

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MBALE**  
**ELECTION PETITION NO. 022 OF 2016**

**WANTUSUSI JOHN MUTENYO.....PETITIONER**

**VERSUS**

**1. NABUNBAYA DAVID**

**2. THE ELECTORAL COMMISSION.....RESPONDENT**

**BEFORE: HON. LADY JUSTICE MARGARET C. OGULI OUMO**

**(JUDGE)**

**JUDGEMENT**

The Petitioner in this matter brought this petition challenging the results of the elections conducted by the 2<sup>nd</sup> Respondent on 9<sup>th</sup> March, 2016 for the post of LC3 Chairman Buwabwala Sub county Manafwa district.

The brief background of this petition is that in an election organized by the 1<sup>st</sup> Respondent on the 9<sup>th</sup> March, 2016, the petitioner together with two others vied for the position of LC3 Chairman for Buwabwala Sub County Manafwa district. Who were the following?

1. Nabumbaya David (1<sup>st</sup> Respondent) polled 800 votes
2. Wantsusi John Matenyo (Petitioner) who polled 715 votes and
3. Wakapi Fred

That the 1<sup>st</sup> Respondent was declared and gazetted winner of the said election as per the Uganda gazette dated 25<sup>th</sup> April, 2016.

The Petitioner being dissatisfied with the result of the election brings this petition challenging the said election on the grounds that; he was the winner of the said election and that the returning officer unjustifiably and unlawfully cancelled his results of Wekele polling station.

The Petitioner thus prays for the relief from this Honorable Court for declarations 1) that the Petitioner was the winner of the LC3 Chairman, Buwabwala sub county elections, 2) that the election of the 1<sup>st</sup> Respondent be set aside, 3) costs of the petition and 4) any other reliefs as the court deems fit.

This petition is accompanied by the Affidavit by the Petitioner deposed on the 9<sup>th</sup> May, 2016 to support the petition.

The 1<sup>st</sup> Respondent in his response denies the allegations in the petition and contends that it has no merit as the results of the two polling stations that is Buwabwala sub county and Wekele were rightly disallowed.

The 1<sup>st</sup> Respondent besides his own affidavit presented two other affidavits to support his contention.

The 2<sup>nd</sup> Respondent in response states that it lawfully declared the 1<sup>st</sup> Respondent as winner and that the elections were conducted in compliance with the provisions and principles laid down in the Electoral Laws of Uganda.

The 2<sup>nd</sup> Respondent thus presented the affidavit of Musoke Martin a Returning officer of the 2<sup>nd</sup> Respondent in support to the answer to the petition.

At Scheduling, parties agreed as a fact that the results of Buwabwala polling station were cancelled and the following issues were raised for court's determination;

1. Whether the Electoral Commission did not comply with the Electoral Laws in tallying of results of the said election?
2. If so whether this affected the results in a substantial manner?
3. Whether the petitioner was the winner of the said election?
4. Remedies available?



At the hearing of this petition, the Petitioner was represented by Mr. Mutembuli Yusuf while Mr. Nyote David Innocent represented the 1<sup>st</sup> Respondent and Mr. Mwasu Jude represented the 2<sup>nd</sup> Respondent.

Both Counsel for the Respondents intimated to Court that they would not cross examine the deponents of the Petitioner.

Both counsel filed written submissions which I shall rely on in my judgment.

**Issue 1: Whether the Electoral Commission did not comply with the Electoral Laws in tallying of results of the said election?**

With regard to this issue, Counsel for the Petitioner contended that the Petitioner as per paragraph 5 of his affidavit in support of the petition and annexure 'B' his affidavit in rejoinder complained that the Returning officer of Manafwa during the tallying unlawfully and without any legal Justification canceled the results of Wekele polling station where he had obtained 558 votes and the 1<sup>st</sup> Respondent obtained 027 votes.

That the 1<sup>st</sup> Respondent in his paragraph 5 of his answer to the petition avers that the results of Sala and Wekele polling station were canceled and not tallied.

Counsel contended that contrary to the evidence of the Petitioner and 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent in his answer to the petition in paragraph 6 denies tallying nor cancelling the results of Wekele polling station.

And that the evidence of the Returning officer in his affidavit and even during cross examination is that the results of Wekele polling station were missing and therefore did not consider them.

That the Returning officer during cross examination further admitted that after the tallying and declaring of results, he submitted all the declaration forms to Electoral Commission Kampala and that he did not cancel results.

Counsel further contended that even during scheduling it was an agreed fact that the results of Wekele were canceled. Counsel contended that the

claim that the results of Wekere were missing does not hold any water since the results were canceled that even the Returning officer was shown annexure 'B' in the Petitioner's affidavit in rejoinder a certified copy of the Declaration form of Wekele polling station and that he admitted that it was certified by the Secretary of Electoral Commission.

Counsel also contended that the Petitioner in paragraph 7 of the affidavit in support avers that the reason the Returning Officer gave to cancel the results of Wekele was that the turn up was unbelievable and unexpected and that this evidence is corroborated by the very evidence of the Returning officer who told Court that he could not believe results showing high vote turn up and that the Returning officer told Court that voter turn up was generally low.

