

The Petitioner was aggrieved by the whole process and petitioned this court to nullify the same and order fresh elections to be held.

The petition is premised on the main ground that there was non-compliance on the part of the respondents with electoral laws and that the non-compliance substantially affected the outcome of the election. The petitioner further complained that the 2nd respondent personally or through his agents with his knowledge, consent and or approval committed a number of electoral offences and illegal practices during the electoral process in contravention of the electoral laws.

The Petition was accompanied by an affidavit in support of the Petition sworn by the Petitioner and dated 7/4/2011. Learned Counsel Byamugisha Gabriel represented the Petitioner in court while learned Counsel Kakuru and Babu represented the 2nd respondent, and learned Counsel Serwanga Sam represented the 1st respondent.

Through their respective Counsel, both respondents filed replies to the Petition denying the allegations of the Petitioner, maintaining that the election was properly conducted in accordance with the electoral laws and prayed that the petition be dismissed with costs.

The evidence in the petition was by way of affidavits. The petitioner filed affidavits in support of the Petition and 2 others in rejoinder by Hon. Theodore Sekikubo, the Petitioners coordinator in charge of electoral process on the entire Ntusi Sub-county, and Moses Mugisha Nayebare, one of the petitioner's polling agents. The petitioner filed a further 13 affidavits in support. The 1st respondent filed an affidavit in support to his answer by Engineer Badru Kiggundu, the Chairman Electoral Commission, while the 2nd respondent filed his affidavit accompanying his answer to the Petition, and also filed a further 11 affidavits in reply to the petition.

The affidavits filed in court and served on the opposite party were taken as read. Counsel for the petitioner cross-examined the respondents and some deponents of affidavits, and Counsel for the respondents also cross-examined the petitioner and other deponents of their choice. All Counsel re-examined most of their witnesses.

Numerous documents and authorities were relied on by the parties in support of their respective cases.

The burden to prove the grounds of the petition is upon the Petitioner. He is party who asserts the existence of certain facts upon which he seeks judgment. Petitioner therefore bears the burden of proof. See Section 101-103, Evidence Act, Cap. 6.

The grounds to be proved, relevant to this petition are, pursuant to Section 139 of the Local Governments Act as follows:-

“(a) that there was failure to conduct the election in accordance with the provisions of this part of the Act and that the non-compliance and failure affected the result of the election in a substantial manner;

(c) That an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his/her knowledge and consent or approval;

The same issues were agreed upon during the scheduling conference, in addition to remedies available to the parties.

By virtue of Section 172 of the Local Governments Act, for any issue not provided for as to elections, the Parliamentary elections law in force for the time being applies with the necessary modifications.

The Local Governments Act is silent on the issue of the level of burden of proof. Thus Section 61 (1) and (3) of the Parliamentary Elections Act, [17 of 2005] applies. The Section provides that the grounds for setting aside an election shall be proved to the satisfaction of court on the basis of a balance of probabilities.

In Supreme Court of Uganda ***Presidential Election Petition No. 1 of 2001: Col. (Rtd) Dr. Kizza Besigye Vs Museveni Yoweri Kaguta and the Electoral Commission***, the Learned Chief Justice Odoki, cited with approval the case of ***Borough of Hackney Gill Vs Reed [1874] XXXI L.J. 69***,

where Grove, J emphasized that an election should not be annulled for minor errors or trivialities thus:

“An election is not to be upset for informality or for a triviality. It is not to be upset because the clock at one of the polling booths was five minutes too late or because some of the voting papers were not delivered in a proper way. The objection must be something substantial, something calculated to affect the result of the election. so far as it appears to me the rational and fair meaning of the section appears to be to prevent an election from becoming void by trifling objections on the ground of informality, but the Judge is to look to the substance of the case to see whether the informality is of such a nature as to be fairly calculated in a rational mind to produce a substantial effect.”

If the Petitioner is to succeed, therefore, he has to prove the grounds, or any one of them, of the petition to the satisfaction of court, on a balance of probabilities.

“Proof to the satisfaction of Court” has been held by the Supreme Court of Uganda to imply that, the matter has been proved without leaving room for the Court to harbor any reasonable doubt about the occurrence or existence of the matter; See Supreme ***Court Presidential Election Petition No. 1 of 2001; Col. (Rtd) Dr. Kizza Besigye Vs Museveni Yoweri Kaguta and another (Supra):*** Judgment of Mulenga, JSC.

The Court of Appeal, too, has held that:

“The Court trying an election petition under the Act (Parliamentary Elections Act 17/2005) will be satisfied if the allegations/grounds in the petition are proved on balance of probabilities, although slightly higher than in ordinary cases. This is because an election is of greater importance both to the individuals concerned and the nation at large A Petitioner has a duty to adduce credible or cogent evidence to prove his allegation at the required standard of proof.”

See Judgment of L.E. Mukasa Kikonyogo, Deputy Chief Justice, in ***Election Petition Appeal No. 9 of 2002; Masiko Winnie Komuhangi Vs Babihuga Winnie***, un reported.

This court will apply the above stated principles as to the burden and standard of proof in the determination of this petition.

Issue No. 1

The Petitioner complained that the 1st Respondent:

- a) Delivered materials that were not properly sealed, with short deliveries of ballot papers at some polling stations;
- b) Ballot stuffing and multiple voting.
- c) Tampering and alteration of results.
- d) Refusal/failure to give DR forms to the Petitioner's agents.
- e) Arrests, intimidation and violence.

a) Delivery of unsealed materials;

The Petitioners complained in paragraphs 6 (e), 10 and 11 of the Petition that the 1st respondent brought ballot papers already tampered with, and the ballot boxes open, with broken seals. The Petitioner's affidavit in support of the petition mentions this in paragraphs 3, 4, 26, 27 and 32, in which the 2nd respondent was also accused of having used his office of L.C. III Chairperson as a holding centre for election materials with the result that he had unlimited access to the election materials prior to polling, which he siphoned to his advantage.

