

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT MASINDI**

**IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT 2005**

**CONSOLIDATED ELECTION PETITIONS NO.001 & 006 OF 2021**

**BINTU LUKUMU JALIA----- PETITIONER**

**VERSUS**

- 1. ELECTORAL COMMISSION**
- 2. AKUGIZIBWE ALED RONALD-----RESPONDENTS**

**AND**

- 1. BANAGE FREDRICK BITAMALE**
- 2. KABINDI STEVEN -----PETITIONERS**

**VERSUS**

- 1. AKUGUZIBWE ALED RONALD**
- 2. ELECTORAL COMMISSION -----RESPONDENTS**

**BEFORE: HON. JUSTICE SSEKAANA MUSA**

**JUDGMENT**

The petitioners filed an election petition challenging the election of Akugizibwe Aled Ronald for the position of Member of Parliament for Buruli County Constituency in Masindi District.

The petitioners (Bintu Lukumu Jalia, Banage Fredrick Bitamale and Kabindi Steven) and Akugizibwe Aled Ronald contested in the election for Buruli County Constituency Directly Elected Member of Parliament held on 14<sup>th</sup> January 2021 and obtained the following votes in their favour; Akugizibwe Aled Ronald-(Independent) (8,848), Bintu Lukumu Jalia-(Independent) (8,316), Kabindi Steven ( NRM) (7,430) Banage Fredrick Bitamale (FDC)(362) and which results were duly gazetted on 17<sup>th</sup> February 2021.

The petitioners contend that the winning candidate Akugizibwe Aled Ronald was not validly elected since he was not qualified or was ineligible to stand in the election having failed to resign from the Public Service as required by law. The petitioners in their affidavits in support have stated that Akugizibwe was at the time of nomination holding office in public service as a teacher at King's College Budo.

The respondent in his Answer to the petition contended that he was duly qualified for nomination and election as a Member of Parliament for Buruli County Constituency. He resigned from public service as teacher at King's College Budo and handed over office as required in preparation for his bid to contest as a Member of Parliament for Buruli Constituency, Masindi district.

The Electoral Commission contended that the entire electoral process and election were conducted in compliance with the provisions and principles laid in the electoral laws of Uganda. The petitioners never lodged any complaint in regard to qualification of Akugizibwe Aled Ronald before or after nomination as provided under the Constitution.

The parties filed a joint scheduling memorandum where the following facts and issues were agreed for court's determination;

**Agreed Facts:**

- The joint petitions arise from the parliamentary Elections held on 14<sup>th</sup> January 2021 in Buruli County Constituency.
- In the said elections, Bintu Lukumu Jalia, Banage Fredrick Bitamale, Kabindi Steven, the petitioners herein and Akugizibwe Aled Ronald, were all candidates in the race for Member of Parliament for Buruli County Constituency.
- Upon conclusion of the election, Akugizibwe Aled Ronald polled 8,848 votes, Banage Fredrick Bitamale polled 362 votes, Bintu Lukumu Jalia polled 8,316 votes and Kabindi Steven polled 7,430 votes respectively.

- The Returning officer of the 1<sup>st</sup> respondent (Electoral Commission) returned Akugizibwe Aled Ronald as the candidate who polled the highest number of votes and declared him as the validly elected Member of Parliament for Buruli County Constituency. The Electoral Commission gazetted the 2<sup>nd</sup> respondent as such and the 2<sup>nd</sup> respondent has since been sworn in as the Member of Parliament for Buruli County Constituency.
- The 2<sup>nd</sup> respondent (Akugizibwe Aled Ronald) was formerly employed as an education officer/teacher at King's College Budo. He was nominated by the 1<sup>st</sup> respondent on 15<sup>th</sup> October as an Independent Candidate.
- The petitioners filed the instant petitions against the 1<sup>st</sup> and 2<sup>nd</sup> respondent challenging the election and declaration by 1<sup>st</sup> respondent of the 2<sup>nd</sup> respondent as the elected Member of Parliament of Buruli County Constituency and seek to set aside his election on ground that he was not validly elected as such.

**Agreed Issues:**

1. *Whether the 2<sup>nd</sup> respondent was not qualified for nomination and election as a Member of Parliament for Buruli County Constituency?*
2. *Whether the Electoral Commission unlawfully declared the 2<sup>nd</sup> respondent as the validly and duly elected Member of Parliament for Buruli County Constituency?*
3. *What remedies are available to the parties?*

The 1<sup>st</sup> petitioner (Bintu Lukumu Jalia) was represented by *Counsel Wandera Ogalo* and *Wamanyi Robinson* while *Counsel Nankya Angella* appeared and represented the other two petitioners (Banage Fredrick Bitamale and Kabindi Steven). *Counsel Ahumuza Edward* represented Electoral Commission while *Counsel Kyazze Joseph* and *Simon Kasangaki* represented Akugizibwe Aled Ronald.

