

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT LIRA**  
**CIVIL APPEAL NO 002 OF 2016**  
**ARISING FROM MISC APPL NO 006/2016**

**OKWIR SAMUEL.....APPELLANT**

**VERSUS**

**AMUGE REBECCA OTENGO.....1<sup>ST</sup> RESPONDENT**

**THE ELECTROLCOMMISSION.....2ND.RESPONDENT**

**JUDGEMENT OF HON LADY JUSTICE MARGARET MUTONYI. J**

## JUDGEMENT

1. Okwir Samuel herein after referred to as the appellant being aggrieved by the decision of the learned Chief Magistrate of Lira, H/W Mushabe Alex Karocho, dated 25/2/2016 whereby he ordered for a recount of ballot papers in all polling stations in Abia, Akura and Aloi Sub counties after Amuge Rebecca Otengo here in after referred to as 1<sup>st</sup> respondent filed an application vide miscellaneous Cause No 006/2016 against The Electoral Commission herein after referred to as the 2<sup>nd</sup> Respondent and the Appellant preferred an appeal to this court.
  
2. The grounds of appeal were the following
  - i. That the learned Chief Magistrate erred in law when he over ruled the preliminary objections raised as a mere technicality,
  
  - ii. That the learned Chief Magistrate erred in law and fact when he failed to evaluate the evidence on record thereby arriving at a wrong ruling and orders which occasioned a miscarriage of justice.
  
  - iii. That the learned Chief Magistrate erred in law and fact when he failed to find that on the evidence presented, the ballot boxes were already tempered with thereby reaching a wrong conclusion which occasioned a miscarriage of justice.

- iv. The learned chief magistrate erred in law and facts when he relied on hearsay evidence of the applicant thereby reaching a conclusion which occasioned a miscarriage of justice.

He prayed for

- i. the appeal to be allowed
- ii. The orders for ballot recount in Abia, Akura, and Aloï be quashed and set aside
- iii. Costs of this appeal be provided for,

### **REPRESENTATION**

3. The appellant was represented by three firms:
  1. M/s Abwang Otim and CO Advocates, plot 57 Police Road, Junior Quarters, Adyel Division, P.O Box 902 LIRA.
  2. Okae, Basalirwa, Kakerewe a co. Advocates, Depai House 1<sup>st</sup> Floor Room 17, plot 14-15 Olwol Road, P.O Box 211, LIRA.
  3. M/s J. Adara co. Advocates, plot No. 19/23, Roseland Estates, Ogwanga Guzzi Road, Opposite the Mayors Gardens, Lira.

While the 1<sup>st</sup> respondent was represented by M/s Mutembule and Co. Advocates, P.O Box 2175, Mbale, plot 47-49 Republic Street and Ms Byamugisha Gabriel and Co Advocates, Total Deluxe House Ground floor, suite 12 and 13 plot 29/33, Jinja Road P.O Box 7635, Kampala.

The 2<sup>nd</sup> respondent was represented by counsel from The Electoral Commission, legal Department .Counsels Okae Isaac, Mike Abwang Otim and Ader Patrick had joint instructions from the appellant while Counsel Mutembule Yusuf and Mugisha Gabriel had joint instructions from the 1<sup>st</sup> respondent. They had personal conduct of the case from their respective law firms.

#### **4. BRIEF BACKGROUND OF THE CASE**

The brief back ground of the case is that the appellant and the 2<sup>nd</sup> respondent were candidates for the parliamentary elections for Moroto constituency in Alebtong District that was conducted by the 2<sup>nd</sup> respondent on 18/2/2016. The Appellant was declared as the directly elected Member of Parliament for Moroto constituency. The 1<sup>st</sup> Respondent alleged that many ballots which should have been counted invalid were counted valid in favour of the appellant despite the objections from her polling Agents.

She therefore sought for a recount of votes in Abia, Akura and Aloi sub counties. The learned Chief Magistrate allowed the application and ordered for a recount which was however suspended pending the outcome of this appeal.

