THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA

ELECTION PETITION NO. 0001 0F 2011

HON. PIRO SANTOS ERUAGA ::::::::::::::::::::::::::PETITIONER

=VERSUS=

1. GENERAL MOSES ALI]
2. ELECTORAL COMMISSION::::::::::::::::::::::::] RESPONDENTS

RULING BY HON. JUSTICE JOSEPH MURANGIRA

The petitioner through M/s Bwambale, Musede & Co. Advocates brought this petition under Sections 60, 61 (1) (b) of the Parliamentary Elections Act No. 17 of 2005 against the two (2) respondents. The petitioner at a later stage instructed M/s Akampumuza & Co. Advocates to join the prosecution of this petition together with his first lawyers. On the other hand, the 1st respondent is represented by M/s Muwema & Mugerwa Advocates. The 2nd respondent is represented by its legal officer, Patrick Wetaka. Both respondents filed in court answers to the petition and their affidavits in support of their respective cases. The grounds of the petition are that:-

1. The petitioner is a male adult Ugandan of sound mind, a contestant/candidate for the just concluded Parliamentary Elections held in the constitutuency of East Moyo.
2. And your petitioner states that the election was held on 18th February, 2011 when Ali Moses, Draga Gasper, Oboma Isaac, Mawadri Sunday and Vusia Bangi Lina and himself Piro Santos Eruaga were duly nominated candidates in the East Moyo Constituency.
3. Ali Moses was announced winner by the returning officer, an official of the 2nd respondent, and the 2nd respondent duly had him gazetted in the National Gazette as the winner and validly elected Member of Parliament for Moyo East Constituency.
4. Your petitioner states that a person other than the one elected won the election.
5. This petition is supported by affidavits including that of the petitioner attached hereto, whereof your petitioner prays that it should be declared that:-
    a) The candidate other than the one elected won the election.
    b) The petitioner is entitled to be declared the duly elected Member of Parliament for Moyo East Constituency and the 1st respondent should be ordered to vacate the said parliamentary seat.
    c) In the alternative but without prejudice to the above a recount of votes cast be ordered.
    d) The respondents pay the costs of these proceedings.

In the answer to the petition, the 1st respondent in the affidavits in support of his answer put the petitioner on notice that he shall raise preliminary objections to his petition; that:-

a) The matters pleaded in the petition are res-judicata.
b) The petition does not disclose a cause of action against the 1st respondent.

On 23rd May, 2011 when the petition came up for hearing, the 1st respondent's counsel Mr. Siraj Ali was allowed to raise and argue the above mentioned preliminary objections. The 2nd respondent had no objection to raise. Its counsel was ready to proceed with the hearing of the petition. The petitioner's counsel Dr. James Akampumuza made a spirited reply to the submissions by counsel for the 1st respondent.

Mr. Siraj counsel for the 1st respondent submitted that the matter before court is res-judicata and that it ought to be dismissed with costs. He relied on a number of authorities to justify his raised point of law. He submitted that in the instant case, there has been a former suit decided by a competent court namely:-

"Miscellaneous application no. 001 of 2011, **Hon. Piro Santos Eruaga –Vs-General Moses Ali and 2 others** in the Chief Magistrate's Court of Moyo holden at Adjumani".

That the matter in dispute is directly and substantially the same as the matter that was in dispute in the Chief Magistrate court of Moyo. He continued to submit that the parties to the petition are the same parties in the previous suit. He prayed to court to find that the petition is res-judicata and that it ought to be dismissed with costs.

In reply, Dr. James Akampumuza counsel for the petitioner does not agree. He submitted that the words used in section 7 of the Civil Procedure Act, Cap 71 clearly support the petitioner's case, that:-

I. The issue or suit should have been fully litigated by the same parties and before a competent court with jurisdiction to determine the matter. That the chief magistrate in this mater is not a competent court for purposes of hearing an election petition.
II. That it is only the High Court of Uganda with jurisdiction to hear and determine this petition.

That the competency of the Chief Magistrate's Court is determined by irrespective of any provision as to the right of appeal as to the decision that was made.

