

THE REPUBLIC OF UGANDA

IN THE HIGHCOURT OF UGANDA AT ARUA

ELECTION PETITION N0.003 OF 2016

MUSEME MUDATHIR BRUCE :::::::::::::::::::::::::::::::::::PETITIONER

VERSES

ABIRIGA IBRAHIM.Y.A:::1ST RESPONDENT

ELECTORAL COMMISSION:::2ND RESPONDENT

BEFORE: HON JUSTICE JOHN EUDES KEITIRIMA

JUDGMENT

This Petition was brought under Sections 60(2) (a), 61(a), (b), (c), (d), 68 & 98 of the Parliamentary Elections Act 2005 as amended; Rules 4&5 of the Parliamentary Elections (Elections Petitions) Rules S.1141-2.

The Petition is supported by the affidavit of the Petitioner who inter alia avers as follows:

1. That the Petitioner was a former candidate in the general National Parliamentary Elections held on 18th February 2016 which were organized by the 2nd Respondent.
2. The 1st Respondent had been disqualified for election as a Member of Parliament at the time of his election by the 2nd Respondent on the premise that he lacked academic qualifications of advanced level standard or its equivalent to be a Member of Parliament.

3. The 1st Respondent was unlawfully declared as elected Member of Parliament in as far as his name did not appear on any of the authentic declarations of results forms.
4. The 1st Respondent in connivance with the 2nd Respondent initiated and forged parallel declaration forms where the 1st Respondent's name appeared and as a result the 1st Respondent was declared as the elected Member of Parliament based on unauthorized and illegitimate declaration forms.-
5. That the Respondents jointly and severally blatantly failed, refused, neglected or ignored compliance with the provisions and Principles of The Parliamentary Elections Act 2005 as amended and as such the elections were not free and fair in as far as non-compliance affected the results of the election in a substantial manner.

The impugned declaration forms are attached to the affidavit of the Petitioner in support of the Petition and marked as Annexure D.

The Petitioner prays for the following remedies:

- I. A declaration that the 1st Respondent was wrongly and unlawfully declared the elected Member of Parliament for Arua Municipality.
- II. A declaration that the Petitioner was the duly elected Member of Parliament for Arua Municipality.
- III. Any other remedy as this Court deems fit.

In answer to the Petition the 1st Respondent in his affidavit in support to his answer avers inter alia that:

- i. The Petitioner has no cause of action as the 1st Respondent's nomination and subsequent election were lawful and done in accordance with the electoral laws of Uganda.
- ii. The 1st Respondent submitted his campaign program which was duly harmonized with all the other contestants and the 1st Respondent actively campaigned and participated in the campaign process together with other contestants including the Petitioner.
- iii. That at the time of the election on 18th February 2016 the 1st Respondent was qualified to be elected Member of Parliament for Arua Municipality.

IV. That his declaration as a Member of Parliament was done in accordance with the law and at all material times were not based on unauthorized and /or illegitimate declaration forms as alleged.

V. That on the 18th February 2016 (Election Day) he discovered that his name was missing on

some declaration forms which was immediately rectified by the 2nd Respondent.

VII. That the correction of the defective Declaration Forms did not affect the result in any way.

VIII. That the 1st Respondent's name appeared on the ballot paper for Arua Municipality Parliamentary seat.

That the Petitioner is not entitled to the reliefs sought.

The 2nd Respondent's answer to the Petition is supported by the affidavit of the Chairman of the 2nd Respondent who inter alia avers that:

