

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT GULU**

**IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT,  
ACT NO. 17 OF 2005 AS AMENDED BY ACT OF 2010**

**IN THE MATTER OF THE ELECTORAL COMMISSION ACT  
CAP 140 (AS AMENDED)**

**AND**

**IN THE MATTER OF THE PARLIAMENTARY  
ELECTIONS RULES 1996**

**AND**

**IN THE MATTER OF THE WOMAN MEMBER OF PARLIAMENT  
ELECTIONS FOR NYOWA DISTRICT HELD  
ON THE 18<sup>TH</sup> DAY OF FEBRUARY, 2011**

**ELECTION PETITION NO. 0004 OF 2011**

**AKIDI MARGARET:.....: PETITIONER**

**VERSUS**

**1. ADONG LILLY )  
2. ELECTORAL COMMISSION ).....: RESPONDENT**

**BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO**

**JUDGMENT**

The Petitioner contested for the Woman Member of Parliament for Nwoya District which was part of the general elections held throughout the County on the 18<sup>th</sup> February, 2011. The 1<sup>st</sup> Respondent was declared the winner by the 2<sup>nd</sup> Respondent. She was said to have won by 7,253 (seven thousand two hundred fifty three) votes as against the Petitioner who got 5,522 (five thousand five hundred twenty two) voted. The results were gazetted by the 2<sup>nd</sup> Respondent vide Gazette CIV No. 16, General Notice No. 158 of 2011.

The Petitioner was not satisfied with the above results contending among other things, that the said elections were done in non-compliance with the electoral laws in force and that there were several electoral offences committed by the 1<sup>st</sup> Respondent by herself and through her Agents with her knowledge, approval and consent. The Petitioner contended that all those offences and non-compliances affected the results of the election in a substantial manner.

The Petitioner was represented by Komakech Kilama & Co. Advocates. The 1<sup>st</sup> Respondent was represented jointly by Bakiiza & Co Advocates and M/S Odongo & Co. Advocates while the 2<sup>nd</sup> Respondent was represented by M. B. Gimara Advocates.

At the commencement of the hearing Counsel for all the parties agreed to file a joint memorandum of scheduling and the same was signed and filed on the 21<sup>st</sup> day of Just, 2011.

**Agreed Issues:**

- (1) Whether the election of the Woman Member of Parliament for Nwoya district was conducted in non-compliance with the provisions of the electoral laws.
- (2) If so, whether the non-compliance affected the result of the election in a substantial manner.
- (3) Whether an illegal practice or offence was committed in connection with the 2011 Parliamentary election for Nwoya Woman Member of Parliament by the 1<sup>st</sup> Respondent.
- (4) Whether this case is fit and proper for a recount to be ordered.
- (5) Whether the affidavit in support of the 1<sup>st</sup> Respondent's reply/reply to the petition offends the law (commissioner for Oaths (Advocates) Act) and should be struck off.
- (6) What are the remedies available to the parties?

The following documents were agreed upon.

- (a) The Uganda Gazette Vol. CIV No. 16 dated the 4<sup>th</sup> March 2011.
- (b) The letter dated the 21<sup>st</sup> February, 2011 authored by the Petitioner.
- (c) The Daily Monitor dated 24<sup>th</sup> February, 2011 (Thursday).
- (d) The Results tally sheet, District Woman Member of Parliament, Nwoya County dated 23<sup>rd</sup> February, 2011.
- (e) The return form for transmission of results, Nwoya District dated 19<sup>th</sup> February, 2011.
- (f) The Revised Electoral Commission Roadmap for 2011-2011 General Elections.
- (g) Declaration of Results Form, Nwoya District, Alero Sub-County, Parido Primary School Polling Station.
- (h) A letter dated 7<sup>th</sup> February, 2011 from the office of the District Registrar, Nwoya announcing candidates for the position of polling day officials.
- (i) Document from the 2<sup>nd</sup> Respondent showing all polling stations in Nwoya for the 2011 General Elections.

