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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO. 69 OF 2016

(Arising from the decision of the High Court of Uganda at Kampala before His Lordship Hon. Justice Joseph Murangira dated 08.08.2016)

10 **NAMBOOWA RASHIIDA..... APPELLANT**

VERSUS

- 1. **BAVEKUNO MAFUMU GODFREY KYESWA**
- 2. **ELECTORAL COMMISSION..... RESPONDENTS**

15 (Coram: S.B.K Kavuma, DCJ (E), Richard Buteera JA, Hellen Obura, JA) ✓

JUDGMENT OF THE COURT

This is an Appeal against the decision of Hon. Joseph Murangira, J delivered on 08th August, 2016, in which he upheld the two preliminary objections raised by counsel for the 1st and the
20 2nd respondents, expunged 83 affidavits in support of the Petition, found that there was no valid evidence left to support the Petition and consequently dismissed it with costs.

BACKGROUND

The background facts of this Appeal as ascertained from the court record are that the appellant, the 1st respondent, Mawanda Harurra, Mukilbi Ahmed, Mulindwa Sulaiman Al Haji,
25 and Mutyaba Ibrahim Star were candidates for the position of LC V District Chairperson for Butambala District held on 24th February 2016. The Electoral Commission returned, declared, published and gazetted the 1st respondent as the validly elected LC V District Chairperson for Butambala District. The appellant being aggrieved by the said declaration

5 petitioned the High Court of Uganda at Kampala challenging the process and outcome of the election. The Petition was dismissed at a preliminary stage, hence this Appeal on the following grounds.

- 10 1. *"The learned trial Judge erred in law and fact when he held that all the Petitioner's affidavits in support of her Petition except P2, P10, P51, P52, P88 and P89 violate the Oaths Act and the Illiterates Protection Act Cap. 78 and struck off the record and expunged the appellant's 83 affidavits in support of the Petition for non-compliance with the law.*
- 15 2. *The learned trial Judge erred in law and fact when he failed to rely on the affidavit on Court record and instead relied on the copy of the Petition served onto the 1st Respondent to dismiss the Petition on the basis that there existed no valid Petition before Court.*
- 20 3. *The learned trial Judge erred in law and fact when he held that failure to securely seal an exhibit to an affidavit under the seal of a commissioner for oaths with serial letters of identification diminishes the potency of Annexures and affidavits to render probable value to the election Petition that relies on certain facts to the point of worthlessness evidence.*
- 25 4. *The learned trial Judge erred in law and fact when he held that where an Act is offended in a pleading for non-compliance with the law, it is a matter of substance which goes to the very root of the documents/annexures in issue.*
5. *The learned trial Judge erred in law and fact when he held that the 83 affidavits in support of the Petition do not comply and conform to sections 2 and 3 of the Illiterates Protection Act Cap. 78 and the Oaths Act Cap 19 Laws of Uganda.*

- 5 6. *The learned trial Judge erred in law and fact when he struck off the Court record the 83 affidavits in support of the Petition for non-compliance with sections 2 and 3 of the Illiterates Protection Act Cap. 78 laws of Uganda.*
- 10 7. *The learned trial Judge erred in law and fact when he held that the Petitioner ought to have lodged the complaints of electoral irregularities like bribery with the Electoral Commission within the campaigning period first before appealing to the High Court and that failure to report the alleged illegal practices to the Electoral Commission before elections took place was fatal to the Petition.*
- 15 8. *The learned trial Judge erred in law and fact when he failed to evaluate the evidence on the Court record thereby coming to the conclusion that the Petition did not have merit thereby dismissing it.” (Sic).*

REPRESENTATIONS

During the hearing of this Appeal, Mr. Katumba Chrisostom together with Julian Nakirija (counsel for the appellant) appeared for the appellant while Mr. Birungi Wycliffe (counsel for the 1st respondent) appeared for the 1st respondent and Mr. Elison Karuhanga (counsel for the 2nd respondent) represented the 2nd respondent.

APPELLANT’S CASE

Counsel for the appellant argued grounds 1, 4, 5 & 6 together first, grounds 2 & 3 together next and grounds 7 & 8 together last.

