THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, CJ., TSEKOOKO, MULENGA, KANYEIHAMBA, JJSC., AND LADY JUSTICE MPAGI-BAHIGEINE, AG. JSC.)

ELECTION PETITION APPEAL NO.25 OF 2007

BETWEEN

JOY KABATSI KAFURA :::::::::::::::::::::::::::::: APPELLANT

VERSUS

1. ANIFA KAWOOYA BANGIRANA
2. ELECTORAL COMMISSION } **::::::: RESPONDENTS**

[Appeal from a judgment of the Court of Appeal at Kampala (Okello, Engwau and Kitumba, JJ.A.) dated 5th October, 2007, in Election Petition Appeal No.3 of 2007 and No. 4 of 2007]

JUDGMENT OF TSEKOOKO, JSC:

This is a second appeal. It arises from a decision of the Court of Appeal which reversed a judgment of the High Court at Masaka (Mukiibi, J.) in Election Petition No. 1 of 2006 between the appellant and the respondents.

BACKGROUND

On 23rd February, 2006, Presidential and Parliamentary General Elections were held throughout this country. Prior to the holding of the elections, the Electoral Commission (2nd respondent) was required by the Electoral Commission Act, "the Act", to carry out certain functions and duties. These include the appointment of

electoral officials such as the District Returning Officers who in turn would appoint Assistant District Officers, presiding officers and polling assistants. A District Returning Officer is in charge of an electoral district while an Assistant Returning Officer is in charge of part of such a district whereas a presiding officer and a polling assistant would be in charge of election matters at a polling station. The Act also requires such appointments to be gazetted. According to Subsections (3) and (4) of S.30 of the Act:-

30 (3) The commission may, by notice in the Gazette, remove from office any returning officer where the retuning officer-

(a) is appointed by virtue of a public office and the person appointed returning officer ceases to hold public office;

(b) ceases to be ordinarily resident in the district for which he or she is appointed returning officer;

(c) is incapable, by reason of illness or physical or mental infirmity, of satisfactorily performing his or her duties as returning officer;

(d) is incompetent;

(e) has been proved to be partial in the performance of his or her duties; or

(f) has since his or her appointed, behaved in a corrupt manner in relation to his or her duties as returning officer.

(4) Where the office of returning officer becomes vacant, the appointment of a returning officer for that electoral district under subsection (1) ***shall be made within fourteen days*** *from the date on which the commission is informed of the vacancy.*

Kabatsi Joy Kafura (the appellant), Anifa Kawooya Bangirana (the 1st respondent) together with two other women, namely, Namukasa Justine Mukiibi and Nakiganda Irene Josephine, contested for the Parliamentary seat of the woman Member of Parliament, Sembabule District, in the said general elections. It seems the appellant encountered problems in the course of her campaign for election in the district. There is evidence that the Hon. Sam Kuteesa who was contesting in one of the constituencies in the same district wanted one Muwaya Tibakuno, the then District Returning Officer, and all presiding officers and polling assistants who had been appointed by him throughout the district to be replaced. Evidently there was disagreement between the appellant, the Hon. Ssekikubo MP, and Herman Ssentongo (who eventually won the LC5 Chairmanship) described as "side A", on the one hand, and the Hon. Sam Kuteesa, MP, the 1st Respondent and others described as side "B", on the other. A meeting intended to iron out the disagreement was convened at Sembabule District Headquarters on the 17th February, 2006.

On that day Hon. Sam Kuteesa appeared at the venue of the meeting. When Mr. Muwaya Tibakuno, took the chair to conduct the meeting, Hon. Kuteesa announced to the gathering that the gentleman was no longer the District Returning Officer because the Electoral Commission had replaced him with a Mr. Ibrahim Kakembo as the new Returning Officer and therefore the latter should chair the meeting. This provoked protests from side “A”. Hon. Kuteesa produced his list of prospective presiding officers and polling assistants. The matter could not be settled. The Hon. Sam Kuteesa telephoned officials of the Electoral Commission headquarters, following which another meeting was fixed to take place on 20th February, 2006. During the meeting of 20th February, 2006, at the headquarters of the 2nd respondent, a number of matters were discussed and reduced into a

Memorandum of Understanding (MOU). This document which was produced in evidence shows in para 1 of the preamble that there had been disagreements between the two sides regarding presiding officers and polling assistants. In the second paragraph the MOU states that the sides recognised that disagreements pose serious threat to unity, peace and stability of the district. The meeting went on until very late at night. Apparently the 2nd respondent urged that elections must take place in the district.

The MOU indicates, inter alia, that each of the sides ("A" and "B") would nominate a person to be appointed presiding officer so that at each polling station there were to be two Presiding Officers. I think that this was strange because the arrangement was not based on any law of which I am aware.

THE ELECTIONS

On the 23rd February, 2006, elections were indeed held during which the first respondent polled 29,398 votes against 28,199 for the appellant, Ms. Mukiibi polled 1,649 while Ms. Nakiganda got 789 votes. Consequently, the first respondent was declared the winner and, therefore, the Woman Member of Parliament for Sembabule District.

THE PETITION

The appellant was dissatisfied with the results. She petitioned the High Court, at Masaka, to have the election of the first respondent annulled on a number of grounds. In the first ground she complained that the second respondent conducted the entire parliamentary election for woman Member of Parliament in Sembabule District in contravention and contrary to the provisions and the principles laid

down in the Parliamentary Elections Act, the Electoral Commission Act and the Constitution and the generally accepted principles in (many) ways which were enumerated in the petition. These complaints were about malpractices which were allegedly perpetuated by the first respondent and or Hon. Sam Kuteesa and or the second respondent or their respective agents. Another complaint was that the first respondent did not possess the requisite educational qualifications. In their answers the respondents denied the allegations and averred that the elections were free and fair.

ISSUES FOR TRIAL

Five issues were framed for determination by the Court. The first and second of these were framed thus –

- *whether the election of the first respondent ……..... was conducted in compliance with the provisions of the Constitution, the Parliamentary Election Act, 2005, the Electoral Commission Act and in accordance with the principles laid down in the said laws*
- *…….. if there was non-compliance, whether this had substantial effect on the elections.*

JUDGMENTS OF LOWER COURTS

In a long and reasoned judgment, the learned trial judge, found that many of the allegations set out in the petition were no proved. He was however satisfied with evidence of the appellant in relation to the 1st and the 2nd issues proving that the appointment of the new returning officer and the new presiding officers and polling assistants was unlawful, irregular and affected the results of the elections in a substantial manner. Consequently the learned Judge annulled the election of the

first respondent and declared the seat vacant. The respondents successfully appealed to the Court of Appeal. The appellant has now brought this 2nd appeal. The appeal is based on 14 grounds. Many of these grounds raise complaints about the same things. They could have been condensed into fewer grounds.

OBJECTION TO GROUNDS 1, 8, 9 AND 10

At the beginning of his written arguments, counsel for the second Respondent stated that he objected to the competence of grounds 1, 8, 9 and 10. But in the course of his arguments, he stretched his objections to include other grounds such as 7, 13 and 14 implying thereby he was not sure of the grounds to which he sought objection. In effect counsel contends that the grounds are too vague and too general and so they offend Rule 82(1) of Rules of the Court. He also contends that grounds 7 and 14 are misconceived. On the other hand counsel for the appellant contends that there is no basis for the objection, arguing that those grounds provide enough particulars.

I find no need to reproduce any of these grounds. Much as some of the grounds could have been combined I think that the objection is not well founded as none of the grounds offend the Sub-rule which requires that each ground of appeal should be concise, distinct, not argumentative or narrative and should specify a point which is alleged to have been wrongly decided. Grounds 13 and 14 should be considered on their merits. I would overrule the objection.

WRITTEN ARGUMENTS

The parties filed their respective written statements of arguments. In fact the appellant personally lodged her written arguments although the rejoinder to the respondents' replies was filed by an advocate who did not indicate his name. It is

trite that advocates who draw pleadings must endorse the pleadings. This is normally done by printing the name of the firm or the advocate at the end of the document or the pleading.

Be that as it may, on the hearing day, Mr. Wakida and Mr. Kamugisha Byamugisha, represented the appellant. For easy reference I shall hereinafter refer to counsel for the appellant as the presenter of both statements of arguments.

The appellant's counsel argued ground 1 to 5 together, grounds 6, 7 and 8 also together, followed by grounds 9, 10 and 13 and ended with arguing grounds 11 and 12 together. He said nothing about ground 14. Counsel for the 1st respondent first objected, as already noted, to the competence of some grounds. He then argued grounds 1, 2 separately, grounds 3, 4 and 5 together followed by grounds 6, 7, 8 separately then grounds 9, 10 and 13 together, 11 and 12 also together and said nothing on the 14th ground. Counsel for 2nd respondent followed the method adopted by the appellant. I propose to consider the grounds in the order in which the appellant argued them.

GROUNDS 1 TO 5

Complaints in grounds 1 to 5 concern the removal and replacement of electoral officials. The appellant complains that the learned Justices of *Appeal erred in law and in fact in holding that–*

(i) *the removal and replacement of the District Returning Officer on the 17/2/2006 was necessitated by the existence of serious tensions in Sembabule District;*

(ii) *the trial Judge failed to appreciate S.50 of the EC Act when the same had not been pleaded nor raised in his court nor invoked by the 2nd Respondent during elections;*

(iii) *the returning officer of Sembabule Electoral District was lawfully removed from office;*

(iv) *the new returning officer……..…was lawfully appointed; and*

(v) *the Presiding Officers and other election officers of Sembabule Electoral District were lawfully appointed.*

The Court of Appeal reversed the decision of the trial court partly on the basis of the evaluation of evidence but mainly on interpretation of law especially Sections 30 and 50 of the Act. Because of the two conflicting decisions by the two Courts below, it is necessary to first refer to the evidence in the trial Court.

The trial of the petition was based mainly on sworn affidavits supporting each side. Some of the 54 affidavits were in support of the petition or in rejoinder to some of the 42 affidavits in support of the answer of the 1st respondent. There were 3 affidavits in support of the answer of the second respondent. In addition the appellant and two of her key witnesses were cross-examined at length on their respective affidavits. Answers from the cross-examination gave further elucidation on what happened. Similarly, the first respondent was cross-examined but only on her educational qualifications.

THE EVIDENCE AT TRIAL

The extensive cross-examination of the appellant, that of Hon. Ssekikubo, MP, and Mr. Herbert Ssengendo illuminate what happened particularly during the meetings of 17th and 20th February, 2006 resulting in the signing of MOU and the decision to replace or appoint new presiding officers and the holding of the elections. At page

81 of Vo.IIA of the record of the appeal, this is what the appellant answered during her cross-examination:

> *We were forced to accept this memorandum. We were in a meeting in the Electoral Commission. We were in the Board Room of the Electoral Commission with all Commissioners and their legal team.* ***The force was made by the Electoral Commission and its Chairman, they said that we either accept the list produced by Hon. Sam Kuteesa. The Vice-chairman said we either go with the list r (sic) the elections be cancelled. After that she walked out. The Electoral Commission had not adopted the list of Hon. Sam Kuteesa.***
>
> ***We were given time to think about it. We were already tired. It was past midnight. We decided to go and handle elections ourselves. Our idea that we handle Elections ourselves became the memorandum. We members of both sides were in the Board room: we had had nothing to eat. Hon. Kuteesa was also tired. Everybody was tired. So we decided. We were given about 30 minutes at around 10:00pm. I had the option of not signing the MOU."***

She went on to state ……

> *"The MOU forced us to use our own agents; to create our own presiding officers.* ***The incumbents had old agents. New ones had to look for people to serve as polling officials.*** *If the Electoral Commission had used fair polling officials I would have won. I could raise one polling agent. It was on 20th February, 2006.*
>
> ***We had two days to raise the people ……"***

In summary there was little time to enable candidates particularly the new aspiring candidates in the field to look for suitable candidates to be appointed polling officials. Perhaps an inadvertent illustration that new candidates would be disadvantaged is the fact that Hon. Sam Kuteesa had already compiled his own list of prospective polling officials when he went to the meeting. The next witness for the appellant was Hon. Sekikubo, MP. He substantially collaborated the appellant. At page 101 of the record he stated–

> ***"My quarrel is with the manner in which***
> ***Sam Kuteesa appointed the Returning Officer indeed he did. I did not see any appointment letter signed by Sam Kuteesa. Such a letter is a detail. Sam Kuteesa practically imposed him (New Returning Officer) on the District. He imposed Ibrahim Kakembo as a returning officer.***
> ***……. I saw Sam Kuteesa telling the previous returning officer to hand over office to Ibrahim Kakembo."***

This witness was cross-examined about how the presiding officers were appointed. To show that candidate in side "A" were desperate, he stated that he and his group participated in putting forward names of prospective presiding officers **even on the polling day itself.** He testified that Sam Kuteesa objected to the list of polling officials which had been prepared by Mr. Muwaya, the previous Returning Officer.