Counsel contended that this reason given by the Returning officer to cancel results of Wekele was uncalled for and unjustified and not based on any fact on ground that the very Returning officer relied on the same turn up to consider the results of the female Councilor at this polling station.

Counsel also relies on the affidavit of Wantsusi Simon who under his an agent of Namono Kanah a candidate for Woman Councilor at Wekele polling station. That Wantusi Simon in his paragraph 3 avers that the voting, counting and announcement of results went on well and the petitioner obtained 558 votes, 1<sup>st</sup> Respondent obtained 027 votes and Wakapi Fred obtained 03 votes and 16 votes were invalid and that all agents of the candidates signed the declaration of results forms reflecting the aforementioned results. That this very witness avers that the voter turn up was good /high because there was good mobilization by the candidates and their campaign agents.

Counsel contended that the evidence of Wantsusi Simon is corroborated by the evidence of Wantsusi Ronald who was an agent of Kwaka Monica at the polling station and Wanagwe Jerimiah who was the presiding officer at the polling station, also supported by Wambala Julius, Wokwana Peter the agent of the petitioner and Wopowa Titus who was the election constable at the polling station who all say that the voting , counting and announcement of results at Wekele polling station went on well and that



there was a good /high voter turn up at this polling station which evidence is uncontroverted.

Counsel also asked court to find the evidence of 1<sup>st</sup> Respondent as unreliable as he admits in his answer to the petition paragraph 5 that the results of Wekele were canceled and thus not tallied, while his paragraph 5 of the affidavit in support to the answer he avers that the results of Wekele were missing.

Counsel submitted that since the fact of cancellation of results is an agreed fact on record, the Returning officer had no reason to cancel the results.

Counsel in addition contended that the Returning officer's evidence that the results of Wekele were missing and therefore opened the ballot box but didn't find any declaration form is defeating and unsustainable. That there is no evidence of I.P Ebiot a police officer who is purportedly witnessed the opening of the ballot box. That the only evidence on record is that of the 1<sup>st</sup> Respondent who admits that the results were canceled and the evidence of the Returning officer himself.

Counsel further contends that the evidence of the 1<sup>st</sup> Respondent's agents(witnesses ) that is Wanyila Joseph and Khaukha in an attempt to show violence at Wekele polling station during election as they contend to have been forced to sign the DR forms is partisan in nature that it requires corroboration which is not there. That there is even no evidence that they reported to police about the incident of violence. Counsel thus contends that as per the affidavit of Mr. Wapowa Titus, the evidence at this polling station was peaceful and conducted transparently.

That there is no evidence in the tally center that the Returning officer did not find the results of Wekele polling station.

Counsel while citing S. 135 of the Local Government Act which provides hat the Returning officer shall immediately after the addition of all the votes of each candidate which are contained in the declaration of results form, contended that the Returning officer has a duty to tally the results of each candidate which are contained in the declaration of results forms. That the

Returning officer did not add the results of Wekele polling station which were available but without any legal justification for cancelling.

That the Returning officer is required under S. 135 ( 2) c of the Local Governments Act to transmit to the electoral commission the declaration of results forms from which the official addition of votes was made. That he admitted that he transmitted the declaration of Results forms from which he acknowledged was certified by the secretary of Electoral Commission.

Counsel thus wondered how the declaration for results forms from Wekele reached the secretary Electoral Commission and certified thereof if they were missing.

Counsel contended that there is sufficient evidence that the results of Wekele polling station were available at the time of tallying but the Returning officer without any legal justification canceled the same.

Counsel also contended that the declaration form of Wekele was dully signed by all agents of the candidates including Wanyira Joseph, the agent of the 1<sup>st</sup> Respondent and also the presiding officer Mr. Wanagwe Jeremiah.

Counsel further submitted that it is settled Law that once the declaration form is signed by the agents of the candidate, such declaration form is valid and forms the basis of declaring results and the candidate cannot deny those results since they are certified by the agent as the true results.

Counsel also refers to the affidavit of Mr. Wayira Joseph the agent of the 1<sup>st</sup> Respondent who counsel states that in paragraph 4 of his affidavit states that elections were conducted and carried out smoothly until closure of the process but again in paragraph 6 avers that the mob dictated and altered the election results for Wekele polling station in favor of the Petitioner, counsel contends that this evidence is lacking and is just an afterthought as the witness does not disclose how many votes each candidate had obtained before the mob altered the same in favor of the Petitioner.



Counsel contended further that the pressing officer of Wekele polling station, Mr. Wanagwe Jeremiah in paragraphs 6 and 7 of his affidavit in support of the petition avers that after filling all the necessary documents, he put one declaration form in the ballot box, one in the tamper proof envelop and submitted the same to the sub county supervisor at the sub county and that upon submission, the supervisor received the same and that he saw the supervisor take the same to the tally center. That this evidence is uncontroverted.

Counsel also while referring to Annexure 'C' a declaration form for female councilors for Wekele polling station which shows that the total number of male who voted were 291 and for female 313 totaling to 604 people who voted just like annexure 'B' for L3 Chairman which shows female as 313 and male 291 totaling to 604 people who voted.

