

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBALE
MBALE ELECTION PETITION NUMBER 0014 OF 2006
WESONGA KAMANA EDWARD ::::::::::::::::::::::::::::::: PETITIONER

VERSUS

- 1. THE ELECTORAL COMMISSION }
- 2. BUKENI GYABI FRED } ::::::::::::::::::::::: RESPONDENTS

BEFORE: AG. JUDGE REMMY KASULE:

JUDGMENT:

The Petitioner challenges the election of the second Respondent as Member of Parliament Bubulo County West Constituency, Manafwa District, held on 23.02.06, conducted and organized by the first Respondent.

It is contended by Petitioner, that the first Respondent conducted the said election in non-compliance with the provisions principles and the guidelines made under the electoral laws, and that such non-compliance affected the result of the election in a substantial manner.

The first non-compliance is that the first Respondent had, contrary to the law, accepted the nomination of second Respondent, as a Parliamentary candidate when the latter had not first resigned his public office of Town Clerk, Mbale Town Council.

Then secondly the second Respondent and/or his agents had committed election offences and/or irregularities of causing ballot stuffing and over-voting, which too, had affected the results of the election in a substantial manner.

The Petitioner, by reason thereof, prays court, to set aside the election; and a re-election be ordered.

The petition is supported by a number of affidavits by the Petitioner and his witnesses.

Both Respondents oppose the petition and filed answers to the same.

The first Respondent's answer to the petition is that the election was conducted in accordance with the electoral laws and guidelines made under those laws. In the alternative, if there was any non-compliance or irregularities with the electoral laws, then the same did not affect the election result in a substantial manner. The nomination, candidature and election of second Respondent was valid, in accordance with the electoral laws.

The first Respondent has no knowledge of any election offences and/or irregularities being committed by second Respondent, or his agents or supporters with his knowledge and consent.

The first Respondent's answer to the petition is supported by several affidavits.

The second Respondent, on his part, avers in his answer to the petition, that the election was transparent, free and fair and conducted by first Respondent in strict compliance with the Electoral laws and guidelines made there under.

Second Respondent further contends that his nomination and election as a member of Parliament was proper and in accordance with the law, as at the material time, his services as Town Clerk of Mbale Municipal Local Government Council, a public office, had been terminated effective 20.09.05, by Mbale District Service Commission. He prays Court to dismiss the petition with costs.

The second Respondent filed a number of affidavits deponed to by himself and his witnesses in support of the petition.

Learned Counsel Richard Mwebembezi of Bamwe & Co. Advocates, represented the Petitioner, Mr. Wakida of LEX Uganda Advocates, appeared for first Respondent, while Paul Palia Kiapi of KGN Advocates represented the second Petitioner.

The affidavits filed by and for the respective parties to the petition were taken as read in open court, since they had been filed and served, well in time, before the hearing.

With leave of Court, a number of deponents of the affidavits, including the Petitioner, the Returning officer and the second Respondent, were cross-examined and re-examined on the contents of their affidavits.

The agreed upon matters at conferencing were that:-

- The contested Parliamentary election was in respect of Bubulo County West, Manafwa District.
- Both the Petitioner and the second Respondent were candidates in the said election held on 23.02.06.
- The second Respondent was declared the winner of the election, amongst six other candidates, with second Respondent getting 16426 votes; and the Petitioner obtaining 10642 votes, the margin of votes between the two being 5784 votes.
- The results of the election at the polling stations stated in paragraph 3 (iii) of the petition were cancelled by the first Respondent.

With respect to documents annexed to an affidavit, Counsel agreed to have the same taken as exhibits of the party for whom the affidavit is filed.

The framed issues are:-

- (i) Whether or not there was non-compliance with the electoral laws by the first Respondent in conducting the contested election.
- (ii) Whether the second Respondent was, at the time of his nomination for election as a Parliamentary candidate, a public servant in the office of Town Clerk, Mbale Municipal Local Government Council.
- (iii) Whether there were election malpractices by the Respondents, or one of them, and whether such malpractices affected the result of the election in a substantial manner.
- (iv) Whether the Petitioner is entitled to the remedies prayed for in the petition.

Court, like respective Counsel in their written submissions, will deal with the second issue first, followed by issue number one and then three and four.

The election of a candidate as a Member of Parliament can only be set aside on any of the grounds provided for in section 61(1) of the Parliamentary Elections Act [17 of 2005], if proved to the satisfaction of the court.

The grounds of the stated section, relevant to this petition, are non-compliance with the provisions of the said Act relating to elections, if court is satisfied, that there has been failure, to conduct the election in accordance with the principles of the provisions of the Act, and the non-compliance and failure affected the election result in a substantial manner. The other ground is that the candidate personally or with candidate's knowledge and consent; or approval, committed an illegal practice or any other offence under the Act, in connection with the election; or that the candidate, was at the time of election, qualified or was disqualified, for election as a Member of Parliament.

The Petitioner has to prove every ground on the basis of a balance of probabilities: See Section 61(3): Parliamentary Elections Act [17 of 2005].

Proof to the satisfaction of the Court, implies that, the matter has been proved without leaving room for the Court to harbour any reasonable doubt about the occurrence or existence of the matter. This burden on the Petitioner does not shift: See **Supreme Court Election Petition Number 1 of 2001: Col. Dr. Kiiza Besigye Vs. Yoweri Kaguta Museveni and Another.**

In the **Court of Appeal Election Petition Appeal No. 9 of 2002: Winnie Matsiko Vs Babihuga Winnie, L.E.M. Mukasa – Kikonyogo, DCJ**, with the concurrence of the rest of the Court, stated:-

“It is now settled law that the present legislative formulation of 62(3) (now 61(3) Parliamentary Elections Act requires that the Court trying an election petition under the Act will be satisfied if the allegations/grounds in the petition are proved on balance of probabilities, although slightly higher than in ordinary cases. This is because an election is of greater importance both to the individuals concerned and the nation at large A petitioner has a duty to adduce credible or cogent evidence to prove his allegation at the required standard of proof.”

This Court shall apply the above principles as to the burden and standard of proof in determining the issues in this petition.