#### **5. SUBMISSIONS.**

Both counsel filed written submissions and a rejoinder in respect of their client's cases

I have carefully considered the submissions while writing this ruling together with all the authorities cited.

I need not reproduce the submissions in this ruling since they are on record but may refer to particular areas where necessary.

## **6. RESOLUTION OF GROUNDS**

I will resolve the grounds in their chronological order starting with ***whether the learned Chief Magistrate erred in law when he overruled the preliminary objection raised as a mere technicality.***

But before resolving this ground, let me address the preliminary point of law raised by the respondents.

Counsel for the 1<sup>st</sup> respondent argued that the appeal is incompetent because the Appellant has no right of appeal against recount order. That The Parliamentary Elections Act does not GRANT any right to the appellant to appeal against recount order nor does it refer to any other law to grant such a right.

The parliamentary Elections Act is a special statute and an appeal is a creature of statute. He quoted a number of cases that have held so including

- 1. Attorney General V Shah (1971) EA 50**
- 2. *Baku Raphael Obudra and Anor Versus The Attorney General SC const/Appeal No 1/2015***
- 3. *Nalukenge Mildred Versus Uganda CACA No. 67/2008***

I entirely agree with the holding in the above authorities as it is trite law that the right to appeal against a court order or decision has to be

as of right or with leave of court as stipulated in the written law pertaining to appellate jurisdiction.

He concluded by submitting that the remedy available to a person aggrieved by the recount order was considered in the case of **Kafeero Sekitoleko Robert versus. Mugambe Joseph and Kifomusana. Mukono Election petition No. 002/2011** where it was held that a person aggrieved by a recount order of the Chief Magistrate should file a petition under sections 60 and 61 of the P.E.A. On the other hand counsel for the appellants submitted in rejoinder that this appeal is a creature of statute and is properly and competently before court. They relied on Article 139(1) (2) of the Uganda constitution 1995 which provides for jurisdiction of the High Court.

***139 (1) "The High Court shall, subject to the provisions of this constitution have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred upon it by this constitution or other law***

***(2) Subject to the provision of this constitution and any other law, the decision of any court lower than the High Court shall be appealable to the High Court"***

They further relied on **S.220 of the MCA** which provides that ***"subject to any written law and except as provided in this section, an appeal shall lie from decrees or any part of the decrees and from the orders of a Chief Magistrate or***

***Magistrate Grade 1 in exercise of its original jurisdiction to the High Court”.***

Counsel for the appellant also relied ***on Civil Appeal No. 0019/2011***

***Kamba Saleh Vs. Namuyangu Jenniffer Byakatonda,***  
***Arising from MA No. 2 of 2011 of Pallisa Chief Magistrate’s court.***

The case presented a similar situation like in the instant appeal. It arose out of the exercise of powers by the learned Chief Magistrate of Pallisa conferred under S.55 of PEA which provides for a recount of votes cast in a parliamentary elections if an applicant is not satisfied with the results.

Apparently the law is silent on whether an appeal lies as of right if any of the parties is aggrieved with the order on recount.

Hon. Justice Stephen Musota had this to say: ***“ I am of considered view that the moment the PEA ceded authority to a Chief Magistrate to adjudicate over matters for a recount of votes, legislation which regulates jurisdiction and operations of Magistrates court came into operation. This legislation is The Magistrates Courts Act cap 16.The MCA extensively outlines the powers of different levels of Magistracy and how their decisions are handled after pronouncement”.***

I entirely agree with the Judge's view and wish to add that ***where a latter statute is silent on an issue like appeals under recount process in this case which is a well-established legal procedure in a former statute, then the provisions of the former statute apply***".

In this case, both the constitution which is the supreme law of the land and the MCA clearly provide for the appellate jurisdiction of the High court against orders of the lower court.

I am of a view that the framers of the PEA were very much aware of the provisions of the constitution and the MCA pertaining to appellate jurisdiction.

Consequently I over rule the preliminary objection and hold that this appeal is properly before this court and therefore competent. In my view, it is not even necessary to file it as civil appeal. It should be clearly filed as an election appeal because it arises out of an election application under S.55 of the PEA because it is handled under the provisions of the PEA and rules there under.