Counsel contended that as per declaration of results form as attached to the Petitioner's affidavit in support of the petition, it shows that the turn up in all the polling stations was above 70% and therefore not low as alleged by the Respondents.

Counsel went on cite the Law on effect of agents signing declaration forms as discussed in the case of **Halima Nakawungu Vs Electoral Commission and Susan Namaganda HCT Electoral Petition No.2/2011** where Court at held that when an agent signs a declaration form, he is confirming the truth of what is contained in the declaration form. He is confirming to the principal that this is a correct result of what transpired at the polling station. That the candidate in particular is therefore stopped from challenging the contents of the form because he is the appointing authority to support his contention.

Counsel in the instant case thus contended that the agents of the 1<sup>st</sup> Respondent signed the declaration form which contains the results of 558 for the petitioner and 027 for the 1<sup>st</sup> Respondent. That there are no other results on record.

Counsel thus invited Court to find that the Electoral Commission didn't comply with the Electoral Laws governing tallying as provided for under S. 135 (1) of the Local Government Act and he unfairly denied the Petitioner

votes from Wekele polling station and that he unfairly denied the Petitioner the votes.

In reply to this issue, Counsel for the 1<sup>st</sup> Respondent while responding to the Petitioner claims that he should have been the winner but that the results of Wekele polling station which were wrongly cancelled by the Returning officer of the 1<sup>st</sup> Respondent, argued that the 2<sup>nd</sup> Respondent's official rightly cancelled the results for the said polling station because during the tallying process, the results of Wekele polling station were neither in the tamper proof envelop nor in the black ballot box which position the 1<sup>st</sup> Respondent agrees with.

That the only difference is that the Returning officer says that the said results were neither canceled nor nullified.

Counsel also observed that the evidence relating to what happened at Wekele polling station is irrelevant because the whole case is centered on what happened at the tally center.

That the evidence the Petitioner relies on what happened at Wekele polling station is hearsay as he does not state that he was present during the voting, counting of the votes and sealing of the counter proof envelopes as well as the ballot boxes and that court should find so.

Counsel also contended that the affidavits of Wantsusi Simon, Wantsusi Ronald , Wanangwe Jerimiah , Wamboba Julius , Wokwona Peter and Wampowa Peter which the Petitioner attempts to rely on is not admissible by way of affidavit because; the affidavits are not attached to the affidavit of the petitioner as his source of information, the said affidavits do not show in which capacity the deponents swear them yet the Law requires so, they are contrary to the Illiterates Act which requires certification of affidavits deposed by illiterate persons who drew the documents and yet all the deponents in this case seemed illiterate apart from Wanangwe Jerimiah and that Wapowa Titus who alleges to be a police Constable at Wekele polling station attaches his alleged appointing letter which is from Buwasu polling station which is not in issue.



Counsel thus contended that since from his above explanation in regard to the affidavits and what happened at Wekele polling station they are of no effect and as such he would not bother to reply to them.

Counsel also contended that the Petitioner's evidence on what happened at the tallying centre was not corroborated as the Petitioner abandoned the affidavits of Kitongo David Mafabi, Masete John, Khwaka Monica who claimed in their affidavits to have been present at the polling station.

Counsel in his submission contended that the onus of proof was on the Petitioner to prove that the 2<sup>nd</sup> Respondent did not comply with the Electoral Laws in tallying of the results of the said election and that the 1<sup>st</sup> Respondent was wrongly declared winner because of the alleged noncompliance on a balance of probabilities.

While relying on the case of **Col. Rtd Dr. Kiiza Besigye Vs Yoweri Kaguta Museveni SC Presidential Petition No. 1 of 2011**, Counsel for the 1<sup>st</sup> Respondent contended that for the Petitioner to succeed on this ground, he had to prove that; the 2<sup>nd</sup> Respondent went against the specific Law in the tallying of the results of the disputed election, the 2<sup>nd</sup> Respondent wrongly and unlawfully declared the 1<sup>st</sup> Respondent as the winner of the disputed election, the said election was not free and fair, there was no transparency in the said election and that the said decision of the 2<sup>nd</sup> Respondent is not a reflection of the majority decision.

Counsel contended that on a balance of probability the Petitioner had failed to prove that as in his affidavit under paragraph 4, the Petitioner states that the elections were conducted in a transparent manner and thus free and fair.

That the Petitioner woefully fails to show by way of evidence that that the provisions of the Electoral Law which the 2<sup>nd</sup> Respondent and or its Returning officer contravened during the tallying of results.

Counsel for the 1<sup>st</sup> Respondent in his further submission contended that while the Petitioner's evidence is that during the tallying process, the Returning officer of the 2<sup>nd</sup> Respondent opened the tamper proof envelop,

read the results for Wekele polling station and said that he did not believe the turn up as per the declaration form and then canceled the same, but that during cross examination, the petitioner said that he got he got 26 votes at Buwabwala S/C polling station and that in the rest of the polling stations he got 715 votes. And that he was present at the tallying center on the 9<sup>th</sup> March, 2016, that the tallying was done at 9;55 am, on further cross examination that the tallying was done at 3.59am and that on reexamination , he said the tallying was done at 3;50am, that the petitioner further states that there was no security officer during tallying and that while present, no ballot box was opened.

