A CRITICAL REVIEW OF THE SUBSTANTIALLY TEST IN PRESIDENTIAL ELECTIONPETITIONS IN UGANDA.

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DECLARATION

I Kasujja Ali Reg. no. LLB/42174/133/DU, do hear by declare to the best of my knowledge that this research report entitled, "a critical review of the substantiality test of the presidential election petitions in Uganda" is truly my original and has not been submitted for the fulfillment of any award of degree or diploma inn any other institution of higher learning or university so it is entirely my own personal and individual efforts.

Dated this..23/10/2017..day of....10.....2017

Signature

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ACKNOWLEDGEMENT

This research work has taken a lot of my time and considerable effort especially those very busy seasons in my life. It has been a lesson in very many things.

It has been a challenging piece of work to accomplish the topic being new thus limited sources where I could draw references from.

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ABSTRACT

This Research is aimed at a critical review of the substantiality test in presidential election petitions in Uganda. Basically this Research is going to examine the laws governing presidential election petitions, the court, nature and standard of evidence required there of which shall later be our basis to examine the viability of the substantiality test. The Research is also going to look at the cases where the substantiality test has been invoked, the judgments and the comments there of.

Lastly this Research is also going to draw a comparison between the laws governing presidential election petitions in Uganda and other jurisdictions where presidential election petitions have orchestrated and the underlying lessons there of that shall be a basis for determining the need for law reforms in our legal system.

CHAPTER ONE

1:1Introduction and back ground of the study.

A presidential election petition is the formal process of challenging the outcome or any aspect of the election of the president. This was defined by **Linda Awuor and Monica Achode**[1]. The procedure for challenging an election varies from jurisdiction to jurisdiction but usually starts by way of an election petition. This is provided for under ***article 104(1)***[2]that is, to the effect that any aggrieved candidate may petition the Supreme Court for an order that a candidate declared by the Electoral Commission elected as the president was not validly elected. The parties to a presidential election petition are petitioner and the respondent(s). Ivory Coast and Ukraine are among the few countries in the world in which a judicial organ cancelled the presidential election results and ordered a repeat poll.

In Uganda, the Supreme Court has been tasked with resolving election disputes on three occasions, that is in 2001, 2006 and 2016[3].However in all the three while the court found irregularities, it determined that these were not substantial enough to affect the outcome. On the flip of the coin the substantiality test which has attracted support from majority justices of the supreme court is partly to blame ***.S.59 (6)(a)***[4] is problematic because it attracts two interpretations . It states that the election of a candidate as the president

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[1]Comparative Analysis of Election petitions in Kenya and other jurisdiction

[2]Constitution of the Republic of Uganda of 1995 as amended

[3]Dr. Kizza Besigye v Yoweri Kaguta Museveni and others Presidential Election Petition no.1 of 2001, Kizza Besigye v Yoweri Kaguta Museveni and others Presidential Election Petition no.1 of 2006 and J.P Amama Mbabazi v Yoweri Kaguta Museveni Presidential Election Petition no.1 of 2016

[4]Presidential Elections Act of 2005 as amended

shall only be annulled if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non compliance affected the result of the election in a substantial manner[5].

In interpreting the above section, two schools of legal thoughts have been adopted[6]. One school of thought pushes for substantiality test. This was heavily supported by ***Justice Benjamin Odoki*** and ***Joseph Mulenga***. On the other hand the second school of thought which is the strict or qualitative approach was heavily supported ***Justice Professor George William kanyeihamba*** and ***Wilson Tsekoko***. The school of thought claims that non compliance with the electoral laws automatically leads to nullification of the election. It looks at the quality of the election.

The question which arises is that which school of thought should be adopted?

While framing the Act, the framers intended to remedy the impediments and mischief of the irregularities during elections however S.59 (6)[7]tends to be protective of such irregularities by giving power to court to determine the substantiality of such.

To resolve the impossible of the contradicting interpretations of the provision the section must be amended.

In its current form, it makes the determination of the petition be influenced by the subjectivity of the judge. Justice Odoki and current chief justice Bart Katureebe have previously called for the amendment of the provision. However both the legislature and the judiciary have of recent shied away from engaging in the discussion.

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[5] ***Ibid***

[6] Dr Kizza Besigye v Yoweri Kaguta Museveni Presidential Election Petition no.1 of 2006

[7] ***Ibid***

In 2009, Dr. izza Besigye[8] petitioned the constitutional court to declare the section unconstitutional however court dismissed the case.

The debate over section 59[9] has continued to attract discussions from several stake holders in the country, professor Ben Twinomugisha, a former dean school of law at Makerere University argued in a February 3 interview[10] that it is hypocrisy for the supreme court to wait for parliament to amend the constitution.

Article 104[11]empowers court determine the petition s.59 attempts to take away that power.

"It *is not legally sound for courts to equate people's aspirations to mathematical precision as used in the substantiality test."*

The court must come out boldly with its judicial powers to give life to people's aspirations. We can have another election so long as the people's right to vote is respected the court should not wait for grave breaches.

"How many people should be killed to have an election nullified? People were killed in Rukungiri and Bulonge even those who could not vote are citizens. It is all injustice."

Other than tinkering with the legal frame work through amendment, the other possibility for nullification of a presidential election will happen if the court is composed of judge whose conviction leans towards state formation.

There are judges whose conviction tends towards the democratic path.