At the hearing, the affidavits of the parties were deemed read and the annexures thereto were admitted in evidence. Counsel for the two petitioners sought leave to cross examine the 2<sup>nd</sup> respondent which was granted. Thereafter, the respective counsel sought leave to file written submissions which I have considered in this judgment.

### **BURDEN AND STANDARD OF PROOF**

S.61 (1) of the Parliamentary Elections Act provides that:

The Election of a Member of Parliament can only be set aside on any of the following grounds if proved to the satisfaction of the Court .....

Odoki CJ(as he then was) in his elaborate reasons for the Supreme Court Judgment in the **Col. (RTD) Dr. Besigye Kizza v Museveni Yoweri Kaguta and the Electoral Commission Election Petition No. 1 of 2001** Supreme Court has the following to say on this important point;

*“In my view, the burden of proof in an Election Petition as in other Civil Cases is settled. It lies on the Petitioner to prove to the satisfaction of Court .....”* at Pg 16 of the Reasons.

The same principles have been reiterated in the case of **Col. (RTD) Dr. Besigye Kizza v Museveni Yoweri Kaguta and the Electoral Commission Election Petition No. 1 of 2006** citing **Election Petition No.1 of 2001**

Odoki, CJ(as he then was) in his Judgment cited with approval the following observation of Lord Denning in the English case of *Blyth -Vs- Blyth [1966] AC 643*:

*“My Lords, the word "satisfied" is a clear and simple one and one that is well understood. I would hope that interpretation or explanation of the word would be unnecessary. It needs no addition. From it there should be no subtraction. The courts must not strengthen it; nor must they weaken it. Nor would I think it desirable that any kind of gloss should be put upon it. When parliament has ordained that a court must be satisfied only parliament can prescribe a lesser requirement. No one whether he be a judge or juror would in fact be "satisfied" if he was in a state of reasonable doubt.....”*

Having quoted the above, Odoki, C.J. goes on to state:

*"I entirely agree with those observations by Lord Denning. The standard of proof required in this petition is proof to the satisfaction of the court. It is true court may not be satisfied if it entertains a reasonable doubt but the decision will depend on the gravity of the matter to be proved....since the legislature chose to use the words "proved to the satisfaction of the court", it is my view that that is the standard of proof required in an election petition of this kind. It is a standard of proof that is very high because the subject matter of the petition is of critical importance to the welfare of the people of Uganda and their democratic governance."*

In this petition, therefore like in all Election Petitions, it is the petitioner who bears the burden of proving his allegations to the satisfaction of Court. It is only after the Court is duly satisfied that the grounds raised have been proved to its satisfaction that it will invoke its powers under Subsection (1) of Section 61, read together with Subsection 4 (c) of S. 63 of the Parliamentary Election Act of 2005

S.62 (3) of the Parliamentary Elections Act *provides that any ground specified in Subsection (1) should be proved on the basis of a balance of probabilities.*

The only crucial aspect of this issue which this Court must emphasize and bear in mind throughout the trial of an Election Petition, is the degree of a probability which must be attained before the Court can regard itself as satisfied that the ground or allegation is proved under S. 61 (1) and S. 61 (3) of the Parliamentary Election Act of 2005.

In the Case of **Karokora Katono Zedekia vs Electoral Commission Kagonyera Mondo HC-05-CV-EP 002 – 2001** Justice V.F. Musoke-Kibuuka (RIP) noted at Pg 6;

*"It is quite critical to emphasize and bear in mind the crucial fact that, setting aside an election of a Member of Parliament is, indeed, a very grave subject matter. The decision carries with it much weight and serious implications. It is a matter of both individual and national importance. The removal of the elected Member of Parliament renders the affected Constituency to remain without a voice in Parliament for some time.*

*Parliament will continue to carry out its legislative function on matters of public national importance without any representation of the Constituency affected. When the election is set aside, the Member of Parliament affected suffers both serious personal remorse as well as adverse financial effects..... Thus, the crucial need for Courts to act in matters of this nature only in instances where the grounds of the Petition are proved at a very high degree of probability".[Emphasis mine]*

In order to merit an order setting aside the election of a Member of Parliament the evidence produced by the Petitioner must be such as would, in the circumstances, compel the Court to act upon it.

Although the standard of proof is on the balance of probability, it must be slightly higher than in ordinary cases. The authority for this observation is **Election Petition No. 9 of 2002 Masiko Winfred Komuhangi vs Babihuga J. Winnie**. This is because an election is of a great importance both to the individuals concerned and the nation at large.