The second issue is whether the second Respondent was, at the time of his nomination for election, as a Parliamentary Candidate, a public servant in the office of Town Clerk, Mbale Municipal Local Government Council.

The Petitioner’s case is that second Respondent was, at the time of his nomination for election as a parliamentary candidate, on 12.01.06, still holding the office of Town Clerk, Mbale Municipal Local Government Council; and that he had not resigned that office. This contravened Article 80(4) of the Constitution and Section 4(4) of the Parliamentary Elections Act [17 of 2005]. The second Respondent had never handed over office of Town Clerk, was still occupying the official residence by virtue of the same office. There was no letter terminating his services as Town Clerk. Indeed second Respondent had written to the Chief Administration officer, Mbale, on 06.11.05, seeking clearance because he wished

to participate in Multi-Party politics. Petitioner produced to Court payment advices of Mbale Municipal Local Government Council for July, August, September, November and December, 2005, showing various money payments had been paid to second Respondent by Mbale Municipal Local Government Council on 23.11.05, and 13.03.06. Petitioner claimed the payments were salary to second Respondent. He was thus still Town Clerk for the period he was paid for.

First Respondent admitted having accepted the nomination of second Respondent as a Parliamentary Candidate after being satisfied that second Respondent, ceased within the period allowed by the law and before nomination, to hold office of Town Clerk, Mbale Municipal Local Government Council.

The second Respondent maintained he had been properly nominated and elected Member of Parliament. At the time of nomination he was no longer working as Town Clerk, for Mbale Municipal Local Government Council had on 20.12.04 resolved to terminate his services as Town Clerk. The District Service Commission, acting on the Council resolution, terminated his services as Town Clerk on 20.09.05 through communication of the Chief Administration officer. Second Respondent was thereafter forcefully evicted from the office of Town Clerk; and issued with an eviction notice to vacate the residential house. He had not left the residential house, for he had not yet been paid his termination package. A substantive Town Clerk had been appointed and was in office at the time of election. Whatever payment he was receiving since September, 2005, were arrears of his salary accrued before 20.09.05. He never received a salary after 20.09.05.

It is not in dispute that second Respondent was a public officer, as Town Clerk, with Mbale Municipal Local Government Council, sometime before the election of 23.02.06.

Article 80(4) of the Constitution and Section 4(4) of the Parliamentary Elections Act, required, under the Multi-party political system, a public officer, employed or an employee of a local government, amongst others, who wished to stand in a general election as a member of Parliament, to first resign his/her office at least ninety days before nomination day.

Section 65 of the Local Governments Act, Cap. 243, before the amendment of Article 200 of the Constitution by the Constitution (Amendment) Act 11 of 2005 which commenced on 30.09.05, vested the power to appoint a Town Clerk, into the District Service Commission upon request of the Local Government Council. Section 68 of the same Act empowered the urban council, by resolution supported by two – thirds of Council members, to recommend the removal of a Town Clerk; and to submit that recommendation to the District Service Commission for appropriate action. The decision of the District Service Commission was appealable to the Public Service Commission.

Both respondents produced to court evidence that on 20.12.04, the Mbale Municipal Council, while duly constituted, sat and passed a resolution recommending immediate removal of second Respondent as Town Clerk. The resolution was transmitted by the Clerk to Council to the Chairman, Mbale District Service Commission. The District Service Commission, after due investigation and deliberation upheld the decision of Mbale Municipal Council to terminate the services of the second Respondent as Town Clerk. The decision was taken on

20.09.05 under minute Number 5(a) 16/2005 re. DSC/142/2MBL. It was communicated to Mbale Municipal Local Government Council through the Mayor, who, directed that a letter of Termination of services of Second Respondent as Town Clerk be issued.

The above evidence is contained in the affidavit of 03.08.06 of the election Returning Officer for Manafwa District, Arinaitwe RwakaJara, paragraph 6 and annexure "A" thereof, and in the affidavit of the second Respondent in support of his reply to the petition of 11.05.06, Paragraph 6, annexure "C" "D" "E" "F" "G" "H" "I" "J" and "K".

No evidence has been adduced to rebut this evidence of the Respondents. No official of Mbale Municipal Local Government Council or of Mbale District Service Commission deponed any affidavit to refute any of this evidence.

Petitioner, instead, bases his contention that the second Respondent was still Town Clerk, on the fact that by nomination day of 12.01.06, the Second Respondent had not formally resigned or handed over office as Town Clerk and therefore he was still in such office. This argument is not correct in the considered view of court. Before one resigns and hands over an office, one must first have been in that office in accordance with the law. The evidence of second Respondent that by 22.09.05 the District Service Commission, Mbale District, had removed him as Town Clerk, Mbale Municipal Local Government Council is not successfully rebutted by Petitioner.

The contention that no letter terminating the services of the second Respondent as Town Clerk, had ever been issued as at the date of nomination, does not, of its own, reinstate the second Respondent into office as Town Clerk. The contention is also not correct on the facts because on 07.10.05, under the caption of :

“Termination of your services” the Chief Administrative Officer, Mbale, wrote to second Respondent, with copy to the Mayor, Mbale Municipal Council; amongst others, informing that the District Service Commission upheld the decision of the Mbale Municipal Council to terminate second Respondent’s services as Town Clerk.

The assertion that the second Respondent continued after September 2005, to receive a salary and therefore was still Town Clerk is also not supported by evidence. The evidence of second Respondent that whatever payments he received were arrears of salary for the period September 2003 to July 2004, and that the same had been approved by the Chief Finance Officer after verification by the auditor has not been shown to be false. So too is his evidence that he remained in the official residence while waiting for payment of his package for leaving the office.

The court, therefore, on the basis of the evidence adduced, accepts the evidence that the second Respondent ceased to be Town Clerk, Mbale Municipal Local Government Council on 20.09.05 and as such he held no public office, to resign from, at the time of his nomination on 12.01.06.

On 04.08.06, while the hearing of this petition was going on, the Constitutional Court determined **Constitutional Petition Number 8 of 2006: DARLINGTON SAKWA AND ANOTHER vs. THE ATTORNEY GENERAL AND OTHERS**, unreported..