In support of the above allegations, the petitioner relied on the affidavit of Hon. Theodore Sekikubo dated 7/4/2011 stating:

***“20. Earlier on at about 9.00 a.m. I had received and verified information from Ms. Phoebe Mbeera, the L.C. III Councillor and L.C. V Counsellor elect to the effect that at Kabukongote polling station, the polling materials had been tampered with, boxes were delivered with broken seals and envelopes containing ballot papers were adulterated and tampered with, with the result that the ballot papers delivered were fewer in number than the registered voters.*”**

22. At that very time I received communication from Rukooma polling station, Kyattuba polling station, Kabingo polling station, Kabaale Parish polling station among others that sealed envelopes contained (sic) had been opened before polling and the ballot papers remaining were fewer than the registered voters at those polling stations”.

I must say that all that Hon. Sekikubo alluded to was from information to him. Although under paragraph 20 he says he verified the information, he did not state how he had verified the information. For sure he did not state that he visited all these polling stations. The information he relied on is not adequate enough to satisfy court of the allegations he makes; especially when he depones that the ballot papers delivered/remaining were fewer than the registered voters. Particulars of numbers of short deliveries are important here. More importantly, how did the short deliveries affect the voting in the stated polling stations? Did some voters go away without voting because of this? Hon. Sekikubo's evidence based on information is not acceptable in an election petition. (See Order 19 rule 3 of the Civil Procedure Rules).

Another affidavit in support of delivery of materials already tampered with was sworn by Phoebe Mbeera, the Petitioner's polling agent at Kabukongote who stated in paragraphs 5 and 7 of her affidavit dated 6/5/2011, that before polling, he observed that the election materials had been tampered with, the ballot boxes had broken seals and the envelopes containing ballot papers for L.C. III Chairperson were tampered with; and upon counting they discovered that the presiding officer had delivered 10 booklets of ballot papers for the L.C. III Chairperson and 12 booklets for parish councilors. The petitioner did not indicate how this affected the results at Kabukongote polling station.

Tumushemereirwe Michael, and Nkatunga Jonah, polling agents for the Petitioner at Nsozi polling station also swore affidavits in which they deponed that when the presiding officer delivered election materials, they observed that the metallic box was unsealed. Actually their affidavits were a replica of each other. The two did not however go ahead to show whether it was found as a fact that the contents of the boxes had been tampered with, or that there was short delivery of materials. The Declaration of Results Form (DR Form) for Nsozi polling station indicated that 400 ballot papers were issued, a total of 316 were used and 4 ballot papers rejected as invalid. The unused ballot

papers were stated to be 077 in number, giving an unexplained short fall of 3 ballot papers. Both the said polling agents duly signed the DR Form without indicating any complaint. The above notwithstanding, I find that these agents, by signing the DR Form, in effect confirmed the fact that 400 ballot papers were delivered to the polling station, meaning that the 3 missing ballot papers got missing at the polling station and not before. There is nothing to show how the ballot box with no seal affected the materials inside the box, or the resultant voting.

Mugabe David, stated to be the petitioner's polling agent at Rukoma (spelt as Lukoma on DR Form) deponed in paragraph 13 of his affidavit that at the commencement of polling, the black metallic box was unsealed, the ballot papers indicated on the packing list were 400, but were in fact less by 100 ballot papers, yet that of the parish counselors were 400 as indicated on the packing list. According to the DR Form for Lukoma, the total number of ballots papers received for this polling station were 400, the total used was 279 and unused was 121.

The court found that the DR Form was signed by all candidates' polling agents. Mugabe did not say he did not sign the DR Form. There are some crossings on the DR Form, but on close scrutiny one can see that the one who filled the DR Form had interchanged the totals, hence the crossings to rectify the mistake.

During cross-examination of the Petitioner, he stated in respect to Lukoma polling station as follows:

“When MPC said we start at 8.00 p.m. people around Lukoma polling station came and stuffed the ballot boxes. They were 4 people. I knew three i.e. Mirombe, Mpono, and Katsigazi and Bekunda. Those are the ones I saw. They brought the ballot papers in their sleeves and when they approached the ballot box they would pull them out and put them in together with their case ballot. Mpono started the process. They were a bundle.”

The court found that the DR Forms in all the polling stations indicated above where tampering with election materials was stated to have taken place, were all signed by the candidate's agents and no indication at all that there was any tampering with the materials. Neither is there any indication on

the DR Form for Lukoma that there were excess ballot papers than those issued to the station by the 1st respondent. They were all accounted for on the DR Form. So where did the stuffed ballot papers go? I find no ballot stuffing proved, had already stated that the crossings on the DR Form was explained that they had interchanged totals in different columns which was rectified.

On the evidence available, the court finds that if there was any tampering with election materials before polling, there is no proof that it was done by the 1st and 2nd respondents for the benefit of the 2nd respondent, or that the results of the polling were affected in a substantial manner in those station.