Similarly in the case of **Sarah Bireete and Another vs Bernadette Bigirwa and Electoral Commission. Election Petition Appeal No. 13 of 2002** (unreported) it was noted by the court of Appeal "A Petitioner has a duty to adduce credible evidence or cogent evidence to prove his/her allegation at the required standard of proof"

The respondent carries no burden to discharge as long as the petitioner has not produced sufficient evidence required to show the truth of the allegations is highly probable. In other words the burden of proof on the petitioner is high and it does not shift. See **Akurut Violet Adome v Emurut Simon Peter EPA No. 40 of 2016**

This court has a duty to look at the affidavits in support of the Petition and evaluate the same against the respondents answer and supporting affidavits in order to satisfy itself of the allegations made in the petition.

With regards to numerical strength, the general rule is that no number of witnesses shall be required for proof of any act. Evidence is to be weighed but not counted. The direct evidence of one witness if believed by the Court is sufficient

proof of a fact but a line of hearsay evidence cannot be sufficient to prove any fact.

**Sarkars' Law of Evidence 14<sup>th</sup> Edition 1993 Reprint 1997 at pg. 87.** States according to Wigmore, the common law in repudiating the numerical system lays down 4 general principles;

1. *Credibility, does not depend on number of witnesses.*
2. *In general, the testimony of a single witness, no matter what the issue or who the person may legally suffice as evidence upon which the Jury may find a verdict.*
3. *The mere assertion of any witness does not of itself need not be believed even though he is unimpeached in any manner, because to require such belief would be to give qualitative and impersonal measure to testimony.*
4. *All rules requiring two witnesses or combination of one witness are exceptions to the general rule.*

It is trite law that the decision of Court should be based on the cogency of evidence adduced by a party who seeks judgment in his/her favour. It must be that kind of evidence that is free from contradictions, truthful so as to convince reasonable tribunal to give judgment in a party's favour. ***Paul Mwiru v Hon Igeme Nathan Samson Nabeta & 2 others EPA No. 6 of 2011***

In addition, it is incumbent upon the petitioner to prove or to produce cogent evidence to prove the allegations and not to rely on the weakness of the respondent's case. See ***Odo Tayebwa v Bassajabalaba Nasser & Electoral Commission Election Petition Appeal No.013 of 2021***

#### *Determination of Issues*

***Whether the 2<sup>nd</sup> respondent was not qualified for nomination and election as a Member of Parliament for Buruli County Constituency?***

The petitioners counsel submitted that the 2<sup>nd</sup> respondent was at the time of his election not qualified for election as a Member of Parliament because he did not resign from his position in the public service. The Petitioners wrote letters to the Ministry of Public Service and Ministry of Education requesting to know whether

the 2<sup>nd</sup> respondent had resigned his position and the reply was that he did not resign. He was still an Education officer at King's College Buddo and there is no record he ever resigned.

The Petitioner's counsel relied on different affidavits of Jane Mwesiga who is a Commissioner Human Resource Management in Ministry of Education who stated that there is no record in the Ministry of the resignation letter. Further evidence relied upon by the petitioners was the affidavit and communication/letter from the Permanent Secretary-Catherine Bitarakwate Musingwire in which she states that she received a letter from the 2<sup>nd</sup> respondent seeking to resign from Public Service and granted the request effective March 2021.

The Petitioners also adduced further evidence to show that the 2<sup>nd</sup> respondent requested for leave for five months ending 1<sup>st</sup> August 2020 to sort out domestic challenges and did not report back to school. The Principal Human resource Officer-Wakiso district deposed an affidavit to confirm that position and he was accused of absconding from duty which attracted disciplinary proceedings. His Salary was suspended on 7<sup>th</sup> January 2021 and was due to appear but failed to turn up and the matter was referred to the Permanent Secretary on 17<sup>th</sup> February 2021 for disciplinary action.

The Petitioners' counsel cited the law on resignation of public officers intending to contest in election specifically the Constitution, Parliamentary Elections Act, Public Service Standing Orders and decided cases *Wasike Stephen Mugeni v Aggrey Awori Supreme Court Election Petition Appeal No. 5 of 2007* and *Kalembe Christopher & Anor v Lubega Drake Court of Appeal Election Petition Appeal No. 32 of 2016*. It was their submission that failure to address and deliver the letter to the Teaching Service Commission means there was no resignation. The non-receipt of the application by the Public Service Commission means there was no resignation.

The 1<sup>st</sup> petitioner's counsel raised an objection as to the admission of documents attached to the 2<sup>nd</sup> respondent supplementary affidavit for contravening section 75 of the Evidence Act. Secondly, counsel contends that the Commissioner for oaths has stamped the documents without identifying the exhibits, and wrongly claims each exhibit is referred to in the affidavit, and does not indicate in respect

of whose affidavit the exhibit is attached nor the date of identifying the exhibit. The affidavit does not introduce the exhibits at all and there is no connection between the affidavit and the exhibits.

The 2<sup>nd</sup> Respondent's counsel submitted that the 2<sup>nd</sup> respondent first sought leave to resolve domestic problems on 14<sup>th</sup> February 2020 effective March 1<sup>st</sup> 2020, which was granted. His evidence is corroborated by the evidence of Mr. Patrick Bakka Male, the head teacher of Kings College Budo. On the 16<sup>th</sup> day of March 2020, he submitted his resignation letter through his Immediate Supervisor, the head teacher of Kings College Budo.

