THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CV-EP-0034 OF 2011

HCT-00-CV-EP-0003 OF 2011(NAKAWA)

IN THE MATTER OF THE LOCAL GOVERNMENTS ACT (CAP. 243)
AND
IN THE MATTER OF THE PARLIAMENTARY ELECTIONS
(ELECTION PETITION) RULES SI 141-2
AND
IN THE MATTER OF THE ELECTION FOR LCV CHAIRPERSON WAKISO DISTRICT
HELD ON 23RD FEBRUARY 2011

NSUBUGA JONAH:: PETITIONER

- VERSUS –

THE ELECTORAL COMMISSION :::::::::::::::::::: 1ST RESPONDENT

BWANIKA MATHIAS LWANGA :::::::::::::::::::: 2ND RESPONDENT

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT:-

NSUBUGA JOHAN (hereinafter referred to as the "Petitioner") brought this petition challenging the election of BWANIAKA MATHIAS LWANGA (hereinafter referred to as the "2nd Respondent") as the LCV chairperson for Wakiso District. The Petitioner was duly nominated as a candidate for the LCV Chairmanship for Wakiso in the 2011 General elections held on 23rd February 2011. The Petitioner contested with other candidates who included the 1st Respondent and one other DENIS MUSISI DDAMBA. The Electoral Commission (hereinafter referred to as the "1st Respondent") returned and declared the 2nd Respondent as validly elected LCV Chairperson for Wakiso District with the highest number of votes. The declared results were as follows:-

(i) 2nd Respondent - 96,372 votes;

(ii) The Petitioner - 88,005 votes;

(iii) Musisi Ddamba - 2,517 votes.

The Petitiner brought this petition seeking that court may declare that:-

a) The 2nd Respondent was not validly elected as LCV Chairperson for Wakiso District;

b) The said election be annulled and set aside and new elections held.

c) In the alternative, but without prejudice to the foregoing, a vote recount be conducted under the directions of court.

d) The Respondents pay costs of this petition.

e) Such other remedy available under the electoral laws as the court considers just and appropriate.

Let me first clarify that the prayer (e) above is redundant. It is the settled position in Law that the phrase "such other remedy available court considers just and appropriate" is not a specific prayer for a particular remedy, because courts cannot "shop around" for remedies on behalf of litigants. ***Order 7 rule 7*** of the ***Civil Procedure Rules***, which is applicable to election petitions by virtue of ***Rule 17*** of the ***Parliamentary Elections (Election Petitions) Rules, SI 141-2;*** is to the effect that a party seeking reliefs in court should make specific averment as to the reliefs sought either simply or in the alternative. See also ***Nkambo v. Kibirige [1973] EA 102; Odd Jobs v. Mubia [1970] EA 476***. Prayers such as (e) above add nothing to what is prayed for, and such a statement is a mere surplusage and cannot be used as an inclusive cover up to avoid penalty for sloppy and inadequate drafting of pleadings. See ***Take Me Home Ltd v. Apollo Construction [1981] HCB 43.*** Therefore, court will disregard prayer (e) as adding no value to the remedies sought in this petition.

The Petitioner advanced multiple grounds, but in the main they converge on the major one that the election was not conducted in accordance with the Law, which violated the cardinal principles of freedom and fairness. In addition, the Petitioner contended that the non-compliance with the law and the violation of the principles of freedom and fairness affected the result in a substantial manner in that the election was a nullity, and the Petitioner wants this court to declare it so.

The petition is supported by the affidavit of the Petitioner dated 23rd day of March 2011. The Petitioner also attempted to file two other additional affidavits; one which was sworn on the 20th June 2011, and was received in the Court Registry on the 21st June, 2011, and another one whose date of swearing was left blank, but was received in the Court Registry on the 23rd June, 2011. All the three affidavits of the Petitioner raise serious issues of form and substantive law, as well as touch on the admissibility of affidavit evidence which, in my view, affect the entire petition which is solely premised on them.

The Respondents, for their part denied all the allegations in the petition. The 1st Respondent made a general denial contending that the election was conducted in accordance with the principles of the elections and the Law, and that there were no irregularities or rigging or malpractices, and that even if these occurred, they did not affect the election result in a substantial manner.