He submitted that these aforesaid grounds are important to show that the matter is or/and was not resjudicata as contended by counsel for the 1st respondent in their bid to take away the petitioner's rights in this petition. Counsel in his lengthy submission relied on the affidavits evidence of the petitioner, filed in this court on 18th /3/2011; that of Cosmos Madile filed in court on 18/3/11, that of Droma Alfred filed in court on 15th /4/2011, that in rejoinder sworn by the petitioner filed in the court on 15/4/2011 and that filed in this court by the petitioner on 20th/5/2011. That considering that evidence the matter before this court cannot be res-judicata. I had the benefit of reading those affidavits and in contrast to those filed in this court by the 1st respondent.
On this issue, counsel for the petitioner prayed court that the 1st preliminary objection of res-judicata be dismissed with costs.

I heard the submissions by both counsel for the parties on the issue of whether the matters as presented in this petition by the petitioner is resjudicata or not. It is my duty to resolve that dispute.
The law in this area is settled. The doctrine of resjudicata is enshrined in section 7 of the Civil Procedure Act, which reads:-

S.7 res judicata

"No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between parties under whom they or any of them claim; litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court".

Interestingly, this section has explanation notes for guidance purposes on the issue of resjudicata. This section is therefore easy to understand as far as the doctrine of resjudicata is concerned.

The operation of the doctrine of resjudicata was discussed in the case of **KARIA AND ANOTHER –VS- ATTORNEY GENERAL AND OTHERS [2005] IEA 83, at page 93** (Supreme Court of Uganda), that:-

1) There have to be a former suit or issue decided by a competent court.
2) The matter in dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.
3) The parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title.

On the first condition, it is the submission by counsel for the petitioner that the suit referred to by counsel for the 1st respondent, that is, miscellaneous application no. 001 of 2011; Hon. Piro Santos Eruaga –Vs- General Moses Ali and 2 others at the Chief Magistrate's Court of Moyo at Adjumani, the Chief Magistrate did not have jurisdiction to determine directly and substantially the matters between the parties. I have looked at annexture A1 to the supplementary affidavit of Kavuma Terence in support of the 1st respondent's answer to the petition and noted that that application was for a recount brought under section 55 of the Parliamentary Elections Act, 2005. Under that section, the Chief Magistrate was competent to hear and determine the matter between the parties. The ruling of the Chief Magistrate is part of the evidence being relied on by the 1st respondent. I have read that ruling of the Chief Magistrate which is an annexture to the supplementary affidavit sworn by Kavuma Terence. That ruling considered the affidavits evidence, which same evidence is being adduced by the petitioner in his petition in relation to the issue of recounting and the aforesaid matter was decided conclusively by the Chief Magistrate. The Chief Magistrate court was

therefore competent to try the issues that were raised in the said miscellaneous application No. 001 of 2011 between the parties.

On the second condition to justify resjudicata, that is, that the matter in dispute in the former suit between the parties must be also directly or substantially in issue between the parties in the suit where the doctrine of resjudicata is pleaded as a bar. I have perused the pleadings in the petition and those in the application that was before the Chief Magistrate and I agree with the affidavit evidence adduced in the supplementary affidavit in support of the answer to the petition by Kavuma Terrence and make a finding that the said pleadings are word for word, specifically in paragraph 8 of Kavuma Terrence's affidavit shows that the pleadings in both suits are word for word. Further, it is my finding that a perusal of the two (2) pleadings referred to hereof, clearly show that the matters in this petition are the same matters that were in dispute in the application before the Chief Magistrate.

On the said condition raised to justify res judicata, that is, that the parties in the former suit should be the same parties in the subsequent suit. In the instant petition the parties are the same parties in the previous matter before the Chief Magistrate. This condition was never disputed or challenged by counsel for the petitioner in his submissions in reply to the submissions by counsel for the 1st respondent.

Furthermore, the test to be applied by the court when determining the question of res judicata was handed down by the Constitutional Court in Constitution Petition No. 0004/2006 in **Cheborion Barishaki –Vs- Attorney General,** where their Lordships at page 7 of the Judgment held that:-

> *"Essentially the test to be applied by court when determining the question of res judicata is this, Is the plaintiff in the second or subsequent action trying to bring before the court, in another way and in the form of a new cause of action, a matter which he has already*

put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon?

If the answer is in the affirmative, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which parties or their privies exercising reasonable diligence might have brought forward at the time."

