

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MUBENDE
PARLIAMENTARY ELECTION PETITION NO. 003 OF 2021

TUMWESIGYE FRED PETITIONER

VERSUS

1. MUSEVENI WILLIAM

2. THE ELECTORAL COMMISSIONRESPONDENTS

JUDGMENT

BEFORE: HER LORDSHIP HON. JUSTICE EVA.K. LUSWATA

A brief background

- 1] The Petitioner, the 1st Respondent and Ainebyona Ronald were candidates for the position of Member of Parliament for Buwekula South Constituency in Mubende District for Elections which were conducted by the 2nd Respondent on 14/01/2021. The 1st Respondent was declared winner of the election by the Returning Officer of the 2nd respondent.
- 2] Tumwesigye Fred the petitioner contests the outcome of the said election, which he contends was wrought with illegalities, electoral offences and irregularities. He seeks (inter alia) for the Court to order that the elections were not held in accordance with the provisions of the electoral laws and the principles governing elections, which noncompliance affected the results in a substantial manner. He in addition seeks an order for the Court to annul and set aside the election and order that a fresh election be conducted in accordance with the law, or in the

alternative, Tumwesigye be declared the duly elected Member of Parliament, and costs.

3] In brief, Tumwesigye's contest against the election was that:-

- i. The electoral process spanning the entire campaigning period to voting day, was characterized by gross irregularities and mal practice, illegal practices and electoral offences, including acts of violence and intimidation, lack of freedom and transparency, unfairness, bribery, committed by the respondents and by other people with the respondents' knowledge, consent and approval.
- ii. The Electoral Commission/2nd respondent (hereinafter the EC), erroneously considered over 1,081 votes as invalid and made falsified entries on the Return Form for transmission of results (hereinafter RFTR)
- iii. The 1st respondent Museveni William and his agents and supporters interfered with Tumwesigye's campaigns and EC officials openly campaigned for Museveni. The two connived to intimidate and threaten or coerced Tumwesigye's polling agents into signing the Declaration of Results forms (hereinafter DR forms) before the closure of voting and counting of votes and ordered for voting to end before the time fixed by law.
- iv. There was ballot stuffing and rigging of votes in favour of Museveni by his agents and supports. That this happened when election constables in charge of security at the polling stations, were attacked while transporting election materials which resulted into late delivery of ballot boxes.
- v. The election officers of the 2nd respondent and poll police constables, permitted electoral malpractices including, campaigns on polling day, underage and unregistered voters, ballot stuffing, multiple voting, pre-ticking of ballots, contradictory entries in DR forms, and manipulation of the voters register at different polling stations, all in favour of Museveni.

- vi. EC polling agents connived with Museveni and his agents to ferry voters from one polling station to another and for the impersonation of registered voters, all in favour of Museveni.
 - vii. Tumwesigye was denied representation during voting, counting of votes and tallying of results of the election and in some instances, EC officials declined to hand over DR forms to his agents
 - viii. There was disenfranchisement as some registered voters, (the petitioner and his family inclusive) were denied voting at polling stations assigned to them during the voter display exercise. They were forced on polling day to wander around the constituency checking for their names
 - ix. The EC presiding officers failed and/or neglected to record the complaints made by Tumwesigye's polling agents as part of the official records of the polling stations during the voting, counting and tallying exercise
 - x. Museveni used election constables, Uganda People's Defence Forces personnel (UPDF), and his supporters who had formed a militia called "*Team Busungu*" to threaten voters who had come to vote for Tumwesigye to refrain from voting, and as a result, many voters shunned the voting exercise.
 - xi. Museveni's speakers/agents at his rallies. with his encouragement on many occasions made false, defamatory and sectarian statements against Tumwesigye
 - xii. The EC's independence was compromised by subjecting its functions to the direction and control of Museveni and security operatives who were in consort with Museveni
- 4] In his brief response to the petition, Museveni contended that he was validly elected and his successful victory is a true reflection of the decisions of the majority of the electorate in a free and fair election. He denied all allegations of wide spread commission of election offences and illegal practices by him

personally, or through his agents, with his knowledge and consent or approval, contending that all his agents were formally appointed by letter. He in addition denied any connivance with the agents/officials of the EC to commit electoral offences and mal practices throughout the campaigns and on voting day. He concluded by praying for dismissal of the petition with costs.

- 5] The EC likewise contended that the entire electoral process was conducted in compliance with the provisions and principles laid down in the electoral laws. In particular, that the elections were free and fair, free from violence, intimidation, bribery, disenfranchisement of voters, improper influence or corruption, and administered in an impartial, neutral, efficient, accurate and accountable manner. They contended that no illegal practices and offences were reported to either the presiding officers, or the returning officer as required by law. That the entire process of counting votes and filling DR forms at various polling stations, was carried out under a peaceful atmosphere. That after the closure of polls, the results from the various polling stations were properly and publicly announced, recorded and delivered to the designated officers for onward transmission to the Returning Officer who accurately counted and tallied each candidate's final result.
- 6] It was contended in addition that all persons who voted were properly identified and verified as registered voters at polling stations, and thus eligible. They continued that there was no collusion between the respondents to manipulate or tamper with results, and no inconsistencies in the votes cast, announced and tabulated at each polling stations. That vote counting, announcement and tallying was well witnessed and authenticated by the candidates' agents who signed DR forms with no complaints. The EC then argued that if there were any irregularities or noncompliance with electoral laws during the election, such noncompliance did not affect the outcome of the election in a substantial manner.

- 7] Each party adduced substantial affidavit evidence by themselves and their witnesses, and cross examination was allowed in respect of some evidence. For reason of space, the contents shall not be reproduced here, but will be considered in my final decision.
- 8] In the joint scheduling memorandum filed in Court on 30/8/2021 and confirmed on the record on 13/9/2021, the parties agreed on the following: -
- 9] **Agreed Facts: -**
- i. Tumwesigye Fred as candidate standing on the National Resistance Movement (NRM) Ticket and contesting against Museveni who stood as an independent, and Ainebyona Ronald who stood on the National Unity Platform (NUP) Ticket, on the 14/1/2021 participated in the elections for directly elected Members of Parliament for Buwekula South Constituency in Mubende District; an election organized by the EC.
 - ii. On the 15/1/2021, the EC returned/declared Museveni Willaim as the validly elected Member of Parliament for Buwekula South Constituency Mubende District having polled 8,075 (eight thousand seventy-five) votes, while Tumwesigye Fred polled 7, 479 (seven thousand four hundred seventy-nine) votes.
 - iii. The total number of votes cast during the election as per the Return Form for Transmission of results were 17,779.
 - iv. The results for the election for directly elected Members of Parliament for Buwekula South Constituency in Mubende District were published in the Uganda Gazette of 17/2/2021.

10] **Contested documents**

- i. Form of Declaration of Results for NRM primaries for Buwekula South Constituency MP 2020
- ii. Certified copies of the Voters Register (hereinafter referred to as VR) for all polling stations in Buwekula South Constituency, Mubende District reflecting the voters that voted and those that did not vote on polling date
- iii. Annexure “PW7” and “PW8” of the petition.

11] Four issues were agreed for determination. Those will be dealt with minor modifications: -

- i. **Whether this Honorable Court should strike out the 2nd respondent’s additional affidavits for having been filed out of time**
- ii. **Whether there were illegal practices and electoral offences that were committed by the respondents and by other people, with the respondents’ knowledge, consent and approval**
- iii. **Whether the election was not conducted in compliance with the electoral laws, and if so, whether such noncompliance affected the results in a substantial manner.**
- iv. **What remedies are available to the parties?**

12] **Representation:**

- Dominic Twinamasiko and Paul Sebunya for the Petitioner.
- Abbas Nsamba Matovu, Asiimwe N. Stephen and Hon. Medard Segona Lubega for the 1st respondent
- Mr. Godfrey Musinguzi for the 2nd respondent

13] In their submissions, Museveni’s counsel raised four preliminary objections that would require my attention before resolving the agreed issues. Suffice to say, I

agree with Tumwesigye's advocates that the objections are raised in bad faith and too late in the day which is prejudicial to his case. In two of the objections, an order is sought to dismiss the petition entirely. I am of the view, and it is the spirit of **Order 6 rr 28 and 29 CPR** (as amended) that objections that go to the root of any proceedings (even if not pleaded), are best raised and argued in the preliminary stages, at which point the complainant (in this case the petitioner) is given a chance to present or rebut them and the Court has the opportunity to consider whether it is a matter which is a question of law, or one that will require first adducing evidence. **Mukisa Biscuit Manufacturing Co. Ltd Vs West end Distributers Ltd (1969) 1 EA 696** and **NAS Airport Services Ltd Vs AG of Kenya (1959) 1 EA** refer.

