

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL REVISION NO. 005 OF 2021

NSIBIRWA WINSTON-----APPLICANT

VERSUS

- 1. MUGANGA MICDAD**
- 2. THE ELECTORAL COMMISSION----- RESPONDENT**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This application is brought by way of Notice of Motion for revision under Section 17 & 39 of the Judicature Act, Section 83 and 98 of the Civil Procedure Act and Order 52 Rules 1 & 3 of the Civil Procedure Rules for the following Orders;

1. The ruling dated 1/2/2021 and Order dated 3/2/2021 delivered and issued respectively by Her Worship Patricia Amoko at the Chief Magistrate's Court of Nabweru dismissing Miscellaneous Cause No. 002 of 2021 be revised and set aside.
2. This Honourable court directs the Chief Magistrates court of Nabweru to conduct a recount of the votes obtained by the parties in the election for Kampala Capital City Directly Elected Councillor for Makerere University.
3. The 2nd Respondent produces at the Chief Magistrate's Court of Nabweru on a date appointed by court for recount the sealed ballot boxes in respect of the election for Kampala Capital City Authority Directly Elected Councillor for Makerere University.

4. The 2nd respondent is restrained from declaring and publishing in the gazette the 1st respondent as winner of the election for Kampala Capital City Authority Directly elected Councillor for Makerere University until a recount is conducted by the Chief magistrate's Court of Nabweru.

5. The costs of the application be provided for.

The grounds in support of this application are set out in the Notice of motion and the affidavit of the applicant briefly states;

1. That on the 28th day of January 2021, the applicant filed Miscellaneous Cause No. 2/2021 before the Chief Magistrate's court of Nabweru seeking among other orders, a recount of votes obtained by the parties in the election for Kampala Capital City Authority Directly Elected Councillor for Makerere University.
2. That the Learned Chief Magistrate of Nabweru dismissed the said application on the 2nd day of February 2021 following an objection raised by the Respondents relating to lack of jurisdiction by Court to Order a recount given that the results of the election had already been transmitted to the 2nd Respondent by the Returning Officer.
3. That the applicant is dissatisfied by the impugned order dismissing Miscellaneous Cause No. 2 of 2021.
4. That the Learned Chief Magistrate failed to exercise Jurisdiction properly vested in the court by law to order a recount since the application was filed within time and the 1st respondent had not yet published in the gazette the winner of the election.
5. That a mere transmission of results by the Returning Officer to the 2nd respondent cannot oust the jurisdiction of the Chief Magistrate's court to Order a recount.

In opposition to this Application the 1st Respondent filed an affidavit in reply and 2nd respondent filed through Hamidu Lugoloobi filed an affidavit in reply wherein they opposed application briefly stating that;

(1) The Chief magistrate lacked jurisdiction to proceed with the application for recount after transmission of results to the 2nd respondent by the Returning Officer.

(2) That it was in the interest of justice to dismiss the application for the recount since the applicant had a remedy either in an election Petition or an application for a recount within that petition properly before the same chief magistrate as by law provided.

In the interest of time the respective counsel made oral submissions and i have considered the respective submissions.

The applicant was represented by *Mr. Joseph Wadambwa* whereas the 1st respondent was represented *Mr. Mpenje Nathan* and 2nd respondent was represented by *Mr. Kayondo Abubaker*.

The main issue for determination is;

Whether the learned Chief Magistrate failed to exercise jurisdiction vested?

I have found it necessary to establish whether the Chief Magistrates Court indeed had any jurisdiction to conduct a recount. The jurisdiction to try an election dispute is created and given by statute and the remedies available are all given by such electoral laws.

The applicant brought the application for a recount under section 33 of the Judicature Act and section 98 of the Civil Procedure Act. The above provisions are of general application to grant any remedies from court and invoking inherent powers of court. There is no single electoral legislation cited as the basis upon which this application was brought.

The applicant sought the following court orders from the Chief Magistrate's court;

- 1. That this Honourable court conducts a recount of the votes obtained by the parties in the election for Kampala Capital City Authority Directly Elected Councilor for Makerere University.*
- 2. The 2nd Respondent is directed to produce at this Honourable court on a date appointed by Court for the recount the sealed ballot boxes in respect of the election for Kampala Capital City Authority Directly Elected Councilor for Makerere University.*
- 3. A certificate of recount results be issued to the parties by this Honourable Court.*

The orders sought are clearly related directly to elections and the applicant has not cited any electoral laws that they invoking to move court exercise such jurisdiction except for the general legislations governing procedure of court.

The inherent powers of court or general power to grant remedies in court can only be exercisable upon court which has jurisdiction. Every court is constituted for the purpose of administering justice between the parties and, therefore, must be deemed to possess, as a necessary corollary, all such powers as may be necessary to do the right and undo the wrong in the course of administration of justice.

