

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT MASAKA**

**ELECTION PETITION No. 0003 OF 2011**

**DR. KIZITO DEO LUKYAMUZI .....**  
**PETITIONER**

**VERSUS**

**1. KASAMBA MATHIAS }**

**2. THE ELECTORAL COMMISSION } ::::::::::::::::::::::::::::::::::::::**  
**RESPONDENTS**

**BEFORE THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO**

**JUDGMENT**

Dr. Kizito Deo Lukyamuzi (herein after referred to as the Petitioner), Kasamba Mathias (herein after referred to as the 1<sup>st</sup> Respondent), together with four others, contested as candidates for Kakuuto County Constituency of Rakai District in the parliamentary elections conducted by the Electoral Commission (herein after referred to as the 2<sup>nd</sup> Respondent), and held on the 18<sup>th</sup> of February 2011. The 2<sup>nd</sup> Respondent declared and returned the 1<sup>st</sup> Respondent as duly elected to represent Kakuuto Constituency in the Parliament of Uganda.

The Petitioner was however dissatisfied with, and objected to, the declaration and return made by the 2<sup>nd</sup> Respondent. Accordingly, he brought this petition against both Respondents seeking relief from this Court on the grounds listed hereunder; namely that:

- (i) The election was carried out in a manner that did not comply with the law; and this led to substantial negative effects on the results.
- (ii) The 1<sup>st</sup> Respondent does not have the minimum education qualification as required by law.
- (iii) There was voter bribery to influence them wrongly.

He then pleaded with this Court to make the following declarations, and then grant the following reliefs; namely that:

- (a) The 1<sup>st</sup> Respondent was wrongly declared winner of the elections since he did not possess the minimum educational qualifications.
- (b) the 2<sup>nd</sup> Respondent wrongly declared the 1<sup>st</sup> Respondent winner of the elections whereas it had not resolved the issue of the educational qualifications of the 1<sup>st</sup> Respondent.
- (c) In the alternative but without prejudice to (a) and (b) above, the election be set aside and a new election held.
- (d) The Respondents pay costs of the proceedings.

The Petitioner swore an affidavit which accompanied and supported the petition, and in which he reiterated the claim made in the petition and also asserted that the 1<sup>st</sup> Respondent had used someone else's academic certificate to join Makerere University. The grounds he gave for saying so were, first, that the 1<sup>st</sup> Respondent had not produced proof either through a deed poll or affidavit that the names 'Kasamba Mathias' and 'Kasamba Mathias L.S.', which appear on two certificates presented by him, refer to him.

Second, was that the length of period between the years Kasamba Mathias sat for 'O' level at St. Mary's College Kisubi, in 1982, and Kasamba Mathias L.S. sat for 'A' level at Busoga College Mwiri in 1987, exceeded the normal period Kasamba Mathias could have sat for 'A' level; hence, the 'O' level and 'A' level certificates in the possession of the 1<sup>st</sup> Respondent belong to two different persons. He averred that the 2<sup>nd</sup> Respondent failed to resolve this issue when it was brought to its attention by a registered voter in a petition. He alleged also that there were a lot of malpractices and illegal practices such as voter bribery, announcing the 2<sup>nd</sup> Respondent as winner whereas he lacked the required educational qualifications.

He alleged further that these malpractices were carried out with the consent, knowledge, and sanction of the Respondents. To this affidavit he attached the St. Mary's Kisubi 'O' level certificate for Mathias Kasamba, and the Busoga College Mwiri 'A' level certificate for Mathias Kasamba L.S., a letter a registered voter in the Constituency wrote to the 2<sup>nd</sup> Respondent, petitioning it over the two certificates the 1<sup>st</sup> Respondent had presented for his nomination, which had different names on, and finally a letter from the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent, demanding clarification over the name discrepancy in the two academic certificates.

In their respective answers to the petition, the Respondents denied the adverse allegations in the petition. The 1st Respondent contended that the parliamentary elections in Kakuuto Constituency were carried out in a free and fair atmosphere, and denied indulging in any act of voter bribery before, during, or after the elections. He contended further that at the time of his nomination for the elections, he had the minimum educational qualification of 'A' level required by law for contesting in a parliamentary election. He prayed that Court should uphold the election results; and dismiss the petition with costs.

In the affidavit he swore on the 30<sup>th</sup> day of March 2011, in support of the answer, he reiterated these facts and stated further that he contested for Kakuuto Constituency parliamentary seat as the NRM flag bearer; and won with 13,006 votes, which was close to the 12,515 votes he had earlier obtained in the NRM primary elections held to choose the Constituency's party flag-bearer. He contended that at his nomination, he had an 'A' level certificate issued by Uganda National Examinations Board (UNEB), out of the examinations had sat at Busoga College Mwiri in 1987, which was the requisite minimum educational qualification for nomination; and in addition, he had a degree from Makerere University.

In an additional affidavit he swore on 31<sup>st</sup> May 2011, in answer to the petition, and as rejoinder to the affidavits of Sekitoleko John, Ssekirembeka Hassan, Wasswa Isaac, and Kato Emmanuel, who had sworn affidavits in support of the claim in the petition, he explained that the discrepancy in his name, as recorded in his 'O' and 'A' level certificates, arose from his having adopted his father's name of Lwekunda Ssebugwawo, initialled as 'L.S.', when he was admitted back to Kisubi in Senior 5 for 'A' level in 1983. He attached the UNEB certificate for his Kisubi 'A' level results which has Mathias Kasamba 'L.S.' as the candidate who sat for the exams.