The letter is correctly addressed to the Permanent Secretary, Ministry of Public Service, through the Permanent Secretary, Ministry of Education & Sports through the Head Teacher Kings College Budo. The letter indicates it was forwarded by Kings College Budo and was received by the Ministry of Education and Sports on 17<sup>th</sup> March 2020.

Amongst those to whom the resignation letter was copied were the Secretary Education Service Commission and the CAO Wakiso District. The 2<sup>nd</sup> Respondent received a copy of a letter of no objection to his resignation from his immediate supervisor, the Head teacher of Kings College Budo. The letter was addressed to the Permanent Secretary of the Ministry of Education and Sports.

The 2<sup>nd</sup> Respondent then submitted a hand over report later the same day of 16<sup>th</sup> March 2020. He did not receive any objection to his resignation from either the Ministry of Public Service or Ministry of Education & Sports. He ceased to be a teacher at Kings College Budo and forfeited all entitlements as a teacher. This is corroborated by evidence from the Head Teacher. He then subsequently joined elective politics, was nominated on 15<sup>th</sup> October 2020 for election and subsequently won the January 14<sup>th</sup> 2021 race for Member of Parliament of Buruli County Constituency.

On 8<sup>th</sup> February 2021, he wrote a follow up letter on his resignation, clearly indicating that he resigned on 16<sup>th</sup> March 2020 and that his letter had been received by the security Registry at the Ministry of Education and Sports on 17<sup>th</sup>

March 2020 and wondered why no communication has been forthcoming, despite him ceasing work and officially handing over on 16<sup>th</sup> March 2020. The letter dated 8<sup>th</sup> February 2021 was received by the Ministry of Education and Sports on 22<sup>nd</sup> February 2021. It bears the stamp of the Ministry. Neither Jane Mwesiga nor Jennifer Atoo, two of the Petitioner's witnesses, whether in their affidavits in support or rebuttal deny the letter being received by the Ministry of Education and Sports.

The 2<sup>nd</sup> respondent's counsel in his submissions contended that there was no response to the letter dated 8<sup>th</sup> February 2021. It was expected that if indeed the resignation letter being alluded to by the 2<sup>nd</sup> Respondent was not in their records, they would have responded and stated so. They did not. Similarly, in their affidavits on record, both Petitioners' witnesses Mrs. Catherine Bitarakwatwe and Jane K. Mwesiga have not suggested or even adduced any evidence to prove that the received stamp on his letter of resignation thereon is forged. Additionally, none of these swore any affidavit denying ever receiving the letter of resignation.

The 2<sup>nd</sup> Respondent on 19<sup>th</sup> February 2021 made another follow-up on his earlier resignation of 16<sup>th</sup> March 2020 in a letter addressed to the Permanent Secretary Ministry of Public Service through the Permanent Secretary Ministry of Education & Sports. Attached to the letter was the letter of resignation of 16<sup>th</sup> March 2020 together with the hand over report. This letter like the one dated 8<sup>th</sup> February 2021 was a follow-up letter and not an application to resign.

The 2<sup>nd</sup> Respondent also attached the response letter from the Permanent Secretary Ministry of Public Service dated 24<sup>th</sup> February 2021 purporting to accept an application for resignation and stating that the resignation is effective from 20<sup>th</sup> March 2021. It was the contention of the 2<sup>nd</sup> respondent counsel that this letter was erroneous and deliberately prejudicially crafted by the said Permanent Secretary to create a wrong impression that the 2<sup>nd</sup> Respondent had applied to resign on 19<sup>th</sup> February 2021 and that the response by the Permanent Secretary is not in tandem with the contents of the 2<sup>nd</sup> Respondent's letter dated 19<sup>th</sup> February 2021.

The 2<sup>nd</sup> Respondent upon receipt of the said letter responded by letter dated 26<sup>th</sup> February 2021 highlighting the errors in the letter authored by the Permanent Secretary of 24<sup>th</sup> February 2021 and requesting for the same to be corrected. Again, the letter was written through the Permanent Secretary Ministry of Education & Sports who forwarded it without reservation to Permanent Secretary, Ministry of Public Service.

The 2<sup>nd</sup> respondent's counsel submitted that in both her affidavit in support of the petition and the supplementary affidavit, the Permanent Secretary, Mrs. Bitarakwate does not deny that contents of the 2<sup>nd</sup> Respondent's letter dated 26<sup>th</sup> February 2021 represented a correct position and showed that her response was erroneous.

