THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO 0008 AND 0010 OF 2016

(ARISING FROM ELECTION PETITION NO.10 OF 2016)

(An appeal arising from the judgment and orders of the High Court by Honourable Lady Justice Lydia Mugambe dated 10th June, 2016)

1. **SEMATIMBA PETER SIMON**
2. **NATIONAL COUNCIL FOR HIGHER EDUCATION** ::::::**APPELLANTS**

VS.

SEKIGOZI STEPHEN ::**RESPONDENT**

CORAM: HON. MR. JUSTICE S.B. K. KAVUMA, DCJ

HON. MR. JUSTICE BARISHAKI CHEBORION, JA

HON. LADY. JUSTICE CATHERINE BAMUGEMEREIRE, JA

JUDGMENT

Introduction

This is a consolidated appeal arising out of the Judgment of Hon. Lady Lydia Mugambe, J, delivered on the 10th day of June, 2016 in which

she nullified the election of the 1st appellant as Member of Parliament, Busiro South Constituency and made the following orders;

1. *The certificate of equivalent illegally and invalidly issued to the 1st respondent by the 3rd respondent is null and void*

2. *The nomination, subsequent election, return and gazetting of the 1st respondent as Member of Parliament for Busiro South Constituency based on the illegally and invalidly issued certificate of equivalent were in contravention of Article 80(1) (C) of the Constitution and S.4 (1)© of the PEA and hereby annulled*

3. *The seat of the 1st respondent is declared vacant*

4. *The Electoral Commission is directed to conduct fresh nominations and elections for Busiro South Constituency in accordance with the law*

5. *Costs of the Petition are to be paid by the 3rd respondent because it is largely its actions or omissions that resulted in the petition. Counsel for the Petitioner has not demonstrated to my satisfaction that this petition was a complex case deserving of a certificate for two counsel. The prayer for the same is accordingly denied.*(sic)

Background to the Appeal

The facts giving rise to the Appeal are that; the 1st respondent (now 1st appellant), the petitioner (now respondent) and three others contested for

the position of Member of Parliament for Busiro South Constituency held on the 18th day of February, 2016. The Electoral Commission (then 2nd respondent) declared the 1st respondent, Sematimba Peter Simon winner of the said elections with 24,298 votes as against the petitioner, Sekigozi Stephen who got 19, 266 votes. The Petitioner was dissatisfied with the above results and filed a Petition contending that there were electoral malpractices committed by the 1st and 2nd appellants that there was lack of authenticity and validity the 1st appellant's academic qualifications which the National Council for Higher Education relied on to issue a certificate of advanced level standard or its equivalent. Judgment was given in favor of the petitioner/respondent in the terms above stated. Being dissatisfied with that decision, the appellant appealed to this Court.

Grounds of Appeal

The 10 grounds of appeal in the Memorandum of Appeal were reduced into 5 issues during conferencing. At the hearing of the Appeal, counsel for the respondent was granted leave to add a sixth issue. The 6 issues on Appeal are as follows;

1. *Whether the learned trial Judge correctly applied the law on the burden of proof in a petition where there was an allegation of fraud and forgery of academic qualifications against the appellant.*

2. *Whether the learned trial Judge erred in law and in fact when she held and found that the certificate of equivalence issued by the NCHE to the appellant was illegal, invalid, null and void*
3. *Whether the learned trial Judge erred in law and fact and misdirected herself on the evaluation of evidence on record when she found that;*
    a. *The appellant's Diploma certificate from the Pacific Coast Technical Institute USA presented to the NCHE for equation wasn't legally authentic, valid or existent*
    b. *That the appellant did not lead any evidence proving that he attended Pacific Coast Technical Institute to be awarded the said Diploma*
4. *Whether the learned trial Judge erred in law when she overruled the preliminary objection on admissibility and reliance on annexures attached to the supplementary affidavits by Kabakubya Bashir.*
5. *Whether the learned trial Judge erred in law and in fact when she laid down standards and guidelines for equation of academic qualifications and retrospectively applied them to the prejudice of the appellant.*
6. *Whether the NCHE consulted UNEB before issuing a certificate of equivalence*

Representation

The appellant was represented by Mr. Kandeebe Ntambirweki, Mr. Nsubuga Sempebwa, Mrs. Christine Ntambirweki, Ms. Barbra Akulo Oboke and Mr. Arnold Kimara/counsel for the Appellant). The 2nd appellant was represented by Mr. Ben Wagabaza and Mr. Asuman Nyonyintono, (counsel for the 2nd Appellant) while the respondent was represented by Mr. Renato Kania, Mr. Rashid Semambo and Mr. Kenneth Muhangi.

On the same day of the hearing of the appeal, this Court granted leave to the respondent to adduce additional evidence in consolidated application **Election Petition Applications No 63 and 65 of 2016**. Election Appeals No.8 and 10 were consolidated by the consent of all parties *vide* **Election Petition Application No.42 of 2016**. The respondent's additional evidence was taken into consideration in the judgment.

Submissions of counsel for the 1st Appellant

Counsel argued the issues in the following order; issue No. 5, 2 and 4 together and then issues 1, 3 and 6.

Counsel submitted that the trial Judge erred and misdirected herself on the law in finding that the certificate of equivalence issued to the appellant was illegal, invalid and null and void. He further faulted the

trial Judge for finding that the appellant, instead of filing the form provided for in the rules of 2007, used a form from the repealed rules of 2005.

Counsel submitted that the trial Judge misdirected herself in law when she held that certification under the rules of 2007 would only be done by the issuing institution or university. Counsel argued that the rules of 2007 and those of 2005 did not apply to Parliamentary Elections nor did they apply to parliamentary candidates. He argued that Legal Notice No. 12 of 2015 published on 23rd October 2015 also did not apply to candidates in parliamentary elections. Counsel contended that even if the rules of 2007 had applied, it was erroneous to say that NCHE had to always use certified documents by the issuing institution. Counsel submitted that it was an admitted fact on both sides that Pacific Coast Institute which the 1st appellant attended and got his award from closed in 1989 and could, therefore, not certify his document. He argued that the closure of the institution did not render the 1st appellant's education null and void.

Counsel submitted that the form that the applicant would be required to fill, according to the rules of 2007, did not provide for the attachment of certified documents from the issuing institution but just attachment of certified photocopies. He submitted that certified copies could be made by a Consular Officer in an embassy, a Notary Public, Commissioner for

Oath or a Magistrate who would look at the original and the photocopy and certifies the same to be a true copy.

Counsel submitted that the learned trial Judge erred in finding that the Electoral Commission proceeded without certified documents and thus, the certification and equation was null and void. Counsel contended that the evidence of Prof. Opuda proved that before certifying, NCHE saw the original Diploma issued to the appellant by the defunct institution which was produced in Court. He argued that the 1st appellant led evidence to show that his Diploma was self-authenticating because it was an original which is the best evidence under S.67 of the Evidence Act. Counsel submitted that the 1st appellant should not be penalized for not producing certified copies because NCHE never availed him with the 2007 form which required him to produce certified copies.