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[8] Dr Kizza Besigye v Attorney General constitutional petition no.7/ 2009

[9] *Ibid*

[10]Daily Monitor Newspaper

[11] 1995 constitution of Uganda as amended

1:2Statement of the problem

In Ugandan jurisprudence, the presidential Elections Act[12]provides for election offences breach of which gives the any candidate to petition court. On the three times we have had presidential election petitions[13] , the petitioners have led evidence that has been admitted by court including video evidence in 2016(though was rejected). [14]Despite the existence of such clear evidence supporting the three petitions, the Supreme Court has been reluctant to invalidate the elections.

1:3Hypothesis

The court on three occasions has failed to invalid the elections where there clear evidence of breach of electoral laws and irregularities which is admitted by the same court, to that effect this research goes deep to find out the reason there of.

1:4 Research questions

1.4.1 Whether the principle of substantiality is viable in election petitions?

1.4.2 What are the appropriate circumstances for the implementation of the principle of substantiality?

1.4.3 What legal, political, and social impact does the substantiality cause?

1.4.4 What are the recommended areas for review of the effective and appropriate application of the principle of substantiality?

1.5 Objectives of the study

Among other objectives, the research will deep down**;**

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[12] Supra page11

[13] Supra page9

[14] John Patrick Amama Mbabazi v Yoweri Kaguta Museveni & 2 others presidential Election petition no.1 of 2016

1.5.1 To examine the influence of the executive arm of government on the independence of the court in determining presidential election petitions.

1.5.2 To examine the legal framework, identify the weaknesses there under on the laws governing presidential election petitions.

1.5.3 To establish the reformative areas and measures of the legal system to enhance justice to the unsatisfied parties.

1.5.4 To find out the influence of security organs such as the police and the army in the obstruction of justice in regard towards the presidential election petitions

1.5.5 To suggest possible recommendations that could be used to address the reluctance of the supreme court in invalidating the elections where there has been breach of the laws.

1.6 Significance of the study.

An election petition is a court process through which an aggrieved candidate seeks relief from court for contentions premised on legal grounds as provided for under the law. The judgments under three presidential election petitions have not served purpose for such petitions as the courts admit the adduced evidence but are reluctant to nullify the elections on grounds of non substantiality there by a need to look critically into such a problem and suggest recommendations and reforms that shall b e relied upon to address such a lacuna hence the significance of this research.

1.7. Scope of the study

This research is going to mainly cover the three presidential election petitions in Uganda the one of Kenya of 2013 and other presidential election petitions in other jurisdictions.

1.8. Literature review

Justice is a key , important and indispensable principle in the due process of court that must be adhered to in order to maintain the confidence of the public in court .Therefore court is expected of expected of adjudicating matters before it without any bias and independently without any influence from any individual person body or any arm of government.

However on three occasions i.e. 2001, 2006 and 2016[15], the court has admitted evidence of election malpractices and breach of electoral laws which is a fundamental ground for nullifying an election but court has been reluctant to order for such. This amounts to an injustice and has led to loss of confidence in court by the public for example Dr. Kizza Besigye one of the individuals and presidential aspirant in 2016 presidential elections in an interview[16] said that he can no longer recourse to court in case he is unsatisfied with the outcome of the election.

Many writers have through their literature made important comments and observations about the injustice caused by the and this have provided relevant and valuable information as analyzed here under;

Crispy kaheru[17] puts it that in all the three presidential election petitions we have had in Uganda court has found glaring issues with the elections but court has contended that those issues have not been found worth rendering an election cancelled.

He adds that court has made more or less similar decisions on all the previous presidential petitions which pattern of the rulings may with time cast doubt on whether court can actually deliver a different form of ruling.

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[15] Supra page 9

[16] Daily Monitor Newspaper

[17] Key lessons from Uganda's presidential Election petition 2016

In review of the judgment of Dr. Kiiza Besigye v Yoweri kaguta Museveni and the Electoral Commission[18], Justice George William Kanyeihamba acknowledged the pressure that judges were under from the executive in both 2001 and 2006 presidential election petition. In his summation he asserts that the laws governing presidential elections had not been complied with and this affected the election results in a substantial manner. "To ***decide otherwise in my opinion, manifestly conflict with the unanimous findings of the court on non compliance of an election legislation. Once a court finds out that the constitution and other country's laws have been flouted, that court has to do its bounden duty and grant the remedy sought".***

Jude Murison[19]puts that the problem concerning election petitions is not the witness of the judiciary per se, but the shortcomings of the laws and the nature of Uganda's judicial system. However some justices of the Supreme Court have been reluctant openly to condemn the government rather than nullifying the elections. This is due to the political implications for Uganda's security once the Supreme Court nullifies the election against the incumbent and the pressure exerted onto the judiciary by the executive.

Linda Awuor and Monica Achode[20] draw a comparison between different election petitions in different jurisdictions and most commonly in some jurisdictions the courts have admitted breach of electoral laws and election irregularities but the same courts have been reluctant to nullify the elections on grounds that such irregularities and breaches have no substantial effect on the election results however in Ivory Coast and Ukraine court has nullified the elections.