Additionally, whereas the 2<sup>nd</sup> Respondent attached all earlier correspondences including the resignation letter and hand over report all dated 16<sup>th</sup> March 2020, it would be reasonable to expect the Permanent Secretary Ministry of Public Service to respond by stating that her ministry is not aware of the resignation and hand over letter or that they are not reflected in its record. She did not. This silence is only confirmation that the Ministry was not denying receipt of the 2<sup>nd</sup> Respondent's resignation letter.

In order to dispel allegations that the Ministry of Education and Sports that they did not have a record of his resignation and hand over letter, the 2<sup>nd</sup> Respondent formally applied for certified copies of the contents of his personal file with the Ministry. In a response letter dated 30<sup>th</sup> March 2021, signed by one of the Petitioner's own Witness, **Ms. Jane K. Mwesiga** for the Permanent Secretary Ministry of Education and Sports, the Ministry availed certified copies including the 2<sup>nd</sup> Respondent's resignation letter dated 16<sup>th</sup> March 2020, the hand over report dated 16<sup>th</sup> March 2020 and the no objection to his resignation by the Head Teacher Kings College Budo. This was a clear confirmation that the Ministry had received the 2<sup>nd</sup> Respondent's resignation on 17<sup>th</sup> March 2020 and the hand over report.

The 1<sup>st</sup> respondent in their submission contended that all that was relevant to them at nomination was that there was a letter showing that the 2<sup>nd</sup> respondent

had resigned. The manner of receipt of the letter of resignation by the relevant authorities, its custody and the manner of responding thereto are internal matters within the knowledge of King's College Budo, Ministry of Education and the Ministry of Public Service, which the 1<sup>st</sup> respondent is not privy to. No letter was ever presented to the electoral commission indicating that the 2<sup>nd</sup> respondent had not resigned or that his resignation had been rejected or had not been received by the relevant authorities.

The 1<sup>st</sup> respondent counsel further submitted that it is not the duty of the 1<sup>st</sup> respondent to make inquiries with King's College Budo, Ministry of Education and Sports, Ministry of Public Service or the Education Service Commission to ascertain the circumstances under which the 2<sup>nd</sup> respondent resigned. Once the 2<sup>nd</sup> respondent produced a letter indicating he had resigned that was enough, under Section 15 of the Parliamentary Elections Act allowed any person with any complaint about documents submitted by the candidate to lodge a complaint with the Electoral Commission, the Petitioners never lodged any such complaint.

### ***Analysis***

The main issue for determination is whether the 2<sup>nd</sup> respondent resigned before taking part in the recently concluded elections in accordance with the law. The petitioners seriously contend that he never resigned and therefore took part in the said election in violation of the Parliamentary elections Act and the Constitution.

It bears emphasis to note that the petitioners never questioned or complained about the 2<sup>nd</sup> respondent's alleged failure to resign as a teacher in spite of his nomination papers clearly indicating that he was a Teacher by profession. It is not clear whether they were aware or knew that he had not resigned and ignored it or because he had been successfully returned as the duly elected member of Parliament that they are concerned.

The Electoral Commission is mandated to investigate any complaint raised before them and make necessary orders in resolving such disputes that arose at nomination under Article 61(1)(f) of the Constitution and Section 15 of the Electoral Commission Act. It is wrong and unfair to blame Electoral Commission

for wrongly nominating a candidate when the person concerned never made any complaint before the election polling day. Section 15 of the Parliamentary Elections Act also specifically provides for Inspection of nomination papers and lodging of complaints in relation to any nomination in respect of the constituency challenging the qualifications of any person nominated.

The petition against the 2<sup>nd</sup> respondent is clearly a complaint which is arising after polling and none of the petitioners ever challenged the 2<sup>nd</sup> respondent's candidature at nomination or even after nomination. The petitioners were comfortable with the 2<sup>nd</sup> respondent taking part in the elections whether he had broken the law or not by failing to resign as alleged. The practice of bringing to court pre-polling complaints after an entire electoral process is concluded should be discouraged and abhorred by this court.

It is incumbent upon a party who failed to challenge the nomination of a candidate at the pre-polling stage to put forward facts to explain why he/she never challenged in order not to be seen as a bad loser or the entire petition being looked at as an afterthought. Why wait for all this long time to raise a complaint on resignation which would have been addressed at the preliminary stage? Petitioners have a duty to act in good faith and be mindful of the taxpayers' resources, rather than wait for this long period to lodge a complaint after the entire election process. Every petitioner(s) who petitions the court, must come forward not only with clean hands but with clean mind, clean heart and with clean objective.

