THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS CAUSE NO. 69 OF 2006

NAMUDDU HANIFA :: APPLICANT

VERSUS

1. THE RETURNING OFFICER
   KAMPALA DISTRICT :: 1ST RESPONDENT
2. OWEMBABAZI RITAH JOY :: 2ND RESPONDENT
3. THE ELECTORAL COMMISSION :::::::::::::::::::::::::::::::::: 3RD RESPONDENT

BEFORE: HON. AG. JUDGE REMMY K. KASULE

RULING:

The applicant, Namuddu Hanifa, and second Respondent, Owembabazi Rita Joy, were candidates for the election of Woman Councillor for Kisenyi I Parish, Kampala Central Division, Kampala District, held on 10th March, 2006. The same was, as mandated by law, conducted by the third Respondent, with first Respondent as Returning Officer.

The results of the election were very close with the applicant having 878 votes; and the second Respondent 877 votes; the margin being a single vote.

The second Respondent requested the first Respondent for a recount of the votes pursuant to section 54 of the Parliamentary Elections Act [17 of 2005] applicable to this election by virtue of Section 172 of the Local Governments Act, Cap. 243.

It is the application to recount that is the subject of this application.

The applicant, by way of Judicial Review, under Section 38 of the Judicature Act, and Rules 2, 3, 4, 5, 6 and 7 of The Civil Procedure (Amendment) (Judicial Review) Rules, 2003, seeks an order of Certiorari to quash the decision of the first Respondent, for a second recount of votes following the results of the first recount where the applicant came out as winner. She further seeks orders of Mandamus to declare her the winner of the election and order of Prohibition stopping the first Respondent from conducting the second recount.

The case for the applicant is that the second Respondent requested for a recount of votes of one polling station: Code 3 Chairman's place, and not for a second polling station: Spidiqua polling station. The result of the election must therefore be declared on the basis of the recount of votes at Chairman's place polling station, Code 3. No recount must be conducted at Spidiqua Polling Station A-K.

The case for the respondents is that the first Respondent requested for a recount at the two polling stations. Therefore a recount ought to be held of the votes cast at each of the two polling stations.

The evidence adduced was by way of affidavits from Namuddu Hanifa, the applicant, that of Mr. James K. N. Sseggane, the first Respondent, as well as one of Owembabazi Ritah Joy, the second Respondent.

Counsel for the applicant prayed to Court to have Mr. Ssegane physically report to Court to be cross examined on his affidavits, but he never appeared.

The cause was adjourned four times for him to appear and each time a reason was being put forward for his non-availability. Court therefore ordered that the hearing proceeds with this witness being not cross-examined.

It is necessary for Court to decide, whether on the evidence and the law, the second Respondent, bonafide, applied for a recount of votes of the two polling stations; or whether the application for a recount of votes at the second polling station of Spidiqua A-K is malfide and or fraudulent.

Both Applicant and Respondents are agreed upon the two letters authored by the first Respondent addressed to the applicant and second Respondent, dated March 14, 2006 and March 24, 2006 respectively.

In the March 14, 2006, letter, first paragraph, the first Respondent refers to the "complaint filed by Ms Owembabazi Rita Joy dated **"10th -3-06."** In paragraph two of the same letter, the first Respondent asserts:-

"Immediately after the official tallying of the results but before declaring Namuddu Hanifa as the winner, the said Joy Owembabazi lodged her complaint asking for the recount of the votes specifically for one polling station (Code 3) Chairman's place where she alleges that the said Hanifa Namuddu obtained 243 votes only but the polling agent who recorded instead wrote 245, thus adding Hanifa Namuddu two extra votes. "

What is quoted above contradicts what the first Respondent writes in his letter of March 24, 2006; and asserts in his affidavit in reply of 24th April, 2006. It is also at variance with the version of facts deponed to by the second Respondent in her affidavit in reply dated 18th April, 2006; as well as her conduct on receipt of the first Respondent's March 14, 2006, letter. For the first Respondent to state in his letter of March 24th 2006 that:

"This serves to notify you and invite you for the vote recount exercise as per Owembabazi Rita Joy's petition, where she asked for the recount of two polling stations and only one was done." is irreconcilable with the contents on this point of the first Respondent's letter of March 14, 2006, where it is clearly stated that:-

"The said Joy Owembabazi lodged her complaint asking for the recount of the votes specifically for one polling station (code 3) Chairman's place ----------"

Further, neither in his March 24th, 2006 letter nor in any of his affidavits filed in Court, does the first Respondent offer any explanation as to why the second Respondent's complaint for a recount was said to be dated **"10th – 3- 06"** in the letter of March 14, 2006, yet a photocopy of same annexure R3 to second Respondent's affidavit in reply, is dated **"12th-3-06"**. Yet the first Respondent received only one complaint for a recount from the second Respondent. If any mistake was made as to this date the first Respondent would have stated so as an explanation. He did not.

The second Respondent too, on her part, offered no explanation to Court, as to what she did when her complaint for a recount and was referred to as being dated 10th-3-06, and the assertion that her complaint was for a recount of votes at only one polling station, Chairman's place (Code 3), when she received the first Respondent's letter of March 14, 2006.

In his affidavit in reply of 24th April 2006, the first Respondent does not state that there was any postponement of the recounting of votes because it was late. He does not avail to Court the proceedings of the recount of votes of Chairman's place polling station. There is therefore no confirmation of what the second Respondent states in paragraph 8 of her affidavit:-

> **"That on the 16th of April 2006, vote recounting was done in respect of the ballot box at Chairman Polling Station Code 3 leaving out ballot box for Spidiqua A-K Polling Station, the returning officer citing that it was late."**

Court also notes that in the March 24, 2006, letter there is no reason stated as to why only one polling station was recounted on the 16th March, 2006.

Court, on the basis of evaluation of evidence as above, concludes that what the first and second respondents state as regards the claim for the second recount of votes of Spidiqua A-K Polling Station to be false. The finding of Court, on the evidence availed is that on 10th March, 2006, after the official addition of the votes, the second Respondent requested for a recount of votes of Chairman's Polling Station (Code 3), which recount the first Respondent ordered and did take place on 16th March 2006, as the first Respondent clearly states in his communication to both applicant and second Respondent, of March 14, 2006.

Court therefore infers and holds that the second recount of votes of Spidiqua A-K polling station was planned by the first and second Respondent after, and not before, the 16th March, 2006; and thereafter back dated to the original request for a recount of votes. This is what first Respondent's communication of March 24th 2006, purports to do.

The third Respondent, through its employee, the first respondent, is mandated by Article 61(a) of the Constitution to ensure that regular, free and fair elections are held and conducted. An election is fair to three parties to it; namely the nation, the candidates and the voters. To the nation when the election is conducted in strict accordance with the nation's laws; to the candidates when there is transparency in the conduct of the election. An election cannot be fair to the candidates if the results of that election are merely second guessed. The election must also be fair to the voters; by ensuring transparency and exercise of free will in respect of choice of a candidate to vote for and the security of the vote after it has been cast: **See High Court at Mbarara Civil Revision No. 0009 of 2001: Byanyima Winnie Vs. Ngomangime (Musoke – Kibuuka J),** unreported.

By conducting themselves, as they have been found by this Court to have done, with regard to the second recount of votes at Spidiqua A-K polling station, the first, second and therefore third Respondents have jointly and/or severally acted in contravention of Article

61(a) of the Constitution, Section 30(5) (a) of the Electoral Commission Act, Cap. 140 that requires the first and third Respondents to be impartial, and Section 78 (g) of the Parliamentary Elections Act; that makes it a Criminal offence for the first Respondent, as an election official, without reasonable cause, to act in breach of his official duty. The second Respondent is duty bound by law, to be truthful in all her acts as a candidate. She was not, in this election, as regards the second recount of votes at Spidiqua A-K polling station.

The applicant, in order to succeed, in an application for judicial Review, has to satisfy Court that the matter complained of is tainted with any, or a combination of, illegality irrationality and/or procedural impropriety. See: **Council of Civil Service Unions Vs. Minister for the Civil Service [1985] AC 2** and also **High Court Miscellaneous Cause Number 152 of 2006: Twinomuhangi Pastoli Vs. Kabale District Local Government Council and Two others,** unreported.