- 14] I therefore agree with the decision of the Court of Appeal in **Muyanja Simon Lutaaya Vs Kenneth Lubogo & EC EP Appeal No. 82/2016** that final submissions are mere summations of evidence already tendered in Court, and should not be used as an avenue to introduce new matters, including objections. The record confirms that on several occasions all counsel were at different times afforded time and did raise objections which were fully resolved. Those constant interruptions derailed the pace of the proceedings and it was for that reason that an order was made for the objection with regard to the EC's affidavits filed on 8/6/2021 be framed as an issue and resolved as part of the judgment. It is clear then that raising objections in their submissions, Museveni's counsel employed ambush tactics, a procedure now much deplored in all courts. My observations notwithstanding, it is still the duty of the Court to consider the merits of the four objections, and I shall do so briefly.

Parts of the petitioner's affidavit in support of the petition offend Order 19 rr 3(1) CPR and contain hearsay.

- 15] Museveni's counsel makes a correct observation that under Order 19 rr 3 (1) CPR the contents of an affidavit in a substantive action must be confined to such facts as the deponent is able by their own knowledge to prove. The contested paragraphs all appear to contain information that Tumwesigye received from third parties, who are not named. However, this is an objection that Museveni's counsel should have raised at the inception of the proceedings. Instead, they held onto the objection and admitted that evidence during scheduling of the matter. They even went ahead to engage Tumwesigye in lengthy cross examination on all his evidence, the impugned paragraphs inclusive. The Evidence Act does not strictly apply to affidavit evidence and it would be dis judicious to sever parts of an affidavit, at the tail end of the trial, especially an affidavit whose deponent was subjected to exhaustive cross examination. Museveni's counsel have only themselves to blame.
- 16] Further, I note that under Order 19 rr 3 (2), parts of an affidavit need not necessarily be expunged. Instead the Court may consider awarding costs against a party who files an affidavit with matters of hearsay. I choose therefore to leave the affidavit intact. I will consider Tumwesigye's evidence both the pleadings and in Court as a whole. It will be possible then to determine what amounts to hearsay; once that is done, it can be dealt with as evidence evaluated in line with the CPR and Evidence Act.
- 17] The first objection accordingly fails.

The affidavit in support of the petition was commissioned by a commissioner for oaths/advocate who at the same time represented the petitioner in the proceedings.

- 18] It was argued for Museveni that counsel Munyaneza Daniel Bazirake who commissioned Tumwesigye's affidavits in support of the petition, also represented him during the exercise of opening the ballot boxes done under supervision of Court, which offends Section 4 (1) of the Commissioner for Oaths (Advocates) Act. It was stated in response that counsel Bazirake is not attached to either of the two firms on record as representing Tumwesigye, the exercise of ballot box opening was not a court proceeding and even it were, Bazirake only held brief of Ssebunya the duly instructed advocate. Tumwesigye's Counsel further cited authority to contend that for cases where a conflicted advocate is found to be taking part in proceedings, the Court would not reject or expunge pleadings, but only to bar such advocate to continue representing that particular client.
- 19] Again, I agree with Tumwesigye's advocates that this is a matter that ought to have been raised during the proceedings. The question whether counsel Munyaneza Daniel Bazirake is attached to any of the two law firms on the record for Tumwesigye, is a question of fact. He would have had a chance then to confirm his address at the material time. Since no evidence was adduced by Museveni's counsel to rebut the response that he was not attached to either firm, the Court can only reasonably agree with what has been raised in response that he is not. Even so, had it been proved then that Bazirake was indeed conflicted, the court would have at that point asked him to step down from further conduct of the case, but not necessarily to dismiss the petition. I also note that Bazirake's involvement was during pre-hearing proceedings, when any prejudice to the respondents would be minimal or non-existent.
- 20] I agree also that the proceedings of the ballot box opening were not ordered by Court. In my order of 19/8/2021, I directed that the EC to hand over to

Tumwesigye's lawyers certain documents they had earlier sought for to assist them prosecute the petition. The EC counsel found it necessary to retrieve those documents from the sealed boxes in their custody, and informally sought that the Court superintends the exercise to ensure transparency. That would explain the presence of the Chief Magistrate Mubende, and the report he filed in Court to explain what took place. Even then, Bazirake was clear in his introduction that day that he was only holding brief of counsel Ssebunya for the petitioner. He would in that stead not be a commissioner for oaths acting as advocate in the same proceeding or matter. I agree therefore with the finding in **Nakivubo Road Old Kampala (Kisekka) & 4 Ors Vrs URSB & 4 Ors HCMC No. 109/2015** that "*...the practice is that a lawyer on brief does not defend the client but watches what goes on and reports back to the lawyer whose brief he had. Such lawyer on brief does not necessarily exercise the client's right to be heard....*".

21] I therefore find no merit in the second objection, and it also fails.

Objections raised against the admission of voter registers

22] Museveni's counsel objected to the admission of the voter registers (hereinafter VT) retrieved during the exercise of opening of the sealed ballot boxes on 9/8/2021, for being a flawed process. Citing authority, counsel argued that using information from a process where some ballot boxes were found open would amount to an abuse of Court process. Counsel prayed that the VT retrieved from the ballot boxes are found inadmissible and rejected altogether. See: **Byanyima Winnie Vs Ngoma Ngime Civil Revision Cause No. 0009/2001**. In response, Tumwesigye's counsel argued that the VT were properly retrieved during discovery proceedings, the seals on only two boxes were tampered with but not

broken, and the anomaly was explained by the EC official, after which the EC proceeded to retrieve and certify them.

- 23] I must state that at the inception of this matter, it is the certification of the DR forms (kept in the sealed boxes) and not the VR, which was in issue or contention. That may be the reason that no objections were raised by any party during the exercise, because most were found intact in the boxes. However, after the exercise was complete, at the hearing of 13/9/2021, Museveni's counsel raised issue with the two tampered boxes, and thus the legitimacy of the entire process which he argued was discredited. However, the arguments then centered on the retrieved DR forms only. I did hold then on page 6 of my ruling that:

“I note in the report of the Chief Magistrate that when the ballot boxes were opened, it was discovered that seals of two boxes had already been tampered with. It was also confirmed that the election materials in the boxes were not for only member of Parliament.....out of all those contents, they fished out what they needed. In my view, it would be dangerous to allow a certification of those DR forms in such a situation, especially when an objection has been raised by the respondents”.

I then held that Tumwesigye's lawyers had never asked for certification of the DR forms in the sealed boxes and the batch which the EC received in the sealed envelope and certified by them, would suffice. Clearly the ruling did not address the admissibility of the VT. It is being raised now, and I must therefore address it.

- 24] The exercise to open the 61 sealed ballot boxes of the constituency was conducted on 9/8/2021 before the Chief Magistrate Mubende, in the presence of Museveni's counsel, one holding brief for Tumwesigye's counsel and the Returning Officer, Mubende District. It is reported that at the opening of the

boxes, it was found that seals of two had been tampered with. In the first report, no details were given of the actual polling stations or the nature or the extent that the tampering entailed. After reading the report, I requested for better particulars and on 20/10/2021, the Chief Magistrate confirmed that seal of the boxes for the Kisenyi Store PS in Bugonza Parish, Kitenga Sub County and Sunga PS, Kabyuma Parish, Kalonga Sub County had been broken. None the less, no objection was raised against that discovery and the exercise was begun and was completed. According to the Magistrate's report, eight boxes had no DR forms and six had no VT. I will assume then that 55 VR were found intact, retrieved, photocopied and then certified by the EC with no contest. The same have been extensively used by the petitioner's counsel in their submissions.

- 25] The Supreme Court in **Kakooza JB vrs EC & Yiga Anthony SC EP Appeal No. 11/2007** condemned the practice of tampering with ballot boxes, which is in fact an offence under the PE Act. Thus, in **Byanyima Winnie (supra)** the High Court declined to consider evidence recorded from an attempted vote recount where 21 ballot boxes (out of 66) were found to have been tampered with. Conversely in **Kakooza JB Vs EC & Yiga Anthony (supra)**, the Supreme Court took a more liberal view where it was confirmed that only a box of one polling station was found open. Kanyeihamba JSC held:

“There is the evidence of a single box at Kalaama polling station which was found open. This irregularity was fully explained by credible witnesses as never intended to alter the cast votes for any candidates..... to vitiate the results, the appellant needs to prove that the phenomenon he complains of had extended beyond one polling station and affected more than one ballot box or was of such nature as to affect the results substantially in the constituency. In my opinion, the appellant has failed to do so”.

