court addressed a contest for that particular constituency. The Judicature (Court of Appeal Rules) Directions (hereiafter COA Rules), require that the memorandum must show the points in the case that were wrongly decided. The decision was made in respect to an election in West Budama County North, and not Kisoko Sub County. It is therefore not possible for the petitioner to have raised a ground with respect to the latter, if at all such an election ever happened, and was contested. This was clearly a case of careless drafting by the appellant's advocates.

10] Grounds 6 is accordingly struck out for contravening Rule 86 (1) of this Court.

Resolution by the Court

11] I have considered the record of appeal, the judgement of the lower court, submissions of counsel for all parties and the authorities, which I found quite useful and therefore, well appreciated. I have indicated the faults in the memorandum of appeal, and shall not repeat them here.

12] Being a first appellant court in the matter, Under Rule 30(1) of the COA Rules, this Court has the duty to re-appraise all the evidence adduced in the Court below and draw inferences of fact therefrom. **See AG Vrs Florence Baliraine CACA No.79/2003.** The mandate of this Court was well stated by the Supreme Court in **Fr. Nansensio Begumisa Vrs Eric Tibebaga SCCA No. 17/2002** that:

"It is a well settled principle that on a first appeal, the parties are entitled to obtain from the appellate court its own decision on the issues of fact as well as of law. Although in a case of conflicting evidence the appellate court has to make due allowance for the fact that it has neither seen nor heard the witnesses."

I will accordingly make my decision with those principles in mind.

Ground one

Submissions of both counsel

13] Appellant's counsel submitted that on 18/8/2021 when the matter was called to hearing for the first time, an objection was raised for the petitioner/appellant that the 1st respondent's answer to the petition as well as the affidavits in support of the answer to the petition were incompetent and incurably defective. The reason given was that the two advocates who purported to commission them, had never gazetted their

appointment as Commissioners for Oaths, in accordance with section 1 (1) & (3) of the Commissioner for Oaths (Advocates) Act, Cap5 (hereinafter COA Act). On the same day, an original copy of the correspondence from the Chief Registrar (hereinafter CR) confirming that Mugoda Denis and Robinah Aketch had never gazetted their appointment, was availed to the Judge. Counsel continued that the requirement for gazetting the appointment is mandatory because under section 6, failure to comply with the Act is a criminal offence. That this interpretation is consistent with many decisions including that of **Kasala Growers Co-operative Society Vs Jonathan Kalemera and Anor SCCA NO. 19/2010,** where it was held that statutory provisions relating to commissioning of affidavits are mandatory and failure to comply therewith renders the oath defective and all documents attached thereto, inadmissible. It was contended and not rebutted that 1st respondent's counsel at page 1233 of the record prayed but did not produce any copies of the Gazette notices and instead filed submissions to contend *inter alia* that the CR's letter was inconclusive on the existence of the Gazette notices and more time was needed to retrieve them.

14] Appellant's counsel continued that for it to become effectual, an instrument of appointment must be gazetted and that requirement is to be found on the face of the instrument. Citing Sections 14, 16, 17(1)(a), 18(1) and19(1) of the Interpretation Act, and the Supreme Court decision of **NFA Vs Sam Kiwanuka SCCA NO.17/2010,** he argued that all statutory instruments must be gazetted. It was his view then that the two commissioners for oath were in fact not commissioners, and the only option open to the 1st respondent was to seek leave to file a fresh answer to the petition, which he did not do. In conclusion that since an answer to the petition must be commissioned and supported by an affidavit in accordance with

Rule 8(3)(a) Parliamentary Elections (Interim Provisions) Rules **(hereinafter PE Interim Rules),** this Court should find that the first respondent's answer to the petition and all its supporting affidavits filed on 31/3/20212, were incurably defective, and hence strike out the same.

15] It was submitted in reply for the 1st respondent that under Section 1 of the COA Act, a commissioner is duly appointed immediately upon the Chief Justice signing the commission. That the requirement to gazette is for notification of the appointment to the world but not aimed to actualize the appointment. Specifically, that the law does not tag appointment or commencement of such appointment on gazetting, which appointment is effectual upon signing and stamping of the commission. That a commission only ceases on the holder ceasing to practice as an advocate. Citing the definition given by the **Oxford law dictionary**, counsel argued that a gazette is only an official publication containing lists of government appointments, promotions and other public notices.

16] Citing the Supreme Court decision of **Prof Syed Huq Vs Islamic University in Uganda SCCA. 47 of 1995,** he continued further that the only requirement in law was for the two commissioners to be practicing advocates with valid practicing certificates for the year 2021, which was confirmed by letter of the Chief Registrar. Counsel disputed the relevance of the cited sections of the Interpretation Act which in their view relate to statutory instruments and not an appointment of a Commissioner for Oath. They in addition argued that section 6 COA Act is only meant to penalise those who hold out as commissioners for oaths, when not.

17] In response to grounds one and two, 2nd respondent's counsel attempted to adopt their submissions of the lower court. This

being an appeal, I am not prepared to accept or consider those submissions, which were clearly addressing matters at the trial. It is taken therefore that the 2nd respondent made no reply to this, and the second ground.

Submissions of counsel for the appellant in rejoinder

18] It was submitted in rejoinder that according to section 1 (1)&(3) COA Act, once the appointment is made by the Chief Justice, the concerned advocate must gazette the appointment, before he or she can commence administering oaths, failing which is an offence under section 6. In essence that, where a law requires an appointment to be gazetted, the appointment cannot confer any authority before gazetting is done. Counsel drew the Court's attention to the decision of **Musiitwa Herbert Mulas Vs Electoral Commission & Anor, EPA NO. 5/2006,** where a petition was declared a nullity because it was filed before gazetting was done in line with section 138 (4) Local Government Act. In their view, renewal of the practicing certificate only extends such advocate's mandate to administer oaths, and only if such advocate initially fully complied with the provisions of the COA Act. That in fact, the Supreme Court decision of **Prof Syed Huq (supra)** cements the principle that documents prepared or filed by an advocate who has no valid practicing certificate are illegal/invalid and of no legal effect. That following that decision, an amendment to the Advocate's Act (by creation of section 14 (a)), cured the illegality in that, documents signed by Advocates with no practicing certificates would remain valid, but the advocates denied costs. That there being no similar addition to the COA Act, the two advocates were perpetrating illegalities, which this court ought not condone.

Decision of the Court

19] The appellant's bone of contention is that Mugoda Dennis Njaye and Aketch Robinah, the two advocates who commissioned the1st respondent's answer to the petition and 15 affidavits in

support of the answer to the petition, never gazetted their appointment as Commissioners for Oaths as required by **section 1(3)** of the **COA Act.** Counsel then considered the answer to the petition and all other evidence incompetent. It was contended for the 1st respondent in reply that the law does not tag appointment or commencement of such appointment on gazetting. Instead, the appointment which can be made to any practicing advocate, is effectual upon signing and stamping of the commission. Both counsel were in agreement that the two advocates held valid practicing certificates and were formerly appointed in the role of commissioners for oaths. The commissions at pages 674 and 676 of the record, indicate as much. It remained unresolved whether after such appointment, those advocates advertised their appointments in the Uganda Gazette. Each wrote to the trial Judge indicting that they had been given short notice to retrieve the notices. Under those circumstances, the COA Act and Advocates Act (as amended) would be the principle laws to investigate.

20] **Section 1(1) COA Act** empowers the Chief Justice to appoint Commissioners for Oaths who are practicing advocates. It is provided that:

"The Chief Justice may, from time to time, by commission signed by him or her appoint persons being practicing advocates who have practiced as such for not less than two years in Uganda immediately prior to making any application for appointment and who are certified to be fit and proper persons by two other practicing advocates to be commissioners for oaths, and may revoke any such appointment; but the power to revoke a commission shall not be exercised till the commissioner in question has been given an opportunity of being heard against any such order of revocation".