Counsel for the Petitioner submitted further that as a result of many ballot boxes coming opened before polling, it gave way to ballot stuffing, and multiple voting. The complaint relating to ballot stuffing is to be found in paragraph 6 (a) and (c) of the petition, and paragraphs 3, 4, 26 and 27 of the petitioner's affidavit in support. He stated that at Ntyazo, Kaishebwoyera, Rukoma, Kabaale Parish, Kyattuba and Kabukongote it was detected that ballot papers were plucked off from their original booklets, and the Returning officer was notified, and that in many of the above stations, the number of votes cast far exceeded the total number of voters present and voting. In paragraph 29, he stated that at Kaishebwoyera polling station, the 2nd respondent's agent, Michael Kakuru stuffed the ballot box to the extent that the 1st respondent's Sub-county supervisor had to close it down when only 4 out of 214 voters had cast their votes.

Related to this complaint, Nayebare Moses Mugisha, a polling agent for the Petitioner at Kaishebwoyera, swore an affidavit in which he deponed under paragraph 5 that just 5 minutes into the polling exercise, they caught Karangira Elidad with 50 ballot papers pre-ticked in favour of the 2nd respondent and when they complained, the Sub-county supervisor closed the station. Further, a going of goons commanded by the Sub-county Chief, Ntutsi, came and stuffed more ballot papers into the ballot box. That the closure of the station disenfranchised the entire 214 registered voters.

On his part Kakuru Michael swore an affidavit in reply denying all the allegations of Nayebare, and denied ever stepping at the said polling station on polling day.

Although Hon. Sekikubo in his affidavit dated 20/5/2011 stated that he knew Michael Kakuru very well, nowhere in his affidavits of 7/4/2011, 14/5/2011 or 20/5/2011 did he ever state that he ever went

to Kaishebwoyera on polling day, so he could not confirm what Nayebare said about Kakuru. He only said he met Kakuru at Nsozi polling station.

Be the above as it may, it is common ground that there was ballot stuffing at Kaishebwoyera polling station. Latif Ngozi, the Returning Officer, Sembabule, deponed and also testified that when he got a report from the Assistant Returning officer on the ballot stuffing, he ordered the closure of the station. He further deponed under paragraph 18, that apart from Kaishebwoyera, he was not aware of any malpractices reported him arising out of Ntutsi Sub-county L.C. III elections for Chairperson.

On analysis of the above evidence and the decision taken by the Returning officer to cancel the results, I find that the cancellation must have affected both candidates. The extent to which each candidate was affected may never be known since court cannot speculate on how many votes each candidate would have polled. According to the Returning officer, Mr. Latif Ngozi, cancellation of these results did not affect the overall results of the election as the 2nd respondent won with a higher margin than all the registered voters of Kaishebwoyera. The Petitioner's allegation that Kaishebwoyera was his stronghold and therefore he was adversely affected is not substantiated with credible evidence.

Another reported incident of ballot stuffing was at Ntyazo polling station where Senkusu David, a voter at the polling station, deponed in paragraph 14 of his affidavit in support, that Kabanda ballot stuffed pre-ticked ballot papers in the ballot box as the presiding officer looked on in approval. He further deponed in paragraph 17 and 18 that after vote counting the total votes cast were said to be 258 when the registered voters are 256; and that the same Kabanda David advised the presiding officer to deduct 2 votes to make it 256 so as to tally with the registered voters.

A look at the DR Form for Ntyazo polling station indicates that the DR Form was duly signed by the presiding officer and the candidate's agents, two for the 2nd respondent, and one for the Petitioner, called Mubangizi Gastaras. The data recorded on the DR Form indicated that the total ballot papers issued to the polling station were 300; 256 votes were cast; and 44 votes were unused. The above being the case, the court has no basis to believe the ballot stuffing since the DR Form does not indicate any excess in the number of ballot papers. The ballot papers issued to the polling station

were all accounted for on the DR forms. Further still, one wonders why the Petitioner did not get an affidavit from his agent at the polling station to depone to what he saw at the station on polling day. This would have added more weight to the claims. As it is, with DR Form indicating as it did, the court finds no credible evidence to corroborate the claims by Senkusu David of ballot stuffing.

On ballot stuffing still, the petitioner further relied on the evidence of Mugabe David who, in paragraph 28 and 29 of his affidavit, deponed that they had received 300 ballot papers at Lukoma polling station, yet 277 were stated as the cast votes, and 128 as the unused votes; and that an excess of 105 votes could not be explained. While dealing with tampered election materials, earlier on, the court found that the DR Form signed by all candidates' agents indicated that the ballot papers issued to the station were all accounted for, and the crossings were not found to be fraudulent. The crossings were clearly mistakes, as indicated earlier. The court therefore finds no evidence to the satisfaction of court to support the allegations of Mugabi David on this aspect.

Still on ballot stuffing, Michael Tushemereirwe and Jonah Nketuga in paragraph 15 of their respective affidavits stated that at Nsozi polling station, during counting they discovered that 211 people cast votes according to their individual registers, yet the actual physical ballot papers counted were 316; that on seeing these anomalies, they protested and refused to sign the DR Forms, and were taken to a classroom and forced to sign by Michael Kakuru, the Sub-county Chief.

The court finds that the above allegations were not proved by attaching the polling day register to prove that only 211 people voted. The allegations alone, without any proof, are not able to satisfy court on a balance of probabilities that what they allege is the truth especially when the DR Form states otherwise.

