

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT,

NO. 17 OF 2005 (AS AMMENDED)

AND

**IN THE MATTER OF THE PARLIAMENTARY ELECTIONS FOR
NANSANA MUNICIPALITY WAKISO DISTRICT**

ELECTION PETITION NO. 004 OF 2016

HON. KASULE ROBERT SEBUNYA ::::::::::::::::::::PETITIONER

VERSUS

1. WAKAYIMA MUSOKE NSEREKO }

2. ELECTORAL COMMISSION }

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

BEFORE: HON. JUSTICE VINCENT OKWANGA

JUDGMENT

The Petitioner, Kasule Robert Ssebunya, was one of the six candidates who contested for the Nansana Municipality Constituency, Wakiso District in the February 18th 2016, parliamentary elections in which the first respondent emerged winner with 25,053 votes. The second respondent declared and gazetted the 1st respondent as the winner with 25,053 votes and the petitioner was the runner-up with 23,415 votes after the final tally.

During the tallying process, the Declaration of Results (DR) Forms for some twenty four (24) different polling stations within the constituency were found missing from the respective tamper proof envelopes and or the

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led black boxes and the Returning Officer, Wakiso District proceeded to cancel the results from all those twenty four (24) affected polling stations and consequently those results were not included in the final tally.

The petitioner filed this petition before this Hon. Court challenging the election of the 1st respondent as directly elected Member of Parliament for Nansana Municipality Constituency on the grounds, among others, that the first respondent was nominated irregularly, that he is not a registered voter as his name does not appear on the voter's register; that the latter does not have the formal minimum educational qualifications of Advanced Level Standard or its equivalent.

In his petition, the petitioner contends that the election of the first respondent as the Member of Parliament for Nansana Municipality was null and void or invalid on the ground that the latter was not qualified to stand as a Member of Parliament as provided under Article 80(1) (b) (c) of the Constitution of the Republic of Uganda, and further;

- (i) That the first respondent, who was nominated as **Wakayima Musoke Nsereko** is not a registered voter and that his name does not appear on the voter's register.
- (ii) That the first respondent does not have the required formal minimum education of Advanced Level Standard or its equivalent.

(iii) That the first respondent presented academic papers of another person, **Musoke Hannington** issued to him on 14/10/2015 by the Uganda National Examinations Board (UNEB).

(iv) That the first respondent was nominated as **Wakayima Musoke Nsereko** and the academic documents presented in support of his nomination are in the names of **Musoke Hannington**.

(v) That the first respondent who is known as **Wakayima Musoke Nsereko** is impersonating **Musoke Hannington** and fraudulently trying to assume another person's name in order to use his academic results and qualifications for the Ordinary and Advanced levels education.

2. The Petitioner further contends and avers in his petition that the second respondent who is a body duly mandated to conduct an election in compliance with the law, breached its mandate and authority when it failed to bar or stop the 1st respondent from participating in the elections of 2016 in accordance with the Constitution, Electoral Commission Act and the Parliamentary Elections Act, respectively.

3. That the electoral process in Nansana Municipality Constituency during the voting, counting and tallying of votes was characterized by acts of unfairness, lack of transparency and contrary to the provisions

of the Constitution, Electoral Commission Act and the Parliamentary Elections Act.

- i) That, contrary to section 12(1)(e) and (f) of the Electoral Commission Act, the 2nd respondent failed to ensure that the electoral process was free and fair and conducted under secure conditions, when;
 - a) The petitioner's agents were chased away from the polling stations; and they were not allowed to sign Declaration of Results (DR) forms after the elections.
 - b) The Presiding officers (PO) required agents to sign before vote counting and close of polling, contrary to the law.
 - c) The Presiding Officers altered and falsified results they had declared at polling stations on the DR Forms in favour of the 1st respondent.
 - d) The Returning Officer (RO) tallied different results from those on the DR Forms in favour of the 1st respondent.
 - e) The 2nd respondent hired incompetent persons to preside over the elections and the election results were entered in the Luganda language instead of English.
 - f) That the 2nd respondent employed the 1st respondent's employees at the Nansana Town Council as presiding officer(s) in the constituency.
 - g) That contrary to sections 51, 53, 76, and 78 (a) of the Parliamentary Elections Act, 2005, the 2nd respondent's officers did not transparently tally the results and some of the results were

interchanged or switched, altered or falsified by different or wrong results for the candidates on the DR Forms.

- h) That the Returning Officer used the first respondent's DR Forms which had been falsified and claimed that over thirty (30) DR Forms were missing.
- i) That different and falsified results were entered on the result tally sheet and DR Forms have continued to change as follows (sic); at the time of declaration of the 1st respondent, he was declared winner with 22,292 votes (initially) and in the Gazette of 03/03/2016 the 1st respondent has 25,053 votes.

The Returning Officer failed to declare or include results of over 24 polling stations and failed to give any explanation for the non-inclusion of the said results, which wrong, falsified results tallied, gave the 1st respondent victory unfairly, and he should not have been declared a winner, and above all, he is not a registered voter, nor possess the minimum academic qualifications.

