THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO. 43 OF 2016

MUTEMBULI YUSUF.....APPELLANT

VERSUS

1. NAGWOMU MOSES MUSAMBA .....1ST RESPONDENT

2. THE ELECTORAL COMMISSION.....2ND RESPONDENT

[An Appeal from the Judgment and Orders of Andrew Bashaija, J *dated the 19th day of August 2016 in High Court Election Petition No. 13 of 2016 at Mbale]*

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE F.M.S EGONDA NTENDE, JA

HON. LADY JUSTICE ELIZABETH MUSOKE, JA

JUDGMENT OF THE COURT

This election appeal arises from the Judgment and orders of Andrew Bashaija, J in *High Court Election Petition No. 13 of 2016* at Mbale dated 19th August 2016.

The appellant, the 1st respondent and one Mwangale Peter contested for the Parliamentary seat for Bunyore East Constituency in the last general election which was held on 18th February 2016. The 1st respondent was declared by the 2nd respondent the winner of that election and his name was published as such in the Uganda Gazette of 16th March 2016.

The appellant being dissatisfied with the decision of the 2nd respondent filed a petition at the High Court of Uganda at Mbale challenging the said election on the following grounds:-

1. *The 1st respondent was not qualified for nomination and elections as Member of Parliament at the time of elections in that he did not possess the required minimum academic qualification.*

2. *That the 1st respondent personally and or his agents with his knowledge and consent or approval committed illegal practices and offences in connection with the election.*

3. *That there was noncompliance by the 2nd respondent with the provisions of the electoral laws related to election of MP during the elections in Bunyole East constituency and that the same affected the results in a substantial manner.*

The petition was heard and dismissed on all the grounds.

The appellant was again dissatisfied with the decision of the High Court hence this appeal.

The grounds of appeal herein are set out in the Memorandum of Appeal as follows:-

1. *The Learned trial Judge erred in law and fact when he expunged the appellant's 85 affidavits Contrary to the law.*

2. *The Learned trial Judge erred in law and fact in holding that letters of verification of results in the names of Musamba Moses belong to the 1st Respondent Nagwomu Moses Musamba as proof of his academic qualifications.*

3. *The Learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record and thereby came to a wrong conclusion of dismissing the appellant's Petition on all grounds.*

4. *The Learned trial Judge erred in law and fact in holding that the burden to prove academic qualifications of the 1st Respondent lay on the appellant.*

5. *The Learned trial Judge erred in law and fact in his failure to subject evidence to a thorough scrutiny thus coming to a wrong conclusion that the appellant had not proved malpractices, electoral offences and illegal practices committed by the respondents respectively or with their agents with their knowledge, consent and approval.*

6. *The Learned trial Judge erred in law and fact when he held that the appellant's evidence was hearsay.*

7. *The Learned trial Judge erred in law and fact when he held that the elections for Member of Parliament of Bunyole East, Butaleja District were held in accordance with electoral laws and in compliance with the electoral laws and that did not affect the results in a substantial manner.*

12. *The Learned trial Judge erred in law and fact when he relied on speculation, imaginations and conjecture in attempting to evaluate the evidence on record.*

When this appeal came up for hearing learned Counsel **Mr. Hassan Kamba** and **Mr. Musa Sekaana** appeared for the appellant while learned Counsel **Mr. Ambrose Tebyasa** and **Mr. Evans Ochieng** appeared for the 1st respondent. **Mr. Joseph Kyazze** learned Counsel appeared for the second respondent.

All the three parties sought and were granted leave to rely on their written conferencing notes, already on Court record. In addition Court allowed them to orally expound on them. The parties by consensus agreed to the facts of the case as outlined by the learned trial Judge in his Judgment.

The Appellant's case

In respect of ground one, Mr. Hassan Kamba for the appellant argued that the learned trial Judge erred when he expunged from the Court record 85 affidavits that had been filed by the appellant and in the result excluded the appellant's crucial evidence.

Counsel cited *Rule 15* of the Parliamentary Elections (Election Petition) *Rules Statutory Instrument No. 141-2* which stipulates that all evidence at the trial in favour of or against the petition shall be by way of affidavit read in open Court. This rule counsel submitted does not specify the format of affidavit but rather is interested in its content. Expunging an affidavit on record, amounts to striking out evidence.