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[18] Presidential Election petition of 2006

[19] Election Petitions and Judicial fraud in Uganda

[20] Comparative Analysis of Presidential Election Petitions in Kenya and other Jurisdictions

CHAPTER TWO

2:1 LEGAL FRAMEWORK OF THE LAWS GOVERNING PRESIDENTIAL ELECTION PETITIONS IN UGANDA:

2:1:1 THE CONSTITUTION OF THE REBLIC OF UGANDA OF 1995 AS AMMENDED:

Article 1[21]provides for the sovereignty of the people where all power belongs to the people .subsection 4[22]of the same article provides that the people shall express their will and consent on who shall govern them and how they should be governed through regular, free and fair elections of their representatives or through referenda. This means that for any person to be legally recognized as a president in Uganda, such person must have been elected by the people under a free and fair election which shall be by universal adult suffrage through a secret ballot as provided under Article 103[23].

However other than through a presidential election, there is also another way that has been recognized by the courts in Uganda where a person can be legally recognized as a president in Uganda. This principle was laid down in the case ***Uganda v Commissioner of prisons, ex parte Matovu***[24] where court held that if a new regime illegitimately overthrows an existing regime, the new regime can legally be recognized if the old ground norm is replaced by a new one .thus this works as an exception to the formal way of being recognized legally as a president in Uganda.

For a candidate to be declared a president under a presidential election petition, he / she must have got a substantial number of votes of more than 50% of valid votes cast at the election in his/ her favor.

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[21] 1995 Constitution of Uganda as amended

[22] ibid

[23] ibid

[24] (1966)EA 514 at page 545

Article 104[25] provides for challenging of a presidential election where any aggrieved candidate may petition the Supreme Court for an order that a candidate declared by the Election Commission elected as a president was not validly elected. The Constitution under this Article provides for a legal path of challenging a presidential election and this right is limited only to candidate who may be may be unsatisfied as a reason of invalidity of the election.

The jurisdiction of the presidential election petition lies only in the Supreme Court and article 104(2) [26]provides for a time limit with in which to file a petition as 10 days after the date of declaration of the presidential election results.

Article 104(3) [27]mandates the Supreme Court to inquire into and determine the petition expeditiously and shall declare its findings not later than 30 days from the date the petition is filed. In my view this article exerts pressure on to the court in inquiring and determining the petition which in one way or another leads to injustice.

2:1:2 THE PRESIDENTIAL ELECTIONS ACT;

Section 59(1) [28]provides that an aggrieved candidate may petition the Supreme court for an order that a candidate declared elected as the president was not validly elected .This section is in an agreement with Article 104 which also provides for the same where both laws confer a right to any aggrieved candidate to legally challenge the declared candidate in the court on grounds of invalidity of the election due to non compliance with the electoral laws.

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[25] 1995 constitution of Uganda as amended

[26] ibid

[27] ibid

[28] Presidential Elections Act of 2005

Section 59(2) [29]provides for time with in which to file a petition and it must be lodged within 10 days from after declaration of the election results .This subsection provides for a time limit with in which a petition should be filed in the supreme court registry and it is to this effect that any petition filed beyond the prescribed time shall not be entertained unless there is a sufficient cause which must be proved to the satisfaction of court by the petitioner.

Section 59(3) [30]mandates the Supreme Court to inquire into and determine the petition expeditiously and declare its finds not later than 30days from the date the is filed. This subsection is of no difference with article 104(3)[31]which exert pressure on to the court. Under normal circumstances the court cannot hear and determine the petition and declare its findings of such a matter of public interest given the kind of evidence which is national wide in form of affidavits. submissions of both parties making the workload quite huge that cannot easily be exhaustively discharged within the limited space of time prescribed by the law which calls for hectic working atmosphere due to pressure exerted on to court which at times leads to injustice. **Professor George William Kanyeihamba**[32] says that the inquiry meant in the constitution is radically different from an ordinary trial whether of a criminal, civil or administrative nature, the implications of which are discernible. An inquiry into a presidential election must be conducted , concluded and its findings and reasons given within the period prescribed by the constitution. The Supreme Court can summarize its findings and give a decision and then give reasons outside the period fixed by the constitution is indefensible.

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[29] Ibid

[30]ibid

[31] Supra page 34

[32] Constitutional and political History of Uganda

Section 59(6) [33]provides for the grounds upon which court to nullify an election of a president. It provides that an election of a candidate as president shall only be annulled on any of the grounds of non-compliance with the provisions of this Act, if the court is satisfied that the election was not conducted in accordance with the principles laid down and that the non compliance affected the results of the election in a substantial manner. This section has been seen to be problematic as on three occasions that is in 2001, 2006 and 2016 court has relied on the same section in declining to annul the presidential election. In reviewing this section, the problem with it is that it is of double standards in other words it is not specific. First it provides for non-compliance with the electoral laws during the election of such a declared candidate as a president and on the other hand it provides that the non-compliance must have affected the result of the election in a substantial manner. The itching and unanswered question among the public in which substantial manner such non-compliance must have occurred to affect the results? This has been tried to be answered by case law as discussed as here in under;

In the case of KIZZA BESIGYE[34] court expounded on what "substantial" is and what it means. Hon. Justice Bart Katureebe observed that, the framers of the constitution could not have intended that even the slightest non-compliance should result in annulling a presidential election. He continued to state that it was for that reason that they provided for in Article 104(9) [35]that Parliament shall provide grounds upon which a presidential election shall be annulled and parliament did so in Section 59(6)(a) of the Presidential Election Act . Justice Tsekoko further stated in Kizza Besigye[36] that Section 59(6)(a) of the

[33] Supra page 35

[34] Supra page 32

[35] 1995 constitution of Uganda as amended

[36] Ibid

Presidential Election Act , "appears to imply a license to a candidate to cheat or violate e law but do it in such a way that the cheating ought not to be so much as amount to creating a substantial effect on result" . This view was welcomed by the public who seem to think that the courts are simply acting in favor of the ruling party when they uphold elections even if there had malpractice as long as such did not affect the results.