Another deponent in side "A" who was cross-examined is Mr. Ssentongo. He corroborated the appellant and Hon. Sekikubo about the appointments of the returning officer and other election officials and what transpired during the meeting of 20th February, 2006.

Apparently the first respondent was cross-examined only about her educational qualifications. However paragraph 10 and 11 of her affidavit sworn on 17th May, 2006 in support of her answer to the petition, are relevant and state–

"10 That the returning officer was removed and replaced in accordance with the law and in consultation with and in agreement with all the candidates.

11 As a result of misunderstanding between candidates, the 2nd Respondent received complaints, resolved the complaints in accordance with S.15 of the ECA by calling a meeting of all candidates whereby all candidates agreed to adhere to the law and to ensure free and fair elections are held by cooperating with 2nd Respondent in accordance with an agreement signed by all parties annexed hereto as annexture X."

These paragraphs support side "A" on replacement of the Returning Officer and on the fact of disagreements in the district which resulted in the holding of a meeting involving the candidates just two days before the general elections.

FINDING OF TRIAL JUDGE

As a result the learned trial Judge, when considering the first issue discussed the principles of equality and fairness, secret ballot and transparency which Odoki, CJ, had set out in his reasons in the Presidential Election Petition No. 1 of 2001 **(Rtd. Col. Kiiza Besigye Vs. Y. K. Museveni and Electoral Commission).** In his typed judgment, the learned trial judge, at page 145 (P 482 of the record) concluded as follows:-

"I have carefully considered this matter. I have kept in focus the provision of the Commission Act which contains the principles of free and fair election. The petitioner has adduced sufficient evidence which on the basis of the balance of

probabilities proves that there was non-compliance by the 2nd respondent with the provisions of the Commission Act and the Parliamentary Elections Act relating to elections. I find that the 2nd respondent failed to conduct the election of the woman member of Parliament for Sembabule District in accordance with the principles laid down in the provisions I have already discussed of the Parliamentary Elections Act. I have already observed that the (MOU) unleashed on Sembabule District polling officials who were ***partisan, partial, biased and untrained.*** *On the evidence available before court, I can firmly state that those polling officials failed to conduct a lawful, competent, free and fair election. I find that the 2nd respondent gravely compromised its powers to independently, freely and impartially appoint Presiding Officers and Polling Assistants and thereby lost grasp of the conduct of the election of the woman MP for Sembabule District. I therefore answer the 1st issue in the negative.*

Parties have alluded to the second issue while submitting on the 5 grounds, as it is tied to the first issue. It is whether the non-compliance affected the results of the election in a substantial manner.

After considering submissions of both sides, especially on the effect of unsigned DR forms, the learned trial judge posed some eight hypothetical questions concerning the absence of a presiding officer at any polling station and the question of the DR forms unsigned by such officers, before holding, at page 151 of his typed judgment, as follows–

"……. I am of the view that signing of DR forms by the Presiding Officer is mandatory, and failure of a Presiding Officer to sign a declaration of results form under Subsection (5) of S. 47 does by itself invalidate the results of the polling

station. In my view a candidate would then rely on the results shown on the duly signed DR forms."

The judge had evidence from the appellant of samples of unsigned DR forms which had been certified and stamped by officials of the 2nd respondent, who received and kept such unsigned forms in respect of the affected polling stations. The judge found that those forms invalidate results of the affected polling stations and that had substantial effect on the result of the election.

He concluded thus (p 152) –
"The experience in Sembabule District was unique. The election of Woman MP was conducted by polling officials who were nominated by the candidates themselves, their own campaign agents who were partisan, partial, biased and untrained. It would be difficult to defend the result of such an election left in the hands of such people. To compound the problem the returning officer also was not even a week old in Sembabule District. So who was in control of the election?"
The learned Judge held that the non compliance affected the results of the election in a substantial manner. On the basis of his findings on the first and the second issues, the learned Judge allowed the petition and annulled the election of the first respondent.

IN COURT OF APPEAL

Each of the two respondents separately appealed to the Court of Appeal. The Court consolidated the two appeals during hearing and reduced the contents of the separate memoranda of appeal into what was described as "five issues" for determination.

The present grounds 1, 2, 3, 4 and 5 arise from the decision of the Court of Appeal on what it framed as issue No. 5 which reads thus–

> ***"Whether the removal and appointment of election officers was valid or not and if not, whether it affected the result of the election in a substantial manner."***

During the hearing of the appeal in the Court of Appeal Mr. Okello - Oryem, the State Attorney, who represented the second respondent there, first argued issue No. 5. He criticised the findings of the learned trial Judge on the first and second issues, especially the conclusion that the Electoral Commission acted unlawfully in the removal and replacement of the District Returning Officer, the Presiding Officers and Polling Assistants. Mr. Okello - Oryem contended for the first time that the trial Judge did not appreciate that S.50 of the Act allowed the second respondent in unforeseen circumstances to make modifications to any law relating to election to meet the exigencies of a situation such as that which obtained in Sembabule District.

In the same Court of Appeal, Mr. Byamugisha, counsel for the present appellant, supported the findings of the trial judge and argued in effect that under Article 60 of the Constitution the Electoral Commission was required to promote the principles of free and fair public elections and that Article 62 required the same Commission to be independent so as to reinforce the promotion of those principles.

In their joint judgment, the learned Justices of the Court of Appeal after opining that the purpose of subsections (1) and (3) of Section 30 of the Act was to provide information to the public about any appointment and or removal of the returning officer of an electoral district, stated–

"In the instant case, there is evidence that the Electoral Commission convened a meeting with all the candidates from Sembabule District at its Head Office on 20th February, 2006. At the meeting, the Deputy Chairperson of the Electoral Commission confirmed to the candidates the removal of Mr. Tibakuno and the appointment of Mr. Ibrahim Kakembo, to replace Mr. Tibakuno as a returning officer for Sembabule District. In our view, the requirement of a notice in the gazette in Section 30(1) and (3) of the Electoral Commission Act is curved (sic) under Section 50(1) of the Electoral Commission Act by the oral information given by the Deputy Chairperson of the Electoral Commission to the candidates about the removal and appointment of the new returning officer for Sembabule District. We therefore accept Mr. Okello – Oryem's submission that the trial Judge did not appreciate the provision of Section 50(1) of the Electoral Commission Act. *(The word "curved" must be a typographical error. The word must be "cured").*

APPELLANT'S SUBMISSIONS

According to counsel for the appellant, the Court of Appeal wrongly interpreted S.50 (1) of the Act. Counsel contended that there is no evidence showing that the 2nd respondent established that exigencies existed as envisaged under that section before the Commission could act as it did. Further, counsel contended that the alleged exigencies were neither pleaded nor canvassed by the 2nd respondent at the trial where not even evidence was adduced by the 2nd respondent about the alleged exigencies.

Counsel further argued that even if there were such exigencies, the second respondent would have to issue a formal instrument conveying its instructions on the matter. Counsel contended that not only was there no gazetting of the appointment of Mr. Ibrahim Kakembo as the new Returning Officer but there was no letter conveying the removal of Mr. Tibakuno as Returning Officer. Again counsel contended, correctly in my view, that S.50 is subject to the Constitution and he relied on Articles 65, 68(1) and (4); and 62 regarding the appointment of electoral officials, voting by secret ballot, signing of Declaration of Results Forms (DRF) and the independence of the Commission, respectively. Counsel contended that had the Court of Appeal addressed itself to the Constitutional provisions it would have come to different conclusions.

Lastly counsel contended that because of the findings by the Court of Appeal, inter alia, that the removal and replacement of the returning officer was unlawful, and that the Commission compromised its authority in effect to be moved by Hon. Kuteesa on telephone and by allowing candidates to nominate prospective election officials, the Court of Appeal had its hands tied as these findings show that constitutional provisions were breached.

RESPONSE BY 2ND RESPONDENT

Grounds 1 to 5 in reality concern the management of the electoral process by the 2nd respondent. This explains why it is counsel for the second respondent who has put up a spirited fight in response to the appellant's complaints and arguments. I therefore find it logical to first set out arguments of counsel for the 2nd respondent (which in any case are clearer) before I set out those of counsel for the first respondent.

Mr. Okello – Oryem, for the 2nd Respondent, supported the decision of the Court of Appeal. He argued that the Commission applied S.50 by replacing the District Returning Officer and dispensing with the requirement of gazetting as required by S. 30(1) and (3) of the Act, to accord with the exigencies of the situation in order to hold the elections as scheduled in a transparent, free and fair manner without shattering the peace and unity of Sembabule District in the process.

He contended that the purpose of S.30(1) and (3) (Supra) to provide information to the public was fulfilled because the 2nd respondent convened a meeting on 20th/2/2006 of all the candidates and their agents at which meeting the Deputy Chairperson of the 2nd Respondent confirmed the replacement of the Returning Officer.

He further contended that the reliance by the Court of Appeal on Section 50 achieved the conduct of a transparent, free and fair election, peace and unity in the District. Counsel argued that S.50 need not have been pleaded. Learned counsel again contended that the exigencies leading to the application of S.50 are contained in the MOU, which was part of the appellant's pleadings.

The third contention of counsel for the 2nd Respondent is that under S.14(3) of the Act, the 2nd respondent has powers to assume any functions of an election officer under any law and that it did in this case assume the functions of the Returning Officer of Sembabule by virtue of both S.14(3) and S.50 through Mr. Ibrahim Kakembo, an experienced official of the Commission who did not require formal appointment as a Returning Officer. He in turn appointed other officials, and therefore, in substance, the law was complied with. Counsel appears to imply that the appellant raised mere technicalities curable under Article 126(2)(c) of the Constitution.

He supported the Court of Appeal in its conclusions regarding the appointment of presiding officers and polling assistants that there is no evidence adduced to prove–

- breach of the Constitution;
- that Hon. Sam Kuteesa or any other person apart from the Commission appointed election officials for Sembabule District;
- that external influence was exerted on the independence of the Commission;
- the MOU being implemented;
- presiding officers and polling assistants being partisan, partial, biased and untrained;
- allegations of breach of any law.

Lastly the learned State Attorney supported the conclusions of the Court of Appeal to the effect that there was no evidence proving the effect and the extent of non-compliance with the laid down principles on the result of the appellant's election.

RESPONSE BY FIRST RESPONDENT

As I pointed out earlier in this judgment, Messrs Kakuru & Co. Advocates, counsel for the first respondent, first objected to the competence of grounds 1, 8, 9, 10, (and 13 plus 14). I have discussed arguments for and against the objection and held that the objection should fail.