Counsel pointed out that the impugned affidavits were struck out on two grounds namely:-

- They introduced new facts
- They were sworn by strangers to the petition

It was argued by Mr. Kamba that neither the respondent nor the Court pointed out the new facts contained in the impugned affidavits. Counsel went on to enumerate the affidavits and to assert that none of them contained fresh evidence as had been held by the learned trial Judge. Counsel asserted that the said affidavits did not contain any new facts.

It was further argued by counsel that the impugned affidavits were not sworn by strangers to the petition but rather, they were introduced to Court by the appellant in order to clarify on the issues that had been introduced by the respondents. Counsel argued that had the trial Judge taken the above into account he would not have struck out the said affidavits. He asked Court to allow this ground.

Counsel argued grounds 2, 4, and 11 together.

He submitted that the Judge had rightly held that, verification letters from Uganda National Examinations Board (UNEB) presented in Court by the 1st respondent were not academic certificates. Further, that the appellant having contended in his petition that the 1st respondent did not at the time of his nomination posses genuine ordinary level certificate, the duty to prove that, indeed he possessed such a certificate fell on the 1st respondent. Counsel then faulted the trial Judge for having held that the burden to prove the validity or authenticity of one's academic qualifications fell on the petitioner and only shifts upon the establishment of a *prima-facie* case. He cited ***Abdul Balingira Nakendo vs Patrick Mwondha*** (***Supreme Court Election Petition No. 9 of 2007***) for the proposition that "*the duty to produce a genuine or valid certificate to the electoral authority lay upon the candidate who presents it*". Counsel asserted that, this duty does shift and that the 1st respondent had failed to discharge it.

In respect of ground 11 of the Memorandum of Appeal it was submitted that, the petitioner had contended that the respondent did not possess the requisite academic qualification for a Member of Parliament. Further that the ordinary level certificate presented by the respondent belonged to someone else with similar names, who is a cousin to the respondent. Therefore, counsel argued that the trial Judge erred when he found that the appellant was qualified to stand for election as a Member of Parliament. He asked Court to allow the above three grounds.

Counsel then argued grounds 3, 5 and 6 together. He submitted that the gist of these three grounds was that the learned trial Judge failed to properly evaluate the evidence on record regarding illegal practices, misinterpreted the law on hearsay evidence and in the result reached a wrong conclusion.

He contended that the trial Judge had failed to find that, the appellant had proved that, the respondent had committed illegal practices during the election to wit:- Bribery and issuing of false statements concerning the character of the appellant.

In respect of grounds 7,10 and 12 which were also argued together counsel submitted that the learned trial Judge erred when he failed to find that the there was none compliance with law in the conduct of parliamentary elections for Bunyole East constituency.

It was submitted that, the appellant had showed that the returning officer cancelled the results of eight polling stations and did not read or tally them. As a result he only relied on results from 85 polling stations out of a total of 93.

He argued that without the results for the eight polling stations the petitioner would have won the election with a majority of 328 votes. Counsel then argued that the trial Judge erred when he included in the tally the votes for the 8 polling stations whose results the returning officer had cancelled. Had he properly evaluated the evidence he would have found that the petitioner ought to have been declared the winner.

Lastly, counsel submitted that the trial Judge erred when he awarded a certificate for complicity from two counsel without just cause.

He prayed for the appeal to be allowed with costs.

1st Respondent's reply

The 1st respondent opposed the appeal. Mr. Tibyasa learned counsel for the 1st respondent supported the trial Judge's decision to expunge from the record 85 affidavits which had been filed by the appellant in rejoinder. He contended that the impugned affidavits were not in rejoinder but rather, were affidavits in support of

the petition or supplementary thereto. These affidavits, counsel contended, were not on Court record when the petition came up for hearing. They were only allowed by the Judge to enable him ascertain whether or not they were indeed rejoinders. Court had only granted the appellant leave to file rejoinders. He contended further that the impugned affidavits had not been deponed to by the persons whose affidavits were already on record, but by strangers to the petition. He supported the Judge's decision to expunge them.

In respect of ground 4 the counsel submitted that the petitioner has a burden to prove all the allegations set out in the petition to the satisfaction of the Court. Citing Section 61(1 a) of the Parliamentary Elections Act (PEA) and Black's Law Dictionary counsel asserted that the burden of proof included burden of persuasion and of production. He also referred to sections 100 to 103 of the Evidence Act.

