THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MASAKA

Misc. Cause No 137 of 2016

PATRICK NKARUBO::APPLICANT

VERSUS

1. THEODORE SEKIKUBO

2. ELECTRAL COMISSION ::RESPONDENTS

BEFORE: HON. JUSTICE DR. FLAVIAN ZEIJA

RULING

:

The applicant and the respondent were dully nominated candidates for Lwemiyaga County Member of Parliament and competed in the 2016 election for members of Parliament for Lwemiyaga County. Upon the elections being held on the 18th day of February 2016, the 1st respondent was declared duly elected as Member of Parliament for Lwemiyaga County. This declaration was made on the 19th day of February 2016 by the Returning Officer of the 2nd respondent. Having been dissatisfied with the result, the applicant took the option of applying for a vote recount before the Chief Magistrates Court of Masaka. The process of recount was never completed until the whole process of a vote recount was brought to a permanent halt by the ruling of my learned brother, the Hon Justice Gidudu Laurence in ***HCT-06-CV-CR-0003-2016 Hon Ssekikubo Theodore Vs Nkalubo Patrick,*** delivered on the 27th of June 2016. The applicant felt aggrieved by this decision hence this application.

This application, was brought by notice of Motion under S. 98 of the CPA, Order 44 R (1)(2)(3)(4)of Civil Procedure Rules and section 33 of Judicature Act.

The application was seeking for orders that:

1. The applicant be granted leave to appeal against the decision of His Lordship Laurence Gidudu dated 27th June 2016 arising from HCT-06-GV-0003-2016.
2. Costs of the application be provided for.

The Grounds upon which the application was anchored are more amplified in the affidavit of the applicant in support of Application but briefly are:

1. That his lordship erred in fact and law when he revised and in effect prevented proceedings that had not been determined.
2. That the trial Magistrate erred in law and fact when he found that the chief Magistrate had no Jurisdiction to stop the gazetting of the applicant as a member of Parliament and further when he found that the degazetting of the applicant was unlawful.
3. That his lordship erred when he found that the 1st respondent was not wrong and could not be faulted for disobeying the orders issued by court preventing him from being gazetted
4. That the his lordship erred in finding that an order of Court can be disobeyed or ignored without it being discharged or stayed
5. That his lordship erred in finding that the Chief Magistrate had no Jurisdiction to proceed or continue with the recount process
6. That his lordship erred in finding that the 1st respondent was an elected Member of Parliament without conclusion of the vote recount process
7. That the decision of his lordship is prejudicial to the rights of the applicant.
8. That the justice of the case requires that the application be allowed.

At the hearing, the applicant was represented by Ojambo Robert Mugenyi and Tonny Okwenyi while Medard Lubega Ssegona and Alaka Caleb represented the 1st respondent. The 2nd respondent was represented by Kayondo Abubakar. Both parties agreed to file written submissions for expeditious disposal of this matter.

Before I proceed to the grounds of this application, I have to state from the onset that I didn't not appreciate the approach counsel for the applicant employed. This application is intended to achieve the same objective as Misc. Appl. No. 16 of 2016 for leave to extend time to file a petition, filed earlier. It would be absurd if I granted this application and at the same time allowed the application for leave to extend time within which to file a petition. The consequences would be absurd. Both approaches sought by the applicant would lead to the same result. It would be absurd to allow an appeal for a recount while at the same time allow an application to file a petition. The danger we run is having two parallel decisions on the same matter. This is an abuse of court process. The applicant is simply casting his nets wide to see which one catches fish, to the detriment of court. The filling of a Multiplicity of suits is an abuse of civil process (***see Springs International Hotel Ltd Vs Hotel Diplomate Limited and Anor, HCCS No. 227/2011, DFCU Limited Vs Begmohammed Limited, Civil Application No 65 of 2005***)

Before I proceed to consider the grounds of this application, the principle followed in such applications were enumerated in the case ***Sango Bay Estates Limited Vs Draisner Bank (1971) EA 17*.** The applicant must show that there are grounds of appeal which merit serious judicial consideration. The grounds must be arguable and must have a high possibility of success on appeal. In essence, the applicant must show that the appeal has high chances of success.

Grounds of Application:

Ground 1

That his lordship erred in fact and law when he revised and in effect prevented proceedings that had not been determined.

Counsel for the applicant submitted that under S 83 CPA, the High Court may call for the record of the lower court which has been determined. According to this section, court can only call for the record of the proceedings that have been determined and not those which are incomplete. Court cannot intervene midway the proceedings. The proceedings in the recount process had not been determined when the 1st respondent applied for revision.

It is erroneous for counsel for the applicant to state that the magistrate had not made any finding on the application for a recount. When the application came up for hearing on the 3rd day of March 2016, counsel for the 1st respondent raised a preliminary objection that the mandate for the Magistrate to order a recount had been exhausted by lapse of time of 4 days from the time of filling that application for a recount. The Chief Magistrate overruled this objection. By doing so, this opened doors for any High Court to investigate whether the Chief Magistrate still had jurisdiction to entertain an application for a recount. This, coupled with other illegal orders that were issued exparte subsequent to this ruling put the entire application for a recount and the attendant orders within the full ream of revision. In fact, counsel for the "objector" applied for leave to appeal and the magistrate never made a ruling on this. This made the application ripe for revision, since the objection was challenging the jurisdiction of the magistrate to proceed with the application for a recount. In other words, the objection was challenging the validity of the application.

