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

JUDGMENT

This is an appeal from the order of the Chief Magistrate Pallisa authorizing a recount of votes cast in the Parliamentary Elections for Kibuku Constituency where the appellant Hon. Kamba Saleh was declared winner against the respondent Hon. Namuyangu Jennifer Byakatonda. The recount was sought by the respondent.

In this appeal, the appellant is represented by Mr. Katumba of Ms. Lukwago and Co. Advocates while the respondent is represented by Mr. Mutembuli of M/s Mutembuli & Co. Advocates.

The grounds of application in the lower court were 6 that:-

1. The figures on some of the result declaration forms do not tally as by law required.
2. Some result declaration forms show figures which are over and above the issued ballot papers.

3. Some of the declaration of result forms are not authentic in as far as they were not signed by the presiding officers as required by the law.
4. Some of the declarations of results forms were not signed by the applicant's agents as by law required.
5. Some polling stations' result declaration forms were not issued at all.
6. It is just and equitable that court makes an order for recount of votes in Kibuku Constituency to rectify the anomalies.

According to the record, it appears no security for costs was deposited as required under S.55 (3) of the Parliamentary Elections Act (PEA).

Further it appears the learned Chief Magistrate conducted the recount after the expiration of 4 days from the date of receipt of the application.

Preliminary objections were raised in respect of these omissions but they were overruled and the hearing of the application proceeded and a recount was eventually ordered.

The appellant was dissatisfied hence this appeal.

The memorandum of appeal raises 5 grounds of appeal that:-

1. The learned Chief Magistrate erred in law and fact and came to a wrong conclusion when he held that payment of security for costs in an application for a recount can be effected at any time.
2. The learned Chief Magistrate erred in law and fact and came to a wrong conclusion when he held that the Chief Magistrate court is vested with powers to proceed with the hearing of the application for a recount of votes after the expiration of the mandatory prescribed period of 4 days from the date of receipt of the application for a recount by court.
3. The learned Chief Magistrate erred in law and fact when he proceeded to hear the application and order for a recount of votes of Parliamentary Elections for Kibuku Constituency after the expiration of the mandatory prescribed period after 4 days from the date of receipt of the application for a recount by court.

4. The learned Chief Magistrate erred in law and fact when he ordered for a recount of votes for Kibuku Constituency without particulars of numerical figures of votes complained of by the applicant.
5. The learned Chief Magistrate erred in law and fact in evaluating the evidence on record and as such came to a wrong conclusion that the applicant had made out a *prima facie* case for the recount for the election of Kibuku County.

The respective counsel were allowed to file written submissions in support of their respective cases.

This was done. I will not reproduce the submissions.

As a first appellate court I have dutifully studied the lower court's proceedings. I have considered the law applicable and submissions by respective counsel. I will proceed to decide this appeal in the order the grounds of appeal were argued by respective counsel.

Ground I:

In his submission, Mr. Mutembuli learned Counsel for the respondent supported the holding by the learned Chief Magistrate that security for costs provided for under S.55 (3) PEA can be deposited at any stage before or immediately after the recount order is made by the Chief Magistrate. That it is not mandatory that the security for costs must be deposited on the day the application is made or filed in court but must be paid before or after the recount order. That the purpose for security is to ensure that the other party is paid costs if the recount does not alter the result.

Further that if the legislature intended to make deposit of security a prerequisite for recount it ought to have expressly provided so.

Learned counsel for the appellant submitted to the contrary. He contends that security for costs is a pre-requisite condition which must be fulfilled at the time of filing the application.

The law which governs security in applications for a recount before the Chief Magistrate is enacted under S.55 (3) of the PEA. It states:-

> "55(3) *A candidate who requests a recount under this section shall deposit with the Chief Magistrate a security for costs of thirty currency points*."

In my considered view, this legal provision is straight forward and does not require complex legal interpretation skills to comprehend.

As rightly submitted by learned counsel for the appellant, it is couched in mandatory terms given the use of the word SHALL. It is therefore a pre-requisite which must be fulfilled at the time of filing the application for a recount. It was erroneous for the learned Chief Magistrate to hold that depositing of security can be done at any stage of the hearing of the application.

The section is not silent on when security shall be deposited. It is deposited upon a request for a recount and this is when the application for a recount is made. I agree that "request" is analogous to "application" since a recount can only be allowed upon a hearing by the Chief Magistrate and is allowed on merit and judiciously.

I will allow ground I of the appeal.

Grounds 2 and 3:

Learned counsel for the respondent supported the position adopted by the learned Chief Magistrate to hear and conduct the recount beyond the 4 days provided for in the law. That it was impossible to abide by the 4 days because of the objections raised by the appellant's counsel which took time yet a fair hearing had to be conducted. Learned counsel implied that the time set by the law was not enough to serve, reply and make rejoinders if any. That the time is short to take into account unforeseen circumstances such as sickness of the Magistrate. That giving

S.55 (2) PEA a strict interpretation would cause a miscarriage of justice to the parties. Therefore the liberal approach would be appropriate.

According to Mr. Mutembuli the appellant was not prejudiced by the decision of the learned Chief Magistrate.