Before I take leave of this point, I also wish to address the issue raised by counsel for the respondents that a party aggrieved by an order of a recount should file a petition under S.60 and 61 of the P.E.A. as it was held in the case of **Kafeero Sekitoleko Robert** supra where it was held **that a person aggrieved by the recount**

**order of the Chief Magistrate should file a petition under S.60 and 61 of parliamentary Elections.**

S.60 (2) of the PEA provides that:

***“An election petition may be filed by any of the following persons.***

***(a) A candidate who loses an election or***

***(b) A registered voter in a constituency concerned, supported by the signature of not less than five hundred voters registered in the constituency in a manner prescribed by regulations”.***

S. 61 of the same Act provides for grounds for setting aside the election.

With due respect to counsel for the 1<sup>st</sup> respondent, the appellant in this case was declared the winner of Moroto constituency, he does not therefore qualify to petition High Court under S.60(2) of the PEA.

Secondly the application for recount is not complete.

The process was halted pending determination of this appeal.

It is after the outcome of this appeal that an aggrieved party may if he or she so wishes, petition the High Court. Whereas the holding at page 29 in the **Kafeero Sekitoleko’s** case is correct, it is not applicable in this case as facts are distinguishable and very different. A party that loses on appeal in an election recount The

Applicant has the liberty to file an election petition since the grounds of an Election petition as stipulated under the law are different from the grounds of a recount. The matter would not be res judicata.

Let me now revert to the first ground of appeal.

***Whether the learned chief magistrate erred in law when he over ruled the preliminary objection raised as a mere technicality.***

It was submitted for the appellant that once an illegality is brought to the attention of court, courts must not close its eyes from it and court must not sanction an illegality.

In the instant case it was brought to the attention of court that the first respondent who was the applicant in the lower court did not comply with S.5 of The Commissioner for oath (Advocates) Act and yet it's coached in mandatory words.

The section provides that:

***“Every commissioner for oath before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and what date the oath or affidavit is taken or made”***

The affidavit of the 1<sup>st</sup> respondent in support of her application before the Chief Magistrates court indicated that it was drawn at Kampala, sworn at Lira and commissioned at Kampala.

That because of the above, there was no valid and competent affidavit in support of the application rendering it untenable due to illegality. That the learned Chief Magistrate dealt with this point of illegality in a casual manner and proceeded to entertain the application making orders which are null and void and of no effect in law as they emanate from the illegal application.

Counsel for the respondent submitted that the trial Chief Magistrate was right to consider the noncompliance with S.5 of the commissioner for oaths (Advocates) Act cap.52 as a mere legal technicality for the same is not coached in mandatory terms just because of the word **shall** but it is directory in nature

The most controversial issue about the affidavit of Amuge Rebecca Otengo was that it was sworn at Lira, while the stamp of the commissioner clearly indicated that it was commissioned at Kampala. That since it was purporting to be made in two places, it was defective.

The learned Chief Magistrate in his ruling on page 17 last paragraph rules as follows:

***“In Response, counsel for the applicant argued that the commissioner for oath only used a stamp indicating his address but remain the same individual and that the point of law raised is simply technical and cannot supersede the force***

***of Article 126(2) of 1995 Constitution of the Republic of Uganda. I have carefully considered the submissions of both counsel, read the relevant law and it is my considered view that the preliminary objection raised is indeed a technicality that should not supersede substantive justice”.***

He disallowed it.

I have considered the earlier holdings in the cases of **Kikongo Noelina versus the Electoral commission** and **yusuf Zalaiki. HCT- Election appeal No 75/2011-unrepaited** and **Lubyayi Iddi Kisiki versus Maurice Peter Koyimu** CACA No 13/2002 where it was held:

***That the wording under the oath Act cap 52 was directory and not mandatory.***

It is widely recognized that the electoral process must be fair to three categories of parties to wit the nation, candidates and the electorate. Judiciary as an institution is to provide a ray of hope where there is injustice and a ray of hope where true democracy has been buried.