- I. The electoral process in Arua Municipality was conducted fairly and legally in compliance with the provisions of the Laws of Uganda.
- II. The 1st Respondent was reinstated as a candidate for Arua Municipality constituency pursuant to various court orders.
- III. The 1st Respondent was declared as winner in accordance with the law and the wish of the voters of Arua Municipality constituency.
- IV. The 2nd Respondent denies any allegation of forgery of Declaration of Results Forms and contends that the Declaration of Results Forms were issued in accordance with the requirements for conducting elections and specifically in circumstances of the 1st Respondent having been restored as a candidate for Arua Municipality constituency.
 - V. The 2ND Respondent did not influence the voters of Arua Municipality constituency to vote for the 1st Respondent.
 - VI. The Petitioner's loss to the 1st Respondent does not imply non-compliance with the electoral principles enshrined in the Laws of Uganda.
 - VII. The 2nd Respondent contends in the alternative that if there were any irregularities or non-compliance with the electoral laws, such non-compliance or irregularities did not affect the outcome of the election in a substantial manner.
 - VIII. The 2nd Respondent admits no liability of any kind and that the reliefs sought by the Petitioner are disputed as having no merit.

Earlier on when this Petition was first brought for hearing, Counsel for the 2 Respondent raised a preliminary objection and this court ruled that the matter was res-judicata in so far as it sought declarations regarding the 1st Respondent's academic qualifications. The detail of that ruling is on record.

At the scheduling conference the issue framed for determination was whether the 1st Respondent did not appear on any of the authentic declaration of results forms and

whether that affected the results of the election in a substantial way.

The other issue to determine is the remedies available depending on how the above issue is resolved.

It was also agreed that written submissions be filed within the time frames that were given by Court. The parties complied and filed written submissions within the time frame agreed. The details of the submissions are on record and which I have used to determine this Petition.

It was the Petitioner's contention that whereas the fresh Declaration of Results Forms was authorized by the 2nd Respondent's Chairman, the same were illegal, invalid, null and void abinitio in as far as they, were generated by unknown sources endorsed by the 2nd Respondent. That this was in breach of the cardinal obligations of impartiality and ensuring a free and fair election to the detriment of the electorate and the candidates save for the first Respondent. The Petitioner also contends that this conduct amounted to non-compliance with the provisions of the electoral laws of the land and the result of the election was therefore affected in a substantial manner.

The Petitioner submitted that according to ***Article 61(1) of the Constitution and Section 12(1) of the Electoral Commission Act Cap 140*** the 2nd Respondent has the sole mandate of organizing and conducting national elections in Uganda as well as to print and design electoral materials. That however for furtherance of its functions, the Commission may assign some responsibilities to any person, institution or organization. See ***Section 14 of the Electoral Commission Act Cap 140***. The Petitioner also submitted that ***Section 28 and 29 of the Parliamentary Elections Act 2005 as amended*** provides that voting materials ought to be capable of being distributed by the Returning Officers to the Presiding Officers within 48 hours from the Polling day and that a list of names of the candidates as well as polling stations shall be published in the gazette for verification purposes.

The Petitioner contended that the 2nd Respondent carried out its mandate and

designed special Declaration of Results Forms for the national elections held on

18TH February 2016. That the said forms essentially conformed to the forms prescribed by law as it had special features to enable the Returning Officer to transmit the Results to the 2nd Respondent's Head Quarter at Kampala. That these special features mainly include serial numbers and bar codes. That it was evident that up to the polling day no complaint was ever made as to the propriety of the voting materials and that it was on the polling day when it was realized that the 1st Respondent's name was inadvertently missing on the Declaration of Results Forms distributed by the Returning Officer of Arua District. That the *Chairperson* of the 2ND Respondent then immediately directed the printing of generic Declaration of Results

Forms with the 1st Respondent's name and ordered that they be provided to the Returning Officer, Arua District.