In the case of **DR. KIZZA BESIGYE V THE ATTONEY GENEAL**[37], Hon. Justice Lilian Tibatemwa cautioned that officers in charge and other actors are permitted to so violate constitutional imperatives and do so poorly mishandle the process that the outcome can only be described as a sham , a mere imitation. If there was no legitimate election , the court would be able to declare the outcome null and void .Therefore , if the process is conducted substantially outside the principles of the constitution , such is no election. This implies that despite court's consistent requirement of substantiality, it is not a free card for candidates to rig elections and expect court to uphold the results in their favor. However political candidates offering themselves for elections should embrace fair play and not rig elections and expect to hide behind the curtains of justice as he who comes to equity must come with clean hands.

[37] Constitutional petition 08 of 2007, 28 July 20009

CHAPTER THREE

3.1. VIABILITY OF THE SUBSTANTIALITY TEST IN THE PRESIDENTIAL ELECTION PETITIONS;

The substantiality test emanates from s.59(6)[38]which provides that the election of a candidate as president shall only be annulled if the court is satisfied that the election was not conductedin accordance with the principles laid down in and that the non compliance affected the result of the election in a substantial manner. This section has brought controversy that has attracted discussion among both the domestic and international community;

3:2 Domestic discussion of the viability of the substantiality test

Domestically the viability of the substantiality test has been discussed by a number of people from the government institutions, political organizations, and Non-governmental organizations and on an individual basis;

3:2:1 Judiciary;

Justine Benjamin Odoki the chief justice and justice of the supreme court as he then was and the current Chief Justice Bart Katureebe have both previously called for the amendment of the controversial provision to resolve the impasse of the contradicting interpretations of the provision as in its current form it makes the determination of the petition be influenced by the subjectivity of the judge which may lead to miscarriage of justice as witnessed in the previous presidential election petitions of 2001, 2006 and 2016[39]. Thus from the above recommendations of the two chief justices, I can only stress that the viability of

[38] Presidential Elections Act

[39] Supra page 9

the substantiality test in presidential election petitions is subject to an amendment of the controversial provision as recommended by the two judicial officers.

The substantiality test in presidential election petitions in Uganda as it stands with in the legal framework is only viable subject to the composition of the judiciary. This can happen only if the court is composed of justices / judges whose conviction leans towards state formation. There are justices / judges whose conviction tends to lean towards the democratic path. Such justices are prominently known for applying the qualitative test as opposed to the substantiality test. Many people sound skeptical about the current composition of the court that is alleged to be composed of carders of the National Resistance Movement which is the ruling party thus such justices seem to bend low to the interests of the party other than the aspirations of the nation (people) thus a hardship in overturning a presidential election. For instance Dr. Kabumba a constitutional law lecturer at Makerere University in an interview[40] said that efforts to return Justice Benjamin Odoki as chief justice and the nature of appointments to the supreme court all tend towards court packing, ***"the*** *fact that twelve(12) names were submitted to the president in order of preference and that the selections were undertaken from the bottom of that list is questionable*". It is alleged that that the president makes the selections of the justices appointed to the supreme court basing on those who are willing to represent his and the party's interests therefore making it for such justices to overturn a presidential election thus the viability of the substantiality hard to be achieved.

[40]Daily Monitor Newspaper

3:2:2 Political Organizations;

Rt Col Dr. Kiiza Besigye a four time presidential aspirant and a flag bearer for FDC in 2009 petitioned the constitutional court[41]to declared the section that is S.59(6)[42]unconstitutional however the case was dismissed. In an interview[43] on 3rd February 2016, Professor Ben Twinomugisha a former Dean school of Law Makerere University argued that it is hypocrisy for the supreme court to wait for parliament to amend the constitution. The court is empowered by article 104[44] to determine the petition however s.59(6) [45]attempts to usurp the power. He further argues that it is not legally sounding to equate the people's aspirations to mathematical precision as used in the substantial test, they must come out boldly within their judicial capacity to give effect and life to the aspirations of the people, we can have another election as long as the people's right to vote is respected. The recent position of the supreme court in matters of presidential election petition reflects the courts act of strangling of the aspirations and the will of the people granted by article 1[46]which provides for the sovereignty of the people who shall express their will and consent on who to govern them how they should be governed through regular , free and fair election of their leaders .To that effect , where there has irregularities and election malpractice and the court upholds such on grounds of non substantiality to affect the result for example in 2001 , 2006 and 2016 [47]in my view that would amount to usurping the aspirations and the will of the people which renders it to be inconsistent with the constitution and article

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[41] Dr Kizza Besigye v Attorney General constitutional petition no.7 / 2009

[42] Supra page 18

[43]Daily Monitor Newspaper

[44] 1995 constitution of the Republic of Uganda as amended

[45] ibid

[46] ibid

[47] Supra page 9

2(2)[48]provides if any other law or any custom is inconsistent with any of the provisions of this constitution , the constitution shall prevail, and that the other law or custom shall , to the extent of the inconsistency be void there the substantiality test being inconsistent with the provisions of the constitution is only viable in Uganda subject to amendment of the problematic provisions.