The Petitioners in the said Petition sought a declaration, amongst other reliefs, that the nomination, election and gazetting of Ministers in Government and UPDF

members, , as candidates in the 2006 Parliamentary elections; and as Members of the 8th Parliament of the Republic of Uganda, following the Parliamentary General Elections, was inconsistent and contravened Article 80(4) of the Constitution of the Republic of Uganda as inserted by Section 18 of the Constitution (Amendment) Act 11 of 2005.

The Constitutional Court held in the said petition that there was no contravention of the Constitution and dismissed the Petition by unanimous decision.

Their Lordships of the Constitutional Court, in the Course of determining the said Petition, pronounced themselves on the applicability of Clause 4 Article 80 and Section 4(4) of the Parliamentary Elections Act [17 of 2005]; which are in identical words thus:-

“Under the multiparty political system, a public officer or a person employed in any government department or agency of the government, or an employee of a local government or any body in which the government has controlling interest, who wishes to stand in a general election as a member of Parliament shall resign his or her office at least ninety days before nomination day.”

In the lead judgment of the Court, the Hon. Deputy Chief Justice, L.E.M. Mukasa – Kikonyogo at page 36, stated:-

“Although the *Constitution (Amendment) Act No.11 of 2005* was enacted in time for the candidates to comply with the requirement of Act 80 (4), the operational law was not in place. *The Parliamentary Elections Act No. 17 of 2006* under which the nomination dates were appointed was assented to on 16/11/2005.

It commenced on 21/11/2005 and gazetted on 23/12/2005 leaving 51 days and 18 days respectively to the nomination dates. The requirement to resign at least 90 days prior to the nomination was mandatory. It could not be partially implemented for example by resigning within the available time, which had to be less than 90 days. Whoever resigned in such circumstances, did not comply with the law. For the 2006 Parliamentary General Elections, therefore, it might have been justifiable for the Electoral Commission by interpretation to waive the requirement to resign by those affected. It is, hence, reasonable to conclude that the insertion contained in Clause 4, although mandatory, was legally not applicable to candidates for 2006 Parliamentary General Elections for the 8th Parliament. However, it might probably apply to those to come after the 2006 Parliamentary General Elections.”

S.G. Engwau, JA, without explicitly mentioning the exact section of the law, observed:

“Further, it was argued that parliament never intended that the 2nd to 45th respondents were persons envisaged and affected by clause 4 of Article 80 as amended due to inadequacy of time for the 2006 Parliamentary General Elections. My humble opinion on that issue is that a level ground should always be put in place on time. Late legislation for elections should not be made a habit to exonerate the Government. Any legislation affecting democratic process ought to be passed early enough to allow free

and fair elections. All the aspiring candidates must be equal before and under such a legislation.”

Twinomujuni, JA, who, in a minority, held the Act amending the Constitution to be unconstitutional, remarked at Pp 19-20 of his Judgment!

“The second reason why I answer the first issue in the negative is that the amendment introduces so many absurd possibilities which Mr. Kabatsi ably pointed out in detail during his submissions. Even if I was to agree with the petitioners that the amendment was valid and that it applies to Ministers and Army members of Parliament, I would find it difficult to accept that Parliament could have intended it to become part of our beautiful (albeit some defects) 1995 Constitution. Consider the following absurdities:-

(a) The amendment could not have become operational until a law to operationalise it was enacted by Parliament. A law called; Parliamentary Election Act 2005 was enacted for that purpose. It was assented to by the President on 16th November 2005 and its commencement date is stated to be the 21st November 2005. After the law came into force, the Electoral Commission declared nomination days to be 12 and 13th January 2006. The choice of this date was dictated by the other provisions of the Constitution relating to duration of the 7th Parliament and the Election of the 8th Parliament. For anyone to comply with the amendment to article 80 of the Constitution, one would have needed to resign in the middle of October 2005. by that time, even the Parliamentary Elections Act 2005 was not yet enacted!! How then could anyone

have complied with the ninety days compulsory resignation requirement before nomination day!?”

Lady Justices Alice Mpagi – Bahegeine JA, and C.N.B Kitumba, JA, agreed with the lead Judgment on this point.

This Court is bound by the decision of the Constitutional Court.

It follows therefore, on the basis of the decision of the Constitutional Court in Constitutional Petition Number 08 of 2006, that the second Respondent, cannot be held to have failed to comply with Article 80(4) of the Constitution and Section 4(4) of the Parliamentary Elections [17 of 2005] since the Article and the section did not apply to the 2006 Parliamentary General Election.

The court therefore holds on the second issue, on the reasons stated, each independent of the other, that the second Respondent was not, at the time of his nomination as a Parliamentary candidate, a public servant in the office of Town Clerk, Mbale Municipal Local Government Council.

The first issue is whether or not there was non-compliance with the electoral laws by the first Respondent in conducting the contested election.

It is the case for the Petitioner that the first Respondent knowingly and/or negligently allowed ballot stuffing in Sibanga sub-County.

The first Respondent also did so at Nalondo Butta Primary School and Bubitumi II Trading Centre Polling Stations in Butta Parish, where the votes of the District Women Member of Parliament were cancelled for stuffing and over-voting, yet

those of the Bubulo County West Constituency Member of Parliament were not cancelled.

The first Respondent also disenfranchised some registered voters at Ikaali Market polling station, and Bukhofu Primary School Polling Stations, Bukhofu Parish, Butiiru Sub County. At Ikaali Market polling station there was no voting as there was no register. At Bukhofu Primary School Polling Station, the register was taken to Bukiboli polling station which is 6kms apart.

The first Respondent also cancelled results of Busangayi, Shamukunga, Mwikaye, Bukewa Dispensary, Bukewa Primary School, Buwatuwa Primary School, Fuluma Growers Co-operative Society, and Tooma Butta Polling Stations, with a total number of 5302 registered voters, and where the Petitioner had a lot of support.