Jurisdiction of court means the power or authority of a court of law to hear and determine a cause of matter. It is the power to entertain, deal with and decide a suit, an action, petition or other proceeding. Therefore, before a court can be held to have jurisdiction to try the suit brought it must also have authority to pass the orders sought for. The power to create or enlarge jurisdiction is legislative in character and Parliament alone can do it by law and no court whether superior or inferior or both combined can confer or enlarge jurisdiction of a court.

Therefore, the exercise of powers under inherent jurisdiction will not be invoked as a tool of convenience for parties to circumvent existing statutory limitations to possible remedies or event remedies not provided for under the electoral laws.

The nature of the remedies sought is rooted in overturning an election and the remedies sought therein must be provided by the respective electoral laws. The electoral in issue is regulated by the Local Government's Act under Part X which caters for Local Government Councils Elections.

An Election matter is neither an action in common law or equity. It is a statutory proceeding to which neither to which the common law nor the principles of equity apply, but only those rules which the Statute makes and applies. It is a special jurisdiction, and a special jurisdiction is always to be exercised in accordance with a Statute creating it.

A court cannot resort to other legislations to grant remedies not provided for. In a trial involving election disputes, the court is put in a straightjacket. Therefore the entire electoral process is regulated by the respective electoral laws and in this case by the Local Government's Act.

The Local Government's Act does not provide for recounting of votes before a Chief Magistrate and it is a remedy that cannot be invoked using inherent powers of court as the applicant tried under section 33 of the Judicature Act and section 98 of the Civil Procedure Act. The applicant in his submissions alluded to section 172 of the Local Government Act as the provision which gives the Chief Magistrates court power to conduct a vote recount.

Section 172 provides as follows:

For any issue not provided for under this Part of the Act, the Presidential Elections Act and the Parliamentary Elections Act in force shall apply to the elections of local councils with such modifications as may be deemed necessary by the Electoral Commission.

The above provision strictly applies to the Electoral Commission and cannot be applied by courts of law or used to confer jurisdiction on the Chief Magistrates court to conduct vote recounting exercise. The jurisdiction to conduct a vote recount can only be exercised under Section 142(4) of the Local Government Act.

Section 142(4) provides;

The Court, before coming to a decision under subsection 3, may where applicable order a recount of the votes cast.

This court's analysis is buttressed by the reasoning in the decision of ***Wanyama Gilbert Mackmot v Hisa Albert & Electoral Commission Election Petition Appeal No. 99 of 2016*** where the Court of Appeal held that;

“We find that the wording of the provisions of Section 172 above quoted clear. The Presidential Elections Act and Parliamentary Elections Act in force shall apply to the elections of Local Councils with such modifications as may be deemed necessary by the Electoral commission.

The two above stated Acts are applicable to the conduct of elections and clearly the legislature did not intend to apply the two Acts to other matters other than the conduct of elections. That is the rationale for enabling the Electoral Commission which is the institution in charge of conducting the elections to make any modifications that the Commission may deem necessary when conducting Elections of Local Councils.

In our view, Petitions and payment of court fees are not matters of conducting Elections of Local Councils. These matters relate to adjudication of disputes after elections. They are handled by the courts and not the Electoral Commission which conducts elections. Therefore, section 172 of the LGA does not apply the provisions of the Presidential Elections Act and the Parliamentary Elections Act to payment of fees in Petitions filed in respect of elections disputes over local Government Elections.

In our view, the Local Governments Act does not set out any provisions on court fees payable by a petitioner upon lodgment of a Petition. There being no specific rules for the payment of fees in respect of the Local governments Election petitions the learned judge should have on the provisions of the Judicature(Court fees) Rules Statutory Instrument 13-1 made under section 48 (1)(d) of the Act to determine the amount of court fees payable.

We find that the trial Judge erred when she relied on section 172 of the LGA to apply the Parliamentary Elections laws to payment of fees in Local Governments

Election Petitions and holding that the appellant paid insufficient fees. We fault the trial Judge on that finding.”

While interpreting a special Statute, which is a self-contained code, the court must consider the intention of the Legislature. The reason for this fidelity towards the legislative intent is that the Statute has been enacted with specific purpose, which must be measured from the wording of the statute strictly construed.

It is the finding of this court that the Chief Magistrate was right to reject to exercise jurisdiction of vote recounting since it was not provided for under the Local Government Act as an independent application or cause.

For the reasons stated herein above this application for revision is dismissed with costs to the respondents.

I so Order.

SSEKAANA MUSA
JUDGE
26th/02/2021