In his response to appellant's arguments on the merit of grounds 1, 2, 3, 4 and 5, learned counsel supported the decision and conclusions of the Court of Appeal and then serially responded to the merits of grounds 1 to 2 followed by 3 to 5 together.

Counsel refuted the complaint in ground 1 by relying on paras 3, 4 to 6 of the appellant's affidavit which accompanied her petition to the effect that affidavit contents prove that there was serious tension in Sembabule before 17th February, 2006. He argued that ground 2 is misconceived because there was no need to plead points of law. Counsel's answer on complaints in grounds 3, 4 and 5 is hazy and not easy to understand. But appears to suggest that the appellant failed to prove that the non-compliance with the law and principles laid down therein affected the results in a substantial manner.

REJOINDER

Counsel for the appellant filed a rejoinder to the arguments of the two respondents. Counsel contended, and here I agree, that the submission by the respondents that the contents of appellant's affidavit (sworn on 24th/2/2006) prove that circumstances existed to justify the invocation of S.50 of the Act is itself an admission on the part of the respondents that there was no such evidence of exigencies before 17th February, 2006 when Hon. Sam Kuteesa effectively removed Sembabule election officials and appointed his own. Counsel reiterates the appellant's earlier arguments to the effect that no conditions were deemed to exist by the Commission before 17th February, 2006 to justify invocation of S.50, contending such invocation must be done formally under the seal of the Commission, i.e., either specifically or generally in the form of instructions where the commission suspends the operation of certain Sections of the Act. Learned counsel argued, again correctly in my opinion, that S.50 cannot be invoked to suspend the operation of Articles 62, 65 and 68(4) of the Constitution, asserting that any interpretation to support suspension of constitutional provisions would be recipe for disaster.

Lastly counsel argued that on the evidence the trial judge correctly found that the appellant had proved mathematical numbers, which show that there was substantial effect on her results.

CONSIDERATION OF ARGUMENTS

Although I agree that generally there is no need to plead law, I am not persuaded by arguments of counsel for the two respondents who do not, with respect, appear to appreciate the oral evidence given by the appellant and her two witnesses during cross-examination. I have produced part of that evidence already. In my opinion there are three questions which must be answered in relation to these arguments.

The first is whether there was evidence proving existence of exigencies which necessitated the 2nd Respondent to intervene in the manner it did and in effect to abdicate its responsibility. Second, was S.50 applicable? Would the commission invoke the Section so as to circumvent any Articles of the Constitution? Third question is whether irregularities had substantial effect on the election of the appellant.

There are provisions of the Constitution, the Electoral Commission Act and the Parliamentary Elections Act, 2005 relevant to discussion of this matter. In particular in this case Sections 12, 13, 14, 15, 30 and 50 of the Electoral Commission Act and Articles 61, 62 and 67 of the Constitution.

S. 12. Of the Act sets out additional powers of the commission and the regulation of ballot papers.

12(1) The commission shall, subject to and for the purposes of carrying out its functions under Chapter Five of the Constitution and this Act, have the following powers–

(a) *to appoint a polling day for any election subject to any law;*

(b – d) ……

(e) take measures for insuring that the entire electoral process is conducted under conditions of freedom and fairness;

(f) to take steps to ensure that there are secure conditions necessary for the conduct of any election in accordance with this Act or any other law;

(g) ……

(h) *to ensure that the candidates campaign in an orderly and organised manner.*

S. 13. Is about the independence of the commission and reads thus–

Subject to the Constitution, the commission shall be independent and shall, in the performance of its functions, not be subject to the direction or control of any person or authority.

S. 14. is about, *inter alia*, assignment of duties by the commission, and it reads–

(*1) The commission may assign to any election officer, public officer, member of the staff of the commission or any organization or institution or group such duties for promoting the discharge of the functions of the commission as the commission may think fit and subject to such conditions and restrictions as the commission may direct.*

(2) The commission may revoke or transfer to any person, organization, institution or group or assume the performance of any duties assigned by it under subsection (1).

(3) The commission may also, where necessary, assume the performance of any function of an election officer under any law.

S. 15. is about the power of the commission to resolve complaints and appeals. It reads–

(1) Any complaint submitted in writing alleging any irregularity with any aspect of the electoral process at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided by the commission; and where the irregularity is confirmed, the commission shall take necessary action to correct the irregularity and any effects it may have caused.

(2) An appeal shall lie to the High Court against a decision of the commission confirming or rejecting the existence of an irregularity.

S. 30. is about the Appointment of returning officers, and other election officers. I have already reproduced subsections (3) and (4) but sections (1) and (2) state –

(1) The commission shall, by notice in the Gazette, appoint a returning officer for each electoral district; and the person appointed shall be a person of high moral character and proven integrity.

(2) The office of a returning officer shall not become vacant unless the holder dies or, with the prior permission of the commission, he or she resigns, or unless he or she is removed from office under subsection (3).

Then S. 50. defines the Special powers of the commission as follows:

50 *(1) Where, during the course of an election, it appears to the commission that by reason of any* ***mistake, miscalculation, emergency or unusual or unforeseen circumstances*** *any of the provisions of this Act or any law relating to the election, other than the Constitution, does not accord with the exigencies of the situation, the commission may,* ***by particular or general instructions, extend the***

time for doing any act, increase the number of election officers or polling stations or otherwise *adapt any of those provisions as may be required to achieve the purposes of this Act or that law to such extent as the commission considers necessary to meet the exigencies of the situation (emphasis added).*

(2) For the avoidance of doubt, this section applies to the whole electoral process, including all steps taken for the purposes of the election and includes nomination.

Article 61 spells out the functions of the Commission while Article 62 guarantees the independence of the Commission. They read as follows–

"61 The Electoral Commission shall have the following functions.

(a) to ensure that regular, free and fair elections are held;

(b) *to organise, conduct and supervise elections and referenda in accordance with this Constitution;*

(d) *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;"*

62 Subject to the provisions of this Constitution, the Commission shall be ***independent and shall, in the performance of its functions, not be subject to the direction or control of any person or authority.***

Article 67 which governs the organization of elections states as follows, in so far as relevant–

(1) The Electoral Commission shall ensure that elections are held at times fixed and notified in advance to the public.

(2) ……

In the written submissions learned counsel for the appellant contended that the Court of Appeal made two conflicting conclusions because at page 14 of its typed judgment, the Court made the following findings which it reversed latter in the same judgment:

"After consideration of those pieces of evidence, the trial judge, ***correctly found*** *firstly that the removal of Tibakuno and replacing him with Ibrahim Kakembo as returning officer for Sembabule District was unlawful. Secondly that the Electoral Commission compromised itself by allowing itself to be communicated to on telephone by Hon. Sam Kuteesa and to fix a meeting with all the candidates from Sembabule District at its head office on 20.2.2006. Thirdly that at the meeting, the list prepared by Tibakuno of persons (sic) election officials in Sembabule was rejected. The Electoral* ***Commission compromised its authority by allowing candidates to*** *nominate persons to be appointed as presiding officers and polling assistants by the returning officers. Fourthly that the election officials in Sembabule District were not appointed by the Electoral Commission as it ought to be but were chosen by candidates."*

Learned counsel then asserted that in the same judgment the Court subsequently reversed its findings set out in the above passage. I agree with the contentions of counsel for the appellant that in fact the Court of Appeal made conflicting findings.

A perusal of pages 15 to 18 of the typed judgment confirms this. For instance the Court, at page 17, found: that the removal and appointment of the District

Returning Officer was prima facie unlawful. The Court referred to S.106 of the Evidence Act which places the burden of proof on the second respondent to show how the removal and appointment was done. The Court then found that–

"The respondent has prima facie shown that Mr. Tibakuno had been removed as returning officer for Sembabule Electoral District other than in accordance with the law [S.30(3) of the Act] and that Ibrahim Kakembo had similarly been appointed to replace him. The burden is ……. upon the 2nd appellant to adduce evidence to show that the removal and the appointment were in compliance with S.30(1) and (3) of the Electoral Commission Act.

Neither a copy of the Gazette in which the notice of appointment of Ibrahim Kakembo replacing Mr. Tibakuno as returning officer ……..…….. nor a copy of a letter of removal of Mr. Tibakuno was made available to Court.

The Court however reversed this subsequently, when it held that this unlawful action was cured under S.50(1) when the Vice-Chairperson of the commission verbally confirmed the removal and appointment to candidates on 20th/2/2006.

With the greatest respect to the learned Justices of the Court of Appeal, I think that their conclusions on the extent to which S.50(1) can provide cure are faulty.
In their judgment, it is clear that the learned Justices were satisfied–

- that the abrupt removal of the previous District Returning Officer and his replacement by Mr. Ibrahim Kakembo at such a very short notice as the new Returning Officer were both unlawful;
- that the removal and replacement of Presiding Officers and Polling Assistants both were equally unlawful;

- that the Hon. Sam Kuteesa influenced the Electoral Commission in the performance of its functions and that its independence was compromised.

These conclusions support the findings of the learned trial Judge and are based on available evidence and the law. The conclusions of the trial Judge are in accord with the provisions of both the Act and the Constitution which I have reproduced already in this judgment. Their Lordships contradicted themselves when they held ultimately that all the unlawful acts mentioned above did not affect the results of the election and that S. 50 of the Act cured the unlawful acts. With respect, I do not share the opinion that Section 50 cured these irregularities. Subsection (1) of the Section indicates that the Section is applicable where there is any of the following factors:-

- a mistake
- miscalculation
- emergency or
- unusual or unforeseen circumstances.

Thus it is not a question of just the manner of removal and appointment of officials. There must be evidence of any of these factors. General elections are a process and not one event. The process covers a much wider scope than appointment and removal of election officials. It involves a series of events.

For obvious reasons a returning officer must be appointed early enough to ensure that he or she familiarises himself or herself with the duties and functions of the electoral district. Indeed under S.30(4) the commission is mandated to appoint a new returning officer within 14 days after the office falls vacant and such appointment must be gazetted.

Early appointment enables the public, particularly candidates, to find out whether the appointee is a suitable person. The returning officer must have adequate time within which to appoint suitable persons as other election officers below him or her.

The question of the short time, in this case, of two days within which side "A" was to select prospective presiding officers and polling assistants was most unrealistic. There is the question of training of such officers and polling assistants so that they may carry out the elections efficiently and effectively. I can not put it better than how the trial Judge described the situation. According to S. 47(5) of the **Parliamentary Elections Act, 2005,** the Declaration of Results Forms (DRF) must be signed by a presiding officer. There is evidence (and the trial judge so found) that in at least 48 of polling stations the DR forms were not so signed. The trial judge correctly ascribed this to the fact that the new presiding officers and other election officials were not trained in these matters. It is clear from the fact that on 17th/2/2006, five days to polling day, a new district returning officer was imposed onto the district by the Hon. Sam Kuteesa, the leader of one side (side "B") in the dispute. Here the 2nd respondent abdicated its responsibility especially of being independent. Then on 20th/2/2006, barely two days to the polling day, one side (A) was directed to propose its prospective presiding officers and polling assistants. According to the law (S. 34 of the PEA Act) such officers should be appointed before the polling day. In practice this means appointing them long before election day so as to allow time for their training. Replacement of a presiding officer is important. So it should be based on good cause [S. 34(2)]. A perusal of both chapters VIII and IX of the Act shows that presiding officers must be knowledgeable not only on matters of voting and the voting procedures but they must also be knowledgeable on the counting of votes, the signing of DRFs and the

announcement of the results. I can not understand how an ordinary person appointed presiding officer a day before polling day (or as Mr. Ssengabo testified under cross-examination) on the polling day itself, would, except in rare cases, know these procedures without undergoing any form of training. I find it difficult to understand how Section 50 of the EC Act could cure this fundamental failure by the Commission. From my understanding of the provisions of Section 50 of the Act, I draw the inference that the second respondent is permitted to improvise imaginatively and positively in simple administrative matters such as setting up new or additional polling stations where the existing one(s) is or are not adequate or the extending of time of voting to enable voters present at a polling station to vote. But the section does not, and could not possibly, confer upon the second respondent powers or authority to violate or breach fundamental laws such as the Constitution or the Act or the PEA, 2005. Matters as fundamental as appointing and gazetting Returning Officers are not just a formality of informing the public as stated. Gazetting serves many purposes such as a purpose of letting voters know who is in charge so that complaints can be channelled to him or her in time for relevant remedial actions. Appointments of POs or polling assistants and training them on such fundamental matters as voting and voting procedure, counting of votes, signing of DR forms cannot be allowed to be taken care of under Section 50 of the Act in the fashion it was done here. To do so is tantamount to authorizing chaos. This is the effect of the conclusion of the trial Judge. The Commission could not be authorised under that Section, for instance, to transfer a presiding officer from one corner of the district to another distant corner. It would be understandable if the commission shifts a few trained POS or polling assistants from one station to another nearby station. I think that those are the types of cures envisaged. That is why S.34(2) states that where a presiding officer dies after his or her appointment or is unable to act as presiding officer on polling day, the

returning officer may appoint another person in his or her place as presiding officer; and if no such appointment is made, one of the polling assistants, (at the same station) **who is older in age,** shall act as presiding officer.