While the CPA S. 83 thereof clearly indicates that revision should be done when the Magistrate has come to a decision, the same Act under S 98 enjoins court to cattail abuse of court process. The high Court cannot fold its hands and wait for a final decision before intervention if illegalities are apparent. The High Court under the Judicature Act S 33 can intervene in proceedings should there be evidence that there is attendant abuse. Nevertheless, in this situation there was a decision by a magistrate. He opted to proceed with the application for a recount when an objection had been raised. Endeed the judge established that the magistrate had no jurisdiction to proceed with the recount after the expiry of the statutory 4 days.

I find this ground not meriting an appeal

Ground 2

That the trial Magistrate erred in law and fact when he found that the chief Magistrate had no Jurisdiction to stop the gazetting of the applicant as a member of Parliament and further when he found that the degazetting of the applicant was unlawful

On this ground counsel for the applicant argued that there is no doubt that once a person is gazetted, he can only be removed from Parliament by a petition. It was in order for the magistrate to order for stay of gazetting until the recount had been ordered to prevent making orders in vain, Since S 55 of the Parliamentary Elections Act gives the Chief Magistrate power to order for a recount. Counsel sought refuge in S. 98 of the CPA which gives court inherent powers.

Counsel for the 1st respondent on the other had argued that clearly, section 55 under which a recount is ordered does not confer powers on the magistrate to get involved in post recount issues like Gazzetting, degazetting and regazetting.

The clear words of S 55 of the PEA do not require court of appeal to interpret them. They are clear in no uncertain wording. There is nowhere in the section that the magistrate is given a mandate to order a stay of gazetting of the winner of an election. If the legislature hand wanted the magistrate to have such powers, they would have stated so. This explains the limited timeframe within which an application for a recount is conducted. I did not find any appealable issue in this ground. If the applicant was aggrieved with degazetting of the applicant in contravention of the court order, he would have applied for contempt of court remedies. Counsel for the applicant relied on the case of ***In the Matter of Eriya Kiwanuka and in the Matter of Kamadi Matenda*** where Butagira J as he then was held that the inherent powers of S.101(now 98) were intended to apply where no statutory provisions exist. However, in the instant case, there are statutory provisions relating to how a person is gazetted. This case was therefore quoted out of context.

I did not find any convincing argument meriting an appeal in this ground.

Ground 3 and 4

That his lordship erred when he found that the 1st respondent was not wrong and could not be faulted for disobeying the orders issued by court preventing him from being gazetted

That his lordship erred in finding that an order of Court can be disobeyed or ignored without it being discharged or stayed

On these two Grounds counsel for the applicant argued that court orders must be obeyed until they are discharged and he referred to various authorities that say so. He referred to the case of *Hadkinson Vs Hadickinson(1952) All ER 569* where it was held that it is an obligation of everyone to respect court orders whether they are illegal until they are discharged.

Nevertheless, failure to obey orders is not a matter which should be a subjected of an appeal process. Orders are enforced by contempt of court proceedings if they are disobeyed.

Be that as it may, I do not think that the Judge indicated anywhere in his ruling that court orders should not be obeyed if they are illegal. I reproduce what the judge stated in his ruling at page 11.

"***The applicant cannot be faulted for disobeying those orders as the respondent's counsel submitted because he was not capable of enforcing them against himself. He was not capable of including himself in the gazette or swearing himself as a member of parliament. He is just a subject or indeed a victim of them. He is not at fault and is entitled to complain"***

What the judge was indicating here is that the duty to enforce court orders is for the aggrieved party and the applicant could not enforce the illegal orders against himself. It

was the duty of the applicant (respondent in the ruling) in this case to enforce the court orders through contempt of court proceedings. He did not in any way state that the orders should be disobeyed. Counsel for the applicant purely misinterpreted the ruling.

The judge went ahead of observe at page 16 of his ruling thus:

"I was asked to find that even if the chief magistrate had no jurisdiction to order the Electoral Commission those illegal orders, not withstanding, prevented the applicant from being gazetted and sworn in as an MP. But it is trite law that orders issued without jurisdiction are null and void. The implication in law is that those orders were never issued in the first place and this being an application for revision, this court is mandated to set them aside as I did when resolving issue number 2. That is the purpose of these proceedings..."

What the judge was indicating here is that illegal orders are *void abinitio*. Once they are set aside, their illegality relates back from the time when they were issued. Any action taken in furtherance of their execution is reversible, where possible.

Where is the merit in these two grounds? None whatsoever.

Regarding dilatory conduct counsel for the applicant submitted that there was no such conduct on the part of the applicant to bring this application. He stated that the ruling was delivered by the Judge on the 27th June 2016 and leave to appeal was lodged on 20th July 2016. He stated that this cannot amount to inordinate delay.

I agree with counsel for the applicant that this period is not too long to amount to dilatory conduct in a normal situation. Nevertheless, this was not a normal situation. Election matters are urgent matters and time bound. The application was urgent given that time was running out/had run out for a recount. Instead of making this application in court, counsel for the applicant instead opted to file an ordinary plaint. After realising that that

was a wrong procedure, he withdrew it and opted for this application. That is besides filing another application for extension of time. I consider this to be dilatory conduct.

In the result, I find no merit in this application and dismiss it with costs to the respondents.

I so order.

Flavian Zeija
JUDGE
24/1/2017