In regard to the petitioner's submission in rejoinder that he was given declaration of results form for Wekele polling station by the 2<sup>nd</sup> Respondent and it is evidenced as annexure "B" , counsel contended that the Returning officer in this regard in his cross examination stated that much as the Petitioner attached a purported declaration form for Wekele polling station, he did not see it during the tallying nor was it one of those he forwarded to the Electoral Commission Headquarters.

Counsel thus contended that if the evidence of the two sides is juxtaposed, the Respondent's evidence is more believable because the petitioner did not provide a tally sheet to prove the votes he got in Wekele and thus the figures in court were not corroborated, that the petitioner did not fully appreciate what was going on in the tallying center if he was there as per his evidence, that the Petitioner claims that the Returning officer opened the tamer proof envelop at Wekele polling station and canceled its results lacks corroboration and he neither shows that he protested the decision by reporting it to the security personnel and that he calls no witness to this effect not even his agents at the tally room as required in elections.

And that moreover the copy the Petitioner attempts to rely on is a photocopy of the certified copy of the declaration form for Wekele polling station to show that the Returning officer had that form at the time he tallied the result. Counsel thus contended that whereas under **S. 64 (f) of the evidence Act** allows original documents in category of the declaration form to be proved by way of certified copy, it does not extend to photocopies of a certified copy. And there was no cogent proof whether



the document was from Electoral Commission Headquarters as the Returning officer in his cross examination stated that all documents going to the Headquarters had to bear his signature to avoid smuggling in documents but that this one did not bear his signature and that there was also no proof of payment of certification fees.

Counsel further contended that the same fate that happened at Wekele polling station also happened at Buwabwaala S/C Head quarters polling station where the Respondent got more votes than the Petitioner thus showing that there was no foul play against the petitioner.

Counsel thus contended that failure to include missing results on the tally sheet does not point to unfairness or want of free elections or want of transparency or failure to reflect the will of the majority. And that under such circumstances, one cannot say that the first Respondent was wrongly declared winner.

Counsel therefore contended that the Petitioner had failed to prove the 1<sup>st</sup> issue in his favor and that the same should be resolved in favor of the 1<sup>st</sup> Respondent.

In his response counsel for the 2<sup>nd</sup> Respondent on this issue contended that the 2<sup>nd</sup> Respondent maintained that the 1<sup>st</sup> Respondent was lawfully declared as winner of the election for Buwabwala subcounty Chairperson.

Counsel contended that from the record's point of view and from the Petitioner's evidence in Chief, the crux of the Petitioner's grievance strictly relates to failure to tally results for Wekele polling station.

That he alleges that the Returning officer unlawfully canceled results for Wekele polling station where he had scored 558 votes wherefrom the non-inclusion denied him victory. That he further claimed that had the Returning officer included he said results, he would have won.

Counsel while Responding to the said allegations by the Petitioner contends that the 2<sup>nd</sup> Respondent through the evidence of Martin Musoke the Returning officer, dated May, 2016 deponed that he did not tally results for Wekele polling station because they couldnot be found in the tamper proof

envelop neither were they available in the black box having opened the same in the presence of AIP Ebiot and that this evidence is uncontroverted.

Counsel further contended that during cross examination, the Returning officer clarified to Court that the Declaration of Results form for Wekele polling station submitted by the Petitioner was a strange document to him. That he denied ever transmitting the same to the Secretary Electoral Commission for purported certification.

That the Returning officer further explained to Court that the practice of transmission of results from the District Electoral Commission head office entails signing on each page of the DRF to avoid possible forgeries and or alterations. That this evidence casts doubt on the authenticity and admissibility of Declaration of results form for Wekele polling station.

Counsel for the 2<sup>nd</sup> Respondent further while citing **section 135(1) of the Local Governments Act** which provides that;

*" Each Returning officer shall, immediately after the addition of all the votes for each candidate or after any recount , declare elected a candidate who has obtained the largest number of votes by completing the return in the prescribed form."*

Contended that in this case the 2<sup>nd</sup> Respondent's Returning officer , tallied only results that were presented to him by the polling officials at the tally center, after which the declaration forms were transimitted to the Eiectoral Commission Headquarters as required under this section and that this did not include results for Wekele polling station.

Counsel in further submission contended that the election cycle is couched in such a way that each stage has statutory officers and duties to be performed by each and also time frames within which prescribed election officials ought to act.

That in the matter at hand, the Returning officer gave a clear and unequivocal testimony of what transpired during tallying and why he did not include results for Wekele polling station.

That the reasons for non-inclusion as contained in pargraph 4 of the Affidavit of Mr. Musoke Martin the Returning officer are that during tallying,



the Declaration of Results form in issue couldnot be found in both the tamper proof envelop and the black ballot box.

That that is why the Returning officer upon conclusion of tallying of the available results rightfully declared the 1<sup>st</sup> Respondent as winner of the election without considering Wekele polling station results. That the Returning officer wasn't barred from declaring the winner of the election because of the missing results.