- 26] The dispute in the **Kakooza JB's** matter was in respect of ballot papers issued by the EC that did not tally with the ballot papers counted at the end of the polling exercise. The facts may be different from the case here, but the principle developed was whether the entire exercise and evidence therefrom would be fully contaminated if it was found that one ballot box that had been tampered with. The Supreme Court did not agree. I know that in my ruling of 14/9/2021, I considered the exercise flawed and ordered that Tumwesigye cannot rely on the DR forms found in the ballot boxes. I am now aware of a Supreme Court decision which gives better direction on the matter, which I agree with, and shall therefore apply its principles here
- 27] The exercise on 9/9/2021 was carried out not to do a vote re-count but to retrieve the VT and other polling documents for certification by the EC as requested for by Tumwesigye's counsel. During the exercise, Museveni's counsel appeared to be most concerned and only raised his concerns about the color of the seals on the boxes. I do agree that Museveni himself who testified that he did not visit all polling stations on voting day, would not know what colour seals were used on the boxes. Even then, the RO explained that it was normal of seals to break and be replaced by EC officials in the presence of polling constables. Notably, the issue of the tampered seals was not pursued then, and the exercise was carried out unabated.
- 28] As I have said, it was discovered that 6 out of the 61 VR were missing. Those found intact were retrieved and photo copied in the presence of all counsel. Indeed on 20/8/2021, counsel Asiimwe indicated that his objections extended only to **Exhibit PW7A-PW7JJJ** (the certified DR forms) and nothing else. This objection then is clearly an afterthought. More important, the EC who readily agreed and did certify all 55 VR, which were then admitted as Tumwesigye's evidence, must have done so after confirming their authenticity. Going by

Kakooza JB's case, save for those of Kisenyi and Nsunga polling stations, the exercise was not contaminated to the extent that those documents are unreliable or even inadmissible. This is a court of Justice and the VR of Buwekula South Constituency is a vital document that should assist the Court to make a fair decision in the matter.

- 29] For the above reasons, I am constrained to reject the third objection. I will retain on the record all the 55 certified copies of VR as part of Tumwesigye's evidence, to be considered using the burden of proof expected of election petitions.

Non payment of stamp duty on documents certified by the Electoral Commission

- 30] In addition, citing authority and quoting the Evidence and Stamps Act, Museveni's counsel objected to the admission of the certified VR for which no stamp duty was paid. In response it was submitted for Tumwesigye that the Evidence Act refers to payment of legal fees but not stamp duty and thus, the cases cited would not apply to the facts here. Further that the VR was a document procured through discovery proceedings which are meant to afford the parties and court, documents essential to a case. That such court orders would have been frustrated by litigants who do not wish to comply by charging exorbitant fees. Further that the EC which is a public body, required (and required to furnish the documents) was a party to the proceedings, thereby placing them outside the ambit of Section 75 Evidence Act.
- 31] Under Section 75 Evidence Act, every public body having custody of a public document shall on demand avail a copy to any person for inspection after payment of the legal fees for the copy together with a certification stamp at the foot of it. The Act did not provide a definition of "legal fees"; Counsel wishes court to consider it to be stamp duty, which under the Stamps Act, must be paid

before a Court can admit it as evidence. I note however that the schedule to the Stamp Duty Act 2014 (as amended) referred to stamp duty on instruments but not every document that is issued by a public body or Government. Indeed, my understanding of fees in this case, would be the certification fee paid to the public body before an original public document is retrieved, photocopied and then certified.

- 32] At the inception of these proceedings, Tumwesigye's counsel furnished proof to show that the VR were some of the documents they had formerly sought from the EC in vain. During the proceedings on 19/8/2021, counsel Musinguzi was emphatic that the EC could and would readily provide and certify any and all documents in their possession and available to them. When they still failed to do so, the Court issued an order directing them to do so by 3/9/2021. They were then prompted by my order of 26/8/2021, to open the ballot boxes, during which the VR were retrieved, retained by them and then certified. The EC has not raised any objections against nonpayment of any fees and readily supplied the VR. Had Museveni's counsel thought this a worthwhile objection, they should have raised it at the point the VR were being admitted into evidence. They did not. I say so because, often times the Courts have taken the liberal view of not discarding documents for which no fees have been paid, but staying the proceedings until the anomaly is corrected. Indeed, as pointed out by Tumwesigye's counsel, the issue of whether the appropriate duty or fees were paid is a matter of fact one which should have been raised at the point the document was being adduced, and not in proceedings. They have not proved that the requisite fee was not paid, and proceedings cannot be revived at this point to investigate this question of fact. I would accordingly reject the forth objection as well.

- 33] In summary all four objections raised for Museveni are rejected and dismissed with costs to Tumwesigye. I shall now turn my attention to the merits of the petition.

The Law: -

Section **61 (1) of the Parliamentary Elections Act (hereinafter EP Act)** sets down the grounds upon which an election of a candidate as a Member of Parliament shall be set aside if proved to the satisfaction of court. The following apply to this election:

- a. Non - compliance with the provisions of this Act relating to elections, if the court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the noncompliance and the failure affected the results of the election in a substantial manner.
 - b.
 - c. That an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally, or with his or her knowledge and consent or approval
- 34] By virtue of Sections **101 – 103 of the Evidence Act, Cap 6**, the party asserting the existence of certain facts on which judgment is sought bears the burden of proof to prove such facts. The burden of proof in election petitions always lies with the petitioner. I am aware that there have been divergent views and decisions on the standard of proof expected of a petitioner. For some courts, the burden on a balance of probabilities has been accepted as sufficient, (see for example **Mukasa Anthony Harris Vs Dr. Bayiga Michael Phillip Lulume SCCA 18/2007** and **Paul Mwiru Vs Hon Igeme Nathan Nabeta Samson and**

2 others C.A. E. P No. 6/2011). For others, the standard has been set higher than ordinary cases. (See for example, **Karokora Katono Zedekiya V. The Electoral Commission & Kagonyera Mondo, Election Petition No. 02 of 2001),**

- 35] The Justices of the Court of Appeal their decision of **Freda Nanziri Kase Mubanda v Mary Babirye Kabanda & EC EP Appeal No.38/2016**, has more recently put the matter to rest by finding that the standard of proof is set out in Section 61 (3) of the PE Act which provides that any ground specified in Section 61(1) PE Act, shall be proved on a balance of probabilities. They held specifically that,

“The trial court misdirected itself on the standard of proof when it stated that it was higher than the usual balance of probabilities applicable in ordinary civil suits. The standard of proof in parliamentary elections is proof on a balance of probabilities as provided for under Section 61(3) of the Parliamentary Elections Act No.17 of 2005”.

- 36] The divergent views of the courts may appear to have left the required standard unclear. However, taking due regard that election petitions are matters of great national importance, with serious budgetary implications, and an expression of civil and political rights guaranteed by the Constitution, the Court should take critical note of all evidence as adduced. Only that which is cogent i.e. compelling, clear, logical and convincing, should be considered. See for example, **Ernest Kiiza Vs Kabakumba Masiko EP Appeal No. 44/2016.**
- 37] CJ Odoki (as he then was) in **Kiiza Besigye Vs Yoweri Kaguta Museveni Presidential E.P. No. 1/2001** summarized the principles governing electoral laws. He advised that:-

- i. The Court should consider the election process as a whole
 - ii. The election must be free and fair.
 - iii. It must be conducted in accordance with the law and procedure laid down by Parliament
 - iv. It must be conducted with transparency.
 - v. The decision must reflect the will of the people, free of intimidation, bribery, violence, coercion or anything intended to subvert the will of the people.
- 38] The position of the law is that an election should not be nullified unless the irregularities or noncompliance with the electoral law affected the results of the election in a substantial manner. See for example **Amoru & Anor Vrs OKello (Election Petition Appeal 2016/39) [2017] UGCA 19 (28 August 2017)**.

My decision

Issue One

Whether this Honorable Court should strike out the 2nd Respondent's additional affidavits for having been filed out of time

- 39] It was submitted for Tumwesigye that the EC was served with a copy of the Petition on the 24/3/2021, such service being confirmed by an affidavit of service deposed by Ms. Komujuni Jane filed in court on 9/4/2021. The EC filed their answer to the Petition on 31/3/2021, and on the 8/6/2021 filed additional affidavits in response to the petition. That late filing was contested because it contravened **Rule 8 of the Parliamentary Elections (Interim Provision) Rules (SI 141-1-4)(hereinafter the Rules)** and was done without leave of Court.
- 40] The EC admitted the date they received the petition and filed their response and 21 additional affidavits. Citing authority, they prayed court treats the late filing liberally and a technicality since it was done after the scheduling conference and

before the scheduling notes were confirmed on the court record. Counsel continued that the strict application of Rule 8 of the Rules should be on the petition and its affidavit, but not other supplementary affidavits, especially as in this case, the petitioner managed to respond to them and has not suffered any prejudice thereby.

41] **Rule 8 (1) Rules** provides that:

“If the respondent wishes to oppose the petition, the respondent shall, within ten days after the petition was served on him or her, file an answer to the petition.”

42] In my view, Rule 8 is mandatory and for that reason, Rule 19 was enacted to ease its strict terms by making provision for extension of time and I quote:

The Court may of its own motion or on application by any party to the proceedings, and upon such terms as the justice of the case may require, enlarge or abridge the time appointed by the Rules for doing any act if, in the opinion of the Court, there exists such special circumstances as make it expedient to do so”.

Emphasis of the Court.

The provision has left it open for the Court to act even without prompting, leaving it then to the individual Judge to exercise their discretion upon the facts of the case. Also, there appears to be no restriction at what point of the proceedings such discretionary powers can be applied.

