

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT MBALE**

PARLIAMENTARY ELECTION PETITION NO 0006/2011

RABBI GERSHOM SIZOMU WAMBEDDEPETITIONER

VRS

ELECTORAL COMMISSION.....1ST RESPONDENT

GUDOYI YAHAYA 2ND RESPONDENT

BEFORE: THE HON MR. JUSTICE PAUL MUGAMBA

JUDGMENT

This petition was lodged by Rabbi Gershom Sizomu Wambedde herein referred to as the Petitioner against the Uganda Electoral Commission, herein referred to as the first respondent and Gudozi Yahaya, herein referred to as the second respondent.

At the scheduling conference two key facts were agreed. It was agreed that elections for Member of Parliament for Bungokho North Constituency were conducted by the 1st Respondent on the 18th February 2011 where the petitioner, the 2nd respondent and six others stood as candidates after which the 1st respondent declared and gazetted the 2nd respondent as winner. Also agreed was the fact that the results declared by the 1st respondent showed the 2nd respondent as winner with 16771 votes while the petitioner polled 14956 votes, a margin of 1815 votes.

The results above are challenged by the petitioner who alleges that on the occasion of the election there were acts of intimidation, harassment and violence at several polling stations aimed at his agents and supporters. He cited also incidents of ballot stuffing during the exercise, multiple voting by supporters of the 2nd respondent, pre-ticking of ballot papers for voters in favour of the 2nd respondent preventing eligible voters from voting, voting by ineligible voters, failure to tally results properly and preventing the petitioner's agents from protecting the petitioner's interest. It was alleged prejudice resulted to the petitioner in consequence. The petitioner contends further that had it not been for matters complained of the results of the election would have been different and would have been in his favour. It is on this account the petitioner seeks this court to make declarations that:

- a) The elections were not conducted in accordance with the law and that the failure affected the results in a substantial manner
- b) The 2nd respondent committed illegal practices and election offences personally and through his agents.

The petitioner further seeks for the election of the 2nd respondent to be annulled and set aside in order for a fresh election to be held and that costs of this petition be met by the respondents.

Besides the facts agreed at the scheduling conference, the parties agreed also the issues as well as the evidence to be relied upon. Needless to say the evidence is affidavit evidence though in agreed cases parties cross examined some of the deponents on their averments.

The agreed issues were;

- 1 Whether the election was not conducted in compliance with the provisions of the Constitution, the Electoral Commission Act and the Parliamentary Elections Act and the principles laid down in those provisions
- 2 If so, whether the non-compliance affected the results of the elections in a substantial manner.
- 3 Whether the 2nd respondent committed the alleged illegal practices or offences in connection with the election personally or with his knowledge and approval or consent
- 4 What remedies are available to the parties

Agreed affidavit evidence tendered in support of the petition was exhibited as follows:

- | | | |
|----|-------------------------------|-----|
| 1 | Rabbi Gershom Sizomu Wambedde | PI. |
| 2 | Bulobe Ali | P2 |
| 3 | Wamunga Fred Kizangi | P3 |
| 4 | Wafenda Akim | P4 |
| 5 | Kigere Ali | P5 |
| 6 | Namoma Edirisa | P6 |
| 7 | Wanje Rehema | P7 |
| 8 | Nabugosi Twaha | P8 |
| 9 | Waluguwa Siraji | P9 |
| 10 | Waluntu Allan | P10 |
| 11 | Ekusai Saulo | P11 |
| 12 | Wozemba Bilal | P12 |
| 13 | Mweru Wilberforce | P13 |
| 14 | Mubajje Isima | P14 |

15	Mafabi Michael	P15
16	Mudde Wetaka Adam	P16
17	Nabumadi Mariam	P17
18	Kutosi Dan	P18
19	Wedala Muniru	P19
20	Galenda Lukiya	P20
21	Namatome Shiat	P21
22	Webisa Sayiya	P22
23	Webisa Siraj	P23
24	Magombe Amidu	P24
25	Booto Magidu	P25
26	Waganala Sulaiman	P26
27	Magomu Saban	P27
28	Lamula Nadunga	P28
29	Masaba Badiru	P29
30	Madoi Hassan	P30
31	Masaba Ali	P31
32	Namonyo Nasuru	P32
33	Mugoya Jamada	P33
34	Mugoya Ali	P34
35	Lwembawo Arajabu	P35
36	Masaba Swaibu	P36
37	Magomu sulaiman	P37
38	Namukose Zalika	P38
39	Gibedyo Nasuru	P39
40	Mushuhu Budalah	P40
41	Galenda Ajala	P41

42	Mafabi Amidu	P42
43	Magomu Asani	P43
44	Wochomu Haluna	P44

In Addition the petitioner filed affidavits in rejoinder and as agreed they were exhibited as shown below:

45.	Rabbi Gershom Sizomu Wambedde	P45
46	Bulobi Ali	P46
47	Kigere Ali	P47
48	Masaba Badiru	P48
49	Nabugusi Twaha	P49
50	Wanje Rehema	P50
51	Ekusai Saulo	P51
52	Waluntu Allan	P52
53	Namoma Edirisa	P53
54	Mafabi Micheal	P54
55	Mudde Wetaka Adam	P55
56	Wafeda Akim	P56
57	Mweru Wilberforce	P57
58	Nabumadi Mariam	P58
59	Woluguwa Siraj	P59
60	Mushuhu Budalah	P60
61	Wozemba Bilal	P61
62	Waganala Sulaiman	P62
63	Masaba Ali	P63
64	Kutosi Dan	P64
65	Webisa Sayiya	P65

66	Siraji Webisa	P66
67	Namatome Shiat	P67
68	Amidu Magombe	P68
69	Wedala Muminu	P69
70	Lamula Nadunga	P70

The first respondent tendered the following affidavits which were agreed to be exhibited as below.

