THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

APPLICATION FOR JUDICIAL REVIEW

MISCELLANEOUS APPLICATION NO. 38 OF 2011

TAMWENYA RUTH :::::::: PETITIONER

VERSUS

1. **THE ELECTORAL COMMISSION**
2. **WENENE SARAH ::::::: RESPONDENTS**

BEFORE: THE HON. MR. JUSTICE MIKE J. CHIBITA

RULING

This is an application for Judicial Review by Notice of Motion brought under section 36 of the Judicature Act and rules 3, 4, 6 and 7 of the Judicature (Judicial Review) Rules 2009. The application is supported by the affidavit of Tamwenya Ruth, the applicant.

The application seeks orders for judicial reliefs thus:-

- Certiorari to quash the decision of the 1st respondent to publish in the Uganda Gazette the results for Kibuku District Woman Member of Parliament elections.
- A declaration that the purported gazetting of the results for Kibuku District Woman Member of Parliament election by the 1st respondent was illegal, invalid and void ab initio.
- Mandamus to compel the 1st respondent to comply with the court order to submit ballot boxes for Kibuku District Woman Member of Parliament to the Chief Magistrates Court of Pallisa for a recount.
- Prohibition, prohibiting the 1st respondent from forwarding the 2nd respondent and/or further treating her as duly elected Woman Member of Parliament for Kibuku District and as such prohibiting the 1st respondent from forwarding or transmitting the names of the 2nd respondent to parliament to be sworn in as duly elected Member of Parliament for Kibuku District.
- Costs of this suit.

The grounds of the application are briefly that the applicant who participated in the elections for Woman Member of parliament for Kibuku District being dissatisfied with the outcome of the elections applied for a recount of the votes, the Chief Magistrate of Pallisa issued an order for recount, which order was not complied with hence the 1st respondent went ahead to gazette the results contrary to the order of court. The applicant contends that the act of refusing to submit the ballot boxes for a recount and subsequently gazetting the results was void and of no legal effect.

Written submissions by the applicant's counsel were filed to elaborate on those grounds.

The respondents oppose the application. In their written submissions the 1st respondent's counsel calls for dismissal of the application because this is not a proper case for judicial review; in any case the 1st respondent acted lawfully, rationally and reasonably at all material times.

Counsel for the 2nd respondent also in their written submissions called for the dismissal of the application for failing to prove that the 1st respondent acted illegally, irrationally or with procedural impropriety warranting the remedies of Judicial Review.

We can start off by disposing of the relief of prohibition, which has obviously been overtaken by events. The 2nd respondent was duly sworn in after her name was forwarded as having been duly elected Woman Member of parliament for Kibuku District. There is nothing more that court can prohibit. That relief is now moot and accordingly disposed of.

This brings us to the order of mandamus that is sought to compel the 1st respondent to comply with the order for a recount.

The relevant law concerning recounts is the Parliamentary Elections Act section 55 which provides as follows:-

55(2)

> "*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 application for a recount was received by the Chief Magistrates Court Pallisa on 22nd February according to the records and this date is not in issue. According to available records, an order for recount was issued by the Chief Magistrate on 18th March, 2011. This order was issued

after whole weeks had expired! I cannot fathom under what law the learned Chief Magistrate issued that order.

I find that the interpretation of the word 'shall' as adopted by my learned brothers Hon. Kibuuka Musoke in **Byanyima Winnie vs. Ngoma Ngime Civil Revision Cause No. 009 of 2001** and Hon. Stephen Musota in **Kamba Saleh vs. Namuyangu Jenniffer Byakatonda Civil Appeal No. 019 of 2011,** is a true reflection of what the jurisprudence on the word 'shall' has crystallized into. 'Shall' has been held to be mandatory and this is still good law and I find no persuasive arguments in the submissions in the instant case to warrant my departure from it.

The Learned Chief Magistrate therefore ceased having jurisdiction on the subject of recount after the expiry of four days. When he gave the order for a recount on 18th March he was doing so outside the law and therefore acted without jurisdiction. I agree with the decision of Hon. Yorokamu Bamwine J, as he then was, in **Uganda vs. Sendikadiwa Revision Cause No. 009** of 2003 that proceedings of a court without jurisdiction are a nullity.

If the order for recount was therefore issued without jurisdiction and is therefore null and void there is no leg left for a declaration against the gazetting of the 2nd respondent to stand on. I therefore find that the prayer for the relief of declaration collapses under the weight of the nullified order for a recount.

Similarly the prayer for the order of certiorari cannot be sustained any longer given that the order upon which it is founded has been declared null and void.

The issue of whether judicial review was an applicable relief or not can only be engaged in for academic purposes, in this case. I find that there is neither time nor need to engage in such an academic exercise. I find that the matter has been amply discussed by my learned brother Hon. Yorokamu Bamwine in the case of **Micro care Insurance Ltd versus Uganda Insurance Commission Misc. Application number 218 of 2009**. I entirely agree with his analysis and conclusion regarding the relief of judicial review in that case.

Under the premises the application must fail on all grounds and is accordingly dismissed.

It is accordingly dismissed with but no order as to costs since the matter has the same facts and issues as Misc. Application number 02 of 2011.

Dated this 17th day of June 2011

Signed by:

JUSTICE MIKE J. CHIBITA

RULING READ AND DELIVERED IN THE PRESENCE OF:

1. COUNSEL FOR APPLICANT ABSENT
2. COUNSEL RESPONDENT MWASA JUDE HOLDING BRIEF
3. APPLICANT TAMWENYA RUTH
4. RESPONDENT ABSENT
5. COURT CLERK GRACE KANAGWA

Right of appeal explained to the applicant.

Signed by: **17th/06/2011**

HON. MR. JUSTICE MIKE J. CHIBITADATE