In this case counsel argued that the appellant failed to prove the allegations that the 1st respondent did not possess the required academic qualifications for a Member of Parliament and therefore Court justified its findings that this allegation had not been proved.

Counsel submitted that the 1st respondent did not change his name as alleged but rather he added on to his existing name his father's name *Nagwomu* and supported the decision of the learned trial Judge in this regard. Counsel asked Court to dismiss the appeal.

Mr. Kyazze, learned counsel for 2nd respondent, also opposed the appeal and associated himself with the submissions of counsel for the 1st respondent.

He submitted that the trial Judge rightly exercised his discretion when he rejected the 85 impugned affidavits that had been filed as rejoinders when they were not. On the issue of academic qualifications counsel submitted that the 1st respondent did

not change his name but simply adopted his father's name without abandoning his own names.

In respect to grounds 7, 10 and 12 and relating to non-compliance with the electoral laws counsel submitted that the complaint raised in the petition was only in respect of 4 and not 8 polling stations and even in respect of the four polling stations non-compliance had not been proved to the satisfaction of the Court. He asked Court to dismiss this appeal.

We have listened carefully to the submissions of counsel. We have also carefully perused their conferencing notes, the Court record and the authorities cited to us. We are aware of our duty as a first appellate Court, requiring us to revaluate the evidence adduced at the trial and to make our own inferences of law and fact *See:- Rule 30(1)* of the Rules of this Court, ***Kifamunte Henry Vs Uganda: Supreme Court Criminal Appeal No. 10 of 1997*** and ***Fr. Narcensio Begumisa & Others vs Eric Tibebaga (Supreme Court Civil Appeal No. 17 of 2002).*** This appeal is premised on 12 grounds set out earlier in this Judgment. We are constrained to reproduce some of the grounds, namely (3), (5),(6),(7) and (12). They stipulate as follows:-

3. The Learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record and thereby came to a wrong conclusion of dismissing the appellant's Petition on all grounds.

4. The Learned trial Judge erred in law and fact in holding that the burden to prove academic qualifications of the 1st Respondent lay on the appellant.

5. The Learned trial Judge erred in law and fact in his failure to subject evidence to a thorough scrutiny thus coming to a wrong conclusion that the appellant had not proved malpractices, electoral offences and illegal practices committed by the respondents respectively or with their agents with their knowledge, consent and approval.

6. The Learned trial Judge erred in law and fact when he held that the appellant's evidence was hearsay.

7. The Learned trial Judge erred in law and fact when he held that the elections for Member of Parliament of Bunyole East, Butaleja District were held in accordance with electoral laws and in compliance with the electoral laws and that did not affect the results in a substantial manner.

12. The Learned trial Judge erred in law and fact when he relied on speculation, imaginations and conjecture in attempting to evaluate the evidence on record.

All the above grounds appear to be too general and as such offend *Rule 86(1)* of the Rules of this Court which stipulates as follows:-

"86.

(1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the court to make." *(Emphasis added).*

During their submissions counsel for the appellant in that respect dwelt on the issue of bribery. However, there is nothing in the above ground that relates to bribery at all. Likewise grounds 5, 6, 7 and 12 do not specify the exact the nature of the complaint against the Judgment of the High Court. This is not a mere technicality.

Rule 102 of the Rules of this Court prohibits any party, without leave of the Court to argue a matter that is not specified in the Memorandum of Appeal. Upon reading any of the above grounds one is left at a loss as to the nature of the specific complaint.

We accordingly strike out grounds 3,5,6,7 and 12 as they each offend the provisions of *Rule 86 (1)* of the Rules of this Court already set out above.

However, the law requires us as a first appellate Court to re-evaluate all the evidence adduced at the trial and make our own inferences. By doing so we shall consider all the issues raised by the parties even though they have not been specifically referred to in the Memorandum of Appeal.

Ground one

During the trial the respondents raised an objection to 86 affidavits that had been filed and admitted on Court record as affidavits in rejoinder. The objection was that the said affidavits were not rejoining anything and as such ought to be expunged. For the appellant it was contended at the trial and at this appeal that the affidavits were valid and qualified as proper affidavits in rejoinder as they were responding to serious allegations of facts raised by the respondents' affidavits in support and in answer to the petition.