1	Badru Kiggundu	R1
2	Umar Kiyimba	R2
3	Sgt Wambe Steven	R3
4	Massa Amuza	R4
5	Massaba George	R5
6	Nambagala Sadala	R6
7	Namajje Anani	R7
8	Mafabi Abdul Rahaman	R8
9	Wangwe Abbas	R9
10	Massa Ahmed	R10
11	Magombe Jonathan	R11
12	Wakhooli Butairu	R12
13	Nangoye Jabberi	R13
14	Sgt Namutosi Juliet	R14
15	Wamanga Eric	R15
16	Sgt Wakubona Daniel	R16
17	Mafabi Gidudu Amidu	R17
18	Okiria Mohammed	R18
19	WPC Nseko Racheal	R19

20	Munabi Salim	R20
21	Okwir Moses	R21
22	CPL Shibale John	R22
23	Akello Christine	R23
24	CPL Wananda Paul	R24
25	Khalokho Joseph	R25

The second respondent tendered the following affidavits which were agreed and exhibited as follows:

1	Gudoyi Yahaya	RR1
2	Wedala Masaba	RR2
3	Abdullah Naleka	RR3
4	Rashid Masaba	RR4
5	Musa Gidudu	RR5
6	Nabwaga Natibu	RR6
7	Makibwe Asuman	RR7
8	Mafabi Augustine	RR8
9	Masolo William	RR9
10	Mugamba Edirisa	RR10
11	Wamisitu Mustafa	RR11
12	Massa Zulia	RR12
13	Namonye Sabuli	RR13
14	Mafabi Safiyi	RR14
15	Masaba Jamira	RR15
16	Gidudu Bwaila Mugamba	RR16
17	Gibedyia Amosi	RR17

18	Kigere Twaha	RR18
19	Gizamba Sam	RR19
20	Kidandi Stephen	RR20
21	Mafabi Sulayi	RR21
22	Namatome Azida	RR22
23	Wedala Amidu	RR23
24	Gimeri Rashid	RR24
25	Namadadi Majidu	RR25
26	Bubbi Jamada	RR26
27	Walumoli Jonathan	RR27
28	Massa Edirisa	RR28
29	Magolo Abuau	RR29
30	Walumoli Perezi	RR30
31	Magomu Nathan	RR31
32	Namajje Yahaya	RR32
33	Walumoli Dison	RR33
34	Nakiwondo Edirisa	RR34
35	Mubakali Mabuyi	RR35
36	Nabende Edirisa	RR36
37	Masolo Ismail	RR37
38	Mutwalibi Wafenda	RR38
39	Madina Wasagali	RR39
40	Wachi Edirisa	RR40
41	Majidu Walumoli	RR41
42	Wasukira Abbasa	RR42
43	Namakambo Amina	RR43
44	Nambale Ahamada	RR44

The following witnesses for the petitioner were cross examined by the respondents.

1	Rabbi Gershom Sizomu Wambedde	PW1
2	Bulobe Ali	PW2
3	Wamunga Fred Kizangi	PW63
4	Mushuhu Budalah	PW4
5	Galenda Ajala	PW5
6	Wofeda Akim	PW6
7	Waluntu Allan	PW7
8	Wanje Rehema	PW8
9	Nabugusi Twaha	PW9
10	Lamula Nadunga	PW10

The respondent's witnesses who were cross examined by the petitioner were as shown below.

1.	Gudoι Yahaya	RW1
2.	Masaba George	RW2
3	Jamira Masaba	RW3
4	Wakholi Butairu	RW4
5	Makibwe Asuman	RW5
6	Nambagala Sdala	RW6
7	Eric Wamanga	RW7
8	Gimeri Rashid	RW8
9	Wachi Edirisa	RW9
10	Wedala Amidu	RW10
11	Naleka Abdullah	RW11

I have noted earlier that the petition seeks inter alia to overturn the results of the election of Member of Parliament for Bungokho North Constituency. Section 61 of the Parliamentary elections Act, Act 17 of 2005 gives grounds for setting aside an election. I set out relevant extracts from that provisions.

‘(1) The election of a candidate as a member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court-

- 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 non compliance and the failure affected the result of the election in a substantial manner;*
- b) *that a person other than the one elected won the election; or*
- 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;*

2).....

