

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
MISC. CAUSE. NO. 06 OF 2016
ARISING OUT OF MISC. APLN. NO. 10 OF 2016

BAGOOLE JOHN NGOBI.....**APPLICANT**

VERSUS

KYOBE LUKE INYENSIKO**RESPONDENT**

BEFORE: - HON. LADY JUSTICE P. BASAZA WASSWA

RULING

[1] The Applicant brought this Application by ordinary letters dated 29/02/2016 and 03/03/2016 under Section 83 (c) of the Civil Procedure Act (CPA) seeking that the following revisionary orders and declarations are made;

- a) That the order by the Chief Magistrate contained in the certificate dated 29th February, 2016 declaring the Respondent a winner after the recount of votes (hereafter referred to as "***the impugned Order***") be nullified and set aside.
- b) An order reinstating the Applicant's election results as declared by the Electoral Commission vide a Return Form dated 2nd February, 2016.
- c) A declaration that the Applicant is the duly elected Member of Parliament for Luuka North Constituency

d) That the Respondent meets the costs of this application and the costs in the lower court.

Background

[2] The Applicant and the Respondent contested in the General Elections held on 18th February 2016 as candidates for Member of Parliament for Luuka North Constituency. The returning Officer returned the Applicant as the winner for the said seat. The Respondent subsequently filed Misc. Application No. 10 of 2016 (*M.A 10 / 2016*) in the Chief Magistrates Court of Iganga against the Applicant and the Electoral Commission. In M. A 10 / 2016 the Respondent sought that a recount in all polling stations in Luuka North Constituency be conducted. M. A. 10 / 2016 was granted on 26th February 2016 and a vote recount was ordered (***the impugned order***), and subsequently conducted. On the basis of the vote recount the results of the poll were altered making the Respondent the winner of the polls. These vote recount results were declared by the learned Chief Magistrate in a certificate of results dated 29th February 2016. On the same day, the Applicant then filed this application for revision of the impugned order and the recount. Contrary to section 58 (3) of the PEA, on 03/03/2016 the Electoral Commission published in the Gazette the results of the election as they stood prior to the alteration following the grant of the impugned order and the vote recount. The name of the Applicant and not the Respondent was published in the Gazette as the winner of the polls.

[3] The gist of the grounds relied on by the Applicant for his Application as stated in his lawyer's letters dated 29.02.2016 ref: KS /CV/16/746 and 03.03.2016 ref: KS/CV/16/746 are that:

- a) The Applicant is aggrieved by ***the impugned order***.
- b) The Chief Magistrate Court acted in exercise of its Jurisdiction illegally and with material irregularity and injustice
- c) The Proceedings were commenced by a Notice of Motion supported by a defective affidavit which did not disclose the source of the deponent's information and which had no documentary support such as a Declaration of result forms and final Tally sheet and was incompetent and bad in law.
- d) The notice of motion was not properly served upon the Electoral Commission contrary to 0. 29 r. 2 of the Civil Procedure Rules (CPR).
- e) The recount was ordered after the electoral materials had been tampered with contrary to section 52 of the Parliamentary Elections Act 2005 (PEA)
- f) The certificate of results after the recount issued by the learned Chief Magistrate deliberately left out invalid votes
- g) The total number of votes scored by all the candidates after the recount exceeded the number of voters who cast their votes on that day as disclosed by the Electoral Commission in the return Form for Transmission of Results.

- h) The learned Chief Magistrate ignored all signs of ballot stuffing by not paying attention to the absence of DR Forms, unused ballots in the respective boxes whereas these had been recorded by the Electoral Commission and kept in each ballot box contrary to section 50 (3) of the parliamentary Elections Act, 2005 (PEA)
- i) The court record of the lower court has been materially edited and is marred with falsehoods

[4] In his affidavit in reply dated 21st March, 2016, the Respondent contends that;

- a) The Applicant's application is bad in law, barred by law and is incompetent.
- b) There is no right of revision against a decision of a Chief Magistrate in a case of a recount.
- c) The learned Chief Magistrate judiciously exercised his jurisdiction and each party enjoyed a fair hearing and there was no injustice caused
- d) Before the recount was conducted, through his lawyers, the Respondent conceded to any results from any polling station whose ballot box would be found to have no seal.