The inference I draw from this provision is that replacement of a presiding officer should be done with due care. Replacement is permitted because of death or absence on polling day. In the latter case, the replacement by the older in age of the polling assistants partly implies experience gained by age.
There is no evidence to challenge the evidence of the appellant, of Hon. Ssekikubo and H. Ssengendo that the new returning officer was imposed by the Hon. Sam Kuteesa. As I said earlier, here the commission abdicated its responsibility and the trial Judge correctly so found.

The opinion of Court of Appeal that there is no evidence proving that the new returning officer did not appoint election officers from the list previously prepared by his predecessor is with respect, not convincing. The MOU and evidence of appellant and her two witnesses is the evidence. The fact that Mr. Kuteesa insisted on replacing the old returning officer and that he had a ready list of his prospective presiding officers and polling assistants shows that all the previous officials had to go. Obviously Hon. Kuteesa influenced the Commission to remove those officers and Deputy Chairperson merely obliged.

The trial judge stated (page 443 of the record)–

I agree with the petitioner that in one day (21st February, 2006) the candidates of side "A" could not determine who was qualified and competent to handle the election exercise as Presiding Officers or Polling Assistants. It appears to me that those candidates were in a state which could be equated to blackmail when the 2nd

respondent informed them of the imminent danger of postponing the elections which would make them incur more costs.

What was agreed upon in the memorandum of understanding gave undue advantage to Hon. Kuteesa to use the people proposed by him; the evidence has shown that he had a list prepared covering the entire district. In my view the 2nd respondent gave in to what Hon. Kuteesa wanted.

What Dr. Jenny B. Okello stated in para 11 of her affidavit that there were some disagreements among the candidates as to who the Polling Officials should be cannot, in my view, be true. According to the evidence the list of Polling Officials prepared by Muwaya Tibakuno was not adopted as a working document or discussed. It was Hon. Kuteesa who wanted his list to be adopted. So, in effect, in my view, the memorandum of under standing permitted Hon. Kuteesa to use his list of proposed persons while the candidates of side "A" were also given the opportunity to propose their own people.

I think the 2nd respondent should have foreseen that the suggestion that candidates of side "A" identify suitable persons and propose them to the Returning Officer for him to choose who to appoint would be difficult to implement because of lack of time. It appears to me that as long as Hon. Kuteesa had his way to use his list the 2nd respondent did not mind how the suggestion could be implemented by the candidates on side "A". Ibrahim Kakembo stated in pare 5 (p) of his affidavit that the Commission directed him to receive the lists of proposed names (from either side) and to determine those who were suitable for appointment. In my view this means that the Returning Officer was directed by the Commission to receive Hon. Kuteesa's list which was ready and available, and then wait for the list from side "A". It is, in my view, evidence of the 2nd respondent being compromised of failing

to perform its duties. I agree with some of the comments of counsel Byamugisha that the memorandum of understanding unleashed on Sembabule District Polling Officials who were partisan, partial, biased and untrained.

As indicated earlier, complaints in grounds 1 to 5 are that the removal and replacement of the District returning officer as well as the removal and replacement of presiding officers and polling assistants was unlawful. Both the trial judge and the Court of Appeal concur on this. The departure arises when the Court of Appeal opined that the acts of the commission in this regard were cured by Section 50 of the Act and that the irregularities did not affect the results in a substantial manner.

In my opinion and with greatest respect, the Court of Appeal erred when it held that the trial Judge did not appreciate the provision of S.50 and that that Section cured the irregularities. How could the judge appreciate that Section when his attention had not been drawn to it? In any case on the facts its application by Court of Appeal in this case was not justifiable.

Holding elections in Sembabule where there were already an appointed returning officer and the other election officials in place was not a mistake, miscalculation, unusual or unforeseen circumstances or an emergency. Apparently the emergency was engineered by side "B" by the removal of election officials as correctly found by the trial Judge.

There is nothing in the record of appeal showing that the second respondent pleaded that it took the steps of removing and replacing election official under S.50. Similarly its memorandum of appeal to the Court of Appeal did not mention the Section. It was its State Attorney who raised it during arguments in that Court.

The Section was resorted to belatedly because in all probability, before 17/2/2008 the Commission was not aware of problems or the factors stipulated by the Section. This explains why there is no written instruction concerning the need to remove and replace election officials.

S.30 of the Act very clearly sets out circumstances under which a district returning officer may be replaced. These included death, resignation, illness, incapacity, incompetence, partiality or bias on the part of an incumbent. I have not seen any credible piece of evidence explaining what exactly caused the removal of Mr. Muwaya. This lends credence to the appellant's assertions that Muwaya was removed and replaced by Ibrahim Kakembo because of the external influence. Ssekikubo supports her. Thus without presenting any written document from the Commission, it was the Hon. Sam Kuteesa who, suddenly, announced at the beginning of the meeting of 17th February, 2006, that the incumbent returning officer had been replaced. The well-known practice in Civil Service is that if there had been official replacement, Mr. Muwaya would have formally handed over office to Ibrahim Kakembo either before or after the meeting of 17th February. Instead, evidence shows it was the Hon. Sam Kuteesa who proclaimed that Mr. Muwaya was no longer Returning Officer. According to the oral evidence of the appellant, when there were protests against the announcements of the Hon. Sam Kuteesa, the latter telephoned the Commission Headquarters. There is no evidence about what the telephone conversation was all about. What is clear is that after the telephone, it was announced that the Commission was convening a meeting of all stakeholders at its headquarters on 20th/2/2006. Surely if there was emergency or threat to peace and unity of Sembabule, it would have been the duty of security forces especially the Police to intervene at that time.

Further I do not accept Mr. Oryem's contention that Mr. Kakembo's assumption of office of DRO was a normal or routine matter. Such assumption would arise if there was no officially appointed DRO in office.

In those circumstances it is difficult to avoid the inevitable, legitimate and reasonable conclusion that the convening of the meeting for 20th February, 2006, was not initiated by the Commission to solve a problem already known by the Commission. What transpired at that meeting is captured in the oral evidence of the appellant and her witnesses. According to the appellant, the Commission forced her side to accept the list of prospective election officials proposed by Hon. Kuteesa. According to her:

"The Vice-Chairman said we either go with the list (produced by Hon. Sam Kuteesa) or the elections would be cancelled After that she walked out."

Need I say more?

From page 109 (of his typed judgment page 446 of record) it is clear that the learned trial Judge evaluated the evidence on lack of competence of Polling Officials, multiple voting, ballot stuffing by agents of either the 1st respondent or of Hon. Kuteesa (page 449) together with evidence on such matters as malpractices in the counting of ballot papers at night in darkness from which he concluded that the incompetence and malpractices affected the results in a substantial manner. I agree with those conclusions.

I have read in draft the judgment prepared by my Lord, Kanyeihamba, JSC. I most respectfully do not agree that because the appellant signed the MOU and participated in the elections, therefore she cannot complain about the clear

illegalities that affected the elections. This Court ought not on the facts of this appeal condone what happened. Such condoning would sent a wrong signals.

Consequently I would allow the five grounds. In my view this disposes of this appeal which I would allow with costs here and in the Courts below to the appellant to be paid by the second respondent as it is clearly responsible for what happened. I would uphold the decision of the trial Judge annulling the election of the 1st respondent and ordering for fresh election of a woman member of Parliament for Sembabule District.

Delivered at Mengo this 11th day of November 2008.

J. W. N. TSEKOOKO
JUSTICE OF THE SUPREME COURT.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, C.J, TSEKOOKO, MULENGA, KANYEIHAMBA, JJ.SC, MPAGI-BAHIGEINE AG. JSC)

ELECTION PETITION APPEAL NO.25 OF 2007

BETWEEN

JOY KABATSI KAFURA:::::::::::::::::::::::::::::::::::::: APPELLANT

AND

1. **ANIFA KAWOOYA }**
2. **ELECTORAL COMMISSION}:::::::::::::::::::: RESPONDENTS**

[Appeal from the decision of the Court of Appeal (Okello, Engwau and Kitumba JJ.A) dated 5 October 2007 in Election Petition Appeal No.3 of 2007]

JUDGMENT OF ODOKI, CJ,

I have had the advantage of reading in draft the judgment prepared by my learned brothers, Tsekooko JSC and Kanyeihamba JSC. I agree with the judgment of Kanyeihamba, JSC, that this appeal should, for the reasons he has given, be dismissed. I concur in the order he has proposed as to costs.

In my view, although the appellant proved that there were serious incidents of non-compliance with the Constitution, the Electoral Commission Act, and the Parliamentary Elections Act, she failed to establish to the required standard of proof that the non-compliance with the law affected the results of the election in a substantial manner. Indeed the appellant gave a blessing to the irregularities by

signing the Memorandum of Understanding which provided the ***modus operandi*** for the election in the constituency. She had the choice to decline to participate in the election at that particular time which would have led to the postponement of the election, but she chose to proceed with the elections under the agreed terms. Both the Election Commission and the candidates should learn a lesson from this incident and avoid repeating similar mistakes.

As Mpagi Bahigeine Ag JSC, also agrees, by a majority decision, this appeal is dismissed with no order as to costs.

Dated at Mengo this 11th Day of November 2008

B J Odoki
CHIEF JUSTICE

IN THE SUPREME OF UGANDA

AT MENGO

(CORAM: ODOKI, C.J., TSEKOOKO, MULENGA, KANYEIHAMBA, JJ.S.C. & MPAGI-BAHIGEINE Ag. J.S.C.)

ELECTION PETITION APPEAL NO. 25 OF 2007

BETWEEN

JOY KABATSI KAFURA :::::: :::::::::::::::::::::::::: APPELLANT

AND

1. ANIFA KAWOOYA
2. ELECTORAL COMMISSION } :::::::::::::::::: RESPONDENTS

(An appeal from the judgment of the Court of Appeal (Okello, Engwau and Kitumba, JJA) at Kampala dated 5th October 2007 in Election Petition Appeals Nos.3&4 of 2007)

JUDGMENT OF MULENGA JSC.

I had opportunity of reading in draft the judgment prepared by my learned brother, Tsekooko J.S.C., and I agree with him that this appeal ought to be allowed. I however would like to explain the reasons for my judgment.