Counsel submitted that as the Law bestows respective electoral officials with specific duties, the Returning officer is the only official mandated to tally results and declare a winning candidate. And that the Law clearly stipulates sources of election results to be tallied and declared these being results obtained from a tamper proof envelops supplied to the Returning officer by the Presiding officer in accordance with section 136 of the Local Governments Act or in exceptional circumstances results obtained from sealed ballot box.

Counsel also submitted that in the absence of results obtained from the primary source being the Returning officer, Court shouldn't be strained to fish for alternative DR forms in order to ascertain a winning candidate.

Counsel thus called upon Court to find that the DR forms of Wekele polling station presented by the Petitioner be deemed strange and irrelevant at this stage.

That considering the said Wekele polling station results would amount to re tallying results for Buwabwala sub county Chairperson an act which would impune the Respondent's victory.

Counsel thus submitted that Court should find this issue in the negative.

In rejoinder to this issue, Counsel for the Petitioner contended that the petitioner's complaint in the petition is that his results of Wekele polling station were canceled by the Returning officer in the tallying center and was not considered in the final tally and that this was an agreed fact during scheduling. And that the 1<sup>st</sup> Respondent in his paragraph 5 of his affidavit also stated that the results of Wekele polling station were canceled and thus not tallied. And thus the parties are bound by their pleadings.

That it is surprising that the Respondents deny this fact and contend that the results were missing.

Counsel also while citing the case of Kakooza John Baptist Vs Electoral Commission & Anor SC Election Petition Appeal No. 11/2007, contended that where a fact is admitted, it need not be proved unless Court directs so before the hearing commences.

That the only question is whether the Returning officer was justified in canceling the results.

Counsel contended that there is no other evidence on record showing the reasons that the Returning officer advanced for cancellation of the results a part from the fact that prior to the tallying, he had received information that the voter turn up was poor and could not believe any results showing high turn up of voters. That he revealed this during cross examination and that this is the very reason that the Petitioner states that the Returning officer relied on to cancel the results of Wekele.

Counsel thus submitted that this was not a reasonable and justifiable reason to require cancellation of the results since there was is no evidence that the Returning officer received any complaint from the candidates or their agents contesting the voter turn up.

That the Returning officer had a declaration form signed by the presiding officer and the agents of the candidates. And that there was no complaint or reservation on the said declaration form.

Counsel further contended that it is illogical, unbelievable and unsustainable for the Respondents to aver that the Results of Wekele polling station were not available at the time of tallying and yet the petitioner applied for the declaration of Results form from of the polling stations in the sub county and the secretary Electoral Commission certified the same and handed them to him including Wekele polling station. Counsel thus contended that by this the Returning officer had the results of Wekele and canceled them without Justification.

Counsel contended that the Respondents had not challenged the declaration form dully certified by the secretary Electoral Commission and



duly signed by the presiding officer and agents that the agents of the 1<sup>st</sup> Respondent agreed that they signed the Declaration forms and therefore certified the Results therein.

Counsel thus cited the case of ***Hon Oboth Marksons Jacob Vs Dr. Otiam Otaala Emmanuel Court of Appeal Election Petition Appeal No38/2011***, where the Court of Appeal at page 23 of the Judgement stated that, *"through periodic elections, the citizens make their choices as to how they are to be governed and that it follows therefore that if the choices are to be genuine and credible, the exercise of carrying out those choices must be through ways and means whereby rights of the individual voters are protected and there is assurance that each vote is counted and reported properly."*

Counsel further contended that in that case under pages 24 and 24, the court held that;

*"for a free and a fair election, no one candidate should have unfair advantage over others and there must be no or anything to take away the will of the people. That fairness and transparency must be maintained. Those committing Electoral wrongs must be punished and election disputes resolved fairly and speedily."*

**That the court in that case also noted that,**

*" the Declaration of Results forms in question (6 polling stations) were signed by the respective presiding officers as well as a set of two agents for the appellant and also for the Respondent. It follows that if anyone of those declaration forms was a forgery, then a party to the petition would straight away point away the forgery. None did so"*

That court noted at pages 28 & 29 that, *" the declaration forms were certified by Electoral Commission and an authentic true copy and that court held that it can therefore safely be concluded that as at the time of the trial of the Petition the Appellant, the Respondent and the Electoral Commission were in possession of the declaration forms and that evidence of this was placed before the trial Judge"*

**Court further at page 32** held that "

*the declaration of results provided by the Appellant was and is valid evidence as to the determination of the results of the election of this polling station . At the Trial the Petitioner and the Electoral Commission did not contest the results.”*

Counsel thus contended that from the above authority, which case is binding to this Court, it is very clear that where the declaration forms are dully signed, by the presiding officer, agents of the candidates and there is no complaint by the candidate or their agents, then such declaration form forms the basis upon which Court can determine the winner of the election. That the court cannot disregard the declaration form which contains the results of the polling station and court should look at the reasons given by the Returning officer to cancel the results.

Counsel contended that the results obtained from elections that were free and fair as per the evidence on record at the polling station should not be disregarded by the Court for determination of the will of the majority voters in an election.

