

UGANDA / JUDGMENT

Magombe v Electoral Commission and Another (Election Petition No. 19 of 2021) [2021] UGHCEP 19 (7 September 2021)

[2021] UGHCEP 19

COURT

Election Petitions of Uganda

BEFORE

Ojok, J

CASE / FILE NUMBER

Election Petition No. 19 of 2021

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

ELECTION PETITION NO. 019 OF 2021

IN THE MATTER OF AN ELECTION PETITION AGAINST THE MBALE CITY
CHAIRPERSON ELECTION HELD ON THE 20TH 5 DAY OF JANUARY 2021.

MAGOMBE VINCENT..... PETITIONER

VERSUS

1. THE ELECTORAL COMMISSION

10 2. NAMUGALI WAMATABU CASSIM RESPONDENTS

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO ANTHONY OJOK, JUDGE

Judgment

Introduction:

- 15 The Petitioner contested as a candidate for District Chairperson in the Mbale City Chairperson elections held on the 20th day of January 2021 and the 1st respondent gazetted the 2nd respondent as the winner on the 12th April 2021. The 2nd respondent obtained 13,259 votes, while the petitioner obtained 11,531 votes.

- 20 The petitioner being dissatisfied with the outcome of the said elections brought the instant petition under Section 138(1) of the Local Governments Act, Cap. 243, seeking the following orders;
- 1. A declaration that the electoral results from Nansu mosque polling station, Nandala mosque polling station, Nabuyoga Primary school, St. Andrews 25 Cell polling station, Nkoma Center polling station, Mbiko T. C polling station, Masada mosque polling station, Busamila mosque polling station, Namabasa 1 mosque polling station, Hamba stores B – malawa (A-M) polling station are illegal, null and void;
- 2. An order for the nullification of electoral results from Nansu mosque 30 polling station, Nandala mosque polling station, Nkoma center polling station, Mbiko T. C polling station, Masanda mosque polling station,

Busamila mosque polling station, Namabasa 1 mosque polling station, Hamba Stores B – Malawa (A-M) polling station, Namabasa IV Primary school polling station;

- 3. A declaration that the election of the 2nd respondent is illegal, null and void 5 ab initio;
- 4. An order nullifying and/or setting aside the election of the 2nd respondent as the duly elected Mbale City Chairperson/Mayor.
- 5. A declaration that the petitioner as the duly elected Mbale City Chairperson/ Mayor was illegal, unlawful, null and void ab initio;
- 10 6. The respondents pay costs of the petition.

In the Alternative;

- i. A declaration that the election of the 2nd respondent is illegal, null and void ab initio;
- ii. An order nullifying and/or setting aside the election of the 2nd 15 respondent as the duly elected Mbale City Chairperson/Mayor.
- iii. An order directing the 1st respondent to conduct free, fair and credible Mbale City Chairperson\Mayor election.
- iv. The respondent pay costs of the petition.

Pleadings:

20 The petitioner contended that the said elections were not conducted in a free, fair and transparent manner in accordance with the provisions of the Constitution of the Republic of Uganda, 1995, the Electoral Commissions Act, and the Local Governments Act, Cap. 243.

That the principles and provisions of the law relating to the conduct of credible 25 elections were never followed and numerous electoral malpractices, illegal practices and offences were committed by the respondents, their agents and/or supporters such as bribery of voters, multiple voting/ballot stuffing, alteration/falsification of electoral results, intimidation of voters, violence/disenfranchisement of voters, and undue influence/compromise

30 /manipulation of electoral officials.

That owing to these malpractices the 2nd respondent freely altered, manipulated and tampered with the results in his favor thus benefitting from the electoral anomalies. And that the non-compliance to the electoral laws affected the results of the election in a substantial manner.

The petition was supported by the affidavits sworn by the petitioner; Nangoley David, Lukholeli Boniface, Wakhata Augustine, Dula Yusufu, Gwamulala Sraji, Wakooli Edward, Munaifu Bosco, Wadada Francis, Walimbwa Stephen, Welishe Ben Muzasi and Maliro Akim.

- The 1st 5 respondent on the other hand in their answer to petition denied all the allegations of the petitioner and averred that the election was freely and fairly administered. That if there were any illegal practices none was ever reported to the 1st respondent or its agents. Thus, the petitioner had no basis for his allegations since the election was carried out in accordance with the law.
- In the alternative, the 1st 10 respondent contended that if there were any irregularities or non-compliance with the electoral laws, which was denied, such non-compliance or irregularities did not affect the outcome of the election in a substantial manner.

The 1st respondent's answer to petition was supported by the affidavit sworn by 15 Rebero Charles.

The 2nd respondent also denied all the allegations of the petitioner and contended that if there were any irregularities, they were not substantial enough to subvert the will of the electorates as was expressed in the final outcome.

The 2nd respondent's answer to petition was supported by the affidavits sworn by the 2nd 20 respondent, Mandu Stephen, Kiirya Hussein, Mafabi Sezi, Wasukira Godfrey, Mansa Musa, Kabosi Ibrahim, Rajab Ntunda and Hamza Matanu who all denied the petitioner's allegations.

During scheduling the parties agreed upon the following issues:

- 1. Whether the 2nd Respondent committed electoral offences?
- 25 2. Whether or not the election was conducted in contravention of the law and if it substantially affected the results?
- 3. What are the remedies available to the parties?

Representation:

Mr. Innocent Wanamboko together with Mr. Mwesiga Phillip represented the petitioner, the 1st respondent was represented by Mr. Joseph Kyazze and the 2nd 30 respondent was represented by Candia Alex together with Mr. Wayolo Paul. All the parties filed written submissions.