He pointed out that before his nomination, he made a statutory declaration (which he appended) clarifying this discrepancy; and it was filed with the 2<sup>nd</sup> Respondent and its District Returning Officer. He stated also that a registered voter had, after his nomination, petitioned the 2<sup>nd</sup> Respondent questioning the said discrepancy in his name; but from his satisfactory presentations in response, the 2<sup>nd</sup> Respondent determined that the petition had no merit. He denied that he used someone else's certificate to join Makerere University. To this affidavit, he appended, amongst others, his 'O' and 'A' level certificates, and his University academic transcript.

The 2<sup>nd</sup> Respondent denied the adverse allegations made against it by the Petitioner; contending in its answer to the petition that the now contested election was conducted in accordance with the laws of Uganda; and that the 2<sup>nd</sup> Respondent had fully satisfied the requirements for minimum academic qualification at the time of his nomination as a parliamentary candidate for the election. It contended in the alternative, but without prejudice to its earlier contention, that in case there was any non-compliance with the electoral laws then such non-compliance did not substantially affect the outcome of the election.

Eng. Dr. Badru M. Kiggundu, Chairperson of the 2<sup>nd</sup> Respondent, made an affirmation in an accompanying affidavit in which he reiterated and expanded on the averments contained in the answer. Thereafter, the parties traded further affidavits in answer to certain affidavits filed by the adverse party. At the instance of Counsel for the Petitioner, Court issued orders to the administrations of St. Mary' College Kisubi, Busoga College Mwiri, and Makerere University, to provide information or clarifications which Counsels believed would assist Court arrive at a just decision over the contested issue of academic qualification of the 1<sup>st</sup> Respondent.

Counsels then, as directed by Court, filed a joint scheduling memorandum in which the following facts were agreed upon:

- (a) The Petitioner, the 1<sup>st</sup> Respondent, Kaggwa Godfrey, Kalema Petero, Sserwanga Samuel, and Wasswa Sentanda, were all candidates for Member of Parliament for Kakuuto County Constituency in Rakai District during the national general elections held on the 18<sup>th</sup> February 2011.

- (b) The 2<sup>nd</sup> Respondent declared the 1<sup>st</sup> Respondent as the winner of the election, and returned him as the person elected Member of Parliament for Kakuuto County Constituency.
- (c) The Petitioner is aggrieved by the 2<sup>nd</sup> Respondent's declaration and return made in (b) above.
- (d) At the time of his nomination, the 1<sup>st</sup> Respondent presented a degree certificate from Makerere University, a Uganda Advance Certificate of Education (UACE) from Busoga College Mwiri, and a Uganda Certificate of Education (UCE) from St. Mary's College Kisubi.

The parties admitted and agreed to rely on the respective affidavits deponed in support of, or in reply to, each party's case, or as additional affidavits, the annexures to the pleadings and affidavits; and as well, the reports which, by order of Court, were procured from St. Mary's College Kisubi, Busoga College Mwiri, the Academic Registrar Makerere University, and letters from Uganda National Examinations Board (UNEB) were admitted in Court as evidence for consideration. Counsels then listed the witnesses from the other side they required for cross examination; and then proposed the following, as issues for Court's determination; namely:

1. Whether at the time of his nomination and election, the 1<sup>st</sup> Respondent possessed the minimum educational qualification of Advanced Level or its equivalent to contest for Member of Parliament.
2. Whether any unlawful practices or offences were committed, in connection with the said election, by the 1<sup>st</sup> Respondent personally or by his agents or any other person with his consent, knowledge, or approval.
3. Whether the parties are entitled to the remedy sought.

After the close of the hearing, the Counsels wrapped up their respective party's case in final submissions. The burden was on the Petitioner to prove the allegations he made in the petition if he was to get the reliefs prayed for. Under section 61(3) of the Parliamentary Elections Act (2005), this proof is required to be on a balance of probabilities; but it is now settled law that owing to the importance an election is accorded, proof of the claim to the satisfaction of Court provided for under section 61(1) of the Act is only achieved when it is done at a standard higher than in ordinary civil suits. I will proceed to, first, dispose of issue No. 2.

**Issue No.2.**

**Whether any unlawful practices or offences were committed, in connection with the said election, by the 1<sup>st</sup> Respondent personally or by his agents or any other person with his consent, knowledge, or approval.**

The Petitioner alleged in paragraph 3 (i) and (iii) of the petition that the elections were carried out in non compliance with the law, resulting in substantial negative effect on the results; and that this included bribery of voters to vote the wrong way. He repeated this in paragraphs 9 and 10 of his affidavit in support of the petition. The 1<sup>st</sup> Respondent denied, in paragraph 4 of his answer to the petition, any involvement in any act of bribery. This denial, and contention otherwise, he repeated in paragraph 6 of his affidavit in support of the answer. The 2<sup>nd</sup> Respondent made similar denial in their answer and affidavit sworn in support; stating, in the alternative, that whatever non compliance that might have taken place had no substantial effect on the outcome of the election.

The Petitioner then, in his affidavit he swore on 19<sup>th</sup> April 2011, in reply (in fact a rejoinder) to the 1<sup>st</sup> Respondent's answer, deponed in paragraph 11 thereof that there were a lot of malpractices, which included illegal practices, during the election; and these influenced the election in favour of the 1<sup>st</sup> Respondent. He categorised the malpractices as bribery of voters to vote the wrong way, and the 2<sup>nd</sup> Respondent returning the 1<sup>st</sup> Respondent as the successful candidate whereas he did not have the required educational qualifications to be nominated for the elections. He contended that these malpractices were committed with the consent, knowledge, and sanction of the Respondents.