[5] When this application came up for hearing on 1st April, 2016, the Applicant was represented by Mr. Medard Segona Lubega and Mr. Henry Kirunda, while the Respondent was represented by Mr. Hassan Kamba, Julius Galisonga and John Isabirye.

At the commencement of the hearing, Mr. Kamba indicated his intention to raise a preliminary objection to the effect that this revision application was incompetent before this court. I

prevailed over all Counsel and it was agreed that in the interests of time the intended preliminary objection be framed as one of the issues for determination. It was accordingly framed as the first issue. The three (3) issues for determination were thus;

1. Whether this revision application is competent before court
2. Whether the Chief Magistrate exercised his Jurisdiction lawfully?
3. What remedies are available to the Parties?

Counsel made Oral submissions.

Issue No. 1: Whether this revision application is competent before court?

[6] Mr. Kamba argued that

1. This court cannot exercise revision powers in so far as the application calls for evaluation of so many facts pertaining to the decision of the learned Chief Magistrate. The application pertains to grounds of appeal yet court is not sitting as an appellate court. In election matters, the CPA which clothes this court with powers to revise the decision of the Chief Magistrate is not adopted. Section 93 of the PEA only adopts the CPR. Questions of law and fact have been raised like falsification of the record which calls for evidence. Counsel relied on a number of authorities including:
 - a) ***Abiro Margaret vs. Eswagu William Civil Revision No. 9 of 2014***
 - b) ***Kyawo David vs. Kamanyire Civil Revision No. 1 of 2012***
 - c) ***Kamba Saleh vs. Namuyangu Jennifer Civil Appeal No. 19 of 2011***

d) Pascal Juma Wasike vs Alex Onyango Situbi & Another: M.A 04 of 2010.

e) Herman Kalisa vs. Gladys Nyangire & 2 Others Civil Reference No. 116 of 2013.

2. To entertain this application would be to create a dual track in the electoral process which sec. 83 (e) of the CPA does not permit, and would be to transgress the bounds under which revision powers may be exercised.
3. The order now sought to be revised is mute, it was enforced on 26/02/2016 when a recount was conducted and that process ended and the Applicant remained with the option to file for an election Petition. Counsel cited **Kasibante vs Katoongole Singh Election Petition No. 23 of 2011.**

[7] In answer, Mr. Segona submitted that;

1. Art. 139 of the CPA gives this court jurisdiction. The power of this court in revision is unlimited. Counsel cited **Civil Revision No. 1 of 2006 Munobwa M vs. Uganda Muslim supreme Council** and argued that the **Rebecca Nalwanga Balwanga (supra)** case is distinguishable from this case as the ballots in that case had not been tampered with.
2. M.A 10 of 2016 was brought under sec. 55 of the PEA, rules 1 & 3 of the CPR and Sec. 98 of the CPA and it is surprising now for the Respondent to exclude the CPA.
3. The Respondent's Counsel has misconceived the **Abiro M vs. Eswangu case (supra)**.

4. Where a person is published in the Gazette as Member of Parliament, the process of a recount cannot remove that Member of Parliament. The recount was on 29/02/2016 and the Application No. 10 of 2016 missed essential steps and did not involve the Electoral Commission which went ahead to Gazette. Section 58 (1), (2) & (3) of the PEA are the only instances where the process can be delayed.

[8] In rejoinder, Mr. Kamba argued that;

1. It is true that Art. 139 of the Constitution gives this court unlimited Jurisdiction in all matters
2. If the Applicant had been published in the Gazette, or the transmission of results had been done, the returning officer who was at the recount should have told court. To Gazette does not give the Applicant victory where a recount has displaced his win. Section 58 (1) of the PEA should be read together with Section 58 (3) of the PEA. Counsel cited ***Okumu O. Robert vs. Alenyo Ezrom William & Another Election Petition Appeal No. 01 of 2012.***