In view of the above, Rule 26 of the parliamentary Election (Election petition) rules provides in part that,

***“No proceedings upon a petition shall be defeated by any formal objections”***

The above rule specifically guards against technicalities.

***Rule 15 of the PE (PE) rules*** provides for the mode of evidence which is adduced by way of affidavit read in open court.

The whole process starting from an application for recount before the Chief Magistrate is proved by way of affidavit evidence which is a written declaration made under oath sworn to be true before someone legally authorized to administer an oath. The law provides for the procedure of administering such an oath, but very often, errors or falsehoods have been made in this solemn statements. It is in such solemn statements that the applicants and their witnesses if any, prove the allegations made in the grounds listed under the Notice of Motion or Petition.

In view of the above, the Supreme Court has pronounced itself on how courts should handle such affidavits which may not comply strictly with the law.

In the case of Election Petition No 1/2001 Dr. kiiza Besigye Vs Y.K. Museven AND The Electoral commission, Odoki CJ as he then was held that ***“there is a general trend towards liberal approach in dealing with defective affidavit. This is in line with the constitutional directive enacted in Article 126 of the constitution that courts should administer substantive justice without undue regard to technicalities.***

***Rules of procedure should be used as hand maidens of justice not to defeat it”.***

It is therefore my view that ***It is now trite that the framers of the 1995 constitution placed a burden on the courts of judicature that was not there before and since judicial power is derived from the people and shall be exercised by the courts established under the constitution in the name of the people***

***and in conformity with the law and values, norms and aspirations of the people, the defective affidavits of witnesses in election petitions or applications can now be legally tolerated unlike in the years preceding the 1995 constitution of the republic of Uganda.***

Courts of law are now charged with resolving disputes without being unduly hindered by legal technicalities including accepting the true statements and rejecting the false statements in the same affidavit. This is how liberal courts have become in as for as handling election applications and petitions.

This is because issues of elections are very important to the nation, the candidates and the electorate.

The only evidence available in this case for the 1<sup>st</sup> respondent is the affidavit in support.

The learned Chief Magistrate was right to consider the disparity appearing on the stamp and place of commissioning as a mere technicality as rejecting the affidavit that was the only evidence of the applicant would deny her substantive justice. However, the liberal approach should not be abused by advocates who are officers of court and who are paid by their clients to present a good case before court right from drafting of pleadings. Obvious errors such as including falsehoods, and hearsay evidence should be avoided because eventually, they would be impugned from the evidence. As for the officer from justice center who commissioned

the affidavit, this court wonders whether the 1<sup>st</sup> respondent/Applicant qualified to get the services of Justice Centre Uganda which was established to help the indigent access justice?

The above notwithstanding, this case is distinguishable from the case of **Kakooza John Baptist Vs Electoral commission** Supreme Court Election petition No. 11/2007.

Which still followed the liberal approach in Dr. Kiiza Besigye's case.

In the ***Kakooza*** case, there was actually unsworn statements seeking to pass as affidavit evidence. Once a statement is not on oath it cannot qualify to be an affidavit. That is why it was rejected.

In the instant case the problem was with the stamp of the commissioner which had the address of Kampala but the actual commissioning took place in Lira. **Given the liberal approach adapted by the Supreme and the law of precedent, the Learned Chief Magistrate exercised his jurisdiction judiciously in rejecting the preliminary objection as regards the affidavit of the 2<sup>nd</sup> Respondent/applicant.**

The first ground is therefore resolved in favour of the 1<sup>st</sup> respondent as I do not find the chief magistrate culpable in his ruling on the preliminary objection.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grounds were argued together by the appellant. They all touch on the issue of evaluation of evidence.

All the three can be paraphrased in the following ground:

***That the learned Chief Magistrate erred in law and fact when he failed to evaluate the evidence on record thereby arriving at the wrong ruling and orders which occasioned a miscarriage of justice.***

As the first appellate court, my duty is to re-evaluate the evidence and subject it to fresh scrutiny. In cases of this nature, the evidence is by way of affidavit. The only evidence at the lower court was the affidavit of the 1<sup>st</sup> respondent and that of the returning officer who deponed on behalf of the 2<sup>nd</sup> respondent.

