[2016] JMSC CIV. 67

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV01099

BETWEEN	**HOMER DAVIS**	**APPLICANT**
AND	**LAURENCE GRANGER**	**FIRST RESPONDENT**
AND	**DERRICK KELLIER**	**SECOND RESPONDENT/INTERESTED PARTY**

Application For Injunction – Magisterial Recount – Whether Judicial Review appropriate – Whether court has jurisdiction – Whether alternate remedy – Costs

Hugh Wildman, Barbara Hines and Tricia Griffith for Applicant

K D Knight, Q.C., Seymour Stewart instructed by A. Don Foote for Second Respondent / Interested Party.

Heard: **12th March, 2016**

BATTS, J.

[1] On Saturday the 12th March, 2016 I dismissed this application and made no order as to costs. I promised then to put my reasons in writing. This judgment is the fulfilment of that promise.

[2] The Applicant filed a document entitled "Ex Parte Notice of Application for Court Order for an Injunction Prohibition and or Stay of the Magisterial Recount of the Ballots for the Constituency of Southern St. James." The Application is

supported by an affidavit sworn to by the Applicant on the 11th March 2016. The Application and the Affidavit were filed in the Supreme Court on the 12th March 2016. The Applicant was one of the four candidates in the constituency of southern St James who contested general elections on February 25, 2016. He asserts in his affidavit that at the close of the polls both a preliminary and a final count were conducted. He objected during these counts because some 28 ballots were torn off at the top thus removing information containing the place for the signature of the presiding officer along with the date of the election. The votes were counted and his objections duly noted. The Returning Officer took no evidence to account for the mutilation of the ballots. The count revealed that Mr. Derrick Kellier obtained 6,236 votes and the Applicant 6,124 votes.

[3] The Applicant says he then applied for a magisterial recount pursuant to section 47 of the Representation of the Peoples Act. That recount convened on Wednesday 9th March 2016 in the Cambridge Resident Magistrates Court. The First Respondent is the presiding Magistrate. The Applicant states that his attorneys took objection on the 10th March 2016 to the counting of the above described mutilated ballots. The First Respondent expressed concern but decided that she was precluded by judicial decision, from calling evidence at that stage because the returning officer had not done so. The First Respondent adjourned for early lunch but on the resumption ruled that she was going to count the impugned ballots. It is the contention of the Applicant that the First Respondent committed a jurisdictional error as she acted in breach of Section 47 of the Representation of the Peoples Act. The Applicant therefore approaches this court for a Declaration to that effect and/or an Order of Prohibition or Injunction to stop the recount until the matter is determined.

[4] I enquired of Mr. Hugh Wildman, the Applicant's counsel, whether the First Respondent had been served and he answered in the affirmative. Indeed he said he was present and saw the bailiff effect personal service. He conceded that an unsealed copy of process had been served as the documents had not been filed at the time of service. Indeed they were only filed on the morning of the

hearing before me. He said that he had been instructed to serve an unsealed copy by the Registrar. There was no answer from the First Respondent when called nor did anyone attend on her behalf. Mr. K D. Knight QC indicated that he and his colleagues were present in chambers because of a report, heard on television news, that an application to stop the recount would be heard in the Supreme Court. His client is Mr. Derrick Kellier the candidate who had garnered the greater number of votes. He therefore sought leave to intervene and to be added as a respondent. Mr. Wildman said he had no objection. I granted the application and added Mr. Derrick Kellier as a 2nd Respondent to the application.

[5] Mr. Knight QC requested, and was provided by the Applicants with, a copy of the application and affidavits. I allowed him 30 minutes to consider the documents. On the resumption, he indicated he had some preliminary objections. The objections taken were such that they invited submissions in reply which articulated the substance of the applications. In summary, and I hope I do his submissions no injustice, Queens Counsel urged that :

a) no claim form had been filed, pursuant to Rule 8 (1)(1)

b) An undertaking to file one could only be granted pursuant to Rule 17(2) by a specified date.

c) An injunction should only be granted prior to the filing of a claim if it was urgent and in the interest of justice so to do.

d) In this case no valid undertaking to file a claim can be given as no claim capable of success can be filed. This is because the law provides an alternative and appropriate remedy as it relates to the questioning of election results. The Magisterial recount may only challenged by an election petition.

e) Such a challenge in any event ought not to be mounted until there is certainty as to the result of the recount.

f) An undertaking as to damages is required and none has been offered on affidavit or in the application.

g) There is no serious issue to be tried because the application is premature as the recount is incomplete. Further the issue whether certain ballots may be counted or not is one for the election court and the statutorily established procedure.