The 2nd Respondent for his part, mainly countered that there were no electoral irregularities, rigging, or malpractices, and that he never connived with, or condoned any of the persons named by the Petitioner as having violated the electoral laws; and that he never benefited from the alleged rigging, malpractices and irregularities. Both Respondents prayed that the petition be dismissed with costs.

The Petitioner was represented by Mr. Kabega Moses of M/s Kabega, Bogezi & Bukenya Co. Advocates, together with Mr. Kakuru Kenneth of M/s Kakuru & Co. Advocates. The 1st Respondent was represented by Mr. Kawuma Terance of M/s Muwema & Mugerwa Advocates, while Mr. Kiwanuka Abdul of M/s Lukwago & Co. Advocates appeared for the 2nd Respondent.

At the scheduling conference, the following issues were agreed and framed by the counsel for court's determination:-

1. Whether the election of the LCV Chairperson Wakiso District was conducted in accordance with the laws governing election.
2. Whether the non-compliance, if any, affected the outcome of the elections in a substantial manner.
3. Whether the 2nd Respondent personally or through his agents, or with his knowledge and approval committed any electoral offences and/or illegal practices.
4. What are the remedies available to the parties?

At the commencement of the hearing, all the parties indicated that they would not call witnesses for cross-examination, and agreed to file written submissions. A schedule was also agreed upon by all the parties, that the Petitioner would file and serve copies of the submissions on to the Respondents' counsel by 21/6/2011, the Respondents would file and serve the Petitioner any replies by 28/6/2011; and the Petitioner would file and serve any rejoinders by 5/7/2011. Judgment would be delivered on 19/7/2011. This schedule was agreed upon bearing in mind the statutory requirements and the need for the expeditious hearing of, and determination of the election petitions.

It was, therefore, rather surprising that instead of filing the written submissions as agreed, the counsel for the Petitioner instead filed a letter with the Registry on 21st June, 2011 seeking to be

allowed more time for the reason that the particular counsel with conduct of the case was reportedly away. They asked for the 24/6/2011 to do the necessary filing. Once again they defaulted on that self-appointed date, and instead filed their written submissions late on 27/6/2011. This would not have raised serious concerns had the Petitioner not filed another supplementary affidavit introducing fresh evidence on the record on 21/6/2011, long after pleadings had closed, and even then without the leave of the court. The Petitioner claimed, in paragraph 2 of the said supplementary affidavit, that:-

> ***"That upon my request court did direct the 1st Respondent to avail me with declaration form and tally sheets, in respect of elections the subject of this Petition."***

This is, however, not the true reflection of the court record. What transpired was that the Petitioner's counsel, Mr. Kabega Moses, wanted court to adjourn the hearing in order for him to first gather documentary evidence from the Electoral Commission (EC) - the 1st Respondent. The counsel for the EC, Mr. Kiwanuka Abdul, opposed the adjournment arguing that if the Petitioner indeed required the documents, he would have applied for, and obtained them long before the scheduling conference from the EC on payment of the prescribed fee. The EC was duty bound to avail them to him and could not refuse to do so. After considering the matter, this court ruled that the Scheduling Conference should proceed, and that it was up to the Petitioner's Counsel make the necessary application, if he needed any particular documents from the EC.

I understood the foregone proceedings to mean that it was up the Petitioner to bring whatever evidence he wished to prove his case, but did not suggest, in the least, that the he was free to file fresh evidence anytime he pleased after pleadings had closed, and the matter had proceeded to the submissions stage. The ruling of this court that it was up to the Petitioner to obtain any documents from the EC did not amount to granting of leave to the Petitioner to re-open his case

and to file fresh evidence after parties had duly closed their respective cases. There was no leave sought, and therefore, no leave was granted.

The irregular procedure adopted by the Petitioner put the Respondents in an awkward situation. It was certainly prejudicial to the other party who had no opportunity of properly responding to any issues raised in the fresh evidence. As a matter of fact, counsel for the 1st Respondent protested the continued filing of more evidence on the court record after the Petitioner had closed his case, and on 24/6/2011 wrote to the Registrar of the High court to bring it to his attention. The Petitioner did not file without leave only once, but twice. On 23rd June, 2011 he again filed more fresh evidence on record. I believe the Respondents were right to protest.