With regard to ballot stuffing having been knowingly and/or negligently allowed to happen in Sibanga Sub-county, Petitioner adduced evidence of Martin Mayeku, his polling agent, that at Bubitumu II Trading Centre Polling Station, Butta Parish, the witness was ordered to leave the polling station on showing his letter to Mr. Mutete Martin, the presiding officer. The reason for the order to leave was because the witness was a supporter of the Petitioner. This evidence is deponed to in an affidavit of the witness dated 02.06.06. The very same witness, however, deponed to another affidavit on 26.07.06, this time in support of second Respondent, stating that he stayed at the said polling station all the time and that the voting was free and fair. The court is unable to rely on the evidence of such a witness as establishing any fact.

Masaba Samuel, another Petitioner's witness, who too, claims to have been at the same Bubitumu II Trading Centre polling station, claimed in his evidence that by 9.00a.m. on 23.02.06; there were at the station only voting materials for 3 voters. The presiding officer, Mutete Martin, told him to cast one vote, and was ordered to go away and come back after counting. This evidence is in direct contradiction of the evidence of Martin Mayeku. The two witnesses could not have been at the same polling station on the same day. Both witnesses state Mutete Martin as having been the presiding officer at the station, in their affidavits of 02.06.06. But then in the affidavit of 26.06.06, Martin Mayeku, names Simon Peter Wekesa, as having been the presiding officer at the polling station.

Neither Mutete Martin nor Peter Wekesa gave evidence to establish the true position. Court does not find, as proved the allegations of the Petitioner as relates to Bubitumu II Trading Centre Polling Station.

At Kitsi upland Primary School Polling Station, Butta parish, James Mooli, deponed he had been chased away from the polling station by second Respondent's supporters, Robert Walimbwa, who was LCII chairman, and Wanzusi. This was in his affidavit of 02.06.06. He was supported by Patrick Wabwire, who claimed, he saw the beating. However, the same witness in an affidavit of 26.07.06 denied the contents of his affidavit presented to court by Petitioner. So too did Patrick Wabwire, also deny, the contents of his affidavit. The court finds the evidence of these witnesses not credible. The allegation relating to Kitsi Upland Primary School Polling Station, Butta Parish is also not proved.

The two witnesses, James Mooli and Patrick Wabwire repeat their contradictory evidence in respect of Nalondo Butta Primary School Polling Station.

Mooli James, Polling agent of Petitioner, was refused to act as such agent on 23.02.06 by supporters of second Respondent, who included Wanyama s/o Sikhoba, Samuel s/o Bukeni, Dison s/o Mubendo and Soita Masolo. They beat him, tore his shirt and destroyed his telephone handset. This was in presence of second Respondent. These assertions are in his affidavit of 02.06.06 in support of Petition. He is supported by Patrick Wabwire. The same witnesses however in affidavits of 26.07.06, in support, this time, of second Respondent, on 23.02.06, the Fracas was with some people, whom they do not name and do not disclose whom these people supported, at splendid Bar, about 400 meters away from the polling station. They both assert in their inter-respective affidavits that the elections were free and fair.

The court, on the basis of evidence of such witnesses, is unable to hold that allegation that ballot stuffing was knowingly and/or negligently allowed to go on at Nalondo Butta Primary School Polling Station has been proved.

The election results of Fuluma Growers Co-operative Society and Tooma Butta Primary School Polling Stations were cancelled by the Returning Officer. They will be considered later on in this Judgment.

Petitioner adduced no evidence of any ballot stuffing having gone on in any other of the polling stations in Sibanga Sub-county.

Court therefore holds, that apart from the two polling stations; whose results were cancelled and are yet to be considered. Later on, there is no credible evidence

adduced of the first respondent having knowingly and/or negligently allowed ballot stuffing in Sibanga Sub-county.

Petitioner's case is also that the first Respondent knowingly and/or negligently disenfranchised a number of registered voters in Ikaali market polling station, Bukhofu Parish, Butiiru sub-county by not producing the voter's register and thus no voting took place. Further, at Bukhofu Primary School A-M Polling Station, Butiiru Sub-county, the register was taken away from that station to Bukiboli Polling Station which was 6kms away, thus disenfranchising 578 voters who, apparently did not vote.

From the Tally Sheet, annexure "M" to Petitioner's affidavit in support of the petition, part of annexure "E" to the affidavit of the Returning Officer, Arinaitwe Rwakajara, in Bukhofu Parish, Butiru Sub-County, there was only one Ikaali Primary School Polling Station for the 2006 elections. The evidence that there was Ikaali Polling Station "N-Z", or "A-M" claimed by Petitioner's witnesses Weyawo John and Natte Vincent is not correct. Indeed in cross-examination, Natte Vincent confirmed his being wrong, in this. There was also no "Ikaali Market Polling Station" as pleaded in paragraph 3(ii) (a), of the Petition.

Natte Vincent Munyita, Petitioner's campaign agent in Bukhofu stated in his affidavit and in cross-examination that there were no voting materials available at Ikaali Trading Centre Polling Station and that registered voters, amongst whom was Mulalu Zakiel and James Natte did not vote. He did not access the Register of voters. He found the voters complaining at the polling station. That is how he knew they were registered voters. On being challenged, he admitted that by Ikaali Trading Centre Polling Station, he meant Ikaali Primary School Polling Station and that he was surprised to learn that elections took place at the polling station.

Nalela John, Petitioner's agent at Ikaali Primary School Polling Station, deponed that he registered voters at the station, whose names were in the register being told by polling officials that the names were not there. He complained and was beaten by second Respondent's agent Waneekota. At counting he saw Mrs. Khabuya Grace Mwenyi, the presiding officer invalidated some votes of the Petitioner by ticking other candidates.

The evidence of this witness is contrary to the case of Petitioner that there was no voting due to absence of voters register at Ikaali Primary School Polling Station. The witness, in cross-examination denied being agent of Petitioner. Yet he asserted so in his affidavit. In Court he stated he did not know which Candidate Wamukota, who beat him, was supporting. In the affidavit he asserted Wamukota was second Respondent's agent. He admitted in cross-examination that agents of all candidates signed the Declaration Results Form at this polling station, thus indicating the election went on well.