The appellant/2<sup>nd</sup> respondent also deponed an affidavit opposing the application.

The evidence on record was therefore contained in the affidavit of Amuge Rebecca Otengo, the applicant, Eyu Christine for 1<sup>st</sup> respondent and Okwir Samuel the 2<sup>nd</sup> respondent in the lower court.

With this kind of affidavit evidence, every statement in the statutory declaration is presumed to be the truth and should therefore pass the test of admissibility of evidence. If it is by information, the deponent has to be specific and disclose the source of information. It should not be in general terms. If it is by personal

knowledge, the source of knowledge should be disclosed and if it is by belief the reason for belief should be clearly indicated. The deponent is obliged to attach the relevant certified documents to the affidavit in support which documents are also endorsed by the commissioner administering the oath if any. The statements in the affidavit are to prove the allegations made in the Notice of Motion by way of grounds.

The practice and procedure in respect of electoral cases is regulated as nearly as may be in accordance with the Civil Procedure Act and Rules made there under relating the trial of suits in the High Court with such modifications as the Court may consider necessary in the interest of justice and expedition of the proceedings.

The same principle applies to electoral cases filed before the Chief Magistrate. The Court applies the facts to the law to come up with a decision. **Section 101(1) (2) of the Evidence Act provides that “(1).whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove those facts exist.**

**(2).When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”**

In the instant case, the burden of proof rested squarely on the 1<sup>st</sup> respondent. Under normal circumstances, the standard of proof in civil matters is on balance of probabilities but it was held in **Dr. Kizza Besigye’s case (supra)** that in election petition and

suppose applications, the standard of proof is slightly higher than in ordinary civil suits but slightly lower than in criminal cases. It does not have to be beyond reasonable doubt but slightly higher than on the balance of probabilities.

The Parliamentary Elections Act S.55 (1) provides for application for a recount to the Chief Magistrate after a Returning Officer declares as elected the candidate who has obtained the highest number of votes in accordance with S.58 of the same Act.

S.58 of the PEA provides:.

***(1) Each returning officer shall immediately after the addition of the votes under subsection (1) of section 53, or after any recount, declare elected the candidate who has obtained the largest number of votes by completing a return in the prescribed form.***

***(2) Upon completing the return, every returning officer shall transmit to the commission the following documents:***

***(a) The return form***

***(b) The tally sheets.***

***(d) The declaration of results forms from which the official addition of votes was made.***

The most important or relevant documents in this case were the Declaration of Result Forms (DRF) and results tally sheet.

In the application for recount the 1<sup>st</sup> respondent made several averments but the relevant ones were the following from her affidavit in support:

Paragraph 4: ***that the transmission, tallying and declaration of results was done in utter contravention of the provisions of the PEA which culminated into declaration of the 2nd respondent as a duly elected member of parliament for Moroto constituency Alebtong District where as not.***

Paragraph 10: ***That the exercise of counting, tallying and declaration was done in contravention of the principles of fairness, free, transparency and was marred with errors.***

Paragraph 11. ***That I have established from the polling agents and those that were in the tally Centre that I obtained the highest number of votes but the returning officer declared the results without DR Forms from 22 polling stations in Aloi Sub County.***

Then from her supplementary affidavit she averred as follows.

Under paragraph 4: ***That I know the results from 14 polling stations were only included in the final tally after the results had been declared by the returning officer copies here of are attached and marked A.***

***5. That I have reliably established from my polling agents that many ballots which should have been counted invalid were counted valid in favour of the 2<sup>nd</sup> respondent despite a host of objections from my polling officers.***

***6. That my polling officials were not given declaration of results forms for many polling stations in Aloi Sub County and I was rendered unable to conduct an independent tally.***

***7. That the results actually counted and announced at many polling stations in Aloi Sub County are not the actual ballots cast in my favour.***

The above was actually her affidavit evidence.

The 1<sup>st</sup> respondent who was responsible for conducting the elections and declaring the current appellant the winner filed an affidavit in response through Eyu Christine.