Multiple Voting

The Petition itself does not mention multiple voting and in his submissions Counsel did not draw my attention to any. However the affidavit in support of the petition mentions under paragraph 21 that the 2nd respondent and his supporters committed many illegal acts and election malpractices including multiple voting. Although in his submissions Counsel for the petitioner referred to one Kakuba Charles mentioned in paragraphs 6 and 9 of Senkusu David's affidavit as having voted twice, Senkusu David's affidavit does not mention that incident. In paragraph 11 he mentions that the

respondents mobilized mercenaries to vote in the names of the dead like Nabutosi Scovia, her sister in law who passed away; and those who had long migrated like Nuwagaba Coleb. Senkusu further stated that if those who voted for the Woman Councillor on the same day were 151, it was not possible for those voting for L.C. III Chairperson to be 256. I don't agree with this deduction because people may go to a polling station just to vote for a candidate in a particular category and not the other.

Further on this point, Mwebaze Coleb, in paragraph 8 of his affidavit and during cross-examination named three people whom he knew had allegedly died but who were indicated as having voted. Mwebaze listed another 49 people who he claimed did not vote. He himself did not vote as he was at school.

On application by Counsel for the petitioner, court ordered for the production of the polling day register of Ntyazo polling station. According to the polling day register, Exhibit P1, there was 100% voter turn up and no invalid vote.

However, Coleb Mwebaze said he was at school and did not vote. Although he claims that 50 other people he listed did not vote, his evidence in this respect is hearsay because he was not at the polling station on polling day so he was not in a position to tell who voted and who did not. As for those alleged to have died, no proof was provided that this was so.

The polling day register showed that Mwebaze voted. The Presiding officer, Mugaiga who happened to be his own brother, swore an affidavit, on which he was cross-examined. In cross-examination he said he saw Mwebaze, his brother, and his sister at the polling station on polling day.

I observed the demeanors of the two brothers while testifying. Both had difficulties telling their exact ages. Apart from that I found Mwebaze to be more truthful and steady and consistent in his answers, and his demeanour was more impressive than that of his elder brother, the Presiding officer. I therefore believed that he did not vote. For reasons already stated however, there is no evidence to satisfy court that the other 49 mentioned in his affidavit, did not vote. Quantitatively, even if the 50 votes (including that of Mwebaze) were deducted from the results of the polls, it would not give victory to the Petitioner, at that polling station, or overall.

Still on ballot stuffing, in paragraphs 16 and 17 of her affidavit, Paskazia Kabonera, stated that at Kawungyera polling station, she found that the Presiding officer's register showed that Phoebe Isingoma who had died had been pre-ticked; and that the Presiding officer allowed many unregistered voters to vote, for example Kushemerera, a non-voter was given a ballot paper to vote. Further that Kushemerera was handed 3 ballot papers, and she cast all of them in the 2nd respondent's favour. I note, however that the DR Form does not indicate that the cast votes were more than the people voting. I further note that the polling agents, including Paskezia Kabonera all signed the DR Forms confirming that the contents were correct. Moreover, Kabonera's assertion in her affidavit that non-voters were allowed to vote was not substantiated with evidence to support the allegations, to the satisfaction of court. Furthermore, although she states she was a polling agent at Kawungyera, the DR Form does not indicate so.

Failure to give the Petitioner's agents DR Forms:

The Petitioner stated in paragraph 28 of his affidavit that his agents at Ntyazo, Nshozi and Kyettuba were denied DR Forms. According to their affidavits, the agents at Nshozi, Nkatunga Jonah and Tushemereirwe Michael they were locked up and forced to sign DR Forms. However, there is no allegation that they were denied DR Forms. Even Kuhabwa Fred, the Presiding officer of Nshozi polling station denied the allegation in paragraph 9 of his affidavit.

At Ntyazo, no polling agent of the Petitioner filed any affidavit. Neither is there any affidavit from his agents at Kyattuba, to the effect that they were denied DR Forms.

The court therefore finds that this complaint has not been proved to the satisfaction of court.

Mistreatment, arrest and detention of polling agents:

The above was alleged in paragraphs 6 (a) and (h), 7, 8, 9, 10, 14, and 15 of the Petition, and 5, 6, 16, 21, 24, 30, 31, and 32 of the affidavit in support. The Petitioner complained that the 2nd respondent personally and through his agents committed illegal practices and election offences when they:

“a) Deployed “mercenaries” from the neighbouring Lugusuru Sub-county to various polling stations on polling day who intimidated voters, beat up the Petitioners known supporters and even chased them away from their respective polling stations.

- b) *On polling day the Petitioner's principal campaign agent, William Kafeero, Mugerwa Fred and Muyuzi Pius, John and others were way laid and rounded up by special police constable and held in illegal detention throughout the polling exercise.***
- c) *Polling agents were kept away from polling table so as to make them unable to detect malpractices.***
- d) *Polling officials refused to allow disabled people suspected to be supporters of the petitioners to be assisted by people of their choice.***
- e) *Arrested and kidnapped the petitioner's agents and key strategists, robbing them of facilitation fees and appointment letters which crippled his election management, denying him of victory.***

The evidence to support the above allegations was to be found in the affidavits of the following:

- 1) Kafeero George William who deponed that on polling day while on the Petitioner's errand to circulate appointment letters and facilitation of the agents a gang of the 2nd respondent's supporters, some of whom were known to him way laid him and robbed him of the facilitation funds and appointment letters. He was put on a truck he knew belonged to the 2nd respondent and was later taken to the 2nd respondent's home where he was detained, only to be released at 6.00 p.m. when he was brought before the 2nd respondent.

