The Republic Of Uganda

In The High Court of Uganda, At Kampala

Election Petition No.23 of 2011

Kasibante Moses :: Petitioner

Versus

1. Katongole Singh Marwaha P. ::::::::::::::::::::: Respondents
2. The Electoral Commission

Before: <u>Hon. Mr. Justice V.F. Musoke Kibuuka</u>

<u>Judgment:</u>

<u>FACTS</u>

The petitioner and the first Respondent were candidates during the Parliamentary Elections held throughout Uganda on 18th February, 2011. They competed for election as Member of Parliament for Rubaga North Constituency, within Kampala Capital City Authority. The second respondent organized those elections in pursuit of it's Constitutional mandate under Article 61(1) (a), of the Constitution. There were six other contestants in the race.

It appears that, on the 20th day of February, 2011, the returning officer, Kampala, declared the petitioner winner of that Parliamentary seat. The Declaration, annexture A to the petition, shows that:

- the petitioner polled 24,054 votes (45.36% of the vote);
- the first respondent polled 18,595 votes (35.07% of the vote);
- the other six candidates shared the remaining 19.37% of the votes among them.

The difference in votes between the petitioner and the first respondent was 5,459. It is also a fact that, as at the time of declaring the petitioner winner, on 20th February, 2011, the returning officer

did not include in the tally, results from seven polling stations. However, when the results from those seven polling stations were eventually tallied, the petitioner worn at four polling stations. The first respondent worn at two polling stations. The results of one of the seven polling stations, that is KCC offices Lungujja, were cancelled. Each candidate polled 0 votes.

On 22nd February, 2011, the first respondent applied for a recount of the votes under section 55(1) of the Parliamentary Elections Act and the application was allowed by the chief magistrate's court at Mengo. The recount was conducted on Monday, 28th February, 2011. The results, from the recount, showed that:

- the petitioner had polled 22,850 votes or 39.53% of the vote; and
- the first respondent had polled 24,802 votes or 42.90%, of the vote.

In simpler terms, through the recount, the petitioner lost 2,207 votes from his earlier declared votes plus the 1003 votes he polled from the seven polling stations that were declared subsequent to his being declared winner. The first respondent had gained 6,207 votes through the recount, plus the 781 votes he obtained from the seven polling stations that whose results were declared subsequent to the first declaration. From the recount alone the first respondent gained some 5,421 votes.

The first respondent was declared winner after the recount. He took up the seat as Member of Parliament, Rubaga North Constituency.

PLEADINGS

The petitioner filed this petition on 30th March, 2011. in it, the petitioner made two broad allegations, namely:

a) that the election for the Member of Parliament for Rubaga North Constituency was conducted in contravention of the provisions of the constitution of the Republic of Uganda, 1995, the Electoral Commission Act, Cap 140 and the Parliamentary Elections Act 2005, and that the non-compliance affected the result of the election in a substantial manner; and

b) that the first respondent personally, committed acts of bribery contrary to section 68(1), of the Parliamentary Elections Act (PAR).

The petitioner, PW1, on the record, particularized the grounds for his allegations in the petition and in his affidavit in support of the petition, PA.1. He subsequently filed Affidavit PA.2(a) and (b) in further support of the petition. Various other witness, for the petitioner swore affidavits in support of his petition.

The first respondent filed his answer on 23rd May, 2011. He denied all the allegations in the petition. He pleaded that the subject matter in the petition was res judicata and that it did not disclose any cause of action, as against the first responded. The first respondent contended that the recount which was conducted on 28th February, 2011, was lawful and was conducted according to the law.

The first respondent alleged, in the answer, that the petitioner had committed or abetted the commission of numerous illegal acts of tampering with and abetted the altering of results from polling stations such as, Namungoona play ground, Masanafu R.C and Masanafu church, St. John Baptist, COU, Njovu House and Sseninda's place. He also alleged that results from 7 polling stations in which he had overwhelming support had been omitted from the tallied results which constituted the basis for the declaration of the petitioner as the winner of the seat in parliament.

Lastly, the first respondent claimed, in his answer, that the reliefs the petitioner sought through the petition were unknown to the law. He prayed that the petition be dismissed. Affidavit RA1.1, deponed by the first respondent supported his answer. He, however swore several additional affidavits personally. He filed 39 affidavits in all in support of his answer and in rebuttal of the allegations in the petition.