In his rejoinder of 12<sup>th</sup> April 2011, to the 2<sup>nd</sup> Respondent's reply and accompanying affidavit, he deponed that he had drawn the attention of the 2<sup>nd</sup> Respondent to the malpractices, first by his lawyers' letters of 11<sup>th</sup> January 2011 complaining of the disruption of his campaign rally by purported NAADS officials who he later learnt were campaign agents for the 1<sup>st</sup> Respondent. Second was by his letter of 20<sup>th</sup> February 2011 to the District Registrar Rakai, in which he reported instances of massive vote bribing and buying before and on the day of election, intimidation of voters and polling agents, refusal to give polling agents declaration forms, or forcing them to sign blank declaration forms.

In the letter he also complained of use of derogatory language by the 1<sup>st</sup> Respondent during the campaigns, campaign at the polling station by agents of the 1<sup>st</sup> Respondent, multiple voting, ferrying of non Ugandans from Tanzania to vote in the border polling stations, etc. He swore an additional affidavit in reply in which he maintained that there had been voter bribery, which were committed with the consent, knowledge, and sanction of the Respondents. There were affidavits in rejoinder, sworn on 24<sup>th</sup> May 2011 by Emmanuel Kato, Sekitoleko John, and Ssekirembeka Hassan, and one sworn by Wasswa Isaac either on 23<sup>rd</sup> or 24<sup>th</sup> May 2011, as proof of the alleged acts of voter bribery by named agents of the 1<sup>st</sup> Respondent, and transportation of voters to vote.

In reply to these were affidavits sworn on 30<sup>th</sup> May 2011, by Bajungu Godfrey Muyambi, Katerega Ronald, and Byaruhanga Daniel a Legal Assistant in the law chambers of the 1<sup>st</sup> Petitioner's lawyers, and also by Ssekyewa Wasswa Paul on 31<sup>st</sup> May 2011. These rebutted the ones sworn by Emmanuel Kato and others named above. Any deposition in the Petitioner's affidavit which was subsequent to the one which accompanied the petition, was only admissible where the Petitioner deposed from personal knowledge; otherwise it would offend the rule against hearsay since such affidavit, unlike that which accompanied the petition, was no longer part of his pleading, but was strictly evidence.

Accordingly the allegations of voter bribery, voter transportation, etc., contained in his letter of 20<sup>th</sup> February 2011 to the District Registrar Rakai which was attached to his affidavit of 12<sup>th</sup> April 2011 in rejoinder to the 2<sup>nd</sup> Respondent's reply, were all inadmissible for being hearsay evidence as he himself did not witness them. Similarly, in his affidavit in rejoinder, stated above, Emmanuel Kato states that Wasswa Paulo "*was found*" distributing various items including sugar, salt, and paraffin, to voters at Kijonjo in favour of the 1<sup>st</sup> Respondent; and "*was arrested*" by the villagers, reported to police, the vehicle he was using and the recovered items, "*was detained*" at Kasasa Police Station, but was released the next day.

He states further, that this "*was brought*" to the knowledge of the 2<sup>nd</sup> Respondent who however took no action. Sekitoleko John also claimed that during the campaign period "*bribery of voters was carried out by the agents of the 1<sup>st</sup> Respondent*". He named one Kateregga as one such agent who "*was found*" bribing voters with soap, sugar, and paraffin at Kijonjo polling station. He stated further that on the night of 17<sup>th</sup> February 2011, the L.C. Chairman Mr. Semanda and one Maama Lukwago *moved house to house bribing voters* in favour of the 1<sup>st</sup> Respondent.

Furthermore, he stated that at Kyamubejja polling station, the LC1 Chairperson “*was found*” bribing voters in favour of the 1<sup>st</sup> Respondent; and the matter was brought to the attention of the officer in charge of Mayanja Police Station and also to the attention of the 2<sup>nd</sup> Respondent; but no action was taken by them. He further stated that at Kakuuto, Mr. Kasagga “*was found*” bribing voters in favour of the 1<sup>st</sup> Respondent; and he had items including sugar, salt, and paraffin on his motorcycle Registration No. UDS 579 E which he rode while bribing voters.

This incident too, he stated, “*was brought*” to the attention of the 2<sup>nd</sup> Respondent but no action was taken. Ssekirembeka for his part deponed that between 14<sup>th</sup> and 16<sup>th</sup> February 2011, Mr. Bazungu the LC3 Chairman of Kibanda, an agent of the 1<sup>st</sup> Respondent “using motor vehicle Reg. No. UAM 123V”, distributed various items including soap, sugar, cooking oil, and paraffin to voters in the area in order to influence their vote in favour of the 1<sup>st</sup> Respondent; and on polling day he used the said vehicle to transport voters to vote for the 1<sup>st</sup> Respondent.

Wasswa Isaac, deponed that on the 17<sup>th</sup> February 2011, Mr Wasswa Paulo an agent of the 1<sup>st</sup> Respondent, “*was found*” distributing various items including sugar, salt, paraffin to voters at Kijonjo in favour of the 1<sup>st</sup> respondent; and the said Wasswa Paulo was arrested by the villagers and the matter was reported to police as SD Ref,11/17/02/2011, the items which were recovered and the vehicle he was travelling in were detained at Kasasa Police Station but these were released the following day. He also deposed that what he stated was true to the best of his knowledge.

For the 1<sup>st</sup> Respondent, Kateregga Ronald swore the above stated affidavit in reply to that of Sekitoleko John, in which he refuted that there was a polling station in Kasasa called Kijonjo; but instead, Kijonjo Kyotera Primary School polling station. He denied ever being a polling agent of the 1<sup>st</sup> Respondent or of any other person. He denied knowledge of Sekitoleko John and also denied the allegations made against him in paragraph 5 of Sekitoleko John’s affidavit. Bajungu Godfrey Muyambi in his abovestated affidavit admitted being Chairperson LC3 of Kibanda Sub County, but denied that he was called Bazungu as stated by Ssekirembeka Hassan, whom he denied knowledge of, but as Bajungu instead.