3) *Any ground specified in sub-section (1) shall be proved on the basis of a balance of probabilities’.*

The duty is on the petitioner to prove to the satisfaction of the court that the irregularities or malpractices or non compliance with the provisions and principles laid down in the relevant laws obtained or that they affected the result of the election in a substantial manner. Such was the holding of L.E.M Mukasa-Kikonyogo, DCJ, as she then was, in **Masiko Winfred Komuhangi v Babihuga J. Winnie**, Election Petition Appeal No. 9 of 2002 when she related to s. 62 (I) (a) of the Parliamentary Elections Act, Act 8 of 2001. Section 62 (I) (a) of that Act is in *pari materia* Section 61 (1) (a) of the Parliamentary Elections Act, Act 17 of 2005. It is gainful to quote from Election Petition Appeal No. 9 of 2002 concerning S 62 (1) (a) then to drive the point home as regards our S. 61 (1) (a) of Act 17 of 2005 now. It was stated then;

“It is now settled that the present legislative formulation of 62 (3) Parliamentary Elections Act requires that the court trying an election petition under the Act will be satisfied if the allegation/ground in the petition are proved on balance of probabilities, although slightly higher than in ordinary cases. This is because an election petition is of great importance both to the candidates 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.”

That position of the law subsists and I heed it in connection with this petition.

The first issue is whether the election was not conducted in compliance with the provisions of the Constitution, the Electoral Commission Act and the Parliamentary Elections Act and the principles laid down in those provisions.

It was submitted on behalf of the petitioner that there are two aspects to this issue. The first relates to intimidation, harassment and violence while the other concerns ballot rigging. The two were presented in sequence and are addressed likewise.

The petitioner claims that the first respondent failed to ensure that the entire electoral process was conducted under conditions of freedom and fairness. It was his complaint also that some of his agents and supporters were not only threatened with injury or harm but were actually battered and tortured in Bufumbo sub county on 18th February 2011. The petitioner accuses the first respondent of failure to ensure that firearms were not taken to polling stations. The petitioner further accuses the first respondent of failure to stop violence and ensure secure conditions required during elections. The petition cites venues and events in support of the complaints.

First mentioned is Bugweri polling station. It is at this station the second respondent was registered as a voter and it is at this station he voted on 18th February 2011. The evidence of Wanje Rehema contained in exhibit P 7 is vital. She was a polling agent for the petitioner at Bugweri polling station. It was her evidence that the second respondent and Naleka ordered her to leave the polling station and that when she resisted the two threatened to beat her. She stated that she exited the polling station at about 9:00 a.m.

She added that the presiding officer was not bothered about the threats to her and her eventual departure. It was her evidence she did not cast her vote for the petitioner as she left before she could vote. It is her evidence the presiding officers' name was Sulaiman Wolumu. The witness was cross examined as PW8 and stated that when she was accosted by the second respondent and Naleka she reported to the presiding officer and a policeman who was at the scene. She said she did not get any assistance from any of them. Wanje stated that she had arrived at the polling station at 6:00 a.m that morning. She added that she did not report her concern to any one else outside the polling station. RW7 was Eric Wamanga who was elections supervisor for Bufumbo sub county. He testified that the presiding officer at Bugweri polling station on 18th February 2011 was not Sulaiman Wolumu as Wanje had stated but rather one Nambagala Sadala. It was the evidence of Wamanga that besides being supervisor for Bufumbo sub county on the occasion he was co-ordinator of the supervisors in the constituency. It was his evidence he had visited Bugweri polling Station twice on election day, 18th February 2011. He said a report had been received regarding an incident at Bugweri polling station and he had been sent by the Returning Officer to check on that report. It is his evidence he had found the presiding officer and the police constable at the polling station who had assured him there had been no incident and all was well. He observed, he said, that nothing was wrong. It was then he reported his observations to the Returning officer. In cross examination the witness stated that he had received calls from Bulobe Ali earlier on telling him that voting at Bugweri polling station had come to an end. It was his evidence what, he saw was different because voting was still going on. Nambagala Sadala deponed to exhibit R 6 where he admitted he had been presiding officer at Bugweri Polling Station on 18th

February 2011. It was his evidence he arrived at the polling station at 8:20a.m that day. He acknowledged that RW7 visited the station and that the voting exercise went on peacefully without any incidents of violence, ballot stuffing or any other malpractice until 5:00 p.m. when voting closed. He said counting of votes started when voting was completed. He said there was no incident or election malpractice. It was his evidence the petitioner's polling agents did not sign the declaration of results forms (DR) because they had gone away since it was raining heavily. Exhibit R 22 is the affidavit of Cpl Shibale John. He was a constable at Bugweri polling station at the time in issue. He stated that his role included ensuring the safe arrival of election material as well as ensuring that the voting process was carried out in a free fair and transparent manner. He said the voting exercise went on peacefully without incidents of violence, stuffing or any other election malpractice until closure of voting at 5:00 p.m. He observed no incident that day, he said, and as such he was able to sign the accountability form confirming that the election process was carried out in a free and fair environment. The second respondent in his evidence denied participating in the visit, alleged by Wanje, to Bugweri polling station when he was said to have been in the company of Naleka. During cross examination as RW1, the second respondent testified that he went to the polling station at Bugweri to cast his vote only and that the time was between 8:40 a.m and 10:00 a.m. Later he said it was between 8:40 a.m and 9:00 a.m. He said after he cast his vote he went to his home and later to Nakaloke to attend to his daily work. He added that he was first in the queue and denied there being any violence at the polling station. He said that that day he did not visit any other polling station but he had warned his supporters to desist from any violence and any other election malpractices. Abdullah Naleka's

affidavit is RR3. He stated that he is a registered voter at Bugweri polling station and that that is where he cast his vote on the day of the elections. In his affidavit he admits to being an NRM supporter as well as NRM chairman of Bufumbo Sub County. He denied any involvement in electoral malpractice as alleged by various witnesses. He denied also being in the company of a UPDF officer as alleged by petitioner's witnesses. These denials were reiterated by him when he was cross examined. I must note that the claims of Wanje Rehema against the second respondent and Naleka are not supported by any other evidence as such but that they are denied by both the 2nd respondent and Naleka. Needless to say the burden to prove any allegation lies on that individual who makes the claim. There is no police report or any other report to that effect.