It is the Petitioner's contention that the generic Declaration of Results Forms printed with the 1st Respondent's name were illegal, null and void abinitio. That the Chairperson of the 2nd Respondent does not disclose the form and means of the directive and that it is not known whether the said directive was an assignment in accordance with the provisions of **Section 14 of the ECA** or a realization of an anomaly under **Section 50 of the ECA**. That the recipient of the directive is not disclosed and no candidate was notified of this directive and the implementations thereof save for the 1st Respondent. It is the Petitioner's

contention that this directive was in blatant and fundamental breach of the principles of impartiality and the Commission's obligation to ensure that the election was conducted in a free and fair environment. The Petitioner refers to **Article 61 (a) of the Constitution and Section 12 (1) (e) of the ECA** to buttress his submission. The Petitioner emphasizes that this was a glaring case of partiality by the 2nd Respondent in as far as the intention was to solely ensure that the 1st Respondent wins the election. That it was not farfetched to infer that these generic Declaration of Results Forms were actually provided by the 1st Respondent who was the aggrieved party at the time and thereafter and that the Chairman of the 2nd Respondent endorsed them. The Petitioner cited the case of **Hon. Oboth Jacob versus Dr. Otiam Otaala Emmanuel C.A Election Petition No.38 of 2011** which held on the concept of a free and fair election.

The Petitioner emphasized that the 2nd Respondent cannot invoke **Section 50 of the ECA** because the same does not provide a license to override the principles of impartiality as well as free and fairness of an election. The Petitioner cited the case of **Joy Kabatsi Kafura versus Anifa Kawooya Bangirana & Electoral Commission S.C. Election Petition Appeal No. 25 Of 2007** to support his submission.

The Petitioner further submitted that nothing can become of an illegality. That the generic Declaration of Results Forms were fundamentally flawed in as far as they were introduced to the Presiding Officers at 5:30 PM and hence disrupting the voting and counting of votes exercise that was already proceeding at the time. That this went to the root of the election in as far as there was inevitable distortion of the results already counted and declared at some polling stations. The Petitioner referred to paragraph 8 of the affidavit of Droti Dennis Felix. That the original Declaration of Results Forms were never withdrawn and the presiding officers were faced with the dilemma of distorting the Declaration of Results Forms by

writing the 1st Respondent's name and votes in ink. That therefore the disparities of what the Declaration of Results Forms were actually used to tally the results of the election cannot be trivialized. That the 2nd Respondent has never pronounced itself on how the results of the elections were transmitted to the National Tally Center at Namboole because it was obvious that the generic

Declaration of Results Forms could not be transmitted for lack of a serial number and bar code that was used on search forms nationwide. That the generic forms were also flawed in as far as they did not bear any indication of a polling station, parish or even sub-county as ought to be the case on genuine declaration of results forms. The Petitioner cited the case of ***Kakooza John Baptist versus Electoral Commission and Yiga Anthony-S.C Election Petition Appeal No.11 of 2007*** that held on the importance of Declaration of Results Forms.

The Petitioner submitted that the law relating to Declaration of Results Forms is couched in mandatory terms and as such requires strict compliance. The Petitioner further contended that some of the generic forms contain major flaws in the contents of the number of votes and the votes counted. The Petitioner cited several stations where this occurred and the disparities in the numbers. That under ***Section 45 of the PEA***, this was a proper case where this election ought to have been postponed to rectify the details of the candidates on the Declaration of Results Forms.

The Petitioner concluded by praying that the Petition be allowed in the terms proposed.

The 1st Respondent submitted that from the onset the Petitioner in his pleadings and evidence did not challenge the results on the impugned Declaration of Results Forms and that nor were they falsified. That it was not enough for the Petitioner to submit that the generic Declaration of Results Forms were illegal. That the Petitioner should have stated the law under which the impugned declaration of results forms did not comply with. It was the 1st Respondent's submission that the generic Declaration of Results Forms are authentic and are not illegal and /or void as submitted by the Petitioner. That the Declaration of Results Forms came from the Electoral Commission as indicated in the affidavit of its Chairman and that this was corroborated by the Petitioner's own witness Droti Dennis Felix the Presiding Officer in charge of Enyau cell polling station in Kenya ward.

The 1st Respondent cited ***Section 6(1) (c) of the Parliamentary Elections Act 17 of 2005 as amended*** which provides for the Commission power to transmit to the

Returning Officers sufficient blank report books and other electronic materials. That the generic Declaration Forms were printed to address and correct an error, mistake and or an emergency.