Counsel argued that the rules of 2007 and those of 2005 do not apply to Parliamentary candidates because they are for equating purposes of universities and other tertiary institutions, not for purposes of parliamentary candidates. He relied on Sections 4(6) and 100 of the Parliamentary Elections Act (PEA) which 4(6) provides *"a person required to establish his or her qualification under sub section 5 shall do so by production of a certificate issued to him or her by NCHE in consultation with UNEB"*.

S.100 of the PEA provides that *"the Minister may on recommendation of the commission and with the approval of Parliament, by statutory instrument, make regulations prescribing any matter which is required or authorized by this act" to fortify his submissions.*

4(6) provides that

Counsel submitted that the Minister had not yet made any recommendation as stipulated under S.100 above. Further, counsel argued that the application form to NCHE is not one of those prescribed under the Parliamentary Elections (Interim Provisions) (Prescription of Forms) Regulations SI 141 -3 which was saved by the PEA. Counsel submitted that the rules of 2007 and Legal Notice No. 12 of 2015 were made by Prof. Michelle Lejeune, Deputy Executive Director NCHE and Prof. JH Nyeko Pen Mogi, Chairperson NCHE without any recommendation from the Electoral Commission and the approval of Parliament. Counsel submitted that in tandem with the Interpretation Act, substance should not be defeated by technicality in the absence of rules which are not authorized by law.

Counsel submitted that **Paul Mwiru v Igeme Nabeta Election Appeal No. 6 of 2011** on which the trial Judge relied was per in curium, wrongly decided and the law ought to be straightened by this Court

Counsel submitted that the trial Judge did not properly evaluate the evidence on record, and that if she had, she would have found as she partly did that there was no forgery on the documents in issue Counsel argued that the respondent did not produce cogent evidence to prove that the 1st appellant did not attend the college in USA in 1988. He submitted that on the contrary, it was the 1st appellant who provided evidence that he attended the college through the uncontroverted affidavit of Juliet Muyingo who attended the same school with him and attached photographs of their graduation ceremony. Further, counsel argued that Juliet Muyingo was never cross examined.

Counsel submitted that **Abdul Balingira Nakendo v Patrick Mwondaha SCEA No.9 of 2007** was distinguishable from the facts of the present case because in the former, there was evidence from Police and there was evidence to show that the petitioner did not go to Nairobi and that the certificates were signed by officers of Uganda claiming to be in Nairobi which is not the case here. He contended that the handwriting expert did not specify whether it was the 1st appellant or Juliet Muyingo's certificate which was not genuine. He therefore submitted that the evidence of the expert was not conclusive and could not prove that the 1st appellant did not attend the college or was not awarded the said Diploma which was equated by the NCHE. Counsel relied on **Joy Kabasi vs. Hanifa Kawooya and Electoral Commission**

SCEPA No 25/2007 where the Supreme Court held that *"those who make such allegations need to do more than merely allege, they need to show that as a result of the allegation, the awarding institution of higher qualification or any other equivalent to A level or some other classification was subsequently cancelled or withdrew their award of the disputed qualification.*

Counsel contended that the burden of proof in qualification doesn't shift. He argued that the Nakendo case was distinguishable in respect to shifting of burden. He stated that the petitioner in **Nakendo's case** (supra) had discharged the burden and it was the evidential burden that shifted to the respondent to discharge while in the present suit, no evidence was produced by the petitioner.

He prayed that the Appeal be allowed with costs with a certificate for 3 counsel given volume of work and the level of research done.

Submissions of counsel for the 2nd appellant

Counsel argued the issues in the following order; issue Nos.1, 3, 5, 6, 2 and 4.

Regarding issue No. 1 on whether the learned trial Judge erred in law in fact when she relied on legally unauthenticated documents in support of the Petition, counsel faulted the trial Judge for relying on a photocopy of

the proceedings of the Court of Appeal and the judgment instead of certified copies contrary to Section 75 of the Evidence Act. He argued that the trial Judge relied on the said pleadings in paragraphs 120 and 121 of her judgment.

Counsel faulted the trial Judge for relying on annextures H, J, K, M, N, O, P, Q1, QQ1 to the affidavit of Bashir because he was neither the author nor the recipient of the documents. Counsel argued that during cross examination, Bashir admitted that the documents did not disclose which officer of the American Embassy gave it to him and that he did not formally write to the American embassy to request for information. Counsel submitted that the annextures above were in contravention of Section 84 (d) of the Evidence Act.

With regard to the admissibility of electronic data messages counsel relied on Section 11 of the **Electronic Transactions Act No.8** which provides that *"a requirement for a signature, statement or document to be notarized, acknowledged or verified or made under oath is fulfilled if an advanced or secure electronic signature of a person authorized to sign or notarized the document is attached, incorporated or is logically associated with the electronic document"*.

Counsel argued that the Evidence Act is applicable to the annexures to the affidavit, though not to the affidavit itself. He relied on **Kakooza**

John Baptist Vs. Electoral commission and Anthony Yiga Supreme Court election petition No.11 of 2007 to support his submissions.

Counsel submitted therefore that the trial Judge's reliance on uncertified documents failed to meet the minimum legal requirements for them to be admissible in evidence and occasioned a miscarriage of justice. He argued that the petition remained unsupported by any piece of evidence and ought to have failed.

Regarding issue No.3 of the Appeal, counsel faulted the trial Judge for exercising her discretion in ordering all the costs of the Petition to be borne by the 2nd appellant. He relied on **Paul Mwiru (supra)** for the position of the law that court will not interfere with the exercise of discretion unless it is shown that wrong principles were followed by taking into account an irrelevant fact or failing to take into account a relevant fact. Counsel argued that the trial Judge held that "costs of the petitioner are to be paid by the third respondent because it is largely its actions or omission that resulted in the Petition" yet the said acts or omissions were not stated. Counsel submitted that the trial Judge was not justified in condemning the 2nd appellant to costs after exonerating it of fraud and non-compliance with the law.

Regarding issue No.5 of the Appeal, counsel argued that the 2nd appellant obtained certified copies for authenticating the documents before equating them. Counsel submitted that the 2nd appellant

authenticated the documents by comparing the original with the copies that had been availed because the awarding institution had closed in 1989. Counsel faulted the trial Judge for using different standards in treating evidence of the parties to the Petition. He submitted that she accepted Mr. Kabakuya's evidence (electronic data message) as the best he could reasonably obtain for purposes of the Petition and yet rejected the one of the 2nd appellant well aware that the awarding institution had closed.

Counsel submitted that the learned trial Judge castigated the erroneous inclusion of a qualification that was never submitted to the NCHE for a certificate of equivalence to conclude that the certificate of equivalence was invalid.

Regarding issue No.6 on whether there was consultation between UNEB and the NCHE, counsel supported the trial Judge's finding that there was such consultation. He submitted that evidence available, including the additional evidence adduced by the respondent, proved that the NCHE consulted UNEB in respect of Mr. Peter Ssematimba's qualifications.