The petition is accompanied by the petitioner's affidavit, that in rejoinder, other affidavits and a host of other documents attached/annexed thereto and he prays that this Hon. Court be pleased to find and declare that;

- i) The 1st respondent was not validly elected as a directly elected Member of Parliament of Nansana Municipality Constituency.
- ii) There was non-compliance with the provisions and principles of the Parliamentary Elections Act, the Electoral Commission Act, and the

Constitution of the Republic of Uganda in relation to the 1st respondent's nomination.

The petitioner having been returned second with 23,415 votes, be declared winner and validly elected under S. 63 (4) (b) of the Parliamentary Elections Act, (PEA) 2005.

In the alternative and without prejudice, the election (Parliamentary elections of Nansana Municipality Constituency of February 18th 2016), be set aside and a new election be organized.

Costs of this petition and,

- vi) Any other remedies this Hon. Court may deem just and appropriate in the circumstances.

In his answer to the petition filed on 04/04/2016, the 1st respondent denies the claims by the petitioner challenging his nomination as a candidate and subsequent declaration as winner by the 2nd respondent as being made without any basis nor substantiated by any evidence and goes on to deny any allegations of irregularities and non-compliance by the 2nd respondent in the conduct of such election in his favour, and submits that he was validly and lawfully declared as the winning candidate on the basis of the results that were ascertained and properly reflected in the DR Forms with which he has a clear winning majority of the votes which is the true reflection of the will of the people of Nansana Municipality Constituency, and that, the elections were held in compliance with the principles and provisions of the laws governing elections in Uganda, and prays that the petition be dismissed with costs. His answer to the petition is also supported by his own affidavit in support to the answer to the petition,

complementary affidavit in support and a host of other affidavits and complementary affidavits in support to the 1st respondent's answer to the petition filed on various dates respectively.

On their part, the 2nd respondent who is the Electoral Commission (EC), also denies all the allegations in the petition regarding the alleged irregular and improper nomination and subsequent declaration of the 1st respondent as the winner of that election for Nansana Municipality Constituency, and further denies any allegations in the petition that the elections in that constituency was characterized by irregularities and non-compliance with the electoral laws in Uganda and contends that the Parliamentary elections for Nansana Municipality Constituency were lawfully held and the 1st respondent was validly declared the winner, having polled majority of the valid votes (cast) in the constituency and that the petitioner has no legal basis seeking to be declared the winner of the said elections and is not entitled to any of the reliefs sought and prayed that it be dismissed with costs.

The second respondent's answer to the petition is supported by the affidavit of Bukirwa Sarah, the Returning Officer, Wakiso District, deposed to on 1st April 2016, and supplementary affidavits as well together with various Annextures and documents in support of their case. At the trial, the facts agreed to between all parties herein were as follows:

at according to the results published in the Uganda Gazette, Vol. GX No. 4, dated 3rd March, at page 165, General Notice No. 144 of 2016, entitled publication of the Parliamentary General Elections Results, 2016 (Under S. 9 (1) PEA No. 17 of 2005), (as amended), the results for the Nansana Municipality Constituency, Wakiso District, Code 052, 160 were as follows:

Musoke Nsereko Wakayima,	DP	25,053, winner
Robert Ssebunya Kasule,	NRM	23,415
Rajab Semalulu Kaaya,	FDC	18,167
Samuel James Kibanga,	Independent	6,737
Samuel Sebowo Kagulire	"	3,157
Frank Adams Mubiru	"	805

Paragraphs 1, 2, 3 and 4 of the petition are admitted by the two respondents herein as well.

The issues agreed to were as follows:

- 1. Whether or not the 1st respondent was validly nominated.**
- 2. Whether there was any non-compliance with the electoral laws.**
- 3. And if so, whether it affected the elections results.**
- 4. Remedies available to the parties.**

In his submission, Mr. Ssekana Musa, lead Counsel for the petitioner submitted that the petitioner filed this petition challenging the election of

the 1st respondent as the Member of Parliament for Nansana Municipality constituency on two grounds, namely;

That the 1st respondent was not qualified at the time of his nomination; and

Secondly, that there was non-compliance (during such election) with the laws governing elections of Member of Parliament.

Counsel submitted that the nomination papers filed by the 1st respondent in support of his nomination which were attached in a batch collectively marked as Annexure 'A' by the petitioner, show a lot of discrepancies and dubious changes in the 1st respondent's name as follows:

The person nominated in Annexure 'A' is **Wakayima** (surname), other names: **Musoke Nsereko** who is the 1st respondent.

