THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

CIVIL APPEAL NO. 0019 OF 2011

(Arising out of Misc. Application No.2 of 2011 of Pallisa Chief Magistrate's Court)

KAMBA SALEH…….APPELLANT

VERSUS

NAMUYANGU JENNIFFER BYAKATONDA…….RESPONDENT

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

RULING

The background to this ruling is that the appellant **Hon. Kamba Saleh** filed this appeal against an order by the learned Chief Magistrate Pallisa for a recount of votes cast in the Parliamentary Elections for Kibuku Constituency where he was declared winner. The respondent **Hon. Namuyangu Jennifer Byakatonda** contested the results announced by the Electoral Commission, applied for a recount under S.55 of the Parliamentary Elections Act which was granted.

The respondent is represented by **Mr. Mutembuli Yusuf** while the appellant is represented by **Mr. Katumba**.

At the commencement of hearing this appeal, **Mr. Mutembuli** raised a preliminary point of law to the effect that this appeal is incompetent and should be struck out with costs.

In his submissions, **Mr. Mutembuli** contends that an appeal is a creature of statute. That he perused the Parliamentary Election Act (PEA) but found no provision which allows an appeal against a recount order. That an appeal is not as of right from orders made under S.55 of the PEA. Further that he looked at O.44 r.1 CPR providing for orders that are appealable and the one for a recount is not one of them. That S.220 of Magistrates Courts Act (MCA) does not provide for such appeal either.

According to **Mr. Mutembuli** the intention of the legislature in not expressly providing for an appeal was not to have an appeal against a recount order given the nature of what is involved in a recount. That the intention of Parliament was to restrict appeals from petition decisions which is provided for under S.66 PEA.

Finally that in the absence of the law providing for such appeal as the instant one, this appeal is incompetent and should be struck out with costs and the recount order be maintained.

In reply, **Mr. Katumba** for the appellant submitted that there is no order which is not appealable unless a right of appeal is expressly outlawed by the Act. That if the intention of the legislature was to bar any appeal then the intention may be expressly indicated in the statute.

According to **Mr. Katumba** S.55 of the PEA left a big lacunae as to next course of action an aggrieved party should take. That this has not been helped by S.98 PEA because the Hon. C.J. has not made rules to regulate election matters. Therefore it is the duty of this court to interpret the law and fill the lacunae for ends of Justice to be met.

Mr. Katumba further submitted that in the absence of a specific procedure and course of action by an aggrieved party, court should look at the law in its entirety and establish or give directions on the course to be taken by an aggrieved party by orders given under S.55 PEA. He referred to the case of ***SERUNJOGI JAMES MUKIIBI V. HON. LULE MAWIYA MASAKA CA 8 OF 2006*** wherein my senior brother **Kibuuka Musoke J.** held *inter alia* that this court has discretion to entertain an appeal for reliefs sought in an appeal for the ends of justice to be met. That where a law gives a judicial officer discretion it has to be exercised judicially and if the standard is not met then his/her order becomes challengeable. **Mr. Kamba** assisting **Mr. Katumba** added that even if the appeal were incompetent, once an illegality is brought to the attention of this court it cannot be condoned. That the appeal is intended to correct an illegality. He referred to the famous case of ***Makula International***. That this court cannot ignore the points of law and allegations of illegality raised in the memorandum of appeal.

I have considered the preliminary objection raised by learned counsel for the respondent. I have related the same to the submissions by respective counsel. I have extensively re-studied the legislation alluded to by **Mr. Mutembuli**. I perused the authorities cited by counsel for my guidance.

My duty is to decide whether the present appeal is competent or not. This appeal arose out of the exercise of powers by the learned Chief Magistrate Pallisa, conferred under S.55 of the PEA. This law provides for a recount of votes cast in a parliamentary elections if an application by an aggrieved candidate has been allowed by the Chief Magistrate. As rightly submitted by both learned counsel it is apparently not clear if an appeal can lie from the order of a Chief Magistrate sanctioning a recount.

Mr. Mutembuli for the respondent vehemently contends that the law does not allow an appeal from such order. **Mr. Katumba** and **Mr. Kamba** for the appellant contends that an appeal is maintainable.

I am of the 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 (MCA) Cap.16. The MCA extensively outlines the powers of different levels of Magistracy and how their decisions are handled after pronouncement.