He stated that he was never a campaign or polling agent of the 1<sup>st</sup> Respondent, and was never involved in any kind of distribution of items as stated in paragraph 3 of Ssekirembeka Hassan's affidavit. He denied ownership of a vehicle, or knowing how to drive. Byaruhanga Daniel, a Legal Assistant with M/s Tumwesigye, Baingana & Co. Advocates deponed in his stated affidavit that he had carried out a search at the motor vehicle registry, and established that the vehicle Reg. No. UAM 123V (referred to by Ssekirembeka Hassan) does not belong to Bazungu, but instead to Nsibambi Ssempeera Mathias of Kyaddondo.

In the affidavit of Ssekyewa Wasswa Paul stated above, he deponed that he was not appointed an agent by the 1<sup>st</sup> Respondent in the parliamentary elections. He denied knowledge of Kato Emmanuel and Wasswa Isaac, and also all the allegations they had made against him. Instead he explained that on the 17<sup>th</sup> February 2011, at around 8.00 p.m., he was tipped by one Baker Kajura that one Samuel Sserwanga, who was himself a parliamentary candidate, was conducting a rally beyond the official time permitted for doing so. He went and told them that night-time campaign rally was illegal; and also notified them that the period for campaigns had ended.

He stated further that however the crowd became unruly, blocked his way, and smashed his car windscreen. He had to call the police, whereupon the District Police Commander directed him to proceed to the Police Station where he recorded a statement. He denied that he was detained at Kasasa Police Station or that his vehicle was found with the items alleged by Kato Emmanuel and Wasswa Isaac in their affidavits referred to above; and deponed further that after carrying out investigations, the police found no merit in the allegations made against him.

The affidavits of Emmanuel Kato, Sekitoleko John, and Wasswa Isaac, manifestly suffer from the pitfall of adducing inadmissible hearsay evidence in so far as they allege that so and so "*was found*" doing this or that, instead of their having personally witnessed such incidents. It is not clear whether Ssekirembeka Hassan witnessed the incidents he accuses Bajungu, whom he calls Bazungu, of committing. Without any reason or explanation given, he failed to appear in Court for cross examination. This has adverse consequence; as it casts serious doubts on the veracity of his evidence by rendering it suspect, and of very little probative value.

Not a single of the alleged bribed or transported voters, or polling stations where foreigners from Tanzania allegedly voted at, was named by the deponents; and equally no evidence was adduced that the alleged acts of bribery were done with the knowledge, authority, or sanction of the 1<sup>st</sup> Respondent. If Ssekyewa Wasswa Paul had given items from his car as bribes to voters, as alleged, then these voters ought not to have run away from the scene of the incident with the items as was adduced in evidence during cross examination. This renders Ssekyewa Wasswa Paul's testimony, in cross examination, that those unruly people caused destruction to his vehicle for intervening in their illegal rally, quite credible.

Equally, the various allegations raised in the petition, such as intimidation of voters and polling agents, refusal by the 2<sup>nd</sup> Respondent to give polling agents declaration forms, or forcing them to sign blank declaration forms, use of derogatory language by the 1<sup>st</sup> Respondent during the campaigns, campaign at the polling station by agents of the 1<sup>st</sup> Respondent, and multiple voting, which had no evidence adduced in support, remained just idle adverse allegations which were of no benefit to the Petitioner at all in his quest for the annulment of this election.

In the premises, I find that there was no persuasive evidence adduced by or for the Petitioner to prove that in the said election, the 1<sup>st</sup> Respondent either personally, or by his agents or any other person with his consent, knowledge, or approval, committed any of the unlawful practices or offences alleged. The evidence adduced in this regard falls far short of what is required to establish these electoral offences; especially where fraud, which demands strict proof to enable this Court grant the relief sought by the Petitioner, was alleged. I therefore have to resolve issue No. 2 in the negative.

**ISSUE No.1.            Whether at the time of his nomination and election, the 1<sup>st</sup> Respondent possessed the minimum educational qualification of Advanced Level, or its equivalent, to contest for Member of Parliament.**

It was submitted for the Petitioner that the discrepancy in the names on the various certificates presented by the 1<sup>st</sup> Respondent, as well as the various dates of birth given as his, were clear pointers that there were here three different persons being referred to. Both the Petitioner and his Counsel contended that the only acceptable way the 1<sup>st</sup> Respondent could have changed his name, or added more to it, was by making a deed poll as required by law;

and then the various names in the certificates would all belong to him. This, he had not done. Counsel disputed the authenticity of the 1<sup>st</sup> Respondent's 'O' level and University certificates too, given the conflicting information given about them.

In response to the Court order directing that Court be furnished with full particulars of a student called Kasamba Mathias who attended St. Mary's College Kisubi, inclusive of the particulars of the parents of the student as would be in their records, the head –teacher of the school, by letter dated 10<sup>th</sup> may 2011, supplied information from the school record that Kasamba Mathias attended the school and sat for his 'O' level exams in 1982, and also 'A' level exams in 1985. His father was Joseph Lwekunda, a Catholic of Kakuuto; and Dennis S. Kizza was named as his guardian. Various photos of Kasamba Mathias found in the school record were included in the communication from the school to Court.

Unlike Kisubi, Busoga College Mwiri did not avail much as the student's file could not be traced. Nevertheless, the headmaster confirmed in his letter of 10<sup>th</sup> May 2011, that one Kasamba Mathias L.S. did attend 'A' level at the school from 1986 to 1987, having joined from from St. Mary's Kisubi. Although his photo in the school record could not be availed, Hon. Abdu Katuntu, a member of Parliament, made an affirmation in an affidavit in rejoinder that he studied together with the 1<sup>st</sup> Respondent in S.6 at Busoga College Mwiri between 1986–1987; after which they both attended Makerere University where he did Law, and the 1<sup>st</sup> Respondent pursued Social Sciences.