The appeal emanates from the general elections held on 23rd February 2006, in which the appellant and the 1st respondent, together with two other persons, contested for the Parliamentary seat of the Woman Representative for Sembabule

District. The 1st respondent was declared elected. The appellant, who was the runner-up, petitioned the High Court to annul the election on three broad grounds, namely that –

- the 2nd respondent did not comply with the law and principles relating to the conduct of the election, which non-compliance affected the result of the election in a substantial manner;
- the 1st respondent was not qualified for election;
- the 1st respondent committed illegal practices of bribery.

The High Court (Mukiibi J.) held that the 1st respondent was qualified for election, and that it was not proved to the court's satisfaction that she committed the alleged illegal practices. However, the court held that in conducting the election, the 2nd respondent failed to comply with the law relating thereto and that the non-compliance affected the election result in a substantial manner. On that ground the court annulled the election.

The respondents filed in the Court of Appeal separate appeals, which were subsequently consolidated. From the grounds of appeal the following five issues for determination by the Court of Appeal, were framed, namely –

"1. Whether or not the learned trial judge properly evaluated the evidence led before him by the appellants….
2. Whether or not the 1st appellant (Kawooya) was entitled to costs against the respondent.
3. Whether the learned trial judge's finding that there was non-compliance with electoral laws which affected the result of the election in a substantial manner was justified or not….
4. Whether or not the learned trial judge properly evaluated the effect of the candidates' memorandum of understanding (M.O.U) on the election….
5. Whether the removal and appointment of the election officers was valid or not and if not, whether it affected the result of the election in a substantial manner….."

The Court of Appeal allowed the appeals, set aside the trial Court's order nullifying the 1st respondent's election and substituted an order dismissing the appellant's petition. Hence this second appeal. The appellant did not cross-appeal on her failed grounds.

In its judgment the Court of Appeal exhaustively considered and answered only issue no.5, and one aspect of the evidence relied on by the trial court, namely: the unsigned Declaration of Results Forms (DR Forms). It did not consider the rest of the issues framed for its determination. The substantive holdings in its judgment are that –

- noncompliance with section 30 of the Electoral Commission Act (ECA), in substitution of the Returning Officer was cured under section 50 of the same Act, which the trial judge failed to appreciate;
- it was not proved that the noncompliance with section 30 of the ECA affected the election result in a substantial manner;
- it was not proved that the polling staff were not appointed from the ousted Returning Officer's list; nor that the candidates' Memorandum of Understanding (M.o.U) was implemented;
- the unsigned DR Forms did not invalidate the properly cast votes and therefore did not affect the election result.

It is noteworthy that the Court of Appeal reversed the judgment of the learned trial judge without thoroughly considering, let alone answering other issues particularly issues no.1 and no.3, which were crucial.

The Memorandum of Appeal to this Court sets out 14 grounds of appeal that are overly fragmented. The grounds may be grouped in four broad criticisms of the Court of Appeal's -

- holdings on the substitution, appointments and quality of election officials (grounds 1, 2, 3, 4, 5 and 6);
- holdings on the conduct of the election by the 2nd respondent (grounds 7 and 8);
- failure to reappraise the evidence and consider the effect of the un-appealed findings/decisions of the trial court (grounds 9, 10 and 14);
- failure to uphold the trial court's finding that the noncompliance with the law in the conduct of the election affected the election result in a substantial manner (grounds 11 and 12).

Ground 13 is incompetent for attacking a holding by the trial court on the 1st respondent's qualification for nomination and election, on which appellant did not cross-appeal to the Court of Appeal.

In dealing with issue no.5 in its judgment, the Court of Appeal considered the substitution of the Returning Officer and the appointments of the polling staff separately. On the former the court held that the noncompliance was cured under section 50 of the ECA; and on the latter it held that the appellant had not proved the noncompliance. With the greatest respect I am of the view that the learned Justices of Appeal arrived at the two conclusions through misdirection on the facts and the law.

Section 50 of the ECA

The learned trial judge, after a careful and detailed review of the evidence, found as a fact that the 2nd respondent, under the influence of Hon. Kuteesa, but in absence of any lawful ground and without complying with section 30 of the ECA, unlawfully substituted Ibrahim Kakembo for Muwaya Tibakuno as Returning

Officer. The Court of Appeal upheld the finding that the substitution was unlawful but accepted a submission by counsel for the 2nd respondent that the same was cured or validated under the provisions of section 50 of the ECA, which the trial judge had not appreciated. Section 50 (1) of the ECA provides –

> ***"Where, during the course of an election, it appears to the Commission that by reason of any mistake, miscalculation, emergency or unusual or unforeseen circumstances, any of the provisions of this Act or any law relating to the election, other than the Constitution, does not accord with the exigencies of the situation, the Commission may, by particular or general instruction extend the time for doing any act, increase the number of election officers or polling stations or otherwise adapt any of those provisions as may be required to achieve the purpose of this Act or that law, to such extent as the Commission consider necessary to meet the exigencies of the situation."*** (Emphasis is added)

Clearly this is not a general or residual provision to be applied *post facto* in order to cure or validate noncompliance with provisions of the Act or other law relating to elections. It is a provision that empowers the Electoral Commission to modify a provision of the Act or other law relating to elections, other than the Constitution, subject to the conditions set out in the section. The main thrust of the conditions is that under the stipulated circumstances the Commission has to give particular or general instructions adapting the provision in question to the circumstances. In other words the Commission has to actually invoke the section and not be deemed to have done so from its failure to comply with the law in question.

The Court of Appeal applied section 50 to the noncompliance with section 30 of the ECA, on the premises that there was serious tension which threatened unity and peace and the holding of the elections in the District as scheduled. In the first place, however, that was putting the cart before the horse. Failure to comply with section 30 in removing and substituting the Returning Officer was not necessitated

by the tension. Rather, the tension was sparked off when, at the meeting on 17th February 2006, Hon. Kuteesa announced the substitution and rejection of the list of polling staff prepared and published by the ousted Returning Officer.

Secondly, there was no iota of evidence before the trial court indicating that the 2nd respondent invoked section 50. The submission of counsel for the 2nd respondent, which the Court of Appeal accepted, was not supported by any evidence. Neither the Deputy Chairperson of the Commission, who allegedly confirmed the substitution to the candidates at the meeting of 20.2.2006, nor Sam Rwakoojo, the Secretary to the Commission who filed an affidavit in support of the 2nd respondent's reply, testified that the Commission had invoked the powers under section 50. Dr. Jenny Okello, the Commissioner whose affidavit evidence was found to be false in many particulars, did not claim that the section was invoked. Lastly, at the trial learned counsel for the 2nd respondent did not canvass the contention that section 50 was applicable or had been invoked. I therefore find that it was a misdirection for the Court of Appeal to fault the trial judge for not appreciating the provisions of section 50(1), when in fact the provision was never invoked and was not canvassed for consideration at the trial.

It seems obvious to me, with due respect, that counsel for the 2nd respondent resorted to the section in the Court of Appeal as an afterthought, and that the Court of Appeal misconstrued the section as if it were a validating provision.

Memorandum of Understanding on appointments of Polling Staff

It is common ground that at the marathon meeting on 20th February 2006 at the 2nd respondent's Headquarters, the candidates were divided in two sides disputing over appointment of polling staff. One side that included the 1st respondent rejected the

list prepared and published by the ousted Returning Officer, and sought to substitute it with one presented by Hon. Kuteesa; and the other side that included the appellant opposed that. Upon the 2nd respondent intimating that in default of resolving the dispute the elections in the District would be postponed, the candidates signed a MoU stipulating *inter alia*,

- that all candidates recognized the need to hold the elections as scheduled and that they be as free and fair as urged by the EC;
- that each polling station would have two presiding officers;
- that each side would nominate one person for appointment as presiding officer, for each polling station and one person to be appointed polling assistant for each table in every polling station; and give the list of its nominees to the Returning Officer; and
- that ***"the two presiding officers representing each side per polling station shall sign the DR Form for the respective polling stations".***

I should point out at the outset that, contrary to the argument in the written submissions of counsel for the 2nd respondent, the M.o.U was not made under section 50 of the ECA. It was not an instruction by the Electoral Commission within the meaning of that section. On the contrary, the 2nd respondent distanced itself from it. In the 2nd respondent's affidavit in support of its answer to the petition, Ibrahim Kakembo averred that, during deliberations among themselves, the candidates had proposed to identify suitable persons to the Commission for appointment as polling staff, and he stressed in paragraph 5(o) of the affidavit -

> ***"That after sometime, the candidates produced an agreement, which neither myself nor the Commission was a party or bound"***

Significantly, the Court of Appeal was not asked to, and it did not apply section 50 to the M.o.U. Instead, it cast doubt on its implementation.

Needless to say, an election under the Parliamentary Elections Act (PEA) is not a personal contest among the candidates. It is a public process by which the people exercise their power and right to choose their representatives. The process is regulated by strict provisions of the Constitution, the PEA and the ECA. Candidates have no legal power to contract out of the provisions. In my view, the MoU had no legal standing or effect. The court's primary concern, therefore, is to determine if on basis of the provisions of the law governing the elections, the election result reflects the will of the electorate and not if the candidate agreed not to comply with any of the provisions.

Turning back to the appointment of the polling staff, the Court of Appeal holding is captured in the following excerpts from its judgment –

> ***"The trial judge found that the Electoral Commission directed the returning officer to implement the [MoU]. According to the trial judge, that direction unleashed on Sembabule District polling officials who were partisan, partial, biased and untrained. In his view, this amounted to noncompliance with …. section 18(3) of [PEA].***
>
> ***With respect, we do not agree with the above finding. We accept the submission of counsel for the appellants that <u>there is no evidence to show that the direction to implement the memorandum of understanding was carried out by the returning officer and thereby unleashed on Sembabule District electoral officials who were partisan, partial, biased and untrained</u>. There is a list of Electoral Officials that was prepared and published by Mr. Tibakuno under section 18(1) of the Parliamentary Elections Act ……. There is also a list of names stated to have been prepared by Hon. Sam Kuteesa under the [MoU] for appointment as presiding officers and polling assistants. …… <u>There is however no evidence to show that the returning officer</u>***

> ***……,appointed only those persons whose names appeared on the list prepared by Hon Sam Kuteesa or nominated by candidates and ignore the list prepared by Mr. Tibakuno.”*** (Emphasis added)

The court opined that the implementation of the MoU could have been proved through production of all the 177 DR Forms to show through a check of the names of the polling staff thereon against those in the two lists, that only Hon. Kuteesa's list was adopted. It then concluded –

> ***“Unfortunately only 48 Declaration of Result Forms were attached to the*** [appellant's] ***affidavit dated 26th September 2006, as sample to show that they are invalid. … These declaration of result forms were not intended to prove implementation of the [MoU]. There is therefore no evidence to show that the returning officer did not use the list prepared and published by Mr. Tibakuno or that he implemented the [MoU].***

This view of the Court of Appeal, however, is against the weight of evidence. The so-called crisis, which culminated in the candidates' MoU, was brought about by a combination of the controversial substitution of the Returning Officer and the rejection of the list of polling staff that Muwaya Tibakuno prepared and published. In my view, it is not likely, let alone probable, that his replacement would have adopted that rejected list. More importantly, however, in his own affidavit in support of the 2nd respondent's answer to the petition, Ibrahim Kakembo, the substitute Returning Officer, averred categorically that following the candidates' MoU, the Commission directed him to receive from the candidates, names of persons proposed for appointment as polling staff which he did. In paragraph 5(q) of the affidavit he reiterated –

> ***“On 21st February 2006, I received lists of proposed names from the candidates which together with my team in the District scrutinized”***

In view of that admission by the Returning Officer and other substantial affidavit evidence I need not go over, it is difficult to understand why the Court of Appeal

asserted that there was ***"no evidence to show that the direction to implement the [MoU] was carried out by the returning officer"***. It may well be that the implementation was lop sided because, as the trial judge held, one side had its list ready while the other was only given opportunity to compile its list within virtually one day. There can be no doubt, however, that the essence of the MoU, namely to appoint polling staff nominated by the candidates, was implemented.