The court noted that although Kafeero stated that some of the 2nd respondent's supporters who kidnapped him were known to him, he did not state any names whatsoever. Even the registration number of the truck which he knew "belonged" to the respondent was not given to make his evidence more credible. Further, for such a serious crime of kidnap and illegal detention not to be reported to police casts doubt on the truthfulness of the allegations. He does not indicate where, at the 2nd respondent's home, he was detained, and whether he was detained with the knowledge, consent or approval of the 2nd respondent. He only stated that at 6.00 p.m. he was brought before the 2nd respondent who ordered for his release. The only involvement of the 2nd respondent appears to be that he ordered his release. I said the persons

who kidnapped him were not named. There is further no proof that whoever they were, they were agents of the 2nd respondent acting with his knowledge, consent or approval.

- 2) Mugerwa Fred swore an affidavit stating that he was the Chairman for the Petitioner's coordination team who, on polling day, was waylaid on his way to voting, by police who were in the company of Tadeke a prominent and notorious supporter of the 2nd respondent. He was arrested and dashed to the Police Station and held captive until 6.00 p.m. The court did not find evidence linking the 2nd respondent to this police arrest. Neither was there any proof that Tadeke was an agent of the 2nd respondent acting with the 2nd respondent's knowledge, consent or approval.

None of the above instances point to the fact that the 2nd respondent either knew of the malpractices as they were committed and approved or condoned them. He cannot therefore be made responsible for the actions of the police and the unnamed supporters, or the use of an undisclosed truck to commit offences.

- 3) Tushemereirwe Michael and Nkatunga Jonah in their affidavits stated they were agents at Nshozi polling station who allegedly noted anomalies in the voting process and they refused to sign the DR Forms, leading to their detention in a classroom block where they were forced to sign DR Forms. They were rescued by Hon. Sekikubo. The witnesses however did not attach their individual registers which would indicate their allegation that only 211 and not 311 people voted, hence their refusal to sign DR Forms prompting their detention and being forced to sign. This casts doubts on the credibility of the allegations of their forceful detention and forceful signature of DR Forms. Hon. Sekikubo deposed that he found the two locked up in a classroom. However the presiding officer, Kunobwa in his affidavit and during cross-examination denied all the allegations of kidnap and forcefully obtaining signatures of the duo on DR Forms. He stated that when they finished counting and signing DR Forms, it started drizzling and he and the agents went to the classroom nearby for shelter and that is where Sekikubo found them.

The court finds that whatever happened at Nshozi, the 2nd respondent was not implicated. Michael Kakuru, the Sub-county Chief who it is said to have ordered for the detention of the two agents of the petitioner. There is no evidence that he was either an agent of the 2nd respondent or he acted with the knowledge, consent or approval of the 2nd respondent. And indeed if the illegal detention was there as alleged, wouldn't the victims have reported to the police, and or the Returning officer? There was no evidence of this. I therefore find that there was no evidence to the satisfaction of court that the two were mistreated and forced to sign DR Forms. Further, there was no attempt to show the effect of the alleged mistreatment/intimidation on the overall results.

I should perhaps point out that on the same polling day, there were elections of the Councillors and Woman Councillor. If all the illegalities alleged occurred at least there must have been some independent witnesses to the same, who would have provided to me independent and more credible evidence. I saw none of such evidence.

In his submissions in rejoinder, Counsel for the Petitioner submitted that the petitioner had proved his case qualitatively in that:

- 1) Kaishebwoygera where polling was cancelled was the stronghold of the petitioner and according to Nayebare the ballot stuffing was found to have been in favour of the 2nd respondent and the presiding officer was arrested for rigging for the 2nd respondent. Therefore in the best case scenario the margin of about 400 votes between the petitioner and the respondent would be reduced the margin by half.
- 2) At Ntyazo with 100% turn up where 2nd respondent got 237 and the petitioner 21, the respondent was a victim of ballot stuffing and if these results are cancelled, the difference would be wiped out completely.
- 3) At Bugobe, Sekikubo is stated to have taken out 80 stuffed votes from the ballot box, and 35 were found with Babiri, a total of 105 votes.
- 4) At Lukoma, Mugabe David deponed to more than 105 votes were stuffed in favour of the 2nd respondent and the DR Form was tampered with.

- 5) Nshozi, the agents of the Petitioner were locked up and forced to sign.
- 6) At Kabukongote, according to Mbeera Phoebe, in her affidavit Mrs. Ninsiima was caught with 7 pre-ticked ballot papers in favour of 2nd respondent.

Counsel therefore puts the minimum total sum at $214 + 256 + 105 + 105 + 7 = 687$, which if deducted from the tilts the balance in the petitioner's favour.

I find the computations above to be very simplistic, and not based on any realistic or credible formulae for proving the quantitative effect. If at Kaishebwoyera the voting was cancelled, then the candidates were all affected the same way. Without the results of a cast ballot, there is no way one can tell that a certain polling station was his stronghold. Many candidates have been known to loose even in their own villages/polling stations. I would not therefore deduct 214 votes in that respect, from the margin.

At Ntyazo where there is stated to have been 100% voter turn up, I agree that 100% voter turn up becomes a bit suspicious, since people die, others migrate or are sick and do not turn up. I found the allegation of ghost voting to have been proved in the case of Coleb Mwebaze, but not in the case of the 50 listed in his affidavit as there was no proof of the fact, since he also was not there on polling day. Even the alleged dead mentioned by Senkusu were not proved. Moreover, the polling day register was produced on court orders and indeed all were ticked. There is therefore no proof to the satisfaction of court that more ghost voters voted. That leaves only one ghost proved, so a reduction of 200 votes from the 2nd respondent is not justified in the least, and neither was there any explanation of how Counsel came to a figure of 200 votes to be deducted from the 2nd respondent.