[9] I have scrutinized sections 55 and 56 of the PEA under which the Chief Magistrate's Jurisdiction to order and conduct a recount of votes is derived. I have also scrutinized the Parliamentary Elections (interim Provisions) (Election Petition) Rules, S. I 141 -2 and the Parliamentary Election (Election Petitions) (Amendment) Rules, 2006. None of these provisions and rules provide for revision, review or Appeals to this court against the Orders

and decisions of a Chief Magistrate in the exercise of his Jurisdiction to order and conduct a recount. Section 93 (1) & (3) of the PEA provides for rules ***to be made under the PEA***, which rules have not yet been made. This section stipulates that the said rules to be made may apply the rules of practice and procedure applicable to civil proceedings in the High Court and the Appellate courts as the case may be, with such modifications. The rules of practice and procedure referred to are the Civil Procedure Rules S.I 71 -1 made under the Civil Procedure Act (CPA) & (CPR). In my view, since section 93 (1) & (3) of the PEA sanctions the adoption and applicability of the CPA and CPR, it is safe to apply the CPA and the CPR in the interim, by virtue of Article 139 (1) of the 1995 Constitution and Sections 17 (1) and (2) and 39 (2) of the Judicature Act, Cap 13, subject to the other provisions of the PEA.

Articles 139 (1) of the Constitution provides that:

"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 on it by this Constitution or other law" (Emphasis added)

Section 17 (1) & (2) of the Judicature Act provides that:

"The High Court shall exercise general powers of supervision over Magistrate's Courts...the High Court shall exercise its inherent powers to ensure that substantive justice shall be administered without undue regard to technicalities"

Section 39 (2) of the Judicature Act provides that:

"Where in any case no procedure is laid down for the High Court by any written law or by practice, the court may, in its discretion, adopt a procedure justifiable by the circumstances of the case"

In addition to these provisions, I agree with the position taken by my brother Musota J, in **Kamba Saleh vs Namuyangu (supra)**; that the moment the PEA ceded to the authority of the Chief Magistrate to adjudicate over matters for a recount of votes, then legislation which regulates jurisdiction and the powers of Magistrate Courts come into play.

In view of the above, I hold that section 83 (c) of the CPA is applicable to this case. I am fortified in this position by the Judgment of Katureebe JSC (as he then was), in **Bakaluba Peter Mukasa vs. Namboze Betty Bakireke Election Petition Appeal No. 4 of 2009** where he stated that rules of procedure only form the framework within which a fair hearing is conducted. Katureebe JSC, opined in that case that the Appellant having received the petition, set out to answer it by filing his own reply, and having not stated that he did not know the case he had to answer, had not suffered any injustice or prejudice by the irregularity in the pleadings and had therefore been given a right to a fair hearing. The court would not allow such irregularity to frustrate the determination of the case.

Likewise in the present case, since the jurisdiction of the Chief Magistrate's court under sections 55 and 56 of the PEA extends to ordering and conducting a recount of votes, the form under which this application was brought is not the test to be applied. The test is did

the Respondent receive the complaint of the Applicant, did the Respondent know the case he had to answer, did he set out to answer it, did he suffer any injustice or prejudice? If the answers to these questions show that the Respondent was given a fair hearing, then the procedure adopted by the Respondent should not be allowed to frustrate the determination of the case. Whether by motion, summons, ordinary letter, appeal or revision, procedure should never precede substantive justice. I hold the view that the Respondent received the Applicant's complaint and knew the case he had to answer and he answered it without any prejudice or injustice.

Issue No. 1 is accordingly answered in the affirmative. This application is competently before this court.

Issue No. 2: Whether the Chief Magistrate exercised his Jurisdiction lawfully?

[10] For the Applicant, Mr. Ssegona and Mr. Kirunda argued that;

1. In conducting the recount when 25 out of 84 ballot boxes had been found to be without seals and had been tampered with, the Chief Magistrate acted irregularly and illegally. 25 boxes were not sealed but had voting materials, and four boxes were sealed, but had no materials. Counsel referred court to ***Winnie Byanyima vs. Ngoma Ngime Civil Revision No. 09 of 2001***

2. In the transmission of results form, the total number of ballot papers counted is 30,745 representing the total number of persons who cast their votes on 18 February, 2016 yet the recount proceedings show total votes of 31, 856 ballot papers excluding the invalid / spoilt votes, the excess votes being 1,111. In his summary in the certificate of results the learned Chief Magistrate excluded the invalid votes, yet he counted them and kept referring to them. The unused ballots were supposed to also be counted
3. The learned Chief Magistrate omitted to deal with the numeric which was a fundamental flaw thereby exercising his jurisdiction irregularly. Application No 10 of 2016 and the supporting affidavit did not have any accompanying annexures or evidence from persons who were at the respective polling stations. The Application did not disclose the ground for a recount. A recount is not a fishing expedition but it is in respect of specific ballot papers of the counting at the polling station. The order of a recount is not automatic. Counsel relied on **Mbaghadi Frederick Nkayi & Another vs Dr. Nabwiso Frank Election Petition Appeal No. 14 & 16 of 2011**
4. The record of the lower court was falsified.
 - a) The conclusion at page 41 of the record that the recounting was done in the presence of all the parties and their agents is false, the Applicant did not take part in the recounting exercise. The record should have instead indicated that the Applicant protested the exercise and that the recounting exercise proceeded without the Applicant and only with the Respondent herein.