It is then provided under **Section 1(3)** that:

"After the commission shall have been duly signed and stamped as provided in subsections (1) and (2), the appointment of the

person named in it as a commissioner for Oaths shall be immediately published in the Gazette."

21] Appellant's counsel considers the provisions of section 1(3) COA Act as being mandatory. It may be due to the use of the word "shall" which is usually construed to give the statutory provision a mandatory character. However, that is not always the case for the word may sometimes be used in a directory sense, and as such, the court will have to determine where the word has been used in either sense. Much as I agree with the appellant's counsel that where a statutory requirement is augmented by a sanction for non-compliance, it is clearly mandatory, that cannot be the litmus test because all too often, particularly in procedural legislation, mandatory provisions are enacted without stipulation of sanctions to be applied in case of non-compliance. See for example, **Kampala Capital City Authority V Kabandize & 10 Ors (Civil Appeal 13/2014) [2017] UGSC 44 (02 November 2017)**.

22] A clearer explanation was given by **Lord Steyner in Regina Vs Soveji and Others [2005] UKHL 49 (HL Publications)** who stated that: -

"A recurrent theme in drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement was mandatory, a failure to comply invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate the act in question."

23] After reviewing decisions from the English Court of Appeal, the privy Council and courts in New Zealand and Canada, Lord Steyner made the following conclusion: -

"Having reviewed the issue in some detail, I am in respectful agreement with the Austrian High Court that the rigid mandatory

and directory distinction, and its many artificial refinements have out lived their usefulness. Instead, as held in Attorney General's Reference (NO. 3 of 1999) the emphasis ought to be on the consequence of noncompliance, and posting the question whether Parliament can be fairly taken to have intended total invalidity."

24] My understanding of the COA Act is that the only pre conditions for an appointment are that the advocate must have practiced for two years immediately preceding the application for a commission, and that their application is supported by two commissioners for oaths. Chief Justice Wambuzi emphasized it as much in his decision of **Prof Syed Huq Vs Islamic University in Uganda (supra).** He stated that:

"The Act itself states in clear terms that the commission must be issued to a person who is a practicing advocate which means a commission can only be in existence when the particular advocate to whom it was granted is in possession of a valid practicing certificate as required by section 10 of the Advocates Act....."

Therefore, once the Chief Justice is satisfied with the strength of the application, the appointment will made. The wording of the commission says as much, and I quote:

"THE COMMISSIONERS FOR OATHS (ADVOCATES ACT) COMMISION

TO ALL TO WHOM THESE PRESENTS MAY COME, GREETING

Be it known that on the .....day of ....., ...an Advocate of the High Court has been appointed to be a Commissioner for Oaths under the abovementioned Act for as long as he continues to practice as such an Advocate and the Commission is not revoked

.....

Chief Justice". Emphasis of this Court.

25] According to section 1(3), such appointment is complete upon the Chief Justice affixing his/her sign and seal. The commission

is clearly not an ordinance, statutory instrument, by law or regulation to require mandatory gazetting. I see no requirement in the law, and cannot read into it that placing the commission into the Gazette is a pre requisite to the commission taking effect. Publication is clearly a requirement after the commission has been sealed. It is not even clear in the COA that gazetting of the commission is to be done by the appointee. It may well be the duty of the Chief Registrar (hereinafter CR) and as such, any omissions in that regard cannot be visited on the commissioner.

26] Again, as argued for the 1st respondent, there is no penal sanction for failing to place the appointment in the Gazette. The only offence created under the Act is where one holds out as a commissioner for oaths whereas not. Specially it is provided in section 6 COA Act that:

"Any person who holds himself or herself out as a commissioner for oaths or receives any fee or reward as a commissioner for oaths when he or she is not a commissioner for oaths duly appointed as such in accordance with this Act commits an offence and, in addition to any other penalty or punishment to which he or she may be liable by any law in force, is liable on conviction to a fine not exceeding six hundred shillings and for a second offence in addition to any other penalty or punishment stipulated in this section is liable to a fine of two thousand shillings or imprisonment for a period not exceeding six months or both".

Having obtained their formal appointments from the proper appointing authority, the two advocates cannot be considered as "*holding out*".

27] I am persuaded then that the requirement for gazetting under **section 1(3)** of the COA Act is merely directory and not mandatory as no sanction is provided for failure to comply with it under the same Act. As submitted for the 1st respondent, it is a procedural requirement following the appointment to alert the world that the named advocate is authorized to commission oaths, but not necessarily to operationalize the commission.

28] I therefore conclude that the two commissioners who commissioned the affidavit in support of the answer to the petition and other affidavits in support thereof, being duly appointed under the COA Act, had the mandate to commission oaths, at the time they did. Therefore, the learned trial judge did not err when she declined to strike out the 1st respondent's answer to the petition as well as the 15 affidavits in support of the answer to the petition.

29] Accordingly, ground one fails.

Ground Two

Submissions of both counsel

30] It was submitted for the appellant that the 14 additional affidavits filed for the 1st respondent on 18/8/2021, (that appear at pages 474-588 of the record), were defective because the *jurat* do not show the full names and title of the translator, the latter who also did not indicate that he/she knew Ddupadhola language. Counsel in addition considered it an error for the Judge to consider that the affidavits in issue were commissioned because there was no affidavit from any court officer to that effect and it was an assertion by counsel at the bar. Lastly, that not all court officers are commissioners for oaths. In counsel's view, failure by the translator and commissioner to state their full names, title and address, rendered the affidavits incurably defective. Counsel continued that if at all the commissioner for oaths was His Worship Hassan Kamba Richard, a judicial officer, no names or even title of the judicial officer was given.

31] Appellant's counsel also found fault with the decision of the Judge that the affidavits were curable since they were apparently administered by court officers at Mukono Chief Magistrate Court, yet no judicial officer from that court swore an affidavit to confirm it. That in the face of contradictory

submissions by counsel for the 1st respondent at the bar, the affidavits were actually commissioned in Tororo. Counsel distinguished the facts here from the Supreme Court decision in **Presidential Petition No. 1 of 2002**, **Kiiza Besigye Vs Y.K. Museveni & Anor.** In that case, the 1st respondent's affidavit which did not indicate the name or title of the person before whom it was made, was found to be a fatal defect. However it was cured when the judicial officer who administered the oath, subsequently swore an affidavit confirming his participation. In addition, counsel drew the court's attention to the decision in **Kasaala Growers Co. Op Society Vrs Kakooza Jonathan & Anor (supra)** where the Supreme Court took exception against deponents signing affidavits in the absence of commissioners for oaths. In conclusion, counsel prayed this court to strike out all the affidavits filed by the 1st respondent on 18/8/2021.

32] 1st respondent's counsel argued that the defects raised were curable. He cited as an example, the decision in **Nabukeera Hussein Hanifa Vs Kibuule Ronald EP No. 17/2011** where the High Court held that where the affirmations were administered by an officer of the court, their omission to include their identity in the *jurat* could be cured by filing supplementary affidavits. Further that in **Odo Tayebwa Vs Gordon Kakuuna Arinda & Anor EP NO. 5/2016,** Justice Damalie Lwanga's decision to maintain similar affidavits by illiterates was upheld on appeal. Counsel continued that at page 24 of her judgment, the Judge indicated that she was persuaded by the decision in the **Nabukeera Case (Supra,** which she followed to find that the affidavits in issue were commissioned by court officers and that the *jurat* complies with the form in the Oaths Act. She then proceeded to overrule the objection.