GROUND 1, 4, 5 & 6

25 Counsel submitted that the trial Judge erred in expunging the 83 affidavits off the Court record yet they complied with the law. On the issue of certification of the jurat by a person



5 other than the Commissioner for Oaths, counsel submitted that the person who does the certification is a matter of form which is not irredeemably defective. He referred this Court to the cases of *Hon. Lillian Nakatte Segujja and anor vs Nabukenya Brenda; EPA No. 17 & 21 of 2016* and *Ngoma Ngime vs Electoral Commission & Hon. Winnie Byanyima; EPA No. 11 of 2001* to support his submissions and added that the 83 affidavits have jurats
10 but they don't strictly comply with the Illiterates Protections Act.

GROUND 2 & 3

Counsel submitted that the trial Judge erred in law in holding that the appellant's annexures did not bear the seal of the Commissioner for Oaths yet the court copy which he should have relied upon was sealed. He argued that the trial Judge should not have called for the
15 unsealed copy that was served on counsel for the respondent. He further argued that the non-certification of those documents did not, in any way, prejudice the 2nd respondent's case because its counsel was able to file a response to the Petition. Counsel contended that the law does not provide sanction for non-compliance with Rule 8 of the Commissioner for Oaths Act and as such, it is not a mandatory requirement.

GROUND 7 & 8

Counsel submitted that failure to report electoral irregularities does not preclude a person from filing a Petition in Court. He further submitted that the trial Judge failed to evaluate the evidence on record and dismissed the Petition on a preliminary objection instead of determining it on the merits.

25 He prayed that Court allows these grounds of the appeal with orders that the file be taken back to the High Court so that the Petition is determined on its merits.

1st RESPONDENT'S CASE

Counsel for the 1st respondent opposed the Appeal.

5 In reply to grounds 2 and 3, counsel submitted that a copy of the Petition that was served on
the 1st respondent was admitted on court record by consent but he opposed the annexures
accompanying the Petition because they were not sealed in accordance with the law. He
referred this Court to the case of **Chelbei Fred & Salimo David vs Masali Labu; Misc.**
Application No. 140 of 2010 in which this Court observed that non-certification of the
10 annexures to the affidavit by the Commissioner for Oaths before whom the affidavit was
sworn offended the provisions of the Commissioner for Oaths Act and could not therefore be
relied upon as evidence by the Court. Counsel urged this Court to dismiss grounds 2 & 3 of
the Appeal since the issues raised are matters of substance and not form.

On grounds 1, 4, 5 & 6, counsel submitted that the trial Judge rightfully made findings in
15 respect of the 83 affidavits as they were not properly certified as required by the Oaths Act
and the Illiterates Protection Act which are mandatory and this was fatal. He urged this Court
not to interfere with the finding of the trial court which is grounded in law.

On grounds 7 & 8, counsel submitted that the trial court relied on Section 15 of the Electoral
Commission Act and there is no reason why the Petitioner did not report. Further, that the
20 trial Judge stated on pages 794-797 in the last paragraph that he had evaluated and
analyzed the submissions and the relevant law. He added that on page 811, the trial Judge
stated that he had done his duty of evaluating the submissions on the preliminary objections.
Counsel explained that what the trial Judge did on ground 2 was to strike out the annexures
to the 83 affidavits and not to dismiss the Petition. The final dismissal was the sum total of
25 the findings on all the preliminary objections.

2ND RESPONDENT'S CASE

On grounds 2 & 3, counsel for the 2nd respondent associated himself with the submissions
of counsel for the 1st respondent. 

On grounds 1, 4, 5 & 6, counsel referred to the case of **Nsubuga Silvest Ssekutu vs**

5 **Kalibbala Charles and Electoral Commission; EPA No. 026 of 2016** in which this Court set out the law regarding certification of jurats, analyzed it and then came to the conclusion that the requirement is not a matter of form but of substance. Counsel submitted that a certificate of translation is not a jurat and only a Commissioner for Oaths can put down a jurat and not an interpreter. He implored this Court not to be influenced by the decision in
10 **Hon. Lillian Nakatte Segujja and anor vs Nabukenya Brenda (supra)** because it creates the impression that you can substitute a Commissioner for Oaths by any other person. He argued that the purpose of the jurat in the Illiterates Protection Act is to protect the illiterate. Counsel prayed that court upholds the findings of the trial Judge which was grounded in the law and dismisses the appeal.