Counsel thus invited Court in view of the authority of Hon. Oboth (supra) to rely on the certified copy of the declaration form to determine the valid winner of the LC3 Chairperson for Buwabwala Sub County.

That the exclusion of the results of Wekele polling station where the petitioner got 558 votes and the 1<sup>st</sup> Respondent 27 votes affected the final result in a substantial manner.

Counsel contended that the results of Wekele polling station as contained in Annexure 'B' to the Petitioner's affidavit in rejoinder and that all the agents of the candidates signed and also dully signed by the presiding officer which is a certified copy by the Electoral Commission given to the petitioner upon application and payment of fees.



That as such the petitioner won the 1<sup>st</sup> Respondent with a vote margin of 446 votes.

The law with regard to voting, tallying and declaration of results is contained in section 132, 133 and 135 of the, Local Government Act

According to section 133(1) votes cast at every polling station, shall be counted at the polling station immediately at the polling station after the presiding officer declares the the polling closed and the votes cast in favour of each candidate shall be recorded separately in accordance with this part of the Act.

(2) subject to section 133, no votes shall stay uncounted overnight,

And where required, the presiding officer shall provide lanterns or any other source of light for the purpose of counting the votes.

133 where counting, tallying or recount of votes is interrupted by riots or violence or reasonable cause the presiding officer shall adjourn the counting tallying or recounting to the next day and shall immediately inform

- (a) In the case of the presiding officer, the returning officer or
- (b) In the case of the returning officer, the Electoral Commission of that fact

Where voting is adjourned under this section, the ballot boxes shall be kept in safe custody and the candidate or his agents should be present to keep watch on the boxes.

#### On DECLARATION OF RESULTS

In section 135 of the same act, it is provided that each presiding officer after the addition of all the votes for each candidates. Or after every recount, declare the candidate who obtained the highest votes by completing the return in the prescribed form.

In this case, the petitioner alleged that the elections were conducted in non-compliance with law. As the results of Wekele Polling Station were cancelled.

The respondents raised three answers in reply to this contention, one is that when the ballot boxes were opened they were found empty, secondly that while counting was going on violence broke out when the petitioner arrived with some thugs and forced the returning officer and agents of candidates present to change the results in the petitioners favor and that when the results arrived at the returning office noticed the turn up was high yet he had been informed by unnamed persons that the turn up at Wekele was low.

However, during scheduling both parties agreed as a fact that the results of Wekele polling station were cancelled.

There is evidence that agents and the presiding officer signed declaration of results forms and were submitted to the Electoral Commission which acknowledged receipt of the forms 9 (Annexure 'B').

There was also evidence that voter turnout was high in Wekele on polling day because of good mobilization by the candidates and their campaign agents. by the evidence of Wantutsi Simon who was an agent

Namono Kanahn A Candidate for Woman Councilor For Wekele,

, Wanagwe Jeremiah who was the presiding officer at the polling station and also evidence of Wambala Julius , Wokwana the agent of Wopowa Titus who was the election constable at the polling station who all say that the voting , counting and announcement of results of wekele polling station went on well and there was good/high turn out at this polling station. that evidence was not controverted. Besides that IP Ebiot, police officer who supposedly witnessed the opening of the ballot boxes which were allegedly found empty did not file any affidavit to that effect



In addition, while the respondent's allege that there was violence perpetrated by the petitioner personally with his agents/gang, whereby they forced the returning officer and agent to sign/ altered DRFS. But there is no evidence that this matter was neither reported to police, neither did the returning office officer report this violence to the E Electoral Commission under Section 133 (1) (b) of the Local Government Act.

Above all it was agreed as fact during scheduling that the results of Wekele were cancelled and court did not direct that this fact be proved during the trial.

The respondents cannot now at the time of submissions deny this fact, I am fortified in this finding by the case by the case of Kakooza John Baptist Vs, Electoral Commission And Anor Sce/P Appeal no 11/2011 where it was stated that once a fact is admitted at scheduling

It need not be proved unless court directs so before hearing.

The above shows that there were inconsistencies and contradictions in the evidence of the respondents which affects their credibility.' it is trite law that inconsistencies in evidence if minor can be ignored but if major affects the credibility of witnesses and their truth fullness. The inconsistencies here were major.

As regards the allegation that the results were cancelled because the Returning Officer could not believe that there was high voter turnout in Wekele, According to annexure 'C', the declaration of results for female councilors of Wekele, at Wekele polling station, it shows the total number of males who voted were 291 and 313 females who voted totaling 604 people and in annexure 'B' for LC3 chairman shows 313 females and 291 males voted showing a total of 604 people who voted,

turnout which shows it is not as low as the respondents wished court to believe besides that the agents signed the DRFS and they cannot now wriggle out and claim they did not sign them.

in any case in the cases of Halima nakawungu v/s electoral commission and susa maganda (supra), it was held by court that *when an agent signs a declaration of results form, he/ she is confirming to the principle that this*

*is the correct result and the candidate is stopped from challenging the contents of the form because he is the appointing authority.*

In view of the above it is courts considered opinion that the alclaim that the results were cancelled because of high voter turn out is amere afterthoght as the voter turn out for the female councilor and the LC3 chairman in the same polling station was the same but the returning officer unjustifiably cancelled those of the chairman LC3.