43] The decisions in the High Court have tendered to apply the provisions of that law strictly by rejecting affidavits filed outside the statutory period, without leave. See for example, **Twinamasiko Onesmus Vs Agaba Aisa EP No. 7/2021**. Unfortunately, it appears that the issue is far from settled in the Court of Appeal. For example, it was on the one hand held (in **Mutembeli Yusuf Vs Nagwomu & Anor EP Appeal No. 43/2016** and **Ibaale Daniel Joseph Vs Katuntu Abdu & EC EP Appeal No. 41/2016**) that litigation should not be endless and for that

reason, timelines were set for parties to follow in election petitions. Further that the party who wished to introduce evidence outside the allotted time should have applied to court to that effect. On the other hand, the same court in **Tamale Julius Konde Vs Senkubuge Isaac & EC EP Appeal No. 75/2016**, took a more liberal view. It was held at page 14 that:

Courts have always adopted a liberal approach when dealing with affidavits in election matters given the peculiar circumstances it presents; First of all, elections are matters of great public interest; Secondly, the statutory time frame for filing election petitions is quite short and thirdly, evidence has to be gathered from a wide spectrum of people, including candidates' agents, voters and sometimes polling assistants. The evidence gathered has to be assessed for probative value before it is reduced into affidavits which are then commissioned and then filed in court....it is sometimes practically not possible to file all the affidavits in support of the petition at the same time with the petition. As long as the individual affidavits are filed before the scheduling conference is conducted, it is usually acceptable, as no prejudice would be occasioned to the respondents even if no leave of Court is obtained. Emphasis of this Court.

- 44] It is borne of the record and not disputed the EC received the petition and its supporting affidavits on 24/3/2021. The EC filed their response on 31/3/2021 and the impugned affidavits were filed without leave on 8/6/2021, almost two and half months late and therefore in contravention of Rule 8 (1) of the Rules. The liberal view would be to allow evidence filed late so long as it is done before the scheduling conference is formerly closed, where the late filing will not interfere with the expeditious disposal of the proceedings, and the contesting party has suffered no prejudice as a result. I would add that where no leave has been sought as is the case here, under Rule 19, the Court must first be satisfied that there exists special circumstances to allow enlargement of time.

- 45] The 21 contested affidavits first came to the attention of the Court on 31/8/2021, when Tumwesigye's counsel objected to their presence on the record for late filing without leave, and prayed for their dismissal. I declined to entertain the informal application because EC's counsel was absent in Court on that day, and there was danger of further delay of the trial by successive interlocutory proceedings. I instead directed that the objection is made an issue to be resolved as part of my judgment. It was for that reason indicated as the first issue in the joint scheduling memorandum filed in Court on 30/8/2021. Tumwesigye's counsel reasonably filed no rejoinder to those affidavits because he had by them put them into issue.
- 46] I have considered the varying views of the Court of Appeal on the matter, the particular facts of this case, and what has been stated in submission for both sides. The EC filed their principle reply to the petition on 31/3/2021. They were aware then that they required additional evidence to bolster their defence. Since the additional affidavits are many, it may well be that the time frame of ten days was too short for them to contact and organize all the witnesses. It should have been prudent then to have filed an application for an extension of time to accommodate them. They did not do so, and instead filed the affidavits late and without leave.
- 47] I have had an opportunity to peruse the expunged affidavits. They are sworn by two supervisors, several presiding officers and polling assistants of different polling stations in the constituency. All (save for one) attached appointment letters indicating that were at the material time, agents of the EC. Having been so appointed, I am persuaded that the EC had their contacts in her data base. It should not have been such a lengthy and tedious task to locate them and obtain their evidence. Further, although each professed to have worked at a different polling station, the affidavits are the "*copy-paste*" type, with identical evidence

save for the name of the polling station. The nature of the evidence therein is such that it required no ingenuity or professionalism in their drafting so as to require a delay of more than two months in their filing. More important, the thrust of Tumwesigye's complaint is that there were gross irregularities at polling stations throughout the constituency. I note that the content of the impugned affidavits is principally meant to rebut that complaint. By filing those affidavits late, he was denied the opportunity to counter them with appropriate rejoinders. Allowing such crucial uncontroverted evidence would be prejudicial to his case. On the whole, the EC has demonstrated no special circumstances to impress my discretion to allow extension of time so as to confirm the 21 affidavits on the record.

- 48] The objection is accordingly upheld and the 21 affidavits filed for the EC on 8/6/2021 are expunged from the record.
- 49] Before I embark to consider the merits of this petition, I need to point out that in addition to the above affidavits, owing to objections raised by counsel Medard Segona on 13/9/2021, all the affidavits deposed in support of the Petition, save for those filed by Tumwesigye (on 19/3/2021 and that of Tumusimme Charles, were struck off the record for failure to comply with **Sections 2 and 3 of the Illiterates Protection Act** and **section 5 of the Commissioner for Oaths (Advocates) Act**. 19 affidavits in reply filed for Museveni were likewise struck off. the additional affidavits in reply except for Kyaligamba Albert and Kalisa Christopher. I shall therefore bear in mind that the 1st respondent's facts contained in paragraph 22 - 48 of his response to the petition were deposed to directly respond to Tumwesigye's affidavits that were struck off. Accordingly, I need not dwell on them substantially.

Issue one

Whether there were illegal practices and electoral offences that were committed by the respondents and by other people with the respondents' knowledge, consent and approval

Bribery

50] The offence of bribery is created by **Section 68 (1) of the PEA**. It is provided that:-

“A person who, either before or during an election with intent, either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that other person, commits the offence of bribery”

Under **subsection (2)** those who receive bribes are equally culpable, and under subsection (3), food and refreshments offered by candidates, their agents or other persons at campaign meetings are exempted.

51] It has been established that the offence has three ingredients:

- a. A gift was given to a registered voter who under Section 1(1) PE Act is described to be one whose name is entered on the voters register.
- b. The gift was given by a candidate or their agent and,
- c. It was given with the intention of inducing the person to vote (for a particular candidate or in a certain manner) Addition by this court.

See: **Oyo Tayebwa Vs Basajjabalaba Election Petition Appeal No. 13/2011** and **Isodo Vrs Amongin Election Petition No. 006 of 2016** citing Col (Rtd) **Dr. Kizza Besigye Vrs Yoweri Kaguta Museveni & EC (Supreme Court Presidential Election Petition No. 1/2001).**

- 52] Bribery is considered a grave illegal offence and a single offence once proved, it sufficient to set aside an election. See: **(Odo Tayebwa Vs Arinda Gordon Kakuuna & EC EP Appeal No. 86/2016)**. It must in all cases be given serious consideration and scrutiny and will require cogent evidence, that is truthful and free from contradictions proved to the satisfaction of the court. See **Amuru & EC Vs Okello Okello (supra)**, citing **Bakaluba Peter Mukasa Vs Nambooze Betty Bakireke Supreme Court EP No. 4/2009**). Given the gravity of the offence, the Court should only consider direct evidence given first hand, See: **(Kiiza Kabakumba Masiko citing Kwijuka Geoffrey Vs EC & Anor EP. No 7/2011)**.
- 53] The courts have further held that it is necessary that persons said to have committed the offence and those said to have been bribed be clearly identified, and such evidence corroborated. See **Hellen Adoa & EC Vs Alaso Alice Election Petition Appeal -2016/57** [2017] UGCA 3 (10 February 2017). It was more specifically stated in *Kabusu Moses Wagaba v. Lwanga Timothy & Electoral Commission*, **EP Appeal No. 53 of 2011**, that a Voter's Register must be attached to show that the person bribed was a voter. It follows therefore that the actual act of bribery needs to be described with precision, or at least with sufficient detail for the Court to determine what happened. Questions as to actually who gave what to who, when and for what purpose, need to be arraigned and answered to the required standard. See **(Kyamadidi Mujuni Vincent Vs Ngabirano Charles & EC EP. Appeal No. 84/2016)**.
- 54] In the case of **Mbayo Jacob Robert V. Electoral Commission & Talisunya, EP No. 07/2006**, Court called for caution. Court advised that some other evidence from an independent source is required to confirm the allegations of bribery instead of reliance on supporters of the candidates trading accusations and counter – accusations.

- 55] Tumwesigye's counsel submitted that contrary to section **68(1) PE Act**, Museveni, during the campaign period and on polling day, and with the intention of influencing voters in the constituency to vote for him, and using the VR to identify the stated voters, bribed them with money (in the dominations of Ush 1,000, 2,000 and 5,000). That he also gave out milk, sugar, salt soda, beer and an alcoholic drink commonly known as *Kombucha*, for the same purpose. He considered Museveni's statement that "*I could have been paying for different services*" (in paragraph 43 of the affidavit in support of the answer to the Petition), an admission that Museveni made payments to voters. Museveni vehemently denied all allegations of bribery against him and **DW4** the returning officer, stated in her affidavit that no complaint of bribery of voters was reported to her or the 2nd respondent as by law required.
- 56] Settabi David's affidavit in which he alleged bribery by Museveni was expunged. Thus save for his testimony, no other cogent evidence was adduced by Tumwesigye to support the allegations of bribery. The persons alleged to have been bribed were not mentioned, his petition and affidavit in support did not indicate that the alleged bribe was reported at Police or the EC, and the alleged bribery items were not exhibited.