Considering the petition before me, the cause of action is that a person other than the person elected was declared winner in the elections that were held on 18th – 2 – 2011. The remedy sought by the petitioner in his petition is that the court should tally all the declaration forms and declare the petitioner the winner. This same remedy was sought by the petitioner in Miscellaneous Application No. 001 of 2011 in the Chief Magistrate's court of Moyo.

A perusal of both the said application and petition shows that the only difference between these pleadings is the ground under Section 61 (1) (b) of the Parliamentary Elections Act, 2005 of a person other than a person elected was declared the winner. In such regard it should be clear to everyone that the petitioner is trying to bring before this court in another way and in the form of a new cause of action a matter which he has already put before the Chief Magistrate's court of Moyo, a court of competent jurisdiction.

It is important to note, that courts have been vigilant in ensuring that litigants do not evade the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before other courts. This proposition is supported by the case of **Cheborion Barishaki –Vs- Attorney General** (supra) where the Court set out the test as being whether the plaintiff in the second or subsequent suit was trying to bring

before the court in another way and in a form of a new cause of action, a matter which was already resolved by a court of competent jurisdiction.
Consequently, in the case of **Omondi –Vs- National Bank of Kenya Ltd and others [2001] IEA 177** the court held that:-

> *"Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit."*

The same court quoted with approval the decision of the High Court of Kenya in **Njangu –Vs- Wambugu and another Civil suit No. 2340 of 1991,** where Justice Kuloba held that:-

> *"If litigants were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata."*

I hasten to observe that the above cited authorities clearly demonstrate that the instant petition is affected by the doctrine of res judicata. Furthermore, where the matter has been proved to be res judicata it falls squarely within the provisions of section 7 of the civil procedure Act (supra) and any further suit on the same matter is barred by the said statute. The doctrine of res judicata gives raise to a mandatory bar from any fresh trial of a concluded issue.

Counsel for the petitioner referred to the affidavit evidence of the petitioner that was filed in court on 20th – 5 – 2011 and submitted that annexture P1, the tally sheet is a forgery as it was made on 14/4/2011 at 10:37.
I have looked at that tally sheet in question and I notice that the date of 14/4/2011 and time of 10:37 show when the tally sheet was printed and not when it was made by the returning officer as submitted by counsel for the petitioner. I am of the considered opinion that that was done to allow the Secretary to the Electoral Commission when certifying the tally sheet to

know the date and time in accordance with the requirements of section 75 of the Evidence Act. Further, referring to the affidavit of Cosmos Madile he swore on 17/3/2011, paragraph 8 of his affidavit in support of the petition which states that::-

“On 20/2/2011 the returning officer called us to his office and asked us to sign the final tally sheet, but I refused because the tally sheet did not reflect the results declaration forms depicted”. I, thus, hold that the tally sheet in issue was available to the petitioner as early as 20/2/2011. The petitioner therefore had the opportunity to bring that tally sheet before the Chief magistrate. I did not see any evidence that as at 20/2/2011, the petitioner wrote to the Electoral Commission and that the tally sheet was denied to him. In the case of **KAKOOZA JOHN BAPTIST –VS- ELECTORAL COMMISSION AND ANOTHER, Supreme Court Election Petition Appeal no. 011 of 2007,** Hon Justice Kanyeihamba JSC (as he then was) held that the petitioner should have given notice to the Electoral Commission or applied through court for the Electoral Commission to produce the declaration form at the trial.

Furthermore, I have perused the proceedings that were before the Chief Magistrate’s Court of Moyo which are attached to the affidavit of Kavuma Terrence in support of the 1st respondent’s answer to the petition on pages 48-57, and the proceedings show that the petitioner’s Advocate Mr. David Bwambale tendered in that Court declaration forms. I have read the ruling of the said Chief Magistrate and he ruled on the issue of the declaration forms.

The petitioner’s advocates cannot now be heard to say that the Chief Magistrate did not have those forms while he was making his decision. In any case, the decision on Cheborion Barishaki –Vs- A.G (supra) at page 7 beginning from the second last line up to page 8, it was held that:-

“The plea of res judicata applies not only to points upon which the first Court was actually required to adjudicate but to every point which properly

belonged to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the time."