The second respondent was, the first respondent to file an answer. It did so on 8th April, 2011. In it, the second respondent contended that the Parliamentary Elections in Rubaga North Constituency were conducted in accordance with the principles of transparent, free and fair elections, laid down in the electoral laws of Uganda and that the results declared by it, reflected the true will of the majority of the voters in that constituency.

The answer was supported by affidavit RA2.1, deponed by the chairperson, Eng. Dr. Badru Kiggundu, RW1. One Molly Mutazindwa, RW2, who claimed to have been the returning officer for Kampala District, during the elections swore affidavit RA2.2, in further support of the answer. Her affidavit centred upon the vote recount purportedly conducted by her at Mengo Chief Magistrate's Court on 28th February, 2011.

ISSUES

At the scheduling conference, five issues were agreed upon for determination. The first two had been intended to be raised as preliminary objections by either side. In the case of the first respondent, he had filed *Miscellaneous Application Number 0237, of 2011*, challenging the competence of the petition. He wanted court to hear and determine that Miscellaneous Application before embarking upon the petition. Court persuaded the petitioner and the first

respondent to agree that those preliminary matters be made specific issues. The five issues agreed upon were:

a) whether the petition is competent;

b) whether the answer of the first respondent is competent;

c) whether the election was conducted in accordance with the electoral laws;

d) whether the first respondent was validly elected; and

e) Whether the first respondent committed any illegal practices or election offences during the election.

It is notable that all parties neither led evidence in relation to issue number five nor made any final submissions in relation to it. That issue is, accordingly, treated in this judgment as having been abandoned or dropped by the parties.

It may be mentioned, only for emphasis, that the burden of proving an allegation during the hearing of an election petition lies upon the petition who must prove it to the satisfaction of the court. Section 61(3) of the PEA clearly clarifies the question of the standard of proof as being upon the balance of probabilities. The case of *Mukasa Anthony Harris Vs. Dr. Bayiga Michael Lulume, SC Election Petition Appeal No.18 of 2007*, which is cited by learned counsel for the first respondent is quite pertinent on this point.

Whether The Petition Is Competent

The first respondent challenged the competence of this petition. They did so upon five distinctive grounds. They are:-

- Non-service of the petition upon the first respondent in breach of the law;
- The rule of res judicata;
- Multiplicity of proceedings;

- Lis Pendens (Notice of a pending suit) or Notice of Pendency;
- Non disclosure of cause of action.

The first respondent prayed that the petition he struck out on account of all those grounds or any of them.

Court has carefully considered each of the five grounds against the first respondent's prayer. It is unable to grant the relief sought in respect of any of them.

Non Service Of The Petition

The Supreme Court of Uganda in *Mukasa Anthony Harris Vs. Dr. Bayiga Michael Phillip Lulume, SC Election Petiton No.18 of 2007*, gave a final position on this point. The omission to serve the notice of presentation of the petition is an irregularity which does not vitiate the proceedings in an election petition.

In the instant case, quite like in the case of Mukasa Anthony Harris, the first respondent has not pointed out any prejudice or injustice which he suffered because of the alleged omission by the petitioner to serve him with the petition in time.

As a matter of fact by the time this court ordered the petitioner to avail a copy to learned counsel for the first respondent, in court, the first respondent had already filed his answer to the petition. Yet he was alleging that he had never been served with the petition even as of them. He does not indicate when he got hold of the copy of the petition against which he prepared and filed his answer. His arguments, in that regard do not satisfy this court.

Res Judicata

The first respondent's submission on this matter is premised upon the fact that the petitioner filed and prosecuted Miscellaneous Application No.07 of 2011, seeking a revisional order against the chief magistrate's order in Miscellaneous Application No.29 of 2011, in which the petitioner obtained an interim order stopping the recount.

It puzzles my humble mind when I hear these arguments by learned counsel for the first respondent. The rule of res judicata is well laid out in its full ingredients in section 7 of the Judicature Act. For it to apply, there must have been a former suit between same parties or parties under which a current party claim title. The same issues must have existed and must have been decided by court.