33] In rejoinder, appellant's counsel insisted that the impugned affidavits are defective, and the only available remedy to cure the defect would have been for the concerned commissioner for

oaths to swear an affidavit in clarification. Counsel emphasized the point by providing excerpts from the decision of this court in **Mugema Peter Vs Mudiobole Nasser (EP Appeal No. 16/2016)** which also followed the decision in **Kakooza John Baptist Vs Yiga Anthony (SC. EPA. NO. 30/2011)** where it was held that:

"We are of the view, that the law on affidavit evidence should be adhered to without hoping that he who violates it may find refuge under ***Article 126) (2) (e) of the Constitution****. In a situation in the instant case where the trial court acknowledged that the affidavits were not administered in the right manner, court in our view, should not have relied on them without evidence to prove that the affidavits were drafted at the instruction of the deponents, we are unable to find that what went wrong was a matter of mere form not substance."*

34] Counsel in addition distinguished the decision in **Odo Tayebwa (supra)** as not binding on this court for there, the witness did, during cross examination, confirm that he took the oath before HW Kwizera a judicial officer. Further that the decision of **Nabukera Hussein Hamida Vs Kibuule (surpra)** was also cited in error because the Judge in that case after noticing that the affidavit was fatal, he directed the 1st respondent to file a supplementary affidavit by the respective court officers before whom the Oaths or affirmations were made, which did not happen in this case. Counsel concluded with a prayer that all the 1st respondent's supporting affidavits filed on 18/8/2021, be found to be incurably defective and strike off the same.

Decision of court

35] At pages 23 and 24 of her judgment, the Judge noted that the *jurat* on the affidavits in question is the same as that set out in schedule B of the Oaths Act and as such, complied with the law. Schedule B of the Oaths Act Cap 19 provides for the form of *jurat* (where the commissioner has read the affidavit to the

deponent). The Judge quoted the *jurat* in the affidavits verbatim that:

"sworn at Tororo in the district of Tororo this 31/5/2021, before me, and I certify that this affidavit was read over in my presence to the deponent he being illiterate and the nature and contents of the exhibits referred to in the affidavit explained to him in the Dhopadhola language. The deponent appeared perfectly to understand the same and made his mark (or signature) thereto in my presence."

36] The Judge further noted that although the seal on the affidavits was faint, she did not see the seal of the Chief Magistrates Court of Mengo, as alleged by the petitioner. She accordingly considered the petitioner's objection as baseless. In making that decision, the Judged considered excerpts from the **Nabukeera Case (Supra),** and I quote:

"I find that the defects complained of are curable and petitions are of public interest which should be considered liberally. In view of the peculiar circumstances of the matter before me, where the oaths or affirmations were apparently administered by officers of this honorable court, as evidenced by the seal of the Chief Magistrate's court Mukono (sic) affixed thereon, whose omissions should not be unjustifiably visited on the respective deponents. I hereby find that the defects complained of are curable."

The Judge then held that similarly, because the *jurat* in the affidavits comply with the form in the Oaths Act, the objection had no merit.

37] I find it imperative to state the relevant laws pertaining to affidavits deposed by illiterate persons and commissioned before a commissioner for oaths.

Section 2 of the Illiterate's Protection Act Cap 78 provides that:-

"Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her."

On the other hand, Section 5 of the Commissioner for Oaths (Advocates) Act provides that:

"every commissioner for oaths before whom any oath of affidavit is taken or made shall state in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

38] Schedule B of the Oaths Act makes provision for the form of *jurat* where the commissioner has read the affidavit to the deponent as follows;

Form of jurat (where the commissioner has read the affidavit to deponent)

> *Sworn at _____ in the district of _____ this _____ day of _____, 20_____, before me, I having first truly, distinctly and audibly read over the contents of this affidavit to the deponent he (or she) being blind or illiterate and explained the nature and contents of the exhibits referred to in the affidavit in the _____ language. The deponent appeared perfectly to understand the same and made his (or her) mark (or signature) thereto in my presence.*

Commissioner for Oaths

39] This court has had the opportunity of perusing the questioned affidavits and confirmed that in the *jurat,* the commissioner did not state their full name, title and address contrary to **section**

3 of the Illiterates Protection Act and schedule of the Oaths Act. The question is whether such affidavits were curable.

40] I do agree with counsel for the appellant that in the case of **Kizza Besigye (Supra)** the lack of a proper form was cured by another affidavit deposed by the officer who had commissioned the impugned affidavit. Even so, in the **Kizza Besigye case**, after finding that the essential requirements of the jurat had been fulfilled, the Court was amenable to allow rectification of the affidavit than to disallow that evidence entirely. Indeed, as ample authority has shown, that appears to be the preferred practice of this and other courts. In her decision in **Saggu V Road Master Cycles (U) Ltd [2002] 1 EA 258,** Justice Mpagi Bahigeine held that:-

"It is trite that the defect in the jurat or any irregularity in the form of the affidavit cannot be allowed to vitiate an affidavit in view of ***Article 126 (e) of the 1995 Constitution****, which stipulates that substantive justice shall be administered without undue regard to technicalities. I should perhaps mention that the jurat is the short statement at the foot of the affidavit indicating when, where and before whom it was sworn. It would follow that the learned judge had the power to order that the undated affidavit be dated in court or that the affidavit be re sworn before putting it on record. He was also correct to penalize the offending party in costs."*

She continued that:

*"..... **Section 8 of the Oaths Act Cap52** which renders it mandatory to date the affidavit before tendering it in court simply means that an affidavit cannot be used without dating it or indicating where it was sworn and before whom. The errors or omissions regarding the date, place and the commissioner, cannot vitiate an application"*

41] This Court again took a similar view in her decision of **Mbayo & Another V Sinani EP Appeal No. 7/2006.** The issue was whether the Commissioner for Oaths or Notary Public must state in the *jurat* or attestation the place where and the date when the oath or affidavit was taken. This court held that the duty of the court when dealing with settlement of a dispute is to determine the rights of the parties and not to punish them for mistakes they commit in the conduct of their cases. Save for cases of fraud, there is no error that cannot be corrected by the Court if it can be done without causing injustice to the other party. The Court faulted the trial judge for rejecting the proposed amendment. In this Court's view, allowing the amendment would not have caused any injustice.

42] The trial Judge here noted and it is apparent that the commissioner's signature was present at the end of the *jurat.* She in addition noted that the commissioner's seal was present albeit faint. This was clearly a technical error by the concerned commissioner and not the deponents. Therefore, the only errors in the *jurat* would be that the name, title and address of the commissioner was missing. Such errors are the type that this Court has previously found to be curable under Article 126(2) **(e)** of the Constitution. The Court reserves the discretion to order the remedial action to save the affidavit, they may do so guided by the facts of each case. In the cases quoted above, the court ordered for the oath to be retaken before another commissioner, or for a supplementary affidavit to be filed.

43] In this case, the Judge did not order for fresh evidence to be filed. The facts here dictated that decision, for which I find no fault. Specifically, the trial Judge found that the *jurat* in the impugned affidavits were similar in form with that found in the law. She observed that the signature and seal of the commissioner were also present. In the *jurat* it is clear that the commissioner explained the contents of the affidavit to the deponents in a language they understood. The Judge in addition considered the office of the judicial officer as a

commissioner, a correct observation considering the provisions of Sections 73(a)(ii), 78(2) and 79 Evidence Act. Section 79 provides that:

"Whenever a document is produced before any court, purporting to be a record or memorandum of any evidence given in a judicial proceeding or before any officer authorized by law to take evidence, required by law to be reduced to writing, and purporting to be signed by any judge or magistrate, or by any such officer as aforesaid, the court may presume that the document is genuine and that the evidence recorded was the evidence actually given; may take oral evidence of the proceedings and the evidence given; and shall not be precluded from admitting any such document merely by reason of the absence of any formality required by law".

44] In view of that law, and the observations of the Judge, I have no reason to find fault with her well-reasoned findings. The 16 affidavits were in their form curable and could be used as evidence in reply to the petition.

45] Accordingly ground two fails as well.