If the petitioner had exercised reasonable diligence while filing his application for recount in the Chief Magistrate's court, he would have ensured that the tally sheet and other necessary documents were placed before the said Chief Magistrate. Therefore, I find that it is no defence to the plea of res judicata that the tally sheet was not availed to the Chief Magistrate.

In the result and considering all the submissions by counsel, the authorities cited and evidence on record, I uphold the first preliminary objection of res judicata in the affirmative.

On the second preliminary objection, that is, that the petition does not disclose a cause of action against the 1st respondent. Counsel for the 1st respondent in his submission referred to paragraph 12 of the affidavit in support of the petition sworn by the petitioner. He submitted that the function of tallying results and declaring the winning candidate is not the function of the High Court. That is a function of the returning officer under section 53 of the Parliamentary Elections Act, and the Chief Magistrate under section 55 of the same Act. He further submitted that the petitioner's pleadings reveal that the questions they are seeking court to answer is who is the winning candidate. That where the petitioner files a petition in the High Court and asks the question who is the winner then such a petition does not disclose a cause of action. That the petitioner's right to file a petition in the High Court only extends to questions of validity of elections and not to questions of numerical nature.

In reply, Dr. Akampumuza, counsel for the petitioner referring to sections 60, 61(1) (b), 63(5) and 86 of the Parliamentary Elections Act submitted that the

petitioner has a cause of action against the respondents. He further submitted that the High Court has unlimited jurisdiction while hearing a petition of this nature. That determination of the validity of an election can never be divorced from the fact of vote counting, deduction of the validity of votes reflected in the tally sheet and comparing them with the results in the declaration forms; the transmission of the results form, etc.
That, that includes the issue of the High Court to establish whether there are illegal practices and electoral offences committed which include false tallying of results.

That on the issue of whether the 1st respondent is liable, he submitted that liability of the respondents in election petitions are statutory, that:-

a) The 1st respondent is a natural respondent in this election by virtue of section 63(6) (a) (b) and (c) of the PEA.
b) The 2nd respondent is statutory respondent in election matters, because it is the one that conducts the elections.

That, therefore, the petitioner has a full and complete causes of action, of his right to be voted and that this right was infringed upon by the respondents and that by virtue of that infringement by the respondents, the petitioner has suffered injury and damages for which he holds the respondents liable. That all the prayers in the petition are causes of action which are not new or evasive or res judicata. Counsel for the petitioner prayed for the dismissal of this second preliminary objection with costs.

Once again, I reiterate my hereinabove statement that it is my duty to resolve such a contentious preliminary objection as argued by both counsel. I had already made a finding on the first preliminary objection that the new cause of action and the new remedy in the petition has been brought by the petitioner to evade the doctrine of res judicata. It is my considered view

that matters barred by law cannot confer a cause of action to a petitioner in this subsequent pleading which is the petition.

The test as to whether pleadings disclose a cause of action was set out in the case of **AUTO GARAGE AND OTHERS –VS- MOTOKOV (NO. 3) [1971] IEA 514,** where it was held that there are three (3) essential elements to support a cause of action; that:-

a) The plaintiff enjoyed the right.
b) The right has been violated.
c) The defendant is liable.

The court went on to hold that if any one of these essential elements is missing, the plaint is a nullity and ought to be dismissed with costs.

It is the submission by counsel for the petitioner that the Chief Magistrate's function was limited to order a recount only. It is my finding that the duty of the High Court when handling election petitions is not limited to inquiring into the validity of the election. The High Court has powers to inquire into questions of numerical nature like tallying of results and declaring the winner. On the other hand, I wish to reaffirm that before the filing of a petition in court, the returning officers and the Chief Magistrate under sections 53 and 55 of the PEA respectively, have the powers of tallying results and declaring the winner in an election. This is to say, the original jurisdiction on that regard lies with those said offices and court, respectively.

In the case of **Byanyima Winnie –Vs- Ngoma Ngime, Civil application No. 9 of 2001,** my brother Judge, Hon. Mr. Justice Musoke Kibuka held that:-

> *"By looking at the Act as a whole it becomes crystal clear that once a candidate takes up his/her seat in Parliament, the only valid question which arises at that point in relation to his election and which may require determination is:- was the member of Parliament validly elected? The question at this stage of the process is no longer who is the winning candidate?. The latter is the question of a recount under section 55 (1) of the PEA is intended to answer."*

I have looked at the petition and its supportive affidavits and I note that the petitioner's pleadings reveal that the question he is seeking court to answer is who is the winning candidate?. This matter was dealt with in the Chief Magistrate of Moyo.