**Disputed Documents:**

- (a) Ballot paper No. 036173 for District Woman Representative to Parliament, Nwoya District, Kulu-Amuka P.7 B.
- (b) Ballot paper No. 0020020 for directly elected members of Parliament, Nwoya, KOCH COO Rom P.7 School.

- (c) Letter from the Criminal Investigation Directorate to Margaret Odong dated 6<sup>th</sup> May, 2011.

With all the pleadings completed, all the advocates filed written submissions within the time framework directed by this court.

Counsel for the 1<sup>st</sup> Respondent raised a pertinent preliminary issue on points of law which I have to dispose of before discussing the general merits of the petition.

The first point of law raised was that the petition was totally defective for noncompliance with the provisions of **the Parliamentary Election Act – Section 61 (4)** which is coined in mandatory. Counsel argued that the above section sets out statutory causes of action which must be specifically pleaded but was not followed. Counsel also submitted that **Section 63 (4) of the Parliamentary Elections Act** which sets out the ordinary prayers in a petition were not complied with. They relied on the case of **Prof. Peter Anyang’Nyongo’ & others v Attorney General of Kenya & Others. East African Court of Justice Ref. No. 1 of 2006.**

Secondly the learned Counsel submitted that the Petitioner referred to a non-existent Election Petition Rules 1999, as the law applicable to this petition. They submitted that the obsolete rules referred to by the Petitioner were replaced by the Parliamentary Elections (Election Petitions) Rules of 2005.

They concluded that by citing obsolete rules of Procedure and filing a petition which did not disclose a cause of action were substantial matters which go to the root of the petition. Accordingly, they submitted that the petition be struck out with costs.

Counsel for the Petitioner in his reply submitted that the mere citing of the sections cannot bestow a cause of action on the Petitioner. He submitted that if they had only quoted the section without providing evidence, by way of affidavit then there would be no cause of action. He further submitted that the Petitioner had locus standi and a cause of action as a former candidate and a loser.

On the issue of the Rules Counsel submitted that the rule quoted was almost “*PARI MATERA*” with the new Rules but that in itself did not bestow the Petitioner with a cause of action. He contended that the above errors could be cured by **Article 126 (2) (e) of the Constitution**. He concluded that it is now the position of courts that such a mistake by Counsel should not be visited on the litigant. Counsel concluded that the case of **Prof. Peter Anyang’Nyongo** cited by Counsel was not binding but merely persuasive.

At this point I would like to state that Electoral process and good governance is a matter of concern to the citizens of this country. Given the anxieties that accompany elections everywhere and their potential for causing conflicts the courts of laws as umpires of last resort should be very scrupulous in analyzing every circumstances of the dispute in order to arrive at a fair and just resolution. I must also add that the world is now a global village. The whole world as a Global family is now interested in every activities taking place in this country including social, political and economical.

As far as democracy and good governance is concerned we are bound by international protocols which emphasize among other things that our elections should be free and fair. See: **The East African Treaty; SADC Treaty; African Charter on Democracy Election and Governance**.

Let me talk more about the East African Country Treaty. **Article 123 of the Treaty** provides for the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms. The treaty further provides for the establishment of the East Africa Court of Justice which is a judicial body which ensures the adherence to the law in the interpretation, application and compliance with the treaty. It is therefore not true that we are not bound by the decisions of the EACJ. All states parties are bound by the decisions of the EACJ in respect of the **Articles of the Treaty such as Article 123: See EACJ Ref. No. 1 of 2011 Hon. Sitenda Sebalu v The Secretary General of the EAC, the Attorney General of the Republic of Uganda, Hon. Sam Njuba and Electoral Commission of Uganda**.

In light of the above findings I find that the case of **Prof. Peter Anyong’Nyongo’ (Supra)** cited by Counsel for the 1<sup>st</sup> Respondent not only binding but also very persuasive. The decision in ANYANG’NYONG’O emphasized that cause of action under common law as defined by Auto Garage was different from one created by Statute or other legislation.