It needs to be emphasized that Petitions too, conform to rules that govern pleadings generally, by virtue of the operation of ***Rule 17*** of the ***Parliamentary Elections (Election Petitions) Rules, SI 141-2***. A party cannot simply file pleadings continuously on the record after it has closed its case. There must be an end to the filing of pleadings. Even if leave were to be sought, it could be properly done before parties have closed their respective cases. It was, therefore, improper for the Petitioner to attempt to re-open the case by the filing of more fresh evidence.

On his part, counsel for the 2nd Respondent also protested the irregular manner of filing fresh pleadings without being given fair notice to respond. In their written submissions, on page 4 thereof, they stated that:-

> ***"Before we proceed with our submissions, we take not of the evidence filed by the Petitioner on 22nd and 23rd of June 2011 after he had closed his case and we had no opportunity to reply to the same and cross-examine the petitioner…..We do object to the same to be on court record and invite court to disregard the said evidence when considering merits of this petition."***

As already stated, counsel for the 1st Respondent, for their part, had written to court on 24/6/2011, expressing "consternation" that rather than file the required written submissions, the Petitioner

had instead continued to file more evidence on record even after he had closed his case. Counsel then put the court on notice that they would object to the evidence being presented after the parties had closed their respective cases.

I could not agree more with the objections raised by both counsel for the Respondents. The supplementary affidavits put in by the Petitioner on the 21st and 23rd June, 2011 were indeed "smuggled" on to the court record. The Respondents had no opportunity to respond to the evidence raised therein, yet the legal position is that where facts are sworn to in an affidavit and these are not denied or rebutted by the opposite party, the presumption is that such facts are accepted. See ***Massa v. Achen [1978] HCB 297***. This would certainly put the Respondents at a disadvantage, in that they would not have been treated on the same or equal terms as the Petitioner. Such would be contrary to; and in violation of the principle of natural justice as to a fair hearing encapsulated in ***Article 28*** of the ***Constitution***; which cannot be derogated from.

Let me restate that the object of pleadings, *inter alia,* is to require each party to give fair and proper notice to his opponent of the case he has to meet to enable him or her to frame and prepare his or her own case for the trial, and this is essential to avoid the other party from being taken by surprise. These basic tenets of pleadings have been considered and confirmed in various decided cases of ***Reiding v Skyline Advertising (U) Ltd. 1971] HCB 166; Bisuti v. Busoga DA [1971] ULR 179; Thorp v. Holdsworth (1876) 3 CHD 647;*** and ***Esso Petroleum Co. Ltd. V Southport Corporation [1956] AC 218 at 238.*** Accordingly, I find that the evidence introduced by the Petitioner in his affidavits of 21st June, 2011 and 23rd June, 2011 cannot be allowed, and it is excluded.

I have also noted that the Petitioner's affidavit registered in court on 23/6/2011 bears no date on which it was deponed, and this appears in the *jurat*, hence it is serious omission. The error is

attributable to the Commissioner for Oaths, whose duty it is under ***Section 6*** of the ***Oaths Act (Cap.16)*** to insert the date. It is a professional *lache* that should not be visited on the Petitioner. I am inclined to disregard the omission as a technicality which does not go to the root of the affidavit, and is ignored and/ or curable under ***Article 126 (2) (e)*** of the ***Constitution.*** Having stated that, I still regard the supplementary affidavits as fresh evidence that could not be filed after parties had closed their respective cases, without leave of court. It is settled that a supplementary affidavit can only be filed with leave of court. See ***Samuel Mayanja v Uganda Revenue Authority, Miscellaneous Application No.17 of 2005,*** *per Egonda-Ntende J. (as he then was).*

I now turn to the affidavit in support of the petition. The parts on which the Petitioner seeks to relay to prove the alleged malpractices, irregularities and rigging are all clearly based on hearsay evidence. This fact has also been pointed out by the Counsel for the Respondents in their written submissions. The affected parts begin from paragraph 9 up to 23. I will reproduce them for ease of reference.