Preliminary objections:

After scheduling Counsel for the 2nd respondent raised a preliminary objection to the effect that service of the petition on his client was done on the 4th May of 2021, while the petition had been filed on the 26th of April 2021. That under Section 141 of the Local Governments Act, service had to be effected within 7 5 days after filing of the Petition. That no leave was sought to have the same served out of time and in the circumstances the late service violated Section 141 of the Local Governments Act. Counsel for the 2nd respondent cited the case of Nda , ula Ronald v. Hajji Nadduli, Election Petition Appeal No. 20 of 2006, where it was held that;

10 "In the aforesaid circumstances, in my view, there was no petition since no notice thereof had been given to the appellant (respondent to the petition) as is required by Section 141 of the Local Governments Act. This illegality cannot be said to have been cured by the appellant's answer to the petition. Noncompliance with Section 141 of the Local Governments Act renders the 15 petition a nullity."

Counsel for the petitioner in response submitted that this was a mere technicality that could be cured by Article 126 (2)(e) of the Constitution of the Republic of Uganda, 1995. That besides the 2nd respondent had put in his reply, so, he prayed the preliminary objection be overruled and the matter be determined on its 20 merits.

In rejoinder Counsel for the 2nd respondent submitted that Section 141 of the Local Governments Act was not procedural but substantive law and Article 126 (2) (e) of the Constitution of the Republic of Uganda, 1995 did not apply.

I have carefully considered the oral submissions of both parties and authorities as 25 cited in regard to the preliminary objection.

Election petitions in their nature are sensitive and serious matters that are given strict time lines and guidelines according to the law. This is to enable the quick disposal of the same. The law (Section 141 of the Local Governments Act) prescribes a time limit within which a petition should be served on the 30 respondent(s) and that is within 7 days from filing of the same.

In the case of Ikiror Kevin v. Orot Ismeal, Election Petition Appeal No. 105 of 2016, the Court of Appeal in regard to the strictness as to time of lodgment and prosecution of election petitions quoted with approval the case of Muiya v. Nyagah and Others [2003]2 E. A 616 at P. 621 where it was held that;

"Elections are serious matters of a state with its citizens. As elections are held, the outcome announced, the electorate must know their political leader quickly and assuredly. There must be limited or no uncertainty about this. Roles of elected representatives are many and diverse vis-à-vis their electors. 5 To perform the roles well the elected must be sure of his post and the elector of his leader. And the sooner the better to give that certainty. So either the election is accepted at once or if challenged, that challenge must be moved along to the end swiftly enough to restore certainty. And for that, election petitions are governed by this Act with its rules in a very strict manner. 10 Election petition law and the regime in general, is a unique one and only intended for elections. It does not admit to other laws and procedures governing other types of disputes, unless it says so itself."

Court added that;

"This court is satisfied that the necessary strictness and certainty expressed in 15 the above quotation equally applies to the election petitions...These provisions must thus be interpreted and applied with this aspect of strictness as to time lines being of material significance."

It is pertinent to note that time lines in election petitions are very vital and are meant to be followed, given the uniqueness and strictness of the law on election 20 petitions. That is why election petitions are given a strict number of days within which to be handled and disposed of so the parties do not have the luxury to lag in filing their pleadings and handling prosecution. In the case of Katongole Arthur v. Babirye Kityo Sarah and Electoral Commission, Election Petition No. 003 of 2016 it was stated that;

25 "Clearly a petition must be lodged in court within 30 days of the gazetting of the results by the second respondent. That petition and a notice of presentation of the petition shall then be served on the respondent within 7 days after the filing. This is the plain meaning of the legislative provisions governing the filing and service of the election petitions as provided for in the

30 law and procedural rules above. I am guided by the holding in Hon. T. Sekikubo & 4 Others, S. C. C. A No. 001/2015, where their Lordships held that the first and cardinal rule of statutory interpretation is that where words are clear and unambiguous, they should be given their primary, plain, ordinary, and natural meaning.

The law governing filing and serving of petitions is clear and unambiguous and I have no difficulty in stating that a petition must be filed in Court within 30 days of the day on which the results are gazetted and served on the respondent together with a notice of presentation of petition within 7 days of 5 filing the petition with the registrar. Prima facie therefore any petition not filed in accordance with these provisions is not properly before the court."

Courts have however, found late service of petitions onto the respondents as not being prejudicial to the respondents, more especially where the respondents filed their answers to the petition as was held in the case of *Mandera v. Bwowe*, 10 Election Petition Appeal No. 91 of 2016, by the court of Appeal that;

"On the issue of the non-service of the Notice of Presentation of the Petition, we find that its late service did not, in any way prejudice the appellant because he filed his answer to the petition and the matter was heard and determined. This is a matter where Article 126 (2) (e) of the Constitution of 15 the Republic of Uganda, 1995, comes in handy and we find that the learned trial judge rightly held as he did."

And in the case of *Mukasa Anthony Harris v. Dr. Bayiga Micael Philip Lulume*, Election Petition Appeal No. 18 of 2007, it was held inter alia that;

"Section 62 of the Parliamentary Elections Act No. 17 of 2005, is to the effect 20 that a notice in writing of a petition accompanied by a copy of the petition shall within 7 days after filing of the petition, be served by the petitioner on the respondent(s) as the case may be. The provisions of Section 62 are not mandatory for they do not state what would happen if the notice is not served within the 7 days. The omission to serve the notice is an irregularity which 25 does not vitiate the proceedings. The appellant had not pointed out any prejudice or injustice which he suffered because of the alleged omission by the respondent to serve the notice."

In the instant matter the petitioner served the 2nd respondent after the 7 days within which the petitioner is required by law to have effected service. The 2nd 30 respondent however, put in his answer to the petition and did not show this court in any way that he was prejudiced by the late service of the petition.