Rule 15 of the Parliamentary Elections (Interim Provisions) *Rules Statutory Instrument No. 141-2* herein referred to as the Election Rules provides that, evidence at the trial in favour or against the petition shall be by way of affidavits read in open Court. Sub-rule (2) thereof states that with leave of Court any person swearing an affidavit which is before Court may be cross-examined by the opposite party and re-examined by the party on behalf of whom the affidavit is sworn.

Further, *Rule 17* of the said Rules provides:-

> ***"17. Procedure generally.***
>
> ***Subject to these Rules, the practice and procedure in respect of a petition shall be regulated, as nearly as may be, in accordance with the Civil***

Procedure Act and the Rules made under that Act relating to the trial of a suit in the High Court, with such modifications as the court may consider necessary in the interests of justice and expedition of the proceedings."

It is trite law that pleadings must at one point come to closure. The Civil Procedure Rules provide the sequency of presentation and closure of pleadings. *Rule 18* of *Order 8* of the Civil Procedure Rules provides:-

"18. Subsequent pleadings.

(1)A plaintiff shall be entitled to file a reply within fifteen days after the defence or last of the defences has been delivered to him or her, unless the time is extended.

(2)No pleading subsequent to the reply shall be filed without leave of the court, and then shall be filed only upon such terms as the court shall think fit.

(3)Where a counterclaim is pleaded, a defence to the counterclaim shall be subject to the rules applicable to defences.

(4)As soon as any party has joined issue upon the preceding pleading of the opposite party without adding any further or other pleading to it, or has made default in pleading, the pleadings as between those parties shall be deemed to be closed, and all material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue."

It appears to us clearly that once a party has filed the plaint, he or she is permitted to reply only once to the defence, within fifteen days of its filing. The reply to the defence, is permitted only to the extent of new issues raised therein that were not

anticipated in the plaint. A plaintiff cannot be permitted to raise fresh claims or change the nature and /or extent of his or her claims in the reply to the defence.

If we consider the petition and the reply thereto in an election petition to constitute pleadings, then a petitioner is not permitted to introduce fresh issues or to change the substance of his or her claim by introducing new matter by way of affidavits in rejoinder. A party cannot adduce evidence in respect of a matter that is not pleaded.

Affidavits are considered purely as evidence and as such they can only contain what has already been pleaded. Under *Section 136* of the Evidence Act (CAP 6) for each witness, evidence in chief is presented first followed by cross examination by the opposite party if any and lastly re-examination if any.

Evidence given in re-examination is restricted only to new matters arising from cross-examination that had not been anticipated in the examination-in-chief. Oral and written submissions of counsel also follow the exact sequence and trend. During submissions in rejoinder a respondent is restricted to new issues raised in submissions in reply and may not introduce new ones.

That being the case, affidavits in rejoinder can only be sworn to clarify or rejoin specific issues raised by the respondent in affidavits in reply. In our humble view affidavits in rejoinder cannot introduce fresh issues which were not at all alluded to in the petition or in the reply to the petition. Doing so would be equivalent to introducing a fresh petition. This would offend the laws cited above and would also contravene *Rule 13* of the Parliamentary Elections Rules that requires expeditious hearing of election petitions.

We are in agreement with the learned trial Judge when at page 5 and 6 of his Judgment he stated as follows:-

"In the usual practice and procedure under the CPR, the applicant or petitioner files an application or petition supported by an affidavit. The respondent replies or answers by filing an affidavit in reply which may raise new matters or fresh issues touching the subject matter of the dispute. In such circumstances the applicant or petitioner may, as of right, file an affidavit in rejoinder only to explain or clarify the specific new matters or issues mentioned in the affidavit in reply or answer.

At no point is a petitioner or applicant permitted to introduce new pleas in his or her affidavit in rejoinder so as to alter the basis of his to her claim. In rejoinder, he or she has to simply explain if certain additional facts have been taken in the affidavit in reply but cannot be allowed to come forward with an entirely new case in his or her rejoinder. The original plea cannot be permitted to be altered under the garb of filling a rejoinder. An affidavit in rejoinder cannot be permitted for introducing pleas which are not consistent with the earlier pleas. This position was taken in the Indian High Court case of Gurjant Singh vs Krishan Chander & ORS (Rajasthan High Court, 27 March 2000) which relied on various other decided cases on the point and applied the Indian Code of Civil Procedure which is substantially in pari materia with the Uganda CPR the case is therefore of great persuasive authority in the instance petition."