For the rest of the mentioned polling stations i.e. Bugoobe, Lukoma, Nshozi, and Kabukongote, the DR Forms which were signed by all candidate's agents do not point towards ballot stuffing as all the cast votes and unused votes were accounted for, except Nshozi (Nsozi) polling station with a short fall of 3 votes, which also is not a sign of ballot stuffing. If there was ballot stuffing the ballots cast in the ballot boxes would have been in excess of the number of voters which was not the case. It may be true that some people were caught with pre-ticked ballot papers, but these admittedly did not form part of the cast votes which were as counted, since they were intercepted before they were cast, showing that the petitioner's supporters, including Hon. Sekikubo were very vigilant. Signature by

agents of DR Forms confirms what transpired at the polling station. Whatever the agent does is on behalf of the candidate and binds that candidate.

Section 172 of the Local Governments Act states that for any issue not provided for under this part of the Act, the Parliamentary Elections Act in force shall apply to the elections of local councils with such modifications as may be deemed necessary by the Electoral Commission. Section 46 (1) and (2) of the Parliamentary Elections Act, Act 17 of 2005, states:

“(1) The candidates’ agents and any voter present at polling station may raise and present in writing complaints relating to voting at the polling station and shall have the right to obtain information from the Presiding officer concerning the counting process.

(2) A presiding officer shall not refuse to receive a complaint presented to him or her under Sub-section (1) and he or she shall initial every such presentation and annex it as part of the official record of the polling stations.”

In respect of the present elections, the Returning officer, Latif Ngozi deponed and also stated during cross-examination that he received no complaints attached to reports from the polling stations in respect to Ntutsi Sub-county Chairperson elections. Indeed none of the polling agents who swore affidavits alleging irregularities and illegal practices at polling stations claimed to have registered any written complaints with the Presiding officers. It is possible that the candidates did not adequately brief their agents on procedures to take in case of complaints. They also did not send their agents for the Electoral Commission training. This would be the fault of the candidate who claims to have been adversely affected by irregularities but no reports were filed as required by law. No reports were made to police either of the illegal detentions. Without such complaints to the presiding officer or police, and without an affidavit from an independent observer who is not necessarily a supporter of the petitioner or his agent, the credibility of the allegations by the very agents who duly signed all the DR Forms, is put in issue.

I find that the petitioner has not adduced sufficient evidence to satisfy court that the conduct of elections at Ntutsi L.C. III elections held on 7/3/2011 were in the main not in compliance with the law and practice regulating the conduct of elections in Uganda; I find that the few instances I found proved e.g. the ghost voting at Ntyazo and the cancelling of results at Kaishebwongyera these did not

affect the outcome of Ntutsi L.C. III elections in a substantial manner. The 1st and 2nd issues are therefore answered in the negative.

The third issue was whether the 2nd respondent committed illegal practices.

Section 139 (1) (c) of the Local Government Act provides that an election will be set aside if it is proved to the satisfaction of court that an illegal practice or any other offence was committed by the candidate or with his knowledge and consent or approval. Sections 147 – 159 list down the illegal practices. Bribery is listed under S. 147 (1) which states:

(1) Any person who, with intent either before or during an election, either directly or indirectly influences another person to vote or to refrain from voting for any candidate, or gives, provides or causes to be given or provided any money, gift or other consideration to another person, to influence that person's voting commits an illegal practice of the offence of bribery.”

Meanwhile Section 139 states:

“139; Grounds for setting aside an election.

The election of a candidate as a chairperson or a member of a council shall only be set aside on any of the following

grounds if proved to the satisfaction of court:

a)

b)

c) That an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval.

In paragraph 20 of his affidavit, the petitioner deponed that the 2nd respondent personally, and through his agents in Karushonshomezi parish bribed voters with money and other groceries and successfully lured them to vote for him. He then lined up affidavit evidence of the following persons.

Nakiwunga Prossy of Kawungera deponed that she is a registered voter at Kawungera polling station in Ntutsi Sub-county Trading Centre. On 6th March, the eve of election, she was at her home at around 11.00 p.m. when the 2nd respondent knocked on her door. After asking for her vote he gave her Shs. 100,000= in two notes of 50,000= each and asked her try and get him 10 more votes from her friends.

The second witness, Rurihona Christopher of Rwantama deponed that he was a registered voter at Kyanja polling station. On 5/3/2011 at around 9.30 p.m. he was at home when the 2nd respondent came on a motor cycle and knocked at his door and identified himself as Kamuhingo Emmanuel Chairman L.C. III. He recognized his voice and opened. He found him seated in the sitting room with his family and asked him for his vote. He offered him Shs. 50,000=.

The third witness is Seguya Ben from Kawungera village who deponed that he was a registered voter at Kawungera polling station and a boda boda cyclist. On the 2nd March at 9.00 p.m. he was at home and received a knock on his door from the 2nd respondent. He came in and asked for support and gave him Shs. 10,000= for a soda.

The fourth is Byakatonda Godfrey who deponed that he voted at Ntutsi Headquarters polling station and was, also a boda boda rider. On 5/3/2011 at around 9.00 p.m. in night he met the 2nd respondent who stopped him and gave him Shs. 15,000= as facilitation to vote for him when the time came. He reminded him again on 6/3/2011 that he had eaten his money so should reserve the vote for him.

The fifth witness is Pasikaziya Kabonera (10) who deponed that she was a registered voter at Kawungyera polling station in Ntutsi Trading Centre, who stated that on 6/3/2011 at around 12.30 a.m. she was approached by the 2nd respondent and given Shs. 100,000=. She said the 2nd respondent knew her to be a polling agent and was asking her to let his agents do what they wished.