> ***"9. <u>That I have been informed by my agents and I verily believe them</u> that the presiding officers did not account for several ballot papers that were handed to them and this facilitated ballot stuffing at diverse polling stations as can bee (sic) seen from the declaration of results forms. Copies of the declaration of results forms are attached hereto collectively marked "B1-B25.***
>
> ***10. <u>That any agents have also informed me which information I verily believe to be true</u> that the presiding officers and the 2nd respondent's agents at different polling stations tampered with the results by reducing my votes and also adding the 2nd respondent more votes***

than he had obtained. Copies of such declaration of results forms are attached hereto marked "CI-C5".

11. That the presiding officers at <u>several polling stations entered wrong figures on the declaration of results forms</u> and this facilitated alteration of results and entering of wrong votes on DR Forms.

12. <u>That I have been informed by my agents which information I verily believe to be true</u> that there were many cases of ballot stuffing and some voters were issued with more than one ballot paper. Copies of declaration for results forms which have excess votes are collectively attached hereto marked "D1-D15",

13. <u>That the presiding officers at different polling stations caused the disappearances of election materials/ballot papers</u> and failed after counting process to account for the missing ballot papers as can be seen from the declaration of results forms. Copies of the declaration of Results forms are attached hereto collectively marked "E1-E16".

15. <u>I was informed by my agents whose information I verily believe to be true</u> that several polling stations there were more votes than the people who had actually case their votes due to ballot stuffing and issuance of more than one ballot papers. Copies declaration of results forms are attached hereto collectively marked G1-26.

16. <u>That I was informed by my agents Nakiggude Caroline and Nasukusa Matilda that the 2nd respondent's agent intimidated and threatened my known supporters</u> and stopped them from voting at Nansana West IB especially Kasozi Paul and Yawe Livingstone.

18. <u>That I was informed by my agent Kagiri Arafat</u> that Kazo Central polling station MUK-NAK the presiding officer was allowing people to vote in names of other voters when they were not registered to vote at this polling station.

19. <u>That I was informed by my supervisor, Tonny Kirumira</u> that the 2nd respondent's agents campaigned and ferried voters at Kazo Central to

vote for Bwanika and this was mainly done by Bumba Joy and Ali Kyagulanyi.

20. ***<u>That I was informed by my agent Sentongo Catherine</u> that many of my valid votes where (sic) declared invalid and the presiding officer refused to record her complaint at Kazo Lugoba Nursery School L-NAKIG.***

21. ***<u>That I was informed by most of my agents</u> that they were duped and others were forced to sign blank declaration of result forms much earlier before the end of the voting exercise under the guise of time management and facilitated the alteration of results.***

22. ***<u>That I was informed by my agent supervisor</u> Nyanzi Moses that the 2nd Respondent bribed votes with money, sugar and promise for tenders in case he is elected in office.***

23. ***<u>That I was informed by my agent Yusuf Sulaiman</u> that 2nd Respondents(sic) agents where (sic) campaigning at polling stations using the slogan – "genda olime" "oze kulima" which slogans were intended to guide the voters to vote for the hoe (DP) (sic)".*** ***(****Underlined to highlight the hearsay aspects of the evidence).*

It is obvious that the facts the Petitioner deponed to constitute hearsay evidence. Of course, as a candidate in the LCV election race, the Petitioner would not be expected to be personally at every of the 1019 polling stations in the entire District, but only to have his known agents at those polling stations to take care of his interests. However, having obtained information from these agents – some of whom are not even disclosed at all – the Petitioner should have required them to adduce evidence by way of affidavits, to prove what he claims they witnessed of the alleged irregularities and/or malpractices on those particular polling stations. They did not adduce any evidence in support, and that left the evidence of the Petitioner the worst kind of

hearsay. It raises very serious questions as to the admissibility of such evidence for a number of reasons, which I will state here below.