The appellant's 86 affidavits in rejoinder were struck out on two grounds, namely;-

-They introduced new facts

-They were sworn by strangers to the petition.

The principles governing the filing of affidavits are well stated by the learned trial Judge. We would, however, wish to clarify that a 'stranger' to a petition may validly

file an affidavit in reply, if the facts or issues that call for the rejoinder are within that person's knowledge.

In the present cases, however, we have had occasion to peruse the impugned (86) affidavits in rejoinder. None of them passes the test of an affidavit in rejoinder. Indeed none of them makes any reference to any particular affidavit in reply and the particular issues that the respective affidavits were rejoining to. As ii is, all the 86 affidavits qualify to be affidavits in support of the petition; or supplementary affidavits in support, which can only be filed with leave of court.

Since the affidavits were not rejoining to anything, they were rightly expunged.

We have found no reason to fault the learned trial Judge's decision in this regard, which we hereby uphold. We find no merit in this ground and we hereby dismiss it.

Grounds 2, 4 and 11

These grounds relate to the appellant's contention at the trial that the 1st respondent at the time of his nomination did not possess the required academic qualifications to be nominated as a Member of Parliament.

It is trite law and indeed common ground that the burden of proof in election petitions just like in any other claims lies upon the petitioner.

This burden remains on the petitioner through the trial and does not shift. Under *Section 61* of the *Parliamentary Elections Act (Act of 17 of 2005)* the court may only set aside an election upon any of the grounds set out in that section being proved to the satisfaction of the Court. The grounds set out therein must be proved by the person who alleges them, that is the petitioner. It is not enough therefore merely to set out allegations in the petition. They must be proved on a balance of probabilities by the petitioner. See; *Section 63 (3)* Parliamentary Elections Act.

The allegation made against the 1st respondent in respect of his academic qualifications is set out in paragraph 9 of the petition as follows;-

> ***"9. That the 1st respondent was not qualified for elections because he does not possess his genuine "O" level certificate but uses one of his maternal cousin Musamba Moses who is an army officer in Kampala."***

In his affidavit in support of the petition the petitioner states as follows in respect of this issue:-

> ***118. That I have received information which information I verily believe to be true that the 1st respondent did not have academic qualifications for a Member of Parliament at the time of nomination for the 'O' Level Certificate presented does not belong to him but to his cousin who is a security officer.***
>
> ***119. That the 1st respondent in abide to disguise that the academic documents of "O" level are his and not his maternal cousin Musamba Moses, swore an affidavit and added the name of Nagwomu.***
>
> ***120. That the 1st respondent was a student at Bukedi College Kachonga for his "O" Level but his "O" certificate bears a different school.***

While concluding his affidavit evidence, the petition states as follows paragraph 124 of the said affidavit in support.

> ***"That whatever I have stated herein above is true and correct to the best of my knowledge, belief and information save for those paragraphs whose source on information has been disclosed herein above."***

Clearly the allegations set out in paragraphs 118,119 and 120 of the appellant's affidavit constitute hearsay evidence. The paragraphs do not disclose the source of information. Had the source of information been disclosed, a supplementary affidavit would have been deponed to by that source to confirm the allegation.

The learned trial Judge could have severed the offending paragraphs and proceeded with the other issues raised in the petition. He did not. He chose to look at the evidence as a whole from both the petitioner and the respondent before coming to the conclusion that he did. Hearsay evidence is severable. In ***Col. (RTD) Dr. Kizza Besigye vs Yoweri Kaguta Museveni & Another Election Petition No.1 of 2001***.

Tsekooko JSC (as he then was) held at page 15 of his Judgment (Besigye petition Vol. II P.15)

> *"In my opinion it would be improper in this petition to strike out whole affidavits which are found to contain hearsay evidence in some parts where the offending parts of the same affidavits can be severed from the rest of the affidavit without rendering the remaining parts meaningless."*

Karokora JSC (Besigye petition supra) observed as follows in this *matter.*

> *"I think the proper thing to do is to consider the petition and the accompanying affidavit and finally reject any matter contained in such an affidavit as it appear not to have been satisfactorily proved"*

Mulenga JSC (Besigye petition Supra Vol II P. 302) Observed;-

> *In my view a Court can reject offending parts of an affidavit while accepting the rest of it the same way it rejects inadmissible oral evidence.*

Both Odoki CJ and Oder JSC agreed with the above proposition of the law.

