THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

MISCELLANEOUS APPLICATION NO. 062 OF 2021

(ARISING FROM ELECTION MISC. APPLICATION NO. 01 OF 2021)

OJERA CHRISTOPHER.....APPLICANT

VERSUS

HON. AKOL ANTHONY.....RESPONDENT

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

RULING

Introduction

The parties were candidates in the general Parliamentary Election held throughout the country on 14th January 2021. They were candidates with six others. They contested for the position of directly elected Member of Parliament for Kilak North Constituency, in Amuru District. The Applicant stood on the NRM (National Resistance Movement) party platform, while the Respondent stood on the FDC (Forum for Democratic Change) party platform. The Respondent was returned the winner with 6534 votes, while the Applicant came second with 6366 votes. The Returning Officer for Amuru Electoral District declared the Respondent as the elected candidate for Kilak North Constituency, having obtained the largest number of votes (a margin of 168 votes). The declaration was made on 15th January, 2021

at 12:20 PM (although the stamp of the Returning Officer affixed to the Return Form shows 14th January, 2021, which court has found improbable as 14th January, 2021 was the voting day, and the votes could not have been counted in the respective polling stations throughout the entire constituency, transmitted to the Returning Officer, and added on the very voting day at 12:20PM). On 22nd January, 2021, the Applicant applied to the Chief Magistrates Court of Nwoya, *vide* Election Miscellaneous Application No. 01 of 2021, seeking for an order of vote recount. The application was dismissed on 27th January, 2021, apparently because on the day of the hearing, it was beyond four days allowed by the Parliamentary Elections Act, 2005, from the date of filing of the application, for a recount to be ordered and done. The learned Chief Magistrate is said to have held that the application was time barred. I say so because, the applicant neither attached the record of the proceedings of the court nor the Ruling or the order dismissing the application. The Respondent did volunteer the same either. The Applicant then lodged the present application in the High Court on 13th July, 2021, seeking for an order of revision of the ruling and order awarding costs of the dismissed application, and that the same be vacated and set aside. He also prays for costs of the present application.

Grounds of the Application and the opposition

The application is grounded on sections 83 and 98 of the Civil Procedure Act, Cap.71 and section 33 of the Judicature Act, Cap 13, Order 52 rules 1 and 3 of the Civil Procedure Rules, S.I 71-1. In brief, the main grounds are that;

a) the learned Chief Magistrate failed to properly exercise the jurisdiction so vested in him as he failed to hear the application for vote recount on merit;

b) the learned Chief Magistrate acted in the exercise of his discretion illegally or with material irregularity or injustice, in two respects, namely,

i) He awarded costs of the application to the respondent who had not made legal appearance and had not prayed for costs;

ii) Finding that the application for vote recount was time barred, and the respondent was served late, whereas not.

c) The learned Chief Magistrate acted illegally when he purported to determine the merits of the Application without hearing any of the parties on the merits of the application.

In further support of the application, the applicant averred that the instant application has been filed without delay; and that, if the application is not heard, the applicant shall suffer irreparable loss over acts or omissions which were not his fault; and lastly that, it is just and equitable that the order of costs of Election Misc. Application No. 01 of 2021 be set aside, as it was illegal, unfair, and unjust, to enable the ends of justice to be met.

In his supporting affidavit sworn on 13th July, 2021, the applicant reiterates the facts alluded to in the introductory background facts. He further deposed that, at the final election results tally, the total invalid votes were 1053. That, given the small margin, he filed the application in the Chief Magistrates Court on Friday 22nd January 2021, and the application was endorsed by a Magistrate Grade One of the Court, on the evening of Monday 25th January, 2021, upon being instructed by the Chief Magistrate (who was on leave), that the application be fixed for hearing on 27th January, 2021. The Applicant relies on information by his lawyers for the foregoing deposition. He also deposed that, 26th January, 2021 was a National Public Holiday in Uganda, and that, as per the information by his lawyers, since courts do not work on weekends or public holidays, the only available date for hearing of the application for vote recount was 27th January, 2021. The Applicant deposes that, having checked on the calendar for the year 2021, 23rd and 24th of January, 2021 (apparently after lodging his application on Friday 22nd January, 2021) fell on weekend