Violence and intimidation

- 57] The offence of undue influence is created under Section 80 PE Act, and presumed complete when:
- i. *a person directly or indirectly through another person, makes use of or threatens to make use of, any force or violence, inflicts or threatens to inflict in person or through any other person any temporal or spiritual injury, damage, harm or loss upon or against any person in order to induce or compel that person to vote or refrain from voting,*

*or on account of that person having voted or refrained from voting,
or.*

*ii. By abduction, duress or any fraudulent device or contrivance, impends
or prevails upon a voter either to vote or to refrain from voting,*

58] Akin to similar provisions in the PE Act, the above law is intended to provide for a peaceful, conducive atmosphere of freedom during the election cycle, and to protect voters from threats, intimidation, assaults, harm or loss during the polling season. Proof that the offences have been committed is generally on a case by case basis. Similar to other offences, violence must be proved to the satisfaction of the court. The courts have preferred that the evidence adduced points to generalized violence and intimidation as opposed to isolated or one off incidents. See for example **Helen Odoa Vrs Alaso Alice** (supra). Courts have also generally looked out for formal reports to police or the EC as corroborating proof of violence. See **Kirunda Kivejinja Vs Abdu Katuntu & EC EP Appeal No 24/2006** and **Kananura v The Independent Electoral Commission & Anor (EP No. 8/2016) lection Petition-2016/8** [2016] UGHCEP 232 (09 September 2016).

59] In his affidavit in support of the petition, Tumwesigye complained of widespread violence during the campaign period and on the voting day. Specifically, that Kahama Fred *alias* Kibuka, (Museveni's brother), Gamba Edward Chairman LC3 Elect, Mulindwa John GISO, Namatovu Grace, Masaba Ali and Gumusizira Tony all agents of Museveni, with his knowledge and at times, his participation, tortured, maimed, and intimidated by Tumwesigye's supporters and campaign agents, with the intention of discouraging his would be voters from participating in the voting. Specifically, Senyonga Joseph his campaign agent at Buswabwera, was assaulted and sustained bodily injuries. Another Tumusimme Charles, was

attacked, assaulted and kidnapped while on his way to Buswabwera as a polling agent. That both Tumusiime and Twinomugisha Justus reported cases of assault against Museveni and his agents and supporters to Kyenda Police Station, and Mwebaze Samuel an EC presiding officer also reported a case of assault committed by the same people at Kibyamirizi Police Post.

- 60] Tumwesigye continued that Museveni's agents and supporters in connivance with EC election officers and without any deterrence by polling constables at Buswabwera polling station, intimidated and threatened his polling agents and coerced them into signing DR forms before the closure of voting and counting of votes. Further that at Budibaga Eden, Buswabwera, Kifuufu- Kamusenene, Kitenga Dispensary (N-Z), Lukaya, Kawumulo, Rusikizi and Butayunja (N-Z) polling stations, Museveni used election constables and UPDF personnel (led by colonel Kagyezi and his supporters who had formed a militia called "*Team Busungu*'") to threaten voters who had come to vote, and as a result, many voters shunned the voting exercise.
- 61] The evidence of violence was supported by Tumusiime Charles who in his affidavit stated that on voting day at about 5:00am, while heading to Buswabwera Polling station as Tumwesigye's polling agent, he was attacked and assaulted by Museveni's supporters at Buswabwera Trading Centre. That during his attack his personal belongings and appointment letter as a polling agent, were stolen and his attackers kidnapped and drove him to Kyenda Town Council. That he managed to escape from them and contacted Tumwesigye's political assistant who took him to Kyenda Police Station where he recorded a police statement and later received medical treatment at the Mubende Referral Hospital. He adduced a **PF3** dated 14/1/2021 which indicated injuries caused by a blunt object, and classified as "harm". He also attached a photo showing his injured eye. That it was for the reason that he arrived late at the Buswabwera polling station where

he found Museveni's supporters holding sticks, intimidating voters and allowing non eligible voters to vote Museveni. This evidence was not challenged in cross examination.

- 62] In his affidavit and during cross examination, Museveni vehemently denied all allegations of violence by himself or as instruction to others. He contended that neither him nor any of his appointed agents was ever been summoned by any police or other responsible government authority to answer any of the alleged claims, and the two mentioned suspects were never his agents and did they commit the crimes with his knowledge or consent. He admitted knowing Kahama as his brother but denied that Kahama had ever intimidated Tumwesigye or his supporters on his instructions.
- 63] On the other hand, **DW3 Kaliisa Christopher** testified that all the candidates were well advised of the complaints process of grievances by themselves or through their agents and if it was not done in real time, would be an afterthought intended to overturn a well-organized election. **DW4** insisted that voting around the constituency proceeded well and was free from violence, intimidation, undue influence and conducted independently in an impartial manner.
- 64] In my view, Tumwesigye complaint that there was violence meted out against his agent Tumusiime was valid. Tumusiime's account was coherent, well corroborated and unrebutted. It is clear in Annexure B to his affidavit that his complaint was reported at the Kyenda Police Post, a result of which he was referred for examination on PF3A to the Mubende General Hospital. The injuries seen by the examining officer corroborated his story and those seen in the photographs adduced. Since the rest of his story was unrebutted, I would conclude that his attackers contravened Section 32 PE Act which provides that a candidate may be present in person or through his or her representative or polling agent at each polling station for the purpose of safeguarding his or her interests.

I would agree then with Tumwesigye's counsel that in Buswabwera the objective to promote transparency in the voting, counting, and tallying of results in Tumwesigye's presence was removed or greatly reduced.

- 65] I would in addition believe that Tumusiime was a victim of violence and abduction which is an election offence. However, this was one isolated case whose only relevance to the outcome would be that he was prevented from arriving at his designated polling station in time. More important, Tumwesigye still needed to connect the violence to Museveni which was not done. Tumusiime did not specifically mention the identities of those who attacked him and did not prove that it was into Museveni's motor vehicle he was abducted. For one to succeed in using violence as an election offence that could overturn an election, the alleged violence has to be wide spread and must have affected the results of the election in a substantial manner. See for example **Kirunda Kivejinja Vrs Katuntu Abdul (supra)**.

Uttering false, defamatory and sectarian Statements

- 66] under **Section 73 (1) of the Parliamentary Elections Act**, it is an offence for any person before or during an election to make a false statement concerning the character of a candidate with the purpose of effecting or preventing the election of that candidate. It is illegal to publish or cause to be published by words whether written or spoken or by song such false statements which one knows or has reason to believe to be false, or in respect of which one is reckless whether it is true or false. I agree with their counsel that the provision is intended to penalize whoever assassinates the character of a candidate during campaigns, and the exact words complained of must come out clearly in the pleading or at least context or background in which they were uttered ought to be explained.

See **Michael Mawanda Vs The Electoral Commission and Andrew Martial EP Appeal No. 98/2016.**

67] Different courts have collectively laid down the ingredients of this offence thus:

- i. There had to be words either spoken or written
- ii. Those words have to be pleaded verbatim
- iii. The words complained of have to have been published
- iv. The words complained of had to attack the personal character of the candidate knowing they were either false or true
- v. The words must be shown to have affected the character of the candidate by lowering his/her esteem in the eyes of the voters or fair-minded persons.
- vi. The words had to be uttered recklessly
- vii. The intention must have been to prevent the election of a candidate

See for example **Ocan Peter & EC Vs Ebil Fred EP Appeal No. 83/2016, Eng. Ibaale Daniel Joseph v Hon. Abdul Katuntu & EC EP Appeal No. 41/2016** and **Acire Christopher Vs Regan Okumu & EC, EP Appeal No. 9/2016**

68] It was also the decision of the Court of Appeal in **Hon. Ocen Peter & Anor v Hon Ebil Fred (supra)** that sectarian connotations relate to or are characteristic of a sect. One must have a sectarian mind or conduct himself in a sectarian manner or exhibit intolerance of the other or intolerance by the electorate as a result of a sectarian campaign.

69] Tumwesigye's counsel submitted, and it was also pleaded that contrary to **Section 22(6) PE Act**, Museveni's speakers at his rallies with his encouragement, on many occasions made false, defamatory and sectarian statements such as "Tumwesigye is a State House agent who is a front of land grabbers in Government of Uganda and once elected he will superintend land

grabbing in the constituency of Buwekula South and Mubende District as a whole, the Petitioner is not from Mubende District and that he should go back to Rakai District, that Museveni is a child of the area hence the voters should shun Tumwesigye and vote for Museveni.”