In the case of *Muhindo Rehema v. Winfred Kizza and Electoral Commission*, Election Petition No. 29 of 2011, citing with approval the case of *Lumu v. Makumbi and Electoral Commission*, Election Petition Appeal No. 109 of 2016,

35 the Court of Appeal in regard to the effect of service of process required in

election petitions found that it was directory rather than mandatory, and that failure to do so, especially where no injustice or prejudice was caused, would be a mere irregularity which did not vitiate the proceedings.

I therefore, find that the late service of the petition to the 2nd respondent did not prejudice him in any way and was not fatal in the circumstances. The 2nd 5 respondent also went ahead to file his answer to petition.

In the interest of justice, and in line with the above authorities as cited which I associate myself with, also, considering the fact that the 2nd respondent put in his answer to petition and appeared in court on the day of scheduling, overrule the

10 preliminary objection.

The 2nd respondent also objected to the voters' registers filed on the 31/8/2021 for being smuggled onto the court record for reasons that;

- 1. On the 19/8/2021, Counsel for the petitioner abandoned the request for the Voters' registers and this court allowed the additional affidavits filed on 15 the 18/8/2021;
- 2. The purported voters' registers are not part of the evidence on record as none is attached or annexed to any affidavit on record;
- 3. They are contrary to Rules 8 and 9 of the Commissioner for Oaths Rules since they are not marked and sealed by the Commissioner for Oaths Who 20 Commissions the affidavits.

Thus, the Voters' registers lack evidential value and should be expunged from the record.

In response, counsel for the petitioner submitted that the impugned affidavits were filed and served on the 2nd Respondent. That by the time the matter came up 25 for scheduling on the 19th August 2021, the 1st Respondent had not availed the said voters' registers to the petitioner. However, they were subsequently availed to the petitioner on the 30th August 2021 and were filed on the 31st August 2021 as per the court record. Counsel prayed that court uses its discretionary powers to adopt the said voters' registers on the court record notwithstanding them not 30 being attached on any affidavit thereby becoming evidence on record.

Counsel for the petitioner added that the said voters' registers were not attached on any affidavit and therefore, did not need any marking and sealing by the commissioner for oaths and that even if the said voters' registers had been attached on an affidavit, failure to mark and seal annexures is not fatal. Counsel

for the petitioner cited the case of *Busonya Jamada & 2 Others v. Daudi Giruli*, SCCA No.11 of 2017, where, Justice Prof. Tibatemwa Ekirikubinza, JSC, held that;

"Despite the apparently mandatory provisions of Rules 8 & 9 of the Commissioner for Oaths Act, it is my opinion that the failure of the 5 commissioner of oaths to seal and identify the annexures does not ipso facto make the affidavit itself fatally defective and inadmissible. She went on to hold that a defective annexure cannot lead to striking out a duly filed affidavit."

Before, I give my view on this preliminary objection, I have this to note, this court 10 on the 19th August 2021 held a scheduling conference and counsel for the Petitioner agreed to let go of their Notice to produce documents written to the 1st respondent which included the impugned Voters' registers. It is therefore surprising that they still went ahead and filed the voters' registers even after agreeing in court to abandon their need for the said registers.

- 15 Be as it may, it is this court's considered view that for documents to carry evidential value the same should be introduced by way of evidence in chief which allows the opposite party the chance to cross examine over the same if they so wish with leave of court. Merely filing and serving documents to the opposite party does not automatically make them gain evidential value. The same

- 20 will remain hanging and unrecognized by court, the petitioner if he so wished to have the voters' registers admitted as evidence should have sought leave of court and brought them as annextures to an affidavit as a way of introducing them as evidence before this court or through a witness which was not done.
- Counsel for the petitioner argued that the voters' registers not being marked and 25 sealed was not fatal since they were not attached to any affidavit, I agree with this position because even annextures that are not sealed and marked by a Commissioner for Oaths are not necessarily fatal when attached to an affidavit and the same affidavit will still be admitted as evidence. However, the instant case is distinguishable from the authority of *Busonya Jamada & 2 Others v. Daudi*
- 30 *Giruli*, (supra), relied on by the petitioner because in the instant case there was no affidavit the voters' registers were attached to. The voters' registers were filed in limbo and therefore carry no evidential value as opposed to an affidavit that has unmarked and unsealed annextures. For the voters' registers to be admitted as evidence, they needed to be attached to an affidavit or introduced by a witness.

In the case of *Wanda Ben Martin v. Electoral Commission and Werikhe Michael Kafabusa*, Election Petition Appeal No. 29 of 2016, it was observed that the appellant was attempting to turn himself into a witness by tendering documents himself, which offended Rule 15, in so far as the said documents had neither

5 been attached to the affidavit in support of the petition nor to any supplementary affidavit sworn nor introduced by any other witnesses.

I accordingly find the voters' registers incompetently before this court and I hereby expunge the same from the record. This preliminary objection is therefore upheld.

10 I will go ahead and consider the petition on its merits.

Burden and standard of proof:

In hearing of a petition, the powers of the court and the rules of procedure followed are those which apply to a civil action in a court of law. (See: Section 143 of the Local Governments Act).

- 15 The burden of proof therefore lies on the petitioner who has the duty to prove the allegations in their petition and the standard of proof required is on a balance of probability. (See: Sections 101(1) and 102 of the Evidence Act and the case of *Paul Mwiru v. Hon. Igeme Nbeta & Others*, Election Petition Appeal No. 06 of 2011). This proof should however, not leave court in doubt as to what is sought
- 20 to be proved, it should not be beyond reasonable doubt as is the case in criminal matters. (See: *Col. (Rtd) v Dr. Kiiza Besigye v. Yoweri K. Museveni & Another*, Supreme Court Election Petition No. 01 of 2001).