[6] Mr. Wildman responded comprehensively. As is to be expected he endeavoured to demonstrate the strength of his case and the real prospects of success. In doing so he stated categorically that he was not making an application for Judicial Review. His remedy he says was for a Declaration. He was prepared to undertake to file the Fixed Date Claim. He said when the magistrate counted papers which were not ballots she acted outside her jurisdiction. Counting ballots which had been mutilated in the manner described was to count papers which were not ballots. This was so because no evidence had been taken, and could not now be taken, to determine if the mutilated papers were valid ballots. The First Respondent had breached sections 47 and 48 of the Representation of the Peoples Act and this court should intervene to correct her error. Mr. Wildman relied upon the authorities of ***Barrington Gray v Resident Magistrate for the parish of Hanover*** **et al Application No**. **148/07 in the Court of Appeal Unreported Judgment dated 23 November 2007*; R v The Resident Magistrate for the parish of St. Andrew ex parte Owen Stephenson (1980) 17JLR264*** *and* ***Wybrow v Chief Electoral Officer [1980] 1 NZLR147.***

[7] I indicated to Mr. Wildman that insofar as his application sought public Order remedies against an inferior tribunal he was making an application for Judicial Review and in my view Rule 56 applied. This is clear even from the authority of **Barrington Gray** (above). Neither the Civil Procedure Rules nor the equivalent provisions to what is now Rule 56 had been enacted in 1980 when the **Owen Stephenson** case was decided. In that case the full court heard the matter as

one of urgency on a Motion filed. No issue appears to have been taken with the procedure see page 267 letter I of the report. In the New Zealand case it was an application for a Declaration made pursuant to a Special Statutory provision that is, the Declaratory Judgments Act. Mr. Wildman was unable to point to an equivalent statutory provision in Jamaica. I indicated to Mr. Wildman that I was prepared, subject to hearing submissions from Mr. Knight, to treat his application as an application for leave to apply for Judicial Review. If the only relief claimed was a Declaration, no leave would be required but no injunction could be granted. However if he sought an injunction prohibition or certiorari and did not wish the application treated as an application for leave then I would be dismissing the application. In my view, and I restate it here, Rule 56 of the Civil Procedure Rules establishes a comprehensive and mandatory procedure for obtaining judicial review i.e. public order remedies. The reason for requiring permission to apply for judicial review is to ensure that frivolous or unnecessary applications do not interrupt the administration of the state.

[8] Mr. Wildman wisely elected to apply to have his application treated as an application for leave to apply for judicial review. At this juncture, Mr. Knight applied for an early lunch break so as to allow him time to consider the implications of this and so he could refresh himself. It was approximately 12:30pm and I acceded to the request. Mr. Wildman indicated that he received information that the Resident Magistrate was continuing the recount. He asked me to Order a stay or injunction until we resumed at 1:30 p.m. I refused on the basis that having heard his submissions thus far I was not satisfied that his claim had a real prospect of success.

[9] The hearing resumed at 1:30 p.m. Mr. Knight indicated that one of his juniors, Mr. Foote, would be making certain submissions. These related to the form of the affidavit that is the full name of the witness was not stated and relevant information was not on the top right or anywhere in the affidavit contrary to Rule 30(4)(d). I indicated that in my view and notwithstanding the well articulated submissions, form ought not to defeat the substance of the application. In the

absence of demonstrable prejudice, I would pursuant to Rule 26 allow the matter to proceed and if necessary direct the Claimant's attorney to undertake to file an affidavit in the appropriate form.

[10] Mr. Knight also said that information had come to his attention that the Resident Magistrate had completed the recount and that therefore pursuing the application was now futile. I indicated that I would be continuing to hear the application because there were still relevant remedies such as Certiorari, which might issue, and indeed a Declaration might still be relevant if only to guide future conduct.

[11] In submissions opposing the application for leave to apply for judicial review Mr. Knight submitted that the Magistrate had a statutory jurisdiction to review the count of the presiding officer. One may disagree with the Magistrate's decision to count the damaged ballots but such disagreement does not give a basis for judicial review. An election petition allows one to question these matters. He submitted that at the petition evidence can be taken as to the circumstances under which the ballots were damaged. The issue there will be whether the election was conducted according to law and whether any irregularities affected the result. In order for leave to be granted there must be no alternative remedy and this was manifestly not so in this case.

[12] I acceded to Mr. Wildman's request and decided to treat the application as if it were an application for leave to apply for Judicial Review. Having heard his submissions thus far, I indicated two concerns and gave Mr. Wildman a further opportunity to satisfy me that:

a) The learned Magistrate acted outside her jurisdiction

b) That leave should be granted although there was an alternate remedy.