On the other hand the fact that Wanje was not available to sign the DR forms is not sufficient testimony to implicate the second respondent or Naleka in the activities alleged by Wanje.

The petitioner adduced also evidence by Webisa Sayiya in exhibit P22, Webisa Siraji in exhibit P23, Galenda Lukiya P20, Namatome Shiat P21 and Magombe Amidu P 24 to drive home examples of interference with the freedom of voters and lack of fairness at Bugweri polling station. It is alleged in p 22 that the 2nd respondent, Naleka and other supporters of the 2nd respondent had taken over the polling station and were distributing ballot papers. It is further alleged that because he supported the petitioner Webisa Sayiya was not supplied with a ballot paper in order for him to vote. In exhibit P 23 Webisa Siraj supports the testimony in exhibit P 22. Then there is evidence in P 20, P 21 and P24 where the deponents allege they were

denied their right to vote by officials of the first respondent. For the record the person named specifically is Wolumu Sulaiman. While Wolumu Sulaiman served as an election official the presiding officer was Nambagala Sadala. There is no evidence any of those witnesses brought to the attention of the presiding officer the complaint that they had been denied opportunity to vote by anyone. The evidence of the presiding officer is that no such event occurred. Needless to say the second respondent and Naleka deny involvement in the alleged malpractices. One would have expected frustrated voters to complain to the presiding officer, to police or to any other authority on account of being disenfranchised. They did not and I find this odd and dubious. Their allegations are made no more credible by the testimony of the supervising officer Wamanga Eric and the presiding officer who say they were not made aware of the allegations on the occasion.

As for the voting trend, statistics can be impressive but they must be accompanied by evidence to support a stated position. For example on the face of it there is nothing striking about getting a voter turn out of 99.34 %. The petitioner would need to point out what the ideal percentage should have been. Sincerely no one was in a position to pontificate on how many votes any of the contestants was entitled to. I note Bugweri is the polling station of the second respondent but in the absence of evidence why the results should be annulled at the polling station court finds no reason to contemplate change in the status quo.

Jewa trading centre polling station is another spot of concern to the petitioner. Waluntu Allan was the polling agent for the petitioner at the polling station. His evidence is in exhibit P10. He stated that Naleka

Abdullah invaded the polling station after which he assaulted the witness, tied him up and dragged him towards a cliff. Ekusai Saulo in his averment in exhibit P II said he was a voter at Jewa trading centre polling Station and that Naleka had gone to the polling station and assaulted him. Owing to the injuries he sustained in the assault he was admitted to hospital for five days. Both Waluntu and Ekusai recorded statements with Police. In paragraph 28 of his affidavit he reported to Police on 20th February 2011 but his P.F 3 reads 18/2/2011. Exhibit P 18 is an affidavit sworn by Kutosi Dan. He stated that he was a member of the petitioner's task force and that he was present at Jewa polling station when Naleka and others supporting him invaded the station. He said at about 4:30p.m. he went to Jewa Trading Centre Polling station but did not find Waluntu Allan and Ekusai Saulo, polling agents of the petitioner. He testified that he saw Abdullah Naleka and a group of people had taken over the polling station at Jewa and that they were in possession of voting material. This evidence is denied by both George Masaba the presiding officer in R. 5 and Naleka. There is no report made by Kutosi to anyone either at the polling station or to any other authority like Police. In fact the presiding officer denies the presence of Naleka at the Polling station on the day in issue. He denies any electoral malpractices took place and says he saw both Waluntu Allan and Ekusai Saulo at the polling station in good health as late as at 5:30 p.m. when rain started. George Masaba denied there was assault on Waluntu Allan and Ekusai Saulo at the polling station on 18th February 2011. Sgt Akello Christine was polling constable at Jewa Trading Centre polling station. Her evidence is contained in the affidavit exhibit R 23. She stated that her duties at the polling station included ensuring that the election material arrived safely as well as ensuring that the voting process was carried out in a free, fair and

transparent manner. In paragraph 5 of her evidence she stated that the voting exercise proceeded peacefully without incidents of violence, ballot stuffing or any other election malpractice. She added that vote counting started after voting was over and that even vote counting had no incidents of election malpractice. Finally she averred that she signed the accountability form confirming that the election process was carried out in a free and fair environment. The petitioner contends that the affidavits from the respondent do not specifically rebut the evidence of the petitioner at the Jewa Trading Centre Polling station. I am not persuaded by that contention. It is alleged by the petitioner that a raid was made on the polling station by the 2nd respondent's supporters who included Naleka and that they committed electoral malpractices in the wake of that raid. The claims are denied by Naleka himself as well as the presiding officer and the polling constable, to mention but a few. Three persons allege the event happened. Obviously they did not report any incident to the election officials or to police nearby. All there is to show for it are reports to police long after the event was over as well as medical reports done belatedly. I make mention of the PF3 Ekusai appended to his affidavit. It has details of 18th February 2011 at the top page. He said he reported the matter to Police on 20th February 2011. The medical report thereon shows it was made on 21st February, 2011. Clearly the report could not have been made on 18th February 2011 going by those revelations. There is no report of any investigations by police or of any arrests. In the normal turn of events Waluntu and Ekusai would have gone and reported the assaults to Police in order to secure Police Form 3 for due examination and treatment. This was not so. In the event they went to Tobin Health Centre in Mbale Town, a distance from where they sustained injury, but a health centre superintended by the petitioner as one of the