and courts were closed. He further deposes that, the respondent was served with the application on 26th January, 2021 (public holiday) upon the applicant's lawyers receiving from court, endorsed copies of the Notice of Motion on the evening of Monday 25th January, 2021, it having been endorsed late (as informed by his lawyers.) That, the fact of the learned Chief Magistrate of the court being on official annual leave, from late December 2020, until early February, 2021, delayed the fixing of the application for hearing. That, the applicant had no influence or means of forcing the court to have the application for vote recount heard before 27th January, 2021, and he did all within his means to have the application fixed for hearing. That, according to his lawyers, the lawyers wrote to court to have the application fixed and it took the intervention of the Magistrate's Affairs to have the Chief Magistrate fix the application, return from leave and handle the application. That when the application came up for hearing on 27th January, 2021, the Applicant was physically present in court, but the Respondent was absent. That, as per the advice of his lawyers, the application was still within four days (from filing date of 22nd January, 2021) and ought to have been heard on merit. That, the court held that the application was time barred, and the respondent was also served late, whereas not. That, awarding costs to the Respondent, who had made no legal appearance, and who had not prayed for costs, was an illegal exercise of jurisdiction, or exercise with material irregularity or injustice. That, the present application has been filed without delay, the Chief Magistrates

Court having certified the record of proceedings during Covid-19 pandemic on 10th June, 2021.

Reply

In his affidavit in reply, sworn on 16th August, 2021, the Respondent deposes that he is a Member of Parliament representing Kilak North Constituency, in Amuru District. The Respondent deposed that the Application for revision is barred in law and should be summarily dismissed with costs. The Respondent deposed in the alternative that, the contents of paragraphs 1-5 of the Applicant's affidavits are noted (in respect of the fact of the election having taken place, the results announced, and the number of invalid votes recorded.) The Respondent deposes that, he was not aware of the contents of the conversations the applicant had with the Magistrate Grade one of Nwoya Chief Magistrates Court, and the lawyers of the applicant, but that the Respondent was served to appear before court for hearing on 27th January, 2021, and he complied, and the matter was dismissed with costs. The Respondent deposes that, as per the advice of his lawyers, vote recount ought to have been conducted within four days after the date of receipt of the application for recount in court, and thus the applicant ought to have sought for enlargement of time from the very court, to hear the application, but no such request was made to court. That, although the respondent reached court late on 27th January, 2021 (due to vehicle mechanical problem), he

appeared by two counsel, who were present in court, and that, the court record proves so. That, the last day for hearing of the application was 26th January, 2021 (public holiday) and the applicant having not sought for enlargement of time, the court was left with no option but to dismiss the application. That, the court therefore acted legally, regularly, justifiably, fairly, and within its jurisdiction to dismiss the application. That, the court is vested with discretion to award costs under statute, and that the exercise of discretion depends on the circumstances of the case, and costs follow the event, hence the court below cannot be faulted. That, both parties were heard by court, through their respective advocates, and the record is clear, thus the applicant's allegation about the lack of a hearing on merit is not correct. The Respondent further deposed that, the instant application is filed out of bad faith and six months after the ruling of the trial court, and that COVID-19 pandemic was not a bar to the filing of proceedings in court. He prayed for dismissal of the application for revision, with costs.

Representation and the court appearances

When the application was placed before me for hearing on 6th September, 2022, Counsel Brian Watmon appeared for the Applicant. The Applicant was absent. The Respondent did not appear, neither was counsel. On record, the Respondent's affidavit in reply was drawn and filed by Victoria Advocates and Legal Consultants, plot. 3 Dewinton Road, P.O Box 23270,

Kampala. There is nothing on court record to show that the firm of advocates have ceased legal representation of the Respondent. On perusal of the record, I noted that this matter first came up on 21st December, 2021, for hearing and no party and counsel appeared in court. The case was adjourned to 15th March 2022 during which the Applicant was represented by Counsel Geoffrey Anyuru, while the Respondent's counsel was recorded as Mr. Geoffrey Komakech but was absent. Both parties were also absent. Mr. Anyuru, for the applicant, prayed for adjournment and undertook to serve the Respondent with a hearing notice. The case was adjourned to 1st June, 2022. On 1st June, 2022, Counsel Louis Odongo appeared for the Applicant, on brief for counsel Anyuru. Both parties were absent, and there is no proof that a hearing notice which counsel Anyuru had undertaken to serve on the Respondent, had been extracted and served. The matter was adjourned on request by Counsel Louis Odongo, to 6th September, 2022 at 9:00AM. Therefore, when counsel Brian Watmon appeared before me on 6th September, 2022, for the Applicant, he addressed court that, since the matter was coming up for hearing, but in the absence of the Respondent and counsel, he needed leave to file written submissions. He therefore prayed for timelines, undertaking to communicate to/ serve the Respondent. Court granted leave, directing that the case proceeds by way of written submissions, and that the Respondent be notified by the applicant. The applicant was to file and serve the Respondent with submissions by 20th September, 2022 by

4:00PM. The Respondent was to file and serve the applicant by 4th October, 2022 by 4:00PM. The applicant was to file a rejoinder, if any, and serve the Respondent by 11th October, 2022 by 4:00PM. The application was therefore set down for ruling on 25th October, 2022, at 9:00AM.