3:2:3 The issue of incumbency and military composition;

Professor Joe Oloka Onyango, a constitutional law expert argued in an interview[49] that as criticism is netted on the judiciary, there is need to understand the situation that Uganda is dealing with, "*as Ugandans, we are engaging in a struggle, it is not about the election, but the place of the state*". This is a military dictatorship that we are dealing with. There is need to liberate institutions of the state from capture by the military. This can be related to the principle of substantiality test through the comments made by top army generals who showed their unwillingness to abide by the court decision in case the court had overturn the presidential election .This means that even if court overturns a presidential election, a military regime is always willing to re-instate the incumbent at all costs notwithstanding the position of court therefore this shows substantiality test is not viable under a military government

[48] 1995 constitution of Uganda

[49]Daily Monitor Newspaper

CHAPTER FOUR

4:1 A COMPARISON HOW THE SUBSTANTIALITY TEST HAS BEEN APPLIED IN UGANDA AND IN OTHER JURISDICTIONS.

The substantiality principle in presidential election petitions has been extensively been applied in Uganda, Kenya and Ghana. Therefore under this chapter, am going to extensively review the cases there in the afore mentioned jurisdictions to draw an extensive comparison that envisage how the principle has been applied in those jurisdictions. I am also going to review some articles that have drawn the comparison of the applicability of the principle in various jurisdiction, mainly am going to rely on "Judicial Intolerance towards Annulment of Presidential Elections" by Joseph G. Akech .

Elections are an important part of democratic governance around the world. They should be free and fair held periodically for the people to choose their own leaders which is a fulfillment of universal adult suffrage and in conformity with the supreme law and other law.

When there is an election dispute as to whether someone was validly elected, courts would be called upon to determine the rightful winner of an election .The petitioner must lodge his or her petition before a competent court within the prescribed time and such petitions are determined using enabling laws usually the constitution, the Presidential Election Act , Rules of Procedure and case law .

To determine the rightful winner of an election courts are enjoined to consider the facts giving rise to an election dispute and apply the laws applicable where the court must consider who has the burden to prove certain facts and to what extent before pronouncing itself on the dispute before it. The challenge however arises as to what constitutes free and fair elections and to what extent can an election malpractice and or an irregularity be condoned by the courts of judicature. In interpreting the relevant laws applicable in election disputes,

courts are mandated to reflect 'the WILL OF THE PEOPLE' in their decisions. This means that the decision of the court should not depart from the will of the people as to amount to injustice to people's aspirations upon which courts derive their power as per article 1[50].

Joseph G. Akech[51] states that democracy in Africa is young and still struggling with armed insurgencies, poverty, diseases and poor infrastructure. Notwithstanding these aforementioned challenges standing in the way of democratic governance in Africa, considerable achievements have been made in constitutional framework allowing elections to be conducted and legally challenging the outcome in of any dispute.

A comparison of presidential election disputes in Uganda, Kenya and Ghana. In all most all the presidential elections giving rise to election petitions, the courts in Uganda, Kenya and Ghana have consistently applied the principle of substantiality in declining to annul those results. This is an ingrained judicial intolerance towards annulment of such elections based on disputes brought before it[52].

According to Linda Awuro and Monica Achode [53] state that,

".... A presidential election petition is a formal process of challenging the process , outcome or any aspect of the election of a president. The procedure for challenging an election varies from jurisdiction to jurisdiction but usually starts by way of an election petition ."

Before discussing the comparison , it is proper to state what the law is in those three jurisdictions before proceeding to discuss presidential elections petitions

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[50] 1995 Constitution of the Republic of Uganda

[51] Judicial Intolerance Towards Annulment of Presidential Electitions

[52] ibid

[53] Comparative Analysis of presidential Election Petition in Kenya and other Jurisdictions

and the rule of substantiality as applied in presidential elections as discussed here under;

4:2 Uganda;

In Uganda, the constitution under Article 10(4)[54]authorizes parliament to make laws for the conduct and annulment of presidential election . Pursuant to such authority, the parliament enacted the Presidential Elections Act [55]under which the parliament outlined the grounds for annulling presidential elections. Section 59(6)(a)[56] of the Act provides that :

" *non-compliance with the provisions of this Act , if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the result of the election in a substantial manner*" .

The leading presidential election petition in Uganda is the case of *KIZZA BESIGYE V THE ELECTORAL COMMISION & YOWERI KAGUTA MUSEVENI*[57] and the subsequent petition[58] by the same petitioner, the long time presidential aspirant, Dr. Kizza Besigye the petitioner sought annulment of presidential election results announced by the Electoral Commission in favor of the second respondent. The petition was based on allegations of non-compliance with electoral law among other irregularities.

The justices of the supreme court made unanimous finding that some voters had been disenfranchised by the deletion of their names from the voters register and that furthermore the counting at polling stations, tallying of

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[54] Supra page 23

[55] 2005

[56] ibid

[57] 2001

[58] 2006

results had been marred by irregularities. Despite supreme court's findings and acknowledge of non-compliance with provisions of the constitution[59] , the Presidential Elections Act[60] and the Electoral Commission Act[61], the court was inclined to annul the results as announced and held by the majority of 4 to 3 that ;

"It had not been proved by the petitioner that the failure to comply with the provisions and principles enunciated above affected the results of the election in a substantial manner"

4:3 Kenya

In Kenya, section 28[62] provides that;

"No election shall be declared to be void by reason of a non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in that written law , or that non-compliance did not affect the result of the election."