This court agrees with the 1<sup>st</sup> respondent's counsel that the Petitioners were expected to lodge a complaint with the 1<sup>st</sup> Respondent against the nomination of the 2<sup>nd</sup> Respondent. This should have been done under **Article 61(f) of the Constitution, Section 15 of the Electoral Commission Act and Section 15(a) & (b) of the Parliamentary Elections Act**. The Petition is clearly an after-thought and the Petitioners are estopped from faulting the Electoral Commission for nominating the 2<sup>nd</sup> Respondent. The Court of Appeal in **EPA No. 01 of 2018 Kasirye Zzimula Fred v Bazigatirawo Kibuuka Francis Amooti & EC** held as follows;

*“From the reading of the above provisions of the law, it appears to us that the intention of the legislature in enacting Section 15 of the Election Petition Act was to ensure that all disputes arising prior or during nominations before voting are resolved with finality before the election date, except where the law otherwise specifically provides. Timely complaints will avoid undue expense and inconvenience to the parties inclusive of the electorate who do not have to vote where nomination is contested. Issues of nomination should be resolved before elections.*

*It appears to us that, the appellant waived his rights to complain when he failed to bring the complaint within the stipulated period and as such would be estopped from doing so after the election.”*

Election disputes should be premised on strong and compelling reasons properly investigated and interrogated in order to achieve the ends of justice not only for the petitioners but for the entire constituency or voters. But ‘post-mortem’ disputes after the entire electoral process should be critically examined to appreciate the bonafides of the petitioner.

In the case of ***Giruli David Livingstone v Mulekwa Herbert & EC Election Petition Appeal No. 76 of 2016*** the Court of Appeal observed and re-echoed similar views as follows;

*“However before take leave of this ground of appeal as a whole we need to observe that it appears illogical in matters such as in these elections for one to contest the eligibility of another candidate in an election after the actual election has taken place and not before. Candidates appear to be willing to contest against others they consider ineligible to contest with in elections as long as they ultimately win the said election. However, in an apparent afterthought, when they lose the election they then contest the said illegibility. A period to contest such eligibility should be provided before the elections and where there is no contest then a candidate should be estopped from raising the same issue again simply because he lost the election.”*

This petition is indeed an afterthought which was crafted with the sole purpose of trying to achieve an intended aim of overturning an election. All the letters (annextures to affidavits) which form the basis were written after the election and indeed were designed to achieve the intended purpose of nullifying a concluded election. The petition against the 1<sup>st</sup> respondent-Electoral Commission is devoid of any merit and incompetent since the petitioners never complied with the Article 61(f) of the Constitution; Section 15 of Election Petition Act and Section 15 of the Parliamentary Election Act.

### ***Resignation***

The petitioners' case is that the 2<sup>nd</sup> respondent never resigned and that his purported resignation letter was made after the elections and specifically after he was declared and returned as winner. This petition is premised on the letter dated 4<sup>th</sup> February 2021 replying to the petitioners' letter dated 1<sup>st</sup> February 2021 and is further confirmed by a letter dated 24<sup>th</sup> February, 2021 wherein the Catherine Bitarakwate Musingwiire made reference to a letter dated 19<sup>th</sup> February, 2021 by the 2<sup>nd</sup> respondent.

The 2<sup>nd</sup> respondent in the letter dated 19<sup>th</sup> February 2021 was reminding the Permanent Secretary about his earlier resignation dated 16<sup>th</sup> March 2020 but the person concerned opted to take the same letter as the letter requesting for resignation rather than to make an Inquiry as to the alleged date of resignation of 16<sup>th</sup> March 2020.

The 2<sup>nd</sup> respondent's letter was a follow up of an earlier letter dated 8<sup>th</sup> February, 2021 addressed to Ministry of Education through the Head Teacher-King's College Budo. It was very wrong to take a letter reminding the concerned office about his earlier resignation to be deemed the actual letter of resignation.

The 1<sup>st</sup> petitioner through her lawyers in a letter dated 28<sup>th</sup> January 2021 after the elections and he was duly informed that the 2<sup>nd</sup> respondent duly resigned. But in her petition does not mention this fact and decided to produce to court only documents that would appear to make her case stronger or favour her in ensuring the election of the 2<sup>nd</sup> respondent is nullified. The Headmaster of King's College

Budo-Patrick Bakka Male in his affidavit states paragraph 9 & 10 the petitioner's lawyers inquired about 2<sup>nd</sup> respondent's resignation and in a letter dated 3.2.2021 informed the said lawyers that Akugizibwe resigned and handed over all school materials in his possession.

The petitioner as a person started looking for any faults in the resignation process by writing letters to Ministry of Public Service and Ministry of Education and Sports. Indeed even after this process, the petitioner engaged Uganda Police to avail a police report crafted in desired manner to sway the court that the 2<sup>nd</sup> respondent did not resign. The petitioners counsel seems to infer that the headmaster should explain how the letter got a received stamp from Ministry of Education and Sports. This is too much to ask from a person who has delivered a letter and it is duly received under the set procedures within that institution. The petitioners were at liberty to cross examine the Head teacher about the delivery of the resignation letter of the 2<sup>nd</sup> respondent instead of engaging in conjectures and surmises of any possibilities as they have submitted. The affidavit of the head teacher was clear and to the point and it could not be assailed by the petitioners' witnesses who had deposed on matters which were not within their knowledge.