However, within the said bundle of documents collectively marked Annexure 'A', there is a National Identification card of the 1st respondent in the name(s) of; **Musoke**, as **surname** and given name: **Hannington Nsereko**. In his answer to this petition, the 1st respondent does respond and avers that he is (the) one and the same person in all those different documents and a registered voter in the Nansana West IIB polling station, and that upon joining elective politics in 2006, and 2011, he had consistently used and been popularized by his clan and family name(s) for which he is easily identified and that Musoke Hannington and Wakayima Musoke Nsereko is one and the only person whose pattern is clearly and

consistently identifiable by his confirmation in the Anglican faith and the certificate thereof and his marriage certificate, academic documents, campaign posters since 2006 elections, National Passport, Application for National Identity Card and the National Identity card, and that the said name(s) refer to one person, being the 1st respondent who goes by, and is widely known by the said name(s). Counsel for the petitioner referred to the 1st respondent's supplementary affidavit attached to his answer to the petition which the petitioner also attaches a copy of the National Voter's Register for Nansana Municipality Constituency, Nansana West Ward, Nansana Division, Wakiso District in which the 1st respondent confirms in his supplementary affidavit in support of his answer to the petition filed on 06/06/2016, that he is the same person appearing and registered in that National Voter's Register under the name of **Musoke Hannington Nsereko**, which is the same order of name(s) that appears in his National ID Card Number 018062370.

It was submitted further for the petitioner that the 1st respondent admits in his paragraph 14 of his affidavit in support of his answer to the petition filed on 04/04/2016, that he was known by his official name(s) **Musoke Hannington** which name(s) appear in all his academic documents and confirmation certificates before he decided to change his names. The petitioner contends that such piece of evidence shows that these were not his names.

Paragraph 15 of the 1st respondent's affidavit in answer to the petition filed on 04/04/2016, quote;

"15. That on 20th March 2013, I adopted my current names Musoke Nsereko Wakayima and on the advice of my then Lawyers, M/S Mugisa, Namutale & Co. Advocates, swore a statutory declaration before Joseph Zagyenda, a Commissioner of Oath to this effect in which I substituted my names Musoke Hannington with Musoke Nsereko Wakayima. (A copy of the Statutory Declaration is herewith attached and marked 'E')."

Submit further that, in paragraph 16 of the 1st respondent's affidavit in support of his answer to the petition, the 1st respondent further avers as follows;

"16. That in December 2013, when I decided to solemnize my marriage at St. Stephen's Nansana Parish Church of Uganda of Namirembe Diocese whereupon the church insisted on the prerequisite of using my Christian name by which I was baptized and confirmed, my best man, Hon. Meddard Ssegona, who is a lawyer by profession, told me that the statutory declaration I had sworn was not sufficient to abandon any of my names since I had not sworn a deed poll and published the same and hence I was free to use all my names as I wished, including the Christian name which I had attempted to renounce and hence I solemnized my marriage with all my names of Hannington Musoke Nsereko Wakayima as is clearly reflected on my marriage certificate attached here to above as Annexure C2."

the petitioner further contends that by such averments in his affidavits in answer to this petition, the 1st respondent was actually aware of the requirements of making a Deed Poll in order to effect any change of name under our law, however, having been advised by his lawyer in December 2013 as above that a Statutory Declaration is not sufficient, the 1st respondent in the December 2015 nomination for candidates for the February 18th 2016 general elections, two years later, the 1st respondent still attached the said Statutory Declaration to his nomination papers and relied on the same as a basis for his alleged change of name during the nomination process for candidates to contest for the Parliamentary seat of Nansana Municipality Constituency. To the petitioner, this Statutory Declaration is deficient in many respects;

Firstly, it was never registered as a legal document under the Registration of Documents Act nor was the necessary Stamp Duty paid thereon to make it legal and admissible in evidence for any purposes in law.

The petitioner stressed that this Hon. Court should determine the issue whether **Wakayima Musoke Nsereko** who stood, contested, and won the Parliamentary elections in Nansana Municipality Constituency is actually a registered voter in that constituency.

On the issue of non-compliance with the electoral law by the second respondent, the petitioner submitted that the results of the (24) twenty four polling stations that were cancelled by the second respondent did substantially affect the results of that elections between the 1st respondent as the winner and the petitioner who was the runner-up in the elections.

In his reply, Mr. Caleb Alaka, lead Counsel for the 1st respondent submitted that in an election petition, the petitioner bears the burden to prove each and every allegation in the petition to the court's satisfaction and the standard of proof being on the balance of probabilities. Counsel cited and relied on the following authorities in support of his submission. **Mukasa Anthony Harris Vs Dr. Bayiga Michael Philip Lulume, EP Appeal No. 18 of 2007 (SC); Toolit Simon Akecha Vs Oulanya Jacob L'okori & EC; EP – Appeal No. 19 of 2011 (COA, Mugema Peter Vs Mudiobole Abed Nasser and EC; EP Appeal No. 20 of 2011; (COA);**

Counsel contended that an election should not be annulled on minor errors or informality as on trivial matters citing the case of **Kwijuka Geoffrey Vs EC and Kamihingo Emmanuel; EP No. 007 of 2011; and Baleke Kayiira Peter Vs EC and Kakooza Joseph, EP No. 04 of 2016; and Mutembuli Yusuf Vs Nagwomu Moses Musamba & the EC; No. 013 of 2016;** and attached the affidavits in rejoinder by the petitioner sworn by Mukasa Robert and Kalungi Kasule Moses whom he categorized as total strangers who cannot rejoin nor file any affidavit in rejoinder as in the instant case.