On ground 2 of the Appeal, counsel faulted the trial Judge for failing to evaluate the evidence on record thus reaching a wrong conclusion. He submitted that the respondent did not adduce any evidence to attack and or prove the nonexistence of the said qualifications but relied on mere speculations. Further, that there were no contradictions in the said

qualifications and no requirement of certified copies as the only way of proving the existence of the said qualifications. He submitted that the 2nd appellant verified the authenticity of the documents that were presented by the 1st appellant within the parameters available in the specific circumstances of this case.

Regarding ground 4 of the Appeal, counsel submitted that the certificate of equivalence that was granted by the 2nd appellant was and is still valid as the mandate to equate what is and what is not equivalent to the advanced level of education is the statutory preserve of the 2nd appellant in consultation with UNEB. He further submitted that this mandate was rightly exercised in equating the 1st appellant's qualifications upon the satisfaction of the two statutory bodies that the said qualifications were equivalent to the Advanced level standard of education.

Counsel submitted that the 2nd appellant in consultation with UNEB are statutory bodies mandated to equate an array of qualifications to advanced level standard. He argued that it was improper for the trial Judge to impose regulations on the 2nd appellant that were inapplicable in equating the 1st appellant's qualifications.

Submissions of counsel for the respondent

Counsel argued the issues in the following order; issue No.1, 3, 2, 5, 4 and 6. On issue 1, they submitted that the learned trial Judge correctly

applied the law on the burden of proof in the Petition where there was an allegation of fraud and forgery of academic qualifications. Further, that the learned trial Judge did not make any finding in her judgment regarding forgery and therefore the appellant's issue as framed was superfluous.

Counsel submitted that the 1st appellant failed to prove the authenticity of his certificates and thus, the question of shifting the burden of proof did not arise. Counsel submitted that in line with **Art 80** of the Constitution, S.4(5) and(6) of the PEA and **Gole Nicholas Davis v Loi Kageni Kiryapawo SCEPA No. 19 of 007,** it is trite law that the duty of proving authenticity of academic qualifications rests with the person that possesses them, in this instance the 1st appellant. He conceded that under S.100 of the PEA, there is no statutory instrument or regulation in place that specifically regulates the issuance of a certificate of equivalence by the NCHE but was quick to add that the Legislature did not intend the equation process to be arbitrary. He argued that the Legislature's intention was reflected in S.4(10) of the PEA which provides that *"a certificate issued by the NCHE under any other enactment to the same effect as certificate required to be obtained under sub section 6 shall be sufficient for the purposes of sub section 1(C)"*

Counsel submitted that one of the functions of the NCHE under S.5 (k) of the Universities and Other Tertiary Institutions (UTOIA) Act is to

determine the equivalence of all types of academic and professional qualifications of degrees, diplomas and certificates obtained elsewhere with those awarded to the Uganda Institutions of higher education for recognition in Uganda. Further, counsel argued that under S.128 of the Universities and Other Tertiary Institutions Act; the NCHE is empowered to make regulations to regulate their functions in consultation with the Minister and that Statutory Instrument No.62 of 2007 was made under this provision. He contended that the rules of 2007 provide guidelines as regards issuing a certificate of equivalence that were not otherwise provided for by the PEA. He referred to Regulation 3 on procedure and form of applying for equating a qualification under S. 5(i) and (k) of UOTIA.

Counsel submitted that the learned trial Judge having found that the diploma certificate presented by the appellant was not certified, rightly held that the same was inexistent.

Regarding issue No. 3 of the Appeal, counsel for the respondent submitted that the learned trial Judge properly evaluated the evidence when she held that the appellant did not give any evidence proving that he attended Pacific Coast Technical institute. He submitted that there was no cogent evidence to show that the appellant attended the institution he claimed he had. Counsel contended that the evidence of a graduation photograph with a one, Juliet Muyingo, was not reliable

because it did not show where that photograph was taken and the course of graduation.

Regarding issue No. 2 on whether the learned trial Judge erred in law and fact when she held and found that the certificate of equivalence issued by the NCHE to the appellant was illegal, null and void, counsel submitted that the law on academic qualifications for a Member of Parliament is couched in mandatory terms. He argued that the NCHE did not confirm that the appellant attended the said Pacific Coast Technical Institute in California Van Nuys or Azusa Pacific Collage from which he purported to have attained a partial transcript on which he claimed to have been admitted to the diploma course. Counsel contended that in the absence of following well established procedures, the certificate was issued illegally, irrationally and unreasonably and could not therefore be of any legal effect. He relied on Section 4(13) of the PEA to fortify his submissions.

Regarding issue No.5 on how the Judge imposed guidelines and applied them retrospectively, Counsel contended that the trial Judge refused to apply Legal Notice No. 12 of 2015 to avoid prejudice to the appellants. She opted to rely on the Rules of 2007. Counsel submitted that Legal Notice No.12 of 2015 was for all intents and purposes relevant and prayed that this Court applies it in interpreting the level and extent of the statutory duty required of NCHE in equating certificate of equivalent.

Counsel submitted that Legal Notice No.12 of 2015 did not do away with the regulations of 2007, so in effect what it did was just explained the process of certification and it was at all material times binding on the NCHE and any aspirant that wanted to gain from those provisions of the law.

Regarding issue No.4 on whether the learned trial Judge erred in law when she over ruled the preliminary objection on admissibility and reliability of the annexures attached to Kabakuya Bashir's Supplementary Affidavit in Support of the Petition, counsel for the respondent submitted that the appellant's arguments were misconceived and frivolous. Counsel argued that the trial Judge did not expressly rely on Kabakuya Bashir's annexures in her judgment but took cognizance of the fact that the information presented in his affidavit was the best that could be obtained within the time that was allowed to file a Petition. He relied on **Commodity Export International Limited VS NKM Trading Company CACA No. 84 of 2008** where this Court held that *"Uganda's Evidence Act was passed in 1909 long before computers were invented and the issue of electronic evidence could not have been contemplated....that it is important that Uganda moves forward into the digital age in a way that makes it possible to resolve legal disputes effectively".*

Counsel contended that even if the trial Judge had relied on Kabakuya Bashir's annexures, she was justified to do so because the best evidence rule has evolved over time as seen under Section 8(1) (a) and (b) of the **Electronic Transactions Act 2011.** The said Section provides thus: *"in legal proceedings the rules of evidence shall not be applied so as to deny the admissibility of the data message or an electronic record merely on the ground that it is constituted by a data message or an electronic record if it is the best evidence that the person adducing the evidence could reasonably be expected to obtain"*

Counsel also relied on **Kajala VS Noble (1982) 75 Criminal Appeal Reports 149** to support his submissions. He prayed that this Court finds that the trial Judge properly evaluated the law relating to electronic documents and that she reached the right conclusion when she declined to expunge Kabakuya Bashir's annexures.