Weyawo John, Majidu Bwayo, Edward Walimbwa, Kawa Ivan, Namakanda Julia, Wakooli James, Francis Mulalu and Nalyanya Steven, all deponed affidavits in support of the petition, asserting that they reported on 23.02.06 to Ikaali Primary School Polling Station to vote, but the names of each one of them were missing from the Register and so they did not vote. Their respective testimonies do not advance the Petitioner's case that there was no voting at Ikaali Primary School Polling Station because there was no register.

The respective claims of these witnesses are also challenged.

Khabuya Grace Mwenyi, a polling assistant, at Ikaali Primary School Polling Station, denied ever meeting directing Weyawo John or Nalyanya Stephen to go and check their names at other polling stations. She also denied meeting and telling Francis Mulalu at the same polling station, that some one else had already voted in his name.

Mrs. Khabuya Grace Mwenyi, a Grade III teacher for 20 years, who was also a relative of Petitioner by marriage as her sister is wife to Petitioner, acted as polling assistant at Ikaali Primary School Polling Station. To her there was voting at the station with all materials available. There was no problem at the station throughout and Petitioner won at this station with 212 votes to second Respondent's 197. She was vigorously cross-examined on her evidence and she was consistent and steady throughout in her testimony. The court believes her evidence as truthful.

Wanzusi Stephen deponed denying threatening Majidu Bwayo at Ikaali Primary School Polling Station. Given the fact that an election constable was at this station and Patrol Police was also active, it is difficult to believe that one would be so threatened and not complain to the security to take action. This witness was also contradictory. He deponed in his affidavit that from Bukhofu polling station he went to Bukiboli Polling Station where he found people threatening to fight because second Respondent's supporters were preventing those of Petitioner from voting. Under Cross-examination he denied considered view of court, the evidence of Majidu Bwayo cannot be relied upon as proving any alleged fact.

Edward Walimbwa claimed that on 23.02.06, Stephen Wanzusi told him to go to Bukiboli, as his name was not in the register at Ikaali Primary School Polling

Station. Both Stephen Wanzusi and Namono Irene Wanzusi deny meeting Edward Walimbwa on this day.

No explanation was availed to Court as to how Stephen Wanzusi, who was not an election official, came to inform the witness; and why the witness believed him, that his name was not on the Register. Namono Irene Wanzusi, the presiding officer at Ikaali Primary School Polling Station, was cross examined and answered well and confidently all the questions put to her. Court believes her evidence as truthful. For the reasons stated court is not putting much reliance on the evidence Edward Walimbwa.

Mrs. Namono Irene Wanzusi also denies directing Kasawa Ivan to Bukiboli Polling Station as no such Station existed in Bukhofu Parish. Kasawa Ivan claimed in the affidavit that at Bukiboli he was told by polling officials that names of Petitioner's supporters were not in register and therefore he could not vote. In court he did not state so under cross-examination. Court prefers to believe the evidence of Mrs. Namono Irene Wanzusi to his evidence.

As to Namakanda Juliana Nekesa, the names on the voters card were different from those she uses and though she was aware of the exercise to correct any mistakes in the Register, she never bothered to do so.

Wakooli James, whose name was also not at Ikaali Primary School Polling Station, went away without voting because a polling agent of second Respondent told him this name was not in the Register because it begins with "W". In the affidavit the witness deponed that the second Respondent's agent told him to go away because he was supporter of Petitioner. Court is unable to take such evidence as credible.

Having considered the evidence adduced on this point court comes to the conclusion that the allegation that in Ikaali Market Polling Station, Bukhofu Parish, Butiiru Sub – County, no register was brought and no voting took place is not proved.

The other allegation that the register at Bukhofu Primary School Polling Station, Butiiru Sub – County, was taken to Bukiboli Polling Station, which is 6kms apart, thus disenfranchising 578 voters, requires court to examine the evidence adduced touching on the allegation.

On the basis of the Tally Sheets produced by the Petitioner and the Returning Officer, there is no Bukiboli Polling Station as pleaded in paragraph 3(ii)(b) of the Petition; and repeated by the Petitioner in his affidavits of 26.94.06 and 27.07.06. There is however Bukibokoli Primary School Polling Station in Bukhofa Parish, Butiiru Sub-county. The burden is on the Petitioner to state exactly which polling station constitutes his case.

Natte Vincent Munyifa deponed that some registered voters at Bukhofa Primary School Polling Station A-M were shifted to vote at Bukiboli Polling Station which is more than 6kms away. Many of them, like Wasirwa Sepiriya and Wabule Margrine did not cast their votes. The witness claimed he came to know that many of the voters did not cast their votes because he saw these voters complain. He had no number of them, except the two named. He stated in the affidavit the polling station to be Bukiboli Primary School Polling Station appearing in the Results Tally Sheets annexure “M” page 6 of 13 to the Petition.

His claim that Wasirwa Sepiriya is one of those transferred from Bukhofa Primary School Polling Station to Bukiboli Primary School Polling Station is refuted by the said Sepiriya Wasirwa who deponed to an affidavit stating he voted at Bukhofa Primary School Polling Station (O-Z). the witness branded Sepiriya Wasirwa to be a liar without any explanation as to why. Further, though in his affidavit the witness stated Margrine as one of those who never cast their votes, in cross-examination, witness stated that Wabule Margrine was allowed to vote by Bernard Watsiye, presiding officer at Bukhofu Primary School Polling Station (A-M) because she was a supporter of the second Respondent. Court finds the evidence of this witness not reliable.

Zake Mulaluya, Wamera Peter and Nangabo John deponed that they reported for voting at Bukhofu Primary School Polling Station, were told their names not on voters Register, they checked at Bukiboli Polling Station in vain, and did not vote. None of them had, before the election, checked the voters Register to update any information or correct any mistakes.