In the case of ***RAILA ODINGA V THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION &3 OTHERS***[63], the petitioner, Hon Raila Odinga challenged the results of the presidential elections in which IEBC declared Uhuru Kenyatta as the winner of presidential polls of 2013. In resolving the two issues framed for determination, the supreme court of Kenya interalia held;

"Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there had been non-compliance but such non-compliance affected the results of the elections in a substantial manner"

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[59] Supra page 24

[60] Supra page 24

[61]

[62] National Assembly and Presidential Elections Act

[63] Presidential Election petition no.1/2013

The court further held that although there were many irregularities in the data and information capture during the registration process, they were not substantial as to affect the credibility of electoral process. It further went on to state that the petitioner did not adduce credible evidence to show that such irregularities were premeditated and introduced by the 1st respondent (IEBC) for the purpose of causing prejudice to any particular candidate .

Again, the supreme court of Kenya, drawing inspiration from ***KIZZA BESIGYE'S***[64] case upheld the results as announced.

Some claimed that the test adopted by court is far too high a standard to be met by petitioners considering the many circumstances that surround election process. It would be surprising if any supreme court would depart from this highly settled principle of substantiality in presidential election petitions unless of course the results were considerably marred with irregularities as to be a true will of the people.

4:4 Ghana

The leading case is ***NANA ADDO DANKWA AKUFO-ADDO & 2 OTHERS V JOHN DRAMANI***[65], tried in the Superior Court of Judicature. In that petition, the petitioners claimed that the election had been marred with irregularities and electoral improprieties such as over voting, lack of signatures on the declaration forms by the presiding officers, lack of biometric verification of voters, and duplicate serial numbers, unknown polling stations and duplicate polling station codes. In resolving the dispute brought before it for determination, the court first laid out the relevant provision of the Ghana Constitution under article 63 (2) [66]which provide that:

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[64] Supra page25

[65] Presidential Election Writ No.J1/2013

[66] Constitution of Ghana

"The election of the President shall be on the terms of universal adult suffrage and shall, subject to the provisions of this Constitution, be conducted in accordance with such regulations as may be prescribed by constitutional instrument by the Electoral Commission."

As we are taught at law school, the word shall is mandatory and one that commands compliance. In its final judgment and orders, the Supreme Court of Ghana held interalia that *'where a party alleges non-conformity with the electoral law; the petitioner must not only prove that there has been noncompliance with the law, but that such failure of compliance did affect the validity of the elections.'* In majority decision of 5 to 4 dismissing the petition, the court held that;

(if) the elections were conducted substantially in accordance with the principles laid down in the Constitution, and all governing law and there was no breach of law such as to affect the results of the elections, the elections (would have) reflected the will of the Ghanaian people.

It is evidently clear that the law in Ghana is that petitioners must prove that there is noncompliance with electoral laws and that such noncompliance affected the results in substantial manner. The test of substantiality is a key ingredient in presidential election petitions. It is a must be heard or jumped set of test

Having reviewed the comparative decisions in Uganda ,Kenya and Ghana on presidential election petitions, it can rightly be concluded that the law is now long settled that courts would not rush to disturb the results of any presidential elections unless there is overwhelming evidence to show that there was non-compliance and that non-compliance affected the results in a substantial manner however it remains perplexing as what amounts to overwhelming evidence that will move court to annul the presidential election

as all kind of irregularities have occurred in several presidential elections especially in Uganda and such have been adduced as evidence in courts but the judges seem to be reluctant. However it is important to apply the law in its strict sense in that once there has been non-compliance courts should go on to annul the elections as failure leads to injustice to the aspirations and the will of the people. It is not clear whether court consider the external factors such as socio-economic and political ramifications that would ensue if results were annulled as most elections are conducted in atmosphere of intimidation, it maybe that courts find it reasonable not to disturb the results if the evil that results is far too great then the evil before them.

An analysis of presidential election laws, Constitution and the cases of the three jurisdictions above demonstrates clearly that courts require very high standard to prove non-compliance before the justices may be persuaded to annul presidential elections results. What then is standard and burden of proof in presidential elections? In Besigye's case[67], their lordships stated that *" it must always be remembered , that an election petition tribunal is not an all intend purpose court that must entertain all matters, it is created for an election petition only ."*

There is an abundant jurisprudence on whose onus it is to prove the allegations so complained of in presidential election. It is however settled principle of law that he who alleges should prove although there may be difference in strict liability cases and where the statute giving rise to the alleged offence states otherwise. **In BUHARI V OBASANJO**[68], the supreme court of Nigeria held that:

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[67] Supra page25

[68] LPELR-Sc133/2003

"The burden is on the petitioner to prove not only non-compliance with the election law, but also that the non-compliance affected the results of the election"

Linda Awuro and **Monica Achode**[69] observed that an electoral cause was established much in the same way as a civil where the legal burden rests on the petitioner, but depending on the effectiveness with which the petitioner discharged that burden, evidential burden could keep shifting. Ultimately it was upon court to determine whether firm and unanswered case had been made. Once the court is satisfied that the party has made his case, it may require the other party to respond .Court is said to be satisfied if the facts constituting the allegations (facts in issue) are proved with the set standards.

Attorney General Mr. Mungai in Raila's case[70]acting as amicus curiae in that presidential election petition , advised court on the evidential threshold in determination of the validity of invalidity of the presidential election .Relying on several cases from Nigeria and Gambia he stated that:

"The supreme court must prima facie determine that it has jurisdiction to hear the petition brought before it. The petitioner bears two separate burdens of proof; (a) was there compliance? And (b) did the non-compliance affect the result in a substantial manner?" It is submitted that the burden of proof is to the effect that the court has to determine whose duty is it to place before court, the evidence to prove his case .As regards the burden of proof, the burden will shift to the respondent to prove that though there is non-compliance , such non compliance did not affect the results in a substantial manner.