- b) At page 7 of the record, the court states that by consent of all the parties a recount is ordered. At page 6 of the record, a ruling had been given after argument of both Counsel and there was no such consent.
 - c) The certificate of the recount is back-dated to 29.02.2016
5. Service of court process on the Electoral Commission was ineffective under 0.29 rule 2 of the CPR, the Respondent served Misc. Applic. No. 10 of 2016 on the District Returning Officer which was not proper service.

[11] In reply, Mr. Kamba submitted that there was no error in the impugned order and that the application lacks merit. He argued that;

1. The Respondent admits that there were 25 ballot boxes that were open without seals and even if the ballots had been opened the recounting could go on. Counsel submitted that the position in ***the Ngoma Ngime (Supra) case*** is no longer good law. He relied for this proposition on ***Election Petition No. 47 of 2011: Rebecca Nalwanga Balwanga vs. The Electoral Commission and 2 others*** and ***Election Petition Appeal No. 7 of 2012 Brenda Nabukenya vs. Rebecca Nalwanga Balwanga***. He submitted further that there was no evidence that the seals had been tampered with, even when the boxes were opened.
2. The outcome of the ballot boxes without seals were not contested.

3. When the recount was ordered in Misc. Application 10/2016, the Respondent remained in court, and it is only the Applicant who went to the returning officer and could have been the one who tampered with the ballot boxes
4. Paragraphs 4, 7, 8 and 9 of the Affidavit in support of M.A 10 of 2016 were premised on the deponent's knowledge and did not state anywhere that he had been told. No law bars a chief Magistrate from referring to such an affidavit. No error was committed in the evaluation of evidence.
5. The learned Chief Magistrate cannot be faulted where the recount bears different results from the declared results. The learned Magistrate simply recounts the votes brought before him in accordance with section 55 (2) of the PEA and it is not his duty to see whether they tally, but rather to simply recount.
6. The assertion that there was falsification of the record of the lower court is not borne out of the record nor backed by evidence. It is true that the Applicant herein was not present at the recount and the record of the lower court reflects so at page 8. At page 7, what is consented was the date for the recount on 28/02/2016 and not the ruling on a recount.

[12] I have carefully perused the record of proceedings in M. A 10 / 2016, particularly at pages 7 -10 thereof. I find, as conceded by both parties and their Counsel that it is not disputed that twenty five (25) ballot boxes did not have seals and had been tampered with, and that four (4) boxes had seals but had no ballot papers. See Annexure "A" to the Applicant's

application by his lawyer's letter dated 29/02/2016. I also noted that the titles of tables 03 and 04 of the Chief Magistrate's Certificate of results for the recount were to same effect.

M. A 10 / 2016 was an application seeking **a recount of all polling stations** in Luuka North Constituency on the grounds stated therein which included; alleged irregular tallying and counting of votes and alleged falsifying of results. It is surprising that despite the protests by the Applicant (Respondent in M.A 10 / 2016) that **some of the ballot boxes were tampered with**, the learned Chief Magistrate went ahead with the process of a recount. He ordered a recount on the premise that the Respondent (Applicant in M.A 10 / 2016) had conceded to the results of the boxes that did not have seals and the recount would proceed with only the boxes from the polling stations that had seals. This was irregular.

I agree with the position taken by Musoke- Kibuuka, J in **Winnie Byanyima vs. Ngoma Ngime, (supra)** that a recount under section 56 of the PEA is intended to serve as a filtering mechanism and is intended to be more secure and reliable than the first count carried out by Presiding Officers at the various polling stations in the field at the end of the polling time, on the polling day. Where any of the ballot boxes presented for a recount are found to be open or unsealed, the purposes of a recount are not achievable the evidence would have been tampered with and the exercise rendered useless. The number of votes obtained by each candidate would not be verifiable by way of a recount and exercising jurisdiction under those circumstances would be exercising jurisdiction with material irregularity.