Counsel for the petitioner in regard to the burden and standard of proof cited Section 139(c) of the Local Governments Act as amended, Cap 243 which 25 provides that; the election of a candidate as a chairperson or a member of a council shall only be set aside if proved to the satisfaction of the court that an illegal practice or any other offence under the Act was committed in connection with the election by the candidate personally or with his knowledge and consent or approval.

30 And, the case of Bantalib Issa Taligola v, Electoral Commission & Wasugirya Bob Fred, Election Petition Appeal No. 11/2006, where it was held in regard to the interpretation of Section 139(c) of the Local Governments Act by Justice S. G. Engwau as follows;

"My understanding of the above section is that once the court is satisfied that an electoral malpractice or electoral offence is committed personally by a candidate as a chairperson or member of a council or with his or her knowledge and consent or approval, it is mandatory for such election to be 5 annulled and set aside with an order for fresh election".

Counsel for the petitioner added that the standard of proof in local council elections is to the satisfaction of court as per Section 139 of the Local Governments Act. Therefore, the petitioner has an obligation to prove his case on that standard alone and nothing more of which I agree.

10 It is trite law that one who makes an allegation must prove it, and in this case that burden lies on the petitioner as elucidated above.

Procedure and evidence:

Evidence in election petitions is by way of affidavit evidence either in favour or against the petitioner. Affidavits are therefore very key in election petitions since 15 it is the main way by which the parties support their allegations or make their responses and adduce their evidence. In the instant case the parties chose not to cross examine any of the witnesses which in any case is not mandatory. Thus, parties can choose to cross examine the other's witnesses or not.

Resolution of issues:

- 20 Counsel for the petitioner as a preliminary remark in his submissions informed court that the petitioner chose to abandon the allegations in the petition relating to bribery of voters on the election day, multiple voting/ballot stuffing, alteration/falsification of electoral results, intimidation/voter violence/ disenfranchisement of voters and undue influence/ compromise/manipulation of
- 25 electoral officials. This in essence means that the claim against the 1st Respondent was abandoned and disposed of the second issue on whether or not the election was conducted in contravention of the law and if it substantially affected the results. This therefore, left only two issues to be determined by this court and these are only in relation to the 2nd Respondent.

- 30 This court will therefore go ahead and only resolve issues one and three since issue two as against the 1st respondent was abandoned by the petitioner.

This court accordingly dismisses issue two as against the 1st respondent with costs.

Issue 1: Whether the 2nd Respondent committed electoral offences?

Bribery:

Counsel for the petitioner submitted that it was pleaded under paragraph 5A (iiii) of the petition and the accompanying affidavit in support that the 2nd Respondent personally and through his agents with his knowledge and consent

5 or approval committed the electoral offence of voter bribery when he donated solar lights to the voters during the campaign period so as to influence them to vote for him.

Counsel for the petitioner cited the case of Col. (Rtd). Dr. Kiiza Besigye v. Yoweri K. Museveni & Another, (supra) where the learned Chief Justice Odoki (as he 10 then was) laid out three ingredients of bribery as; a gift was given to a voter; the gift was given by the candidate or his agent; and that the gift was given with the intention of inducing the person to vote.

Counsel for the petitioner also relied on the case of Kaija William & Electoral Commission v. Byamukama K. James, Electoral Petition Appeal No.12/2006, 15 where the Court of Appeal endorsed the findings of the trial judge regarding agency during the election period wherein in his judgment, the learned trial judge stated that;

"The learned JSC made reference to his judgment on the law on agency for electoral purposes as stated in Halsbury's laws of England, 4th Edition Vol. 15 20 paragraph 698, which is to the effect that in order to prove agency, it is not necessary to show that the person was actually appointed by the candidate or that he was paid. The crucial test is whether there has been employment, or authorization of the agent by the candidate to do some election or the adoption of his work when done. The candidate however, is liable not only for 25 the acts of agents whom he has himself appointed or authorized, but also for the acts of the agents employed by his election agent or by another agent having authority to employ others. The same law and principles of agency are in my view applicable to elections of the Local Councils with equal force."

The Petitioner contended that the 2nd Respondent personally or through his 30 agents with his knowledge and consent or approval committed the illegal practice of voter bribery contrary to Section 147(1) of the Local Governments Act, Cap 243 as amended in five separate incidents as follows;

a. Donation of two solar lights at Doko Mosque on the 19th day January 2021.

The Petitioner adduced affidavit evidence of Lukholeli Boniface and Wakhata Augustine, registered voters at Doko Mosque who stated that the 2nd Respondent and his agent Kiirya Hussein at a campaign rally at Doko Mosque gave a gift of two solar lights to the voters present for installation in the said area. That this

5 allegation was corroborated by affidavit evidence of Maliro Akim.

Counsel for the petitioner further submitted that the 2nd Respondent and Kiirya Hussein generally denied the allegations of the petitioner whereas, the evidence as adduced by the petitioner was cogent and credible and that the petitioner ably proved this allegation of bribery.

- Counsel for the 2nd 10 respondent on the other hand contended that the petitioner's affidavit did not have any voters' registers attached to it to prove that the alleged recipients or bribe takers were registered voters. That in the circumstances bribery was not proved. (See: *Kasifa Namusisi and Others v. Francis M. K. Ntabaazi*, S. C. C. A No. 4 of 2005).
- Counsel for the 2nd 15 respondent added that the affidavit of Maliro Akim relied on by the petitioner offends Order 6 Rules 1 and 7 of the Civil Procedure Rules as the petitioner alleged in his affidavit that the bribery at Doko Mosque at Namabasa 3A Village occurred on the 19/1/2021 while in the affidavit of Maliro Akim he stated that it occurred on the 26/12/2020. Thus, this evidence was not
- 20 truthful. (See: *Kasifa Namusisi and Others v. Francis M. K. Ntabaazi* (Supra)).