Now, an election petitions constitute special proceedings emanating from the High Court's jurisdiction vested in it under Article 86, of the Constitution and section 61(1) and 86, of the PEA. That jurisdiction is special and cannot be affected by a prior Miscellaneous Application. Moreover which Miscellaneous Application that never determined the essential question of the validity of the election of a Member of Parliament for Rubaga North Constituency.

The arguments raised on behalf of the first respondent, with regard to this particular objection, to say the least, appear to be of the weakest legal value.

Multiplicity Of Proceedings

As already stated above, this petition is **sui generis**. It is not comparable to any of the miscellaneous applications that proceeded it. Although it is true that miscellaneous application No.07 of 2011, was stayed by the High Court, to enable the first respondent appeal to the court of Appeal against my brother Justice Zehurikize's refusal to make a reference to the Constitutional,

the objective of Miscellaneous Application No.07 of 2011, in as far as this petition is concerned are already nugatory. Miscellaneous Application No.07/2011 sought for a revisional order to the chief magistrate's order in Miscellaneous Application No.29 of 2011. The objective was to stop the recount. The recount, nevertheless, was duly executed on 28th February, 2011, by the returning officer, Kampala. How can this petition then constitute a multiplicity of suits in relation to Miscellaneous Application No.07/2011?

Lis Pendens

The rule is **lis alibi pendens**. This rule presupposes that there are proceedings pending between the plaintiff and the defendant in a court in respect of a given matter. That fact, if true, would constitute good ground for preventing the plaintiff from taking proceedings in another court against the same defendant in respect of the some subject matter and arising out of the same cause of action.

I have placed the requirements of this rule in perspective to the position in this petition. I find that the rule does not and cannot apply to this petition.

Non Disclosure Of Cause Of Action

The tests as to whether a plaint discloses a cause of action or not was well laid down by the court of Appeal for E.A in the celebrated case of *Auto Garage Vs. Mutukov No.3 (1971) EA 514.*

- the plaintiff enjoyed a right
- the right was violated
- the defendant is liable

even if court just applies those general tests to the situation in the instant petition, court is bound to find that the petitioner was declared winner of the Parliamentary seat for Rubaga North on 20th

February, 2011. That election was interfered with and the first and second respondents were responsible. A cause of action is clearly disclosed.

However, an election petition has another statutory character. It is no ordinary suit the cause of action upon which it is based is statutory by merely glancing at the petition. Court is satisfied that it raises a cause of action within the perimeters of the provisions of section 61 of the PEA.

Issue Number one is, therefore, answered in the affirmative.

WHETHER THE FIRST RESPONDENT'S ANSWER IS COMPETENT

The petitioner's ground for challenging the competence of the first respondent's answer is the fact that the answer was filed outside the period of the ten days provided under sub-rule (1) of rule 8, of the Parliamentary Elections (Election Petition) Rules. The first respondent does not dispute the fact that his answer was filed out of time. He, however, gives the reason that he did not get access of the petition in time.

In those circumstances court would adopt the same reasoning it has expressed with regard to the objection to the petition in this case and uphold the competence of the first respondent's answer.

Whether The Election Was Conducted In Accordance With The Electoral Law

The trial of this petition was very extensive and protracted. That was so on account of various reasons which court will not go into in this Judgment. I have gone over the immense record, more than once. I have examined the contents of the various affidavits, in support of the case of each party to the petition. With regard to this issue, the evidence on record falls into two distinctive categories. Those categories can appropriately be referred to as:

a) Pre-recount – evidence relating to the conduct of the elections through the candidate's campaigns and the polling day activities up to the 20th day of February, 2011, when the petitioner was declared winner of the Parliamentary seat for Rubaga North Constituency; and

b) recount – evidence relating to the recount which took place at the Chief Magistrate's Court at Mengo, 28th February 2011, leading to the declaration of the first respondent as the winner of the Parliamentary seat for Rubaga North Constituency.

