

**THE REPUBLIC OF UGANDA**

**IN THE CONSTITUTIONAL COURT OF UGANDA HOLDEN AT KAMPALA**

**CONSTITUTIONAL PETITION REFERENCE NO. 8 OF 2016**

**NKALUBO PATRICK;,,,,,,,,,,,,,,,,,,,,,,,,; PETITIONER/APPELLANT**

**VERSUS**

**1. ELECTORAL COMMISSION**

**2. RETURNING OFFICER,SEMBABULE DISTRICT**

**3. SSEKIKUBO THEODORE;,,,,,,,,,,,,,,,,,,,,,,,,;RESPONDENTS**

**Coram:**

**1. Hon. Justice Steven B.K Kavuma, DCJ/JCC**

**2. Hon. Justice Richard Buteera, JA/JCC**

**3. Hon. Justice Elizabeth Musoke, JA/JCC**

**4. Hon. Justice Cheborion Barishaki, JA/JCC**

**5. Hon. Justice P.K Mugamba, JA/JCC**

**RULING**

**Introduction**

The Petitioner, a former candidate for the Member of Parliament seat for Lwemiyaga, Sembabule District, being dissatisfied with the declared results filed an Application under section 55 of the Parliamentary Elections Act, Section 98 Civil Procedure Act and Order 52 Civil Procedure Rules, at the Chief Magistrate's Court of Masaka seeking mainly an order for recount of the election results of Lwemiyaga Electoral Area.

**Background**

When the hearing of the application commenced, on the 3<sup>rd</sup> March 2016, counsel for the respondents raised preliminary objections which were that-

The application was bad in law and barred by law,

The court lacked Jurisdiction to entertain the application,

That the application did not disclose a cause of action and

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that the 1<sup>st</sup> and the 2<sup>nd</sup> respondents' written submissions filed in the court before the hearing and lacking any affidavit in support, were not only irregular but also bad in law.

Those objections challenged the Chief Magistrate Court's jurisdiction to handle the application since S.55 (2) of the Parliamentary Elections Act, through which the Application was brought, requires such applications to be heard and determined within four days after receipt of the application. They argued that the application was bad in law since the four days limit had passed by.

Counsel for the applicant responded to the points of objection and supported the application as being proper in law saying it should be heard on its merits.

The Chief Magistrate gave a ruling in respect of the four preliminary objections raised, which he resolved as three issues. In his ruling, once an application for recount is filed in accordance with the law as set out under S.55 (1) of the Parliamentary Elections Act, the fair trial principles as enshrined in Article 44 of the Constitution naturally apply. The hearing process sets in irrespective of the statutory bar of 4 days. He relied on **Okumu O Robert Vs Alenyo Ezrom William and Electoral Commission**, Court of Appeal Election Petition No. 1 of 2012. He rejected the preliminary objections and decided to continue with hearing of the application.

It was at that stage counsel for the 3<sup>rd</sup> respondent sought leave of court to appeal against the decision and applied for a stay of proceedings to enable them pursue the appeal.

The Chief Magistrate did not rule on the said application. Instead he opted to refer the matter to the Constitutional Court for interpretation, hence this Reference.

This reference was made under **Article 137(5) (a) & (b)** of the Constitution. It provides:  
Section'137. Questions as to the interpretation of the Constitution.

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**(3)**

**(4)**

**(5) Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a field court martial, the court—**

**(a) may, if it is of the opinion that the question involves a substantial question of law; and**

**(b) shall, if any party to the proceedings requests it to do**

so,

**refer the question to the Constitutional Court for decision in accordance with clause (1) of this article.'**

**The questions before this court for interpretation.**

The Chief Magistrate, in referring the matter to the Constitutional Court for interpretation, framed three questions. They read:

- 1)** *Whether the provisions for 4 days to conclude the election recount applications as well as the entire process of recount in the Parliamentary Elections Act, 2005 is in contravention to Articles 28(1) & 44(c), particularly on fair trial.*
- 2)** *Whether section 55(2) of the Parliamentary Elections Act, 2005 ousted the Chief Magistrate's jurisdiction in vote recounting applications when handled outside the 4 days' rule therein.*
- 3)** *Whether none (sic) filing of an affidavit in reply to an application but filing submissions in rebuttal was a legal omission and therefore fatal to a respondent.*

The record from the lower court reflects a joint position as to the question framed for interpretation by the Constitutional court. The question being;

*Whether the provisions for 4 days to conclude the election recount applications as well as the entire procession to recounting in the*

*Parliamentary Elections Act is in contravention to Articles 28(1) & 44(c), particularly on fair trial. '*

As earlier noted, the empowering law for this court is Article 137 (5) of the Constitution which gives court powers to entertain questions that require constitutional interpretation arising from proceedings in courts of law.