Compliance status

At the time of drafting the Ruling, and the actual delivery, the Applicant had not filed any submissions. There is also no proof that learned counsel for the Applicant notified counsel for the Respondent about the court directive, yet learned counsel had made an undertaking to court, to do so. Naturally, the Respondent and counsel are deemed not to know about the court directive given on 6th September, 2022 since they did not attend court.

Decision of court

It seems to me that, by his conduct, the applicant is not seriously interested in prosecuting the application. Although court would be competent to decide the application without submissions of the parties, it would only be fair and just that the parties are heard and the case decided on the basis of their submissions, as it is within their right to be heard first before a decision is rendered by court, in accordance with article 28 (1) and 44 (c) of the Constitution, 1995. Importantly, the nature of the matter requires that, parties be heard, before any revision order is made.

Section 83 of the Civil Procedure Act (CPA) enacts "The High Court may revise the case and may make such order in it as it thinks fit; but no such power of revision shall be exercised- (i) unless the parties shall first be given the opportunity of being heard; (ii) or where, from the lapse of time or other cause, the exercise of that power would involve serious hardship to any person. I have quoted this last limb of the section for completeness, as the same is not relevant for the purposes of my decision.

On the facts of the application, apart from the absence of written arguments of the parties, court is not possessed of the requisite record of the trial court, for the purposes of revision, yet the applicant stated in his affidavit that the same was certified on 10th June, 2021. Court wonders why the applicant did not obtain and attach the requisite record to the affidavit in support when lodging the application in court on 13th July, 2021. In the persuasive case of Mabalaganya Vs. Sanga (2005) E.A 152, the Tanzanian Court of Appeal held that in cases where the High Court exercises its powers of revision, its duty entails examination of the record of any proceedings before it for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any decision and the regularity of any proceedings before the High Court. See: Nsubuga Joseph Vs. Ndiwalana Lawrence, Revision Application No. 05 of 2018 (Hon. Justice Oyukó Anthony Ojok).

In his summary page of the Motion, the applicant indicates the list of documents to be relied on during the hearing, which include, copy of the letter requesting for certified record of proceedings; certified copies of the ruling, copy of the application for vote recount (already attached to the application); certified copies of the record of proceedings; copy of the notice by the Chief Magistrate going on official annual leave. It is thus a little puzzling to court why the applicant did not bother to pursue and obtain the certified record and the ruling of the trial court, one year and 3 months after lodging the matter, to-date. The inescapable conclusion is that, the applicant and counsel are simply not serious about prosecuting the application.

It has been held that whereas the procedure to be adopted for revision is within the discretion of the High Court, as there is no prescribed procedure, and a party could move court by way of a letter, nevertheless where a party adopts a particular procedure (such as Notice of Motion), the procedure must be fully and correctly complied with. See: Jaffer Vs. Gupta [1959] EA 406; Gulu Municipal Council Vs. Nyeko Gabriel & others, [1997] 1 KALR 9; Wadri Mathias & 4 others Vs. Dranilla Angella, Civil Revision No. 0007 of 2019 (Hon.Justice Bashaija K. Andrew)

In the instant case, having formally moved court, the Applicant ought to have fully complied with the procedural requisites of Revision Application.

Thus the order sought to the revised and the proceedings therein, ought to have been attached to the Motion. Although court could exercise its unlimited power to call for the record, I find this is a case where the applicant ought to have follow-up the record from the trial court, having himself moved this court for revision.

On the record of this court, appears the letter written for the Applicant, by Odongo and Co. Advocates, to the Deputy Registrar of Court, dated 10th September, 2021, wherein the Applicant's counsel requested this court to call for the lower court file, to enable the proper hearing of the application for revision. I note that the Deputy Registrar of Court wrote a letter the same day (10th September, 2021) to the Chief Magistrate Nwoya, calling for the original file, certified copies of the record of proceedings and Judgment (sic), for the purposes of hearing the present application. Both parties were copied in the letter by the Learned Deputy Registrar. The record was not transmitted and no reason is given. The Applicant has since that letter, not taken it upon himself to ascertain what has become of the trial court record, which he himself says was certified on 10th June, 2021.

Given all the circumstances of the matter, I am of the considered view that the applicant and counsel are not diligent in prosecuting the application without undue delay.

I have carefully considered the provision of section 83 of the Civil Procedure Act (CPA), under which the High Court may call for the record of any case which has been determined under the CPA by any Magistrate's Court, and have come to the conclusion that the High Court will normally exercise that power to call for the record if the Magistrate Court appears to have exercised a jurisdiction not vested in it in law; failed to exercise a jurisdiction so vested; or acted in the exercise of its jurisdiction illegally or with material irregularity or injustice.