Upon examination of the evidence on record it clearly indicated that the resignation letter was duly received and it bears a stamp and as the practice of the Ministry of Education there is no signature in a received document. Similarly, the letters of the petitioner and those of the respondent to the Ministry of Education all bear a similar stamp without any signature. The received stamp is conclusive evidence of delivery and questions of who received the same should not arise and the petitioner's witnesses from the Ministry of Education have not alleged that it is a forgery. Instead it is the hired police officers who have tried to allege that it was backdated and the petitioner has re-echoed the same in her affidavits without any supporting evidence.

The petitioners tried to selectively bring only those documents that favoured their case and deliberately refused to attach the resignation letter, hand over report and the Headmaster's letter confirming the resignation. The Ministry of Education official Jane K. Mwesiga only queried the letter as to where it has been since that

time. This is a clear indication that she was aware that the letter of resignation was stuck somewhere in their system and never alluded to it being forged or backdated.

In addition, the Permanent Secretary-Ministry of Public Service denied receiving the resignation letter from the 2<sup>nd</sup> respondent but no one has accused her of receiving the same. However, it is wrong for the Ministry of Public Service to accept letters of resignation directly from the employers without the endorsement of the line Ministry, Department or Agency. This creates some confusion and especially so when there are pending disciplinary issues or other administrative issues of surrendering government property.

The Permanent Secretary –Catherine Bitarakwate Musingwiire states that she only received a letter dated 19<sup>th</sup> February 2021 and she replied granting his application to resign. But the said letter was only alluding to an earlier letter of resignation dated 16<sup>th</sup> March 2020. She ought to have made inquiries with Ministry of Education and Sports about a letter dated over 11 months ago that had not been delivered to her desk as the concerned officer instead of haphazardly writing to accept the resignation as of that date she had seen the letter.

The 2<sup>nd</sup> respondent wrote his letter of resignation and addressed it through the Head Teacher, King’s College Budo, through The Permanent Secretary Ministry of Education and Sports and The Permanent Secretary, Ministry of Public Service. In my view this was the proper way of addressing the letter in order to get clearance from all the responsible officers and this satisfies the requirement of a proper resignation letter. The 2<sup>nd</sup> respondent also made a hand over report to the Head-teacher of the School as the immediate supervisor. The Head teacher thereafter, accepted the resignation of the 2<sup>nd</sup> respondent and the letter of resignation was forwarded for requisite consents.

The Head Teacher in his letter addressed to the petitioner’s lawyers-Kasumba, Kugonza & Co Advocates dated 3<sup>rd</sup> February 2021 confirmed to the resignation and further clarified that;

***“As a School we last paid him our local PTA Salary in March 2020. He has not been enjoying any privileges of a teacher in this school like Child Assistance Allowance and Staff Assistance Package (SAP).***

***From March 2020 he ceased being my staff and never did any work for the school.”***

It can be deduced from the above analysis that the 2<sup>nd</sup> respondent resigned and never continued work with the school after handing over to join elective politics.

***Resignation*** is defined in ***Black’s Law dictionary 11<sup>th</sup> Edition (2019)*** at page 1566 as follows;

*The act or an instance of surrendering or relinquishing an office, right, or claim. Or A formal notification of relinquishing an office or position; an official announcement that one has decided to leave one’s job or organisation, often in the form of a written statement.*

In the case of ***Davis v Marion Cty. Engineer No. 90-561 Supreme Court of Ohio*** it noted that;

*“Acceptance of a tender of resignation from public employment occurs where the public employer or its designated agent initiates some type of affirmative action, preferably in writing, that clearly indicates to the employee that the tender of resignation is accepted by the employer.”*

Article 252(2) of the Constitution provides; resignation takes effect once received by the person or authority to whom it is addressed or any person authorized by that person or authority to receive it. The resignation is deemed to take effect when the writing signifying the resignation is received by the person or authority to whom it is addressed or any person authorized by that person or authority to receive it.

Therefore, what is required is for it to have a received stamp of the receiving authority or person. See ***Kalemba Christopher & another v Lubega Drake Francis Court of Appeal Election Appeal No 32 of 2016 at page 20***

The 2<sup>nd</sup> respondent tendered his resignation in accordance with the law and the immediate supervisor the headteacher accepted his resignation and forwarded the same to Ministry of Education. See **Okeyoh Peter v Abbot George Ouma EPA No. 08 of 2011**

The confusion or mix up or mistakes at the Ministry of Education and Sports in handling the letter of resignation should not be visited on the 2<sup>nd</sup> respondent whom the head teacher has duly confirmed that he resigned and his resignation was accepted and was never given any local PTA salary and other attendant privileges from the school. The letter of resignation was forwarded by the head teacher to the Ministry of Education and Sports.