In fact it is not true as submitted by **Mr. Mutembuli** that S.220 thereof does not provide for appeal from decisions and orders of a Chief Magistrate. It does. The said section provides that:-

> "*Subject to any written law and except as provided in this section, an appeal shall lie.*

(a) *From decrees or any part of the decrees and from the orders of a Magistrates Court presided over by a Chief Magistrate or a Magistrate Grade I in exercise of its original jurisdiction, to the High Court*."

Once the PEA ceded authority to the Chief Magistrate to handle matters related to recounts and it was silent on anything else, then automatically his/her exercise of jurisdiction was left to the MCA to regulate and guide him/her on what the next course of action would be. Likewise parties to the recount litigation have to be guided by the provisions of the MCA.

In my view, since the jurisdiction of the Chief Magistrate given under the MCA is subject to any other written law and there is no other law to be subject to which deals with appeals then S.220 MCA comes in handy to solve what learned counsel referred to as a lacunae although in my considered view there is no lacunae in the PEA since the MCA provides a way forward.

To buttress my view, is the preamble to the MCA which states that the said law is:-

"*an act to amend and consolidate the law relating to establishment, constitution and jurisdiction of, and the practice and procedure before Magistrates Courts and to make provision for other matters connected therewith or incidental thereto*."

Therefore I do not agree with **Mr. Mutembuli**'s submission that because there is no express provision in the PEA allowing appeals from a Chief Magistrate's order for a recount then Parliament did not intend that an appeal should arise from such orders. If it intended so, it would have expressly legislated to that effect since the constitution and Judicature Act give the High Court unlimited jurisdiction. See Article 139 Constitution and sections 14 and 16 Judicature Act.

I think, Parliament enacted S.55 PEA and made it appear hanging or definite in itself because it was aware of the existence of an enabling law it enacted earlier under S.220 of the MCA which deals with dissatisfaction with the decisions of a Chief Magistrate while dealing with civil cases before him/her in their original jurisdiction including S.55 PEA, subject to any other written law.

The laws cited by learned counsel for the respondent do not expressly outlaw the operation of the MCA. The Magistrates Courts Act has protective sections in SS.229 and 230 thereof.

S.229 provides that:-

> "*In so far as the context allows, and notwithstanding the provisions of any other written law in force on the date of the coming into force of this Act providing for an appeal to the High Court, those provisions shall be read as providing for an appeal to the appropriate court under this Act*."

S.230 thereof deals with the relationship between the Magistrates Courts Act on the one hand and both the Criminal Procedure Code Act and the Civil Procedure Act on the other. It enacts that:-

"*Where this Act makes provision for any matter so much of the criminal procedure Act and the Civil Procedure Act as relates to the same matters shall cease to have effect in respect of Magistrates Courts*."

My take from this provision is that where any provision in the Civil Procedure Act and the Criminal Procedure Act (and rules made there under) respectively is in conflict with the express provisions on such matter in the Magistrates Courts Act, then the same matters shall cease to have effect in respect of the Magistrates Courts. For example if S.220 (1) MCA expressly allows appeals and other laws provide otherwise those other laws will have no effect to the extent of the inconsistence.

S.76 CPA relied upon by learned counsel for the respondent in fact agrees with this position. It states that:-

"*76. Orders from which appeal lies*

(1) *An appeal shall lie from the following orders, and except otherwise expressly provided in this Act or by any law for the time being in force from no other orders*."

It appears the enactment in O.XLIV CPR under S.76 lists orders appealable as of right but these are appeals from orders given under the Civil Procedure Rules not other principal legislation.

In view of my decision herein I am with due respect unable to be persuaded by the decision in ***SERUNJOGI JAMES MUKIIBI'S*** case (supra), that there is a lacunae in the law. I however agree that where the law gives a judicial officer discretion, it has to be exercised judicially and if the standard is not met then his or her order becomes challengeable especially if an illegality is pointed out.

Consequently, I will overrule the objection and hold that this appeal is properly before this court.

Musota Stephen

JUDGE

28.3.2011

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Martin Muhumuza on brief for **Katumba** appearing in Constitutional Petition 11/2011 E. Lukwago v. A.G.

Mutumbuli Yusuf for the respondent.

Both parties in court.

Kimono Interpreter.

Muhumuza: Matter for ruling and ready to receive it.

Court: Ruling delivered.

Musota Stephen

JUDGE

28.3.2011