The first Respondent cited Section 50 (1) and (2) of the Electoral Commission Act

Cap 140 which gives the 2nd Respondent special powers in order to achieve the purposes of the Electoral Commission Act or any law, where in the course of an election it appears to the Commission that by reason of any mistake, miscalculation an emergency that any of the provisions of any law relating to elections other than the Constitution does not accord with exigencies of the situation to adapt any of the provisions to such extent as the Commission considers necessary to meet the exigencies of the situation. That therefore the generic forms were made in accordance with the law. That there was nothing illegal about writing of the 1st Respondent's name and results in ink by the 2^{na} Respondent's presiding officers on the existing Declaration of Results Forms. The 1st Respondent contends that this was only to ensure that the people of Arua Municipality are not disenfranchised. That the 2nd Respondent also has the power to direct and assign any of its duties to any election officer Under **Section 14(1) of the Electoral Commission Act Cap 140**.

The 1st Respondent further submitted that **Article 68(4) of the Constitution** provides for the essential requirements of the Declaration of Results Forms which are the signing by the Presiding Officer, polling agents, the name of the polling station, number of votes cast in favour of each candidate. Further, that the generic Declaration of Results Forms are lawful and authenticated by the fact that they were all signed by all the candidates polling agents without registering any complaints. That the effect of signing of a Declaration of Results Form has been a subject of litigation and court's adjudication in the case of **Hon. Oboth Markson Jacob versus Dr. Otiam Otaala Emmanuel E.P APPEAL NO.38 OF 2011** where it was held that; ... **"the DR Forms in question are signed by the respective station presiding officers as well as a set of two agents for the appellant and also for the respondent. It follows therefore that if any of those DR Forms were a forgery; then a party to the petition would straight away point out the forgery. None did so". ... "the presiding officer and the agents of the appellant and the** respondent signed the respective DR Forms at each station, each agent keeping a copy of the form. There were no complaints raised to the returning officer before the announcement of the election. I conclude from all this that a proper election as is reflected in the Declaration of Results Forms from each of these polling stations did take place and that the results were valid."

The 1st Respondent further submitted that use of a non-prescribed Declaration of Results

Forms is not a ground for annulling an election under **Section 61 of the Parliamentary Election Act 17 of 2005 as amended**. That the Petitioner had to prove that non-compliance affected the result in a substantial manner. The 1st Respondent cited the case of **Sitenda Sebalu versus Sam Njuba & E.P APPEAL NO.1 of 2008** to buttress his submission.

The 1st Respondent contended that apart from Counsel's submissions from the bar, it is not the Petitioner's evidence that the results were falsified, the Petitioner simply complains that that the 1st Respondent's name should not have been printed in ink on the original DR Forms and the new /generic DR Forms bearing the 1st Respondent's name should not have been printed and used by the 2nd Respondent. The 1st Respondent also prayed that the Court should invoke **Section 43 of the Interpretation Act Cap 3** which provides that a document shall not be rendered void for mere deviation from the prescribed form where the substance is not affected.

The 1st Respondent concluded by submitting that the Petitioner had failed to discharge the burden of proving that the 1st Respondent did not appear on any of the authentic DR Forms and if so whether non-compliance if any substantially affected the result. That instead it was the 1st Respondent that had proved that he was duly elected as a Member of Parliament for Arua Municipality on authentic and lawful DR Forms and the non-compliance if any did not affect the election in a substantial manner. The 1st Respondent further contends that the Petition is incompetent and should be dismissed with costs to the 1st Respondent.

In their submission, the 2nd Respondent stated that under **Section 50 (1) of the Parliamentary Elections Act**, a presiding officer is mandated to fill in the necessary number of copies of the prescribed form for the Declaration of Results.