The most relevant part of her evidence was contained in paragraph 3

In paragraph 3, she contended the application was frivolous vexatious and lacks merit.

She denied paragraph 4 which was to the effect that transmission, tallying and declaration was done in contravention of the PEA as deponed in paragraph 5 of the 1st respondent's affidavit.

Paragraphs 6 and 7 were not relevant because both parties agreed to the order seeking to exclude results from 22 polling stations from Aloi sub-county

The above paragraph were in response to paragraphs 5,6, and 7 of the applicants evidence about results from 22 polling stations from Aloi sub county.

In paragraph 9 of her affidavit the returning officer denied the contents of paragraphs 11 where the applicant/ 1<sup>st</sup> respondent claimed that she obtained the highest number of votes but the returning officer declared results from 22 polling stations without DRF in Aloi Sub County.

Under paragraph 10, she maintained that the exercise of counting, tallying and declaration was conducted in accordance with the provisions of the law. This was in reply to the contents of paragraphs 3-11 of the applicants' affidavit.

In paragraph 10 the returning officer of the electoral commission in essence denied any contravention of the law in the elections as regards counting, tallying and declaration of the winner.

The appellant/ 2<sup>nd</sup> respondent filed his affidavit opposing the application which affidavit is on record. The most relevant part of his evidence is contained in paragraphs 7, 10, 11, 13 1<sup>st</sup> and 14.

In brief, the appellant claimed that they both had agents at the polling stations in sub counties of Abia and Akura and that upon the votes being counted at their respective sub counties, the applicant's agents agreed that those were the results and never

made any comment on whether there was any problem before, during and after voting.

That the results were read from declaration of results forms from all polling stations in the open, in the presence of all the parties and their agents.

He also doubted the safety of the ballot boxes and feared that they could have been tempered with rendering the whole recounting exercise futile.

With the above evidence on record, I proceed to re-evaluate the evidence.

The word recount is not defined under the PEA. We therefore take its literal meaning which is to count again.

In an election, a recount is a repeat tabulation of votes cast in an election that is used to determine the correctness of an initial count. Recounts often take place in the event that the vote tally during an election is extremely close or there is a tie like the circumstance under the mandatory recount under S.54 of the PEA.

***Election recounts should therefore be premised on either human error or misjudgment. It should be intended to correct errors such as transcription errors, or machine errors where wrong data is entered by mistake since the machines are operated by human beings and clarification of invalid or,spoilt ballot papers that are counted as valid or valid votes that are declared invalid.***

A recount therefore should be used to either confirm that there was no error in the final results or there was an error by the following:.

- (1) Counting of invalid votes as valid
- (2) Counting of valid votes as invalid
- (3) Transmitting wrong results different from what is in the result declaration forms
- (4) Errors in additions of the final results.

Since the grounds for a recount under S.55 of the PEA are not clearly spelt out like those of Election petitions under S. 61 of the PEA, the Chief Magistrate has to be very cautious to avoid mixing up grounds for an election petition and for recount.

***The applicant for a recount has to be very specific in the affidavit evidence to enable the Chief Magistrate give proper directives during the process of recounting if he or she is satisfied that a recount would provide a remedy to the complaint raised***

***to avoid turning himself or herself into a returning officer.***

Under paragraph 11 of her affidavit in support, the 1<sup>st</sup> respondent in this case deponed that ***“I have established from my polling agents and those that were in the tally Centre that I obtained the highest number of votes but the returning officer declared the results without the DRF from 22 polling stations in Aloi Sub County”***.

The statutory duty of a polling agent is clearly specified under **S.32 (1) of the PEA.**

The main duty is to safe guard the interest of the candidate with regard to the electoral process.