Regarding issue No. 6 of the Appeal on whether the NCHE consulted UNEB before issuing a certificate of equivalence under Section 4(5) of the PEA, counsel submitted that the NCHE skipped an essential step in verifying the appellant's documents when they did not consult UNEB. Counsel submitted that NCHE only sought advice but did not consult UNEB in equating the appellant's academic qualifications. Counsel contended that the documents the NCHE forwarded to UNEB were the O' level equivalent of the 1st appellant's certificate and the diploma. He

argued that the NCHE did not attach all the documents that the appellant or the respondent at that time had submitted to the NCHE including his partial transcript which was not sent to UNEB to equate and yet it was important in equating his qualifications. He relied on **Nicholas Gole (supra)** where it was held that *"a person elected to Parliament on the basis of a certificate of equivalence based on nonexistent or fraudulent qualification would not have been validly elected for the simple reason that he would not be in possession of valid academic qualifications. The NCHE certificate of equivalence notwithstanding"*

He also relied on **Paul Mwiru** (supra) where this Court held that *"the plain or literal meaning of section 4 of the above act is that a person qualifies to be a Member of Parliament on proving to the satisfaction of the Electoral Commission to have completed A level standard of education or its equivalent as a minimum level of education"*.

Counsel submitted that NCHE flouted procedure in issuing the certificate of equivalence and argued that policy decisions cannot tantamount to a legal or statutory requirements especially where the law is unequivocal in the steps and procedures to follow.

Regarding the issue of costs, counsel for the respondent submitted that it is trite law that the award of costs is discretionary and that it is settled that discretion should be exercised judiciously i.e. substantial reasons should be advanced before costs are either granted or denied. Counsel

argued that the trial Judge had belabored in her judgment to point out the omissions and actions of the 2nd respondent that gave rise to the Petition.

Submissions in rejoinder

Regarding the issue of forgery, counsel for the 1st respondent submitted that counsel for the appellant's concession that there was no fraud implied that there was no forgery and thus, the documents were genuine. Counsel submitted that this Court should take judicial notice of the fact that the awarding institution had closed in 1989 before the advent of internet. He reiterated that the respondent's evidence from the internet was unreliable.

Counsel reiterated that the Nakendo case was distinguishable from the present one because in the former, the petitioner proved that the respondent's documents were not authentic. Counsel submitted that counsel for the respondent rightly conceded that a person in possession of an original document must produce it to Court in line with **Kajala v Noble (1982) 75 Criminal Appeal Reports 149**

Counsel submitted that where no rules are enacted, any form could suffice including an ordinary letter. He argued that non production of the certified copies could not be the basis of nullifying a certificate of equivalence.

Counsel disagreed with the submission that the Rules of 2005, 2007 and Legal Notice No. 12 of 2015 were made under Section 5 (k) of the UOTIA. He reiterated that they do not apply to the appellant. He argued that the certificate of equivalence issued to the 1st appellant was under the PEA, not UOTIA. Further, counsel submitted that the making of the rules under Section 108 of UOTIA does not over ride Section 100 of the PEA because Section 100 of the PEA is very specific as to who can make rules.

Regarding failure to submit documents such as the partial transcripts from Asuza, counsel argued that in order to prove Advanced level, one does not prove a string of qualifications. He relied on **Butime Tom Vs Muhumuza David & Electoral Commission Court of Appeal Election Petition Appeal No.11 of 2011** to support his submissions.

Counsel maintained that there was consultation between the NCHE and UNEB and argued that the law does not provide how consultation should be done and in which form. He submitted that if counsel for the respondent was not satisfied with the substance of the consultation, he should have raised it in a Cross Appeal rather than arguing it from the bar.

Counsel reiterated that **Paul Mwiru** (supra) is no longer good law and should be clarified and the Minister responsible should be able to make rules to guide aspirants.

Regarding the annexures to Mr. Bashir's affidavit, counsel submitted that the trial Judge relied on the same to find that there was no evidence that the 1st appellant went to Pacific Institute in USA.

Regarding the burden of proof, counsel maintained that it lay on the respondent to prove that the 1st appellant was not qualified to be a Member of Parliament, which burden he failed to discharge.

Counsel for the 2nd respondent associated himself with the submissions of counsel for the 1st appellant that the rules of 2007 and Legal Notice No 12 of 2015 are not applicable as against the 1st appellant. He submitted that if this Court is inclined to find otherwise, it should take cognizance of the fact that the certificate of equivalence in question was issued several months before the Legal Notice.

Counsel submitted that the NCHE took steps to establish whether or not Pacific Technical Institute existed by 1989, whether it was accredited at the time and if the 1st appellant attended it contrary to counsel for the respondent's submissions.

Counsel submitted that it was speculative and unfair for the trial judge to find that the NCHE should have written either to a custodian of record or a liquidator or some other person whom she believed was having custody of this information yet she observed it tried to get such information from the custodian of records but failed.

Counsel reiterated their earlier prayers.

Court's resolution

We have studied the record of Appeal and the judgments of the lower Court. We have also considered the conferencing notes, the additional evidence adduced by the respondent, the submissions of counsel for all the parties and the authorities that were availed to Court for which we are grateful.

This being a first Appeal, we find it necessary to remind ourselves of our duty. Rule 30 of the Court of the Appeal Rules provides:

30. Power to reappraise evidence and to take additional evidence.

(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—

(a) reappraise the evidence and draw inferences of fact; and

(b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.

In **Kifamunte Henry v Uganda SSC NO. 1 of 1997**, it was held that *"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate*

Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.

We shall bear the above principles in mind while resolving this Appeal. We shall resolve the Appeal in the order in which the issues were framed.

Issue 1

The gist in this issue revolves around the question of shifting of the burden of proof in matters of proving academic qualifications. The general position of the law in election Petitions is that the petitioner must adduce cogent evidence to prove his/her case on the balance of probabilities to the satisfaction of Court. In **Masiko Winifred Komuhangi v Babihuga J. Winnie Election Petition Appeal No.9 of 2002, Lady Justice Mukasa-Kikonyogo DCJ,** (as she then was) held in her lead judgment that ***"As I have already stated above, the decision of Court should be based on the cogency of evidence adduced by the party who seeks judgement in his or her favour. It must be that kind of evidence that is free from contradictions, truthful so as to convince a reasonable tribunal to give judgment in a party's favor.***

Black Law Dictionary 8th Edition defines the word *"cogent"* to mean ***compelling or convincing.***

Section 61(3) of the PEA sets the standard of proof to be to the satisfaction of the Court on a balance of probabilities.

In ***Paul Mwiru v Hon. Igeme Nabeta and others, Election Petition Appeal No.06/11*** this Court held that:

> *"Section 61(3) of the PEA sets the standard of proof in parliamentary election petitions. The burden of proof lies on the petitioner to prove the allegations in the petition and the standard of proof required is proof on a balance of probabilities. The provision of this subsection was settled by the Supreme Court in the case of* ***Mukasa Harris v Dr Lulume Bayiga*** *(supra) when it upheld the interpretation given to the subsection by this court and the High Court."*

In respect of the burden of proof, the trial Judge stated thus; *"the 1st and 3rd Respondents have extensively accused the Petitioner of shifting the burden of proof, particularly to the 1st Respondent. Under S. 61 (3) of the PEA, the standard of proof in election petitions is on a balance of probabilities. And this is what I have applied all through, save for the analysis of fraud.*

She further held that;

> *"The jurisprudence has also established that the burden of proving the authenticity of impugned academic qualifications or*

documents rests with the one who relies on them. This position was settled in the *locus classicus case of* ***Abdul Bangirana Nakendo v. Patrick Mwondah, Supreme Court Election Petition Appeal No. 9 of 2006*** *where Katureebe JSC (as he then was) in his lead judgement authoritatively pointed out that: "the duty to produce valid certificates to the Electoral Authorities lies with the intending candidate for elections. Where the authenticity of those certificates is questioned, it can only be his burden to show that he has authentic certificates."*

In the case before me given that the authenticity, validity and integrity of the 1st Respondent's Diploma qualification which the 3rd and 2nd Respondent respectively relied on to issue a certificate of equivalent and for his nomination and election is in question, then within the terms of S.106 and Nakendo's case (supra) it is the 1st Respondent's burden to prove that the questioned qualification is actually authentic and valid, but he failed". (sic)

Once a person contending that a document is invalid establishes a prima facie case, it shifts the evidential burden and necessitates proof to the contrary by the person in possession of that special knowledge and who asserts the facts of that document.