directors. It is not disputed that in the vicinity of Jewa Trading centre there is a Government health facility said to be bigger than Tobin Health Centre in far off Mbale Town. The decision taken thus assumes proportions other than those of transparency. Of course Kutosi Dan did not report anything to anybody on the occasion of the elections. In the circumstances I find it hard to believe that there was any infraction of any electoral laws or procedures at Jewa Trading centre Polling station on the occasion of the election on 18th February 2011.

Nkusi Polling station was also claimed by the petitioner to have been invaded by Naleka and other supporters of the second respondent, who were said to have interfered with the electoral process. Waluguwa Siraj was the star witness for the petitioner. His affidavit P 9 shows he was a campaign agent for the petitioner in Nkusi village. He stated that after Naleka and other supporters of the 2nd respondent raided the polling station he was singled out as agent of the petitioner and assaulted severely as a result of which he sustained injuries for which he was admitted to hospital. He cited Naleka Abdullah, Wodada Namanda and Muzamiru Wamume as people who assaulted him. For a fact he did not report the incident to Police immediately. The matter is recorded by Police in Mbale as SD 12/21/02/11. It must have been reported to Mbale Police on 21st February 2011. Lest it be forgotten the assault is said to have taken place on 18th February, 2011. Nabumadi Mariam was polling agent for presidential candidate Dr. Kizza Besigye at Nkusi Polling station on 18th February 2011. Her evidence is contained in affidavit exhibit P 17 and shows that Naleka Abdullah and other supporters of the second respondent committed acts of violence and that they intimidated and harassed voters at Nkusi Polling station. Indeed paragraph

12 of the affidavit states that the second respondent was physically present at Nkusi Polling station and that there he met and addressed Naleka and his supporters before Naleka and the supporters assaulted Woluguwa Siraj and violently disorganized the elections. The evidence of Mweru Wilberforce in his affidavit exhibit P 13 stated in paragraph 10 that Naleka Abdullah and supporters of the second respondent committed acts of violence, intimidated and harassed voters, including himself, at Nkusi polling station. He avers that he was polling agent for the petitioner at Nkusi Polling station and that Naleka and his group forced him to sign the Declaration of Results forms before voting ended. He added that despite the fact that he witnessed all this the presiding officer did nothing to prevent this interference with the voting exercise. Affidavit exhibit P 20 was deposed to by Waganala Sulaiman. He stated that after the second respondent had addressed Naleka and others of his supporters at Nkusi Polling Station the supporters and Naleka started intimidating the voters and beating them. He says that Naleka wielded a leather whip and was being escorted by a UPDF soldier with a gun. It is his evidence that the elections at Nkusi were disrupted at 1:00 p.m. and that violence, intimidation, beating and multiple voting followed. It is his observation the elections were not free and fair. The affidavit of Magomu Sabani is exhibit P 27. He avers that he was at Nkusi Polling Station at 12:00 p.m. When he saw four vehicles arrive and that he recognized Naleka, Muhammad Wadada, Namanda Safiyi, Muzamiru Womame, Manina, a UPDF soldier and several other people alight from those vehicles.

He stated that Naleka carried a leather whip, the soldier carried a gun while others of the group carried sticks. It was his evidence that what

followed was Woluguwa Siraj was assaulted and most voters fled the polling station without voting. The evidence in exhibit P 31 is deponed to by Masaba Ali who stated that he was at Nkusi Polling station at about 1:00 p.m. when Naleka, Bwaila Mugamba, Hakim Nakade, Hakim Woniale, Muzamiru Womame, Musa Wolubiri and others arrived in three vehicles. That the second respondent arrived later in a saloon car. It was his evidence Naleka carried a leather whip and was escorted by a UPDF soldier carrying a gun. Others in the group, he stated, carried sticks. It was his evidence Naleka was NRM Chairman for Bufumbo sub county and a campaign agent for the second respondent. He added that when Naleka and his group arrived the polling process turned violent with lots of intimidation, beating and harassment. It was his evidence that the second respondent addressed his supporters and urged them to vote for him only. It is his evidence also that Wodgaga Mohammed, Naleka and Muzamiru Womame assaulted Siraj Woluguwa and that when Woluguwa was assaulted most voters fled the polling station without voting. The witness added that he saw Naleka's group grab ballot papers which they ticked and stuffed in the boxes. It is his evidence the presiding officer did nothing to stop the second respondent, Naleka and the rest of the group from interfering with the elections.