The 1st respondent also tendered in a batch of 25 Declaration of Results (DR) Forms from the 24 Polling Stations whose results were cancelled by the Returning Officer as proof that the elections in Nansana Municipality Constituency was conducted fairly and in a transparent manner in full compliance with the electoral laws by the second respondent and that such cancellation of results from those twenty four (24) polling stations did not substantially affect the overall results to warrant this Hon. Court annulling

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the elections of Member of Parliament in that Constituency. The batch of all the twenty five (25) Declaration of Results Forms from the twenty four (24) polling stations whose results were cancelled was received in evidence and collectively marked as Exhibit RE2. I shall return to these 25 DR Forms later in my analysis of evidence before this Hon. Court.

It suffices to say herein for now that, although the original impression given by Counsel for the 1st respondent at the time of tendering these documents in court was that all of them were the original Declaration of Results Forms from those twenty four affected polling stations, a closer analysis and scrutiny has revealed that the one for Nabweru South I (NAL-NAM) play ground polling station, later on crossed and corrected to (N-NAJ) by hand which correction was never acknowledged by the person correcting unlike in the other Forms where such corrections were made, this particular DR Form is a photocopy apparently extracted from a bound volume of a spiral bound document, and the one for Nansana West IIB (N-N)- Nansana Church of Uganda polling station, Code 15, Nansana West Ward, Nansana Municipality, in Wakiso District appears twice with different entries in figures regarding the number of valid votes, total number of valid votes cast for candidates, total number of rejected (invalid) votes; total number of ballot papers counted, total number of spoilt ballot papers, total number of ballot papers issued to polling station, and the total number of unused ballot papers, and so do the names and signatures of the candidates agents thereat and that of the presiding officers. That seriously calls into question, the sources and authenticity of all these 25 DR Forms. As I said

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herein before, I shall return to the issue of these 25 (twenty five) DR Forms later on in my Judgment.

On the first issue of whether or not the first respondent was validly nominated in order to stand as a candidate in the Parliamentary Elections of Nansana Municipality Constituency, Wakiso District, I find that according to the nomination paper form NP, filed with the Electoral Commission in respect of the 1st respondent's nomination for the February 18th 2016 elections (attached collectively as Annexure 'A' to the petitioner's affidavit dated 23/03/2016, the 1st respondent was nominated in the name of **Wakayima** (surname in full) **Musoke Nsereko** (other names). The other particulars of the 1st respondent included on that Nomination Paper were: Occupation/profession: Teacher/Entrepreneur of P O Box 6000 Kampala, Voter No. or National ID No. or Application ID No. 63366459, 41 years old, male.

The supporting documents like the Oath Authenticating Statement and Statement Under Oath by person to be nominated as a Parliamentary candidate all filed by the 1st respondent on 12/11/2015, as part of his nomination documents all bear the name(s) **Wakayima Musoke Nsereko**.

However, other documents filed by the 1st respondent as required by law in order to accompany the Nomination Paper were; Letter of Verification of Results from the Uganda National Examination Board dated 14/10/2015 in the name of **Musoke Hannington**, Index No. U0512/535, year of sitting

1997, level of Examination: Uganda Advanced Certificate of Education
Centre Name: Namagabi Senior Secondary School.

Another document attached to the batch of documents accompanying the
1st respondent's nomination paper is a photocopy of his National ID card
no. 018062370 in the name of **Musoke Hannington Nsereko**, sex: M S.
Date of birth: 04/04/1974. There is a further document attached entitled
Statutory Declaration sworn by the 1st respondent before a Commissioner
for Oaths on 20/05/2013, in the name of **Musoke Hannington**, making
a declaration authorizing and requiring all persons at all times to identify,
describe and address him by his new name of **Musoke Nsereko** 10
Vakayima. This Statutory Declaration was however conceded to by the
1st respondent in his paragraph 16 of his affidavit in support to the answer
to the petition as being insufficient as a legal document to effect a name
change as a Deed poll would. That said and done, one would wonder why
the 1st respondent still attached this copy of the Statutory Declaration 15
which even appears to have been badly drafted as the heading runs thus:

The Republic of Uganda

In the matter of Declaration of a car model; Statutory Declaration

and the 1st respondent proceeds to append his certification at the end
thereof that he believes conscientiously that the declaration to be true. 20

Under Article 80(1) of the Constitution of the Republic of Uganda;

"A person is qualified to be a Member of Parliament if that person;

- a) Is a citizen of Uganda;
- b) Is a registered voter; and
- c) Has completed minimum formal education of Advanced Level Standard or its equivalent."