Therefore, for the petitioner to have brought the same question in this petition which was already answered by the Chief Magistrate pursuant to section 55 of the PEA does not confer upon him a cause of action. The High Court's jurisdiction in this petition is barred by the doctrine of res judicata. And since, by virtue of the said doctrine, the petitioner was barred from filing such matters in a different way in a form of a petition, the petitioner has no right which has been violated by the respondents.

I further, make a finding that the Parliamentary Election process is by its nature a progressive one which should have been observed by both parties. In the case of **BYANYIMA WINNIE –VS- NGOMA NGIME (supra**) at page 7 of the judgment, it was held that:-

> *"From the context in which section 56 (now section 55) exists, it is clear that the Parliamentary Election process is a progressive one. The Act contains clearly marked and self-contained segments of the electoral process. The context also reveals that the electoral process does not move along a dual track. Nor does it go forward and backwards. It is clear that it moves in a single direction and along a single track. Once one segment is completed, the process moves on to another segment. Those segments or sets of election activities, e.g. nomination of candidates, campaigning, voting, counting of votes and announcing of the results and election petitions, are all well demarcated by the law. Indeed each segment is contained in a well numbered and different part of the Act. It is clear that none of them flows into the other. The law does not provide for overlapping. There*

will for instance, be no official campaigning until the nomination of candidates is over. There will be no counting of votes until the voting period is over. There will be no declaration or the gazetting of the name of the winning candidate by the electoral commission until the vote counting process is over in the particular constituency of the particular Member of Parliament. That I think is a singular characteristic of the electoral laws of Uganda."

I hold the same view. Going by this quoted decision, the petition is asking this court to answer the question which fall under Part 9 of the Act and which was legally handled by the Chief Magistrate's Court of Moyo. It is the submission by counsel for the petitioner that there is no provision in the law that allows the petitioner to have appealed against the decision of the Chief Magistrate of Moyo. That on such, the petitioner cannot be locked out from accessing justice through this petition in the High Court. When a party is aggrieved with the decision of the Chief Magistrate's Court on the issues emphasized under Section 55 of the PEA, such party ought to seek a remedy in the High Court through a revision. Counsel for the petitioner submitted that the decision of the Chief Magistrate's Court is erroneous in law. Yet he never applied for an order of revision under section 83 of the Civil Procedure Act for the decision of the said Chief Magistrate to be revised. The petitioner stands to blame. He should not blame that oversight to any person. As a former Member of Parliament he is presumed to be knowing the law.

Consequent to the above, the power of the petitioner to have applied for the revision of the Chief Magistrate's decision in the application for a recount is settled in the judgment of **Byanyima Winnie –Vs- Ngoma Ngime (supra)** on page 13 on the 10th line from the top, where it was held that:-

"An order made by the Chief Magistrate in an application for a recount which has been without jurisdiction is subject to revision by invoking

the supervisionary0 jurisdiction of the High Court under section 83 of the civil procedure Act."

Therefore, the contention by counsel for the petitioner that the petitioner had no remedy when his application for a recount before the Chief Magistrate was dismissed is not true. In any case, in the case of **Cheborion Barishaki –Vs- A.G** (supra) on page 8 of the judgment, it was held that:-

"The parties in the subsequent suit (as is the case now) are estopped from showing that the decision of the judgment in the earlier suit is incorrect."

In the result, for the reasons advanced herein above in this ruling, I hold that the petition in its circumstances and nature of its pleadings does not disclose a cause of action.

All in all, for the reasons given hereinabove and my own analysis, the two (2) preliminary objections have merit and they are accordingly upheld. The two (2) preliminary objections, therefore, dispose of the entire petition. The petition no. 001 of 2011 between the parties is dismissed with costs to the 1st respondent. Costs are denied to the 2nd respondent simply because its counsel did not participate in these proceedings.

Dated at Arua this 2nd day of June, 2011.

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JOSEPH MURANGIRA

JUDGE