Grounds three and four

Submissions for both counsel

46] Appellant's counsel submitted that once scheduling of the matter was closed, the trial Judge did not allow for witnesses to be cross examined on their affidavit evidence. That she instead issued directives regarding submissions. That no objection or comment was ever raised with regard to witness's signatures until when the respondents raised it in their submissions. Counsel argued then that any contest to identity and signatures of witnesses not being a point of law, could not be resolved without calling witnesses in cross examination to confirm or deny such contest. That doing so would be a fetter on the right to a fair hearing guaranteed under **Articles 28(1)(e)** and **44 (c)**

of the Constitution and should result into a nullification of the court's decision. Counsel in addition found fault with the Judge for relying on the decision of **Hon. Kipoi Tonny Nsubuga Vrs Ronny Waluku Wataka EP Appeal No. 7/2011** which was bad law. That there is proof that decision was subsequently set aside by this court in **Ronny Waluku Wattaka and 2 Ors Vs Kipoi Tonny Nsubuga COA Review No. 36/2012** for being delivered by a wrong panel. That upon being re-fixed, the appeal was dismissed by this court on 21/9/2021, for want of prosecution.

47] Counsel also considered the Judge's decision on that point as being discriminatory because she failed to find fault with affidavits filed in support of the 1st respondent's affidavits that had similar issues of signatures that were different from those on the National IDs presented. Counsel specifically pointed out the affidavits of Olowo Richard, Ochai Rapheal, Ofwono Gaetano, Onyumba Stephen, Osinde Patrick , Ocheing Johny , Owor Ogen, Owino Innocent, Okongo Bruno, Oloka Denis, Opiyo Joseph, Owor Alex and Openda Remigio. In his view, the decision being discriminatory violated the appellant's rights under Article 21 of the Constitution and those affidavits should have similarly been struck off the record. He then invited this court to set aside the decision of the Judge on that point for the reason that it arose out of an act of discrimination, and in contravention of the rules of natural justice

Submissions for the respondents

48] In response, 1st respondent's counsel considered the objection against the impugned affidavits as one being on law and as such, admissible at any point in the proceedings. Further that the Judge was alive to the law and applied the correct principles by carefully comparing and then finding disparities between the signatures used in the affidavits and on the national identity cards, for the witnesses in question. Citing authority, counsel

then argued that the Judge was correct to find that it was not necessary to raise that disparity during the scheduling proceedings and cross examination of those witnesses was also not necessary. It was argued in the same vein that the Judge was correct to expunge the two affidavits of one Anguma James, who claimed to be one and the same person but whose signatures on affidavits he filed (as PW5) on 18/3/2021 and (as PW 36) on 25/8/2021, differed and thus made his evidence suspect. In addition, Counsel considered the submissions of discrimination as new matter before court that was never raised before the trial judge and ths could not be the subject of this appeal.

49] 2nd respondent's counsel substantially agreed with his colleague. He argued that the issues raised against the impugned affidavits were points of law. That the objections rested on both the Oaths and Illiterates Protection Act in as far as the signatures of the deponents apparently and evidently differed from those on their National ID cards. For others, although there was indication on their identity cards that they were unable to sign, signatures appeared on their affidavits. In their estimation, the witnesses that deposed the affidavits, are in fact not the same as those that actually signed, which put their identities in doubt. The 2nd respondent denied the allegation of trial by ambush because they had in paragraphs 2 and 3 of their answer to the petition indicated an intention to raise preliminary points of law to the effect that the petition is frivolous and vexatious and devoid of any evidence.

50] Counsel continued that before arriving to her decision to expunge the affidavits, the Court did acknowledge her lack of expertise but even then, was able to see the glaring disparities. That in addition cited authority supporting her decision to act even where expert evidence was not available. He supported the Judge's discernment arguing that affidavit evidence is by nature

very delicate and despite the pressure under which election cases are organized, some mistakes cannot be ignored or held to be inconsequential. Citing this court's decision in the case of **Hon. George Patrick Kassaja V Fredrick Ngobi Gume & Anor EPA NO. 68/ 2016,** he argued further that being the principal source of evidence in election matters, it is of paramount importance that affidavits are carefully drafted.

Decision of the court

51] As part of their submissions, 1st respondent's counsel raised an objection against the affidavits of PW 2, 3, 5, 7, 9, 10, 11, 12, 15, 19, 21, 23, 25, 27, 29 and 31. The contention was that some signatures of the deponents did not tally with those in their attached IDs or other documents which put into question their authenticity. Their argument is that this was a point of law that could be raised at any point of the proceedings and required no evidence to support or rebut it. Counsel for the appellant disagreed. In his view, the objection was an ambush, and the Judge should have made provision for the concerned witnesses to be cross examined to confirm or dispute their identities or confirm that they were the actual deponents of the impugned affidavits. The appellant's response then raises three questions

a) *Would the objection raised against the impugned affidavits qualify to be a point of law and therefore one that the respondents could raise at the stage of written submissions?*
b) *Was the Judge under an obligation to first give the deponents of the impugned affidavits a right to be heard before expunging their evidence?*

52] A definition of what amounts to a preliminary objection is imperative at this point. The Court will adopt the definition given in **Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd [1969] EA 696.** It was held:

".... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion".

See also NAS Airport Services Ltd vs A.G. of Kenya [1959] EA 53

The position of the law is that a preliminary point of law or objection can be raised at any stage in the proceedings. **See Ndaula Ronald V. Hajji Nadduli Abdul, Election Petition Appeal No. 20/2006.**

53] The record confirms that the appeal proceeded by affidavit evidence in line with Rule 15(1) PE (Interim Provisions) Rules. One of the formal requirements of an affidavit is that it must be signed by the deponent. However, any alleged discrepancies in signatures or identities of deponents would in my view be a question of fact, and not of law. It would require an investigation by the Court or cross examination by the other parties. Therefore, the objection was not a question of law. However, the facts of this case presented special circumstances and, I shall now elaborate.

54] Appellant's counsel seems to indicate by his submissions that once evidence was closed, the Court had the duty to direct parties to cross examine witnesses on their affidavits. That at that point, the objection against the signatures could have been traversed and then responded to. Rule 15 does not place that burden on the Court, but on the parties. Each may with the leave of court subject the other party to cross-examination. The Court, may on her volition also examine any witness. In this case, the respondents chose not to cross examine any of the appellant's witnesses, it was their prerogative. Even so, that did not preclude the Court from making her findings on the

objection as raised in the submissions. Under Order 15 rr 5(1), the Court may at any time before passing a decree amend or frame additional issues and make her decision on them. According to Order 15 rr 3(a) CPR, such issues may be framed from any allegations made on oath, or in the pleadings of the parties.

55] The Judge addressed the preliminary objection on pages 27 and 28 of her judgment. She stated that:

I have carefully looked at the signatures in dispute and compared those on the affidavits with those on the national identity cards for the witnesses in question with the exception of PW5 who did not file an identity card. I have compared the signature of PW5 on his affidavit in support of the petition with that of his signature in Annexure A to his affidavit and found there is a significant difference. I also find that the signatures of PW2, PW3. PW8, PW9, PW11, PW15, PW19, PW21, PW27 and PW31's signatures on the affidavits are different from those on their respective national identity cards. Further, there are signatures on PW23 and PW25's affidavits in support of the petition yet they are stated as unable to sign on their national identity card"

56] She then gave reasons for striking off those affidavits. She stated at page 28 that:

"Because of the difference in signatures, this court is left in doubt about who signed the affidavits and whether the dependent indicated therein actually deponed the same. Such affidavits cannot be relied on by the court and are of no evidential value. The contention by the petitioner that the objection should have been raised at scheduling and that the witnesses were not cross examined does not change the fact that the signatures are different. Therefore the affidavits of PW2, PW3. PW5, PW8, PW9, PW11, PW15, PW19, PW21, PW23, PW25, PW27 and PW31 are expunged from the court record"

She followed the same reasoning at Page 29 to expunge the affidavits of PW5/36 Anguma James whose two affidavits in support of the petition (filed on 18/3/2021 and 25/8/2021 respectively) had what appeared to her to bear varying signatures of the same person. However, in Anguma's case, the Judge rejected an attempt by the 1st respondent to introduce into evidence an affidavit of SP Sebuwufu and its attachment, an expert/forensic report confirming that the two affidavits were not sworn by the same person.