The Academic Registrar, Makerere University, by his letter of 16<sup>th</sup> May 2011, attached a copy of the University's first year registration form showing that one Mathias Kasamba L.S. was admitted to the University and registered as a first year student in 1987 under Reg. No 87/862; and his father was entered as Joseph Lwekunda of Kakuuto Kyotera. His 'O' level school was entered as St. Mary's College Kisubi, and his 'A' level school was Busoga College Mwiri. The Registrar explained that the final certificate awarded to Mathias Kasamba L.S by the University does not have the initials 'L.S.' due to the University policy which excludes initials. A photograph of the Kasamba Mathias L.S. accompanied the Registrar's letter.

The other reason the Petitioner gave for disputing that the 1<sup>st</sup> Respondent was the same person referred to in the various places was that three documents showed three conflicting dates of birth. In Kasamba Mathias' application form for admission to St. Mary's College

Kisubi, his date of birth was stated as 8<sup>th</sup> of June 1963. The date of birth of Kasamba Mathias L.S. in the Makerere University registration form gave the date of birth as 1<sup>st</sup> of June 1963. In his statutory declaration of 25<sup>th</sup> October 2010, the 1<sup>st</sup> Respondent gave his date of birth as 3<sup>rd</sup> of June 1963. An entry in a baptism register, produced in evidence by the Petitioner showed that Kasamba Mathias, son of Yozefu Lwekunda, was born on 1<sup>st</sup> of June 1963 and baptised on 8<sup>th</sup> June 1963.

All these anomalies were seized upon by the Petitioner, and his Counsel who made it fodder in her submission that it strongly pointed to there being three entirely different persons being referred to in the three documents; and therefore the 1<sup>st</sup> Respondent must be an impostor. When he took the witness stand, and was subjected to cross examination, the 1<sup>st</sup> Respondent clarified that his correct date of birth is 1<sup>st</sup> of June 1963. He explained that the erroneous entry in his application form for admission to St. Mary's College Kisubi, that his date of birth is 8<sup>th</sup> of June 1963, was made by his elder brother Dennis Ssebuggwaawo Kizza who had filled the application form for him.

He asserted that the entry in the Makerere University entrance registration form, which he himself had made, giving the 1<sup>st</sup> of June 1963 as his date of birth, is the correct one. This matched with the entry about his date of birth in the baptism register. He explained that the deposition he made in his statutory declaration of 20<sup>th</sup> October 2010, that he was born on the 3<sup>rd</sup> of June 1963, was inadvertent; and the confusion came about owing to his habit of annually celebrating his birthday, not on the 1<sup>st</sup> of June which is his actual date of birth, but instead, on the 3<sup>rd</sup> of June to coincide with the Uganda Martyrs' day celebrations; and this is because he was named Mathias after Saint Mattia Mulumba, one of the Ugandan martyr saints.

I find the 1<sup>st</sup> Respondent's explanation in this regard plausible. It is quite understandable that his brother mistook his date of baptism of 8<sup>th</sup> of June for his date of birth, and erroneously entered it as the date of birth. It is also credible that owing to the 1<sup>st</sup> Respondent celebrating his birthday annually on the 3<sup>rd</sup> of June instead of 1<sup>st</sup> of June, he did innocently mix himself up, resulting in his giving the wrong date on oath. There was no ulterior motive in this misrepresentation as it was not intended to mislead anyone or derive any benefit there from. That being so it was not at all fatal that, on oath, he gave the wrong date of 3<sup>rd</sup> of June 1963 as his date of birth. I treat it as an unfortunate, but innocent, human slip.

Regarding whether Kasamba Mathias is the same as Kasamba Mathias L.S., the beginning point is the baptism register from St. Mary's Catholic Parish Kyotera, adduced in evidence by the Petitioner as an annexure to his additional affidavit of 27<sup>th</sup> April 2011 sworn in reply. It stated that Yozefu Lwekunda was the father of Kasamba Mathias who was born on 1<sup>st</sup> June 1963, and baptised on the 8<sup>th</sup> June of the same year. It is common knowledge that the name Yozefu is the local version of the name Joseph. The 1<sup>st</sup> Respondent certainly had no hand in making this entry, as he was a toddler of only a few days on earth then.

Kasamba Mathias' application form for admission to St. Mary's College Kisubi named his father as Joseph Lwekunda of Kakuto. The same Kasamba Mathias, according to his testimony, and the 'A' certificate of St. Mary's College, adopted additional names after his 'O' level, and became Kasamba Mathias L.S.; and he explained that L.S. were initials of his father's name Lwekunda and his grandfather's name Ssebuggwaaao respectively. The head-teacher of Busoga College Mwiri informed Court that Kasamba Mathias L.S., who pursued 'A' level at his school in 1986/1987 had joined his school from St. Mary's College Kisubi.

Hon. Abdu Katuntu, affirmed in his affidavit in rejoinder of 6<sup>th</sup> May 2011, that Kasamba Mathias L.S., his class mate at Busoga College Mwiri in 1986/87, and contemporary at Makerere University, is none other than the 1<sup>st</sup> Respondent. This Kasamba Mathias L.S. from Mwiri, registered himself at Makerere University as son of Joseph Lwekunda of Kakuuto Rakai; and that he had attended his 'O' level at St. Mary's College Kisubi. Dennis Kizza Ssebuggwaaawo (DW2), the elder brother of the 1<sup>st</sup> Respondent, corroborated that Lwekunda and Ssebuggwaaawo were their father and grandfather respectively; and that he also adopted the name Ssebuggwaaawo.