Illegality is when the authority that made the decision being questioned committed an error of law in the process of making that decision. Acting ultra vires or contrary to the provisions of the law or its principles are instances of illegality. An example of illegality is that before the powers to dismiss Senior District employees were reverted to the Public Service Commission, it was held to be an illegality for the senior Executive of a District Local

Government to dismiss an employee when those powers were at that time vested by the Local Government's Act, Cap. 243 in the District Service Commission: See: **High Court (at Mbarara) Miscellaneous Cause Number 63 of 1999: In the matter of an Application for an Order of Certiorari by Bukeni Gyabi Fred,** unreported.

Irrationality goes to unreasonableness of the decision taken or act done; in that no reasonable decision making authority, addressing itself to the facts and the law before it, would make such a decision. The decision being questioned is in defiance of logic and/or acceptable moral standards: See: **Re An Application by Bukoba Gymkhana Club [1963] EA 478 at p.47 Para "E".**

A decision or an act may be quashed by reason of procedural impropriety; that is when there is failure on the part of the decision maker to act fairly either by not observing the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision, or by failing to adhere and observe procedural rules expressly laid down in the instrument by which such authority exercises jurisdiction to make a decision: See: **AL-MEHDAWI VS. SECRETARY OF STATE FOR THE HOME DEPARTMENT : [1990] AC 876.**

In the considered view of this Court, it was illegal of the first and second Respondents to advance a claim of a second recount of votes at Spidiqua A-K Polling Station, when, at the very beginning, the second Respondent did not request for a recount of the votes at that polling station.

Court also finds that no reasonable Returning Officer, addressing the facts and the law with regard to this case, would make such a decision as the first Respondent made and stated in his letter of March 24, 2006. To that extent the first Respondent acted with irrationality.

As to procedural impropriety the applicant, having been communicated to by the first Respondent that the second Respondent requested for a recount of votes at only Chairman's place polling station, Code 3, and the recount having been carried out on 16th March, 2006, was entitled to know from the first Respondent, the candidate declared elected, by reason of obtaining the largest number of votes, in accordance with Section 135 of the Local Governments Act. It was procedural impropriety resulting in unfairness to the applicant for the first and second Respondents to come up, instead, with a recount of votes at Spidiqua A-K polling station.

Prerogative remedies are grantable as a result of judicial exercise by Court of its discretion. The Court exercises that discretion by acting according to settled principles, being

conscious all the time, that the decision to make must be based upon common sense and Justice. See: **Gardner Vs. Jay [1885] 29 Ch. D. 50 at P.58;** and also **High Court at Kampala Miscellaneous Cause Number 152/06 Twinomuhangi Pastoli Vs. Kabale District Local Government Council and Two others** (supra).

Court has made a finding that the first and second Respondents were not truthful in their advance for a claim of a recount of votes at Spidiqua A-K polling station. This militates against Court's exercise of its discretion in their favour. Further, the law, that is Section 135 of the Local Governments Act, entitled the applicant to know, and mandatorily obliged the first and third Respondents to declare the winning candidate immediately after the recount of the votes on 16th March 2006. This was not done to the prejudice of the applicant. These are valid matters why Court should exercise its discretion in favour of the applicant.

Accordingly this Application is allowed. A writ of certiorari is hereby issued quashing the decision of the first Respondent, for a second recount of votes at Spidiqua A-K polling station as is contained in the letter addressed to the second Respondent and Applicant dated March 24, 2006.

A Mandamus Order is hereby issued directing the first and third Respondents to declare the applicant, Namuddu Hanifa, the duly elected woman Councillor for Kisenyi I Parish, on the

basis of the results of the election as those results stood after the recount of votes of Chairman's place polling station (Code 3) on 16th March, 2006.

The Order for a second recount of votes of Spidiqua A-K polling station having been quashed, Court finds it unnecessary to issue a Prohibition Order. The same is not issued.

The applicant is awarded the costs of this application and those of the application for leave to file the application for Judicial Review jointly and or severally against the applicants.

Remmy K. Kasule

Ag. Judge

19th January 2007