- 70] In the instant case, besides Tumwesigye raising the complaint in his pleadings, no other evidence was adduced to support it and it was not even traversed in cross examination. It was not shown that because of the specified words complained of, the electorate, who held him in high esteem, shunned him, or that the electorate, or a very good proportion of it, lost all the respect they had for him hearing those statements. It was correct for Museveni’s counsel to argue that no evidence of defamation was ever adduced.
- 71] I accordingly find that this offence of uttering defamatory and sectarian statements was not proved

Issue three

Whether the election was not conducted in accordance with the electoral laws, and if so, whether such non-compliance affected the results in a substantial manner

- 72] According to Section 61 PE Act, the Court shall set aside an election only when there is failure to conduct the election in compliance with the law, and such failure and noncompliance affected the election in a substantial manner. I repeat that non-compliance *per se* is not enough to overturn an election. The principle is that the non-compliance must be substantial. Justice Benjamin Odoki considered the provisions of Article 126(2)(e) of the Constitution to hold in **Dr. Kizza Besigye Vrs EC & Yoweri Museveni 2006 (supra)** that:

“some noncompliance or irregularities of the law or principles may occur during the election, but an election should not be annulled unless they have affected it

in a substantial manner. The doctrine of substantive justice is now part of our constitutional jurisprudence.....Courts are therefore enjoined to disregard technicalities or errors unless they have caused substantial failure of justice.

**Contravention of section 51(2) of the Parliamentary Elections Act, Act 17 of 2005/
tampering with ballot boxes**

- 73] Tumwesigye's counsel submitted that DW3 a parish election supervisor conceded during cross examination that the voting material for six polling stations at Kilyabwirizi Primary School polling station were kept at the Kibyamirizi Police post instead of being taken to the nearest results collecting center, and without their supervision or protection, exposed them to tampering contrary to section 51(2) PE Act, Act. He continued that without a proven inventory, it is not clear what items the police received and kept and which documents were returned to the EC officials. He argued then that any involvement of police should have extended only to protection of the ballots until means for their transportation was secured. In his estimation, this violation affected the elections in a substantial manner because the electoral materials were for six polling stations.
- 74] In response it was submitted for Museveni and EC that DW3 gave a satisfactory explanation that the police was part of the election exercise, and the election material were duly escorted by presiding officers to the police station who remained manning them, and no evidence was adduced that they were tampered with
- 75] Under Section 51(2) of PEA, immediately after the close of the poll, it is the duty of each presiding officer to transmit or deliver to the returning officer or the nearest results collecting centre, the sealed ballot box with all its contents. The law notwithstanding, I would agree with the respondents that failure to comply with this requirement was well explained by DW3. It is conceivable that the poll

having ended late at midnight, the EC agents found themselves without transport and acted reasonably to collect the material and place it at the Kibyamirizi Police post; the safest place in the circumstances. Keeping them under guard at one polling station would also have been an option, but it does not disqualify the first and preferred choice taken by the presiding officer. No evidence was adduced to show that while in police custody, the ballot boxes were tampered with.

76] I fear that since no other witness was called over the matter, the evidence that that DW3 received information that one Gamba wanted to unlawfully take the voting materials away from the polling station, would be hearsay. Even so, keeping the material at the police must have averted any adverse or illegal/criminal third party interventions.

77] I therefore find that although placing the ballot boxes at the Kibyamirizi Police post was an irregularity, it was one done out of necessity, and did not affect the final result in any manner.

Contravention of Section 29(2) PE Act.

78] In the petition, Tumwesigye alleged that voters were disenfranchised by early closure of five polling stations around the constituency. He supported that assertion with evidence from DR forms of Njagazi, Kibyamirizi (A-M), Kitenga Dispensary, Kagoma and Butayunja polling stations in which the signing off time by the presiding officers and polling agents ranged between 4:00-4:44pm). In his estimation, if the time of time for vote counting and tallying was factored in, at some of those polling stations, the closing time would have happened three hours prior to filling of DR forms. Using tabulation from statistics derived from the VT, he calculated that 1,011 eligible voters were disenfranchised, and going by statistics from the DR forms, 872 voters never managed to vote. Again in his

estimation, this violation affected the election in a substantial manner because the voter margin between the two candidates was only 596 votes.

- 79] Indeed, the evidence of early closure of polling stations was not seriously rebutted. It was submitted for the EC that the standard practice is to allow voters to join and remain in the voting lines only up to 4 pm, and remain in the line until they vote. Both respondents argued however that no single witness came forward to testify that they had been disenfranchised due to the above anomalies.
- 80] I have considered all the evidence and submissions on this point. Considering the signing-off times of some EC officials and polling agents, and taking into account the time ordinarily spent on vote counting and tallying, it is conceivable that at some polling stations, voting ended earlier than 4pm. Going by the law, voting lines should be kept open until 4pm whether or not voters are present, and the vote count should begin only immediately after 4pm, if no more voters are still waiting to vote. EC's explanation would thereby not be tenable.
- 81] Counsel's computation on this point was with commendable ingenuity. However, it is merely a statistical account based on factors which made no reference to normally pertaining variables. For example, an assumption was made that all those who were registered to vote, had the intention to, and tried to do so, and were only prevented by closing the poll before time. He did not factor in possibilities of those who had died or moved away since the updating of the VT, made a personal decision not to vote, or those who were genuinely late. More needed to be proved. In particular, no registered voter came forward to state that he/she was turned away from voting Tumwesigye before the official closing time, and no formal complaint was registered by the polling agents to that effect. It would be too speculative to assume that all those who did not vote, were turned away before time.

- 82] I find that the non-compliance by early closure of some polling stations although proved, it was not shown that it affected the outcome of the final poll to any degree.

Voter transfer after completion of updating/revising the Voter's Register

- 83] Relying on annexure PW2 and PW6 of his affidavit in support of the petition, Tumwesigye alleged that some registered voters in the Constituency (himself and family inclusive) were denied voting at polling stations to which they had they had previously been registered. As a result, on polling day, on request of EC presiding officers, many moved from one polling station to another checking for their names which made some of his voters to give up due to transport constraints. He mentioned movement of voters from Bulima to Kyakadali Catholic Church, Kirangwa P/S to Muleete Trading Centre, Kalembe Trading Centre to Kayunga area, all areas that had showed him strong support during the NRM preliminaries. That allegation was strongly denied by the respondents.
- 84] It was submitted and I agree that changing Tumwesigye without notice or his consent from the parish or ward in which he was formerly registered contravened sections 19 (3), (4), (5) and (7) of the EC Act. It was not rebutted that he was without his permission transferred from Kalembe TC polling station to Kinyiga A polling station; He asserted that his case was not an isolated occurrence because many voters came to learn of the changes a day before, or on the actual polling day when they reported to pick their voter allocation slips. He continued that many who were transferred too far from their homes abandoned voting altogether because of transport constraints and this was a contributing factor to

the lower voter turnout. In his view, this was an irregularity that affected the outcome of the elections in a substantial manner.

- 85] In my view, Tumwesigye did furnish cogent proof that he was without his consent or permission changed from his parish to another. That may have caused him much inconvenience and disorientation. None the less, he managed to overcome that mishap by reporting in time to his new voting station of Kinyiga A to cast his vote. Unfortunately, without adducing evidence of any other person who suffered a similar fate, the Court is unable to assume that there were other victims, a good number of them who could show they intended to vote for him, but actually failed to vote, so as to have any effect on the final outcome of the election.

Ballot stuffing, multiple voting, pre-ticking of ballots

- 86] Tumwesigye's complaint is that the EC officials failed to regulate the ballot papers and follow the National Voters Register (NVT) during the voting process contrary to **Section 12 of the Election Commission Act (EC Act)** and **Sections 1, 29 (4), 30 (5)(a), 31 and 47(1) of the PE Act**. Heavily relying on **Exhibit PW1** (the certified Voter's Register) and **Exhibit PW7** (the certified DR Forms from the EC), counsel contended that the total votes cast as per PW7 are more than the voters that participated in the voting exercise by **2,925**. He classified them as votes that were unauthorized and unaccounted for and therefore sufficient corroboration of Tumwesigye's evidence in the petition that there was ballot stuffing, multiple voting and pre-ticking of ballots at different polling stations in the constituency that affected the election in a substantial manner because the winning margin between Tumwesigye and Museveni was only 596 votes. Counsel made summaries (in a table) of what they deduced from the DR forms

certified by the EC and the 55 VR retrieved from the ballot boxes during discovery.