He explained that his brother's adoption of the name Lwekunda Ssebuggwaaao is not an uncommon practice in the Kiganda culture. In fact, during cross examination, Isaac Wasswa Gwayambadde (PW2) who had earlier petitioned the 2<sup>nd</sup> Respondent challenging the 1<sup>st</sup> Respondent over the inclusion of the L.S. in his name, and seeking revocation of the 1<sup>st</sup> Respondent's nomination, unwittingly corroborated the 1<sup>st</sup> Respondent's and his brother DW2's contention by revealing that his name Gwayambadde was his family name he had adopted; but which he only uses occasionally. This should have settled the matter of Kiganda practice of adoption of family names.

Counsel for the Petitioner however submitted that Ssebuggwaawo is a Ganda name whereas Lwekunda is not; and that under Ganda culture a person cannot be given names from two different tribes. Without any evidence in rebuttal of that of Dennis Kizza Ssebuggwaawo (DW2) in that regard, I am unable to rely only on Counsel's submission from the bar. In any case, DW2 stated that his clan the Balangira, like the Babiito, is of Luo descent. No evidence was adduced that there was any other known Kasamba Mathias, with or without L.S., or any other Joseph Lwekunda of the same area, or at all, to suggest that there could possibly be two different persons or families being referred to here.

Instead, the several photos of Kasamba Mathias availed to Court from St. Mary's College Kisubi, taken at various stages of his six years stay at the school, and the picture of Kasamba Mathias pasted on the Makerere University entrance form were easily discernible as versions of the same person, with the Kisubi ones relatively younger than the one of Makerere. There is clearly a continuous thread and an unbroken trail which persuasively links Kasamba Mathias who joined St Mary's College Kisubi from Kakuuto Rakai, to the 1<sup>st</sup> Respondent nominated to contest for the Kakuuto County Constituency parliamentary seat, through use of that name and the one with the initials 'L.S', used for the 'A' level at Kisubi and Mwiri and also at the time of registration at Makerere University.

Hon Abdu Katuntu who affirmed personal knowledge of the 1<sup>st</sup> Respondent all the way from Busoga College Mwiri, through Makerere University, to the august House, was neither called for cross examination, nor his evidence controverted. It stands unchallenged. I highly doubt that the Hon Member of Parliament, also an advocate of Ugandan Courts of judicature, who knows only too well the repercussions that would result from stating deliberate falsehood on oath would, for whatever reason, stick out his neck unless he was confident of the truth of the affirmation.

The Petitioner and his Counsel were however not yet done. They contended in the alternative that even if it is established that the 1<sup>st</sup> Respondent was the same person who attended Kisubi, Mwiri and Makerere, then without evidence that he made a deed poll or swore any other clarification as proof of change of name, the discrepancy in his names in the 'O' level certificate and 'A' level certificates from the inclusion of the initials L.S. to his name in the latter, legally makes his Kisubi and Mwiri 'A' level certificates refer to a different person from the one who sat for 'O' level at Kisubi. Accordingly his Makerere certificate, though it has a name that matches that in his 'O' level certificate, is rendered useless.

Counsel for the Petitioner cited the Births and Deaths Registration Act (Cap. 309 Laws of Uganda) and *Serunjogi James Mukiibi vs Lule Umaru Mawiya, Election Petition Appeal No. 15 of 2006 (C.A.)* case in support of this contention. When the 1<sup>st</sup> Respondent added the name Lwekunda Ssebuggwaawo, initialled as ‘L.S.’, to his name, upon joining Senior 5 at St. Mary’s College Kisubi in 1983, the relevant law in force regarding change of names, was the Births and Deaths Registration Act (No. 28 of 1970). That Act provided in sections 11 and 12 (contained in Part III of the Act), as follows:

*“11. (1) Any person, being over the age of twenty one years or a widower, widow, divorced person or married person, who wishes to change his name shall cause to be published in the Gazette a notice in the prescribed form of his intention to do so.*

*(2) Not less than seven days after the publication of the notice, the person intending to change his name may apply in the prescribed form to the registrar of the births and deaths registration district in which his birth is registered.*

*(3) The registrar shall, upon being satisfied that the requirements of this section have been carried out and upon payment of the prescribed fee, amend the register accordingly and shall sign and date the amendment.*

*12. (1) The parents or guardian of any child under the age of twenty-one years who is not married, divorced, a widower, or a widow, may apply in the prescribed form to the registrar of the births and deaths registration district in which the birth of the child is registered, to change the name of the child.*

*(2) The registrar shall, upon payment of the prescribed fee, amend the register accordingly and shall sign and date the amendment.”*

These provisions have now respectively been reproduced in sections 12, and 13 (Part IV), of the Births and Deaths Registration Act (Laws of Uganda, 2000 Revised Edition, Cap. 309). The corresponding rules provided for under the Births and Deaths Registration Act, are the Births and Deaths Registration Regulations (S.I. 309 – 1), and The Births and Deaths Registration Regulations (S.I. 309 – 2). Neither the Act nor the regulations made under it give a definition of the phrase ‘change of name’. Therefore, it is not clear whether variation in name by merely adding or adopting more name, without losing or abandoning use of the original one, amounts to change of name or not.

Be it as it may, it was and is still a mandatory provision under the Act that a person who is above 21 years over age, or (if below that age) is either divorced or widowed, who intends to change his or her name, must first publish notice of such intention in the Gazette. After the publication, he or she may apply to the registrar where the name was earlier registered, for amendment of the entry in that register. It is clear that while publication of intention, in the Gazette, by a person above 21 years over age, or (if below that age) is either divorced or widowed, to change his or her name, is mandatory, applying to the registrar for amendment of name in such person's case is discretionary.