As regards cancellation of the result and noncompliance with the law, at scheduling, parties agreed as a fact that the result of Wekele polling station was canceled. In the Collins Thethras English Dictionary A-Z, at page 90, the word cancelled is defined to mean call off, drop, forget, abolish, abort, deal away with, revoke or forget.

In the context of this petition the returning officer canceled/dealt with the results of Wekele polling station.

Justice Benjamin Odoki CJ (as he then was) in the case ***Col. Rtd Dr. Kiiza Besigye Vs YK Museveni Election Petition No.1 of 2001***, had this to say about noncompliance with the Law and free and fair elections;

*"That elections must guarantee accuracy in the counting of votes and that means that the choices of the people must be protected as enshrined in the Law. Each vote cast is counted and reported properly."*

In the instant petition the people of Wekele voted and their votes were canceled negating the accuracy in the counting of the votes and violating the principles of free and fair elections, disenfranching the voters of Wekele and violating their fundamental rights to vote for leaders of their choice contrary to Article 59 of the Constitution.

In those circumstances, it is the opinion of Court that the Petitioner has proved to the satisfaction of the respondents did not comply with the electoral laws in tallying the results.



**Issue No. 2: If so whether this affected the results in a substantial manner?**

In regard to this issue, Counsel for the Petitioner in a bid to discuss what amounts to a substantial manner cited the case of Toolit Simon Aketcha Vs Oulanya Jacob L'okori & Another Court of Appeal Election Appeal No. 19/2011 where the Court of Appeal at pg 16 referred to the case of Dr. Kiiza Besigye of 2001 where it was held that in order to assess the effect of non compliance, the quantitative tests were relevant and that to evaluate the whole process of election to determine how it affected the result and then assess the degree of the effect. That in this process of evaluation, it cannot be said that the numbers are not incompetent just as the conditions which produced those numbers.

Counsel submitted that the petitioner in the instant case under paragraph 8 of his affidavit in support shows that he obtained 715 votes and the 1<sup>st</sup> Respondent 800 votes and the 1<sup>st</sup> Respondent was declared winner on the basis of these results excluding Wekele where the Petitioner got 558 votes and 1<sup>st</sup> Respondent 027 votes.

That in paragraph 15 of his affidavit, the Petitioner contends that if you add his 715 with votes to 558 votes, he gets 1273 votes and when you take the 1<sup>st</sup> Respondent's 800 votes and add the 027 votes obtained at wekele he gets 827 votes bringing the margin between the petitioner and 1<sup>st</sup> Respondent to 446 votes.

Counsel further contends that the Petitioner alleges that even if the results of Buwabwala sub county headquarters polling station where the petitioner got 026 votes and the 1<sup>st</sup> Respondent 280 votes which are also missing on the tally sheets are also to each of them, the Petitioner would still win the 1<sup>st</sup> Respondent.

Counsel thus contended that if you add the 1<sup>st</sup> Respondent's 800+27of Wekele +280 of Buwabwala, sub county polling stations he gets 1107 votes and when you add the Petitioner's 715 + 558of Wekele +026 of Buwabala Sub County he gets 1299votes making a margin of 192 votes. That therefor either way the petitioner would become winner.

By the Returning officer canceling and refusing to include the results of Wekele polling station where the petitioner obtained 558 votes against the 1<sup>st</sup> Respondent's 27 votes this affected the results in a substantial manner because he got the majority votes but was denied to win.

Counsel thus prayed that Court finds that the failure by the Returning officer to include the results of Wekele polling station affected the results of the election of LC3 Chairman of Buwabwala Sub County.

In response to his issue, Counsel for the 1<sup>st</sup> Respondent submitted that in the absence of the tally sheet before Court, there is no proof that any decision of the Returning officer affected the results in a substantial manner. That besides that there is no proof of wrong doing by the Respondents to warrant the success of the Petitioner on this issue.

For the 2<sup>nd</sup> Respondent on this issue, Counsel contended that the Petitioner has failed to substantially prove his case to the satisfaction of Court as set up in the case of Kizza Besigye and invited Court to find this issue in the negative.

In his rejoinder, Counsel for the Petitioner contended that That according to annexure 'A' to the petitioner's affidavit in support of the petition which is a gazette published upon which the 1<sup>st</sup> Respondent was declared winner with 800 votes.

That it is an undisputed fact that the petitioner got 715 votes and 1<sup>st</sup> Respondent 800 votes.

That the results on the certified declaration form of Wekele polling station for the petitioner are 558 votes and the 1<sup>st</sup> Respondent 27 votes.

That therefore if you add 715 to 558 =1273 votes for the Petitioner and when you add 800 + 27 =827 votes for the 1<sup>st</sup> Respondent.

In the instant case the petitioner had 715 votes and obtained 558 votes at Wekele polling station. While the first respondent had 800 but obtained 27 votes at Wekele polling station.