The provision for the four days to conclude the election recount applications as well as the entire process of recount are contained in section 55(2) of the Parliamentary Elections Act which provides:

***'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 directions of the chief magistrate.'***

Perusal of the record shows the Chief Magistrate entertained this issue. He heard from counsel for both sides. Counsel gave strong arguments both for and against the provision. Finally he gave his ruling on the preliminary objections. Notable in the ruling was his conclusion that he had jurisdiction to handle the application and that despite the expiration of the statutory days hearing would proceed.

Given the above resolution, we wonder what question is being put before this court. The court making the referral made the decision to go ahead and hear the application. It should have gone on with the recount. What appeal could lie could have arisen thereafter. In the event the Chief magistrate adjourned to rule on the application for leave to appeal. In the process he crafted this reference. Clearly a reference was out of the question at that stage as the court was functus officio. The issue of the statutory four days in that respect is no longer available for reference.

In **Andrew Kibaya vs Uganda, Constitutional Petition No. 28/2010 (Reference)** this court pronounced itself on the qualification of questions for determination in a Reference. It noted:

***Article 137(5) of the Constitution is very dear in its wording. Before a question can be framed and sent to this court for determination it must arise out of the proceedings and its***

*determination must be done before the issues raised in the case are disposed of by the trial court. The question or questions must arise in the proceedings directly or by necessary implication. The proceedings before the original court must show that a question as to the interpretation of the Constitution has arisen and the hearing of the case cannot proceed before the question is determined This should be evident from the record of proceedings.*

*The articles of the constitution which were cited in this reference did not arise out of the proceedings. Whereas the defence cited the said articles in the submissions the prosecution was not afforded an opportunity to make any reply. Moreover we think that a court which is being requested for a reference must make a judicial decision after being satisfied that the interpretation of the Constitution is required.'*

The proceedings before the Learned Chief Magistrate relating to the issue of a recount and the timelines applicable thereto had been concluded. This court to give any directions to the Learned Chief Magistrate in respect of that issue as required by Article 137(6) of the Constitution and makes any order in that regard would be one in vain in the instant Reference.

In response to questions two and three. We find none of the two requiring interpretation of the Constitution. Those questions:

*' Whether Section 55(2) of Act 17 of 2005 ousts the jurisdiction of the Chief Magistrate in vote re-counting applications when handled outside the 4 days' rule, 'and*



'Whether none (sic) filling of an affidavit in reply to an application but filling submissions in rebuttal was a legal omission and therefore fatal to a respondent

are misplaced in respect to **Article 137(5)** of the Constitution.

*As was put succinctly by Wambuzi CJ (retired) in Ismail Serugo v Kampala City Council and Attorney General (Constitutional appeal No. 2 of 1998),*

*'... the petition/reference must show on the face of it, that interpretation of a provision of the constitution is required. It is not enough to allege merely that a constitutional provision has been violated/ See also Uganda Vs Atugonza Francis, Constitutional Reference No. 31 of 2010.*

Before we leave this issue we note that counsel for the respondents questioned the origin of the two referenced questions above, given that the record only reflected one question. A glance at pages 15 and 16 of the record of the Chief Magistrate's Court shows one question was framed. Upon reference two more questions were framed by the Chief Magistrate. These questions were not framed in the lower court. The chief magistrate should have restricted himself to the question agreed upon that clearly transpired in the proceedings before his court. The additional two questions lacked authenticity. The essence of a reference was expressed by Justice Odoki, former Chief Justice, in **Rtd Col. Dr. Kizza Besigye vs. Electoral Commission and Yoweri Kaguta Museveni, Presidential Election Petition No. 1 of 2006,**

*\.The provisions of article 137(5) of the Constitution should not be invoked to dog proceedings in court by referring questions of interpretation of the constitution to the constitutional court when the questions do not arise out of the particular proceedings and are necessary for the determination of issues in the proceedings.*

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In the result this reference lacks merit. It is dismissed and parties are each to bear their costs. This file is to be returned to the Chief Magistrate's Court in Masaka to urgently conclude the management of Miscellaneous Cause No. 11 of 2016.

We so order.

Dated at Kampala this 28<sup>th</sup> day of April 2016

HON.Mr.JUSTICE STEVEN B.K.KAVUMA,DCJ/JCC

HON.Mr.JUSTICE RICHARD BUTEERA ,JA/JCC

HON.LADY JUSTICE ELIZABETH MUSOKE,JA/JCC

HON,Mr JUSTICE CHEBORION BARISHAKI,JA/JCC

HON.Mr JUSTICE PAUL K MUGAMBA,JA/JCC