Counsel for the 2nd respondent also made reference to the case of *Interfreight Forwarders (U) Ltd v. East African Development Bank*, SCCA No. 33 of 1992, where it was stated that;

"A party is expected and is bound to prove the case as alleged by him. He will not be allowed to succeed on a case not so set up by him and be allowed at the trial to change his case or set up a case at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings."

Counsel for the 2nd respondent further submitted that the petitioner's evidence 30 was based on hearsay contrary to Order 19 Rule 3 of the Civil Procedure Rules and the same evidence was not corroborated by Lukholeli who allegedly told him about the campaign at Doko Mosque. And in the case of *Col. (Rtd) v Dr. Kiiza Besigye v. Yoweri K. Museveni & Another*, (Supra) it was held that;

"Technically speaking this information was hearsay as the deponent did not witness the incidents reported to her. Her affidavit can only be relied on if it is corroborated by other evidence from those who reported to her or who witnessed similar incidents."

Further, that both Kiirya Hussein and Namugali alleged agents of the 2nd 5 respondent denied ever being his agents but rather that Kiirya was also a contestant for councillorship and was doing his own campaigns at the time.

Counsel for the petitioner in reply quoted the case of Chebrot Stephen Chemoiko v. Soyekwo Kenneth & Another, Election Petition Appeal No.56/2016, at page 13, 10 where the learned justices of appeal held that; the affidavits in support of the petition give substance to issues raised in the petition.

The court held that:

"Affidavits are considered part of pleadings in the petition".

The court also faulted the respondents for not cross examining the said witness.

15 Counsel for the petitioner in further rejoinder submitted that the 2nd Respondent opted not cross examine the said witnesses and contended that the minor contradiction in respect of the dates does not amount to departure from pleadings.

I have carefully analyzed the submissions under this allegation as adduced by the petitioner and the 2nd 20 respondent.

The petitioner in this case has the duty to prove to the satisfaction of this court that indeed the two solar lights were donated by the 2nd respondent to the voters at Doko Mosque and that the same were donated as a bribe to the voters seeking favour for the petitioner in the recently concluded elections.

Counsel for the 2nd 25 respondent argued that the petitioner did not stick to his pleadings contravening Order 6 Rules 1 and 7 of the Civil Procedure Rules in relying on affidavits that had varying dates as to when the alleged bribery took place at Doko Mosque.

I have taken time to compare the dates in the petition and affidavits in support of 30 the petition relied upon by the petitioner to prove this allegation and this is relayed below;

- The petitioner in his petition mentioned the date of 26th December 2020 as the day the bribery occurred while in his affidavit in support he stated the 19th January 2021 as the date the 2nd respondent personally donated the solar lights at Doko Mosque and that this information was told to him by 5 Lukholeli Boniface and Wakhata Augustine.
- The petitioner to corroborate this allegation relied on the affidavits of;

- i. Maliro Akim, who under paragraph 4 stated that the alleged bribery was on the 19th day of January 2021 where he and other voters were told to gather at Doko Mosque by the agents of the 2nd respondent led by Kiirya Hussein and lights were brought said to be a donation by the 2nd respondent.
- ii. Lukholeli Boniface stated that on the 26th December 2020 he was called for a campaign organized at Namabasa 4 trading center and the solar lights were donated to Namabasa 3A trading Center.
- iii. Wakhata Augustine stated that on the 26th 15 December 2020 residents gathered at Namabasa 4 Village at Namabasa 4 trading Centre and the 2nd respondent donated lights which were installed in Namabasa 3A trading Centre.

The gist of the petition in regard to this allegation was that there was bribery 20 through donation of two solar lights and the same was stated in the affidavits relied up on bringing out the petitioner's allegation against the 2nd respondent. Departure from one's pleadings would mean that the petitioner or the witnesses introduced a different offence, a new claim or a new piece of evidence all together in the affidavits as opposed to what was laid out in his petition which is

25 not the case. Inconsistencies as to dates and locations of where the donations occurred in my view does not constitute to departure from one's pleadings.

I accordingly, find that the petitioner did not depart from his pleadings in the instant case.

- However, the petitioner in his evidence clearly had inconsistencies in regard to 30 dates and places where the donation actually took place. The Petitioner alleged that the donation of the two solar lights was done at Doko mosque, however, Lukholeli Boniface and Wakhata Augustine stated that the lights were donated at gatherings at Namabasa 4 trading center and not at Doko Mosque. These in my view are not minor contradictions.
- Secondly, counsel for the petitioner submitted that the 2nd 35 respondent should have cross examined the witnesses for clarity which he did not do, therefore it

was his fault for not seeking an explanation as to the inconsistencies. With all due respect, this is the petitioner's case and not for the 2nd respondent. The petitioner has the duty to lay out his case as consistently and coherently as possible. Mix up of dates cannot be blamed on the 2nd respondent's failure to 5 cross examine the said witnesses to seek an explanation as to the inconsistencies.

The law on contradictions and inconsistencies is well settled that when they are major and intended to mislead or tell deliberate untruthfulness, the evidence may be rejected. I find that the inconsistencies in the petitioner's evidence were major and touched the root of the matter and such evidence as adduced by the 10 petitioner is not credible and unreliable, therefore, it is rejected. (See: Makau Nairuba Mabel v. Crane Bank Ltd, HCCS No. 380 of 2009 and Alfred Tajar v. Uganda, EACA Criminal Appeal No. 197 of 1969).

In the case of Masiko Winifred Komuhangi v. Babihuga J. Winnie, Election Petition Appeal No. 9 of 2002, Justice Mukasa-Kikonyogo DCJ (as she then was)

15 held that;

"As I have already stated above, the decision of court should be based on the cogency of evidence adduced by the party who seeks judgment in his favour or her favour. It must be the kind of evidence that is free from contradictions, truthful so as to convince a reasonable tribunal to give judgment in a party's

20 favour."