(i) Hearsay evidence is only admissible on the principled basis, the governing one being the reliability of the evidence and its necessity. Using the reliability test, the question to ask in the instant case is: can the information the Petitioner claims to have obtained from his agents, who never put in evidence to confirm what is attributed to them be reliable? In my view it is not. This is particularly so given the fact that it cannot be determined with certainty that it was the exact kind of information the agents gave to the Petitioner, if they did at all. Similarly, it cannot be ascertained from the available evidence that the so-called agents even existed, since a good number of them are not named. The Petitioner makes sweeping statements such as, "I was informed by most of my agents"; which is the most absurd way to conceal the sources of information and evidence in support, which remain anonymous, and as such the evidential value is greatly diminished. The correct position, in my view, is that the evidence set out in an affidavit should be confined to the particular facts within the personal knowledge of the deponent, except where the hearsay exception rule applies. I am alive to the fact that evidence by affidavit may constitute one of the exceptions to the hearsay rule, but where the fact in issue needs to be proved, the evidence of the witness who is alleged to have witnessed the fact needs to be called to prove the fact in issue. Therefore, the failure to adduce evidence in support from the alleged agents puts the particular affidavit of the Petitioner outside the exception to the hearsay rule.

(ii) When a statement is made to a witness by a person, who is himself or herself is not called as a witness, such evidence is inadmissible particularly where the object of the evidence is to establish the truth of what is contained in the statement. The rule against hearsay, in the strict

sense, is that a witness who proves the out-of-court statement has no personal knowledge of the facts stated, and a party against whom the statement is tendered has no opportunity of cross-examining its maker.(see ***Cross On Evidence (1979 5th pp. 7-8 Edition)***. In the instant petition, the parts of the Petitioner's affidavit in support of the petition with hearsay would not be admissible as long as it was clear that the alleged agents would not be available to put in affidavits in support of the statements attributed to them by the Petitioner, upon which they could have been cross-examined by the opposite party.

(iii) The admissibility of hearsay evidence is a matter of substantive law, and in considering whether or not to admit the hearsay evidence, courts are usually guided by the "threshold reliability test", which requires that the circumstantial indicators or guarantees of reliability be present to completely avoid instances such as where the declaration is likely to be fabricated or inaccurate as opposed to true or accurate. The exclusion of hearsay evidence is to the effect that evidence of previous representation made by a person is not admissible to prove the existence of a fact that the subsequent person intended to assert by that representation. In the instant petition, the so-called agents, if any, have remained voiceless and faceless. Their alleged information cannot be independently verified, or constitute, or be substituted for evidence of another party. There is a high likelihood of "putting words into the mouths" of these anonymous agents, which makes the evidence in the affidavit of the Petitioner highly suspect and unreliable. It fails the threshold reliability test.

(iv) In determining the admissibility of hearsay evidence, such as contained in the Petitioner's affidavit, it is the reliability of the deponent that is in issue more so than the credibility of the witness to the hearsay. An affidavit with hearsay will be admitted at trial as long as there is some indication that the out-of-court declarant will be available and willing to testify in

accordance with the hearsay statement. In the instant case, it would be difficult to relay on the evidence of the Petitioner, particularly in absence of verifiable evidence from the other sources of his information to testify in accordance with the Petitioner's hearsay statements.

I have taken note of the fact that copies of the Declaration of Results Forms (DRFs) were referred to in the Petitioner's affidavit, and attached in an attempt to show the alleged irregularities and malpractices. But the having stated that the information of alleged malpractices is contained in the DRFs as stated by his agents, the Petitioner should have followed up by adducing the evidence of those agents, whom he claims witnessed the malpractices and irregularities, in order to match it with the information on the DRFs. Instead, the Petitioner just filed a mass of documents and left the court on its own devices to sift through and guess whether or not there could have possibly been evidence to prove right his suspicion of the alleged malpractices and irregularities. In my view, this amounts to shifting the burden which is always cast upon the Petitioner, and not otherwise, to prove the allegations in the petition to the satisfaction of the court, on the balance of probabilities as required by ***Section 61(3)*** of the ***Parliamentary Elections Act.*** Whereas the ***Local Governments Act*** does not specifically provide for the burden of proof in election petitions brought under the Act, ***Section 172*** thereof stipulates that the principles relating to the ***Presidential Elections Act*** and the ***Parliamentary Elections Act (Act 17 of 2005)*** shall apply to petitions under the ***Local Governments Act.***

Section 61(3) of the ***Parliamentary Elections Act*** states:

> ***"Any ground specified in subsection (1) shall be proved on the basis of a balance of probabilities"*** (underlined for emphasis).