No report was made to any authority such as the first respondent or to Police concerning the breach in the electoral process said to have happened at Nkusi Polling station. Masolo William was polling agent for the second respondent at Nkusi polling station. His evidence is contained in affidavit exhibit RR7 where he stated that the elections in issue at Nkusi polling station went on smoothly without any harassment of voters, violence or

threats. He stated also that the second respondent was never at the Polling station. He added that there was no coercion, intimidation or violence by supporters of the second respondent and that he together with the other agent of the second respondent called Mafabi Augustine signed the declaration of results forms. He observed that among agents who signed the declaration of results forms were those of the petitioner. It is his evidence that no one at the time had complained regarding the conduct of the election so that they could be halted on account of multiple voting, irregular voting, intimidation or any offence/malpractice. Mafabi Augustine in his evidence contained in affidavit exhibit RR8 supports the contents in RR7. Then Magombe Jonathan in his affidavit contained in exhibit R11 stated that he was presiding officer on the occasion of the elections in issue. It is his evidence that the voting exercise went on peacefully without incidents of violence, stuffing or any other election malpractice. He added that voting was closed at 5:00 p.m. and that after voting there followed counting of votes after which declaration of results forms were signed. He added that the voting process at the polling station was free and fair, devoid of any violence or other election malpractices. There are allegations of electoral malpractices made on behalf of the petitioner against the first respondent at Nkusi polling station. There is no evidence reports of the alleged infractions came to the notice of the polling officials at Nkusi or were brought to the attention of the first respondent. The only alleged assault happened to Walugawu Siraj. He reported it at a distant police station and went to a distant health facility. He could have immediately reported to the polling officials, to the police in Bufumbo Sub County and gone to a nearby health facility for medical attention. As the evidence stands I do not find it

established that there were any election malpractices at Nkusi polling station on 18th February 2011.

Matemu Polling station is alleged to have been another hot spot. There is the evidence of Wofende Akim in Exhibit P4, Mafabi Micheal in exhibit P 15 and Mudde Wetaka Adam in exhibit P16. The evidence is to the effect that Naleka and a group of supporters of the second respondent arrived at Matemu polling station at about 3:00 p.m. stopped the voting process and stuffed the ballot box, besides assaulting Mudde Wetaka Adam who was the petitioner's polling agent. It is further alleged that the first respondent took no action in light of what happened. There is evidence of a reported assault case at Mbale Police station on 21st February 2011 regarding Wetaka Adam, presumably the same as Mudde Wetaka Adam. Remarkably it was 3 days after the day of the alleged assault. The presiding officer at Matemu polling station, Mafabi and polling constable, Okwi Moses, in their testimonies deny the alleged interference with the electoral process took place. Naleka also denies involvement. No evidence was given of a report concerning the matters alleged by the petitioner as having taken place at the polling station. The first respondent had no knowledge of it. I am not persuaded the alleged infraction at Matemu polling station happened.

The petitioner alleges through the affidavits of Masaba Badiru P 29, Nabugusi Twaha P8 and Booto Magidu P 25 that supporters of the second respondent led by Naleka invaded Bukobe polling station at around 3:30 p.m. on 18th February, 2011 and interfered with the peaceful polling taking place then. In affidavit exhibit P 29 it is deponed that the invaders violently disrupted the peaceful election and that Masaba Badiru was assaulted by

Mohammed Wodaga s/o Namunane who was part of the invading group. Nabugusi Twaha and Booto Magidu alleged that they were assaulted by Abdullah Naleka. In cross examination Nabugusi Twaha (PW9) stated that after he was assaulted he fled the scene because he did not want to lose his life. He reported the matter to police three days alter, he stated. This evidence is rebutted by Presiding officer Massa Amuza in R 4 and by the polling constable Sgt Juliet Namutosi in R 14. Both stated that the alleged interference never occurred. Even Naleka in his affidavit RR3 denied the alleged interference. Then there is the evidence of Masaba Jamira wife to the victim Masaba Badiru. Her evidence is in exhibit RR 15 she stated that she was at the polling station on the day of the elections. She said the alleged invasion of the polling station never happened and that the elections proceeded peacefully. It was her evidence her husband Masaba Badiru was never assaulted. I do not find satisfactory evidence that there was any electoral malpractice at Matemumu polling station. Not only was the first respondent unaware of the alleged incident but no report to that effect was made anywhere.

The petitioner alleged that there was interference with the electoral process at Bufumbo Primary School and Nabushero Polling station. The affidavits relied on are those of Kigere Ali (P5), Wozemba Bilal (P12), Mubajje Isima (P14), Wedala Muminu (P19), Lamula Nadunga (P28), Madoi Hassan (P30), Nasuru Namunyo (P32) and Mugoya Jamada (P33) . In their evidence Kigere Ali, Wazemba Bilal and Mubajje Isima show that elections at the two polling stations were initially peaceful but later campaign agents of the second respondent told them to indulge in election malpractices. It is their evidence that upon their refusal of the suggestion they had to contend with

Naleka who soon arrived with a gang of supporters of the second respondent at the polling station. The invaders confiscated the voters' registers and assaulted them. They fled the polling stations thereafter. The evidence of Wedala Muminu is in affidavit exhibit P 19. He was a campaign agent for the petitioner and was assaulted while he stood in the queue awaiting his turn to vote. Others who waited in the queue but had to leave the polling station upon the assault on Wedala Muminu are shown to be Lamula Nadunga, Nasuru Namonyo and Jamada Mugoya. It is stated further on behalf of the petitioner that the presiding officers and other electoral staff stood by and did nothing while all this went on. There is denial by Naleka of any involvement. On behalf of the first respondent it is denied any interference with the electoral process happened. No reports were made to Police or any other authority at the time regarding the allegations. I do not find it proved that there was occurrence of the alleged malpractices at Bufumbo primary School polling station or at Nabushero polling station.