- 87] Counsel continued that it was confirmed during the discovery proceedings, that only 55 out of 61 polling stations had Voter Registers (hereinafter VR)s which implies that the EC never identified voters in at least six polling stations before allowing them to vote in contravention of **Article 61 of the Constitution** (as amended), **Section 18 EC Act, Sections 1, 29 (4), and 30 (5)(a) PE Act**. Counsel singled out polling stations at Lwangire, Kabunyonyi PS B/Kabunyonyi, Kavule, Katoma, Budibaga and Kamusenene as missing VR and therefore that, the total number of votes cast without a voter's register were **1,512** which also affected the elections in a substantial manner considering the small margin between the two candidates.
- 88] Counsel further referred to Tumwesigye's pleading that election constables in charge of security at the Kinyira A, Busenya P/S and Budibaga Eden polling stations, were attacked as they were transporting declaration forms and other election materials to Kalongo Sub County which resulted into chaos caused by Museveni's agents and supporters, and an opportunity to commit more ballot stuffing and rigging of votes in his favour. Also that at Budibaga Kalonga Trading Centre (A-M), Kalonga Trading Centre (N-Z), Busenya, Bulima Kirangwa P/S, Muleete T/Centre and Kyakadali Catholic Church polling stations, Museveni's polling agents connived with EC officials on polling day to allow unspecified people to impersonate registered voters to vote for Museveni, and thereby kept out the legitimate registered voters from the vote. That since the total number of votes cast during the election (as per the return form for transmission of results) was **17,779, 11,104** voters never participated in the voting exercise.
- 89] In his petition, Tumwesigye also complained against contradictory entries of vote tallies on DR forms compiled by EC presiding officers at Bulima, Kibuye Community Center, Nsengwe, Kirumbi P.S, Butayunja (A-M), Kawumulo

Kayunga, Kivera, Rwamaboga, Bushenya P/S B Kijuuya, Butayunja (A-M) Kirumbi Pri. Sch, Lwemigo, Buwuniro, Kinyiga A, Kalonga Trading Centre (A-M), Budibaga Eden, Katoma, Budibaga, Googwa Trading Centre, Kibyamirizi, Kagoma, Kifuuka Kamusenene, Lukaya, Kawumulo and Nsengwe polling stations. That the above actions affected the outcome of the election because the final results were based on grave numerical inconsistencies. He continued that EC officials failed to record complaints raised by his polling agents during the voting, counting and tallying exercise at Budibaga Eden, Kisenyi Stores and Saka Polling Stations. In his estimation, once the numerical inconsistencies on the DR forms, votes reflected as invalid votes (whereas not) and the VR is made in tandem with the votes cast, by removing the excess votes or votes attributed to persons that never voted, he should be declared the duly elected member of Parliament.

- 90] I note that in cross-examination, Tumwesigye conceded that he had agents at each polling station. Some of them did not sign the DR forms, and gave no reasons for not doing so. However, failing to sign would not necessarily translate into a formal rejection of the contents of the DR forms, especially when no formal complaints were communicated in the DR forms or reported to the EC. In fact, an endorsement by the presiding officer would suffice. Tumwesigye also admitted that his chief agent received training from the EC on the election complaints procedure and had alerted him of it. His parting note on this important point, was that after the tallying was completed and a declaration of the winner made, it was futile for any candidate to make or register a complaint against any part of the election process.
- 91] Museveni's counsel agreed with the law on ballot stuffing and multiple voting but contended that none had been proved. He specifically contested the method used to prove the offence, contending that the proper method should have been to compare the DR forms against the ballot papers issued to each polling station, as well as the allotted serial numbers. He continued that there was no evidence to

back Tumwesigye's assertion that 1,512 votes were cast without VR. He concluded that by signing all DR forms without complaint, Tumwesigye's agents confirmed to have been present and therefore witnesses to the fact that the polling exercise at all polling stations, was conducted freely and fairly. In addition that, their signatures without any registered complaint, should be considered total compliance with the electoral laws.

- 92] Counsel further attributed any wrong entries and numerical inconsistencies in the DR forms to human error which did not affect the tally since actual votes cast in favor of each candidate were intact. He pointed out that the total number of women and men who voted appeared to have been obtained from the VR which were used for two other voting positions of the presidential and woman member of Parliament. Citing authority, he invited court to consider the exigencies and pressures obtaining on polling day and consider as important, the duty of the electoral officials to strictly account for the results on polling day. See **Ngoma Ngime Vrs EC & Winnie Byanyima EP Appeal No. 11/2002**.
- 93] The EC likewise contested Tumwesigye's over reliance on the VR and DR forms. Counsel explained that three safe guards were in place at all polling stations to identify voters i.e. the National Voter's Register (VR), Vote Location Slip (VLS) and the biometric voter verification kits (BVVK). That all three had to be present before voting could start. It was contended further that Tumwesigye and his agents all knew how, but did not raise any complaints at the individual polling stations or tally centre and by signing the DR forms, his agents confirmed the results as true. In addition, that it was wrong and speculative for Tumwesigye to have considered the unaccounted for votes (2,925 in number) as his alone, yet there were two others in the race. Counsel stressed that mere highlights and differences in number of ballots counted and number of ticked voters on VR was not cogent evidence of ballot stuffing

- 94] The court in **Muhindo Rehema V. Winfred Kiiza & Anor [2012] UGCA 18** emphasized the importance of DR forms which must be treated not as a mere formality, but a check on the system that prevents fraud and ensure propriety. The DR forms must therefore tally and be properly certified by the presiding officers at each polling station. In that vein, Tumwesigye’s counsel pointed out mistakes in computation in at least 19 polling stations which accounted to a total of 852 votes, which he asserted was evidence of ballot stuffing. He singled out the evidence of DW4 who in cross examination admitted that at Namalewe Life Centre Polling Station, (which is part of exhibit PW7), there was an evident mistake in the gender votes which should have been 275 and not 400. I followed though counsel’s arguments and confirmed by looking at the DR forms that Tumwesigye’s complaint was valid. After DW4 was taken through her evidence, it was clear that besides Namalerwe, similar discrepancies were present in 18 other polling stations with unexplained excess votes ranging from one to 125 votes. Such mistakes in one or two polling stations can be explained as exigencies of voting day and human error, but mistakes, some with a very high numerical difference, and carried through to nearly one third of the polling stations in the constituency, raises suspicion. In the case of **Waguma v Electoral Commission & Anor (Election Petition-2016/11) [2016] UGHC 11 (20 June 2016)** court held, and I agree that failure to accurately state facts in the DRF is actually an electoral offence under section 78 (a & b).
- 95] The entrenched principle of “one man/woman-one vote” under our Constitution and election laws, must be rigorously protected in all elections. Once it is abused, then the Court can with cogent evidence, conclude that the offence of ballot stuffing was present. Ballot stuffing is an election malpractice created by **Sections 31(1), 76 (f-j) and 77 PE Act**. I am aware that it is a common complaint in many election petitions and has thus received considerable attention and often defined.

I will take the elaborate definition in **Toolit Simon Aketcha Vs Oulanyah Jacob L'Okori & EC EP Appeal No. 19/2011**. It was held:

Ballot stuffing is therefore an election malpractice which involves voting more than once at a polling station or moving to various polling stations casting votes either in the names of people who do not exist at all or those who are dead or absent at the time of voting and yet they are recorded to have voted

Ideally at the end of the polling exercise, the number of votes cast ought to be equal to the number of people who physically turned up to vote; **Emphasis of this Court**

Under our voting system, every registered voter is authorized to cast one vote. Therefore, ballot stuffing occurs when someone intentionally and knowingly causes unauthorized votes to be put in the ballot box for purpose of rigging the poll in favour of some candidate.

Also see **Ninsiima Boaz Kasirabo & EC Vs Mpuuga David EP Appeal No. 55/2016 and Suubi Kinyamatma Juliet Vs Sentongo Robinah Nakasirye EP Appeal No. 92 OF 2016**

- 96] It was DW4's evidence, and it is evident in the DF forms, that the total number of valid votes cast for all candidates is obtained by adding the total number of valid votes cast for ALL candidates to the number of rejected (invalid) votes. Again according to DW4, as she received the votes from the different polling stations, she only interested herself with the final scores of each candidate, and found those not to have been tampered with, and no complaints were registered by any candidate. That having done so, she confirmed that Museveni had the most votes cast in his favour, and was therefore declared winner of the poll. In her view, the EC did as a result, conduct a free, fair and transparent election.

- 97] It was also DW4's evidence that at any polling station, voter verification is carried out with the use of the VT, BVVT machine and for this particular constituency, she received no complaints about missing or malfunctioning BVVT machines. In my view, that is the ideal situation and therefore, the information registered on all three should be identical, such that evidence from one, should be as good as evidence from the other. According to DW4, the EC determines the number of ballots to send to any polling station by counting the number of voters in that polling station at their head office; that number is sourced from the National Voter's Register, the same Register from which extracts of VT or voter rolls are made and then used by polling agents at each polling station. DW4 stressed that it is the VR which is the principle identifier at polling stations, and the BVVT is a backup, only used to verify VLS of each registered voter, which VLS is as a rule, generated from the National Voter Register, before the poll date.
- 98] Under Section **30(5)(a) PE Act**, each voter who arrives at the polling station, must first be verified, and then ticked against the VR, given a ballot paper, and only then allowed to vote their candidate of choice. In this case, a voter may vote for one, two or all three candidates in the different categories of President, member of Parliament and District Woman member of parliament. It follows therefore that the number of ticked voters in the VR at each polling station should tally with the number of ballot papers counted at the end of the voting exercise, or at least be less, where it is then assumed that a voter chose not to vote all three categories.
- 99] A careful perusal of the 53 Voter registers/rolls (Kisenyni and Nsuga excluded) showed glaring discrepancies in the ticked voters on the VR, and the total number of ballot papers counted in each DR form. For some polling stations (e.g. Buzooba, Buwumiro, Kayunga, Kagoma, Kibuye Community Centre, Kilenge Dispensary A (N-Z)) the difference ranged from a small 1-7 votes. In others (e.g. Kalembe, Namalerwe Life Centre, Bwakago, Mujunwa and Kitovu) differences

seen were a high of 287, 253, 227, 198 and 160 votes respectively. The result is that a total sum of **2,690 votes** was unaccounted for.