Regulation 2 of the Parliamentary Elections (Interim Provisions) (Prescription of Forms) Regulations SI 141-3 and. schedule therein prescribes the format of a declaration of results form. The 2nd Respondent contends that the generic Declaration of Results Forms, bearing the name of the 1st Respondent and the Petitioner conform to that format as prescribed by the law. The 2nd Respondent cited the case of **Ngoma Ngime versus EC and Winnie Byanyima-C.A NO.11/02** where it was held inter alia that all the 66 declaration of results forms that court examined contained the essential information that the law requires and were accordingly found to be valid.

The 2nd Respondent submits that in this case the Petitioner's only contention is that the forms did not bear the bar codes and serial numbers. That save for these, all information required was contained in the forms. That as per the format prescribes by the law, bar codes are a

superfluous addition whose failure to appear is just a matter of appearance and does not render a declaration of results forms invalid. Further, that the Petitioner does not deny that the Declaration of Results Forms as having been signed by the respective returning officers and some of the agents of the candidates who signified that the contents therein are true. The 2nd Respondent cited the case of ***Babu Edward Francis versus the EC AND Elias Lukwago HC E.P NO.10 OF 2006*** Where Justice Stella Amoko as she then was held that "***when an agent signs a DR Form, he is confirming the truth of what is contained in the DR Form. He is confirming to his Principal that this is the correct result of what transpired at the polling station. The candidate in particular is therefore stopped from challenging the contents of the form because he is the appointing authority of the agent.***"

The 2nd Respondent further submitted that the minimum legal requirement for a declaration of result form is that it must be signed by the presiding officer in order to be used as a basis for declaring the results at every polling station. The failure to comply with any other of the requirements prescribed by the law does not invalidate the results which have been declared as validly obtained by each candidate. The 2nd Respondent also cited a recent case of ***Toolit Simon Akecha versus Jacob Oulanya and the Electoral Commission -Election Appeal No. 19 of 2011*** it was held that all the impugned declaration of results forms as attached to the affidavit of the Petitioner on which they were signed by the respective presiding officers was not denied, as such were valid and reflected the outcome of the election.

The 2nd Respondent contends that the Petitioner does not dispute the results reflected in the DR Forms but only disputes the appearance. The 2nd Respondent invited Court to disregard the difference in the structural/ornamental appearance of the declaration of result forms and come to the conclusion that whereas the declaration result forms were reprinted, the results contained therein indicate the will of the people of Arua Municipality.

With regard to the errors in the computation of results as reflected in the declaration of results forms, the 2nd Respondent submitted that the errors cited were trivial and if corrected would not affect the outcome of the election. The 2nd Respondent cited the case of ***Kizza Besigye versus Museveni E.P NO.1 OF 2006*** where the case of ***Morgan versus Simpson*** was cited with approval which held to the effect that elections must not be set aside on light of trivial grounds. It is a matter of great public interest. The 2nd Respondent invited the Court to disregard the mistakes as trivial as they could not affect the outcome of the election.

The 2nd Respondent further submitted that the Petitioner merely states that the generic declaration of results forms were used in declaring the winner of the election but does not dispute the results of each of the candidates polled at the respective polling stations. That

each of the declaration of results forms show that the same were signed by each of the respective agents signifying acceptance of the results. The 2nd Respondent cited the recent case of *Amama Mbabazi versus Yoweri Museveni E.P NO.1 of 2016* where Chief Justice Bart Katureebe held that "*given the national character of the exercise where all voters in a country formed a single constituency, can it be said that the proven defects so seriously affected the result that the result could no longer reasonably be said to represent the true will of the majority of the voters?*".The 2nd respondent concluded by praying that the petition should be dismissed with costs.

The Petitioner made a submission in rejoinder basically reiterating his earlier submissions. The Petitioner emphasized that the introduction of the impugned generic Declaration of Results Forms in the 18th February 2016 for Member of Parliament of Arua Municipality was not substantially and intrinsically compliant with the provisions and more so the principles of the enabling electoral laws of the country. That this was unfair to all the candidates save for the 1st Respondent in as far as the exercise turned from being a free and fair election into an imposition of one candidate who was the 1st Respondent and hence affected the result of the election in a substantial manner. That there was no amount of directive from the Chairman of the 2nd Respondent that could legitimize an illegality as there was no law permitting that. That an illegality was a nullity. That the Petitioner would have been the winner of the election if it had not been for the interference of the 1st Respondent.