From the record of Appeal, the respondent challenged the authenticity of the appellant's academic credentials. For ease of reference, we shall reproduce paragraph 4(j) of the respondent's Petition.

And your petitioner states;

THAT however, the 1st respondent presented fraudulent academic awards purportedly granted from the United States of America, which were never authenticated and verified but fraudulently relied upon by the 3rd respondent to issue the said certificate of formal education of advanced level or its equivalence, an act incapable of being condoned by Court.

PARTICULARS OF FRAUD OF 1ST RESPONDENT

1. *The 1st respondent has never been in possession of the requisite student visa to enable him pursue further education in the United States of America.*
2. *The 1st respondent's passport, the basis of his travels to the United States of America for the alleged studies, possesses different names from those appearing on his academic awards.*
3. *The 1st respondent was never admitted to Pacific Coast Technical Institute, a higher institution of learning since he never possessed Advanced Level standard or its equivalent.*
4. *Presenting a forged Diploma in Electronic and Computer technology allegedly obtained from Pacific Coast Technical*

Institute, California, Van Nuys 1988 which institute he never attended.

5. *Presenting a forged Christian degree of Advanced Diploma in Theology allegedly obtained from International College of Excellence, an Affiliate of Life Christian University, Chicago Illinois, 2005, which institution is nonexistent.*

At page 22 of the Judgment, the learned trial Judge held that although fraud was pleaded, it was not proved to the required standard.

Sections 101,102 and 103 of the Evidence Act CAP 6 requires a person who alleges a matter to adduce evidence to prove the allegation or matter. However the 3 sections need to be read together with article 80(1)(c) of the Constitution, Section 106 of the Evidence Act and S4 (1) (c) of the PEA.

"*In civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person.*"

Article 80(1) (C) of the Constitution and Section 4(1) (C) of the PEA both provide that a person is qualified to be a Member of Parliament if that person has completed a minimum formal education of Advanced Level Standard or its equivalent.

The academic qualifications being challenged belong to the 1st appellant. He is therefore the only one who can tell Court what kind of such academic papers he owns. He therefore bears the burden under **Article**

80(1) (C) of the Constitution Section 106 of the Evidence Act, and Section 4 (1) (C) of the Parliamentary Elections Act to prove to the satisfaction of Court that his academic documents were genuine and valid. He must also prove that his papers satisfy the requirements of the law for the purposes of parliamentary elections.

We find that the trial Judge rightly applied the law on burden of proof in the Petition. The general position of the law as enunciated in **Paul Mwiru** (supra) is that the burden of proof lies on the Petitioner. However, where authenticity of the respondent's qualification is challenged, the burden lies on the respondent to prove that his/her documents are authentic **(See Nakendo (supra)**. Therefore issue No.1 of the appeal is answered in the affirmative.

Gist

On issue 2 of the Appeal, the 1st appellant's counsel faulted the trial Judge for finding that the certificate of equivalence issued by the NCHE to the appellant it was illegal, invalid and null and void. On the other hand, counsel for the respondent contended that the 2nd Appellant did not follow well established procedures and thus, the certificate was issued illegally, irrationally and unreasonably and could not therefore be of any legal effect. He relied on Section 4(13) of the PEA to support his submissions.

The trial Judge held that "...failure to verify authenticity and validity is fatal to the certificate issued. Without this verification of authenticity and validity, the issued certificate was based on a nonexistent Diploma certificate. All in all, the 1st Respondent's certificate of equivalent was issued illegally in violation of paragraph 18 of the second schedule of the 2007 Rules and without the expected exercise of due diligence by the 3rd Respondent. It was also contrary to S. 4(13) of the PEA as the Diploma certificate in issue is not one of the listed certificates for exception from verification. It is accordingly invalid, null and void".(sic)

For the trial Judge to reach the above position, she considered the fact that the 1st respondent did not avail certified copies during his application for a certificate of equivalence and that the 2nd appellant did not diligently discharge its duty in verifying the authenticity and validity of the 1st appellant's academic documents. She cited the cases of **Paul Mwiru and Muyanja Mbabali v Birekerawo Mathias Nsubuga Election Petition 6 of 2011 and Election Petition Appeal 36 of 2011** where the 2nd appellant went to great lengths in verifying the authenticity and validity of the applicant's foreign qualifications but which it failed to do in this case.

In **Gole Nicholas Davis** (supra), Justice Katureebe, JSC, (as he then was) held that ***"Furthermore, the qualifications for being elected as spelt out in Article 80 of the Constitution is that one must have A-level***

standard or its equivalent. It is true that the equivalence must be determined in a manner stipulated by law. But there is a basic assumption that the qualifications to be equated must be in existence and valid. If the NCHE equates valid qualifications, then courts of law may not interfere with its decision. But where the certificate it purported to equate is what is being challenged, then the High Court has power to inquire into that question. It is not the equating that is being inquired into but the validity of the qualification that were equated".

In **Nakendo (supra),** Katureebe JSC, (as he then was) held that ***"...If the High Court on evidence that the decisions of an administrative body, like NCHE, were irrationally made or were not based on proper diligence, the Court can, and should, so declare. In my view, the NCHE certification of equivalence is not the qualification for election to parliament. It is meant to be evidence but not conclusive evidence of the qualification set out in the Constitution. It is therefore subject to court's evaluation or scrutiny."(sic)***

Our reading and appreciation of the two holdings above is to the effect the NCHE should determine equivalence in the manner stipulated by law and Court should not ordinarily interfere with NCHE's decision to equate, if the qualifications presented are valid. But where qualifications presented for equating are challenged, Court should inquire about the validity of the same and not the equating. In the event that Court finds

that the decision taken by NCHE was irrationally made or were not based on proper diligence, the Court can, and should, so declare.

Having faulted the 2nd appellant for not being diligent in authenticating and validating the 1st appellant's diploma, the trial Judge declared so in line with **Nakendo** (supra). However, she also declared the certificate of equivalence illegal, invalid, null and void. We are of the considered view that the learned trial Judge erred in law and in fact when she held that the certificate of equivalence issued by the NCHE to the appellant was illegal, invalid, null and void. **Nakendo** case gives Courts jurisdiction to inquire into the validity of qualifications for equating and declaration of decisions of an administrative body, like the NCHE, where irrationally made or not based on proper diligence.