The cases cited by Mr. Kamba, Counsel for the Respondent; ***Election Petition No. 47 of 2011: Rebecca Nalwanga Balwanga vs. The Electoral Commission and 2 others*** and ***Election Petition Appeal No. 7 of 2012 Brenda Nabukenya vs. Rebecca Nalwanga Balwanga***, are distinguishable from the ***Winnie Byanyima vs. Ngoma Ngime case (supra)***. Those cases were in respect of mandatory recounts under section 54 of the PEA, while the present case is in respect of a recount under sections 55 & 56 of the PEA.

[13] M.A 10/ 2016 seeking a recount of all polling stations was indeed a blanket application, I agree with the Applicant's Counsel on this point as well. Save for paragraphs 7 & 8 in respect of two (2) Polling stations; Misita T/C and Gwembuzi Primary School, all the other averments in the affidavit in support in M. A 10 /2016 in respect of all the other stations, were non-specific. In his grounds for a recount, the Respondent (Applicant in M.A 10 / 2016) did not state specific numerical errors or irregularities but used phrases like; ***"many of my votes"***, ***"many of my valid votes"***, ***"many ballots cast in my favour"***. It is therefore correct for the Applicant to have stated that M.A 10 / 2016 did not warrant a recount ***for all the polling stations***. This lack of specificity is evident in the ruling of the Chief Magistrate where he stated at page 6 of the record that:

*"...I believe a vote recount will be able to put everyone at rest in this matter given that **numerical errors and the like will be identified and addressed**. In the interest of justice this application would be allowed and a recount ordered"* (Emphasis added)

From this extract, clearly the learned Chief Magistrate had not satisfied himself of any numerical errors, or at all, for which he conducted the vote recount. He simply ordered and simply conducted a recount. With all respect, it is my view that an aimless and unfocused recount of votes, without numerical points of reference against the backdrop that some ballot boxes were found without seals and tampered with, was an exercise in futility. To echo the words of Musota J, in **Kamba Saleh vs. Namuyangu Jennifer Byakatonda C/A No 19 of 2011**, ***“there was nothing for the learned Magistrate to scrutinize”***. In the ***Kamba Saleh case***, the grounds raised by the candidate for a recount had nothing to do with numerical questions. Musota J held that court cannot be called upon to scrutinize all the votes cast in favour of candidates which are in tens of thousands nor can it go into ballot boxes on a hunting expedition in the hope that it will chance on ballot papers in favour of the Applicant that were not counted as hers. I agree with this holding.

Likewise, the learned Magistrate in this present case should not have blindly conducted the recounting exercise. This too, was irregular.

[14] On the question of whether or not the record of proceedings was correct and or falsified, the record is not clear whether the Applicant or his Counsel were present or not at the recount exercise. However, contrary to the argument of the Applicants' Counsel, the record does in fact reflect; at pages 7-10 thereof, that the Applicant protested the recounting exercise.

On the questions relating to the summations stated in the Magistrate's certificate of results and those stated in the Returning Officer's return form for transmission of results, I think these are questions that are best suited for determined on appeal and not by way of revision. Revision is concerned not with conclusions of law or fact but with questions on the exercise of jurisdiction.

[15] For the reasons I have given under paragraphs [12] & [13] above, I hold that the impugned order to recount votes by the learned Chief Magistrate and the resultant vote recount as shown in the certificate of results dated 29th February, 2016, were irregular and of no consequence. The learned Chief Magistrate acted in the exercise of his jurisdiction illegally and with material irregularity.

Issue No. 3: What remedies are available to the Parties?

[16] In the result, this application is allowed, with the following orders;

- 1 The learned Chief Magistrate's order to recount the votes cast in Luuka North Constituency, Luuka District, and the vote recount, and the resultant certificate of results dated 29th February, 2016 declaring the Respondent as winner are hereby revised and set aside.
- 2 The return of results for Luuka North Constituency declared by the returning officer of the Electoral Commission in the Return Form for transmission of results dated 19th February, 2016 is hereby re-instated.

- 3 For the reason that the irregularities pointed out were the fault of the lower court, each party shall bear his own costs for this application and for the costs in the lower court.

I so order,

P. BASAZA WASSWA
JUDGE

25/04/2016