THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

REVISION CAUSE NO. 02 OF 2011

(ARISING OUT OF MISC APPLICATION NO. 03 OF 2011 OF THE CHIEF MAGISTRATES COURT, PALLISA)

WENENE SARAH :::::::::::::::: APPLICANT

VERSUS

TAMWENYA RUTH :::::::::::::::: RESPONDENT

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

REVISIONAL ORDER

This Revision arises out of the ruling and orders of His Worship Herbert Birungi of Pallisa Chief Magistrates Court in Miscellaneous Application Number 003 of 2011; Tamwenya Ruth versus Wenene Sarah.

The application is brought by Notice of Motion under sections 83 and 98 of the Civil Procedure Act and Order 52 rules 1, 2 and 3 of the Civil Procedure Rules. The Notice of Motion is accompanied by the affidavit of the applicant Wenene Sarah Mwebaza.

The applicant is represented by M/s Lukwago and Co. Advocates while the respondent is represented by M/s Omoding, Ojakol and Co. Advocates.

During the scheduling Conference parties agreed to write and file written submissions and a timetable was drawn up, which unfortunately was not strictly adhered to. Be that as it may, both parties eventually filed their submissions.

There are no brief facts in this case. The facts are part of the issues in contention and they are not brief. I will therefore start by laying down the chronology of events since the dates are of the essence in this whole saga.

CHRONOLOGY OF EVENTS.

- 18TH FEBRUARY 2011, Elections for Woman Member of Parliament were held.
- 22nd February, 2011, Respondent filed an application for recount of votes.
- 28th February, 2011, an Interim Order against gazetting of the results was issued.
- 28th February, 2011, The Interim Order was served on the Electoral Commission.
- 7th March, 2011, The Applicant was gazetted as Member of Parliament.
- 18th March, 2011, hearing of the application for recount was held, P.Os were raised and were overruled, an order for the recount of votes was issued.
- 21st March, 2011, Revision Cause was filed in the High Court, Mbale.
- 18th March, 2011, The High Court called for the file.
- 4th April, 2011, Order issued committing the Returning Officer to Civil Prison.

GROUNDS FOR REVISION

The grounds of this application are:

- That the applicant is aggrieved by the ruling and Order of the Chief Magistrates Court in Pallisa ordering for a recount of the votes in the elections for Woman Member of Parliament for Kibuku District held on 18th February 2011.
- That the learned Chief Magistrate lacked jurisdiction when he proceeded to hear and grant the order for a recount after the expiry of the four mandatory days.
- That the learned Chief Magistrate lacked jurisdiction to hear and grant the Order for a recount after the applicant had been gazetted as the winner.
- That it is just and equitable that the said Order and decision be revised and set aside.

The gist of this application is about whether the Chief Magistrate Pallisa had jurisdiction to order a recount of the votes polled in the parliamentary elections of the Woman Member of Parliament for Kibuku District after the expiry of the statutory four days after receipt of the application for the recount.

The relevant law 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 filed and received on 22nd February according to the records and this date is not in issue. According to records, an order for recount was issued on 18th March, 2011. It is obvious that this order was issued not under the mistaken belief that maybe four days had not expired; it was now no longer a question of expiry of days but whole weeks had expired!

Reading through the submissions of Counsel for the respondents gives one insight into why the learned Chief Magistrate could have disregarded the statutory number of days in which a recount could be given not just by one or two days but by leaps and bounds! Counsel in his submission argues that the word 'shall' in section 55(2) of the Parliamentary Elections Act should be construed liberally to mean, it was directory rather than mandatory for the application to be dealt with conclusively within the time frame. Understandably he quotes no authority to support this revolutionary departure from trite law regarding whether 'shall' is mandatory or directory.

I find that the interpretation of the word 'shall' as adopted by my learned brothers the Hon. Kibuuka Musoke in Byanyima Winnie vs. Ngoma Ngime Civil Revision Cause No. 009 of 2001 and the Hon. Stephen Musota in Kamba Saleh vs. Namuyangu Jennifer Byakatonda Civil Appeal No. 019 of 2011, as quoted by Counsel for the applicant in his submissions, 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 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.

The second ground of the application will not be handled separately. This is because the operating words in this case are 'four days'. The issue of gazetting or not gazetting is secondary. As soon as four days expire the recount ceases to be an option. What else has or has not happened in the process is immaterial.

Be that as it may, according to the checklist given by Hon. Justice Kibuuka Musoke in Byanyima versus Ngoma Ngime (supra), the act of gazetting a candidate is one of the triggers that should halt the process of considering a recount in its tracks. Either way therefore, the order for a recount issued by the learned Chief Magistrate lack any colour of law.

Grounds 1 and 2 of the application are therefore answered in the affirmative.

Consequently, I find that the proceedings, ruling and orders of the learned Chief Magistrate purporting to order for a recount are a nullity. The application for revision is allowed with costs to the applicants in this court and the court below.

Before I take leave of this matter, I find that Counsel in this unnecessarily drawn out matter did not at all material times act as officers of court are required to. Even while representing politicians, lawyers remain officers of court who owe a duty of diligence and impartiality to the law and to the courts. If they had played their role as expected this matter would not have dragged on to this point.

Singed by: **17/06/2011**

JUSTICE MIKE J. CHIBITA **DATE**

RULING READ AND DELIVERED IN THE PRESENCE OF:

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

17th/06/2011

BY: HON. MR. JUSTICE MIKE J. CHIBITA DATE

Right of appeal explained to the respondent.