Pre-Recount Evidence

a) The first category of evidence mainly relates to allegations by the first respondent against the petitioner and the second respondent. In his own affidavits and in numerous affidavits by his witnesses, the first respondent testifies about:

- what he calls character assassinating statements allegedly made against him during the campaigns, polling and post-polling days, by the petitioner and some of his supporters;
- attacks on his home at Lungujja on 15th and 16th February, 2011, by a group of people allegedly led by Mukiibi Sserunjogi, PW4, and the petitioner, PW1;
- about utterances purportedly made by the petitioner on 28th February, 2011, at a campaign rally for Mayor Joyce Ssebugwawo at Lugala, (affidavit RA1.3 by Ssalongo Nsubuga John) to the effect that the petitioner declared himself M.P. Lubaga North Constituency and allegedly threatened to kill the petitioner and other Indians or chase them out of Uganda as Iddi Amin did in 1971;
- about DR forms that were not signed by the presiding officers at various polling stations;
- about DR forms which showed crossings or over-writings in the record of his votes;
- about DR forms which showed that some of the presiding officers could not properly record the votes cast at the polling station or for a particular candidate; and

- about missing signatures of his agents on some of the DR forms.

In counter to this evidence the petitioner filed affidavits from several witness in rebuttal. The second respondent had affidavit R2.1, by Engineer Prof. Bedom Kiggundu on record in that regard.

Court would only repeat what it did state so many times during the trial in relation to the spectrum of the evidence in question. Without a specific counter petition, in which clear specific reliefs are sought, such evidence by a respondent in useless. It serves no purpose at all. Court cannot issue any specific orders based upon it in the absence of any relevant pleading and prayer.

In my own view, the position in the instant petition is different from that that pertained in ***Ngoma Ngime Vs. Hon. Winnie Byanyima And Election Commission, Election Petition Appeal No.25 of 2006***, which learned counsel for the petitioner has cited in the final submissions in this regard. It seems to me that what, particularly, places this petition in **sui generis** is the fact that the petitioner and the first respondent was each declared by the second respondent to be the winner of the station.

Secondly, this petition is quite unique. It looks as if it is for the first time that an election petitioner is seeking, from this honourable court essentially a declaratory relief. A relief to the effect that his victory, as M.P. Rubaga North Constituency, which was announced on 20th February, 2011, has never been lawfully altered. There was no such position in the petition mentioned in the Ngoma Ngime petition (supra). It also appears to be legally untenable, to argue that sections 60 and 61, of the PEA do not provide for counter-petitions. Unlike an appeal, which is always a creature of statute; a counter-suit is not always a creature of statute. It seems to me to be a sound presumption of law that what is not prohibited is allowed.

In cross-examination, the first respondent stated that he led all that evidence because he wanted the show why he had resorted to applying for a recount. Evidence to justify an application for a recount ought to have been presented before the chief magistrate who heard the application and granted it. This petition is not an appeal against the learned chief magistrate's decision. It does not seek to review what the lower court did. What the petitioner challenges, to my understanding, is the legality of the recount.

Recount Evidence:

For the petitioner, the key witnesses were:

- the petitioner himself, PW1,
- PW2, Yunusu Ntale
- PW4, Mukiibi James Sserunjogi
- PW11, Hon. Lukwago Erias

For the first respondent it was;

- RW3 the first respondent and
- RW4, Kayanja Ddumba James

For the second respondent,

- RW2, Molly Mutazindwa.

The Law Relating To Recounts By Chief Magistrate's Courts:

In order to fully understand the legal concept of a vote recount before a court of law, it is essential to closely look at the law that embodies that concept.

A recount before the Chief Magistrate's court is regulated by sections 55 and 56 of the PEA. The other relevant provision is sections 58(3), of the PEA. For Abundancy of caution, and for greater clarity, all those provisions of the PEA are pre-produced below:

"55. *Application to Chief Magistrate for a recount*.

(1) Within seven days after the date on which a returning officer has, in accordance with section 58, declared as elected the candidate who has obtained the highest number of votes, any candidate may apply to the chief magistrate for a recount.

(2) The chief magistrate shall appoint the time to recount the votes which time 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.

(3) A candidate who requests a recount under this section shall deposit with the chief magistrate a security for costs of thirty currency points.

56. *Recovery of costs of recount*.

(1) where a recount under section 55 does not alter the result of the poll as to effect the declaration by the returning officer under section 58, the court may order the costs of the candidate declared to be paid by the person who applied for the recount.

(2) The monies deposited as security for costs shall, so far as necessary, be paid out to the candidate in whose favour costs are awarded and, if the deposit is insufficient to cover the costs, the court shall order the liable party to pay the balance.

58. ***Declaration of winning candidate.***

(1) …….