The respondent's contention in the lower Court was that the 1st appellant had never attended college, never obtained the impugned qualifications and there was therefore no certificate to equate, cancel, withdraw or recall.

The trial Judge was satisfied that the 2nd respondent had consulted UNEB in fulfillment of the requirements of Section 4(6) of the PEA and UNEB, in its letter of 23rd April, 2014 confirmed that the 1st appellant held a valid O-level certificate and if Pacific Coast Technical Institute had been accredited by NCHE, then the 1st appellant may be deemed to have attained A level equivalent qualification.

Issue No.2 of the appeal is answered in the affirmative.

On issue No.3, counsel for the appellant faulted the trial Judge for misdirecting herself on the evaluation of evidence on record when she found that the appellant's Diploma certificate from the Pacific Coast Technical Institute USA presented to the NCHE for equation wasn't legally authentic, valid or existed.

The trial Judge held that *"Overall, on a balance of probabilities, I am satisfied that without attachment of certified copies of the Diploma certificate to the application or verification of authenticity and validity of the same as a prerequisite, there was in effect no existent certificate for the equation process".(sic)*

It is not disputed that the 1st respondent produced his original diploma certificate in the lower Court. It is also an agreed fact that the Pacific Coast Technical Institute USA closed in 1989. However, the trial Judge wanted certified copies of the original certificate to authenticate the 1st appellant's qualifications such as his admission letter or some other kind of confirmation from the Institute that he actually attended Pacific Coast Institute and obtained the Diploma certificate he presented. She was reluctant to believe the evidence of Juliet Muyingo who had sworn an affidavit in support of the 1st appellant on grounds that she was a friend and a colleague of the 1st appellant and was thus susceptible to being biased in her evidence.

In **Nakendo** (supra), Katureebe JSC (as then was) in his lead judgment held that; *"The duty to produce valid certificates to the Electoral*

Authorities lies with the intending candidate for elections. Where the authenticity of those certificates is questioned, it can only be his burden to show that he has authentic certificates."

As already noted in the resolution of issue No.1 above, the petitioner alleged that the 1st appellant presented a forged Diploma in Electronic and Computer Technology allegedly obtained from Pacific Coast Technical Institute, California, Van Nuys 1988 which institute he never attended. However, the trial Judge found that he had not substantiated his claims and thus did not consider the specific fraud claims. She held that *"The Petitioner made claims of fraud against the 1st and 3rd Respondents in Para. j of the petition. Apart from stating these particulars, the Petitioner never effectively substantiated in the affidavits in support of the petition. They have not clearly been followed through in the affidavits and submissions or sufficiently proven to the standard of fraud, which is higher than on a balance of convenience. I will therefore not consider the specific fraud claims".(sic)*

In a bid to prove that his documents were genuine, the 1st appellant presented the original certificate and a former classmate swore an affidavit attaching her own certificate. Counsel for the 1st appellant argued that producing the original certificate was sufficient under the best evidence rule. S.63 of the Evidence Act provides thus:

63. Proof of documents by primary evidence.

"Documents must be proved by primary evidence except in the cases hereafter mentioned."

However, counsel for the respondent supported the trial Judge's finding that the 1st respondent should have presented certified copies of his certificate to authenticate it. From the judgment, we could deduce that the trial Judge treated the certificate as a private document. She held that *"strictly speaking even the Respondents' certificates and, documents from abroad which do not meet the standard in S. 84 of the Evidence Act should be rejected. However for the justice of this case, I will not order that much"*

The relevant subsection of S.84 (supra) is (d) which provides thus;

84. Presumption as to private documents executed outside Uganda.

"The court shall presume that private documents purporting to be executed out of Uganda were so executed and were duly authenticated if-

(d) in the case of such a document executed in any place outside the Commonwealth and the Republic of Ireland (in this section described as a foreign place), it purports to be authenticated by the signature and seal of office—

(i) of a foreign service officer of Uganda or of a British consul or diplomatic agent in such foreign place; or

(ii) of any secretary of state, undersecretary of state, governor, colonial secretary, or any other person in that foreign place who shall be shown

by the certificate of the consul or diplomatic agent of that foreign place in or for Uganda to be duly authorized under the law of that foreign place to authenticate the document;"

From the above provisions, there was no requirement for the 1st appellant to produce certified copies in evidence before Court but rather for the certificate to bear the signature and seal of office of a Foreign Service Officer in Uganda or of a British Consul or Diplomatic Agent in such a foreign place among others. It is not in dispute that the 1st appellant's certificate did not comply with S.84 (d) above and the trial judge could have rejected the certificate and other documents therein, but she opted not to, for the justice of the case. The implication was that she presumed the documents to be authentic under S.84 (d).

Further, we note that the trial Judge took into consideration the fact that the annextures to Kabakubya Bashir's supplementary affidavit were the best that he could do in the circumstances of the case but did not give a similar consideration to the 1st appellant where it was an agreed fact that Pacific Coast instate had been closed in 1989, almost 28 years ago. We are of the considered view that she should have applied the same standard to both parties to the suit. We are cognizant that the awarding Institute would have been best placed to have certified the 1st appellant's certificate but that was impossible in the circumstances.

We also note from Richard S. Cabelus's response to the respondent's counsel dated March 24 2016 (annexure "G" to Kabakubya Bashir's

supplementary affidavit) that he confirmed the existence of Pacific Coast Technical Institute and that it was accredited by 1988 when the 1st appellant studied there.

On page 24 of the record of proceedings, Prof. Opuda during cross examination stated that *"NCHE has never established these documents are a forgery or not, or had reason to doubt them"*. Even the trial Judge found that the petitioner had failed to substantiate his fraud claims against the appellants to the required standard.

The respondent's counsel was granted leave to adduce additional evidence of a forensic report to prove that there was forgery of the 1st appellant's academic documents. We have carefully studied the forensic report of Chelangat Sylvia where she examined the 1st appellant and Juliet Muyingo's certificates to ascertain whether the questioned documents share the same printing methods and writing or not. We did not find the report conclusive and as such not helpful to the respondent's case. Chelangat noted in the report that; *"Therefore the possibility of exhibit E16 being electronically manipulated from a document with such related information can only be ruled out if the original or first generation photocopy is provided. The questioned signature of the executive director show clear differences in design and manner of construction of letter B, positioning of letters on paper, i.e. "e", adjacent strokes and connectivity"*

Later she concludes that *"Based on the observations made above, in my opinion it is unlikely that the questioned signature in exhibit J.M1 share the same authorship with the questioned signature in exhibit E16".*

We find that Chelangat's report does not state whether the 1st appellant's certificate is not authentic or whether it is Muyingo's. Without such a conclusion, we cannot speculate. We are mindful that the original certificates were in the possession of the 1st appellant and Juliet Muyingo but there is no evidence that the respondent's counsel required the same from the 1st appellant's counsel or sought Court's indulgence.

We also find view that the respondent did not lead evidence on his part to prove that the 1st appellant's qualification was recalled by the awarding institution. In **Joy Kabatsi v. Hanifa Kawooya and the EC, SCEPA No. 25 of 2008,** Justice Kanyeihamba held that *"those who make such allegations need not to do merely allege. They need to show that as a result of their allegations, the awarding institution of the qualification in issue cancelled or withdrew the award of the disputed qualification".* We agree with and accept as the correct position at law.