I have perused the petition very critically. Although the Petitioner does not mention **Section 61 (4) of the Parliamentary elections Act**, the petition mentions that the Parliamentary elections was not carried in compliance with the Constitution, Parliamentary Elections Act and Electoral Commission Act. All these are canvassed in paragraphs 4-8 of the petition. The above events were supported by the Petitioner’s affidavit and other supporting affidavits. The above information clearly puts the Respondents on notice as to how to respond to the allegations. I therefore find that failure to cite the enabling **Section 61 (4) of the Parliamentary Elections Act** was not fatal to the petition.

As for citing wrong Rules of Procedure, this was the negligence of an Advocate which should rarely be visited on an ignorant litigant. Obviously, there was lack of due diligence in carrying out ordinary research on law applicable. Counsel even went that far to argue that the expunged law was in PARI MATERIA with the new rules. I wonder whether he would rely on a British law in pari material with Ugandan law as binding in the circumstances.

Be that as it may, this court is not a court of discipline but court of law. The procedural law applicable is well known and can still be applied. The error can therefore be cured by **Article 126 (2) (e) of the Constitution** to allow court to determine substantial rights of the parties.

#### **RESOLUTION OF ISSUES:**

**ISSUE NO.I: Whether there was non-compliance with Electoral laws:**

Non compliance with electoral laws as a ground for vitiating a Parliamentary election is a matter of Statute as provided under **Section 61 (1) (a) of the Parliamentary Elections Act, Act 17 of 2005 as Amended.**

**Burden of proof:**

The Statutory burden of proof in an election petition lies on the Petitioner, and the standard is on the balance of probabilities:

See: **Section 61 (3) of the Parliamentary elections Act, Act 17 of 2005.**

See: **Sitenda Sebalu v Sam Njuba, Election Appeal No. 6 of 2009.**

The Petitioner alleged the following non-compliances:-

Vote stuffing, vote buying, voting by non-registered persons, rejection of valid votes as invalid, non-displaying of election results at conspicuous places at the polling station, forgery, briberies.

These were spelt out in paragraphs 4 and 5 of the petition:-

**(a) The 2<sup>nd</sup> Respondent did not control and use the ballot papers contrary to Section 12 (1) (b) of the election Commissions Act.**

**Toorach Michael** deponed that he found ballot papers at Ywanya Parish Onyomtil village – Anaka Sub-county while hunting. He stated that the ballot papers he found were for Kulu-Amuka polling station ticked in favour of the Petitioner and that of Coo-Rom polling station ticked in favour of Oyet Simon.

The 2<sup>nd</sup> Respondent replied that the ballot boxes were blown by wind. The 1<sup>st</sup> Respondent produced witnesses from Kulu-Amuka polling station who were voters at that station who were present during the voting who stated that whirlwind opened the ballot box for Woman Member of Parliament. They also confirmed that the public helped the election constables to recover the

ballot papers taken away by the wind. The 1<sup>st</sup> Respondent conceded that may be one of them could have escaped with the wind.

The incident was also reported in the Monitor Newspapers of 15/2/2011 by one Cissy Makumbi. It was the contention of the Petitioner that no amount of wind would have opened the ballot boxes and that if it happened it should have been backed by a Report Book as provided for in **Section 48 of the Parliamentary Elections Act No. 17 of 2005 as Amended.**

The issue of ballot papers being blown away was reported to the whole world in Monitor Newspapers of 19/2/2011. The officials of the 2<sup>nd</sup> Respondent might have been negligent due to an oversight. However I do not think the said Act of God only affected the Petitioner any more than the rest of the candidates. In election process benefits due to human deficiencies should be taken into account. Parties should not be allowed to build issues out of every incident.

**(b) Establishment of new polling station:**

It was contended by the Petitioner that the 2<sup>nd</sup> Respondent violated **Section 12 (11) (d) of the Electoral Commission Act** by creating/transferring polling stations without notifying the Petitioner and other candidates and instead chose to notify the 1<sup>st</sup> Respondent to the prejudice of the Petitioner. Further, that the 1<sup>st</sup> Respondent through her agents hired lorries/trucks to ferry voters to the transferred polling stations since she was informed in advance and had formal means/resources to do so. The polling station transferred was Parido to Lungulu polling station. The Petitioner relied on the affidavits of deposed by Rose Lamunu, Florence Akwongo and Nancy Anena.