S. 48 of the same Act provides for complaints during the counting of votes

***(1) “a candidate or a candidate’s agent or any voter present may raise any objection during the counting of the votes and each presiding officer shall:***

***(a) Keep a records in the record book, of every objection made by any candidate or a candidate’s agent or any voter found in the any ballot box: and***

***(b) decide every question arising out of the objection.***

***(2) Every objection recorded under subsection (1) shall be numbered and a corresponding number placed on the back of the ballot paper to which it relates and the ballot paper shall be initialed by the presiding officer and it shall be witnessed by the polling assistants and candidates agents.***

***(3)The decision of a presiding officer in respect of an objection raised under subsection (1) is final subject to reversal only on recount or on a petition questioning the election return”.***

Under S. 50 (1) of the PEA, it is provided ***that “Each presiding officer fill the necessary numbers of copies of the prescribed form for the declaration of results as follows.***

***(d) One copy shall be delivered to each of the candidates agent or in the absence of those agents, to any voters present claiming to represent the candidates and***

***(e) One copy shall be deposited and sealed in the ballot box”.***

***Under S.53 of the PEA***, the tallying of the results by the returning officer is done after all the envelopes containing the declaration of forms have been received in the presence of the candidate or their agents or such of them as wish to be present; he then opens the envelopes and adds up the number of votes cast for each candidate as recorded on each form.

In view of the above provisions of the law, the applicant for a recount relies on the declaration of results, forms to put up a case of falsifying or invalidating her votes, and showing that she actually got more votes than the appellant/1<sup>st</sup> respondent.

The attachment to her NOM were Tally sheet and final results. She attached 14 declaration of results forms from Abia Sub County which were not certified, but never the less court looked at the portion where the agent signs. All her agents signed and did not indicate any complaint about the results. In case it was an oversight on their part, no formal complaint was made in writing to the returning officer to that effect. The candidate’s polling agent

play a very vital role in ensuring the transparency, fairness of the electoral process and correctness of the results. Even if they are not given RDF at least, they should write on a piece of paper the results of their candidate at a polling station where they were deployed. It is that information especially concerning numbers that is used to help court assess whether a recount is necessary.

She did not indicate under paragraph 4 of the supplementary affidavit that if they had added results from the 14 polling stations, she would have won the elections.

I also considered her averment under paragraph 5 of her supplementary affidavit. Where she deponed that she reliably established from her polling agents that many ballots which should have been counted as invalid were counted valid in favour of the 2<sup>nd</sup> respondent/appellant despite of a host of objections from her polling officials.

The 1<sup>st</sup> respondent/applicant did not attach a single RDF where her polling agents objected and as mentioned earlier S. 48(2) provides for such scenarios. Such ballot papers are initialed by a returning officer and witnessed (countersigned by the polling assistant and candidate's agent.

In case there is a recount such ballot papers are specifically identified.

The trial Chief Magistrate did not have any evidence as to how many of the invalid ballot papers and from which polling stations were counted as valid for the appellant.

As regards her allegation under paragraph 6 of the supplementary affidavit, that her polling officials were not given declaration of results forms for many polling stations in Aloi Sub County, that averment presupposes that the polling agents were there.

No mention of the specific polling station was made and no single polling agent filed an affidavit in support of the 1<sup>st</sup> Respondents allegations.

The returning officer of the 1<sup>st</sup> respondent now 2<sup>nd</sup> Respondent Eyu Christine denied the allegations and stated the exercise of counting, tallying and declaration was conducted in accordance with the provisions of the law.

The applicant also averred under paragraph 7 of the supplementary affidavit that the results counted and announced at many polling stations in Aloi Sub County are not the actual ballots cast in her favour. She did not adduce evidence of what was her actual ballots cast in her favour and the source of that information.

In his ruling, the learned Chief Magistrate held on page 19 from second paragraph as follows:.

***“No doubt the evidence of the applicant visa vis that of the 2<sup>nd</sup> Respondent is a hard word against the other.***

***I therefore find the evidence of Eyu Christine of great import in determining this application. She was the returning officer in this election exercise. She states in her evidence that results of 22 polling 22 polling stations from Aloi Sub County had been omitted from the final tally following the complaints***

***by the agents of the applicant that they had been falsified and tempered with. She further states that she was enormously over whelmed with work that she in advertently included the impugned results from the said 22 polling stations in the final tally of the results.***