The trial Judge found the Petition distinguishable from the Kawooya case (supra) and stated that *"However the circumstances of the case before me are distinguishable, it appears the Petitioner's contention is that the 1st Respondent has never attended the college. As such there would be nothing to cancel, withdraw or recall."*

With great respect, we do not agree with the trial Judge. From paragraph 4(j) already quoted earlier, the respondent claimed that the 1st appellant presented fraudulent academic awards purportedly granted from the United States of America. The contention of never attending the college was one of the particulars of fraud. Failure to prove fraud in the acquisition of the 1st appellant's academic documents left them intact, valid and presentable

We therefore find that the trial Judge misdirected herself on the law when she found that the 1st appellant's Diploma certificate from the Pacific Coast Technical Institute USA presented to the NCHE for equation wasn't legally authentic, valid or existent.

a) *That the appellant did not lead any evidence proving that he attended Pacific Coast Technical Institute to be awarded the said Diploma*

In respect of the attendance of Pacific Coast Technical Institute by the 1st appellant, the trial Judge held thus;

"The certificate as presented, in circumstances where its integrity is being questioned, could not prove this authenticity and validity. Not even Ms. Muyingo attempted. All that the 1st Respondent does is insist that the certificate he adduced is authentic. This is not satisfactory on a balance of probabilities. Perhaps if the 1st

Respondent had presented copies certified by the Institute, his admission letter or some other kind of confirmation from the Institute that he actually attended Pacific Coast Institute and obtained the Diploma certificate he presented."(sic)

The 1st appellant apart from the original certificate produced before Court, relied on the affidavit of Muyingo who attached graduation photographs to show that he attended the Institute. Counsel for the respondent argued that the graduation photos were not reliable because it does not show where they were taken or what course the 1st appellant was graduating in. We do not find merit in that argument because one cannot expect a photograph to reveal all the details that counsel for the respondent is asking for.

We note that Juliet Muyingo was never cross examined which by implication meant that her evidence was not being challenged by counsel for the respondent. Even in adducing additional evidence, the only evidence that Counsel for the respondent challenged was Juliet Muyingo's certificate, not her evidence that she attended Pacific Coast Technical Institute. However, in general, the trial judge did not believe her evidence. She held that *"Ms. Juliet Muyingo also swore an affidavit in support of the 1st Respondent. She avers that she attended the same Pacific Coast Institute with and was a classmate of the 1st Respondent, included an Annexure of a graduation photo which has the 1st*

Respondent in a graduation gown with her. She also annexes a copy of her own Diploma certificate from the same Institute. As a friend and colleague of the 1st Respondent with the same Diploma certificate, she may be biased in her evidence so I am reluctant to believe Ms. Muyingo's testimony on its own".

We find the reason for the trial Judge's reluctance to believe Muyingo's testimony unjustified. Even in instances where affidavits contain falsehoods, Court has power to sever those particular paragraphs, not to reject the evidence wholly unless it is fatally defective.

Therefore, we answer issue 3 of the Appeal in the affirmative.

Regarding issue No.4, the trial Judge held that *"The 1st and 3rd Respondents raised preliminary objections regarding the admissibility and reliability of annexures to Mr. Kabakubya's supplementary and rejoinder affidavits and requested their expunging from the record basing almost entirely on the Evidence Act. Strictly speaking even the Respondents' certificates and, documents from abroad which do not meet the standard in S. 84 of the Evidence Act should be rejected. However for the justice of this case, I will not order that much....With these authorities I will not order such omnibus expunging as the 1st and 3rd Respondents want. Rather if I chose to rely on a particular annexure, I will make a case-by-case analysis of its reliability within the standard*

above. Besides O. 19 rule 3(1) applies across board to all affidavits before me and not just Mr. Kabakubya's".

We have perused Kabakubya Bashir's supplementary affidavit in support of the Petition and noted that most of the annextures thereto were obtained from the internet and he acknowledges that source of information. We agree with the trial Judge's reliance on the Electronic Transactions Act No.8 of 2011 to admit the annextures to the affidavit. As rightly quoted by the trial Judge, S. 8(1) (a) and (b) provide for the admissibility and the evidential weight of a data message or an electronic record in the following terms:

> *"(1) in legal proceedings the rules of evidence shall not be applied so as to deny the admissibility of a data message or an electronic record –*
>
> *(a) merely on the ground that it is constituted by a data message or an electronic record;*
>
> *(b) if it is the best evidence that the person adducing the evidence could reasonably be expected to obtain."*

We also agree with the trial Judge's consideration that given the time frame within which the Petition had to be filed, the annextures that were attached to Bashir's affidavit were probably the best that he could get. We also note that the said annextures did not substantially affect the trial

Judge's decision. Her decision was largely influenced by the steps NCHE took in verifying and authenticating the 1st appellant's academic qualification before issuing him with a certificate of equivalence. She referred to his evidence alongside that of Prof Opuda and Muyingo in appreciating the USA education system. She held that *"So while Iam content from the general explanations of Prof. Opuda, Mr. Kabakubya, Ms. Muyingo and my own research on the course of writing this judgment, that a candidate in the USA can get admitted to a Diploma course like the one in issue for the 1st respondent based on GEDs, SATs or a partial transcript, I have no satisfactory demonstration that the 1st Respondent in the case before me actually attended Azusa College to validly obtain the partial transcript."*

Counsel for the 2nd appellant took issue with the trial Judge's reliance on uncertified Court proceedings in the **Paul Mwiru** case (supra) contrary to S.75 of the Evidence Act. She opted to do so because she could easily verify the record since she is Court. The said section provides:

75. Certified copies of public documents.

"Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees for the copy, together with a certificate written at the foot of the copy that it is a true copy of that document or part of the document, as the case may be, and the certificate shall be dated and subscribed by the officer with his or her

name and official title, and shall be sealed whenever the officer is authorised by law to make use of a seal, and the copies so certified shall be called certified copies."

We find that the trial Judge had discretion to rely on the record in line with S.79 of the Evidence Act which provides;

79. *Presumption as to document produced as record of evidence.*

"Whenever a document is produced before any court, purporting to be a record or memorandum of any evidence given in a judicial proceeding or before any officer authorised by law to take evidence, required by law to be reduced to writing, and purporting to be signed by any judge or magistrate, or by any such officer as aforesaid, the court may presume that the document is genuine and that the evidence recorded was the evidence actually given; may take oral evidence of the proceedings and the evidence given; and shall not be precluded from admitting any such document merely by reason of the absence of any formality required by law; provided always that an accused person is not injured as to his or her defence on the merits.

In the circumstances we answer issue No.4 in the negative.

Issue 5

The gist of this is in the question whether learned trial judge set standards and guidelines for the equation of academic qualifications and thereafter applied them to the appellants prejudice.