The standard of proof in election petitions was duly clarified by court in ***Matsiko Winfred Komuhangi Vs Babihuga J. Winnie, Election Petition Appeal No. 9 of 2002 (CA)*** while

considering ***Section 62 (3)*** of the ***Parliamentary Elections Act***, which is very similar to the current ***Section 61 (3)*** (supra). It was held that the court trying an election petition under the Act will be satisfied if the alleged grounds in the petition are proved to the balance of probabilities, although it would be slightly higher than in the ordinal civil case. This is because an election petition is of great importance both to the individual concerned and the nation.

This court is not satisfied that the hearsay evidence adduced by the Petitioner in the instant petition would meet the required standard of proof set for an election petition. Further it is now settled Law, (See ***Runumi Mwesigye Francis v. The Returning Officer, Electoral Commission and Adson Kakuru, Election Petition No.2 of 2002***) that hearsay evidence cannot be relied upon by a court to substantiate any allegation as true. To that extent, this petition would fail since hearsay material was just about all the evidence adduced to prove the alleged irregularities and malpractices. The evidence falls far too short of being the "credible and cogent" required to set aside an election.

I am also acutely aware of the position which was taken by the Supreme Court of Uganda in ***Rtd. Col. Kizza Besigye v. Yoweri Museveni Kaguta & the Electoral Commission, Supreme Court Presidential Election No.1 of 2006,*** that the parts of an affidavit which are hearsay and offend against provisions of ***Order 19 rule 3 Civil Procedure Rules*** ought to be severed off without rendering the remaining parts of the affidavit defective or nullity, and that a defective affidavit is not necessarily a nullity. I have carefully subjected the remaining parts of the Petitioner's affidavit to the same test in the ***Rtd. Col. Kizza Besigye*** case (supra), and they still could not pass the test because they are bad in themselves. The affected parts are particularly to be found in paragraphs 6, 7, 8, 11, 13, 14, 17, 24 and 25. The Petitioner makes generalized and sweeping statements, which are not supported by any credible and cogent evidence. Essentially, all the

allegations made therein are not premised on the Petitioner's knowledge as required under ***Order 19 Rule 3*** of the ***Civil Procedure Rules***. As such, the Petitioner should have disclosed the source of his information. Instead, the Petitioner attached the photocopies of DRFs and tally sheets, which have their particular problems as I will shortly show. Counsel for the Petitioner then followed up this with what I considered to be a strange procedure in their submissions, whereby they attached "self- made" annextures from "1" to "12" which they claim show the inconsistencies in the following;

1. the number of votes indicated in the tally sheets and the DRFs for the various polling stations,
2. DRFs with more voters than the voters who voted,
3. inconsistencies between issued ballots papers,
4. used ballot papers and declared unused, unused ballot papers not declared on DRFs,
5. DRFs with more ballot papers than what was issued,
6. DRFs with less ballots used than the voters that voted,
7. DRFs that were signed earlier than 5.PM the closing time,
8. DRFs that did not indicate the time of signing.

All this was done in order to explain the alleged irregularities and malpractices on the DRFs and tally sheets annexed to the affidavit of the Petitioner for those parts which were not severed off as listed above.

A look at the said "Annextures" to counsel's submissions reveals that the content therein is directly derived from the copies of the DRFs and Tally Sheets either attached to the Petitioner's affidavit in support of the petition, or his supplementary affidavits, which were filed after the close of pleadings. This court has already pronounced itself on both categories of the affidavits.

The “Annextures” to the affidavit in support of the petition themselves raise serious issues as to their admissibility in evidence as they offend against the provisions of the ***Evidence Act (Cap 6).*** The Petitioner attached photocopies of the documents all of which constitute secondary evidence. ***Section 62*** (supra) defines secondary evidence as meaning and including copies made from the original by mechanical process which in themselves ensure accuracy of the copy and copies compared to such copies. There can be no doubt that photocopies of the DRFs and tally sheets fall under the section. In addition, under provisions of ***Section 60*** (supra), contents of a document may be proved by secondary evidence. ***Section 64*** (supra) gives instances in which secondary evidence relating to document – such as the photocopies of DRFs attached to the affidavit of the Petitioner – may be given. The Annextures to the affidavit in support of the petition clearly do not fall under any of the instances stipulated under the provisions of the ***Evidence Act*** *(supra*) referred to.