Bernard Wanata Watisye, presiding officer Bukhofa Primary School A-M Polling Station, in opposition to the above evidence, deponed that the names Zake Mulalu and Wamera Peter were not on Register of voters in Bukhofu Parish, and that there was no polling station known as Bukhofu Primary School N-Z. In cross-examination he emphasized that as presiding officer Bukhofu Primary School Polling Station (A-M) he did not receive on polling day any voters with voters cards, but whose names were not on the voters Register. There were also no voters whose names were on the register but with no voters cards. There had been civic education and display of the voters Register at the Polling Station before polling day. It had been there for three weeks. He had been the display officer. This

witness was not broken down in cross examination. He appeared a witness of truth. Court prefers to believe his evidence; to that of Zake Mulalu, Wamera Peter and Nangabo John.

Petitioner's witnesses Walyaula Patrick L.W. and Natte Martin, claimed to have been Bosa Registered voters at Bukhofa Primary School Polling Station (O-Z). On polling day their names were missing from the voters Register and were told to go to "Bukiboli" Polling Station, 6kms away. Walyaula saw other registered voters, who included Wapata Edward and Walimbwa Paulo, being in the same position as his. Natte Martin, on his part saw polling officials at the station give numerous ballot papers to voters to go and vote for the second Respondent. At about 3.00p.m. a Dyna Lorry of one Yahaya was brought by second Respondent's agents, who included Stephen Wanzusi, to ferry voters to Bukiboli Polling Station to go and vote for the second Respondent. Stephen Wanzusi also ferried voters from Bukaboli Polling Station to Bukhofu Primary School Polling Station (A-M).

Though both Walyaula Patrick C.W and Natte Martin claim to have been at the same Bukhofu Primary School O-Z on voting day. Walyaula Patrick does not depone having seen polling official Bernard Wanata Watsiye giving some voters numerous ballot papers with instructions to cast them for second Respondent, which Natte Martin claims to have seen. Bernard Wanata Watsiye was cross-examined. He denied knowledge of Natte Martin or having given ballot papers to voters and instructing them to vote for second Respondent. He was not broken down in cross examination. He was a reliable witness.

Moses Ferikasi Wepukhulu mentioned a voter who while boarding Yahaya's Dyna Truck, was given money by Stephene Wanzusi to vote for second Respondent, deponed an affidavit denying such.

Stephene Wanzusi, deponed denying the allegations of Walyaula Patrick and Natte Martin. He has already been found to have been a credible witness.

For the above reasons the court finds the evidence of Walyaula Patrick and Natte Martin not credible.

On an appreciation of the evidence adduced on the point, Court finds that the assertion that the register at Bukhofu Primary School Polling Station in Butiiru Sub-county was taken to Bukiboli (or Bukibokoli) Primary School Polling Station which is 6kms away from Bukhofu Primary School and that this resulted in disenfranchising 578 voters has not been proved by the Petitioner.

It is the case of the Petitioner that the first Respondent failed to prevent ballot stuffing at Nalondo Butta Primary School and Babitumi II Trading Centre Polling Station where the votes of the District Women Member of Parliament were cancelled due to ballot stuffing and over-voting, yet those of the Member of Parliament for Bubulo County West, were not cancelled. The number of registered voters at the polling stations was 621 and 652, respectively and the second Respondent polled 1005 votes from the two polling stations.

It was not denied by any of the parties that the election results of the District Women Member of Parliament were cancelled at these two polling stations. The Petitioner however did not adduce any evidence to show that the election

malpractices that led to the cancellation of the results also, of necessity, ought to have led to the cancellation of the results for the Bubulo County West Constituency Member of Parliament. Whatever evidence that there was, apart from being not directly to the point, very weak and contradictory.

Patrick Wabwire, James Mooli and Martin Mayeka swore affidavits on 02.06.06 supporting the Petitioner's case. The same witnesses however, on 26.07.06, swore affidavits, individually, retracting the contents of their earlier affidavits, and this time supporting the second Respondent. Patrick Wabwire and James Mooli had on 02.06.06 claimed to having been molested and stopped from acting as Petitioner's agents at Nalondo Butta Primary Polling Station, by supporters of second Respondent, on polling day. They retracted this, stating that the fracas that happened was at splendid Bar, away from the polling station, and that those responsible for the same were not supporters of the second Respondent.

The evidence of Masaba Samuel, to the effect that, at Bubitumi II Trading Centre polling station, by 9.00a.m; on polling day, there were only election materials left for three voters, is contradicted by the Returning Officer, Arinaitwe Rwakajara, who deponed that he never received complaints of election malpractices from Petitioner during or soon after the election. The Petitioner's polling agents signed the election Declaration Results Form for this polling station. Martin Mayeka, in his second affidavit of 26.07.06 also states that polling went on well at this polling station.

On the basis of the evidence available to Court, Court holds that the petitioner has not satisfied Court that the election results for Bubulo County West Constituency Member of Parliament at Nalondo Butta Primary School and Babitumi II Trading

Centre Polling Stations ought to have been cancelled on the basis that the District Women Member of Parliament election results were cancelled; or for any other proven reason.

The Petitioner pleaded, and it was admitted by Respondents, that results of eight polling stations were cancelled by the Returning Officer. It is the Petitioner's case that he had a lot of support of the registered 5302, in al, of the affected polling stations.

According to the Returning Officer, he had to cancel the results of seven of these polling stations because the total number of votes cast for the candidates exceeded the total number of registered voters at each of the polling stations. According to Mr. Arinaitwe Rwakajara's affidavit, these seven polling stations were:-

POLLING STATION	REGISTERED VOTERS	TOTAL VOTES CAST	EXCESS VOTES
i. Shamukungu Primary School	478	500	21
ii. Mwikaye Trading Centre	713	742	20
iii. Bukewa Dispensary	453	456	5
iv. Bukewa Primary School	434	450	16
v. Buwatuwa Primary School School A	435	447	12
vi. Fuluma Growers co-operative Society	650	682	12
v. Tooma Butta Primary School	257	291	34

Court observes that according to its tabulation the excess votes for Shamukungu Primary School Polling Station is 22,not 21, Mwikaye Trading Centre 29, not 20. Bukewa Dispensary 3 not 5, and Fuluma Growers Co-operative Society 32 not 12; as stated in paragraph 7 (V) of Arinaitwe Rwakajara's affidavit In Reply of 03.08.06.