The petitioner also adduced photographic evidence by attaching photographs of individuals who are not identified to court and no clarity was made or elaborations as to who was in the photographs and what exactly was going on and where. These photographs in my view cannot stand in evidence as proof to

- 25 an allegation of bribery. The photographs only show unidentified individuals standing in watch while others erect a light/pole. Lukholeli on whose affidavit the photographs are attached did not make mention in his affidavit who of the people in the photograph was him or the 2nd respondent or for that matter identify any of the individuals. He only stated in his affidavit that he was present
- 30 at the installation of the solar lights and pictures were taken in commemoration. Failure to identify the 2nd respondent as being present during the donation and installation of the solar lights and the people in the photograph leaves court to speculate, which this court declines to do. This is in line with the case of Apolot Stella Isodo v. Amongin Jaqueline, Election Petition Appeal No. 0060 of 2016, 35 where the case of Col. (Rtd). Dr. Kiiza Besigye v. Yoweri K. Museveni & Another, (supra) was cited with approval, it was stated that; following the three

ingredients of bribery listed in the afore mentioned case, an allegation of bribery must be proved by unequivocal evidence, not mere suspicion.

Further, and in agreement with the submissions for the 2nd respondent, the photographs lack a date showing when they were actually taken, the 5 photographs could have been watermarked with the date they were taken which is not the case here. The photographic evidence also does not show who handed (giver) the solar lights to whom (receiver). It is also not known who took the photographs and where.

- The deponent Lukholeli Boniface stated that there was a campaign meeting 10 where he was invited in his capacity as the Local Council 1 Chairperson at Namabasa 4 Trading Center in which the lights were donated but the same was never proved to this court. How then does court determine indeed that the solar lights were made as a donation during a campaign meeting at Namabasa 4 Trading Center even though this is evidence being relied on for a donation that
- 15 allegedly occurred at Doko Mosque which was also not proved?

Counsel for the 2nd respondent also submitted that the petitioner mostly relied on hearsay evidence which was not corroborated.

It is trite law that failure to disclose the source of information in an affidavit renders the affidavit null and void. (See: Uganda Journalists Safety Commission 20 and Others v. Attorney General, Constitutional Petition No. 7 of 1997).

The petitioner in this case made averments in his affidavit and stated from whom the information he was deposing to was obtained from and the informants equally made affidavits in that regard. This court is therefore satisfied that the petitioner ably disclosed the source of his information.

25 On the other hand, this court also has the discretion to sever parts of affidavits which rely on hearsay and rely on parts which are based on one's knowledge if the need to consider search affidavits arises. (See: Dr. Besigye Kiiza v. Museveni Yoweri Kaguta and Electoral Commission, Election Petition No. 1 of 2001).

I accordingly find that the petitioner did not prove to the satisfaction of this court that there was indeed a donation of two solar lights at Doko Mosque on the 19th 30 day January 2021 as a form of bribery by the 2nd respondent either personally or through his agent and as a way of bribing voters of Doko Mosque. The affidavits relied on have contradictory evidence which has been rejected by this court.

b. Donation of two solar lights at Namabasa Church of Uganda on the 19th January 2021.

Counsel for the petitioner submitted under this allegation that the petitioner adduced affidavit evidence of Lukholeli Boniface and Wakhata Augustine 5 confirming that the 2nd Respondent donated two solar lights in order to persuade the voters and that this was corroborated by the affidavit evidence of Welishe Ben Muzasi.

Counsel for the 2nd respondent on the other hand submitted that the affidavits of Lukholeli and Wakhata did not make reference to Namabasa Church of Uganda 10 at Namabasa 5A Village but instead talk about Namabasa 4A and 3A trading centers. Counsel added that Welishe's affidavit departed from the petition in regard to the date the donation of the lights was made contrary to Order 6 Rules 1 & 7 of the Civil Procedure Rules meaning he was telling lies and the same evidence was contradictory and cannot be relied upon. (See: James Katende and

15 Another versus Uganda Railways Corporation, SCCA No. 12 of 1993). That it is therefore not known when exactly the campaign at Namabasa Church of Uganda took place whether on the 26/12/2020 as per the petition or the 19/1/2021 as per the petitioner's affidavit and that of Welishe Ben Muzasi.

In rejoinder counsel for the petitioner submitted that the petitioner clearly stated 20 in his accompanying affidavit in paragraph 5A(ii) the source of information in respect to the incident of the donation of the two solar lights at Namabasa Church of Uganda. That the 2nd Respondent contended that the averments in the affidavit for Welishe Ben Muzasi were a lie to which the petitioner disagreed since paragraph 7 of the said affidavit confirmed that the 2nd Respondent 25 delivered two solar lights to the persons who had gathered at Namabasa Church of Uganda. That in contrast, the 2nd Respondent just denied the said allegation.

It is my humble view that indeed the affidavits of Lukholeli Boniface and Wakhata Augustine do not mention any donations at Namabasa Church but rather talk about Namabasa 3A and Namabasa 4A trading Centers. This evidence

30 in the circumstances does not corroborate the petitioner's allegations in regard to donation of two solar lights at Namabasa Church. It is only the affidavit of Welishe Ben Muzasi that talks about donation of lights at Namabasa Church of Uganda. In the circumstance the affidavit of Welishe cannot be said to have corroborated the affidavits of Lukholeli and Wakhata.

Counsel for the petitioner in his submissions stated that the 2nd respondent made just a denial of the allegation. The duty is on the petitioner to prove his allegations as against the 2nd respondent and not vice versa. In the case of Ocen Peter and the Electoral Commission v. Ebil Fred, Election Petition Appeal No. 83 of 2016, it was held that the 1st 5 respondent did not have to file an affidavit to

supplement his general denial evidence considering that the burden was on the appellant at all material times to prove that the 1st respondent committed an electoral offence which substantially affected the outcome of the election.