In the present matter, it is not clear whether the determination by the Learned Chief Magistrate was made under the CPA or not. This Court is aware that, an application for a vote recount in a Parliamentary election can only be made under section 55 (1) of the Parliamentary Elections Act, 2005 (PEA, 2005). The question therefore remains whether the impugned determination was a determination under the CPA or under the PEA, 2005. This is a point which, because of the decision court has taken in the present matter, will not be resolved.

Given my analysis, I therefore conclude that the Applicant has not shown diligence in prosecuting this matter, which is unduly delaying justice. In adjudicating all cases, courts are commanded not to delay justice. See Article 126 (2) (b) of the Constitution, 1995. The old adage that justice delayed is justice denied remains true, and this seems to be the case here.

Case delays contribute to avoidable case backlog. It wastes time and resources, and compounds costs and other expenses for all parties. In some cases, it locks financial resources in courts which could otherwise have been released into the national economy. Moreover, a party to litigation may not be very productive during the pendency of litigation, as he/she has to follow up matters before court. This court will not countenance delay of justice.

Under section 17 (2) (a) of the Judicature Act, Cap. 13, the High Court, with regard to its own procedures (and those of the Magistrates Courts which it supervises) shall exercise its inherent powers to prevent abuse of the process of the court by curtailing delays in trials (*inter alia).* I hasten to add that, the above section of the Judicature Act applies to all matters that come before the High Court and the Magistrate Courts over which the High Court exercises supervisory powers under sub-section 1 of section 17 of the Judicature Act.

Under 98 of the Civil Procedure Act, Cap. 71, nothing in the Act is deemed to affect or otherwise limit the inherent powers of this Court, in exercising its civil jurisdiction, to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Order 17 rule 4 of the Civil Procedure Rules, S.I 71-1 provides "where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding the default, proceed to decide the suit immediately."

In the present case, the Applicant failed to present its arguments in the matter and therefore frustrating the further progress of the case. It has also not attached the requisite record, the order and the judgment sought to be revised. Court accordingly dismisses the application, under Order 17 rule 4 CPR, and under section 98 of the Civil Procedure Act.

On costs, the general rule is that it follows the event, under section 27 of the Civil Procedure Act, unless court for good reason orders otherwise. In the present matter, I am cognizant that I have not decided the case on merit, given the glaring deficiency in the matter. I am also alive to the fact that the applicant's Motion for vote recount was dismissed with costs, and on the record of this court, is a copy of the hearing notice for taxing the bill of costs, issued by the trial court on 9th September, 2021, for taxation hearing of 30th September, 2021. It is not clear whether the bill was taxed and if so, in what quantum and if the same have been satisfied by the applicant. I am aware that, in election matters, courts have started

adopting a liberal approach, depending on the circumstances of each case, by not awarding costs. The raison détre is that election cases involve matters of great national importance.

Thus courts have held that costs should not deter aggrieved parties with a legitimate cause of action from seeking redress from the courts. See: Aisha Kabanda Nalule Vs. Lydia Daphine Mirembe & 2 Others, Election Petition Appeal No. 90 of 2016. There, the vote margin between the parties to the appeal was 67 votes, and the court of appeal considered that it was not appropriate to condemn either party to costs.

In Wilfred Nuwagaba & Electoral Commission Vs. Protazio Begumisa, Civil Application No. 9 and 10 of 2022, the Court of Appeal held that parties should be spared the incidental costs that would ensue from electoral contestations as this would temper their inclination to test the authenticity of an election result within legal confines. In the Nuwagaba case (Supra), the Court considered the slim vote margin of 136 votes, and ordered that given the circumstances, each party would bear its own costs. Court made the orders after striking out the Respondent's appeal.

In the matter at hand, although the application is for revision and therefore a bit different from the matters considered in the above decided cases, the common thread in this application and those cases, is that, it springs from

an election contestation. In the present matter, it is about vote recount. The applicant is seeking revision of order of costs given against him in a failed application for vote recount under section 55 of the PEA, 2005. I am therefore of the considered view that, given that the vote margin between the applicant and the respondent was only 168 votes, which is slim, and considering that there were 1053 invalid votes, and that if a recount had been allowed and conducted, the fortunes of the parties could have been different, I order that each party bears its own costs of Misc. Application No. 062 of 2021, which stands dismissed.

I so order.

Delivered, dated and signed in chambers this 25th October, 2022.

25.10.2022

George Okello
JUDGE HIGH COURT

Ruling read in chambers in the presence of;

Ms. Grace Avola, Court Clerk.
Mr. David Kinyera, holding brief for Counsel Brian Watmon, for the Applicants. The Applicant is absent.
Respondent, and Counsel absent

JUDGE
25.10.2022