The petitioner herein having setout hearsay evidence in his affidavit in support should have gone further to substantiate the allegations by providing sufficient evidence to prove them. He failed to do so.

No evidence was produced to show that the 1st respondent did not possess a valid ordinary level certificate. The allegation that the certificate referred to belonged to someone else remained unproved. The petitioner did not call the person who allegedly held that certificate to testify or any other such direct evidence.

Be that as it may, a person who holds an Advanced level certificate or any higher qualifications obtained in Uganda has no obligation to produce an ordinary level certificate.

The trial Judge at page 17-18 of his Judgment held:-

> ***"I must emphasize that the law as it stands now does not provide for a person who holds "A" Level education obtained from Uganda to establish their minimum academic qualifications with academic certificates to IEC for nomination. It is clear from Section 4 (6) (supra) only provides that:-***
>
> > ***"A person required to establish his or her qualification under subsection (5) shall do so by the production of a certificate issued to him or her National Council for Higher Education in consultation with the Uganda National Examination Board"***
> >
> > ***Subsection (5) (supra) referred to only applies to three categories of persons as follows:-***
>
> ***(a) Person , whether their qualification is obtained from Uganda or outside Uganda , <u>who are claiming to have their qualifications as equivalent to advanced level of education.</u>***

(b) ***Persons <u>claiming to have advanced level qualification from outside Uganda;</u>***

(c) ***Persons claiming to have academic degrees which were <u>obtained outside Uganda.</u>*** *(Underlined for emphasis).*

We agree with the above holding as it is a true statement of the law as it stands. The other leg of the petitioner's appeal on this issue is that the 1st respondent could not have obtained valid qualifications at "A" level and / or the University because the same were based on an "O" level certificate that belonged to someone else. The only factual evidence before Court to prove this fact is the disparity in names between the names on that "O" level certificate and those now being used by the 1st respondent. It is not disputed that the 1st respondent's "O" level certificate bears the name *Musamba Moses* whereas he is now known as *Nagwomu Musamba Moses.*

It is the petitioner's case that the name Nagwomu was added in order to disguise himself as the holder of the "O" level certificate. The petitioner contended further that, the 1st respondent could not change his name without first complying with *Section 12* of the Birth and Death Registration Act.

We agree with the learned trial Judge that *Section 12* of the Act applies only to a person whose name was registered under it. That Section provides for amendment of a Register of births and deaths. It is common ground that the 1st respondent had never been registered under that law. A register in our humble view cannot be amended in respect of a name that does not appear on it. The purpose of the procedure for change of name under that Act, is to enable the Registrar amend the name that already exist on the register. Where the name does not exist on the register in the first place, there is nothing to amend.

In our humble view interchanging of names, that is, writing of the same name in a different order cannot affect ones' qualifications. That in itself cannot be proof that,

because the order of names on one certificate differ from another certificate therefore, that certificate is invalid or the holder must be a different person. That would be an absurdity that the law cannot permit. In this particular case the 1st respondent did not change his name but simply added his father's name on his own names.

In Supreme *Court Election Petition No. 1 of 2001* the names of the parties were set as follows:-

> *Col (Rt.) Dr. Besigye Kizza (Petitioner) -vs- Museveni Yoweri Kaguta (Respondent)*

This is how the order of the names were written upon nomination and the same order was used through the 2001 election. In 2011 elections the same person's names were set out as follows *Besigye Kifefe Kiiza, Yoweri Museveni Kaguta.* In 2016 the presidential elections, the above person's names were set out as follows;- *Kizza Besigye Kifefe and Yoweri Kaguta Museveni*

We now know that the order of the names of those parties have been changing almost on every election at the instance of the Election Commission. We do not agree with the proposition that the order of names would have any effect on the candidate's academic qualifications on their own. More evidence must be adduced to prove to the satisfaction of the Court, that a person who sat and obtained certain academic qualification is not the same person who was nominated for election. In this case the only evidence presented was that of discrepancy in names. That discrepancy was ably explained away by the 1st respondent when he proved that he had only added his father's name on to his own names.