This provision is replicated under section 4(1) of the Parliamentary Elections Act 17 of 2005. 5

Section 1 (1) of the Parliamentary Elections Act defines a registered voter as a person whose name is entered on the voters' register. That section goes further to define the word "registered" as follows:

"Registered", in relation to a voter, means registered for the purpose of voting at an election;" 10

The first respondent in his paragraph 8 of his affidavit in support of the answer to the petition avers that he is a duly registered voter having been biometrically registered and later on identified and biometrically verified at the time of voting and he attaches a copy of his national ID Card No. 018062370 as proof of such registration. In his supplementary affidavit in support of his answer to the petition, he attaches a certified copy of the National Voters' Register for Nansana Municipality Constituency, Nansana Division of Wakiso District, under reference number 63366459 in the name of **Musoke Hannington Nsereko (male)** under Nansana West II village. 15 20

In that copy of Certified National Voters' Register, a similar copy with the one petitioner also attaches to his affidavit in rejoinder, there is no voter (person) registered in that National Voters' Register in the name of

Wakayima Musoke Nsereko a name by which the 1st respondent was nominated and subsequently ran as a candidate and was subsequently declared winner of that election race. The National ID Card No. 018062370 by which the first respondent registered as a citizen bears the name **Musoke Hannington Nsereko**. 5

A closer look and scrutiny of the batch of papers submitted and attached to the 1st respondent's nomination paper shows that the 1st respondent was nominated as **Wakayima (surname) Musoke Nsereko** being other names.

However, the 1st respondent's National ID Card No. 018062370, attached thereto which also bears his facial photograph identifies him as; **Musoke; (surname)** with **Hannington Nsereko** as given names. Furthermore, the letter of verification of Results issued by the Uganda National Examinations Board (UNEB) dated 14/10/2015, addressed to the Chairman, Electoral Commission, Kampala, which the 1st respondent also attached among his other documents supporting his nomination as a candidate for Nansana Municipality Constituency shows the holder of Uganda Advanced Certificate of Education as: **Musoke Hanington** Index No. U0512/535; year of sitting 1997, centre name; Namagabi Senior Secondary School. However, this letter, attached in the batch of Annextures attached to the petitioner's affidavit in support of the petition and marked collectively as Annexture 'A' contains a disclaimer from the Board to the effect that; **the Board is not responsible for the identity of the candidate**. 10 15 20

Still on this issue of the name(s) and identity of the 1st respondent as regards his academic certificate for Advanced Level of Education, an interesting drama regarding the identity of the 1st respondent as given by the Head teacher of his former alleged school where he is reported to have attended his Advanced Level Education Studies from where he obtained his Uganda Advanced Level Certificate of Education, who writes two contradictory letters to two different addresses on two different dates regarding the identity of the first respondent. S

In his letter to the Director of CIID Kampala dated, 22/03/2016, the Head teacher of that school, one Hajji Lwanga Siraje, certifies that **Musoke Hannington** (D) was a student of Namagabi Secondary School who registered and sat for his Uganda Advanced Certificate of Education Examinations in 1997 under Index No. U0512/535 and was issued a Certificate Serial Number A236242 in the same names. 15

This Head teacher concludes this letter with a disclaimer thus;

"Unfortunately further information about this candidate regarding true identity then cannot be availed since his files with photos cannot be traced."

Surprising, barely a week later, on 29/03/2006, this same Head teacher while writing to some anonymous addressee headed; **To whom it may concern**, on the Letter Head of the same school, now vouches for and certifies the identity of the 1st respondent as a former student of that school as follows; 10

"This is to certify that Musoke Hannington whose photograph appears above was a student at 'A' Level during the academic year 1997 under Index No. U0512/535"

Apart from going that extra mile of purportedly vouching for the identity of the 1st respondent by affixing the 1st respondent's current passport size photograph, this same Head teacher goes ahead to certify the scores this candidate obtained in the 1997 'A' Level UNEB examinations, a thing the latter Board is the only one mandated to do so.

This Head teacher does not explain whether he later on traced this candidate's files and photographs, which a week earlier, when writing to the Director of CIID, he could not commit himself to. It is also noteworthy that the telephone numbers this Head teacher appends below his names in the two letters respectively as his personal contact telephone are both different.

All those documents attached and accompanying the 1st respondent's nomination papers show a lot of discrepancies regarding the true identity of the 1st respondent. That notwithstanding, the 1st respondent contends and submit that all those various names of **Musoke Hannington, Musoke Hannington Nsereko, Wakayima Musoke Nsereko, Musoke Nsereko Wakayima** all refer to him and belong to him as the same person.

In his answer to the petition in paragraph 7(a) thereof, the 1st respondent contends and replies that he is a duly registered voter having been biometrically registered and later on identified and biometrically verified at the time of voting in all the recent elections at Nansana West II B Polling Station at Nansana Church of Uganda in Nansana Municipality Constituency, though he stops short of giving the particular name(s) by which he was biometrically registered and identified during such registration. He however clarifies that he was nominated for these elections in the name of **Wakayima Musoke Nsereko** after he was restricted to the above name(s) after the name Hannington was crossed out. This current name **Musoke Nsereko Wakayima** he adopted on 20/03/2013 on the advice of his lawyers by swearing a statutory declaration before a Commissioner for Oaths which enabled him to substitute the name(s) **Musoke Hannington** with **Musoke Nsereko Wakayima** before another lawyer, Hon. Medard Ssegona who also happened to be his best man at his December 2013 wedding advised him that the Statutory Declaration he had sworn on 20/03/2013 was not sufficient to effect any change of name as a deed poll would have, on which advise he decided to resume use of all his name(s) **Hannington Musoke Nsereko Wakayima,**