As to Busangayi Trading Centre Polling Station with 588 registered voters the Returning Officer explained that the Presiding Officer never submitted to him the results.

No evidence was adduced by Petitioner, and he never so pleaded in the petition, that the second Respondent was responsible for the cancellation of the results their or non submission of any of the stated polling stations.

The petitioner adduced the evidence of Bwayo David, Wabooka Kulooba and Mayoka Hosea, voters of Buwatuwa Primary School Polling Station, that of Bukuwa Stephen Katenya, and Kitonga Wilson of Shamukunga Primary School Polling station, also of Wasike Mwisaka Martin and Mweru William of Mwikaye Trading Centre Polling Station, that of Wananda William, Wamaluku David, Nalondo Stephen, Musoba Milton of Bukewa Polling station; and of Wakima Dan of Bukewa Dispensary Polling Station, to the effect that there was free and fair voting at the respective polling stations. Each of the witnesses was surprised to learn later of the cancellation of the election results. Under cross-examination Bukuwa Stephen Katenya (Shamukunga Polling Station) and Wasike Muisaka Martin (Mwikaye Trading Centre Polling-Station) gave an explanation as to what went wrong. Both Admitted that the election officials allowed those who had voters cards, but whose names were not in the voters Register, to vote. The names

of such voters had been recorded in the Report Book and forwarded to the Returning Officer, with the rest of the election materials. The Returning Officer denied having received such names. He maintained that all polling officials had been strictly instructed not to allow any voter whose name was not on the Register. The Register was supreme as to who was to vote.

With Regard to Fuluma Growers Co-operative Society Polling Station, Petitioner's evidence was that of his witnesses, Muse Michael, Anthony Khisa and Yolamu Wolukawu. The first two witnesses had also deponed affidavits for the second Respondent retracting what they had deponed to earlier on 02.06.06 in support of the Petitioner. Counsel for the second Respondent withdrew their affidavits deponed later on 26.07.06 to in support of the second Respondent. The Court is therefore approaching their affidavit evidence for Petitioner with caution; more so, as due to withdraw of their affidavits, they were not cross-examined.

Muse Michael and Anthony Khisa claimed that as Petitioner's polling agents, they were chased away from Fuluma Growers Co-operative Society Polling Station by Supporters of Second Respondent. Both witnesses do not explain how their being chased away contributed to the cancellation of the results at this station, since the Petitioner had his other agents around, they signed the Declaration Results Form. Yolamu Wolukawu, on his part claimed that he heard from his home which was near Fuluma Growers Co-operative Society Polling Station, noise at the said polling station. He went there at 1.30p.m. and found the election materials used up; and therefore voters who came later at the station did not vote. He did not explain how he came to know this, since this was not his voting polling station and he was not an election official. Court is not putting much reliance on the evidence of these

three witnesses as proving anything with regard to cancellation of the results at the said polling station.

Article 61 of the Constitution provides for the functions of the first Respondent, one of those being:-

“(b) to organize, conduct and supervise elections and referenda in accordance with the Constitution,”

Section 12 of the Electoral Commission Act, Cap.140, expounds on the duties of the first Respondent, as including appointing a polling day for the election, to design, print, distribute and control the use of ballot papers, to establish and operate polling stations, to take measures for ensuring that the entire electoral process is conducted under conditions of freedom and fairness, and that there are secure conditions necessary for the conduct of the election in accordance with the Act or any other law.

Court is satisfied on the evidence and the law that the first respondent is responsible and answerable for the cancellation and non submission of election results at the stated polling stations. In failing to ensure that only those entitled to vote did vote, and no one else, the first Respondent failed in the discharge of the statutory duties vested in her. This failure, some how, affected the result of the election.

In Paragraph 5 of the Petition, the Petitioner alleges that the second Respondent and/or his agents/supporters knowingly and or negligently committed election offences and irregularities that affected the results of the election in a substantial manner, in that they caused ballot stuffing and over-voting.

There is no specific submission in Written Submissions of Counsel for the Petitioner about the above assertion. This is because possibly, Petitioner's Counsel, realized that there is no such evidence on record.

The Court, too, comes to the same conclusion. An evaluation of the whole evidence adduced, shows that Petitioner produced no evidence proving that the second Respondent on his own, and/or with his knowledge and consent, his agents carried out ballot stuffing and/or over-voting in the election. This allegation is not proved.

The Court's answer therefore to the first issue, is that except for the cancelled or non-submitted election results at the eight polling stations, there was compliance with the electoral laws by the first Respondent in conducting the contested election. There was non-compliance with the electoral laws by the first Respondent in conducting the elections at the eight polling stations, whose election results, had to be cancelled due to over-voting; or were not submitted by the Presiding Officer.

Whether there were election malpractices by the Respondents or any one of them, and whether they affected the result of the election in a substantial manner, Court has already held that there is no evidence to prove that the second Respondent personally or his agents, with his knowledge and consent, or approval, committed any illegal practice or election offence. The first Respondent has already been found to have failed to conduct the elections in accordance with the electoral laws with regard to the eight polling stations where results were cancelled or non-submitted. What has to be determined is whether the proved non-compliance with the electoral laws by the first Respondent affected the result of the election in a substantial manner.

Section 61(1)(a) of the Parliamentary Elections Act [17 of 2005], requires the Petitioner, to satisfy Court, that the non compliance and failure to conduct the election in accordance with the provisions and principles of the electoral laws, affected the result of the election in a substantial manner. It is not enough for the Petitioner to prove that non-compliance happened. The Petitioner has to go further and prove the exigent, degree and substantial effect the non-compliance had on the out come of the election.

In Supreme Court Election Petition Number 1 of 2001: Rtd. Col. Kiiza Besigye Vs. Electoral Commisison and Yoweri Kaguta Museveni, a Presidential election petition, (supra) Odoki C.J., considered what is “a substantial effect.” He stated:-

“This has not been defined in the statute or judicial decisions. But the cases of *Hackney (Supra)* and *Morgan Vs. Simpson (Supra)* attempted to define what the word “Substantial” meant. I agree with the opinion of Grove J. The effect must be calculated to really influence the result in a significant manner. In order to assess the effect, the Court has to evaluate the whole process of election to determine how it affected the result, and then assess the degree of the effect. In this process of evaluation, it cannot be said that numbers are not important just as the conditions which produced those numbers, numbers are useful in making adjustments for the irregularities.”