The delay of the transmitting the resignation letter of the 2<sup>nd</sup> respondent should not prejudice the intent of the 2<sup>nd</sup> respondent. In the case of **Kasibbo Joshua v Mbogo Kezekia & Electoral Commission Election Petition Appeal No. 04 of 2011; Mike J.Chibita J** (as he then was) observed that;

*‘However in a system where there is selective acknowledgment of communication and therefore lack of proper systems an exception has to be made to the rule that resignation is complete only after acceptance of resignation.*

*Resignation in such situations should only be read from the intention of the officer wishing to resign, when he wrote the letter of resignation, when it was received by the proper officer, if at all, and whether the proper officer acknowledged receipt of the letter and accepted or rejected the request to resign and after how long. ....*

*...there should be a reasonable time within which to expect certain things. It should be expected that when a letter is written it should be received within a certain period of time. After it has been received, it should be responded to within a certain period of time. Failure of which somebody should be held to account and my view is that person should not be the person who is seeking an answer from the proper officer. It would be harsh and unjust to visit the penalty of the delay or failure to forward a received letter of resignation to a proper officer who expressed his intention to resign way before the expected 90 days.*

*Otherwise, we would make a mockery of the 90 days and consequently frustrate officers wishing to resign’.*

This court entirely agrees with the above observation and applies it to the circumstances of this present case to infer and confirm that the 2<sup>nd</sup> respondent tendered his resignation and the confusion in the responsible Ministry should not be interpreted to prejudice the 2<sup>nd</sup> respondent. See ***Kalembe Christopher & EC v Lubega Drake Francis Election Petition Appeal No. 32 of 2016***

In addition, the argument by the petitioners that the 2<sup>nd</sup> respondent continued drawing a salary is equally very flimsy and devoid of merit. The 2<sup>nd</sup> respondent was not drawing the local PTA salary from the school and he never received any benefits and privileges from the school as confirmed by the head teacher in his letter. The salary that was sent to his account from government was a lapse in the system and this cannot be inferred to mean that he continued to be in employment and thus never resigned.

The Court of Appeal noted that; Even if the appellant did have money paid to his account after retirement, jurisprudence had established that such monies should be recovered by the Auditor General and therefore the issue of salary should not be a ground for nullifying an election. ***Wamboya Vicent v Ssasaga Isaias Johnny EPA No. 11 of 2016, Okeyoh Peter v Abbot George EPA No. 11 of 2011***

The petitioners have failed to produce cogent evidence to prove that the 2<sup>nd</sup> respondent never resigned or was still a public servant at the time of nomination on 13<sup>th</sup> October 2020. This petition fails on this issue.

***Whether the Electoral Commission unlawfully declared the 2<sup>nd</sup> respondent as the validly and duly elected Member of Parliament for Buruli County Constituency?***

The petitioners counsel submitted that the 1<sup>st</sup> respondent is under a duty to ensure that section 4 has been complied with. It is even more so where like in this case the 2<sup>nd</sup> respondent declared he is a teacher.

The respondent's counsel submitted that the nomination papers have a space for occupation/profession and the 2<sup>nd</sup> respondent filled in his profession as a teacher. By stating his profession as a teacher, which cannot mean that he did not resign.

### ***Analysis***

This issue falls by the way side after the resolution of the first issue and the argument of the petitioner's counsel is totally misplaced and off target because he alludes to 2<sup>nd</sup> respondent's indication of his occupation or profession as a teacher to infer that he never resigned. The 2<sup>nd</sup> respondent is a teacher by profession and the nomination form did not require him to indicate whether he is retired or active in the teaching profession. A trained teacher does not cease to be called so, merely because he has resigned or retired from his job.

Secondly, being a teacher is not a bar to disqualify a person from contesting in elective politics under the law. But rather, the disqualification to stand in politics is about being *a public officer or person being employed in any government department or agency of government or an employee of a local government or any body in which the government has controlling interest* as provided under Section 4(4) of Parliamentary Elections Act.

Teachers who are in private schools are free to contest in any election without resigning from their employment. The petitioner's argument on this issue is totally flawed and devoid of any merit. The right to contest in an election or the right to be elected is a pure and simple statutory right regulated by the Constitution and Other electoral laws. Outside the Constitution and the electoral laws there is no right to elect, no right to be elected and no right to dispute an election.

This issue equally fails.

### ***What remedies are available to the parties?***

It is basic to the law of elections and election petitions that in a democracy, the mandate of the people as expressed at the polls must prevail and be respected by the courts, which is why the election of a successful candidate is not to be set aside lightly. See ***R.P Moidutty v P.T Kunju Mohammad [2000] AIR SC 388***

The petitions fail on all the issues and the 2<sup>nd</sup> respondent is the duly elected Member of Parliament for Buruli County Constituency. The respondents are awarded costs of the two petitions.

It is so ordered



**SSEKAANA MUSA**

**JUDGE**

**28<sup>th</sup>/09/2021**