Bunamajje P.S Polling station was also said to have been invaded by Abdullah Naleka and supporters of the second respondent causing interference with the electoral process. To support his case the petitioner relied on the evidence of Mushuhu Budalah (P40), Galenda Ajala (P14), Mafabi Amidu (P42), Magomu Asani (P43) and Wachomu Haluna (P 44). According to Mushuhu Budalah when Naleka arrived at the polling station he ordered polling officials to ensure the second respondent got all the votes. It is further averred by Mushuhu that the presiding officer and other officials just stood by and obeyed. It is also stated by Mushuhu that when he protested he was ignored by the presiding officer. It was then he decided not

to vote because of harassment and intimidation by Naleka and lack of support from the polling officials. He said in cross examination that the presiding officer had stopped him from voting. Affidavits contained exhibits P41, P42 and P43 state that supporters of the petitioner were prevented from voting by the attitude of officials of the first respondent. Indeed in cross examination Galenda Ajala (PW5) stated that the presiding officer at Bunamajje polling station stopped him from voting. Naleka denied involvement in the alleged malpractices at Bunamajje polling station on the day of the elections. The presiding officer at Bunamajje Polling station on 18th February, 2011 was Wakholi Butairu. His evidence is contained in affidavit exhibit R 12. He was also cross examined as RW4. While he admitted agents of the petitioner at the polling station did not sign the declaration of results forms he said this could have been due to the onset of rain which caused agents and supporters of different candidates to leave the polling station at the time of vote counting. Paragraph 8 of his affidavit. It was his evidence the voting exercise went on peacefully without any incidents of violence, stuffing or any other election malpractices until 5:00 p.m. when voting was closed. He stated that voting was free and fair devoid of any violence or other election malpractice. The evidence of Cpl Wananda Paul the polling constable at Bunamajje P.S Polling station on 18th February 2011 shows that he was detailed to ensure the safe arrival of election material in addition to ensuring that the voting process was carried out in a free fair and transparent manner. He added that the voting exercise went on peacefully without incidents of violence, stuffing or any other election malpractice until 5:00p.m when voting was closed. He averred also that the vote counting commenced on completion of voting and the same proceeded without any malpractice. Here again I must note that there was

no report made to the first respondent, the police or any other authority regarding alleged electoral malpractices at the polling station.

Another polling station said to have been invaded by Naleka was Bukikoso polling station. The evidence is contained in affidavit exhibit P 6 sworn by Namoma Edirisa a polling agent for the petitioner at the station. His evidence is that Naleka and his gang invaded Bukikoso polling station at about 1:20 p.m. on the day of the elections. He added that Naleka was armed with a whip and was escorted by stick wielding supporters and a UPDF soldier armed with a gun. It is his evidence the invaders confiscated his voters' register and he together with his co-agent were chased from the polling station. It is his further evidence that the presiding officer did nothing to prevent this interference with the electoral process. It was in protest he and his co-agent declined to sign the declaration of results forms. This evidence is contested by the respondents. Wangwe Abbas in affidavit in exhibit R 9 stated that he was the presiding officer at Bukikoso Polling station on 18th February 2011. He stated that the voting exercise went on peacefully without any incidents of violence, stuffing or any other election malpractice until 5p.m. when voting was closed. He added that on completion of voting there followed vote counting and that the same proceeded without incidents of any election malpractice. WPC Nseko Rachael was polling constable at Bukikoso P.S polling station then. Her affidavit is exhibit R 19 she stated that her role was to ensure that voting material arrived at the polling station safely and that the voting exercise went on smoothly without any irregularity and/or electoral malpractice. It was her evidence the voting exercise went on peacefully without incidents of violence, stuffing or any other malpractice until 5:00 p.m. when voting

closed. She added that vote counting started after voting was over and that it proceeded without incident of any electoral malpractice. It is her evidence she signed the accountability form confirming that the elections were conducted in a free and fair manner. Both the presiding officer and the polling constable deny any malpractice happened. No report was made to the first respondent concerning the alleged malpractice. There is no evidence of a report made to Police or to any other relevant authority. I find no proof for the petitioner's claims.

The petitioner alleges that there were several acts of rigging at some polling stations. Such acts were not compliant with the electoral laws. The acts were said to be the following:

- a) Ballot stuffing during the polling exercise
- b) Multiple voting by supporters of the second respondent
- c) Pre-ticking of ballot papers for voters in favour of the second respondent
- d) Preventing eligible voters from voting
- e) Voting by ineligible persons
- f) Not tallying results properly
- g) Preventing the petitioner's agents from protecting the petitioner's interest to ensure that the above acts are not committed to the prejudice of the petitioner.

The petitioner earlier presented what evidence was available to him of allegations of violence, harassment and intimidation. Needless to say evidence of a malpractice was countered any evidence denying it took place.