Although in his said affidavit the Returning Officer tried to white-wash the exercise by claiming that he screened the names nominated by the candidates to ensure that only suitable persons were appointed, his claims are unconvincing for conspicuous lack of specificity. Moreover, given that the marathon meeting, which culminated in the MoU lasted until after midnight of 20th/21st February 2006, the Returning Officer had barely 48 hours before commencement of voting, within which to receive the proposed names from the candidates, to screen them and select the suitable ones for appointment and to train them. He did not indicate how he could have achieved all that in such a short time.

In my opinion, the learned trial judge's finding that the directive to the Returning Officer to implement the candidates' MoU unleashed unto Sembabule District ***"partisan, partial, biased and untrained"*** polling staff was a reasonable inference he deduced from the evidence before him. With due respect to the learned Justices of Appeal, they had no legal or reasonable basis for disagreeing with him.

For those reasons, I hold that grounds 1, 2, 3, 4, 5 and 6 ought to succeed.

Unsigned Declaration of Results Forms

The learned Justices of Appeal further disagreed with the findings of the learned trial judge to the effect that failure to sign a Declaration of Results Form (DR Form) invalidates the results of the affected polling station, and that in the instant case such invalidation affected the results of the election in a substantial manner. In their judgment, the learned Justices of Appeal said that it was not clear how many out of a total of 177 DR Forms were unsigned, as those produced in evidence were mere samples, useful only in predictions, but not ***"in a live case*** [where] ***evidence is required to prove either qualitatively or quantitatively the extent of the noncompliance on the result of the election".*** They then went on to say –

> ***"Even if more than half of that number had not been signed, they would not have affected the result of the election in a substantial manner. <u>The reason is that failure to sign the declaration of result forms per se does not affect the quality of the elections.</u> Declaration of result forms are filled or completed after the poll is closed and the votes are counted in a polling station. If there are failures in the correct filling or signing of the declaration of result forms in many polling stations that could be a ground to justify recount. <u>They do not affect the result of the election because such a failure does not invalidate the votes otherwise properly cast.</u>"*** (Emphasis is added)

In her written submissions, the appellant criticizes this holding as trivializing a Constitutional provision under Article 68(4) that requires the DR Forms in respect of every polling station to be signed. She supports the holding by the trial judge that noncompliance with the requirement invalidates the results of the affected polling station and thereby affects the election results. She contends that the DR Forms produced in court showed that official record of votes was *"constitutionally deficient in 48 polling stations"* which affects the election result in a substantial manner.

Learned counsel for the 1st respondent reiterates the view of the Court of Appeal that it was not possible to determine the extent of the noncompliance without all the 177 DR Forms from the 177 polling stations being produced in evidence. On the other hand, learned counsel for the 2nd respondent claims that most of the DR Forms produced in evidence were signed by the appellant's agents and argues that because of that *"the provisions of section 47(5) of the PEA, which require the presiding officer to sign and retain a copy* [thereof] *became directory rather than mandatory."* Furthermore, counsel argues that it would be a violation of Article 1(4) of the Constitution to invalidate DR Forms solely for lack of the presiding officer's signature, when the particulars thereon reflecting the voters' will are authenticated by signatures of the candidates' agents. Lastly, counsel argues that the appellant cannot rely on terms of the MoU, which she challenged in the courts below.

This aspect of the case raises two issues, namely, first, whether failure by the presiding officer to sign a DR Form invalidates the results of the affected polling station; and secondly, whether in the instant case, that failure affected the election result in a substantial manner. By its aforesaid holding the Court of Appeal answered both issues in the negative.

Once again I respectfully disagree with the learned Justices' assertions that failure to sign DR Forms does not affect the quality or the result of the election. An election is a process encompassing several activities from nomination of candidates through to the final declaration of the dully elected candidate. If any one of the activities is flawed through failure to comply with the applicable law, it affects the quality of the electoral process, and subject to the gravity of the flaw, it is bound to affect the election results. One such activity is the declaration of the

results at every polling station. If any declaration is invalid by reason of noncompliance with the applicable law, it affects the quality and the result of the electoral process.

In the instant case, the learned trial judge carefully considered section 47(5) of the PEA, and the implications of noncompliance with it and concluded –

> ***"I am of the view that signing of the DR forms by the Presiding Officer is mandatory, and failure of a Presiding Officer to sign a declaration of results form under sub-section (5) of section 47 does by itself invalidate the results of the Polling Station. In my view a candidate would then rely on the results shown on the duly signed DR forms."***

In ***Kakooza John Baptist vs. Electoral Commission & another,*** Election Petition Appeal No.11/07(S.C.), Katureebe J.S.C., expressed the same view where, upon considering section 47(5) of the PEA, he said –

> ***"Clearly, the declaration of result form must be signed, at the very least by the presiding officer and*** [the] ***candidates or*** [their] ***agents must retain a copy. A signed declaration of results form becomes the basis for the immediate declaration of results at that polling station. An unsigned declaration of results cannot be validly used as a basis for declaring results."*** (Emphasis is added)

I share the same view and should add that sub-section (5) of section 47 reiterates the Constitutional requirement under Article 68(4), which reads –

> ***"The presiding officer, the candidates or their representatives and in 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…***
> ***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."***

It follows that an announcement of results that is not based on a duly signed DR Form is invalid for contravening both the Constitution and the PEA.

The learned trial judge must have had this in mind when he noted that the unsigned DR Forms that the appellant produced in evidence were obtained from the 2nd respondent as evidenced by the certification and official stamp thereon. From this he deduced, quite rightly in my view, that the Returning Officer had received from the affected polling stations unsigned and invalid DR Forms, and that this had effect on the results of the election.

I am not persuaded that such invalidation of the results of affected polling stations amounts to violation of Article 1(4) of the Constitution as submitted by counsel for the 2nd respondent. While in Article 1(4) the Constitution proclaims the people's power and right to express their will, through regular elections, on who shall govern them, in other provisions, including Article 68, it prescribes regulations for the conduct of those elections and for determining the people's will as so expressed. Interpreting and applying those regulations does not amount to violation of Article 1(4).

On whether the effect of the invalid DR Forms was substantial, the trial judge noted the concession by Mr. Kakuru, counsel for the 1st respondent, with which he agreed, that if the failure to sign the DR Forms invalidates the results of the affected polling station then the 48 DR Forms produced in evidence showed ***"there was substantial effect on the result of the election"***. Because of its erroneous premise that failure to sign the form has no effect on the result at all, the Court of Appeal did not consider the effect that the invalidity of the 48 out of 177 DR Forms, had on the election results. In holding that all 177 had to be produced in

order to determine the effect, they misconstrued the phrase "affected the result". Production of all the forms would be necessary where the court is required to determine which candidate obtained the highest number of votes according to the forms. The 48 DR Forms were not produced as samples of what happened everywhere, but as evidence of irregularity at the particular 48 polling stations and the issue was whether that irregularity affected the election result.

In **MBOWE vs. ELIUFOO** (1967) EA 240 at p.242 D-E. Georges C.J., aptly defined the phrase as follows -

> ***"In my view in the phrase*** *"affected the result"* ***the word*** *"result"* ***means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules."*** (Emphasis is added)

In the instant case, the 1st respondent was declared winner with 29,398 votes and the appellant was runner-up with 28,199 votes; the margin between them being 1,199 votes. In her written submissions, the petitioner shows that if adjustments are made by deducting the votes recorded for each of them in the invalid DR Forms, that margin would disappear. Though that is not proof that the appellant was the winner as she seems to argue, it does show that the invalid declaration of the results of the affected polling stations affected the election result in a substantial manner as held by the learned trial judge. In my view, grounds 11 and 12 ought to succeed.

Failure to re-appraise the case as a whole

In the remaining grounds of appeal the appellant criticizes the court for failing to re-appraise the case as a whole. I think there is a lot of substance in the criticisms. As I pointed out earlier in this judgment, the Court of Appeal omitted to consider two crucial issues framed for its determination. It allowed the appeal on basis of its three technical, but erroneous findings in my view, that the irregular substitution of the Returning Officer was cured under section 50 of the ECA, that it was not certain if the MoU was implemented and that the unsigned DR Forms did not affect the election result, as if the trial court had based its decision to annul the election solely on those issues. In my view if the Court of Appeal had appraised the case as a whole it would have found that the learned trial judge annulled the election upon being satisfied, rightly in my view, that the 2nd respondent had failed to conduct the election in accordance with provisions of the law and principles laid down therein.

The learned trial judge carefully reviewed in detail the complaints in the petition, and the law applicable thereto, as well as the evidence adduced and counsel submissions from both sides in regard to those complaints. From that review he in particular made the findings *inter alia*, that the 2nd respondent failed to control the proper use of ballot papers and to prevent multiple voting, stuffing of ballot boxes and voting by unauthorized persons.

He noted that the court had to find out if there was a failure to conduct the election in accordance with the principles laid down in the PEA and concluded that the 2nd respondent failed to conduct the election of the Woman MP for Sembabule District in accordance with the principles of secret ballot and freedom and fairness. Lastly, he found that all the failures, (including the failure on the part of presiding officers

in 48 polling stations to sign DR Forms that I discussed earlier in this judgment) had affected the election result in a substantial manner.

At the end of the long review and the several findings, the learned trial judge observed, aptly in my view, that -

> ***"The experience in Sembabule District was unique. The election of the Woman MP was conducted by polling officials who were nominated by the candidates themselves, their own campaign agents who were partisan, partial, biased and untrained. <u>It would be difficult to defend the result of an election left in the hands of such people.</u>*** (Emphasis is added)

The learned trial judge did not find that there was noncompliance with the law only in the appointment of the election officials but also in the manner they conducted the election. The Court of Appeal having failed to consider and fault his findings in respect of the misconduct of the election, it was not justified to set aside his judgment. Accordingly I would uphold grounds 9, 10 and 14.

In the result, I would allow the appeal, set aside the judgment of the Court of Appeal and reinstate the judgment of the High Court. I would order that the 2nd respondent bears the costs of the appellant here and in the courts below and that the 1st respondent bears her own costs.

DATED at Mengo this 11th day of November 2008

J.N. Mulenga
Justice of Supreme Court

THE REPUBLIC OF UGANDA

IN THE SUPREME OF UGANDA
AT MENGO

(CORAM: ODOKI, , TSEKOOKO, MULENGA, KANYEIHAMBA, KATUREEBE, JJ.S.C. MPAGI - BAHIGEINE Ag. J.S.C)

ELECTION PETITION APPEAL NO. 25 OF 2007

BETWEEN

JOY KABATSI:: APPELLANT

AND

1. **ANIFA KAWOOYA**
2. **ELECTORAL COMMISSION**

::::::::::::::: RESPONDENTS

(An appeal arising from the judgment and orders of the Court of Appeal (Okello, .Engwau..Kitumba, JJ.A) dated 5th October, 2007, in Election Petition Appeal No. 3 of 2007)

JUDGMENT OF KANYEIHAMBA, J.S.C

The appellant, Kabatsi Joy Kafura, was an independent candidate in the Parliamentary Elections for woman member of Parliament for Sembabule District and contested for the seat against three other candidates, namely Bangirana Anifa Kawoya, the first respondent who was standing for the NRM party, Nakiganda Irene Josephine, who was standing for the DP party and Namukasa Justine Mukiibi, who was standing for the FDC party.

The election in Sembabule District was part of the general elections held throughout Uganda on the 23rd of February, 2006. The Electoral

Commission, the second respondent in this appeal, which organized the elections, declared the 1st respondent as the winner of the Sembabule District Woman seat. Dissatisfied with the results, the appellant petitioned the High Court on the 26th April, 2006.