(2)…….

(3) Where a returning officer receives notice of a recount under section 55, he or she shall delay transmission of the return and report for the constituency in question until he or she has received from the court a certificate of the results of recount."

In order to absorb the full impact of this petition, one has to look at those legislative provisions closely. It is equally important to bear in mind the cardinal principle of interpretation of statutes. That principle requires a court of law to put upon the words of the legislature, honestly and faithfully; their plain and rational meaning, according to the legislature's express or manifest intention *Oponya Vs Uganda (1967) EA 754.*

With that in mind, it is clear to court that section 55(1), of the PEA, vests courts presided over by chief magistrates with jurisdiction to order and to conduct recounts upon applications made to them under that provision of the PEA.

The term jurisdiction is not a term of art. It is a term of law. It is a term of very extensive legal import. It embraces every kind of judicial action. it confers upon the court, the power to decide any matter in controversy. It pre-supposes the existence of a duly, constituted court with full control over the subject matter under adjudication. It also presupposes full control by the court of the parties to the subject matter under investigation by it. **Jurisdiction** defines the power of a court to inquire into facts, to apply the relevant law, to make decisions and to declare the final outcome of the subject matter under it's inquiry.

It appears to court that the jurisdiction which the section 55(1), of the PEA confers upon a chief magistrate's court is very peculiar, indeed. It is very unusual. It is, as it were, essentially an appeal against the returning officers tallied and announced results. It is the losing candidate who challenges the results. The chief magistrate does not only order the recount. He or she conducts that recount.

The exercise of that jurisdiction it, appears, involves a two-step court process. First, the court hears the application for the recount. The applicant must justify making it by satisfying the chief magistrate with good reasons why the court should order a recount. If the chief magistrate is not satisfied with the applicant's reasons he or she shall dismiss the application. That will mark the end of the matter at that stage.

If the chief magistrate is satisfied that there exists good cause for ordering a recount, he or she shall order the recount. The court shall set a date and time to conduct the recount. The recount is a court process. The court sits as usual; fully constituted with counsel and clerks to assist the Chief Magistrate. Of course the returning officer and some members of his or her staff are to be available to assist court and to handle the electoral material before the court. One box will be opened at a time. It's contents duly be examined.

When the law says that the recount is to be carried out in accordance with the directions of the chief magistrate, it simply means that it is the chief magistrate who decides which invalid ballot should be treated as valid or which ballot earlier treated as valid should be taken as invalid. He or she is in charge of this unique court process and directs and controls all actions during recount process.

The chief magistrate will make the usual court record in respect of each ballot box or polling station whose contents have been recounted. Some application for recounts may only affect

invalid votes or votes from specified polling stations only. The recount process shall cover only those. A fully fledged recount may take more than one or two days. Court will adjourn and resume during court's time on the following day leaving all the electoral material secured within the court's house.

At the end of the court process, the chief magistrate will prepare and sign a certificate of recount, under the seal of the court. It is the final order that the court makes in the application apart from disposing off the security for costs under section 56 and the issue of costs as a whole. The certificate of record ought to specifically show what variations the court has found or made in the results earlier tallied by the returning officer before the returning officer announced the winner. It is the certificate of recount together with the tally sheets earlier made by the returning officer that the returning officer then attaches to the return form which he or she transmits to the commission under section 58(2), of the PEA, following the recount.

Now, in order to decide whether or not what took place at the chief magistrate's court at Mengo, on 28th February, 2011, was a recount as envisaged under section 55 and 56 of the PEA, one has to relate the evidence on record to the law, as laid out and briefly interpreted above.

The rotten apple appears to have fallen into the basket in the form of Miscellaneous Application Number 29 of 2011. That application was filed in the chief magistrate's court on behalf of the first respondent, by Messrs Kahumaa and Khaheeru Advocates. They could well have been handling this kind of application for the first time or it might have been deliberate. In the view of court, this application was the starting point of all that subsequently went wrong with the recount in this petition.