This is what Shakespeare wrote in his book *Romeo* and *Juliet "what is in a name? A rose by any other name would smell just as sweet!"*

In otherwise a label, or name cannot alter the character or substance of the subject. A qualified doctor does not cease to be one simply because the name at his door is mispelt or includes a name that does not appear on his degree certificate. The question to be answered is whether or not the person behind that door is one who qualified from the medical school. The answer to that question must inevitably go far beyond the order of the name on paper qualification. In this case there must be proof provided by the appellant that the 1st respondent did not obtain the required qualifications. That proof was lacking.

In this regard the trial Judge held as follows at P. 24:-

> *"To sustain such a grave allegations, the petitioner needed to adduce evidence of the alleged Musamba Moses the security officer, who would either swear an affidavit or appear in person to testify in Court to prove that the 1st respondent is not the Musamba Moses. The law does not place any duty on the 1st respondent to prove what he is not; as that would merely imply a futile attempt to prove a negative. He is only required to deny knowledge of the alleged cousin Musamba Moses which, in my view, he effectively discharged.*
>
> *The petitioner failed to discharge the burden under Section 61(3) PEA to prove the facts in issue to the satisfaction of Court. Needless to state, that the cardinal principle in Section 101 (2) of the Evidence Act (Cap 6) is that he who alleges must prove. Issue No.1 has no merit and it is dismissed."*

We agree with him entirely. The evidence adduced was insufficient to shift the evidential burden. We find no merit in these grounds which we hereby dismiss.

Grounds 3, 5 and 6

The above grounds together with grounds 9 and 10 relate to evaluation of evidence. It is contended for the appellant that the learned trial Judge failed to evaluate the

evidence on record and that had he done so he would have found that the respondent had committed illegal practices and was guilty of electoral offence of bribery.

The trial Judge considered the evidence adduced to support the claim that the petitioner committed an electoral offence of bribery.

In evaluation of evidence the learned trial Judge took into account the fact that allegations were largely based on hearsay evidence and where they were not, they had been denied by the 1st respondent's witnesses. Even where the allegations were not denied the evidence set out to prove the charge was too weak to suffice.

We have carefully perused the Court record. We have read the Judgment of the Court and listened to the submission of counsel. We find that the Judge properly evaluated the evidence before arriving at the conclusion that he did. We have found no reason to fault his reasoning or his decision. We find no merit in grounds 3, 5 and 6 which are hereby dismissed.

Grounds 7, 10 and 12

These grounds relate to none compliance with electoral law in the conduct of the elections, particularly at the tally centre.

The allegations of non-compliance with the electoral laws and malpractices complained of in the above grounds were first set out in the petition. Those allegations were categorically denied by the 2nd respondent in their answer to the petition. Paragraph 6 thereof states as follows;-

> 6. *In specific answer to paragraph 3 (f)-(I) of the petition, the 2nd respondent in addition to denying the contents therein avers that:*

(a) There was never any connivance whatsoever between the 1st respondent and the presiding officers at Dube Rock Primary School, Rock Mosque, Mvule, Mutumba, Lubanga, Bufujja primary school, Mushishana place, Namutima primary school, Mawanga, Mabale polling stations to record the alleged false results and to include persons as alleged agents of the petitioner on the DR Forms and petitioner shall put to strict proof thereof.

(b) There was never any connivance whatsoever between the 1st respondent and the presiding officers to sign and deliver to the Returning Officer DR forms known to be forged and the petitioner shall be put to strict proof thereof.

(c) The allegations of use of force by the 1st respondent and his agents, and the several alleged threats against the petitioner's agents/supporters in paragraphs 3(h), (i), (j) and (k) are denied and in any case not within the 2nd respondent's knowledge, as no such complaint was ever drawn to the 2nd respondent's attention.

(d) The allegation of entry of false results by the presiding officer in connivance with the 1st respondent and his agents in paragraph 3(I) is denied and the petitioner shall be put to strict proof thereof.

(e) The results at the impugned polling stations announced were genuinely polled and dully filled in the DR forms which were dully endorsed by the petitioner's agents without any objection in absolute confirmation and certificate of the results thereof.

In the determination of this issue the trial Judge observed and held as follows at P.50 of his Judgment.