In her petition, she listed a number of complaints which led her to be dissatisfied with the election results in Sembabule District, and they included the following;

a) **"That there was non compliance with the provisions of the Constitution, the Parliamentary Elections Act, of 2005, (PEA) and the Electoral Commission Act (ECA) relating to the conduct of the said elections and principles laid down in the said Act, and that the non-compliance and failure affected the results of the election in a substantial manner.**

b) **That the 1st respondent was at the time of her election, not qualified for election as a member of Parliament Contrary to Section 54(1) (c) of the Parliamentary Elections Act.**

c) **That the 1st respondent committed illegal practices contrary to sections 68 and 72 of the Parliamentary Elections Act in Connection with the said election personally, or by her agents with her knowledge and consent, or approval".**

In response the respondents denied all the allegations. The petition in the High Court was supported and opposed respectively by affidavits of the parties and their witnesses**.**

The petition was heard by Moses Mukiibi, J who exhaustively analyzed the issues and evidence presented by the parties in

support and against the petition. The learned Judge upheld the petition, set aside the election of the first respondent, declared the seat vacant and ordered that a fresh election be organized and held in the constituency under Section 61 of the Parliamentary Elections Act. Dissatisfied with the High Court Judgment, the first respondent appealed to the Court of Appeal which allowed the appeal. Hence this appeal. There are 14 grounds of appeal in this Court.

1. **The Learned Justices of Appeal erred in law and in fact in holding that the removal, and replacement of the election Returning Officer on the 17th of February 2006, was necessitated by the existence, of serious tensions in the Sembabule District**
2. **The Learned Justices of Appeal erred in law and in fact in holding that the trial judge to fail to appreciate Section 50 of the Electoral Commission Act when the same had not been pleaded nor raised in that Court nor invoked by the 2nd Respondent during elections.**
3. **The Learned Justices of Appeal erred in law and in fact in holding that the Returning Officer of Sembabule Electoral District was lawfully appointed.**
4. **The Learned Justices of Appeal erred in law and in fact in holding that a new Returning Officer of Sembabule Electoral District was lawfully appointed.**
5. **The Learned Justices of Appeal erred in law and in fact in holding that the Presiding Officers and other election officers of Sembabule electoral District were lawfully appointed**

6. **The Learned Justices of Appeal erred in law and in fact in holding that the electoral officials appointed by the 2nd Respondent were not untrained, biased or partisan.**
7. **The Learned Justices of Appeal erred in law and in fact in holding that the 2nd Respondent conducted the election of the woman Member of Parliament for Sembabule District impartially and independently and without the direction of or control by any person or authority.**
8. **The Learned Justices of Appeal erred in law and in fact in holding that the election of woman Member of Parliament for Sembabule District was free and fair.**
9. **The Learned Justices of Appeal erred in law and in fact in failing to reappraise the facts of the case before the trial Court, thereby arriving at wrong conclusions.**
10. **The learned Justices of Appeal erred in law and in fact in failing to consider the effect of the findings and decisions of the trial court which were not appealed.**
11. **The Learned Justices of Appeal erred in law and in fact in holding that all Declaration of Results Forms must be produced in evidence in order to prove substantial effect on an election.**
12. **The Learned Justices of Appeal erred in law and in fact in refusing to nullify the election of the 1st Respondent on the basis of invalid Declaration of**

Result forms.

13. **The Learned Justices of Appeal erred in law and in fact in failing to reappraise the evidence with regard to the illegal and fraudulent nomination and election of the 1st Respondent as a Member of Parliament**
14. **The Learned Justices of Appeal erred in law and in fact in holding that the noncompliance with electoral law and failure to conduct the election in accordance with the principles laid down in the law did not affect the results of the election in a substantial manner.**

I found these grounds to be unnecessarily duplicated and offensive to the rules of this Court. In my opinion, they could have been redrafted and reduced to about two or three grounds only.

To this extent, Counsel for the 1st respondent is right to object to these grounds of appeal. Interestingly, in the Court of Appeal it was observed that the only issue that was relevant to the appeal was:

> **"That there was non-compliance with the provisions of the Constitution, the Parliamentary Elections Act 17 of 2005 (PEA) and the Electoral Commission Act (ECA) relating to the conduct of the said elections and the Principals laid down in the said Acts and that the non-compliance and failure affected the result of the election in a substantial manner"**

However, in the judgment, the Learned Justices of Appeal found that the petition was based not only on that issue but on two other grounds, namely:

“whether or not the first respondent was at the time of her election qualified for elections as a member of Parliament in conformity with Section 4 (1) (c) of the Parliamentary Elections Act, and whether the first respondent had committed illegal practices contrary to Sections 68 and 71 of the Parliamentary Elections Act personally, or by her agents with her knowledge and consent or approval”.

In their written submissions, Counsel for the appellant combine grounds 1,2,3,4 and 5 and argue them jointly. The contention of counsel on these grounds is that the Justices of Appeal erred in both law and fact in holding that the removal and replacement of the Returning Officer for Sembabule District was necessitated by the existence of serious tensions in the District and that the Judge failed to appreciate the provisions of section 50 of the Electoral Commission Act Counsel for the appellant contended however that section 50 had not been pleaded nor relied on in the trial Court.

Counsel further contended that it was due to the disagreement amongst candidates over electoral officials in Sembabule District which led candidates to sign a memorandum of understanding between them.

Counsel argued at length the details of the provisions of section 50 and their meaning and implications. Counsel contend that the Court of Appeal erred in that having found that section 50 had been violated, failed to allow the appeal. On ground 6,7 and 8 which

counsel intimated were inter-related, contend that the Court of Appeal erred in law and fact in holding that the election officials appointed by the 2nd respondent were not untrained, biased or partisan.

On ground 7, counsel for the appellant contend that the Court of Appeal contradicted itself by first finding that the Electoral Commission was compromised by Hon. Sam Kutesa and then holding that this compromise did not have any effect on the candidates or influence on the polling assistants.

Counsel submit that the Court of Appeal was wrong not to find any nexus between the bogus papers the 1st respondent presented to Nkumba University to acquire that degree from University.

On ground 1, Counsel for the 1st respondent contend that there is evidence to confirm that serious tensions existed in Sembabule District before February 17th, 2006. Counsel contend that ground 2 is misconceived as parties do not have to plead the law.

On grounds 3,4 and 5, counsel submit that the Court of Appeal held that the circumstances of the election in Sembabule District justified the Electoral Commission to invoke section 50 of the Electoral Commission Act.

On ground 6, counsel contend that the Court of Appeal adequately considered the issues raised and concluded that there was no proof that the polling officials were untrained.

On ground 11 and 12, counsel for the appellant contend that the Justices of the Court of Appeal erred in holding that all declared results should be produced to show substantial effect on the election.

Lastly, counsel contend that the Court of Appeal was in error to hold that it would not have made any difference to the results even if half the results from the remaining 177 polling stations had been produced in Court. For the appellant Counsel cited the provisions of the Constitution, **Fredrick Zaabwe V Orient Bank and Others (S.C) (**unreported), Civil appeal No.04.2006

Padfield V Ministry of Agriculture (1968) AER.694**,** **Demetriades V Glasgow Corporation,** (1951) 1 ALL.E.R 457**,** **Besigye V Museveni and Others,** Presidential Petition Appeal No 001 of 2006,(S.C), (unreported) as authorities in support of the appellant's submissions.

For the 1st respondent, counsel submitted that ground 1,8,9 and 10 of the memorandum of appeal are too vague and too general to warrant a reply. Counsel cited the case of **Katalemwa Estates Traders Ltd V Attorney- General,** Civil Appeal No 2 of 1987, (S.C), (unreported) as authority for this submission.

On ground 9,10 and 13, Counsel submit that the Court of Appeal adequately revaluated the evidence.

On ground 11 and 12, Counsel contend that the Justices of Appeal correctly held that it was not possible to determine the extent of non-compliance by looking at samples of declaration forms as results are contained in the ballot boxes and not in DR. forms.

On ground 14, counsel contend that this ground was abandoned by the appellant.

For the 2nd respondent, Counsel supports the findings of the Court of Appeal on ground 1,2,3,4 and 5. On grounds 6, 7 and 8, Counsel for the 2nd respondent state that it is not disputed that Ibrahim

Kakembo and all the rest of the election officers did perform their respective duties correctly.

On ground 9, 10, 11 and 13, counsel contend that as the Court of Appeal properly and adequately revaluated the evidence, there is no merit in these grounds.

On ground 12, Counsel contends that there is no merit in this ground and supports the holding of the Justices of Appeal.

In rejoinder, Counsel for the appellant reiterated their written submissions on all the grounds emphasizing two points

On section 50, counsel for the appellant insisted that there were no circumstances obtaining in the constituency to resort to the provisions on that section. Secondly, counsel for the appellant submits that both the High Court and the Court of Appeal, having looked into the conduct of Hon. Sam Kutesa an MP in that area in removing election Officials agreed that the Minister interfered with the independence of the Electoral Commission.

In my view, this appeal consists of the two parts. The first relates to the facts, events and circumstances which occurred before the time the candidates signed a Memorandum of understanding under the sponsorship and encouragement of the 2nd respondent. The second part is to deal with subsequent events including the declaration of the election results of the Woman Member of Parliament for the Sembabule District Constituency.

PART ONE

Following the perusal of the appeal and the submissions of Counsel for the parties, I find it convenient to consider and determine the complaints that occurred before the candidates made an

agreement. Firstly, in a lengthy and detailed consideration of the background facts and circumstances leading to the petition, the learned trial Judge, Moses Mukiibi ,J, ably discussed and resolved the material facts and Pertinent issues argued before him. In my view, his findings and conclusions on the first part are correct on whether or not the appellant was qualified to stand as a Parliamentary candidate for the Sembabule Woman seat, the learned Judge said.

> **"I therefore answer issue No.4 in the affirmative that the 1st respondent at the time of the election possessed a degree from Nkumba University, a qualification which is higher than the prescribed minimum academic qualifications for election as a Member of Parliament".**

At the inter-parties scheduling conference in the Court of Appeal the issues framed for determination did not include determination of qualifications of the 1st respondent nor is it one of the grounds of this appeal. Consequently, in my opinion, for Counsel for the appellant to raise the same matter in prayer (c) and later make submissions upon the same is not proper.

In my view, where a candidate presents a qualification which is higher than the minimum required for nomination for any post, it is not enough for his or her opponents to argue that the same higher qualification was based on a forgery or something irregular, nor is it sufficient for a spokesperson of the Institution in which the higher qualification was obtained to suggest that had the institution known that fact they would not have admitted the candidate or awarded the said qualification. Those who make such allegations need to do more than merely allege. They need to show that as a result of their

allegations, the awarding institution of the higher qualification or any other equivalent to “A” Level or some other classification subsequently cancelled or withdrew the award of the disputed qualification.
I would therefore agree with the learned trial judge that the appellant failed to prove that the respondent was not qualified to stand as a woman member of Parliament.

In my view, the Court of Appeal’s finding that the removal of The Returning Officer and the appointment of his replacement both heavily influenced by external forces were not unlawful is at variance with the clear evidence presented and thoroughly reviewed by the learned trial judge. In my opinion, the findings and decisions of the trial judge on this matter are the correct ones. The learned Judge said.
In the circumstances, I agree with the submission of Mr. Byamugisha that **“the 2nd respondent acting on the influence from external forces illegally removed Mr. Muwaya Tibakeno as a returning officer of Sembabule Electoral District and unlawfully appointed Mr. Ibrahim Kakembo to replace him and the 2nd respondent thereby contravened the provisions of Section 30 (1) C2) (3) of the Electoral Commission Act (ECA)”.**

> An overwhelming number of deponents of affidavits regarding the events in Sembabule District give credence to the allegations and to the findings of the High Court that the independence of the Electoral Commission and the preparations, arrangements and the appointment of electoral officials in Sembabule District were not only compromised but in most cases were contrary to the law applicable and the learned trial judge rightly held them to have

been unlawful. Up till the meeting of the candidates to review the situation, interference with the process and the functions of the duly appointed returning officer who was replaced and the appointment of polling officials by unauthorized persons were all unconstitutional and illegal and dealt a serious blow to the contents of and freedom of free and fair elections in a democratic society that practices a multiparty system of government.