The petitioner also relied on pictorial evidence to prove his claim, however, as I 10 have already mentioned, above the photographs as attached by the witnesses are unable to aid this court in showing where they were taken, who they were taken by, the photographs do not even show the 2nd respondent handing over the said solar lights to whom nor do they bear dates of the alleged donation day.

I find and hold that the petitioner's evidence was not sufficient to prove this 15 allegation to the satisfaction of this court.

c. Donation of solar lights at Namabasa 4 Trading Centre.

The Petitioner relied on the affidavit evidence of Welishe Ben Muzasi in regard to the above donation.

- Counsel for the 2nd respondent on the other hand submitted that the affidavit of 20 Welishe Ben Muzasi relied on by the petitioner does not talk about Namabasa 4 Village but rather talks about St. Peters Church, Mushinekesa and Namabasa IV Upper and Namabasa Ward. That this affidavit grossly contradicted that of Lukholeli who he made reference to as having been present during the campaign when the donations were made but the two mention different dates and different 25 places as to where the donations were made. Thus, this evidence should be rejected.

Secondly, that the evidence of Welishe Ben Muzasi should be rejected because according to the jurat, the name of the deponent is "Welishe Ben Musazi."

Counsel for the 2nd respondent in rejoinder submitted that regarding this 30 incident, the 2nd Respondent contended that the evidence by the petitioner was hearsay and there was no affidavit of Welishe Ben Muzasi on the court record but then contradicted himself when he analyzed the evidence of the said witness.

Further, that the disparity in the name at the first page and jurat came up as a result of typographic error.

It is my considered view that the minor disparity of name spelling in this case cannot invalidate the affidavit and I believe it to be true that it was a typographical error.

In regard to the affidavit evidence of Welishe Ben Muzasi, the deponent in his 5 affidavit stated that at the gathering at St. Peter's Church he was told by Kiirya Hussein that the solar lights would be installed at Doko Mosque and Namabasa. That the 2nd respondent and Kiirya Hussein among others brought and installed solar lights at St. Peter's Church among other places but did not mention Namabasa 4 Trading Centre. That the 2nd respondent told the voters that NRM

- 10 had forgotten them and did not care about them. Apart from the affirmations in the affidavit, the witness did not adduce any other evidence to prove what was being stated therein. There was no corroborative evidence to support the allegations as stated therein nor did this evidence corroborate the bribery allegations committed at Namabasa 4 Trading Centre as made by the petitioner.
- 15 Therefore, for the petitioner's claim to stand there ought to be cogent, independent and credible evidence for this court to rely on to ascertain if the petitioner's allegations are true or not. (See: Kabuusu Moses Wagabo v. Lwaiga Timothy Mutekanga & Electoral Commission, Election Petition No. 15 of 2011).

I find that the petitioner has not proved this allegation to the satisfaction of this 20 court and therefore has failed to discharge his duty in that regard.

d. Donation of solar lights at Namabasa 3A, Namabasa Central, Namabasa 5A and Namabasa 5B villages.

The Petitioner adduced affidavit evidence of Walimbwa Stephen contending that one Kiirya Hussein, the agent of the 2nd Respondent approached him and asked 25 him which areas needed solar and he made suggestions. That the said lights were then delivered in exchange for votes for the 2nd Respondent. That the above evidence was corroborated by the affidavit evidence of Muniafu Bosco who received the said solar lights from Kiirya Hussein, the 2nd Respondent's agent and they are in his custody as they could not be installed since they had not brought 30 the poles.

Counsel for the 2nd respondent submitted that these were not pleaded by the petitioner and he should therefore stick to his pleadings and nor do the affidavits he relies on mention bribery in the above places. Counsel also noted that the photographs as attached lack evidential value since they have no dates, details of

- 35 photographer are lacking, the giver and recipient are also not seen.
- 19

Counsel for the petitioner submitted in rejoinder that the said photographs as attached on the affidavit of Muniafu Bosco and marked as annexures "B1-B4" were not challenged in regard to their evidential value, that counsel should have sought leave to cross examine the said witness but opted not to. That the evidence 5 of the said witnesses therefore is cogent and credible and unchallenged.

It is this court's view that it is trite law that a party is bound by their pleadings and relief cannot be granted for a claim that is not in the pleadings. (See: Ms. Fang Min v. Belex Tours & Travel Ltd SCCA No. 6 of 2013 consolidated with SSCA No. 1 of 2014, Crane Bank Ltd v. Belex Tours & Travel Ltd). All the 10 allegations against the respondent should therefore be stated in the petition as was the holding in Interfreight Forwarders (U) Ltd v. East African Development Bank, Civil Appeal No. 33 of 1992, as follows;

- "The system of pleadings is necessary in litigation. It operates to define and deliver with clarity and precision the real matters in controversy between the 15 parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the double purposes of informing each party what is the case of the opposite party which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."
- 20 I find that the affidavit of Walimbwa Stephen departed from the pleadings of the petitioner and thus, this evidence could not be used to corroborate what was not laid out in the petition from the start. This evidence is accordingly disregarded.

It is the petitioner's duty to prove his allegations. The contents in Walimbwa Stephen's affidavit are outside what was pleaded in the petition and thus, the 25 photographs as attached are lacking in evidential value and to make matters worse the photographs are lacking a lot of detail despite being used to support a claim that was not laid out in the petition. I accordingly disregard this piece of evidence for departing from the petition. This allegation is equally disregarded as the same was not pleaded in the petition.

e. Donation of Saucepans, plates and cups by the 2nd 30 Respondent's agent.