On the other hand, learned counsel for the appellant submitted that the 4 days provided in the law is mandatory and the Chief Magistrate has no jurisdiction to extend time. That by 2nd March 2011, the Chief Magistrate's Court was no longer vested with jurisdiction to conduct a recount of votes.

S. 55(2) PEA provides that:-

> "*The Chief Magistrate shall appoint the time to recount the votes which shall be within four days after receipt of the application under subsection 1 and the recount shall be conducted in accordance with the directions of the Chief Magistrate*."

The record shows that Misc. Application 002/2011 was filed on 22 February 2011. This means that the four days expired on 27th day of February 2011 not 26th February 2011 as submitted by learned counsel for the appellant.

S. 34(1)(a) of the interpretation Act bears this out. It provides thus:-

> *"(1) in computing time for the purpose of any Act:*
>
> (a) *a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done*."

The day of receipt of the request for a recount is therefore excluded.

I however agree with learned counsel for the appellant that by the time the application came up for hearing on the 2nd day of March 011, the mandatory four days had long expired. Therefore court's jurisdiction to appoint a day for the recount of votes let alone proceeding with the application had long expired.

By 2nd March 2011, the Chief Magistrates Court was no longer clothed with jurisdiction to order a recount. Whatever a court purports to do without jurisdiction is null and void *ab initio*.

Whether the time frame provided by the law was inadequate or unreasonable as submitted by learned counsel for the respondent, it was not within the powers of the Chief Magistrate to purport to amend the law in his court room. This is the duty of the legislature to cure the mischief.

I wish to note that election matters are urgent matters which are in most cases emotionally charged thus requiring expeditious handling. I think the framers of the law had this in mind when they provided for a recount within four days of the request given the challenge of having ballot boxes secured to avoid possible tampering with them. A Chief Magistrate must do whatever it takes to do everything within the prescribed time and avoid being derailed by unnecessary interjections in the process. A Chief Magistrate should not be misled to turn an application for a recount into a fully fledged petition to challenge an election.

I will allow grounds 2 and 3 of the appeal.

Grounds 4 and 5:

Learned counsel for the respondent submitted that S.55 (2) PEA does not provide grounds upon which court should rely to order a recount. That courts are trying to develop such grounds but the grounds are not restrictive and exhaustive. That it is not true that court can only intervene after announcing results when the applicant proves there is a question of numerical error and nothing else. Learned counsel reviewed in detail the events which led to the order for a recount

and further submitted that the grounds raised by the respondent in the lower court were for a recount not setting aside an election in a petition.

That the numerical questions raised by the respondent called for verification and clarification in a vote recount.

Learned counsel for the appellant submitted to the contrary and I agree. The decision in the case of ***Byanyima Winnie v. Ngoma Ngime Civil Revision Cause No. 009 of 2001*** per Kibuka Musoke J is still good law.

It was held *inter alia* that:-

> "*A recount of votes under S.56 (now 55) of the Act is merely a legal function performed under the neutrality of the courts and intended to untangle any numerical question of the results as part of the vote counting process. It is intended to assist the Electoral Commission to announce the correct winner in the constituency*."

I agree with learned counsel for the appellant that the grounds raised in the application before the Chief Magistrate had nothing to do with numerical figures but were general grounds for non-compliance with electoral laws which are grounds for setting aside an election under S. 61 (1) of the PEA. They are also grounds for non compliance with the electoral law under sections 47 and 50 PEA.

A recount could solve none of the complaints.

The learned Chief Magistrate wrongly used these grounds to support his order for a recount. The applicant did not state in her application that there was any complaint raised during the counting of votes by herself or her agents or any voter. No ballot papers were presented as having been numbered on the back, initialed by the presiding officer and witnessed by the polling assistants and agents (see S.48 of the PEA).

There is no indication in the lower courts record that any of the applicant's agents came up to corroborate the respondent's evidence. Interestingly as pointed out by learned counsel for the appellant the agents endorsed/signed the declaration of results forms without raising any objection to the contents therein. It is the position of the law that for scrutiny of votes to be allowed, it should be in respect of votes objected to the presiding officer by the candidate or agent.

The grounds raised by the respondent in the application for recount had nothing to do with numerical questions. There was nothing for the learned Chief Magistrate to scrutinize. By delving into issues supposed to be handled by a petition the learned Chief Magistrate squandered the little time he had to conduct the recount. If he restricted himself to what he was supposed to do the time would have been enough. Court cannot be called upon to scrutinize all the votes cast in favour of candidates which is in tens of thousands nor can it go into the ballot boxes on a hunting expedition in the hope that it will chance on ballot papers in favour of the applicant but were not counted as hers.

I will allow grounds 4 and 5 as well.

Having allowed all the grounds of appeal, I will finally allow this appeal. The order for a recount by the learned Chief Magistrate is hereby quashed and set aside.

The appellant shall get the costs for this appeal.

Musota Stephen

JUDGE

26.4.2011

26.4.2011

Martin Muhumuza holding brief for Katumba C. appearing for appellant.

Hadijja as Clerk.

Mutembuli Yusuf for respondent.

Both parties in court.

Muhumuza: The matter is ready for judgment. I am ready to receive it.

Mutembuli: Very ready

Court: Judgment delivered in open court.

Gladys Nakibuule Kisekka

DEPUTY REGISTRAR

26.4.2011