It was contended on behalf of the Respondents that Parido polling station was first located at the school near IDP Camp. When the camp was dissolved, people returned to their homes and the location became a problem because it was central to the village. Hence relocation of the polling station to Lungulu. After the relocation voting took place as scheduled.



Once again it was the duty of the Petitioner to prove that there was foul play in the relocation of the polling station in question. I have noted the reason for relocation. I think it was a genuine concern of the 2<sup>nd</sup> Respondent to relocate the same to a convenient point to all the villagers concerned. The Sub-villages which originally constituted Parido i.e. Lungulu, Aguruk, Lumik, Nyamokino, etc had a low population to warrant setting up polling station. I do not think there was good faith in contending that the Petitioner did not know the changes and that only the 1<sup>st</sup> Respondent was informed of the changes. How then did the Petitioner's supporters and polling agents know of the changes such that they traveled and voted for her as shown in annexure Y to the petition?

Lastly the 1<sup>st</sup> Respondent vehemently denied allegations of transporting voters in trucks. I do not have reasons to disbelieve her.

**(d) Elections were not free and fair C/S 12 (1) (e) of the Electoral Commission Act.**

It was contended by the Petitioner that the elections were not conducted in a free and fair manner as one OMAVA intimidated voters together with his colleagues with impunity.

In his affidavit Omayo Dominic denied intimidating anyone on behalf of the 1<sup>st</sup> Respondent. None of those who swore affidavits in support of the petition i.e. Lamunu rose, Akwongo Florence or Anena Nancy did not allege intimidation by Omayo Dominic or anybody else but rather that Omayo refused them to enter the truck under his control.

In my view this was the weakest allegation in the petition. The Petitioner attempted to establish in affidavits that UPDF soldiers were involved in the voters intimidation but his allegation was dropped in the submissions of Counsel. Instead Captain Peter Mugisha, Odong George and Angwech Betty Ojok indicated that the Army was never involved in the Nwoya Elections. The

affidavit of Angwech Betty Ajok is of special significance because she was one of the candidates for Woman Member of Parliament who lost the elections. She clearly stated that the election was free and fair and that she found no merit in the complaints about the elections. The contention by the Petitioner that her evidence be disregarded because the Petitioner had defeated her in FDC primaries does not hold any water. Counsel should have cross-examined her to establish that she was prompted by grudge. He cannot now assail the said affidavit. I therefore hold that the said elections were free and fair in accordance with **Section 12 (1) (e) of Electoral Commission Act.**

**(d) Civic Education:**

The Petitioner alleged that there was lack of civic education which led to her votes being rejected because the 2<sup>nd</sup> Respondent was leaning towards the 1<sup>st</sup> Respondent.

If there was lack of civic education the impact would have gone across-board covering the intelligence of all the voters in the Constituency. The contention of the Petitioner seems to suggest that only the Petitioner's voters were affected by lack of proper civic education. The Petitioner should have addressed this problem during campaign and before going to the polls. To that extent, I consider the above ground a mere afterthought and it is dismissed with all its contempt.

**(e) Declaring Petitioner's votes as invalid and yet the intention of the voters could be ascertained.**

In paragraph 8 of the Petitioner's affidavit she alleged that many of the ballot papers ticked in her favour were rejected notwithstanding the fact that the voter(s) placed the authorized mark of choice within her space in the ballot paper, especially on her party symbol (the key); her photograph among others and that all those were rejected as invalid votes despite protest from her agents such as a one Lakony Michael.

The response of the Respondents was that there was no proof not even by a single affidavit to support the allegation of any incident where a ballot was rejected as invalid and in favour of the Petitioner. DR forms signed by the Petitioner's agents should have indicated the above but none was produced by the Petitioner. Instead the Petitioner was pressing for a recount of ballot boxes.

As shown by the 1<sup>st</sup> Respondent the number of invalid votes in the Constituency were 912. One wonders if those votes were added to the Petitioner's whether it would alter the results in a substantial manner. The answer is in the negative. The above ground automatically fails like a pack of cards.