In requiring the petitioner to prove his or her petition that the alleged malpractice affected the results in a substantial manner is to require a very high standard that is not a mere balance of probabilities. In the above cases in

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[69] Supra page17

[70] Supra page26

Uganda, Kenya and Ghana the pattern demonstrated by supreme courts' decisions, the standard is higher above the balance of probabilities.

Cancelling a presidential election is very rare .Only Ivory Coast [71]and Ukraine[72] are the only few known countries which annulled presidential elections and ordered fresh polls. The principle of substantiality has been discussed by the supreme in Uganda on several occasions. In the case of **KIZZA BESIGYE**[73] court expounded on what "substantial" is and what it means. Hon. Justice Bart Katureebe observed that, the framers of the constitution could not have intended that even the slightest non-compliance should result in annulling a presidential election. He continued to state that it was for that reason that they provided for in Article 104(9) [74]that Parliament shall provide grounds upon which a presidential election shall be annulled and parliament did so in Section 59(6)(a) of the Presidential Election Act . Justice Tsekoko further stated in Kizza Besigye[75] that Section 59(6)(a) of the Presidential Election Act , *"appears to imply a license to a candidate to cheat or violate e law but do it in such a way that the cheating ought not to be so much as amount to creating a substantial effect on result*" . This view was welcomed by the public who seem to think that the courts are simply acting in favor of the ruling party when they uphold elections even if there had malpractice as long as such did not affect the results.

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[71] Gbagbo v Alassane Ouattarra presidential Electition petition of 2010

[72] Yulia Tymoshenko v Petro Poroshenko Presidential Election petition of 2014

[73] Presidential Election petition no.1/2006

[74] 1995 Constitution of the Republic of Uganda

[75] Supra page 31

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This chapter covers a summary of the finds of the research, reforms/ recommendations and the general conclusion in my own opinion.

5:1 Summary of the findings.

Professor George William Kanyeihamba[76] says that the inquiry meant in the constitution is radically different from an ordinary trial whether of a criminal , civil or administrative nature, the implications of which are discernible .An inquiry into a presidential election must be conducted , concluded and its findings and reasons given within the period prescribed by the constitution. The supreme court can summarize its findings and give a decision and then give reasons outside the period fixed by the constitution is indefensible. Giving reasons outside the fixed time implies that the statutory time with which the court can hear ,investigate, determine and give its findings is not enough as explained earlier under chapter 4. In addition the supreme court is mandated under article 104(3) [77]to inquire into and determine its findings, in my view the court does the contrary to the afore mentioned mandate where it just hears evidence brought by parties to the petition other than carrying out its own investigations as its ought to be the matter being of a national importance.

In the case of KIZZA BESIGYE[78] Hon.Justice Bart Katureebe observed that, the framers of the constitution could not have intended that even the slightest non-compliance should result in annulling a presidential election. Justice Tsekoko

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[76] Constitutional and political History of Uganda

[77] 1995 constitution of Uganda

[78] Presidential Election petition no.1/2006

in the same case states that Section 59(6)(a) of the Presidential Election Act , *"appears to imply a license to a candidate to cheat or violate law but do it in such a way that the cheating ought not to be so much as amount to creating a substantial effect on result"* . This means that the constitution itself and the Presidential Elections Act when construed broadly allow election malpractices much as a candidate especially the candidate do it in a way that does not affect the presidential election results in a substantial manner.

In the case of **DR.KIZZA BESIGYE V THE ATTONEY GENEAL**[79], Hon. Justice Lilian Tibatemwa cautioned that officers in charge and other actors are permitted to so violate constitutional imperatives and do so poorly to mishandle the process that the outcome can only be described as a sham , a mere imitation. If there was no legitimate election, the court would be able to declare the outcome null and void .Therefore , if the process is conducted substantially outside the principles of the constitution , such is no election. This means that as much as the there is an election conducted under the confines of law, court will disregard the minor breaches of such laws through malpractices and uphold the results. In my view this amounts to injustices as the will and aspirations of the people are not reflected by the election results which is unconstitutional. However , it is not a free card for candidates to rig elections and expect court to uphold the results in their favor. However political candidates offering themselves for elections should embrace fair play and not rig elections and expect to hide behind the curtains of justice as he who comes to equity must come with clean hands

[79] Constitutional petition 08 of 2007, 28 July 20009

5:2 Reforms Recommendations:

A great deal of talk and writing have been done on desirability and the need to reform Uganda laws in regard to presidential election petition laws as well as the principle of substantiality in its entirety. This talk and writing has been ignited by several actors from court, NGOs, to an individual basis. However the reforms suggested by those actors have been analyzed from findings of the court.

On three the occasions where there have been presidential election petitions, the supreme court after dismissing the presidential election petition has on each occasion come out to give reforms that are desirably needed for a democratic governance in Uganda .The reforms suggested by the supreme court under the three petitions are more or less the same the most recent ones given under the 2016 presidential election petition between **AMAMA MBABAZI V YOWERI KAGUTA MUSEVENI and 2 others**[80]. These are discussed here in under;

In its decision under the case above , court pointed out a number of areas of concern that seem to come up at every Presidential election among which include ;

(a) An incumbent's use of his position to the disadvantage of other candidates
(b) Use of state resources
(c) Unequal use of state owned media
(d)Late enactment of relevant statutes inter alia

[80] Presidential Election Petition no.1/2016

In regard to the fore mentioned areas of concern, court stated that in the past two presidential petitions, the same court mad some important observations and recommendations with regard to need for legal reform in the area of presidential elections in particular however many of these calls have remained unanswered by the executive and the legislature.