Counsel for the petitioner submitted that the Petitioner adduced affidavit evidence of Dula Yusufu and Gwamulala Siraji that the 2nd Respondent's agent known as Kiirya Hussein donated saucepans, plates and cups to voters at the home of the late Nyirira Yower. That this evidence was corroborated by the

35 affidavit evidence of Wakooli Edward.

Counsel for the 2nd respondent on the other hand submitted that this claim was abandoned by the petitioner earlier and therefore cannot be resurrected and even then the affidavits relied on contravene Order 6 Rules 1 and 7 of the Civil Procedure Rules and have contradictions as to who actually made the donations,

the 2nd 5 respondent or his alleged agent. That even the donation made to the Munno Mu kabi group was denied by Stephen Madu the group's Vice Chairperson.

Counsel for the petitioner in rejoinder submitted that the claim was not abandoned and the same was addressed in the submissions. Further, that the 10 petitioner provided affidavit evidence of Dula Yusuf, Gwamulala Siraji which was corroborated by Wakooli Edward which was to the effect that the said Kiirya Hussein donated the saucepans, plates and cups. Therefore, there were no inconsistencies as alleged by the 2nd Respondent and this incident was proved.

- I have carefully read the affidavit evidence of the witnesses and apart from 15 stating that plates, cups and sauce pans were donated at the home of the late Nyirira Yower, no one from the home of the late nor any recipient of the items was brought to corroborate this allegation or swore any affidavit to that effect. The evidence of Wakooli Edward under paragraph 4 states that the donations of the plates, saucepans and cups were made by the Kirya Hussein on behalf of the
- 2nd 20 respondent whereas the petitioner in his affidavit stated that he was informed by the same Wakooli Edward that the 2nd respondent personally made the donations. That these donations were made to the Munno mu kabi community. I find these pieces of evidence unreliable and contradictory and the same are hereby rejected.
- 25 The allegation of donations of cups, plates and saucepans to the Munno mu kabi were also denied by Stephen Mandu the vice Chairperson of the group.

I accordingly find that the petitioner also did not prove this allegation to the satisfaction of this court. There was no sufficient proof showing who was bribed and who exactly did the bribing considering the fact that there were 30 contradictions in this regard.

- In the case of Adoa Hellen and Electoral Commission v. Alaso Alice, Election Appeal Nos. 57 and 54 of 2016, the court of Appeal was of the view that given the gravity of the offence of bribery in elections, it is necessary that persons said to have committed the offence and those said to have been bribed be clearly 35 identified and such evidence be corroborated.
- 21

Counsel for the petitioner in his submissions noted that the 2nd respondent made bare denials in regard to the petitioner's allegations against him and did not apply to cross examine some of the witnesses as opposed to the petitioner who adduced evidence.

- 5 It is trite law that total denial is a complete defence in itself. It was therefore incumbent on the petitioner to prove or produce cogent evidence to prove his allegations of bribery and not rely on the weakness of the 2nd respondent's case. (See: Isodo Aolot Stella v. Amongin Jacqueline, Election Petition Appeal No. 60 of 2016).
- 10 In the case of Ocen Peter v. Ebil Fred, Election Petition Appeal No. 83 of 2016, it was observed that; the 1st appellant did not have to file an affidavit to supplement his general denial evidence considering that the burden was on the respondent at all material times to prove that the 1st appellant (Hon. Ocen) committed electoral offences which substantially affected the outcome of the election in Kole South
- 15 Constituency.

It was submitted for the 2nd respondent that there were no voter's registers attached, these were eventually filed and expunged from the record by this court.

It is this court's finding and holding that petitioner's witnesses did however, submit their voter slips and National Identity cards as directed by this court 20 which proved that indeed they were registered voters and who they claimed to be. Therefore, it is not in dispute that the petitioner's witnesses were registered voters and were true to their identity. The evidence as adduced by the said witnesses was however, not sufficient as discussed above to annul the election of the Mbale City Chairperson as held on the 20th day of January 2021 in line with

25 Section 139(c) of the Local Governments Act. The Petitioner failed to discharge the burden and standard of proof as provided under the law to establish voter bribery on the part of the 2nd Respondent under the outlined incidents. This issue is therefore resolved in the negative.

Issue 3: what are the remedies available to the parties?

- Counsel for the 1st 30 respondent submitted that under Section 27(1) of the Civil Procedure Act, costs follow the event and in the circumstances the 1st respondent should be awarded costs. This prayer was premised on the fact that the petitioner intentionally brought the now abandoned claims against the 1st respondent. That the 1st respondent was wrongly and unfairly dragged to Court and had to engage
- 35 an external lawyer to represent it in defending the petition.

Counsel for the petitioner in rejoinder contended that the 2nd Respondent in his answer to the petition never prayed for costs. That it is trite law that a party is bound by his pleadings. (See: Order 6 rules 1 and 7 of the Civil Procedure Rules, SI-71-1 and SCCA No.33 of 1992, Interfreight Forwarders (U) Ltd v. East African

5 Development Bank.)

That the 2nd Respondent's prayer for costs came as an afterthought in his submissions in reply as he never pleaded for them in his answer to the petition. Consequently, the said prayer has no merit and should not be entertained.

It is trite law that parties are bound by their pleadings and indeed the 2nd 10 respondent did not make a prayer as to costs in his answer to the petition.

Having found that the Petitioner failed to discharge the burden and standard of proof as provided under the law to establish voter bribery on part of the 2nd Respondent under the various incidents, this court is unable to grant the prayers as made by the petitioner.

This petition therefore lacks merit and stands dismissed with costs to the 1st 15 respondent and no order is made as to costs for the 2nd respondents. I so order.

Right of appeal explained.

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20 OYUKO ANTHONY OJOK

JUDGE

7/9/2021

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