#### **Display of Results under Section 50 (1) (b) Parliamentary Elections Act.**

The Petitioner contended that the DR Forms were not displayed thus contravening the above laws.

The 2<sup>nd</sup> Respondent relied on an affidavit sworn by Ezale Oshman, the returning officer that he had never received any complaint from the Petitioner relating to the displaying of the DR Forms because the same were displayed.

I do not agree with the Petitioner on this point. From the record, Petitioner attached a copy of the Declaration of Results Forms duly signed by her polling agents (annex 4). In any case **Tsekooko JSC in Sitenda Sebalu v Sam Njuba, Election Petition Appeal No. 6 of 2009 (Supra)** stated that the provisions regarding DR Forms in the Act were only directory and not mandatory. Therefore non-compliance with them was not fatal to the final results.

All in all I find the allegations of non-compliance with the election laws were not established to the required standard and cannot stand.

**Issue No. 2: If so, whether non-compliance affected the result of the elections in a substantial manner.**

The issue of non-compliance affecting the results substantially has to be premised on proved irregularities. See **Joy Kabatsi v Anifa Kawoya (Supra)**.

In the instant case there was no proof of non-compliance and that should dispose of this issue. However, according to the Respondents there were **912 invalid votes and 352 spoilt votes totaling 1,264 votes. The vote difference between the 1<sup>st</sup> Respondent and the Petitioner is 1,731.** The above cannot affect the results even if it is assumed that all the invalid and spoilt votes belonged to the Petitioner alone, which is impossible.

In conclusion the Petitioner has failed to prove that there was non-compliance with the electoral laws and that the non-compliance affected the results in a substantial manner.

**Issue No. 3: Whether an (any) illegal practice or offence was committed in connection with the 2011 Parliamentary elections for Nwoya Woman Member of Parliament by the 1<sup>st</sup> Respondent.**

Illegal practices are set out in **Section 68, 69, 70 and 71 of the Parliamentary Election Act.** Offences are also listed in the Act. Both an illegal practice and an offence under the Act must be proved on the preponderance of evidence i.e. balance of probabilities.

**Bribery of voters at Parido Centre:**

It was alleged that the 1<sup>st</sup> Respondent gave money to one Amito Pauline to distribute to the voters. Anena Nancy and Lamunu Rose claimed to have got Shs.200/= from the said Amito.

Lamunu Pauline and 1<sup>st</sup> Respondent denied that the 1<sup>st</sup> Respondent never went to Parido. Atii Paula the campaign agent of 1<sup>st</sup> Respondent swore affidavit denying being given money for vote buying.

Before an election is annulled for bribery other considerations have to be made. The court will take account of the provisions of **Section 63 (3) of the Parliamentary Elections Act**. This is so because elections in this country are highly politicized and are matters of life and death. That is why the law in its usual kindness provides that unless the acts complained of are substantial court should not annul simply because there were isolated cases of bribery. Thus the above Section provides that:

*“... the vote given for a candidate by that person shall be deducted from the total number of votes given for the candidate at the election.”*

However, there was an indication that the said Lamunu Rose, Akwango Florence and Anena Nancy did not vote.

As for allegation of bribery against Martin Ojul, affidavit of Police Detective Silver Loris Ongom was to the effect that there was no merit in the allegations.

For the above reasons I find it difficult to rely on the allegations of bribe as a ground for annulling the elections in question.

**Obstruction of a person from voting:**

Affidavit of Akwongo Florence was to the effect that Omayo barred them from going to vote when the said Omayo ordered them to disembark from the lorry they had hired. Anena Nancy also deponed to the same effect.

The vehicle in question was hired by Omayo. Omayo was therefore right to refuse to give a lift to whoever he did not approve, including Anena and Akwongo. That did not constitute obstruction. It would have amounted to obstruction if the two had boarded the vehicle up to the polling station and later on denied to disembark to vote.