RESOLUTION

The facts in this Petition are not disputed. These are that on the 18th February 2016, the 2nd Respondent organized and conducted National Parliamentary elections for Arua Municipality Constituency wherein the Petitioner and the 1st Respondent participated as candidates. It was noted on the day the said elections were held that the 1st Respondent's name did not appear on the Declaration of Results Forms issued by the 2nd Respondent throughout the entire constituency though the 1st Respondent's name had appeared on the ballot papers. The 2nd Respondent then ordered that generic Declaration of Results forms be printed to reflect the 1st Respondent's names and to also include in ink the names of the 1st Respondent on the original Declaration of Results Forms that had earlier been issued.

The issue to determine now is whether the 1st Respondent did not appear on any authentic DR Forms & whether that affected the results of the election in a substantial manner.

The burden of proof lies on the Petitioner who has to prove his Petition to the satisfaction of Court as required under **Section 61 (1) of the Parliamentary Elections Act No.17 of 2005 as amended**. The standard of proof is slightly higher than proof on a balance of probabilities but short of proof 'beyond reasonable doubt'. See *OdoTayebwa versus Bassajjabalaba Nasser & Electoral Commission- Election Petition Appeal No.013 of 2011*.

In trying to explain how the generic Declaration of Results Forms came to be issued in the said election, the Chairman of the 2nd Respondent in his supplementary affidavit in reply stated that the 1st Respondent's name was on the ballot paper for the election of MP Arua Municipality. That he was on the 18th February 2016 advised by his Returning Officer Arua that the 1st Respondent's name was inadvertently missing on the Declaration of Results Forms. That he then directed the Printing of generic Declaration of Results Forms with the 1st Respondent's name included. The 2nd Respondent's Chairman further avers in his supplementary affidavit that the Correction of the Declaration of Results Forms did not affect the results of the election in any way but ensured a fair electoral process. The Chairman of the 2nd Respondent avers that this was done in accordance with the law and hence the said generic forms were not illegal.

Article 68(4) of the Constitution of the Republic of Uganda provides that "The presiding officer, the candidates or their representatives and in the case of a referendum, the sides contesting or their agents, if any, shall sign and retain a copy of a declaration stating-

- (a) The polling station;**
- (b) The number of votes cast in favour of each candidate or question, and the presiding officer shall there and then, announce the results of the voting at that polling station before communicating them to the returning officer."**

Article 61 of the Constitution provides for the Functions of the Electoral Commission which include-

- (a) To ensure that regular, free and fair elections are held;**
- (b) To organize, conduct and supervise elections and referenda in accordance with this Constitution;**
- (c) To ascertain, publish and declare in writing under its seal the results of the elections and referenda;**
- (e)-----**
- (f) To hear and determine election complaints arising before and during polling;**

There is no evidence to show that when the generic declaration of results forms were introduced at the various polling stations, any of the candidates complained to the 2nd Respondent as to their introduction. It would appear that the complaint only arose after the 1st Respondent won the election and the complaint was only raised in this petition. Am sure that if the Petitioner had won the election this complaint could not have arose. The impugned generic forms that were introduced by the 2nd Respondent and which are marked as annexure D to the Petitioner's affidavit indicate that the forms were all signed by the presiding officer and the agents to the candidates. This is an indicator that the Petitioner and the other candidates acquiesced to the use of those forms otherwise they had the right to out rightly reject them and formally complain to the 2nd Respondent or even refuse to sign them. Apparently this was not done and in my opinion the Petitioner by his conduct is estopped from complaining now.

It was held in the case of Babu Edward Francis versus Electoral Commission and Elias Lukwago-High Court Election Petition No.10 of 2006 that "When an agent signs a DR Form, he is confirming the truth of what is contained in the DR Form. He is confirming to his Principal that this is the correct result of what transpired at the polling station. The candidate in particular is therefore stopped from challenging the contents of the form because he is the appointing authority of the agent".