Secondly***, Section 65*** of the ***Evidence Act*** (supra) requires that secondary evidence shall not be given unless the party proposing to give it <u>has previously given notice</u> to the party in whose possession and power the documents are.(*the underlining is for emphasis*). In the instant petition, there is no evidence that such a notice was given to the Electoral Commission or any other party, that the secondary evidence would be adduced. What is on record is the request, through court, by Mr. Kabega Moses counsel for the Petitioner, to be availed particular documents after he had filed the pleadings with the photocopies of DRFs in question already attached. Even when the specified documents were obtained, they were neither the originals nor the certified photocopies thereof. This could not serve as the notice required under ***Section 65*** (supra). It is therefore, not certain as to the source of the attached photocopies of the DRFs. It is also not explained as to whether they are photocopies of the originals, which are usually left with

agents of each candidate as required by ***Section 136 (1)(c)*** of the ***Local Governments Act*** (supra), or whether they are photocopies of the originals retained by the Electoral Commission as required by ***Section 136(1)(b)*** (supra). Whichever the case may be, still they would require to be proved under ***Section 60*** of the ***Evidence Act*** (supra) in order to attest to their authenticity - if not their accuracy. Since the essential requirements of admissibility of secondary evidence under ***Section 64*** of the ***Evidence Act*** (supra) were not complied with, it follows that that the attached copies of DRFs could not be validly admitted in evidence. The Supreme Court has exhaustively provided guidance on the principles that govern admissibility of secondary evidence in ***Prince J.D.C Mpuga Rukidi Vs Prince J.D.C. Mpuga Rukidi, SCCA No. 18 of 1994; Kananura Melvin Consultant Engineers Vs Connie Kabanda SCCA No. 31 of 1992***, and this court has been guided by them.

Having severed off the offending parts of the supporting affidavit, the remaining parts were also found to be bad in law for failure to comply with the rules of evidence as to admissibility of secondary evidence. Since the source of the photocopy DRFs and other documents attached to the affidavit of the Petitioner was never explained, and also it could not be shown that they fall within the ambit of ***Section 63*** of the ***Evidence Act,*** the few remaining parts of the Petitioner's affidavit remained completly unsupported and unproven allegations. They cannot upgrade to the required standard of proof in election petitions under ***Section 61 (3)*** of the ***Parliamentary Elections Act*** (supra). When an affidavit fails for non compliance with statutory requirements, even the application it supports must fail because it remains unsupported. See ***Teddy Namazi v. Anna Sibo [1986] HCB 508***. The same principle, in my view, applies equally to petitions.

For emphasis let it be stated that provisions in the main body of the electoral law derive from the Constitution, and therefore the requirements therein are constitutional as well as substantive. When an Act of Parliament prescribes requirements to be complied with, and the party ignores,

or flouts them, it is not a mere procedural technicality that can be ignored under ***Article 126(2) (e)*** (supra), but a requirement of substantive law and the Constitution. A party has no option but to comply with the requirements, the failure of which may be fatal to the petition. See ***Muzoora Amon RK v. NRM & 2 O'rs, High Court Misc. Cause No. 0201 of 2010***; ***Ssali Godfery v. the Electoral Commission and Kabaale Sulaiman, Election Petition No.13 of 2011***.

The Petition herein largely fails for reasons of non-compliance with requirements of substantive law enumerated above. There is no necessity to proceed to consider any other grounds which are also underlain by the said discredited evidence. The Petition is accordingly dismissed with costs.

BASHAIJA K. ANDREW
JUDGE
DATE: ……..
22/07/2011:-

Mr. K. Kakuru for Petitioner.

Petitioner present.

M/S Faridah Nabakibi for 2nd Respondent.

1st Respondent absent.

2nd Respondent present.

Court:-
Judgment read in open Court.

BASHAIJA K. ANDREW
JUDGE
DATE: ……..