Whereas section 55(1), of the PEA vests a chief magistrate's court with jurisdiction to conduct a vote recount, the order that was sought, in Miscellaneous Application No.29 of 2011, was an order requiring the second respondent to conduct a recount of all the votes cast during the Parliamentary Elections in Rubaga North Constituency. It is a fact that the petitioner was not a party to this application. It is on record that the learned counsel who represented the second respondent Mr. Sabiiti, told the chief magistrate's court at the hearing of the application, that the application was acceptable to the second respondent. The learned chief magistrate, thus, misdirected himself, fatally, by granting that order in the form in which the prayer had been made. He ordered the second respondent to recount all the votes cast during the Parliamentary Elections in Rubaga North Constituency.

By issuing such an order, the learned chief magistrate was, as it were, giving away the jurisdiction vested in him by law. It is trite law that no court can confer jurisdiction upon itself. It is equally trite that no court can assign or delegate jurisdiction vested in it. *Desan Vs. Warsama [1967] E.A. 351*. By way of comparison, perhaps the words of Khan J, of this court, in *Tomasi Musoke Vs. Joseph Mpunga HC Civil Appeal No.85 of 1974*, best describe the legal position which arose after the learned chief magistrate issued that order. The learned judge wrote in that case,

> *"the learned chief magistrate acted beyond the scope of his powers, his order is a nullity in the eyes of the law and it is invalid ab-intio. Such an order does not become valid or operative if no appeal is filed against it. It will remain a nullity for all purposes and can be ignored by the respondent*.

By making the order he made on 25th February, 2011, in Miscellaneous Application No.29 of 2011, the chief magistrate, at Mengo, abdicated his court's jurisdiction. He purported to vest it in

the second respondent; an act which tainted everything that was subsequently done based upon that illegal order which was itself a nullity **ab-initio**.

In the final submissions, learned counsel for the second respondent submitted that the evidence of Molly Mutazindwa, RW2, was never challenged in court and that court takes it as fully admitted. They rely upon *Col. Rtd. Dr. Besigye Kizza Vs. Museveni Yoweri Kaguta, SC Election Petiton No.1 of 2001*. It is argued for the second respondent further, that it announced the first respondent as winner through compliance with the law. They argue that the second respondent followed the court's directives thereby leading to the declaration of the second respondent. To these submissions court can only say that courts have no ability to divorce human law from the law of nature. A snake will always produce a snake. It cannot produce an elephant! If the second respondent strictly, as it says, followed an order that was a nullity ab-initio, then all that it did in so religiously following that order, it was itself a nullity.

What puzzle's this court even more, is the fact that in spite of the clear order that the chief magistrate gave to the second respondent to recount all the votes cast during the Parliamentary elections in Rubaga North Constituency, the returning officer chose to transfer the ballot boxes from City Hall to Mengo Court. Why did she do this since the order never mentioned the transfer of these boxes? In her affidavit, RA2.2, Molly Mutazindwa, in paragraph 4, avers that in the order, the chief magistrate directed *her to transport the ballot boxes to Mengo court and execute the recount from 10.00a.m and accordingly declare the winner*. She attaches a copy of the court's order to her affidavit.

From the order, it is clear that the chief magistrate neither mentions the returning officer, nor the transportation of the ballot boxes or the fact of announcing the winner. Apart from the fact that the returning officer is a clear liar on those matters, it would also appear that the second

respondent understood the correct legal position. It transported the ballot boxes to Mengo court and did not conduct the recount at City Hall, in order to give the so called recount a symbolence of legality. But that effort ended up in a miserable failure. In order to meet the legal requirement of section 55(1) of the PEA, it is not enough to carry out the recount in the court's premises alone. The recount must be conducted by the chief magistrate personally. It must be treated as a court process. No person other than a judicial officer can exercise the jurisdiction conferred by section 55 of the PEA.

Nor did Molly Mutazindwa lie only once in her affidavit. In paragraph 14 of her affidavit, she makes an even graver lie. She avers that she conducted the recount *during day time and not at night and that the second respondent has booked in advance to gazette whoever would be the winner*. Those averments are very absurd, indeed! The evidence on record including that of the first respondent and RW4, Kayanja Ddumba James, is that the recount was completed after mid-night. Indeed, it was completed at about 3.00a.m. No court process can go to such wee hours of the morning!

The returning officer says the second respondent had booked space in the Uganda Gazette for gazetting whoever would win the recount. What was so special about this particular case? Did the second respondent know about the requirements of the provisions of section 59 of the PEA. The results had to be *ascertained and declared first under the seal of the Commission*? Was this done when the recount ended at 3.00a.m and the Gazette was issued that very morning? What was so special about Rubaga North results when the results of other elected Members of Parliament were gazetted several days after they were declared winners?