At this stage, any party or candidate could have proffered different proceedings to halt the election exercise and appealed to the High Court in accordance with the law but none chose to do so.

PART TWO

THE MEETING OF 20.2.2006 AND THE MEMORANDUM OF UNDERSTANDING

The evidence is compelling that up till the meeting called by the Electoral Commission, Officials, Candidates and other stakeholders in Sembabule District were facing tensions and controversies as well as disagreements between candidates problems of how the election for the District women representative could proceed and who should preside and conduct the elections. On that day the Electoral Commission rightly in my opinion, summoned a meeting of the candidates and others and, in my opinion, it was entitled to do so. Section 50(1) and (2) of the Electoral Commission Act provides that;

1. *"where, during the course of an election, it appears to the commission that by reason of any mistake, miscalculation, emergency or unusual or unforeseen circumstances any of the provisions of this Act or any law relating to the election, other than*

the Constitution, does not accord with the exigencies of the situation, the commission may, by particular or general instructions, extend the time for doing any act, increase the number of election officers or polling stations or otherwise adapt any of those provisions as may be required to achieve the purpose of this Act or that law to such extent as the commission considers necessary to meet the exigencies of the situation.

(2) *For the avoidance of doubt, this section applies to the whole electoral process, including all steps taken for the purposes of the election and includes nomination".*

The object of the meeting was to find a solution to the disputes in order to enable the elections to proceed in the District as scheduled. At the close of the meeting, the candidates signed a memorandum of understanding (MOU). In the memorandum, the candidates agreed on the following;

1. *"That the elections was to proceed in the District as scheduled*
2. *That there was to be two presiding officers at each polling station*
3. *Each side to the dispute was to nominate one person to be appointed presiding officer*
4. *Each side to the dispute was to nominate one person to be appointed polling assistant at each table;*
5. *The list of persons nominated by each side to the dispute was to be passed over to the returning officer,*

6 *Any further dispute was to be referred to the Electoral Commission whose decision was appealable to the High Court"*

Having chosen to condone the irregularities committed before the Memorandum of Understanding, it is my opinion that the

candidates mutually agreed to be bound by the subsequent results provided always that the election thereafter was conducted justly and fairly in accordance with the provisions of the memorandum of understanding between the candidates, and as provided for in the Constitution and relevant laws.

In my opinion, by committing themselves to the memorandum of understanding, the candidates consented to having their brand of election in Sembabule District taken outside the Acts of Parliament allegedly violated. The Court of Appeal was correct to disagree with the learned trial judge where in his judgment he observed,

"**The experience in Sembabule District was unique. The election of woman member of Parliament was conducted by polling officials who were nominated by the candidates themselves, their own campaign agents who were partisan, partial, biased and untrained. It would be difficult to defend the result of an election left in the hands of such people. To compound the problem the returning officer also was not even a week old in Sembabule District. So who was in control of the election?**

So, in answer to the 2nd issue, I hold the non-compliance affected the result of the election in a substantial manner" (*emphasis added***)**

In my opinion, it is the non-compliance which the candidates chose to ignore in agreeing to be bound by a memorandum of understanding that would expedite the election of woman MP for the constituency on the same day as the rest of elections throughout the country.

I notice that ground 11 and 12 relate to issues which arose during and after the elections. In my opinion however, these two grounds do not alter the fact that by accepting and signing the Memorandum of understanding which was intended to ignore all the irregularities in the Sembabule District the candidates chose to proceed outside electoral laws. In my view, grounds 11 and 12 were subsequently and similarly bound up together with all the complaints contained in the appellant's petition and cannot be determined separately

In my view, any candidates who complain of any defects that the learned trial judge feared would occur, would have themselves to blame for having accepted to bye-pass the Constitution and the laws applicable and proceed with the election. The actual election would be validly held because it would be as required by both the Constitution and the Parliamentary Election Act as this court observed in Constitutional Appeal No 3 of 2004 on the referendum. It would also be subjected to the memorandum of understanding amongst the candidates. I would agree with the learned Justices of Appeal, that after all, all the candidates were affected in the same way. No doubt perhaps, had the appellant herself won in the election this case would not have arisen. What emerges from the Sembabule elections and my findings is that it is manifestly clear that the Electoral Commission was compromised if not intimidated to defer to the commands of extrinsic forces. This is clearly a violation of the provisions of Article 62 of the Constitution which provides that:

"Subject to the provisions of this Constitution, the Commission shall be independent and shall in the

performance of its functions not be subjected to the direction or control of any person or authority".

Candidates in the Sembabule District constituencies who attended the meeting and agreed to the resolutions which came to be incorporated in the candidates' memorandum of understanding knew that what they were doing was intended to cover up illegalities and acts which were constitutionally and legally objectionable. Although they had an immediate right to object to the illegalities that had occurred, in their enthusiasm and anticipation of being the ones to be elected, they connived in the unlawful electoral multipractices. They should have opted for court proceedings under Section 15 (2) of the Electoral Commission Act but did not do so.

The section provides.

"15 (2) an appeal shall lie to the High Court against a decision of the Commission conferring on rejecting the existence of an irregularity.

(3) The appeal shall be by way of a petition supported by affidavits of evidence which shall clearly specify the declaration that the High Court is being requested to make".

By failing to utilize the above legal provision at the earliest opportunity and choosing to proceed with the elections instead, the appellant must be deemed to have accepted to take a chance and to abide by any outcome thereafter. In my view, by doing so the appellant consented to the outcome of the exercise and

should not be heard to complain. The candidates cannot approbate and probate the exercise.

They chose willingly to participate and wallow in flawed elections. They must now abide by the outcome. It is for this reason, that

I am not persuaded by the arguments advanced for the appellant. All the people who signed the candidates' so called memorandum of understanding in the Sembabule District for the elections of February 2006 conspired and agreed to the flouting of the electoral law. Sadly, the conduct of the elections in that District must b e regretted from beginning to end. They should stand alone in the annals of Uganda's electoral misadventures. They deserve to be severely reprehended even though regrettably, I have had to dismiss this appeal for a different reason. I would therefore hold that this appeal ought to fail. I would order that the electoral commission bear the costs of both the appellant and respondent in this court and in the courts below.

Dated at Mengo 11th day of November 2008

G.W. KANYEIHAMBA

JUSTICE OF TH SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME OF UGANDA

AT MENGO

(CORAM: ODOKI, C.J, TSEKOOKO, MULENGA, KANYEIHAMBA, JJ.S.C., BAHIGEINE Ag J.S.C)

ELECTION PETITION APPEAL NO. 25 OF 2007

(An appeal arising from the judgement and orders of the Court of Appeal dated 5th October, 2007, in Election Petition Appeal Nos. 3 and 4 of 2007)

BETWEEN

JOY KABATSI ::::::::::::::::::::::::::::::::::

APPELLANT

AND

1. **ANIFA KAWOOYA**
2. **ELECTORAL COMMISSION :::::::: RESPONDENT**

JUDGEMENT OF A.E.N.MPAGI-BAHIGEINE, Ag. J.S.C

I have read in draft the judgement of my Lord Kanyeihamba JSC.

I entirely subscribe to the views expressed therein and would only add a comment or two, just for emphasis.

The Memorandum of Understanding subscribed to and implemented by both sides is captured in the affidavit sworn by the petitioner in support of the petition, dated 24th April 2006, especially paragraph 7c which states in part:

"7(c) The 2nd respondent compromised or failed to exercise its independence, impartially and fairness in conducting the said elections when;

(i) ***Three days before the said elections were held, it removed Returning Officer Muwaya Tibakuno and unlawfully replaced him with one Ibrahim Kakembo.***

(ii) ***On the 17th day of February 2006 at Sembabule Council Hall it allowed Hon. Sam Kutesa candidate in the Parliamentary Elections for Mawogola Constituency in Sembabule District and a well known campaigner and supporter of the first respondent, to impose the said Ibrahim Kakembo as the new***

Returning Officer of the district in the place of the lawful Returning Officer, Mr. Muwaya Tibakuno and further allowed the said Kutesa to order the Returning Officer to handover his officer to the imposed myself, Hon. Ssekikubo Theodore, Mr. Herman Sentongo and members of the public thereby causing a temporary stalemate.

(iii) ***Consequently Hon. Sam Kutesa rang the 2nd respondent from Sembabule Council Hall informing it of the stalemate and in turn informed all the candidates that the 2nd respondent required us to attend a meeting at the 2nd respondent's head office in Kampala on the 20th day of February 2006 to discuss the stalemate.***

(iv) ***On 20/2/2006 during the said meeting which began at 10:00 a.m and ended at midnight, the Deputy Chairperson of the Electoral Commission confirmed, in the presence of the entire Commission and amidst protests from the petitioner and other candidates, the appointment of Mr. Ibrahim Kakembo as the new Returning Officer whom the other candidates knew had been***

appointed with the influence of Hon. Kutesa.

(v) ***During the same meeting, the said Hon. Sam Kuteesa objected to all the Presiding Officers and other polling officials that had been appointed by the Returning Officer, Mr. Muwaya Tibakuno and the 2nd respondent instead decided that all the candidates sign a Memorandum empowering them each to appoint their own presiding officers and polling assistants in contravention of the law. No other district was treated in this manner during the Parliamentary elections."***

What emerges from this affidavit is that it was crystal clear to all concerned that the Electoral Commission was deferring to commands from an extrinsic source, much in contravention of article 62 of the Constitution which provides:

"62. Subject to the provisions of this Constitution, the Commission shall be independent and shall, in the performance of its functions, not be subject to the direction or control of any person or authority."

This is operationalised by ***section 13*** of the ***Electoral Commission Act (Cap 140)*** which provides:

"13. Independence of the Commission.

Subject to the Constitution the Commission shall be independent and shall, in the performance of its functions, not be subject to the direction or control of any person or authority."

It cannot therefore be said that the commission was exercising its powers under ***section 50(1)*** of the ***Electoral Commission Act*** as alleged, for this section does not sanction breach of the Constitution.

It provides in the material part:

"(1) Where, during the course of an election, it appears by reason of any mistake, miscalculation, emergency or unusual or unforeseen circumstances any of the provisions of this Act or any law relating to the election, other than the Constitution, .. ……."

The appellant thus knew that the meeting she was attending and whose resolutions she implemented necessarily involved the commission of acts which were legally objectionable. This was to portend the direction of the entire electoral exercise which would be riddled with illegalities.

She thus had the option of expressing her disapproval by withdrawing, abandoning the exercise and utilizing ***section 15(2)*** of the ***Electoral Commission Act*** or else participate in the already flawed process and abide the outcome.

I would therefore agree with Kanyeihamba JSC that by deciding to participate in such an illegal exercise the appellant is deemed to have accepted to take a chance, the outcome of which she cannot escape from. In my humble view she cannot eat her cake and have it.

The conduct of these elections left a lot to be desired. As expressed by Kanyeihamba JSC, the process ought to be condemned in the strongest terms possible.

Consequently I would dismiss this appeal for reasons aforesaid. Each party to bear its own costs.

Dated at Mengo this 11th day of November 2008.

A.E.N. MPAGI-BAHIGEINE

Ag. JUSTICE OF SUPREME COURT