Further more, there was no proof that the said Omayya had connection with the 1<sup>st</sup> Respondent. There was no proof that Omayya was an agent of 1<sup>st</sup> Respondent nor that he did all that he did with the knowledge, consent or approval of the 1<sup>st</sup> Respondent although he was said to be an agent of NRM Party. Being NRM party agent could not make him an automatic agent of the 1<sup>st</sup> Respondent. The petition failed to adduce an independent cogent evidence to prove the above allegation.

**Campaigning within 24 hours from polling day C/S 20 (5) of Parliamentary Election Act:**

**Section 20 (5) of Parliamentary elections Act** states:

*A campaign meeting shall not be held within twenty-four hours before the polling day.*

It was alleged that the 1<sup>st</sup> Respondent campaigned at Parido Trading Centre within 24 hours from the polling day.

Counsel for the 1<sup>st</sup> Respondent contended that Parliamentary Elections Act does not declare campaign within 24 hours from voting as an illegal practice. He submitted that the above law was an administrative matter to be monitored and remedied by the Electoral Commission. I think the provision of **Section 20 (5) of Parliamentary Elections Act** was not meant to be mandatory but directory since the Act does not provide for remedies against the offender. It was an administrative tool by the Electoral Commission to monitor and to give rest to candidates and calm to the electoral candidates. Violating the same would not allow for annulment of the results.

For the above reasons I conclude that the Petitioner has failed to prove any illegal practice or offence committed by the 1<sup>st</sup> Respondent or by anyone else with her knowledge, consent or approval. This issue is accordingly answered in the negative.

**Issue No. 4: Whether this case is a fit and proper case for a recount to be ordered:**

The Petitioner advanced the following reasons for the recount:-

- (i) That it would be in the interest of justice and democracy and that the recount would prove that the declared results tally with what was in the ballot boxes.
- (ii) That no ballots were removed and stuffed before, during or after the elections.
- (iii) That the rejected or votes to be valid or spoilt are actually invalid or spoilt votes and establish whose votes they were.
- (iv) That there was no foreign ballot papers brought from illegal sources and placed in the ballot boxes to favour 1<sup>st</sup> Respondent.
- (v) That all the serial numbers of the ballots cast correspond with those sent to the various polling stations.
- (vi) That all the votes correspond with the number of persons who voted on 18/2/2011 at each of the polling station.
- (vii) That reports of events and incidences on 18/2/2011 were all recorded and placed in the ballot boxes and authenticated.
- (viii) That the results that the Petitioner's agents were verbally told correspond with what the Declaration of Results forms state and whether the results that are on the DR Forms obtained by the Petitioner tally with what is on the Dr Forms sealed in the black Ballot boxes.

Under **Section 63 (5) of the Parliamentary Election Act**, the High Court can order a recount during the trial if the court is satisfied that there were such irregularities and on such a scale as to warrant entering the ballot boxes for a recount.

In the instant case there were no such irregularities to warrant a recount. The circumstances under which a recount is being preferred should have been pursued under **Section 55 of the Parliamentary Elections Act** before the Chief Magistrate. It

seems the Petitioner flouted that procedure. All in all I find that this is not a deserving case for a recount. Even if it was I do not think a recount would deliver justice as there was no evidence to establish that the integrity of the ballot boxes were intact and well secured.

**Issue No. 5: Whether the affidavit in support of the 1<sup>st</sup> Respondent's reply/answer to the petition offends the law (Commissioners of Oath (Advocates) Act and should be struck off.**

This issue is a non-starter as the Petitioner has failed to establish her case on the balance of probabilities. In any case, Akena did commission the affidavit in his own capacity as Akena the Advocate who only shared box number with Odongo & Co. Advocates.

**Issue No.6: What are the available remedies?**

Upon making the analysis above I do not believe that a case has been made out for the nullification of the election of Woman MP for Nwoya. I accordingly dismiss the petition with costs.

There was prayer that Certificate of two Counsel be granted and Certificate of complexity be granted as well. In all fairness I am of the view that Certificates of two Counsel be granted but not that of complexity. **I so Order.**

**HON. MR. JUSTICE RUBBY AWERI OPIO**

**JUDGE**

**21/7/2011**

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