However, for a person below 21 years of age, except where such person is either married, divorced, or widowed, the Act does not make publication in the Gazette of intention to change such name a requirement. Equally, the Act leaves it to the discretion of the parents or guardian of such person whether or not to apply to the registrar of the registration district where the birth of such person was registered, to change the name. The Act sets 21 years as the age of majority or responsibility for purposes of change of registered name; except that it treats a divorced or widowed person below 21 years of age, as if such a person is above 21 years of age.

It is quite clear from the provisions of the Act, that Parliament intended that registration of change of name, whether in the case of persons above or below the age of 21 years, is only with regard to names that have already been registered in accordance with the Act. Otherwise, a person whose name was not so registered is at liberty to change his or her name at will without recourse to the provisions of the Act; and in doing so, he or she will not have acted in breach of any law. In the event that there is need for any clarification, a statutory declaration in that regard would certainly suffice.

Interestingly, even with regard to registered names, as seen in the provisions of the Act reproduced above, whereas application for change of name is discretionary even after the mandatory publication in the Gazette, regulation 8(2) of the Births and Deaths Registration Regulations (S.I. 309 – 1) makes registration of change of name mandatory; and in rule 8(3), the registrar of births is obliged to draw a line across the old name in the register, and enter the new name above it. This provision in the subsidiary legislation is in conflict with the provisions of the principal Act; and so it is invalid as being *ultra vires* the provision of the Act.



It is a tenet of statutory construction that such conflict, as this, is resolved in favour of the provisions in the principal Act; because, as was held by Chanan Singh, J. in ***Shah Vershi v. Transport Licensing Board [1971]EA 289***, at 295:

*“Subsidiary legislation must not go beyond the purposes or dominant purposes of the Act. ... The regulation, in case of a conflict, must give way to the Act.”*

The 1<sup>st</sup> Respondent was only 20 years of age, and was neither married nor widowed, in 1983 when he adopted the additional names of Lwekunda Ssebuggwaawo, initialled as ‘L.S.’ Thus, he fell in the category that did not require gazetting an intended name change; hence, registration of change in his name was a discretionary for his parents, or guardian, to make. In addition, no evidence was adduced that his birth was registered in any of the registration districts provided for under regulation 2(a) and (e) of the Births and Deaths Registration (Division of Districts) Instrument (S.I. 309 – 2); which is either a sub county or hospital.

Accordingly, he was under no duty whatever to make a deed poll and register the variation of his name incorporating Lwekunda Ssebuggwaawo, initialled as ‘L.S.’ as contended by the Petitioner and his Counsel. I accordingly distinguish the Serunjogi case (supra) from this one. No evidence was adduced in that case that Serunjogi was a minor, under the Act, at the time he changed his name, as was the case with the 1<sup>st</sup> Respondent herein. In that case too, Serunjogi’s explanation of the various documents which gave entirely different names as that of his purported father was extremely damaging to his case, as the Court made adverse inference there from of it irresistibly pointing to the existence of two different persons he was fraudulently referring to as his father.

Under section 4(14) of the Parliamentary Elections Act (2005), as ammended, which is specific to matters of elections, the Electoral Commission is only barred from accepting a statutory declaration or affidavit where the purpose is to serve as evidence of possession of an academic qualification required under that section. Otherwise, it is open for the Commission to accept clarification, by way of a statutory declaration, of such matters as variation in names of a nominated candidate or question of age. The Electoral Commission was therefore justified in accepting the 1<sup>st</sup> Respondent’s statutory declaration made on the 25th October 2010 explaining the variation in his name through the use of ‘L.S.’.

The second leg of issue No.1 is the contention over the academic awards presented by the 1<sup>st</sup> Respondent at his nomination. The Petitioner contends that these were forgeries; and therefore the 1<sup>st</sup> Respondent indulged in acts of fraud. St. Mary's College Kisubi provided his 'O' level results which matched with the entry in the certificate issued by Uganda National Examinations Board (UNEB). However, Mr Dan N. Odongo of UNEB verified the 1<sup>st</sup> Respondent's results, by his letter of 14<sup>th</sup> March 2011 to the Petitioner's Advocates and attached to the Petitioner's additional affidavit in reply dated 27<sup>th</sup> April 2011, in which he entered results of two subjects which differed from the entry in the certificate from UNEB, and St. Mary's College Kisubi records.

Yet in his second letter of dated 17<sup>th</sup> May 2011, issued to the 1<sup>st</sup> Respondent's lawyers in verification of the 1<sup>st</sup> Respondent's same 'O' level results, and produced in Court, the same Dan N. Odongo entered results which differed from his earlier verification but perfectly tallied with the entries in the UNEB certificate, and the records at St. Mary's College Kisubi. As was authoritatively stated by Katureebe JSC in *Abdul Balangira Nakendo vs Patrick Mwendha; Supreme Court Election Petition No. 9 of 2007*, the evidential burden of proving the authenticity of an impugned certificate lies on the person relying on that certificate, and this is not a shift in the burden of proof; and accordingly, in the case before me that evidential burden lay on the 1<sup>st</sup> Respondent.

I have carefully scrutinised the various certificates contested by the Petitioner. It is evident that the 'O' level results of Kasamba Mathias in the records of Kisubi, and in the latter verification by Dan N. Odongo are corroborated by the entry in the UNEB certificate; and are thus the correct record. A letter of verification cannot rebut or override the entry in a certificate issued by an authority with responsibility to do so, unless such rebuttal is accompanied by cogent explanation of some defect in the certificate. In the instant case there was no evidence that Dan N. Odongo had the UNEB certificate at the time he issued the two letters of verification.