15 **APPELLANT'S REJOINDER**

Counsel for the appellant, in rejoinder, submitted that there is no contention that what was on court record was certified as seen at page 767 of the court record. He added that even the one served on the 2nd respondent had annex "A"- "H" of the Petition which were certified. Counsel further submitted that Annex "R" was admitted with the consent of the appellant's
20 counsel but this did not negate the duty of court to rely on what was filed on court record which were all properly certified. He argued that the affected affidavits did not offend Section 2 of the Illiterates Protection Act and form B of the Oaths Act.

Counsel also implored this Court to rely on the authority of **Hon. Lillian Nakatte Segujja and anor vs Nabukenya Brenda (supra)** because the analysis in that case is more
25 convincing than that of **Nsubuga Silvest Ssekutu vs Kalibbala Charles and Electoral Commission (supra)**.

Regarding the evaluation of evidence, counsel submitted that if the trial Judge had done so, he would not have dismissed the Petition. He prayed that court allows the Appeal with costs.

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5 **COURT'S FINDING**

The duty of this Court as a first appellate court is to re-evaluate all the evidence on record and come to its own conclusions as was held in the case of ***Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997***. We have carefully studied the court record and considered the submissions of counsel. We shall consider the grounds in the order
10 set out and argued by counsel for the appellant. But we must observe that ground 6 is a repetition of what is already stated in ground 5 and so it was not necessary.

On grounds 1, 4 & 5, the appellant faults the trial Judge for expunging the 83 affidavits from the Court record for not complying with the provisions of the Illiterates Protection Act and the Oaths Act.

15 We are alive to the fact that these two laws were enacted to protect illiterate persons. Counsel for the respondents argued that the 83 affidavits were not properly certified as required by the mandatory provisions of those Acts which is fatal. We have carefully read Sections 2 and 3 of the Illiterates Protection Act which provide as follows;

2. *Verification of signature of illiterates.*

20 *No person shall write the name of an illiterate by way of signature to any document unless such illiterate shall have first appended his or her mark to it; and any person who so writes the name of the illiterate shall also write on the document his or her own true and full name and address as witness, **and his or her so doing shall imply** a statement that he or she wrote the name of the illiterate by way of signature after the
25 illiterate had appended his or her mark, and that he or she was instructed so to write by the illiterate and that prior to the illiterate appending his or her mark, the document was read over and explained to the illiterate. (Emphasis added).*



5 3. Verification of documents written for illiterates.

10 Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, **and his or her so doing shall imply** a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her. (Emphasis added)"

15 It is clear from the above sections that the act of a person writing his or her own true and full name and address on a document written on behalf of an illiterate person, implies that he or she received instructions from the illiterate person to do so and that the contents of the document were properly read over and explained to the illiterate.

20 In the instant Appeal, the impugned affidavits were deposed by illiterate persons who were not well conversant with the English language. They were translated to the deponents and a certificate of translation to each affidavit was made either by a one, Sekitoleko Peter, or Mpenje Nathan. We shall reproduce one of the certificates of translation made at page 71 of the Record as follows:

25 "I MPENJE NATHAN of C/o M/s Lukwago and Co. Advocates, Plot 78 Kiira Road-Kamwokya, 1st Floor Media Plaza Building, P.O.Box 980 Kampala, being conversant with both English and Luganda languages do hereby certify that I have read and translated the contents in the affidavit of Kibombo Ismail the deponent herein in Luganda language and he appeared fully to have understood the same before appending his signature thereon.

CERTIFIED BY;

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MS

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.....

MPENJE NATHAN

This.....day of.....2016

SWORN AT KAMPALA

By the said

10

Ssuna Joseph

This.....day of2016

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DEPONENT

BEFORE ME;

.....