57] I believe that in her decision above, the Judge was exercising her powers under Section 72 of the Evidence Act. Even without expert evidence, a court which is considered the *"expert of all experts"* can compare contested signatures and make a finding on them. See for example **Premchandra Shenoi & Anor Vs Maximov Oleg Pretovich SCCA No. 9/2003.** However, as earlier pointed out, the variance in signatures of witnesses was purely a matter of fact which when raised, triggered the requirement for evidence to prove or disprove the respondents' contestations. My understanding of Section 66 Evidence Act is that the Court may decline to attach any evidential value to a document only if there has been proof on a preponderance of evidence, that the author did not sign it.

58] As pointed out for the appellant, There is no legal requirement that a person must have or use only one signature at all times. There is also no legal requirement that a person who was previously described as unable to sign, cannot subsequently sign a document. It is also my view that, there is no rational connection between one person's differing signature(s) on documents, and their credibility. Indeed, Sections 45, and 72(1) & (2) Evidence Act presuppose that when signatures are contested, the court initiates an investigation by receiving an opinion or evidence of a person (other than the author) well

accustomed to the signature in question, to confirm that it belongs to the one claimed to have signed it. In the other instance, the court may request from the owner (in court) or others in court, to provide an uncontested signature which is then compared with that which is contested. The Court may also refer to other evidence to prove or disprove a signature. For example, in **Premchandra Shenoi & Anor** (supra), the court considered the contents of a document and other pieces of evidence out of the appellant's own testimony, to pin him as the owner of a document that he had denied.

59] The thrust of my reasoning then is that, once the respondents objected to the impugned affidavits on grounds of differing signatures on their national identity cards and affidavits, or on the documents attached thereto, the Court should have allowed the affected witnesses to be heard, before making a finding on the objection. As pointed out for the appellant, that would be fulfilment of the principle of a fair hearing which is a constitutional tenet under Article 28, one that is non derogable under Article 44(c). Since there was no contest against the contents of the affidavits, there was no basis for the Court to find that the affidavits were of no evidential value, or that they were unreliable and suspicious, before expunging them. It is clear then that in my decision, I am prepared to depart from this court's earlier judgment in **Muyanja Simon Lutaaya Vs Kenneth Lubogo & EC EPA No. 82/2016,** that was followed by the Judge here.

60] I hasten to add that in this case, the objection was raised at the point of submissions after hearing of the matter was closed. It would be procedurally wrong for the court to re-open proceedings at that point and conduct a hearing, one which was not requested for by any party in the case. However, as pointed out for the appellant, any objections to the contents of the

affidavits (including the signatures of the deponents) could have been raised at scheduling, by indicating an interest to cross examine those witnesses. During the scheduling conference conducted on 1/9/2021, the Court recorded that all affidavits filed were presumed to have been read and formed part of the respective parties' evidence. Further it was recorded in paragraph 13.0 of the Joint Scheduling Memorandum (JSM) that, all affidavits filed for either party were deemed as read in open court and *".....all deponents are available for cross examination with leave of Court".* No objections were raised against any signature for any witness and neither respondent indicated any interest to cross examine any of the appellant's witnesses on that point. The inference then would be that the respondents relinquished all rights to raise the issue in submissions. In fact, by their own admission and in paragraph 14.0 of the JSM, only preliminary points of law could be raised by way of written submissions. It was then the duty of the court to consider all evidence (including that in the impugned affidavits), which she did not do.

61] It is evident from the record that the Judge cited and then relied on the authorities of **Hon. Kipoi Tonny Nsubuga V. Ronny Waluku Wataka and 2 Others EP Appeal No.07/2011** (unreported) and not **Hon. Kipoi Tonny Nsubuga Vs Ronny Waluku Wataka and 2 others EP No. 07 /2011.** It is possible that for the reasons given by the appellant, that case is no longer good law. Even then, the Judge relied on several other authorities that support the legal position that the courts have the power to compare signatures or handwritings on documents, before making a decision to confirm the writer. I have added that such powers will be functional only after the court has heard from either party to the dispute.

62] It was also raised by the appellant's counsel that the 1st respondent's affidavits which similarly had varying signatures, did not attract any attention from the Court, which he deemed as discriminatory adjudication. That may be so. However, I see no objection raised in that regard at the trial, and as pointed out for the 1st respondent, none can be raised on appeal. The Supreme Court after considering her earlier decision of **AG vs Paulo Ssemogerere & Ors Constitutional Application No. 2/2004,** gave guidance on the types of matters that can be admitted on appeal. One is relevant here. Such matters would *(inter alia)* be:

D*iscovery of new and important matters of evidence which, after the exercise of due diligence, were not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence.*

See: **Hon. Anifa Bangirana Kawooya Vrs National Council of Higher Education M/A No. 8/2003** and **Karmali Tarmohamed and Another V T.H. Lakhani and Co. [1958] EA 567.**

63] The appellant or his counsel were aware or should have been aware after being served with the reply to the petition that some of the evidence was questionable or suspect. They could have, but did not raise any objection earlier on in the proceedings, or open up the concerned witnesses for cross examination. It is our decision that the court could not make a decision on that objection without first hearing the appellant's witnesses. The same principle would apply for the 1st respondent's witnesses. The appellant is thus estopped from raising the issue on appeal, especially when it was not one of the grounds presented for adjudication here. Thus, the trial court cannot be faulted for not having given attention to some of the affidavits filed in support of the 1st respondents reply to the petition.

64] Accordingly grounds 3 (a), 3(b) and 3 (c) succeed, but grounds 4 fails.

Grounds 5

Submissions for the appellant

65] Appellant's counsel agreed with the Judge that the biometric voter verification machines (hereinafter BVVM) are essential in as far as they ascertain the true identity of the person presenting themselves as a voter. However, he found fault with the decision that because the BVVM Machine print out was in dispute, it could not be the basis to say that the 2nd respondent failed to rely on the verified results. Counsel considered that an error in law because the record at page 1242 (paragraph 330) shows that the print out had been certified by the 2nd respondent, and the same was tendered in and admitted as the petitioner's Exhibit **P2** without any objection from the 2nd respondent's counsel.

66] Counsel continued that the 1st respondent did not in his answer to the petition or in the affidavits in support thereof, specifically deny that any other person save for Aguma James, was ever in charge of the BVVM. Similarly, that the 2nd respondent declined to reveal the person in charge of the machines yet all her witnesses alluded to the fact that BVVM were used. Counsel further disputed the letter allegedly authored by one Mulekwa Leonard (at page 465 of the record) as hearsay. Specifically, that Mulekwa who was stated to be an officer of the 2nd respondent, should have availed that information by way of an affidavit. That as a result, Mulekwa's letter had no foundation in the 2nd respondent's answer, and should have been rejected. He concluded that since the 2nd respondent did not aver anywhere that the machines malfunctioned, then the failure to verify the results using the machines, and the failure to base their final

results on those results was an irregularity that caused a substantial change in the results.

Submissions for the respondents

67] In response, 1st respondent's counsel pointed out that the BVVM print out and tally sheet were annexed to the affidavit of **PW5** (**PW36** in rejoinder) as annexure **E** and **F.** As such, the moment the affidavits were struck out, all the annexures collapsed and ceased to form part of the record, and the Judge could not, and rightly did not rely on them. In addition that, the Judge correctly applied the substantiality test before coming to the conclusion that there was no basis to find that the election was affected in a substantial manner.

68] On the other hand, citing the decision of the Supreme Court in **Rtd. Col. Kiiza Besigye Vs Yoweri Kaguta Museveni and Another Election Petition NO. 1 of 2001,** it was submitted for the 2nd respondent that although section 61 (3) PE Act sets the standard of proof in election petitions on a balance of probabilities, it should be regarded as being higher than in other civil matters. Counsel contended then that in order to merit an order setting aside the election of a member of Parliament, the evidence produced by the petitioner must be such as would, in the circumstances, compel the court to act upon it.