In some instances affidavits in rejoinder were filed. I have however observed earlier in this judgment that the onus is on the petitioner to prove the allegations in the petition. I need not repeat it. Suffice it to say that proof must be to the satisfaction of court. In this petition a common denominator is the person of Abdullah Naleka, the NRM Chairperson for Bufumbo Sub County and certainly a supporter of the second respondent. He is alleged to have been on a rampage throughout the length and breadth of Bufumbo Sub County on the day of the elections. It is alleged he was responsible for the various electoral malpractices cited in the petition. Is it not amazing that he was not only immune to arrest let alone to being reported to any authority for the nefarious activities attributed to him? Of course the first respondent said the alleged acts never took place so there would be nothing to report. But there was nothing reported by agents and supporters of the petitioner, those of other candidates or by civic minded persons. Even the incident said to have taken place at Bugweri polling station was said not to have occurred after Eric Wamanga the supervisor went to the polling station and found the reports to be false. Allegations of assault were not reported to Police on the day they are said to have occurred. Where they were reported to Police it was three days after. Even there is no evidence they occurred at the polling stations. Medical attention was not received at government facilities which are near the respective polling stations. Medical attention was said to have been received at a health centre where the petitioner is a director. It is private and would raise a few eyebrows given that the patients and the facilitators are beholden to the petitioner. It is not sufficient to prove an event which is contested on evidence that is shaky. It would have been feasible to prove what transpired if any grievances had been addressed to the authorities concerned,

particularly the first respondent. Then there would have been evidence of action or non action. In the case of Bugweri there was action and the supervisor was dispatched to the station and his findings were reported. Police would have been another place to report. I must note that the petitioner has failed also to prove any of his allegations under the head of ballot rigging and related acts for the same reason that no reports were made to the first respondent or to any other person. It is not sufficient to speculate that there is ballot stuffing, rigging or people voting out of turn without accompanying evidence of the same. What was presented in this respect is allegation and speculation, not facts.

From the above I am not satisfied that petitioner has proved that there was any non-compliance with the electoral laws and principles.

Having found as I have on the first issue I would answer the second issue in the negative.

On to the third issue. Whether the second respondent committed the alleged illegal practices or offences in connection with the election personally or with his knowledge and approval or consent. At the head of the petitioners' evidence is the evidence of Wanje Rehema who in her affidavit exhibit P 7 stated that the second respondent together with Naleka prevented her from voting at Bugweri Polling station. The two were allegedly threatened to beat her and chased her away. In cross-examination she said she reported the matter to a police officer at the polling station but that the police officer did not assist her. She didn't report to any police station.

In his evidence in cross examination the second respondent stated that he went to the polling station at Bugweri only once on the day of the elections. He said he was at the head of the queue and that soon after he voted he went away. He said he did not visit any other polling station that day., As for the testimony of Nabagwa Natibu (RR60) alluded to by the petitioner there is no support there for the proposition that there was any electoral malpractices on the occasion. He states in paragraph 4 that the supporters and campaign agents of the second respondent never interfered with the voting process as alleged by the petitioner and his witnesses. In paragraph 5 he stated that there were no complaints by voters or agents to the Returning officers or polling assistants at the polling station. Both the second respondent and Naleka deny being party to any of the malpractices alleged by Wanje Rehema particularly involvement in preventing a voter from voting.

There are complaints also attributed to Webisa Sayiya (P65) and Webisa Siraj (P66) who are from the same village as the second respondent. In his affidavit the 2nd respondent did not specifically rebut allegations in P 65 and P66 but he did state in cross examination that he could not have been at the scene at the time alleged. With respect I do not agree with submission by the learned counsel for the petitioner that that answer by the second respondent in cross examination is rendered invalid by the fact that it was not made earlier in his affidavit evidence. What could be better than an answer given in cross examination? The answer in the affidavit was made earlier and was general as admitted by counsel for the petitioner but upon being cross examined a specific answer was given which does not in any case conflict with affidavit evidence. I hold the answer in cross examination to be valid. The two deponents Webisa Sayiya and Webisa Siraj were relied

on by the petitioner to give evidence of interference with the electioneering activities. Both stated that as registered voters they were to vote at their polling station where they found the second respondent, Naleka and other supporters of the 2nd respondent had taken over the polling station. It was their evidence the 2nd respondent and Naleka denied them an opportunity to vote because they were supporters of the petitioner. For that reason they left the polling station without voting. Both the 2nd respondent and Naleka deny the allegations. It is submitted on behalf of the petitioner that Webisa Saiyiya and Webisa Siraj are from the same village as the second respondent and as such their testimonies should be believed. I am sorry but I find no logic in this especially if they belonged to different political camps. There should have been a report to serve as evidence that there was the alleged infraction at the time. This is particularly so given the denials of people alleged to have been involved.

Various offences were alleged to have been committed with the knowledge and consent or approval of the second respondent. The offences were said to have been committed at various polling stations. None of those alleged offences was proved to have come to the notice of the polling officials, none of those alleged offences was proved to have been reported to any polling officials, the police or other authority. What is more, I do not find it proved that the alleged offences and malpractices, presuming they took place, were done with the knowledge consent or approval of the second respondent. It behooves the petitioner to adduce evidence which assist should prove this also. There is no such evidence.

In the result I find the petitioner has not proved any of the allegations in the petition to the required standard of proof. The petition is dismissed with costs.

Paul Mugamba

Judge

18th August, 2011.