Similarly, it appears that he issued the second verification without his attention having been drawn to his earlier verification which was in conflict with the record in the UNEB certificate. He would otherwise have realised the contradiction and offered an explanation and clarification on how the discrepancy in his first letter of verification came about; and thus settled the matter which must have been occasioned by an unfortunate clerical error. Since his

second letter of verification corroborates the entry in the certificate, it conclusively serves to vindicate the 1<sup>st</sup> Respondent.

With regard to the two academic transcripts Makerere University issued to the 1<sup>st</sup> Respondent, they manifestly differ in format, and detail such as the date of graduation of the student named therein. The graduation date on the degree certificate differs from the one on the academic transcript. The certificate was signed by Professor Sebuwufu who had not yet assumed the office of Vice Chancellor of Makerere University at the time the 1<sup>st</sup> Respondent is stated to have graduated there from. All this gave justification for the Petitioner's strong suspicion that these academic documents were forgeries.

The Academic Registrar however explained the variation in the formats of the academic transcripts as due to the changes introduced by the University after the issue to the 1<sup>st</sup> Respondent, of the first transcript; otherwise both transcripts were authentic. He also explained in his letter to Court of 16<sup>th</sup> May 2011, that some sitting Vice Chancellors and Academic Registrars of Makerere had left certain certificates unsigned at the time their tenure came to an end; hence, it was instead their successors in office who signed such certificates. However, such certificates belatedly signed by the successors had to reflect the date of the award of such certificates.

He conceded that where any signing did not reflect the correct date of graduation, as was the case with the one contested in Court, it was an error by the University. He availed a certified copy of the graduation booklet for 20<sup>th</sup> September 1991, with the name Kasamba Mathias appearing on page 9 as one of the graduands of the day; and this was put in evidence. He also clarified that the date 20<sup>th</sup> March 1992 appearing on the certificate in the possession of the 1<sup>st</sup> Respondent, signed by Professor J.P.M. Ssebuwufu and Dr. Mukwanason Hyuha, as Vice Chancellor and Academic Registrar respectively, was an error by the University. He then advised that the certificate be returned for rectification.

I am satisfied with this explanation. Although one of the transcripts is more detailed than the other, the results entries in both of them are exactly the same. The one bearing a date of graduation was issued before the graduation, so it appears the date stated therein was the then intended date of graduation. The Academic Registrar certified both transcripts to be authentic; hence I cannot fault the 1<sup>st</sup> Respondent on them. It would be wrong to visit institutional mistakes, or their lack of due diligence, upon the 1<sup>st</sup> Respondent; or to even

suggest that he committed fraud thereby, or that these were the consequence of fraudulent acts which he has benefitted from.

As was authoritatively laid down by Wambuzi C.J. in *Kampala Bottlers Ltd. vs. Damanico (U) Ltd.; S.C. Civ. Appeal No. 22 of 1992*, for a plea of fraud to succeed, the fraudulent act must first be proved; and it must be attributable to the person benefiting from it, either of direct involvement, or by necessary implication that such person had knowledge of the fraud and took advantage of it. The 1<sup>st</sup> Respondent convincingly explained that he obtained the second academic transcript because he had misplaced the first one; and yet UMI demanded for his transcript for purposes of admission. The authentication of the two certificates by the Academic Registrar conclusively negates the allegation of fraud.

The evidence before me is clear that the 1<sup>st</sup> Respondent is the same person who has gone by the name Kasamba Mathias, with or without the 'L.S.' as additional names. No evidence was adduced that he has committed the act of fraud or forgery he is accused of, or knowingly benefitted from any such act. He declined to take advantage of the more generous albeit erroneous verification of his 'O' level results by Dan N. Odongo, and pursued a second verification in rectification. That is by no means the conduct of a fraudulent person, or one who knows he is a beneficiary of a fraud.

True, there have been many instances of irregularities with regard to academic documents the 1<sup>st</sup> Respondent has relied on for his nomination or have been produced in Court; but all these have been credibly and persuasively clarified upon by the responsible officials of the respective institutions where the documents emanated from. The Petitioner has failed to prove the commission of any act of fraud at all, leave alone by the 1<sup>st</sup> Respondent, to rebut the evidence adduced by the 1<sup>st</sup> Respondent in proof of his ownership of the certificates. I find that the 1<sup>st</sup> Respondent has convincingly discharged the evidential burden that lay on him to prove ownership of the certificates.

For these reasons it is abundantly and unmistakably clear that the 1<sup>st</sup> Respondent is the same person who attended Kisubi, Mwiri, and Makerere University; hence the various certificates in issue are his; and for which reason, I find that he had the minimum academic qualifications that entitled him to be nominated for the parliamentary elections, as indeed he was; and which he triumphed in. Therefore, I have to resolve issue No. 1 in the affirmative.

**Issue No. 3.                      Whether the parties are entitled to the remedies sought.**

Having found for the Respondents on the 1<sup>st</sup> and 2<sup>nd</sup> issues, it follows naturally that the remedies pleaded for by the Petitioner are not available to him. I must therefore, as I hereby do, dismiss this petition with costs. However, owing to the numerous irregularities in the impugned documents of the 1<sup>st</sup> Respondent, which would rightly raise any law-abiding citizen's eyebrows, I think the 1<sup>st</sup> Respondent is entitled to only half of the costs of this petition as against the Petitioner; and I accordingly so order. Between the Petitioner and the 2<sup>nd</sup> Respondent, however, either party will bear his or its respective costs.

A handwritten signature in dark ink, appearing to read 'Alfonse Chigamoy Owiny - Dollo'. The signature is fluid and cursive, with a large, sweeping initial 'A'.

**Alfonse Chigamoy Owiny – Dollo**

**JUDGE**

**4 – 07 – 2011**