[13] Mr. Wildman made a valiant effort in further submissions. These really were a more vigorous repeat of what he had earlier stated. The jurisdiction of the Magistrate, he said, was to count ballots and a mutilated ballot was not a ballot.

Furthermore an election petition was a special jurisdiction. It was not an alternate remedy in the context of this application as it could not stop the recount or prevent an excess of jurisdiction.

[14] I refused the application for permission to apply for Judicial Review. In the first place, I am not at all satisfied, as Mr. Wildman submitted that ex facie there had been a breach of jurisdiction such as to allow for judicial review. On the contrary, it seems to me that the learned Magistrate acted within the powers granted. A decided authority precluded her taking evidence where the Returning Officer had not already done so. It was therefore for her to decide on the material before her whether the ballots were to be counted. The Representation of the People's Act does not say such ballots are not to be counted. The reason for that is clear. In this case for example, it may well be that the Returning Officer was satisfied that it was a clerical error which resulted in these ballots being torn at the wrong end. Indeed, it may be that the Returning Officer herself observed this and therefore had no need to call evidence. There is no suggestion of a crowd invasion or of the area of the poll being otherwise disrupted. It may be that the Returning Officer was satisfied that the ballots were genuine and the intent of the elector clear. These are all matters that an election court hearing a Petition could enquire into. They are not appropriate for judicial review. In deciding to count the ballots there is no credible case that can be mounted that the Resident Magistrate exceeded her jurisdiction and therefore to invite judicial review.

[15] The second and perhaps more important reason I exercised my discretion to dismiss the application had to do with the availability of relevant alternative remedies. The Representation of the People's Act establishes a statutory framework for the conduct of elections and the challenge to those results. Except for the most exceptional circumstances, it is in the public interest that that procedure be abided. The question, which the Applicant seeks to have answered, that is, whether the Resident Magistrate erred in counting the damaged ballots, is best left to an election court. That court will operate within certain time lines and a statutory matrix designed to facilitate a certain and

hopefully speedy result. The public interest cannot be served if recounts are to be stopped or interrupted by judicial action each time an elector or a candidate finds a fault. This is because the matter of selecting a government by ballot must be clear, quick and decisive. The Representation of the Peoples Act contemplates that an election court can investigate such matters even after a count and after a candidate is declared a winner. The administration of the affairs of the state is not to be held in limbo, as may be the case, if judicial review applications of this nature were permitted.

[16] This case is to be distinguished from R **v Resident Magistrate ex parte Stephenson** (above) in which an urgent Motion for Prohibition was brought to challenge a decision by the Magistrate to call evidence at a recount. The basis of the decision to intervene was admirably summarised by Parnell J in the Full Court at page 270 of the report,

> ***"Parliament, in its wisdom, has delimited the power of a Resident Magistrate to call witnesses at a recount. If this were not done, then there would be the opportunity to invite the Resident Magistrate with an acceptance of the entreaty – to probe areas, make rulings and otherwise to intermeddle in questions which are to be argued in and determined by an election court. Where such a hazard rears its head – as shown in this case – the duty of this court is to put a stop to the threatened intrusion."***

In that case there was evidence that there were missing ballots, gunmen had invaded the polling station and "polled" votes, and there had been tampering with ballots. The returning officer had not, prior to the recount, called evidence. The Full Court held that the statute gave the Resident Magistrate no power to call evidence at a recount in such circumstances. Prohibition was therefore granted. The court be it noted was very guarded in its comments as an election petition had been filed and it did not wish to prejudice any future determinations on the matter. The decision of the Full Court was therefore made in exceptional

circumstances to prevent the Resident Magistrate doing something the statute said he could not. In a way, the case before me is the converse. The Resident Magistrate has, in accordance with the Full Court's decision, decided not to call evidence on the recount and to proceed with the count. Mr. Wildman wishes us to stop the recount and intervene to instruct the Resident Magistrate not to count these ballots. We should do so, notwithstanding that there has been no evidence to determine the circumstances under which the ballots were damaged, whether they are genuine ballots and whether the true intent of the elector can be determined. This I believe is the precise role and preserve of the election court particularly as here, the returning officer did not think it necessary or desirable to call evidence before counting these ballots.

[17] In the result and for the reasons stated I dismissed the application. I refused Mr. Knight's application for costs and decided to abide the general rule that costs should not be awarded against an unsuccessful Claimant in Judicial Review proceedings (Rule 56.15(5)). In my view, it was not unreasonable for the Claimant to apply given the authorities cited and the short time available for sober consideration and reflection.

David Batts
Puisne Judge
26th April 2016.