If you take 715 votes which the petitioner had and add the 558 obtained at Wekele but were unjustifiably cancelled, he would have obtained 1,273 votes



while the second respondent who had 800 votes if the 27 he obtained in wekele are added , he would get 827 votes bringing the margin between the second respondent and petitioner to 446 votes,

According to section 135(1) of the Local Government Act, each returning officer is required to immediately after the addition of all votes for each candidate declare the candidate who has obtained the largest votes as the winner of the elections, by filling the return in the prescribed form.

The second respondent claimed that he also lost 280 votes which were not added to his votes, however this was not raised in his pleadings and counsel knows very well that parties are bound by their pleadings but even if those votes are added to his votes, the petitioner would still have higher margin to him.

In view of the above court is of the considered view that the noncompliance of the law did affect the result in a substantial manner.

***1 Issue No. 3: Whether the Petitioner was the winner of the said election?***

Counsel for the Petitioner submitted that having established that if 558 votes denied to him by the Returning officer had been included in the final tally, he could have obtained 1273 votes and the 1<sup>st</sup> Respondent 827 votes and therefore got the majority votes making the margin of 446 votes.

Counsel thus submitted that the Petitioner got the largest number of votes and in accordance with section 135 of the Local Governments Act, the Returning officer ought to have declared him the winner.

Counsel thus invited Court to find that the Petitioner was the winner of the I.C3 elections Buwabwala subcounty.

The 1<sup>st</sup> Respondent on this issue contended that in the absence of a tally sheet in Court as well as declaration forms in all polling stations dully paid for and certified by the 2<sup>nd</sup> Respondent, there is no basis for the Court to hold that the Petitioner was the winner of the said elections.

The 2<sup>nd</sup> Respondent on the other hand submitted that the 1<sup>st</sup> Respondent having obtained a larger number of votes upon tallying compared to the

petitioner , qualified him to be declared a winner and that the Returning officer Rightly did so.

In rejoinder counsel for the Petitioner contended that the petitioner got the majority votes in total and was the person voted/elected by the Majority votes of Buwabwala polling station. That if it was not for the unfair and illegal exclusion of the results of Wekele polling station, the Petitioner would have won the said election.

In the instant petition the petitioner has established that the presiding officer did not include the results of Wekele polling station unjustifiably in tallying the results for various reasons. If the 558 excluded are added to the 715 votes he had obtained, he would have obtained 1273 votes as compared to the 800 and 27 votes obtained by the second respondent.

In the Law under Section 135(1) of the Local Government Act, the Petitioner who obtained the highest votes should have consequently been declared the winner of the elections

In those circumstances court is compelled to find and court finds that the Petitioner other than the Petitioner should have been declared the winner of the elections for LC3 chairperson Buwabwala sub county Manafa District.

#### Issue 4 : ***Remedies available***

Counsel on this issue while citing ***S. 142(3) (b) of the Local Governments Act***, which provides that after due inquiry, the Court hearing an election Petition may declare a candidate other than the candidate declared elected earlier to have been validly elected.

And S. 142(5) b (i) & (ii) of the Local Governments Act which provides that,

If at the conclusion of the trial of the Election Petition , the Court determines that the 1<sup>st</sup> Respondent was not dully elected but that some



other person was or is entitled to be declared duly elected, the Respondent shall be ordered to vacate his seat and the Court shall notify the Electoral Commission and the speaker or Chairperson of the relevant Council of its determination and the Commission shall thereupon, by notice published in the gazette declare that other person duly elected with effect from the date of determination by the Court.

Prayed that this Court be pleased to Order the 1<sup>st</sup> Respondent to vacate the seat of LC3 Chairman of Buwabwala Sub County, declare the petitioner the duly elected person and order the Electoral Commission to publish in the gazette the Petitioner as the duly elected Chairperson of Buwabwala LC3 Sub County.

Regarding this issue, Counsel for the 1<sup>st</sup> Respondent contended that the Petitioner has failed to prove his case on a balance of probabilities and he thus prayed that the petition be dismissed with costs to the 1<sup>st</sup> Respondent

On the other hand Counsel for the 2<sup>nd</sup> Respondent contended that from the foregoing submissions and evidence presented, the petitioner is not entitled to remedies sought having failed to present cogent evidence in support of the petition.

That the petition should accordingly be dismissed with costs.

The Petitioner in his rejoinder prayed that the petition be allowed with costs and the Petitioner be declared the winner of the Election of LC3 Buwabwala Manafa District.

The petitioner having obtained the majority votes should have been declared winner.

Consequently, court makes the following orders

The petition is allowed

The 1<sup>st</sup> Respondent is hereby directed to vacate the office of Chairperson LC3 of Buwabwala Manafa District.

(3) The 2<sup>nd</sup> Respondent is directed to gazette the Petitioner as the duly and lawfully elected Chairperson LC3 Buwabwala Manafa District.

(4) The Respondents are to pay the Petitioners costs

The parties have a right to appeal against the judgement of the court.

  
.....  
**MC OGULI OUMO**

**(JUDGE)**

**8 / 09 / 16**

***Present***

- (1) Mr. Mutembule Yusuf- counsel for the Petitioner
- (2) Petitioner in court
- (3) First Respondent in court
- (4) Musolwa David holding brief for second Respondents.