The second factor which added illegality upon illegality was the fact that, vide Miscellaneous Application No.85 of 2011, the High Court issued an interim order or injunction staying the

recount until after Revision Application No.07 of 2011 would be heard and determined by the High Court. The first respondent and second respondent denied that that the interim order was ever effectively served upon any of them. The chief magistrate did not file any affidavit denying service. Nor was any filed by any officer at Mengo court. Court, however, upon the basis of the evidence on record, is satisfied that the order was effectively served upon everyone who was to be served. The service was ignored and the recount went ahead in total disobedience of that order of the High Court.

Court must state that the High Court's order, in that regard, was very well directed. It was directed to the person who, in law, was supposed to conduct the recount. He was effectively served with it. He did nothing to stop the process, which apparently was not under his control, anyway. The returning officer argues that the order was not directed against her. It need not be. She had no powers to conduct the recount. Why would the High Court have directed that order against her?

It might well be the first time that a lower court ignored an order of the High Court stopping a court process. It may also be the first time that we see a public officer ignoring an order of the High Court halting such process. It surprises this court to note there were also advocates of this court that were involved and encouraged the disobedience. Suffice it to say, such trend does not augur well for this country's efforts to cement the rule of law.

Thirdly, it is notable, from the evidence on record, that because the chief magistrate abdicated his jurisdiction, he never issued any certificate of recount to the returning officer. He could not do so because he never sat as a court to carry out the recount. The returning officer, as she states, in her affidavit, she carried out the recount and announced the results. This particular aspect too

rendered the recount more illegal. The returning officer, according to the law, only awaits for the results of the recount which comes to him or her in the form of a certificate of recount. That certificate should indicate the changes if any, in the results earlier tallied by the returning officer. In the instant case, the returning officer even purported to carry out a second tallying. She purported to reverse the flow of the electoral process backwards to the tallying process again. The electoral process flows like a river. It never turns back.

In answer to issue number three, therefore, in as far as the second respondent conducted an illegal recount and upon that illegal recount reversed the declaration of the winning candidate, the election was not conducted in accordance with the electoral laws. The non-compliance affected the result in a substantial manner as the illegal recount reversed the earlier result in favour of the first respondent. The third issue is, therefore answer in the negative.

The recount process that was carried out by the returning officer was obtained erroneously as already indicated. The record also shows that it was grossly abused by both the returning officer and the first respondent. The returning officer and the first respondent seemed, according to the evidence on record, which court accepts as truthful, to be in equal control. All the ballot boxes were opened at once. There was no prior inspection to ensure that all the boxes had been properly secured. Some, as the evidence shows were not properly sealed. Others that were included were not from Rubaga North. The recounting was carried out at four separate points within the compound of the court premises. The first respondent played the role of Godfather supplying food, drinks and lights for the purpose. Even if the process had not been already illegal, such conduct would have negatively affected it.

Whether The First Respondent Was Validly Elected

It follows that because his declaration as winner of the Parliamentary seat was based upon the results of an illegal recount, which had no effect in law, the first respondent has never been validly elected Member of Parliament for Rubaga North Constituency.

The illegal recount conducted by the returning officer, Kampala, at Mengo Court on 28th February, 2011, did not affect the declaration of the winner of the Parliamentary election in Rubaga North, which was made by the returning officer on 20th February, 2011. It did not do so because the recount was illegal ab-initio. It had no force of law.

The winner of the Parliamentary elections in Rubaga North Constituency, who was declared then remains the winner to date. His declaration was not affected by the outcome of the illegal recount because it was incapable of doing so.

To the above effect, court makes the following declaration and orders:

a) a declaration under the provisions of section 63(4) (b), of the PEA, that the petitioner was validly elected Member of Parliament for Rubaga North Constituency;
b) an order under the provisions of section 63(6)(b)(i), of the PEA requiring the first respondent to vacate the seat for Rubaga North Constituency in Parliament;
c) an order requiring the first and second respondent each to pay 50% of the costs of the petitioner, in respect of this petition.

V.F. Musoke-Kibuuka

(Judge)

24th October, 2011