The last witness was Mujuzi Sam who deponed he was a registered voter at Kawungera polling station; and that on 6/3/2011 around midnight, the 2nd respondent went to his home at midnight and offered him Shs. 15,000= as a soda to be taken after casting a vote in his favour.

Mr. Byamugisha submitted that the second respondent never responded to this evidence and that consistent evidence not rebutted must be taken to be true. The petitioner needed to prove only a single incident, but here were 6 of them near polling day. Counsel further submitted that even the general denial in the second respondent's answer did not apply since the affidavit accompanying the answer was incurably defective as the 2nd respondent's evidence is to the effect that he swore the affidavit in Masaka before Matovu Advocate, yet the affidavit indicates that it was sworn in Kampala before Isaac Dylan Jombwe. It therefore offended the Oaths Act.

That left the answer without an accompanying affidavit. It therefore ceased to be an answer and therefore all witnesses who swore in support of the answer should have their evidence rejected.

I shall deal with the validity of the 2nd respondent's affidavit at a later stage. Suffice it to stay at this point that the 2nd respondent's answer/affidavit in reply is not mandatory. It is the affidavit accompanying the Petition that is mandatory. With or without the answer, the burden on the Petitioner still remains to prove the allegations to the satisfaction of court on the basis of a balance of probabilities.

In response Mr. Kakuru submitted that the bribery allegations had no substance whatsoever, and were an afterthought. The Petitioner's affidavit was omnibus and did not therein mention his agents whom he states were bribed. If ones agents were bribed before elections, their names should have appeared in the petitioner's affidavit. Counsel further submitted that to prove bribery one must prove that the person allegedly bribed was a voter. He had to annex his voter card and the polling day register to his affidavit. Further still, once a bribe is given and accepted, the receiver becomes an accomplice whose evidence must be taken with a pinch of salt. If a self confessed criminal swears an affidavit, it ought to be given the weight it deserves.

I have considered the evidence relating to the offence/illegal practice of bribery. The court bears in mind the fact that this is a very serious petition issue on which alone the petition can succeed.

As indicated earlier on, the Petition does not talk about bribery. It is only mentioned in the petitioner's affidavit. Parties are bound by their pleadings (order 6 Rule 7 of the Civil Procedure Rules). A party cannot prove what was not pleaded except through amendment with leave of court. There was no such amendment in this case.

The above notwithstanding, I will go ahead to analyze the bribery evidence to determine its adequacy. In paragraph 20 of his affidavit the petitioner deposed that the Petitioner personally or through his agents in Kashonshomezi parish bribed voters I note from the DR Forms Exhibit P3A – P3X that none of the alleged bribery was committed in Kashonshomezi parish. Five of the witnesses stated that they were from areas within Ntutsi parish, and one from Nabitango parish. This could go to suggest that the witnesses came in as an afterthought.

Be the above as it may, ***Oder JSC (RIP) in Col. (Rtd) Dr. Besigye Vs Yoweri Kaguta Museveni – SCEPI of 2001, at page 475*** set out the ingredients of bribery as follows:

- 1) That a gift was given to a voter.
- 2) The gift was given by a candidate at his agent.
- 3) It was given with the intention of inducing the person to vote.

The gift or money must be given to a voter. The Local Government Act does not define a “voter” but a “registered voter” in Section 1, as a person whose name is entered on the voters register. Needless to say the person bribed must be a registered voter. In the local council elections I must add that the person allegedly bribed must be a registered voter in the sub-county in issue, otherwise it would be no bribery. This fact must be proved, and the burden lies on who asserts.

In ***Rt. Col. Kizza Besigye Vs Yoweri Kaguta Museveni [2006]*** (supra) Odoki CJ held that absence of evidence that the person alleged to have been bribed was a voter, was a serious flaw, because unless one is a voter, he or she cannot be influenced to vote for a candidate (page 159).

All the 6 petitioners’ witnesses in the bribery allegation alleged they were registered voters in named polling stations within the sub-county in issue; that is to say Ntusi (Ntutsi) Sub-county in Lwemiyaga Constituency, Sembabule District. It however remained an allegation without any proof whatsoever. In my view one can only prove being a registered voter by attaching his voter ID card to the affidavit. It would also be important to attach the polling day register of the particular polling station to which the voter is attached to ensure that he was actually registered for the polls in issue, and had not probably registered in another sub-county where he works.

None of the witnesses in this respect attached any voter ID card in evidence, let alone, mentioning their voter registration numbers in their affidavits.

I find that none of the 6 allegations of bribery against the 2nd respondent have been proved to the satisfaction of court; in that there is no evidence at all that these witnesses were voters at the polling stations they alleged to vote. The requirements of the law have not been fulfilled.

The second illegal practice alleged by the Petitioner against the 2nd respondent under paragraphs 7, 9, 10, and 14 of the Petition and paragraphs 5, 6, 7, 8, 10, 17, 19, 21, and 30 of the Petitioner's affidavit in support, was undue influence under Section 154 of Local Government Act which prohibits the use of force or violence or threat of injury to induce a person to vote or not to vote.

Section 154 (b) states:

“If a person by abduction, duress or fraudulent device impedes or prevails on a voter to vote or not to vote.”

The Petitioner's evidence as per the affidavit of his chief campaigner, Kafeero was that the latter was arrested/detained and Shs. 1 million was taken away from him by 2nd respondent's goons who later presented him to the 2nd respondent who purportedly forgave him. He says that on polling day he was put on a truck he knew belonged to the 2nd respondent then later taken to 2nd respondent's home where he was detained; and at about 6.00 p.m. the 2nd respondent ordered for his release. I have already considered this person's evidence above.