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A COMMISSIONER FOR OATHS

We note that the Illiterates Protection Act does not provide for a specific form in which the verification should be made and in our considered view, we find that the above certification complied with the requirement stipulated in Sections 2 and 3 of that Act.

On the other hand Section 1 of the Oaths Act provides as follows;

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"1. Oaths to be taken.

The oaths which shall be taken as occasion shall demand shall be the oaths set out in the First Schedule to this Act."



The Form of jurat in the First Schedule to the Act is set out as follows;



Form of Jurat

(Where a third person has read the affidavit to deponent.)

Sworn at _____ in the district of _____ this ____ day of

_____, 20____, before me, and I certify that this affidavit was read over in my presence to the deponent he (or she) being blind or illiterate and the nature and contents of the exhibits referred to in the affidavit explained to him (or her) in the _____ language. The deponent appeared perfectly to understand the same and made his (or her) mark (or signature) thereto in my presence.

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Commissioner for Oaths

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We have looked at Form B in comparison with the certification made in the deponents' affidavits on court record and we find that there was a deviation from the form provided by law but the law itself was complied with though not strictly.

Section 43 of the Interpretation Act provides thus:

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

In **Nanjibhai Prabhudas & Co. Ltd vs Standard Bank Ltd. [1968] E.A 670**, Sir Charles Newbold, P stated thus;

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"The Courts should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a fundamental

5 *nature. Matters of procedure are not normally of a fundamental nature.”*

We are alive to the fact that the intention of the Legislature in enacting Section 1 of the Oaths Act and the form prescribed thereunder in the first schedule was to protect an illiterate person from endorsing on an affidavit whose contents he or she had not understood to his or her detriment.

10 **In Smith’s Judicial Review of Administrative Action 4th Ed. 1980 at page 142**, the author lays out a set of guidelines which were adopted in the case of ***The Secretary of State for Trade and Industry vs Langridge [1991] 3 ALL ER 591*** as follows:

15 *“The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act. In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights...that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute.*

20 *Although nullification is the natural and usual consequence of disobedience, breach of procedure or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced...or if the court is for any reason disinclined to interfere with the act or decision that is impugned.”*

25 Counsel for the 2nd respondent submitted that a certificate of translation is not a jurat and only a Commissioner for Oaths can put down a jurat and not an interpreter.

This Court, in its earlier decision in the case cited to us by counsel of the appellants of **Hon. Lillian Nakatte Segujja and anor vs Nabukenya Brenda** (*supra*) stated at page 29-30 that;

5 *"We note that while the inclusion of a jurat in an affidavit is an indispensable matter of substance, the manner of certification or the person who does it is a matter of form; hence, it is provided for under 'Form B' of the Schedule to the Act; which is an Appendix to the Act. By the Commissioner for Oaths administering the oath, after the certification by the third party interpreter that the affidavit was interpreted to the deponent, the*
10 *Commissioner for Oaths attests in proof of the fact that such interpretation, though not done by him or her, was in fact done to his or her knowledge and satisfaction. Therefore, the Commissioning of the affidavit by the Commissioner for Oaths, serves as a certification too.*

...

15 *Second, where the interpretation of the contents of the affidavit is done by a third party, as is provided for in the First Schedule to the Oaths Act, it presupposes that it was the third party, and not the Commissioner for Oaths, who was conversant with the language the deponent understood. Hence, pursuant to the safe guard provided in the 1st Schedule to the Oaths Act, the interpreter is better placed, than the Commissioner for Oaths, to*
20 *certify in the jurat that following the interpretation, the deponent appeared to fully understand the contents of the affidavit.*

25 *We are therefore satisfied that the certification of the jurat by the interpreter, instead of the Commissioner for Oaths as provided for in Form B of the first schedule to the Act, should be considered an insubstantial deviation; which never seriously flouted the intention of the Legislature. We believe that where a Commissioner for Oaths administers an oath in an affidavit to a deponent after a third party instead of the Commissioner for Oaths, has effectively interpreted the contents of the affidavit to the deponent to his or her understanding, the affidavit should not be regarded as irredeemably defective as to be rejected. Parliament could not have intended that such*
30 *an insubstantial deviation from the statutory provision should suffer such a*

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5 *consequence.*"

We adopt the reasoning of this Court in the above decision and find that the deviation in form of the jurat of the 83 impugned affidavits was not fatal as, in our view, it did not prejudice the deponents to the affidavits.