I therefore take it that even though the Petitioner challenges the form of the Declaration of Results Forms that was introduced by the opinion would be whether what was reflected in the ballot papers is what was transmitted to the Declaration of Results Forms. It is my considered view that the generic Declaration of Results Forms were introduced to correct a mistake that was discovered on the polling day which was the omission of the 1st Respondent's name on the Declaration of Results Forms. It is my considered view that the Chairman of the. 2nd Respondent had the mandate under the said provisions of the law to correct that mistake in as far as it did not disenfranchise the voters of Arua Municipality Constituency.

Section 43 of the Interpretation Act Cap 3 provides that "Where any form is prescribed by any Act, an instrument or document which purports to be in such form shall not be void by reason of any deviation from that form which does not affect the substance of the instrument or document or which is not calculated to mislead."

It is my considered view that the generic Declaration of Results Forms that were introduced did not affect the results of the votes that had been cast and was not calculated to mislead or even benefit the 1st Respondent as the Petitioner would wish to intimate. The submission that

the said forms could have even been generated by the 1st Respondent is a submission from the bar not backed by any credible evidence and definitely not according to the required standard of proof as required in Petitions of this nature. The chairman of the 2nd Respondent owned up the said forms and gave reasons which are convincing as to why they were introduced. This is in the supplementary affidavit of the 2nd Respondent's Chairman specifically paragraph 7. These forms were accepted by the Petitioner in as far as his agents at the various polling stations signed on them and hence acknowledged the results that were reflected therein. If there was any fundamental discrepancy the Petitioner or his agents had the right from the onset to reject them by raising a formal complaint to the 2nd Respondent. In the case of **Hon. Oboth MARKSON Jacob versus Dr. Otiam Otaala Emmanuel-Election Petition Appeal no.38 Of 2011** it was held by Justice Remmy Kasule JA " *...the DR Forms in question are signed by the respective*

station presiding officers as well as a set of two agents for the appellant and also for the respondent. It follows therefore that if any of those DR Forms were a forgery, then a party to the petition would straight away point out the forgery. None did so". Similarly if the Petitioner had noticed something fundamentally wrong with the said forms he should pointed that out straight away and not wait for the 1st Respondent to be declared a winner for him to do so.

In the case of Sitenda Sebalu versus Sam k. Njuba and Electoral Commission-Election Petition Appeal NO.1 OF 2008 Justice Byamugisha as she then was held that "the complaint by the appellant that the presiding officer used a non-prescribed form at the polling station in question in my view could be considered a triviality which should not be used to upset the choice of the voters in choosing a candidate. As we all know an election is an exercise of great public importance".

In the Election Petition of **Kiiza Besigye versus Museveni Election Petition No. 1 of 2001** it was held that "***Elections must not be set aside on light or trivial grounds. It is a matter of great public interest.***" In this instant case I find that the major complaint about the Declaration of Results Forms is about the form but not the substance. In my view the substance was whether those forms reflected the results of the votes cast in Arua Municipality Constituency and the answer is in the affirmative. In the recent case of **Amama Mbabazi versus Yoweri Museveni E.P NO.1 OF 2016 the Hon Chief Justice Bart Katureebe held** that it was important for the Court to ask the question that given the national character of the exercise it can be said that the proven defects

seriously affected the result and that the result could no longer reasonably be said to represent the true will of the majority of voters.

In this instant case I have already observed that the introduction of the generic Declaration of Results Forms did not affect the results of the votes that were cast in Arua Municipality Constituency. Even the witness of the Petitioner a one Droti Dennis Felix who swore an affidavit in rejoinder to the 2nd Respondent's supplementary affidavit stated that he recorded the results on the new declaration forms as they were obtained by each candidate. There was nothing to show in his affidavit how the new forms affected the results in any way. The 1st Respondent and his party would have been grossly affected if the anomaly was not rectified and there is nothing to show that any other candidate was affected by the introduction of the generic forms unless they want to say that they would have taken advantage of the situation to be declared winners if the 1st Respondent had not appeared on the declaration form! That would have been taking undue advantage that cannot be condoned in a democracy where the wish of the majority is what is considered.