69] Counsel for the 2nd respondent also agreed with his colleague that the evidence of BVVM that was introduced by the appellant through **PW5**, was expunged from the record. Even then, there was no affect on the vote count because the results garnered by each candidate were deducted from the DR forms, which were counter signed by the petitioner's agent's without any complaints of irregularities. In addition, that there were no

written complaints from any agent with regard to any other processes of the election in line with sections 46 (1) and 48(1) PE Act. Counsel argued then that by signing the DR forms, each of the petitioner's agent(s) confirmed in principle that the contents represented the correct result of what transpired at the polling station. Being their appointing authority, the petitioner would thus be estopped from challenging the contents.

70] Counsel contended further that the BVVM Machines were only intended to supplement identification of voters using the National Voters Register and indelible ink to curb cases of multiple voting. Even then that, the appellant did not mention any unauthorized person who voted. It was contended in addition that the appellant wrongly attempted to adduce uncertified DR forms in contravention of Section 73(a) (ii) of the Evidence Act. Further that the appellant did not show that he applied for, and the EC declined to provide him with certified copies. That it was therefore wrong for the Court to have ordered the EC to provide the certified copies which in their view would be shifting the evidential burden. Again, citing the decision of the Supreme Court in **Kakooza John Baptist Vs EC & Yiga Anthony EPA No. 11/2007,** counsel contended that the Court was correct not to consider the contents of the BVVM as worthy of any evidential value.

Rejoinder by appellant's counsel

71] In rejoinder to ground 5, counsel for the appellant emphasized that **Exh. P2** (at pages 25-28) was attached to the appellant's affidavit support of the petition. He then reasoned that there was no rebuttal to the petitioner's evidence that it is the 2nd respondent's officers who availed this document to him, which evidence was repeated in paragraph 2(a)-(c) of the affidavit in reply to the 1st respondent's supplementary affidavit. Counsel argued then that striking out of PW5's affidavit did not necessarily affect the petitioner's affidavit, because **Exh 2** was

admitted for identification purposes at the scheduling conference, and was by court order, subsequently certified.

72] He continued that the appellant endeavored to obtain the data printouts which were utilized by the 2nd respondent to establish the level of compliance in terms of *"voter verification."* That as admitted by the 2nd respondent, the BVVM were employed to supplement Voter Registers. Counsel then clarified that the petitioner's complaint in para 6(b) of the petition, was that whereas machines were used, the 2nd respondent, who did not adduce any evidence of malfunction in the machines, ignored them, and at the trial insisted on the results in the DR forms, which forms are not a record of verified voters. Appellant's counsel insisted that there was evidence of a big margin between the votes verified in the data printout of the BVVM and the tally sheets.

Decision of court

73] The election and results from polling stations in the Kisoko Sub County were the focus of contention in ground 5. All counsel agreed that the BVVM were used and an attempt was made to adduce records retrieved from the machines and an analysis made by the petitioner's counsel to point to wrong tallying, multiple voting and ballot stuffing. The appellant's complaint with regard to the BVVM evidence was three fold. First, it was contended that the 2nd respondent without reason, neglected to ensure that all voters were verified through the machines which culminated into some eligible and non-eligible voters voting more than once. Second, that the 2nd respondent's failure to adhere to the results as verified in the machine, rendered the entire results in the constituency doubtful. Third, that the 1st respondent was declared winner, before the 2nd respondent resolved the complaint lodged by the petitioner in that respect.

74] Having carefully perused the record, I confirmed that at pages 33, 34 and 35 of her judgment the Judge recorded her

evaluation of the petitioner's complaints with regard to the BVVM. She noted that the affidavit of Anguma James **PW5** was struck out yet the appellant sought to rely on copies of the tally sheet and BVVM print out attached to his affidavit as Annexures E and F. I have when resolving the third ground held that Anguma's affidavit was wrongly expunged from the record.

75] In his affidavits, the appellant fully explained how he obtained the BVVM print out and tally sheet. In paragraph 5 of his affidavit in support of the petition, he claimed to have received copies of the printouts and tally sheets from the Assistant Returning Officer and Anguma. Both were attached to his affidavit and the print outs were admitted into evidence as PWII. Certified copies of the same document were attached to Anguma's affidavit. The appellant in addition explained that Anguma was at the material time, employed by the EC as an IT Officer. A letter of appointment is evident on page 595 of the record. Anguma was obviously the expert presented by the appellant to explain whatever discrepancies the latter was raising with regard to the results of the polling stations mentioned therein. The Judge was specific that she did not consider Anguma's evidence at all, and thus any arguments being put forward by the appellant with regard to the results in the BVVM and tally sheets were never investigated. The question then would be whether the absence of Anguma's evidence would have any effect on the final outcome or decision of the court.

76] Even without Anguma's evidence, the Judge still made a finding on this issue. She mentioned at page 34 of her judgment, that the appellant failed to indicate how many voters were verified through the **BVVM** and the converse. She in addition noted that the appellant did not show how many eligible and non-eligible voters voted more than once as alleged. She observed on the other hand that the tallying of votes at each respective polling station was done in the presence of all the candidates and their agents who signed the DR forms with no protests being

recorded, after which the 2nd respondent ascertained and verified all results before declaring the 1st respondent winner.

77] Appellant's counsel contended that the 2nd respondent should have verified and then based their final results on the records from the BVVM which did not malfunction during elections, and whose printouts were certified by the EC and then produced into evidence by Anguma. That it was Anguma who was specifically in charge of the BVVM during elections. Conversely, it was contended for the 2nd respondent that the results recorded in the DR forms was the primary source of the tally for each candidate. The BVVM were only used as an identification tool for voters used to supplement the Voters Registers and indelible ink to prevent multiple voting.

78] It was never in contention that the BVVM were used in this election. They are a recent introduction, being used after the enactment of The Electoral Commission (Adoption and Manner of Use of Technology in the Management of Elections) Regulations S.I. No.2/2021. The principle document for verifying voters is the National Voters Register which under Section 30(5)(a) PE Act, must be placed at a table stationed at each polling station, and upon which each voter is identified before being handed a ballot and allowed to vote. The BVVM were introduced as a technological advancement to give even more precise verification of voters. Indeed in her decision at page 37, the Judge decided that the BVVM are essential in as far as they ascertain the true person of one presenting themselves as a voter.

79] The appellant's objection was mainly against voter verification which he argued, resulted into a wrong tally. In this case, the 2nd respondent admitted that BVVM were used. According to the appellant, BVVM records for the entire constituency were available and properly certified by the EC. The EC officials mentioned that tallying was done against the DR forms only. No mention was made of the Register. Thus the BVVM records, which are supposed to be a reflection of the Register, can be

investigated when making a finding on voter verification before voting. The Judge herself admitted at page 43 of her judgment that without Anguma's evidence, it would be a guessing game to understand the unexplained contents of the BVVM print outs. In my view, that was an indication that an analysis of Anguma's evidence was important. As an expert, Anguma emphasized in his evidence that the records were authentic and accurate. That of course, would still be subject to proof.

80] It is my decision then that the purpose of a BVVM at the polling station was for verification of voters. Whether or not it was in dispute was a matter that was not fully investigated because Anguma's evidence and evidence of other witnesses, was wrongly excluded and never considered.

81] Accordingly ground 5 succeeds.

Grounds 8 and 9

82] This ground was raised to contest the manner in which the court resolved the third issue that was during the scheduling framed as follows:

Whether the 1st respondent committed any illegal practices or electoral offences personally or through his agents with his knowledge and consent.

Submissions for the appellant

83] The appellant's counsel reiterated their earlier submission that affidavits filed in support of his client's claim were wrongly expunged. That those impugned affidavits contained sufficient evidence to prove electoral offences against the 1st respondent. Counsel discounted evidence presented by the EC polling officials in rebuttal as weak and suspicious. With regard to the offence of bribery, it was submitted that the Judge erred when she rejected the evidence presented through PW10 and PW 24 for reasons that there was no independent corroboration.