If such submission from the 1st respondent was the true position in actual fact, one wonders why didn't the 1st respondent apply for the registration under the National ID Card in 2014/15 in the names of **Hannington Musoke Nsereko Wakayima?** Why didn't he insist on being nominated in the same names and why didn't he also register for the National Voters'

Register for purposes of elections of the Nansana Municipality Constituency under the same name? The registration of a person as a voter under S. I (1) of the Parliamentary Elections Act, 17 of 2005, is a mandatory requirement, it is a prerequisite before one can qualify to be a Member of Parliament and a registered voter is a person **whose name** is entered in the voters' register. 5

I find that in the entire National voters' register for the whole of Nansana Municipality Constituency, the name **Wakayima Musoke Nsereko** is clearly not entered on to that register. I do not accept the submissions from the first respondent that **Hannington Musoke** or **Hannington Musoke Nsereko**, or **Musoke Hannington Nsereko** and **Wakayima Musoke Nsereko** are all his names and he is free to use any of them at his will. For purposes of the February 18th 2016 general elections, the 1st respondent's names by which he is identified and was nominated to stand as a Parliamentary candidate for that elections in the Nansana Municipality Constituency is **Wakayima Musoke Nsereko**. That name is not on the voters' register for that constituency for that elections of 18th February 2016. 15

The 1st respondent has also averred in his affidavits in support of his answer and the supplementary affidavits in support that he had changed his name and adopted the current name(s) of **Musoke Hannington Nsereko** by which he is officially known in order to show that he is the same person officially known as **Musoke Hannington Nsereko** as well as **Wakayima Musoke Nsereko**. 20

Such a contention cannot hold for him because, with effect from 26/03/2015, when the Registration of Persons Act, 2015 came into force, every person being over the age of eighteen years, or a widower, widow, divorced person or a married person who wishes to change his or her name, shall cause to be published in the Gazette a notice in the prescribed form of his or her intention to do so. (See **Section 36(1) and regulation 11(1)**, the Registration of Persons (Births and Deaths) Regulations 2015, SI 68 and regulations 4(1) (2), and 5 of the Registration of Persons Regulations 2015, SI No. 67 respectively. S

It is important to emphasize herein that any adult person who has applied for issue or re-issue of a national identification card or aliens identification card or a holder of such card, who may wish to change his or her name with effect from 26/03/2015, must do so in compliance with section 36(1) of the Registration of Persons Act 2015 and regulations 4(1) (2) and (5) of SI No. 67 of 2015 and regulation 11 of SI No. 68 of 2015. 15

Under the Parliamentary Elections Act, 11 of 2005 and the Electoral Commission Act, the name of an individual voter is a personal and an identification "tag" by which a voter is registered and do participate in any voting/election exercise. It is personal to holder at any given time so to say and one cannot vote or participate in any election without such name being entered on the National Voters' Register. 20

In the instant case, the 1st respondent whose particulars and name appear on the National Identification Card Register under **Musoke Hannington Nsereko**, ID Card No. 018062370 is clearly governed by the Registration of Persons Act 2015, and ought to have followed the procedure laid therein if he wished to change his name as he purported to do, to make it legally effectual. I find that he has not done this, so any purported change or adoption of names he had done is null and void. He cannot now take people for a ride by masquerading under different names interchangeably and the law now requires that he owns up to one name, or set of names at a time, for which he should have registered in the National Voters' register.

Having found as above, I do hold that the 1st respondent, **Wakayima Musoke Nsereko** was nominated by the 2nd respondent in error to stand as a Member of Parliament for the Nansana Municipality Constituency, as his name is not entered on the voters' register for that constituency for purposes of the February 18th 2016, Parliamentary elections. Such nomination was illegal as it contravened S. 1 (1) Parliamentary Elections Act, and Art. 80 (i) (b) of the Constitution. He does not qualify to be a Member of Parliament under sections 4(1) (b) and 1(1) of the Parliamentary Elections Act, 17 of 2005.

I have found the following authorities cited by Counsel Caleb Alaka for the 1st respondent on the standard and burden of proof on all fours with the law on standard and burden of proof in civil matters.

Mukasa Anthony Vs Dr. Bayiga Philip Lulume; EP Appeal No. 18 of 2007 (SC); Toolit Simon Akecha Vs Oulanya Jacob & Another; EP Appeal 19/2011; 9COA); Mugema Peter Vs Musiobole Abedi Nasser; EP Appeal No. 30 of 2011; (COA).

Regarding the affidavits filed in rejoinder by Mukasa Robert, and Kalungi Kasule dated 02/05/2011, I would agree with Counsel for the 1st respondent's submission that these two witnesses for the petitioner were total strangers to the petition as they had not sworn any affidavits in reply or answer and therefore could not file any affidavits in rejoinder when they did not make any affidavits in this petition before filing the purported affidavits in rejoinder. Court has accordingly expunged the affidavits of Mukasa Robert and Kalungi Kasule sworn on 02/05/2016 as they offend the rules of making an affidavit in rejoinder and no reliance shall be placed on them at all.