10 On the whole, we find that the learned trial Judge erred in expunging the 83 affidavits from the court record for non-compliance with the Illiterates Protection Act Cap. 78 and the Oaths Act Cap 19. Therefore, grounds 1, 4 & 5 succeed.

15 Regarding grounds 2 & 3, the appellant faults the learned trial Judge for failing to rely on the sealed affidavits on court record and instead relied on the copy of the Petition served onto the 1st respondent to dismiss the it. Counsel for the 1st respondent objected to the annexures to the affidavit in support of the Petition because they were not sealed in accordance with the law. We note from the court record at page 767 in the last paragraph that counsel for the 1st respondent admitted that the Petition that was served upon the 1st respondent was valid. However, his concern was that the annexures marked A-L that were attached to the affidavits in support of the Petition were uncertified and therefore did not conform to the mandatory provisions of the law. It is on this basis that the learned trial Judge, in his Judgment at page 20 10 (page 801 of the court record) found as follows;

25 *"I therefore, make a finding that sealing a document to an affidavit means annexing it securely. This means, therefore, that where a deponent seeks by exhibits annexed to an affidavit to prove a fact such exhibit must be securely sealed to the affidavit under the seal of the Commissioner and shall be marked with the serial letters of identification. Failure to do this would diminish the potency of the annexures and indeed of the affidavit to render probation value to the election Petition that relies on certain facts to the point of worthiness as evidence. This cannot be the purpose of*

5 *affidavit evidence.*" (Sic).

We are cognizant of the requirement under Rule 8 in the First Schedule to the Commissioner for Oaths (Advocates) Act, Cap 5 that all exhibits to affidavits should be securely sealed to the affidavits under the seal of the commissioner and should be marked with serial letters of identification.

10 It is not disputed that the annexures A-J to the Affidavit in Support of the Petition on court record were securely sealed and certified. We also note that much as the 1st respondent was served with a copy of the Petition with unsealed annexures, he managed to file an answer to it which, in our opinion, suggests that he was not prejudiced by the unsealed annexures. It is our well-considered view that the learned trial Judge should have relied on the sealed
15 documents on court record to determine the Petition on its merits and order that the 1st respondent be availed copies of the properly sealed and certified annexures pursuant to **Article 126 (2) (e)** of the Constitution which enjoins courts to administer justice without undue regard to technicalities.

In the case of ***Uganda Corporation Creameries Ltd and anor vs Reamaton Ltd; CACA***
20 ***No. 44 of 1998***, in which some of the annexures had not been duly sealed by the Commissioner for Oaths, counsel for the respondent raised a preliminary objection that the original and supplementary affidavits supporting the Notice of Motion were incurably defective because all exhibits to these affidavits ought to have been sealed by the Commissioner and marked with serial letters of identification, but that was not done. In his
25 view this defect rendered the entire application incompetent due to lack of supporting affidavits which should have been filed and served with the Notice of Motion.

In his judgment, Engwau, JA (as he then was) made an elaborate distinction between exhibits and annexures and stated as follows:



5 *"I think it is very pertinent at this juncture to have words "exhibit" and "annexure" defined. According to Black's Law Dictionary, "Exhibit" is defined as a paper or document produced and exhibited to a court during a trial or hearing in proof of facts. "Annex" means to tie or bind to or to attach. The word expresses the idea of joining a smaller or subordinate thing with another, larger, or of higher importance. In that context, it is my*
10 *well-considered view that the word "exhibit" cannot be used interchangeably with the word "annexure". An exhibit is a document or thing tendered in court during a trial or hearing to prove a fact but an "annexure" is a smaller or subordinate thing attached to a larger or principal thing which does not affect that thing of higher importance.*