Counsel argued that the decision was made contrary to section 133 Evidence Act. In their view, corroboration is sought, only with good reason and when the evidence is lacking. With particular reference to Opoya Badru, counsel submitted that he was a registered voter at the County Chief's Residence Polling Station. In their view, beyond being a consistent witness, there was irrefutable evidence to support his version of events because in paragraph 18 of his affidavit, he states to have seen one Tanga Odoi arrive at the polling station in a vehicle with a personalized registration number plate beginning with "RM OO".

Submissions for the respondents

84] In reply, 1st respondent's counsel cited the decision in **Amama Mbabazi Vs Yoweri Museveni (supra)** to argue that allegations of electoral offences must be proved beyond reasonable doubt. In his view, the burden on a balance of probabilities is reserved for facts to prove noncompliance with the electoral laws. After citing authority, counsel continued that bribery being a very serious allegation that can on its own overturn an election, the petitioner has the burden to prove each and every allegation to the satisfaction of court with a high degree of specificity. Counsel then drew the court's attention to the decision of Justice Bart Katureebe JSC in **Kizza Besigye Vs. Museveni Yoweri Kaguta & Anor (2006) (supra)** with regard to the offence of bribery. Counsel argued that the Judge at pages 45-60 of her judgment made a detailed analysis of the evidence to arrive at a correct decision that the petitioner had not adduced evidence to prove that the 1st respondent committed electoral offences personally, or through his agents with his knowledge, consent or approval.

85] 2nd respondent's counsel equally gave the legal and statutory definition of the offence of bribery and insisted that proof that

the recipient is a registered voter, is mandatory. That in this case, the petitioner provided no voter details or particulars such as a copy of the voter's register, voter location slips or voter identification numbers of the alleged recipients of the bribe. Counsel concluded that without independent cogent evidence to support the alleged distribution of money, the evidence of bribery was unreliable.

Submissions in rejoinder

86] In rejoinder, counsel for the appellant submitted that the petitioner's evidence was cogent and proved beyond a balance of probability and to the satisfaction of court, all the electoral offences pleaded. He argued that the two decisions provided by his colleagues did not lay down any hard and fast rule that in election matters, there must be corroboration before evidence can be accepted as being truthful. That it was therefore important for the learned judge to have stated why the evidence of one witness is preferred against another, or at least specified which particular evidence required corroboration. Citing authority, he argued that this Court has previously sanctioned the provisions of 133 Evidence Act. See: **Kikulukunyu Faisal Vs Muwanga Kivumbi EPA. NO. 44/2011** and **Hon. Mukasa Anthony Harrision Vs Dr. Bayiga Micheal Phillip Lulume. EPA No. 18/2007 (Supreme Court)**

87] Counsel then submitted that PW10 Ocwo John, a registered voter at Mbula Parish in Peta Sub County indicated that on the eve of election day, he was bribed by the respondent's agent while at Manjani's house. That the burden to rebut the fact of his voter registration fell on the respondents. That since neither of them raised any contest, the contents of Ocwo's affidavit were presumed to have been accepted.

Decision of Court

88] In ground nine, the appellant contested the decision of the court that the evidence of PW 10 John Ochwo and PW24 Oyoki Richard regarding allegations of bribery and incidents of

election malpractice at the county chief's residence required independent corroboration.

89] The offence of bribery is created by Section 68 of the EP Act. It will require proof on a balance of probabilities that gifts or money were given to a registered voter with the intention of inducing them to vote for a particular candidate or in a certain manner. The Judge was not convinced that there was evidence to corroborate that of PW10 John Ochwo that he was bribed to favor the 1st respondent. I have found that some of the appellant's evidence was wrongly expunged. Without having considered the appellant's evidence in full, such a decision would not be based on evidence that was fully considered and evaluated. The same would apply to the decision made with regard to the evidence of PW4 Richard Oyuki. For both incidents, the trial court will need to re-visit the evidence as a whole before making a decision.

90] Accordingly, ground nine succeeds.

91] Apart from voter bribery, the appellant complained of multiple voting and ballot stuffing at different polling stations by the 2nd respondent's presiding officers and agents of the 1st respondent. In addition, there was a complaint that at some polling stations, elections were interrupted by actual violence and the presence of the military to the extent that, some of the appellant's voters were prevented from voting. That in other areas, the appellant's agents were forced to abandon their duties as polling agents and never witnessed the counting and tallying of votes. After perusing the record, I have confirmed that much of that evidence was contained in affidavits that were expunged and never considered. In some instances, the evidence that was retained, was found to lack corroboration or be too weak to support any credibility. I may need to elaborate on that evidence.

92] Elizabeth Aboth, Monica Adong, Margaret Auma, Peretetwa Awor, Mathew Oboth, Alex Opendi, Christopher Opio and Samuel Wandera stated that they witnessed named and unnamed people receiving several pre ticked ballots that they stuffed into ballot boxes at different polling stations which they manned as polling agents, or attended as registered voters. Some of them were specific that pre ticked ballots were made out in favour of the 1st respondent. The same witnesses and others like Mathew Oboth, Julius Odhwo, Simon Odongo, John Ochwo, and Fred Okoth gave testimonies of what can be termed as undue influence. Their versions may have been different but on the whole, they mentioned intimidation, taunts, threats, assaults, and being prevented from accessing polling stations or from voting, and being chased away from polling duty.

93] On the other hand, Mathew Oboth and Alex Opendi mentioned that they saw Tanga Odoi, the NRM Electoral Commission chairperson, and the 1st respondent converge at Bendo and Gwaragwara polling stations in the company of armed soldiers, where they issued open threats against the appellant's agents and supporters. Further, Bonifance Osinde, Margaret Auma, Simon Odong and Benard Owori mentioned a gang commonly known as *"Kiboko Squad"* or *"Yellow Boys"* who terrorized and assaulted them and others either before, or on election day. The gang whose members were named were stated to be associated with the 1st respondent.

94] All the above was evidence adduced to support the petition, either on its own, or as evidence in support of witnesses whose evidence was not expunged. The conclusion is that there was no due process, because the appellant's side of the story was never fully heard and evaluated.

95] Accordingly ground 8 succeeds.

Ground 7

96] In ground 7, the appellant contended that the Judge wrongly applied the substantiality test when confirming the election

result, and by doing so, came to the erroneous decision that noncompliance with the electoral laws by the 2nd respondent did not affect the outcome of the election in a substantial manner. Much of what was put forward for both parties in respect of this ground, involved the court's evaluation, or none of it, of the results from the BVVM, and records in the tally sheets and DR forms. Both counsel agreed that a quantitative and qualitative evaluation of the election process and results was crucial. As shown here, the results of the BVVM and evidence of 14 witnesses were expunged. Therefore, some of the evidence of how the election was conducted, especially in Kisoko Sub County, was also never considered. Thus, the trial Judge's decision that the facts of noncompliance did not affect the election in a substantial way, was made without hearing and considering much of the appellant's case. It was a one sided decision that cannot stand.

97] Accordingly ground 7 succeeds as well.

Ground 10

98] In ground 10, a complaint was raised that the trial Judge was wrong to rely on the 2nd respondent's witness affidavits that had averments framed in a general denial and in similar fashion. The gist of that evidence was a response to the allegations raised by the appellant in grounds 5, 7 and 8 with regard to electoral offences committed by the respondents or their agents during, and after voting. I have found that much of the appellant's evidence on those grounds was wrongly expunged and may have to be revisited. As such, there would be no reason to make any decision on ground 10.

Ground 11

Submissions for the appellant

99] Appellant's counsel contended that had the trial judge properly addressed the petitioner's concerns, she would have allowed the petition with costs to the petitioner, but not to the respondents.

Submissions for the respondents

100] Conversely, 1st respondent's counsel submitted that courts are guided by **section 27 (1) (2) of the CPA** which is to the effect that costs are at the discretion of the court, and follow the event. Counsel then relied on the definition provided by **Duhaime's Law Dictionary**, **(www. Duhaime.org),** for the phrase *"costs follow the event"* to mean *" an award of costs will generally flow with the result of litigation; the successful party being entitled to an order for costs against the unsuccessful party."*

101] Citing authority, counsel then argued that the successful party should be granted costs and a court should only depart from the rule with reason. 2nd respondent's counsel equally agreed that the appellant did not show any good cause why the respondents should be deprived of an award of costs of the petition.