Regarding the petitioner's own affidavit in rejoinder and the Annexures 'RA', 'RC', I find that the said paragraphs 3, 4, 7 and 8 of the petitioner's affidavits in rejoinder do not introduce any new matters as such as they all appear to restate certain facts and matters already averred to as the issue of the 1st respondent's name(s) as contained in the different documents contained on the batch of documents accompanying his nomination papers and the statutory declaration and change of names by 1st respondent in paragraphs 7 and 8, of that affidavit is also part of the documents already attached to the affidavit in support to the petition. I shall not exercise my

discretion to strike them off or have those paragraphs expunged from the records. I hereby decline such request.

However, regarding paragraph 4 of that affidavit all those documents stating the different dates of birth of the 1st respondent, court had ignored all matters of the 1st respondent's date of birth and has not considered the 1st respondent's passport in my inquiry in this petition. 5

Issue No. 2 whether there was any non-compliance with the electoral laws;

The petitioner contends that any person standing for election as a Member of Parliament must have a minimum educational qualification of Uganda Advanced Certificate of Education or its equivalent. In the instant case the 1st respondent submitted an Advanced Level Certificate of Education in the name of **Musoke Hannington**, Index No. U0512/535 year of sitting 1997, centre name, Namagabi Senior Secondary school, Result 5. 10

In their letter of verification of Results, annexed to the 1st respondent's nomination paper, Annexure 'A' the Uganda National Examinations Board, (UNEB) makes a disclaimer that the Board is not responsible for the identity of the candidate the person who stood and won the Parliamentary elections of directly elected MP of Nansana Municipality Constituency on the February 18th 2016, elections was **Wakayima Musoke Nsereko** who is not the same person as **Musoke Hannington** who was awarded the Uganda Advance Certificate of Education under Index No. U0512/535 who sat at Namagabi Senior Secondary School. Accordingly, the person who 15 20

won that election was nominated to stand contrary to the legal requirement under S. 4(1) (c) of the Parliamentary Elections Act, 2005.

In their answer to the petition, the 2nd respondent; the Electoral Commission admits in paragraph 10(v) that the Returning officer did not include the voters results from some 24 (twenty four) polling stations as the DR Forms for those polling stations were not found in the tamper proof envelopes on opening those envelopes at the tallying centre and so the Returning officer cancelled the results from the 24 affected stations since their respective results could not be ascertained. This is borne out by the evidence of Sarah Bukirwa in her paragraph 11 (vi) of her affidavit in support of the 2nd respondent's answer to the petition deponed on 1st April 2016. There is no evidence before me whether by way of affidavit or orally to clarify what caused the disappearance of the DR Forms in those twenty four (24) polling stations.

Under s. 53 (1), (2) Parliamentary Election Act 2005, the Returning officer on receipt of all the envelopes or some of the envelopes, in the presence of the candidates or their agents or such of them who wish to be present, open the envelopes and add up the number of votes cast for each candidate as recorded on each form.

Section 53 (3) of Parliamentary Elections Act,

"(3) where any envelope under sub-section (1) does not contain the results of the poll, the returning officer may, for the purpose of

finalizing a statement of the poll, use the declaration of results form in the presiding officer's report book."

No clarification is made in any of the affidavits of Sarah Bukirwa in support of the answer nor the supplementary affidavit in support as to why the said returning officer upon opening the ballot boxes of the 24 affected polling stations could not rely on the DR Forms in the presiding officer's report book as provided for under S. 53 (3) of the PEA. All that the returning officer could think of was to rush to cancel those results. That was irregular.

However, during the trial in this petition, the 1st respondent through his Counsel produced and tendered in court original copies of twenty five (25) DR Forms all from the 24 (twenty four) affected polling stations. These twenty five (25) original copies of DR Forms from the 24 affected polling stations were collectively tendered and received in evidence as respondent's Exhibits RE 2 respectively. Of the twenty four (24) polling stations whose results were cancelled as above, two certified copies of the DR Forms for Nansana WIIB (N-N) - Nansana Church of Uganda were enclosed in the batch collectively tendered and received in court as Exhibit RE2. However, although these two separate DR Forms were allegedly for Nansana West II B (N-N)- Nansana Church of Uganda Polling Station under the same Code 15 in Nansana Division of Wakiso District. The entries and the results thereon all differ significantly and the names and signatures of the presiding officers thereon appear clearly different and distinct from each other. In one DR Form from the said Polling station, the presiding

officer is stated to be one Menya Ismail with the total number of valid votes cast for candidates indicated as (524) five hundred twenty four while in the other DR Form for the same Polling station as above the presiding officer's name is indicated as Agalan Gabriel and the total number of valid votes cast for candidates is (438) four hundred thirty eight votes. 5

All other information and entries differ as above. I note however, that in the second DR Form signed by Agalan Gabriel as presiding officer, the Nansana West Ward was crossed off as a Parish and replaced with Nabweru North and above that (A-J) indicated. However, without any acknowledgement signature of such crossings and alterations by hand, this Hon. Court cannot trust and be satisfied that the alteration was done by an authorized person for a genuine reason or cause. 19