"I have had occasion to peruse all the evidence on the alleged non-compliance. Clearly the petitioner failed to establish his case to the required standard. His evidence lacked corroboration of credible independent witnesses and it was effectively rebutted. The affidavits of Highimba Peter and Kirya Twaha in support of the petition cannot be relied on. They are simply cut and paste work and cannot be said to corroborate each other; let alone corroborate the Petitioners' evidence. Same words were just picked and attributed to the two different deponents, a very unfortunate trend, which also extends to the affidavits of Maghino Amos and Muyiya Ibrahim."

Further at page 52 he concludes as follows;-

"The petitioner adduced no evidence of figures that were changed to show that there was any tampering with results. There is no DR form showing any figures that were changed. As was held in Kakooza John Baptist vs. EC and Igga Anthony SC EPA No. 11 of 2011, without such evidence showing how the total figures or results of an election were affected, it cannot be found that there was any non-compliance. The net effect is that the petitioner has not proved any non-compliance by the 2nd respondent which affected the results of the election in a substantial manner, and issue No. 4 is answered in the negative.

We have perused the Court record, we have found no proof that the results for the eight polling stations, that were alleged to have arrived late at the tally centre had been cancelled. Had that been the case, the 2nd respondent would have stated so. It is the second respondent who has the legal authority to cancel results at any polling station but only then, in compliance with the law. No evidence was adduced to prove that the results tallied were not a reflection of the actual votes cast at those polling stations. Even then the appellant would have been required to adduce further

evidence that the exclusion of those results affected the results of that election in a fundamental manner. He did not.

We are satisfied that the learned trial Judge properly evaluated the evidence and arrived at the correct decision in regard to the above grounds of appeal.

We find no merit in these grounds which are hereby dismissed.

Ground 8

The appellant's Counsel complained that the learned trial Judge erred when he awarded a certificate for two Counsel without any just cause. In his view, the matter was decided on technicalities without deep evaluation of evidence. Neither were the pleadings voluminous nor the research comprehensive.

The 1st respondents in their replies supported the Judge's decision to award a certificate for two Counsel because of the volume of pleadings and research involved, for which the 1st respondent found it necessary to engage two firms of lawyers.

The 2nd respondent on their part relied on Section 27(1) and (2) of the Civil Procedure Act to state that the Court acted within its discretion which could not be interfered with on appeal unless wrong principles of the law were followed.

Resolution of the Issue

The trial Judge, in awarding the certificate for two Counsel to the 1st Respondent stated:

> ***"The 1st respondent is awarded a certificate of complicity for two Counsel. Reasons: The certificate of complicity for two Counsel is awarded premised on the nature and complexity of this particular petition which was quite voluminous and involved substantial amount research,***

entailing perusal and gathering of voluminous authorities as is apparent from the bound copies submitted to court. It also entailed quite enormous amount of time to prepare and defend the petition which is also clear from the number of days it took for Counsel just to make their oral submissions. In addition, the 2nd respondent was represented by lawyers from two firms, vide, M/S Ochieng Associates Advocates and Solicitors, and M/S Ambrose Tebyasa & Co. Advocates."

Although mention is made of the 2nd respondent, it is clear that the trial Judge was still referring to the 1st respondent, who was represented by the stated two firms. Costs in petitions are governed by rule 27 of the Parliamentary Elections (Interim Provisions) Rules – S.I. 141-2, which states as follows:-

"All costs of and incidental to the presentation of the petition and the proceedings consequent on the petition shall be defrayed by the parties to the petition in such manner and in such proportions as the court may determine."

It is not exactly the same provisions as those under the Civil Procedure Act.

The voluminous nature of the Record of Appeal gives us a clue on the involvement of Counsel in the lower Court and the attendant research related thereto. We find no reason and cannot therefore, fault the learned trial Judge for awarding a certificate of two Counsel to the 1st respondent who had engaged two Law firms to tackle to arduous tasks involved.

We find no merit in this ground of appeal.

This appeal therefore fails and is hereby dismissed with costs.

Dated at **Kampala** this 27th day of July 2017.

.....
HON. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

.....
HON. JUSTICE F.M.S EGONDA NTENDE
JUSTICE OF APPEAL

.....
HON. JUSTICE ELIZABETH MUSOKE
JUSTICE OF APPEAL

27/7/2017
Semuyaga Nasser for 2nd Respondent
Sophia holding brief for Ambrose Tebyasa & Ochieng Evans for 1st Respondent
Wakibi Nasur for Appellant
Amin c/c
1st Respondent present
Ct, Judgment read in Court