The evidence is further said to be supported by evidence of Theodore Sekikubo on 1st affidavit paragraphs 9, 10, 11, and 12, he got information which he believed to be true about Kafeero's predicament and others. He searched all police stations and could not find them. Police could not find them.

Another witness (alleged victim) on this was Mugerwa Fred, Vice Chairman of Coordination Team of the Petitioner and registered voter at Ntutsi. He deponed that at around 8.00 a.m. on polling day he was intercepted by Tandeke and taken to police and held capture up to 6.00 p.m. so he never voted.

During detention, Kakuru and Tandeka reportedly kept on telling him that he would better start supporting the respondent.

Mr. Byamugisha concluded that the 2nd respondent and his agents committed so many illegal practices to extent that elections that took place in Ntutsi Sub-county were not fair and free, were a sham and should be set aside.

I don't see the 2nd respondent's hand in all these alleged illegal practices or offences, or his connection with the alleged undue influence. Police is said to have arrested Mugerwa, in the presence of the 2nd respondent supporter (Tandeka) but there is no indication that this was done at the instance of the respondent or with his knowledge, consent or approval.

I already found that in Kafeero's case, although he said some of his kidnappers were said to be known to him, he did not name any of them. He knew the vehicle belonged to the 2nd respondent but did not mention its make or registration number. Even the alleged detention at the 2nd respondent's place, there was no allegation that the 2nd respondent ordered for the detention or knew about the detention; or was at home all that time; the place of detention within the home is not indicated. The 2nd respondent is only mentioned when it came to ordering his release, not before that.

The court is no satisfied that the respondent or his agents with is knowledge, consent and approval, engaged in the illegal practices as mentioned above.

I should mention that Hon. Sekikubo swore three affidavits alleging illegalities and electoral offences against the respondents. Unfortunately his affidavits offend against the Order 19 rule 3 (1) which states:

“Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted provided that the grounds thereof are stated.”

Hon. Sekikubo's affidavits contained a lot of allegations obtained from information from others. This makes them incurably defective. ***In Election Petition No. 1 of 2001 Kiiza Besigye Vs Yoweri Kaguta Museveni and Another, at page 25*** of the judgment of Odoki CJ, it was held that:

“An election Petition is not an interlocutory proceedings but final proceedings, which is aimed at determining the merits of the case. Therefore affidavits admissible in such proceedings must be based on the deponent’s own knowledge, not on his information and belief.”

I would therefore answer the third issue in the negative.

On the remedies available to the parties, costs normally follow the event. However there is the unresolved issue as to whether there is an answer to the Petition, in which case the 2nd respondent would be entitled to remedies. The answer to the petition had an affidavit in reply attached to it deponed by the 2nd respondent. It indicated at the end that it was sworn at Kampala before Isaac Dylon Jombwe, Advocate and his stamp is affixed thereto. In cross-examination, however, the deponent stated that he swore the affidavit accompanying his answer in Masaka before Matovu Advocate. To me this means that we were dealing with two different affidavits here, and this fatally affects the affidavit in support of the answer since the affidavit the 2nd respondent says he swore in reply is not the one attached to his answer. For that reason the answer to the petition by the 2nd respondent is not supported by an affidavit. The Local Government Act does not provide for the answer to the petition so on the basis of Section 172 thereof (supra) the Parliamentary Elections Act shall apply and the Rules there under (SI – 141-1) rules 8 (4) states that a respondent other than the commission may answer the petition by an affidavit within 2 days after the service.

As I stated earlier I find the affidavit incurably defective in that it is strange to the answer. I therefore find that there was no answer to the petition. The petition only failed on the ground that the petitioner did not satisfy court on the validity of the grounds upon which the Petition was based. The Petition is therefore dismissed with the declarations:

- 1) The 2nd respondent was validly elected as Chairman L.C. III Ntutsi Sub-county, Lwemiyaga Sub-county, Sembabule District.

- 2) Although the 1st respondent's officials were found to have committed some negligent acts leading to cancellation of the elections at Kaishebwoogyera polling station, and along multiple voting e.g. in Ntyazo where a Mwebaze who did not vote was ticked as having done so; and ballot papers found their way illegally in peoples' hands like in polling stations where people were said to have been intercepted with ballot papers; such acts did not affect the results the elections in any substantial manner as indicated in the judgment.
- 3) Because I found that the 2nd respondent filed no answer to the petition, and the petitioner had some genuine complaints against the 1st respondent, each party shall bear their own costs.

I should add that even if the answer was found to be valid, I would still order that each party should bear their own costs. This is because this electoral area is very charged and ethnic differences are tearing people apart, affecting the development of the sub-county. Asking the Petitioner to pay costs would even push the wedge between the warring parties further; instead of being encouraged to bridge their differences and forge ahead with the development of the sub-county.

Before I take leave of this matter, I wish to comment on the election process for Chairman, Ntutsi Sub-county. The findings of court especially in Kaishebwoogyera where voting was cancelled, and in Ntyazo where multiple voting was prevalent, reflect on the incompetence or the glaring partisan nature of presiding officers. In future elections in this Sub-county, the Electoral Commission should take keen interest in the process and ensure that the polling officials remain neutral. This could go a long way in reducing the differences brought about when the losers in election perceive unfairness in the process.

Elizabeth Musoke

JUDGE

8/08/2011