Furthermore, while the rest of the twenty five (25) DR Forms are in the original form, the one for Nabweru South I (Nal-Namo) playground is a photocopy certified by a commissioner for oaths. The second respondent further relies on the affidavit of Sarah Bukirwa, Returning officer for Wakiso District who in paragraphs 9(iii) and (iv) admit in her affidavit in support to the 2nd respondent's answer to the petition that the DR Forms were available to the Returning officer and the same was used to tally the results of the relevant polling stations. 15 20

In respect of DR Forms for Nansana West II B (N-N) Nansana C.O.U. Primary School under Code; No. 15, Nansana West Ward, she admits in her paragraph 9(iv) of her affidavit sworn on 1/4/2016 that the DR Form

was misplaced and went missing after it was used to tally the results for that Polling station. She then avers in her said affidavit thus: -

"However, in order to keep the DR Forms record file complete and as the Returning officer, I made a photocopy of the 1st respondent's original copy after verifying and confirming that its records were the same as the results tallied from the missing DR Form and filed a certified copy of the same for my record."

From the above piece of evidence, court cannot be sure that the photocopy the Returning officer made from the 1st respondent's original copy was a genuine one and still the question remains on what basis did she (the Returning officer) verify and confirm that its records were the same as the results tallied from the missing DR Form when her own DR Form, the very record which would have assisted her to verify and confirm the 1st respondent's original copy as genuine is missing? That procedure adopted by the Returning Officer in relying on a copy and document from the 1st respondent's copy is irregular and breaches the Parliamentary Elections Act.

From the record before me, there were a total of 17,239 registered voters in all the 24 affected polling stations whose results were cancelled as above.

I find further that after the results were declared, the winning margin of votes between the 1st respondent and the petitioner who was the runner up in that election is 1,638 votes (one thousand six hundred thirty eight

votes). Further doubt is left in the mind of the court as to where did the 1st respondent secure these 25 DR Forms which he did not mention them nor refer to them in his affidavits in support of his answer to the petition.

Accordingly, I do find and hold that the non-inclusion of results from those 24 (twenty four) polling stations as enumerated under paragraph 13 of the supplementary affidavit of the 1st respondent sworn on 02/06/2016, was an irregularity caused by non-compliance with the electoral laws by the 2nd respondent. Any argument that even if all the 17,239 registered voters in all those 24 affected polling stations did vote for the petitioner, a practical impossibility in real life, the same would not alter the results substantially cannot stand. On the contrary I find that, that was a non-compliance with the electoral law which substantially affected the results of the election in Nansana Municipality Constituency.

Having made this due inquiry, I find that the 1st respondent's name, **Wakayima Musoke Nsereko** having not been entered on the National voter's register for Nansana Municipality Constituency, Wakiso District, is not a registered voter under S.I (1) of the Parliamentary Elections Act for purposes of the 18th February 2016 elections and accordingly he was not duly nominated and consequently not duly elected as a directly elected member of Parliament for Nansana Municipality Constituency under S. 63(6) of Parliamentary Elections Act.

The Electoral Commission was wrong to have accepted the academic certificate for Advanced Level qualification presented by the 1st respondent

in the name of **Hannington Musoke** by relying merely on the affidavits or statutory declaration made by the first respondent. That action of the commission contravenes S. 4(14) of the Parliamentary Elections Act 2005 as amended.

Under the above section the commission shall not accept for the purposes of this section a statutory declaration or affidavit as evidence of an academic qualification as required by this section.

The 1st respondent having relied on the various affidavits and statutory declaration filed in support and or annexed to his nomination paper as a basis for authenticating his Advanced Level Certificate in the name of **Hannington Musoke** as a basis for his proof of his said qualification to the Commission as required under S. 4(5) of the Parliamentary Elections Act, 2005, has not satisfied the requirement of establishing his qualification with the Commission as person holding a minimum qualification of Advanced Level or its equivalent.

The petitioner having polled a total of 23,415 (twenty three thousand four hundred fifteen) votes as against the first respondent 25,053 (twenty five thousand fifty three votes) and coming second (runner up) in that election is hereby declared duly elected as directly elected Member of Parliament for Nansana Municipality Constituency.

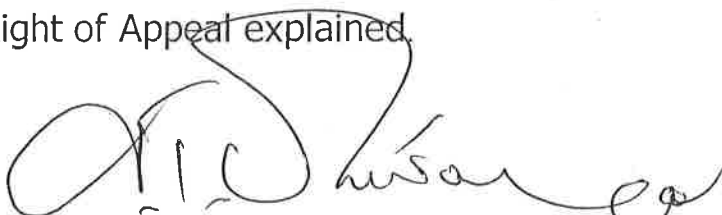
All other claims of the Petitioner's agents being chased away from polling stations, not being allowed to sign the Declaration of Results Forms, or

being required to sign the same before vote counting and closure of polling and alleged alteration and falsification of results, I do not find any possible evidence of such claims. They are accordingly disallowed.

The petition is hereby allowed with costs, which shall be borne out equally between the 1st respondent and the Electoral Commission the 2nd respondent. 5

A certificate of two Counsels is hereby granted in respect of the Counsels who appeared for the petitioner. It is hereby ordered!

Right of Appeal explained.



HON. JUSTICE VINCENT OKWANGA

JUDGE

20/07/2016