The Petitioner tried to point out that the generic Declaration of Results Forms had major flaws in the contents and number of votes and votes counted. He went on to point out the stations where this occurred and the figures involved. I think that the onus was on the Petitioner to prove how this substantially affected the outcome of the results in the said constituency. ***Section 61 (1) of the Parliamentary Elections Act [17 of 2005] as amended provides that "The election of a candidate as a Member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court-***

- a) Noncompliance with the provisions of this Act relating to elections , if court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the noncompliance and failure affected the result of the election in a substantial manner;**
- b)**
- c)**
- d)**

In the case of Kizza Besigye versus Museveni-Election Petition No.1 of 2006 the

Supreme Court held that a court cannot annul an election on the basis of some irregularities that had occurred. It is my considered view that even if there were some irregularities on how

some figures were computed in some polling stations, the onus was on the Petitioner to prove to the satisfaction of this court how that affected the result of the election in a substantial manner. No candidate or agent complained that the votes counted, announced and recorded on the impugned Declaration of Results Forms as those of his/her candidate were wrongly recorded on the said forms. The above being the state of affairs, it is safe to infer that the writing of misstatements on these forms relating to total valid votes cast, or rejected or ballot papers counted or spoiled, or issued or unused are mere irregularities not affecting the results of the election in a substantial manner. See the case of ***Hon.Oboth Marksons Jacob versus Dr. Otiam Otaala Emmanuel- Election Petition Appeal No.38 of 2011.***

The Petitioner had also questioned as to how the said DR forms were transmitted to the tally center when the forms had no bar codes. Again I believe that what was important is whether the 2nd Respondent received accurate results but as to how they were transmitted was not important. Again in the case of Dr. KiizaBesigye versus Electoral Commission &Yoweri Museveni-Supreme Court Presidential Election Petition No.1 of 2006 Chief Justice Benjamin Odoki as he then was held that ... "some noncompliance or irregularities of the law or principles may occur during the election, but an election should not be annulled unless they have affected it in a substantial manner. The doctrine of substantive justice is now part of our constitutional jurisprudence. Article 126 (2) (e) of the constitution provides that in adjudicating cases both of civil and criminal nature, the courts shall subject to the law, apply the principle among others, that substantial justice shall be administered without undue regard to technicalities. Courts are therefore enjoined to disregard irregularities or errors unless they have caused substantial failure of justice".

So whether the results were transmitted electronically or by bus, air or water what was important is whether the National tally center received the genuine results that came from Arua Municipality Constituency.

Before I take leave of this matter, at one point the Petitioner had expressed the wish to cross-examine the Chairman of the 2nd Respondent on matters he had deposed to in his affidavit. This was not possible because it was reported that the Chairman of the 2nd Respondent was busy and another date was sought to enable him appear in court. The 2nd Respondent should be alive to the fact that these petitions are given timeframes in which they should be determined and I would advise that in future some of the affidavits should be deposed by the Commissioners of the 2nd Respondent or even technocrats if they are able to explain certain

facts so that it is much easy to access them once they are required for cross examination. In this case it was my considered view that since the 2nd Respondent's Chairman had owned up to the generic forms that had been introduced in the said election, there was nothing much of probative value he would have added by his physical presence in court and I don't believe that prejudiced the Petitioner in any way as he could still prove the facts he had alleged without necessarily cross examining the Chairman to the 2nd Respondent.

I therefore find that the 1st Respondent was duly elected and declared as Member of Parliament for Arua Municipality.

The petition will therefore be dismissed. However considering the circumstances that gave rise to this Petition and in the interests of Justice I will order that each party bear their own costs.

Hon. Justice John Eudes Keitirima

24th /06/2016