***To me the evidence by the returning officer is largely supportive of the applicant's evidence. The applicant alleges that many ballots that should have been counted invalid were counted valid in favour of the 2<sup>nd</sup> respondent and the returning officer concedes to some of the applicant's queries. The only way the applicant's concerns can be addressed is by ordering a recount"***

From the above excerpt from his ruling, it is apparent that he does not mention of any evidence before him adduced by the applicant/1<sup>st</sup> Respondent other than her allegations in the affidavit. He even held that it was her hard word against that of the appellant. He found it hard to know who to believe or not. In fact according to his own statement, there was a draw between the appellant and 1<sup>st</sup> respondent in their evidence. The 1<sup>st</sup> Applicant had to discharge that light burden against both respondents. Had she been cross examined, she would have informed Court that she was merely told by her agents who are not even named.

It is also clear that the trial Chief Magistrate used the so called admission of Eyu Christine against the appellant/2<sup>nd</sup> respondent.

It is trite law that where there are two defendants or Respondents, an admission by one cannot be used against the other who has denied.

The Applicant had to prove her case against the appellant by way of adducing evidence that there were invalid votes that were counted as valid in his favour.

In any case, the returning officer did not concede the allegation of invalid votes counted as valid.

The learned Chief Magistrate did not evaluate the evidence on record especially that of Eyu Christine.

This is what she stated under paragraph 7 of her affidavit.

***“In further reply to paragraphs 5,6 and 7 I was enormously over whelmed with work that I inadvertently included the impugned results from the said 22 polling stations in the final tally.***

Then under paragraph 8 she stated ***“the contents of paragraphs 7 and 10 are denied and the applicant shall be put to strict proof of the allegations therein.***

Under paragraph 9, she denied the contents of paragraph 11 of the applicant’s affidavit.

And finally under paragraph 10 of her affidavit, she stated ***in further reply to the contents of paragraph 3-11, the exercise of counting, tallying and declaration was conducted in accordance with the provisions of the law.***

In essence, she denied any wrong doing that was alleged by the applicants/1<sup>st</sup> respondent in paragraphs 5, 6,7,10 and 11.

Had the learned Chief Magistrate put her affidavit to judicial scrutiny he would have realized that the applicant now 1<sup>st</sup> respondent did not have any evidence at all to support her application for a recount.

In fact it was very erroneous for him to rely on contradictory evidence of Eyu Christine to order for a recount.

In an application for recount, the evidence adduced must clearly bring out the contentious ballot papers if Court is to determine whether they are valid or invalid.

It must bring out clear evidence not based on speculation. The Court should be in position to determine whether the complaint can be resolved through an election recount or it's a fit and proper case for the election petition.

In my humble view, the averments by the 1<sup>st</sup> Respondent in the NOM contained in paragraph 4-7 alleging flouting of the provisions of the PEA, although no specific section was quoted and allegations of illegalities and irregularities, cannot be cured by an order for recount. The above if true are indicative of a flawed electoral process which should be properly investigated through an election petition.

In the absence of any DRFs indicating protests of results from any polling station from the sub counties in issue, her evidence in her affidavits remain hearsay evidence which is not admissible in law. If what she deponed was what she was told by her polling agents who were not disclosed, then they were either very ignorant of their role as polling agents or the Electoral commission failed in its duty to train and sensitize the polling agents and general public because even a registered voter has a right to raise a complaint.

It was brought to the attention of court that the Appellant has already been gazetted as the duly elected MP for Moroto Constituency. The returning officer of course acted in error because section 58 (3) of the PEA clearly states that ***where a returning officer receives notice of a recount under section 55, he or she shall delay transmission of the return and report for the constituency in question until he or she has received from the court a certificate of the results.*** The conduct of the returning officer in this case leaves a lot to be desired as to her competency. She is either incompetent or very ignorant of the law that guides her operations.

In the result, the appeal is allowed and orders of the learned Chief Magistrate quashed and set aside

As regards costs, they follow the event.

I am however hesitant to approve three certificates of counsel. This was a simple appeal. Costs are however awarded to the appellant both here and in the court below.

S

Margaret Mutonyi

Judge

29/3/2016