In the same vein some of election observer Reports point to several instances where the observers found irregularities and malpractices , the main thrust of these Reports being directed at the need for structural and legal reforms that would create a more conducive atmosphere that would produce genuinely free and fair elections. The Citizens Election Observers Net-work (CEON-U) under its Report states an important observation;

"Uganda's legal framework limits the foundation for conducting credible elections. These limitations prompt civil society to produce the citizen's compact on free and fair Elections, which includes recommendations for legal reform, overhauling the Electoral Commission to ensure independence and impartiality, ensuring recruitment of polling officials is done transparently, competitively and based on merit, and establishment of an independent judiciary to adjudicate on electoral disputes impartially. Again these recommendations were not taken up for the 2016 elections."

In an effort to ensure that the above recommendation of the need for structural and legal framework of the electoral laws, the supreme court assigned the attorney general to ensure that such legal forms are put in place by the executive and the parliament as suggested by the court and other stakeholders.

The supreme court also stated under its judgment that of at the hearing a group prominent constitutional scholars from Makerere University were allowed as amicus curiae where they proposed a number of recommendations

which court promised to consider such proposals in deeper detail in its full opinion which is yet to be out.

In an interview with Daily Monitor News paper[81] on the aftermath of delivering the judgment, retired Supreme court judge Prof. George William Kanyeihamba criticized the Supreme Court's ruling in the case of ***Amama Mbabazi v Yoweri Kaguta Museveni and 2 others***[82] saying that the supreme court erred in law in the way they reached their conclusion. He further argued that the Bench ought to have inquired into the petition by digging deeper into observer reports and evidence outside court instead of solely relying on what the petition had put before them "*as if they were conducting a normal trial*". Under the this petition the supreme court narrowed the grounds of the inquiry where videos were rejected to form part of documentary evidence and confined it to evidence supplied to them by parties whereas they should have dug deeper and wide. In doing so the supreme court would be returning to the actual meaning of article 104(3) [83]which obliges it to inquire into and determine presidential election petitions expeditiously and to declare the its findings not later than thirty days from the date the petition is filed even though the both the periods in which to collect evidence by the petitioners and the court to consider and give its findings also need to be extended.

The retired supreme court justice Prof. George William Kanyeihamba who dissented in the 2006 presidential election petition further gives other desired reforms and recommendations in his book ***'Constitutional and Political History of Uganda'*** to the effect that ;

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[81] 1/4/2016

[82] Supra page 41

[83] 1995 constitution of Uganda

Section 59(6) [84]is another area of concern. It appears to conflict with article 104(1) [85]of the constitution. In 2009 Dr. Kizza Besigye[86] petitioned the Constitutional court challenging the unconstitutionality of section59 (6) [87]to the extent of it being in conflict with the constitution however it was not until 2016 that the petition was dismissed.

The appointment and status of members of the Electoral Commission. The Electoral Commission and the way its members are selected need a radical surgery. Political party leaders have raised have raised reform proposals in this area and their views ought to be accommodated so that the nation has an Electoral Commission which is truly independent and impartial and is trusted and respected by all sections of the community. However in Uganda this seems to be in vein for example before the appointment of the reigning Electoral Commission political parties under their umbrella The Inter-Party Organization for Dialogue suggested to the president that all political parties and all stakeholders such find away in participating in the constitution of the new Electoral Commission however no sooner had they reached the state house in Entebbe than the president announced the newly appointed members of the current Electoral Commission. Article 12[88] of the Universal Declaration on Human Rights on Democracy is fairly clean. It provides that the key element in the exercise of democracy is the holding of free and fair elections at regular intervals enabling the people's will be expressed. That will cannot be freely expressed if the elections are presided over and conducted by a partisan Electoral Commission. Persons who are not properly trained or who are easily

[84] Presidential Elections Act 2005

[85] Supra page43

[86] Supra page40

[87] Ibid

[88] Universal Declaration on Human Rights on Democracy

intimidated to comply with the ruling party should never be employed in this role.

There should be a law that candidates and agents who commit electoral offences should be prosecuted and punished in accordance with laws of the land and in any event, the presiding judge in an election petition should have concurrent jurisdiction on anyone else who committed or was a party to electoral offences.

5:3 Conclusion;

It can rightly be concluded that the law is now long settled that courts would not rush to disturb the results of any presidential elections unless there is overwhelming evidence to show that there was non-compliance and that non-compliance affected the results in a substantial manner. However it has been argued that application of the law in its strict csense; once there has been non-compliance courts should go on to annul the elections as failure leads to injustice to the aspirations and the will of the people thus the unconstitutionality of such law. It is not clear whether court consider the external factors such as socio-economic and political ramifications that would ensue if results were annulled. As most elections are conducted in atmosphere of intimidation, it maybe that courts find it reasonable to not disturb the results if the evil that result is far too great then the evil before them thus in its current form as envisaged under Section 59(6) of the Presidential Elections Act , the substantiality test is unconstitutional as it usurps the will and aspirations of the people by giving room for such malpractices during presidential elections.