15 *In the instant case, only the annexure ("A-I") were attached to the main and supplementary affidavits supporting the Notice of Motion. In my view, whether or not those annexures have been securely sealed with the seal of the advocate who commissioned the affidavits thereof, does not offend Rule 8 because they were not exhibits produced and exhibited to a court during a trial or hearing in proof of facts. In any case, the annexures in the present case are not in dispute. Even if those annexures*
20 *were detached, the affidavits thereof would still be competent to support the Notice of Motion. Rule 8, though mandatory, is procedural and does not go to the root as to the competence of affidavits. In the premises, substantive justice should be administered without undue regard to technicalities."*

25 We agree with the distinctions made by the learned Justices in the above case and we also find, as he did, that failing to securely seal the annexures with the seal of the advocate who commissioned the affidavits did not offend rule 8 because they were not exhibits produced and exhibited to a court during a trial or a hearing in proof of facts.

30 It is noteworthy that the annexures that were on court record at the time of the trial were properly certified and conformed to the law. In the result, we find that the learned trial Judge erred in basing his decision on the documents which had been served onto the 1st respondent



5 that contained unsealed annexures to dismiss the Appeal. In the premises ground 2 and 3 succeed.

Regarding grounds 7 and 8, counsel for the appellant submitted that failure to report electoral irregularities does not preclude a person from filing a Petition in court. He faulted the trial Judge for failing to evaluate the evidence on record and consequently dismissing the Petition
10 on a preliminary objection instead of determining it on the merits. In his judgment at page 19 (page 810 of the court record) the trial Judge stated thus;

15 *“Wherefore, it is my considered view that all the matters/irregularities allegedly to have been committed by the 1st Respondent should have been lodged before the Electoral Commission for redress. Then the aggrieved party would prefer an appeal to the High Court. Therefore failure by the Petitioner not to allege the said illegal practices during elections to the Electoral Commission before the election took place is fatal (SIC) to this Petition. The law does not allow any party/candidate in an election to do the campaigns during the campaigning period, and only becomes aggrieved after losing.” (SIC)*

20 In arriving at the above decision, the learned trial Judge took into consideration Section 15 (1) and (2) of the Electoral Commission Act which provides for the power of the commission to resolve complaints and appeals.

We agree with the trial Judge’s position that the Petitioner should have filed her complaints with the Electoral Commission which has quasi-judicial powers to solve such disputes. However, it should be noted that, that is merely an administrative procedure which does not
25 oust the unlimited original jurisdiction of the High Court in all matters provided for under **Article 139** of the Constitution. We are of the view that the intention of Parliament in enacting Section 15 of the Electoral Commission Act was not to limit the inherent powers and jurisdiction of the High Court to determine and resolve complaints of electoral irregularities where no such complaint had been lodged with the Electoral Commission. Indeed, if the

5 Legislature had intended that for a person to qualify to file an Election Petition he or she needed to have first lodged a complaint of election malpractices with the Electoral Commission, it would have expressly stated so under Section 138 (3) of the Local Government Act.

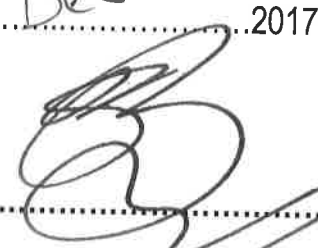
10 It is our finding therefore that the Petitioner's complaint regarding electoral irregularities was properly before the High Court and the trial Judge erred in finding that failure to report the alleged illegal practices to the Electoral Commission before elections took place was fatal to the Petition. Grounds 7 & 8 of the Appeal therefore succeed.

15 In the result, we find merit in all the grounds of appeal and allow this Appeal, set aside the order dismissing the appellant's Petition and order a full trial of the same before another Judge of the High Court. Costs of this appeal and those in the lower court are awarded to the appellant

We so order.

Dated at Kampala this 20th day of Dec 2017

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HON. JUSTICE S.B.K KAVUMA, DCJ (E)

JUSTICE OF APPEAL



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25 HON. JUSTICE RICHARD BUTEERA

JUSTICE OF APPEAL



HON. LADY JUSTICE HELLEN OBURA

JUSTICE OF APPEAL