Whether or not the non-compliance is substantial may be proved by direct evidence, or may be inferred from the proved non-compliance. In case of the latter, for the petitioner to succeed, the Court has to find that the only irresistible inference to be drawn from the

evidence from the several aspects that constituted non-compliance affected the result of the election in a substantial manner. The non compliance may be so grave and extended to such large proportion of the electorate that it becomes compelling or irresistible to infer that it affected the result. On the other hand, the non compliance would have been such as would not compel an average voter to act against his/her will or may have been confined to a relatively small proportion of the electorate. In such eventuality the Court would not infer that the non compliance affected the result, except where the contest was so close that the court is led to the conclusion that the balance in the contest was swung or tilted by the non-compliance: See: **The Judgment of Mulenga, JSC, in the Col. Kiiza Besigye's Electoral Commission and Yoweri Kaguta Museveni** case (Supra), where the above principles were stated in relation to non compliance by way of intimidation in the said Presidential petition.

Tsekooko, JSC, in the same case stressed that Court has to decide whether or not the non-compliance is substantial depending on the facts of each case.

For Oder, JSC,:-

“ ---- arithmetical numbers or figures are not the only determining factors in deciding whether non-compliance with the provisions and principles of the Act did not affect the result in a substantial manner Numbers or figures of course are terribly important, but to me, they are not the only yardstick for assessing the quality and purity of an election. Whether or not compliance with the provisions and principles of an Act, in the instant case, affected the result of the election in a substantial manner, is in my considered opinion a value judgment. Figures cannot tell the whole at any. In my considered opinion an accumulated or sum

total of the non-compliance with the provisions and principles of the act, is the yardstick for measuring the effect of non-compliance with the provisions and principles laid down in the Act.”

The court will apply the above principles to the evidence adduced in this petition.

The court has already held that, apart from the cancellation and non-submission of the results of the election at the eight polling stations, the petitioner has not proved the other allegations of non-compliance with the electoral laws pleaded in the petition.

With regard to the cancelled elections, the Petitioner, under cross-examination stated that he did not know why the results had been cancelled in the eight polling stations. He admitted that the cancellation affected results of the election of all candidates for the seat of Member of Parliament, Bubulo County West Constituency.

He did not know whether the 5302 registered voters in the eight polling stations had voted. If the results had not been cancelled, he expected all the 5302 to have voted for him.

The Returning Officer, Arinaitwe Rwakajara, testified that, inspite of the cancelled election results, the overall results of the election were not affected and that the electoral Commission conduct of the whole electoral exercise in the Constituency was a “good job”. He explained that the Electoral Commission Computer System had been programmed to reject any election results where the number of votes cast on polling day exceeded that of registered voters at the polling station in question. This had been the case in the seven polling stations whose election results were cancelled. As to one

polling station of Busangayi Trading Centre the presiding officer had just disappeared with the results.

In the seven polling stations of the cancelled results the Petitioner had got 2103 as total number of votes cast and the second Respondent 1198. In the whole Constituency, the second Respondent had polled 16,426 votes, the Petitioner 10,642, with the margin between the two being 5784 votes.

If the results at the seven polling stations had not been cancelled and included in the total of each of the Petitioner and Respondent, the Petitioner would have had a total of: $(10,642 + 2103) = 12,745$ votes, while the second Respondent would have: $(16,426 + 1198) = 17,624$ votes. Thus the second Respondent would still have an overall majority of 4879 votes over the Petitioner. Second Respondent would still be declared the winner. This would still be the case, even if all the votes of registered voters, 588, of Busangayi Trading Centre polling station were to be given to the Petitioner. Indeed even if all the votes of the registered voters numbering 5302 were to be given to the Petitioner, still the second Respondent would have a winning majority of 482 votes. There was no credible evidence of over voting for this particular seat in the rest of the Constituency.

According to the Returning Officer, therefore, the cancellation of the results; or non submission of those of one polling station did not in any way affect in a substantial manner, the overall election results of member of Parliament, Bubulo County West Constituency.

The Petitioner, in the considered view of the Court, has not adduced evidence to dispute the figures of the votes as analyzed by the Returning Officer. Petitioner has also not succeeded in proving either by direct evidence or by way of inference that over-voting,

ballot stuffing or any other non-compliance with the electoral laws and the principles therein, affected the results of this election in a substantial way. This assertion in the petition also fails.

The fourth issue is whether the Petitioner is entitled to the remedies sought.

The Petitioner has not succeeded in proving the petition to the satisfaction of Court. The petition therefore fails and stands dismissed as against both Respondents. The Respondents are to have the costs as regards costs of the Petition.

Counsel for second Respondent prayed for a Certificate for two Counsel on the grounds that the nature and importance of the petition justifies such. Counsel relied **on Election Petition No.1 of 2006, High Court (at Jinja) Anthony Kanyike Vs. The Electoral Commission and 2 Others.**

Petitioner's Counsel relying on **Pollo K. House Ltd Vs. Nairobi Whole Sellers Ltd [1992] EA 172**, opposed the award of a certificate for two Counsel contending that the petition was not very involved and second Counsel just sat in the proceedings taking notes and doing no more.

In the Court's consideration, this election Petition has been a matter of great importance to the country, but in particular to the people of Bubulo County West Constituency; as it involves the democratic exercise of the people to choose their representative to Parliament. It is an exercise in building democratic governance and the whole country is interested in the exercise. The pleadings were extensive, with many affidavits and annexures to deal with. The hearing started on 24.07.06 and ended on 11.08.06 when a date for judgment was fixed. Legal and other

Research, study of evidence and interviewing witnesses' on the part of Counsel must have been extensive. Bearing those factors in mind a certificate of costs for two Counsel is hereby awarded to Counsel for the second Respondents.

Remmy Kasule

Ag. Judge

13th October, 2006