100] It may well be that no confirmation is present that those extra votes went to either candidate, or Museveni specifically. However, those were votes which were given to and then cast by voters who were not verified by the polling agents in contravention of Section 1 PE Act. That would be an illegal introduction and inclusion of those votes in the final tally for each candidate; a classic case of vote stuffing. I say so because the Court of Appeal has in an earlier decision considered unexplained votes cast (over and beyond the registered voters) as evidence of ballot stuffing. **See Ninsiima Boaz Kasirabo v EC EP Appeal No. 55/2016.**

101] It was also argued for Tumwesigye and proved that VR for six polling stations were missing from the ballot boxes opened on 9/9/2021. That fact came to the attention of the EC on that date. Even then, no evidence was adduced by them to show that verification of voters at those particular polling stations was done by means other than the VR. Since the VR is confirmed to be the principle document on which voter verification is done, the assumption is that 1,512 voters at those polling stations were not legally verified yet their votes were counted as part of the final tally of the three candidates.

102] Under Section 12 (j) EC Act, the EC has the duty to ensure that all election officers comply with the provisions of the EC Act. Similarly, the EC has the duty to ensure that the voting and tallying exercise as well as transmission of the completed vote to the national tally centre is done in compliance with Part VII and IX of the EC Act, and that no illegal practices or electoral offences are committed. By failing to verify voters against the VR at the six polling stations, allowing un registered voters to cast the vote, entering falsified data into DR forms, failing to secure the VR by placing it into six ballot boxes, and failing to properly verify results from polling stations, there was serious mismanagement of the poll, the vote and its

tally at 59 polling stations. The decision in **Betty Muzanira Bamukwatsa v Masiko Winnifred Komuhangi & the Returning Officer EP Appeal No.65/2016**, would come to mind. It was held that:

“From the evidence on the record, it is apparent that the 2nd respondent mishandled the conduct of the elections in 14 out of 276 polling stations where a total of 7,663 votes may have been adversely affected by such misconduct. This is evidence of noncompliance with the electoral law and the principles of a free and fair election”.

103] I would accordingly find that the offence of ballot stuffing contrary to Section 77 PE Act and making wrong or false returns contrary to Section 78 (a) PE Act has been proved to the required standard. To that extent, the election of the directly elected member of Parliament of Buwekula South Constituency, was not conducted in compliance with the electoral laws.

If so, whether such noncompliance and the failure affected the result of the election in a substantial manner.

104] Noncompliance *per se* is not enough to overturn an election. The noncompliance must be so significant as to substantially affect the results of the election. It must be substantial. Justice Odoki in his decision in **The Presidential Election Petition No. 1 of 2001: Col. (Rtd) Dr. Kiiza Besigye vs Museveni Yoweri Kaguta & EC** cited with approval the holding of Grove. J. in **Borough of Hackney Gill versus Reed [1874] XXXI L.J. 69** to hold that:

“An election is not to be upset for informality or for a triviality. It is not to be upset because the clock at one of the polling booths was five minutes too late or because some of the voting papers were not delivered in a proper way. The objection must be something substantial, something calculated to affect the result

of the election. ... so far as it appears to me, the rational and fair meaning of the section appears to be to prevent an election from becoming void by trifling objections on the ground of informality, but the Judge is to look to the substance of the case to see whether the informality is of such a nature as to be fairly calculated in a rational mind to produce a substantial effect.

- 105] In a subsequent decision, the Supreme Court considered the importance of elections and their significance as a national expression of civil and political rights. Chief Justice Katurebe (Emeritus) advised that the proven defects should seriously affect the result to the extent that the result could no longer reasonably be said to represent the true will of the majority of voters. See **Amama Mbabazi Vs Yoweri Museveni EP No.1/2016**. Similarly, in **Kizza Besigye Vs Museveni Kaguta Presidential EP No. 1/2001**, Justice Mulenga advised that:

“....to succeed, the petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that his/her winning majority would have been reduced but such reduction however would have to be....such that would put the victory in doubt” Emphasis of this Court.

- 106] The substantiality test entails the use of both the quantitative and qualitative methods, and the entire election cycle is always at stake. The Court in **Kisirye Vs Bazigatirawo & Anor EP. No. 8/2016**, followed Justice Odoki’s decision in **Kiiza Besigye** (supra) to hold that:

“....in assessing the effect of such noncompliance, the trial court must evaluate the whole process of the election by using both the qualitative and quantitative approaches with the quantitative taking the numerical approach to determine whether the noncompliance significantly affected the results, and the qualitative approach looking at the overall process of the election especially, voter information, the process of counting and tallying and declaring results, and the ability of each voter to cast their vote. In this process of evaluation, it cannot be

said that numbers are not important just as the conditions which produce those numbers. Numbers are useful in making adjustments for irregularities. The crucial point is that there must be cogent evidence direct or circumstantial to establish not only the effect of non-compliance or irregularities, but to satisfy the court that the effect on the election was substantial” Emphasis of this Court.

107] **In Morgan Vs Simpson & Anor (1974)3 ALLER 722 at 728** Lord Denning addressed the substantiality question as follows:

“I suggest that the law can be stated in these prepositions;

*If the election was conducted so badly that it was not substantially in accordance with the law as to the elections, the election is vitiated, irrespective of whether the result was affected or not. That is shown by the **Hackney Case (1974) 2 O’M & 77**, where 2 out of 19 polling stations were closed all day and 5,000 (out of 41,000) voters were unable to vote.*

*If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls- provided that it did not affect the result of the election. That is shown by the **Islington West Division Case (1901) 17 TLR 210** where 14 ballot papers were issued after 8:00pm.*

*But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls- and it did affect the result- then the election is vitiated. That is shown by **Gunn Vs Sharpe (1974) Q.B. 808** where the mistake in not stamping 102 ballot papers did affect the result”’.*

- 108] Further the Court in **Masiko Winfred Kyomuhangi V Babihuga J. EP Appeal No.9/2002 [2002] UGCA** advised that where possible, courts should quantify the effect which alleged manipulation of the voters' register or any other electoral malpractice had on the election results in order to assist court in assessing the effect of their magnitude. Thus, arithmetic can be used to determine whether such manipulation had a substantial effect on the final result of the election and how that is to be applied, depends on the particular facts of the case. Both the quantitative and qualitative tests are relevant as long as they are supported by evidence. No law requires a Court to be guided exclusively by either test.
- 109] In this case, the margin between the two candidates was **596 votes** (representing a **3.6%** of the final tally). The numbers then become very crucial. The evidence has shown that **2,690** votes were mysteriously introduced into the final tally. Since they were unexplained, their presence was an action of fraud. That figure is nearly four times the size of the margin between the two candidates. Further allowing voting at six polling stations without a VT or failing to use one, meant that a substantial number of voters were never verified. Again, wrong entries in 19 out of 61 DR forms that pointed to deliberate manipulation or reckless negligence, had a significant impact on the final tally. Going by the decision of Justice Katurebe in the **Amama Mbabazi case (supra)**, the proven defects seriously affected the final result of the election to the extent that the result could no longer reasonably be said to represent the true will of the majority of voters of Buwekula South Constituency. The margin between the candidates being small, the evidence leads the court to believe that Museveni's victory was seriously in doubt. Thus, employing both the quantitative and qualitative test, the noncompliance did affect the results of the election, substantially.

Issue four:

What remedies are available to the parties?

110 The petitioner has substantially succeeded on his claim that there was noncompliance with the electoral laws in the petition. That said, Museveni's testimony that he had no hand in the electoral mal practices is to be believed. As a candidate, he had no control of the polling exercise or voting material, and it was not proved that him or his agents connived with the EC agents to make wrong entries into the DR forms or ballot stuffing. Even so, this was a tainted election, one that cannot be allowed to stand.

111] In conclusion, I find that on the evidence available, Tumwesigye Fred the petitioner, has on a balance of probabilities proved his claim in the petition. Judgment is accordingly entered in his favour with the following orders: -

- a) I declare that the election for the Member of Parliament for Buwekula South Constituency held on 14/1/2021, was not conducted in compliance with the electoral law and principles governing elections, and such noncompliance affected the election in a substantial manner
- b) Museveni William the 1st respondent was not validly elected as the Member of Parliament for Buwekula South Constituency, in Mubende District
- c) The election of Museveni William the 1st Respondent as the Member of Parliament for Buwekula South Constituency in Mubende District, is hereby nullified and set aside
- d) It is ordered that fresh elections be conducted for Member of Parliament for Buwekula South Constituency in Mubende District
- e) Tumwesigye William the petitioner is hereby awarded costs of the petition. The costs attendant to the rejection of the four preliminary objections, shall be met by Museveni William the 1st respondent. Those in respect of the petition in general, shall be met by the Electoral Commission.

I so order.

Eva K. Luswata

JUDGE

Dated: 22/9/2021