In her judgment the trial Judge had this to say:

"In particular, I wonder why the 3rd Respondent is opposed to the retrospective application of the benchmarks aimed at enhancing its efficient functioning in regard to equation of qualifications and opts to oppose the application and defending the 1st Respondent. Nonetheless, in my discretion, I will not apply it to avoid any possible prejudice, imagined or otherwise that may derive from such application.

Instead, I agree with the 3rd Respondent, and in its own words in submissions at page 8, I will use the standard the 3rd Respondent ought to have considered using the legal and practicable regime at the time of equation. This is the standard that would reasonably have been expected of the 3rd Respondent".

From the above holding, we are of the considered view that the trial Judge did neither set any standard or guideline for equation nor retrospectively applied the same. She clearly abstained from the retrospective application of Legal Notice 12 of 2015 which came into force 5 months after the 1st appellant's equation of his academic qualification was done. She did this to avoid any possible prejudice, imagined or otherwise that may derive from such application. We therefore find no merit in this issue.

Counsel for the 1st appellant argued that the Rules of 2005, 2007 and Legal Notice No.12 of 2015 did not apply to the 1st appellant as a parliamentary candidate because they were for equating purposes of Universities and Other Tertiary Institutions, not for purposes of Parliamentary candidates. He supported his submissions with S.4(6) of the PEA which provides that *"a person required to establish his or her qualification under sub section 5 shall do so by production of a certificate issued to him or her by National Council for Higher Education in consultation with Uganda National Examination Board"*. The form of the certificate was to be in the form provided in the 2nd schedule to the Act under S.4 (8).

We accept counsel for the 1st appellant's submission that the PEA does not provide for the procedure of applying for certificate of equivalence. However, S.100(1) of that Act empowers the Minister for Presidential and Parliamentary Elections and Referenda on recommendation of the Electoral Commission and with the approval of Parliament by Statutory Instrument, to make regulations prescribing any matter which is required authorized by the Act. S.100(2)(a) is to the effect that the regulations may be made under subsection 1 to provide for the form of any document to be used to effect purposes of the Act. It is not in dispute that the responsible Minister has not made such regulations.

However, NCHE is created by the UOTIA of 2001which provides for its functions and administration. S.5 (k) of the UOTIA provides that the

NCHE has power to determine the equivalence of all types of academic and professional qualifications of degrees, diplomas and certificates obtained elsewhere with those awarded by Uganda institutions of Higher Education for recognition in Uganda. Further, S.128 empowers the NCHE, with the approval of the minister, to make regulations for the better carrying into effect the provisions of the Act, including the fixing of minimum fees to be paid for the services of the National Council and prescribing anything to be prescribed under the Act. The rules of 2005 were made under S.5 (k) and 123(2) of the Act while those of 2007 were enacted under S.5 (i) and (k) and S.128 of the Act. Legal Notice 2015 was enacted under S.5 (k) and 6 of the UOTIA and S.4(c), 4(5), 4(6) and 4(7) of the PEA, among others.

It goes without saying that the rules of 2005 did not apply to the 1st appellant or anyone else because they were repealed by the 2007 Rules as rightly observed by the trial Judge. The Legal Notice equally did not apply to the 1st appellant because it was enacted after the 1st appellant's application for a certificate of equivalence.

Upon consideration of the provisions of the law above, we are of the considered view that the PEA provides for issuance of a certificate of equivalence by the NCHE and provides for its form. The Act is silent about the procedure of acquiring the said certificate from the NCHE but

the UOTIA empowered the NCHE to regulate its own operations and it made the rules of 2007.

We agree with the trial judge that at the time of application for the certificate of equivalent in issue, the 2007 rules were applicable to the 1st appellant.

Issue No.5 is therefore answered in the negative.

Regarding issue No.6, counsel for the respondent's main argument was that the NCHE did not consult UNEB but only sought for advice. The trial Judge held that; *"Without going into the nature of the consultation, I am satisfied that the 3rd Respondent carried out the mandatory consultation with UNEB before issuing the certificate of equivalent as required by S. 4(6) of the PEA".*

Issue 6

The gist of this issue is whether or not the UNHCE consulted UNEB before issuing the certificate of equivalence in issue.

The bone of contention in counsel for the respondent's argument was a letter from UNEB dated 1 September 2016 where the Executive Secretary Mr Odongo responds to a letter from the respondent dated 15th

July, 2016 and states that *"Communication marked "B" is therefore, not an equated document but advice".*

Counsel argued that consultation is a process while advice is not.

Black's Law Dictionary, 8th edition defines consultation as **"the act of asking the advice or opinion of someone". This is what the Director, Quality Assurance and Accreditation did in her letter to UNEB dated 4th April 2014.** She stated thus *"The purpose of this communication is for you to advise this Council as to whether the above qualifications are equivalent to "A" level." We are satisfied that what happened is indicated above passes the test of consultation.*

Issue No.6 is, therefore, answered in the affirmative.

Regarding the issue of costs which were awarded against the 2nd appellant, we agree with counsel for the respondent the award of costs is at the discretion of Court but such discretion must be exercised judiciously. The trial Judge held that; *"Costs for the Petitioner are to be paid by the 3rd Respondent because it is largely its actions or omissions that resulted in the petition. Counsel for the Petitioner have not demonstrated to my satisfaction that this petition was a complex case deserving of a certificate of two Counsel. The prayer for the same is accordingly denied". (sic)*

Counsel for the respondent argued that the trial Judge did not indicate the actions or omissions that resulted in the Petition but we find no merit in this argument. We have carefully read the judgment of the lower Court, we note that during her analysis and evaluation of the evidence on record, the learned trial Judge severally pointed out mistakes of the 2nd appellant and on page 44 of her judgment, she held that *"Based on my analysis above I am satisfied on a balance of probabilities and hereby declare that the 3rd Respondent's issuance of the certificate of equivalent to the 1st Respondent was in contravention of S. 4(13) of the PEA, para. 18 of the 2007 Rules and unreasonably and irrationally made because it was not based on proper due diligence.*

Further, we note that she cautioned the 2nd appellant to evaluate and realign itself to the very important mandate vested in it in the electoral process. We also wish to applaud her observations about that actions and duty of the 2nd appellant during the equating time. We note that it was the NCHE that provided the 1st appellant with application forms made under the rules of 2005 which were repealed and did not require certified forms and it did very little in verification of the qualifications of the appellant. It would be prudent for it to be more diligent while carrying out its mandate. We are satisfied that the trial Judge exercised her discretion judiciously in the award of costs against the 2nd appellant.

In conclusion, based on our findings on issues No.1, 2, 4 and 5, the appeal substantially succeeds. The judgment and orders of the lower Court are set aside. We make the following orders;

1. The 1st appellant is the validly elected Member of Parliament for Busiro South Constituency.
2. Costs here and in the lower Court are awarded to the 1st appellant.

We so order.

Dated this ....18th....day of ....September....2017

.....
S.B. K. Kavuma,
DEPUTY CHIEF JUSTICE

.....
Barishaki Cheborion
JUSTICE OF APPEAL

.....
Catherine Bamugemereire,
JUSTICE OF APPEAL

18/9/2017
Nambuga Lempembwa, Christine Ntambirwe
Eki, Barbara Akullo, Arnold Kumaka
for 1st Appellant.