Rejoinder for the appellant

102] In rejoinder, appellant's counsel argued that the 1st respondent and his counsel prayed for a certificate of two counsel which was denied at the trial. That such a prayer could only be entertained if they had filed a cross appeal against the learned trial judge's decision which was made as a matter of discretion.

Decision of court

103] Costs in civil litigation are a matter of law and ordered as part of judicial discretion. They should not be mistaken to be a mode of punishment but instead a way of indemnifying or compensating the successful party for the expenses they incurred during litigation. Section 27 of the Civil Procedure Act provides that the costs of an action follow the event unless the court, for good cause, orders otherwise. In the same vein, **Rule 27** of the PE Interim Provisions Rules is to the effect that costs of and incidental to the presentation of the petition, shall be defrayed by the parties in such manner, and in such proportions as the court may determine. That position was well summarised by the Supreme Court in her decision of **Besiyge Kizza Vs Museveni Yoweri Kaguta & Anor Presidential Election Petition NO. 1/2001** where Justice Odoki stated that:

"It is well settled that costs follow the event unless the court orders otherwise for good reason. The discretion accorded to the court to deny a successful party costs of litigation must be exercised judicially and for good cause. Costs are an indemnity to compensate the successful litigant the expenses incurred during the litigation. Costs are not intended to be punitive but a successful litigant may be deprived of his costs only in exceptional circumstances."

104] This court confirmed that judgment in **Patrick Kassaja V. Frederick Ngobi Gume & EC EPA No. 68/2016)** by holding that an award of costs is a matter of judicial discretion which discretion has to be exercised judiciously and not arbitrary. Like in all other matters, an appellate court should be cautious in interfering with a decision made on discretion. Thus this court in the case of **Freda Nanziri Kase Mubanda V Mary Babirye Kabanda & Anor EP Appeal No. 38/2016,** held that an appellate court will not interfere with the exercise of discretion

by the trial court unless there has been a failure to exercise such discretion or failure to take into account a material consideration, or that an error in principle was made while exercising that discretion. See in addition, **Banco Arabe Espanol V. Bank of Uganda SCCA No.8/1998.**

105] This Court in **Akuguzibwe Vs Muhumuza, Mulimira & EC EP Appeal No. 22/2016)** further advised that even if there was an error in principle, the court should interfere only on being satisfied that the error substantially affected the discretion on quantum, and that upholding the amount allowed would cause an injustice to one of the parties. Electoral litigation is a matter of great national importance in which courts have to carefully consider the question of awarding costs so as not to unjustifiably deter aggrieved parties with a cause from seeking court redress

106] At the trial, the appellant lost his quest to have the election of the 1st respondent reversed and was ordered to pay costs. However, it is the decision of this court that the trial Judge reached her decision after wrongly expunging some of the appellant's evidence and without hearing the case in totality. The order for the appellant to pay costs was equally wrong and cannot stand. I would accordingly set aside the award of costs in the High Court, and accordingly ground 11 succeeds.

107] The final result is that this appeal has substantially succeeded.

108] As a way of resolving his client's complaints, appellant's counsel moved court to exercise her powers under Section 11 Judicature Act to re-evaluate the evidence regarding electoral offences. It is a legitimate prayer but unfortunately one that this court cannot embrace. I have agreed that much of the appellant's evidence with regard to electoral offences was never considered. It is the duty of the Court of first instance to consider all evidence of both sides, as well as the law applicable

before making a decision on a balance of probabilities. I find the decision of the Court of Appeal of Nigeria at Abuja on the matter, persuasive. It was held:

"Evaluation of evidence and the ascription of probative value to such evidence are the primary functions of a court of trial which had the opportunity of seeing, hearing and assessing the witnesses and their respective evidence; where after doing that, that court unquestionably evaluates the evidence and justifiably assesses the facts, the duty of the Court of Appeal is to find out whether there is evidence the basis on record on which the trial court acted. Once that exists, i.e. there is sufficient evidence on record from which the trial court arrived at its findings of fact; the Court of Appeal cannot justifiably interfere.....The essential consideration is that there is enough evidence on record from which the trial court's finding can be supported". Emphasis of the Court.

See **Atlantic Networks Ltd & Anor Vrs Abawah Nigeria Ltd (A 200 of 2012)[2016]NGCA 57 (18th April 2016).**

109] This is a court with appellate jurisdiction. I did earlier on in this judgment clearly set out the law and the limitations of her jurisdiction and powers. I repeat that being a first appellant court in the matter, Under Rule 30(1) COA Rules, our mandate is restricted only to re-appraisal of all the evidence adduced in the Court below and to draw inferences of fact therefrom. We can only re-consider evidence that has been placed before, and then fully considered by the High Court, and not evidence which was completely left out of the court's evaluation, as is the case here. There was never any finding on law or fact with respect to the evidence of 14 witnesses on aspects of electoral offences, and one witness on the aspect of the use of the BVVM. By wrongly expunging some evidence, the trial Judge was not able to determine on a balance of probabilities, the weight and credibility of the omitted witnesses, which resulted into a miscarriage of justice.

110] I consider the only available remedy in the circumstances of this case, is to remit the proceedings back to the High Court for a new trial to be held. I do appreciate that an order for a trial *de novo*, should be ordered only if absolutely necessary and if the justice of the matter dictates it. I believe it is the most appropriate remedy here because the Court failed to determine the case as dictated by the law. The trial Judge, without hearing the concerned witnesses, expunged from the record evidence of facts essential to a correct and fair decision of this election dispute. Since the matter proceeded by affidavit evidence alone, an expeditious re-trial can be achieved. It may well be that the 1st respondent as the current representative in Parliament will be inconvenienced. However, matters of elections are matters of public interest, and a significant mistake occasioned at the trial, must be corrected.

111] Thus exercising powers of this court under Rule 32(1) COA Rules, I would set aside the judgment of the trial court. In its place, I would order that the record is remitted back to the High Court and placed before a new Judge for a re-trial on all issues that were set forth in the petition. The High Court will, if prompted, have a fresh opportunity to entertain and in a fair manner, investigate the objections raised against the affidavits of some of the appellant's witnesses before making a decision.

112] Each party shall bear their costs of this appeal. The costs of the court below shall abide the outcome of the retrial at the High Court.

DATED at Kampala this 1st day of August 2022

EVA K. LUSWATA

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: EGONDA NTENDE, MADRAMA AND LUSWATA JJA)

ELECTION PETITION APPEAL NO 70 OF 2022

(ARISING FROM ELECTION PETITION NO 14 OF 2021 AT MBALE HIGH COURT)

OTHIENO OKOTH RICHARD} ..... APPELANT

VERSUS

1. **OCHAI MAXIMUS}**
2. **THE ELECTORAL COMMISSION .....RESPONDENTS**

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the Judgment of my learned sister Hon. Lady Justice Eva K. Luswata, JA, setting aside the Judgment of the High Court and remitting Election Petition No. 14 of 2021 for retrial by the High Court.

I agree with the Judgment and orders proposed and I have nothing useful to add.

Dated at Kampala the 14th day of Aug 2022

Christopher Madrama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Madrama, Kawuma JJA]

ELECTION PETITION APPEAL NO. 70 OF 2021

BETWEEN

OTHIENO OKOTH RICHARD==========APPELLANT

AND

OCHAI MAXIMUS==========RESPONDENT NO.1

THE ELECTORAL COMMISSION==========RESPONDENT NO.2

JUDGMENT BY FREDRICK EGONDA-NTENDE, JA

[1] I have had the opportunity to read in draft the Judgment of my sister, Luswata, JA. I agree with it.

[2] As Madrama, JA, also agrees, this appeal is allowed with the orders proposed by Luswata, JA.

Signed, dated and delivered at Kampala this 1st day of April 2022

Fredrick Egonda-Ntende
Justice of Appeal