THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 093 OF 2021

KALIBBALA HERBERT :: APPLICANT

VERSUS

THE ELECTORAL COMMISSION :::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] The Applicant brought this application by Notice of Motion under Articles 2(1), 28, 38, 42 and 44 of the Constitution of the Republic of Uganda, Sections 33, 36 and 38 of the Judicature Act as amended, Rules 3, 3A, 4, 5, 6, 7, & 8 of the Judicature (Judicial Review) Rules, 2009 as amended and Order 6 rules 1-5 of the Civil Procedure Rules seeking the following reliefs;

a) A declaration that the Respondent's decision and actions of nullifying, eliminating and failure to return the Applicant as a duly nominated candidate for the post of Directly Elected Councillor for LC111 – Nakasero IV Electoral Area, Central Division, Kampala Capital City Authority, on the ballot paper on the election day, 25th January 2021, were illegal, unreasonable and procedurally improper.
b) A declaration that the Respondent is liable to refund all the fees charged from the Applicant as a candidate and compensation for all the costs incurred throughout the campaigns and on election day.
c) An order for payment and compensation of UGX 180,000,000/= for the Applicant's legitimate expectations.
d) An order for award of UGX 68,000,000/= as damages being all the fees collected from the Applicant as a candidate and for payment of all costs

incurred by the Applicant throughout the campaigns and on election day.

e) An order for general, exemplary and aggravated damages.
f) An order for payment of the costs of the application.

[2] The grounds upon which the application is based are summarized in the Notice of Motion and also set out in the affidavit in support sworn in support of the application by **Kalibbala Herbert**, the Applicant. Briefly, the grounds are that the Applicant, being sponsored by the National Unity Platform (NUP), was on 23rd September 2020 duly nominated by the Respondent as a candidate for the post of Directly Elected Councillor LC 111-Nakasero IV Electoral Area Central Division, Kampala Capital City Authority. On 25th January 2021, the day the elections were held, the name and photograph of the Applicant did not appear on the ballot paper throughout the electoral area. The Applicant immediately complained through his lawyers to the Chairperson of the Respondent who ignored the complaint and went ahead to hold the elections thereby eliminating the Applicant's participation in the said elections. The Applicant later on 1st February 2021 wrote another complaint to the Chairperson of the Respondent but it was also ignored. The Applicant avers that the Respondent's actions contravened the provisions of the Local Government Act and Constitution of the Republic of Uganda, affected his legitimate expectations, amounted to negligence and breach of duty. He concluded that it is fair and equitable that the Court allows the application and grants the remedies sought.

[3] The Respondent opposed the application through an affidavit in reply deposed by **Doreen Musiime** who was the Assistant Returning Officer/Election Administrator in charge of Kampala Central Division. She stated that the she nominated the Applicant on 23rd September 2020 upon presentation of nomination papers allegedly endorsed by the Registrar of the National Unity

Platform (NUP) Party. On 27th October 2020, the National Unity Platform Party communicated to the Respondent's Chairperson confirming that the Applicant's endorsement for the party's flag bearer had been obtained through fraud. The Applicant was then substituted with Nabiryo Winnie who the party confirmed to be its flag bearer by way of the clarification from the NUP Secretary General and upon a complaint by Nabiryo Winnie. The deponent concluded that the Applicant's endorsement for the party's sponsorship, which was the basis of the Applicant's cause, was tainted with illegalities and was thus null and void, and as such, the Applicant is not entitled to the remedies sought.

Representation and Hearing

[4] At the hearing, the Applicant was represented by **Mr. Kakande Kenneth Paul** and **Ms. Lydia Nakyejwe** from M/S Alaka & Co. Advocates while the Respondent was represented by **Mr. Lugolobi Hamidu** from the Legal Department of the Respondent. It was agreed that the hearing proceeds by way of written submissions which were duly filed by both counsel. I have taken the submissions into consideration in the course of determination of this matter.

Issues for Determination by the Court

[5] Three issues were raised for determination by the Court, namely;

a) **Whether the application is competent before the court?**
b) **Whether the impugned decision and actions of the Respondent were illegal, irrational or procedurally improper?**
c) **What remedies are available to the parties?**

Resolution of the Issues

Issue 1: Whether the application is competent before the Court?

Submissions by Counsel for the Respondent

[6] It was submitted for the Respondent that the present application for judicial review is improperly before the Court for reason that before bringing the application, the Applicant did not satisfy the requirement of exhaustion of existing remedies available within the public body or under the law. Counsel submitted that the Applicant ought to have exercised the remedy provided for under Section 15(2) and (3) of the Electoral Commission Act by lodging a pre-polling complaint and, if not satisfied by the decision of the Commission, would have appealed to the High Court instead of lodging an application for judicial review. Counsel submitted that the alleged complaint of 25th January 2021 (annexure G) made through Nsibambi & Nsibambi Advocates does not bear an acknowledgement of receipt by the Respondent and the only complaint was the one lodged on 1st February 2021 after the elections. Counsel submitted that there is no indication that the Applicant followed the required procedure before coming to this court.

[7] The second allegation of incompetence of the application raised by the Respondent's Counsel is that the proceedings are an abuse of process as the Applicant's claim is based on fraud and untruths. Counsel for the Respondent submitted that the Applicant's claim is tainted with illegality and is founded on fraud. Counsel relied on paragraph 10 of the affidavit in reply to the effect that the Respondent's decision to substitute Nabiryo Winnie as the flag bearer of the National Unity Platform was on the strength of a letter from the Secretary General of NUP confirming that the Applicant had obtained the party flag fraudulently and illegally.

Submissions by Counsel for the Applicant

[8] In reply, Counsel for the Applicant submitted (in the submissions in rejoinder) that the procedure set out under Section 15 of the Electoral Commission Act is available to parties that have been heard by the Commission whereupon a dissatisfied party may exercise their right to appeal

to the High Court; which was not the case in the present matter. Counsel submitted that in the present case, the Applicant learnt of the decision at the tail end of the electoral process. Counsel stated that the communication about the Respondent's decision was informal by word of mouth by the Respondent's spokesperson on the day of voting and the Applicant made a formal complaint to the Respondent through his lawyer's M/s Nsibambi & Nsibambi Advocates which the Respondent never responded to. Counsel further submitted that the Applicant's complaint herein is not about the outcome of the tribunal's decision but the procedure taken by the tribunal to conduct a hearing without affording the Applicant a right to be heard.

[9] On the second preliminary point, Counsel for the Applicant submitted that an allegation of fraud needs to be fully and carefully inquired into and must be attributable directly or by implication to the person complaining. Counsel relied on the cases of *Fredrick Zabwe v Orient Bank Ltd SCCA No. 4 of 2006* and *Kampala Bottlers Ltd v Damanico (U) Ltd SCCA No. 22 of 1992*. Counsel concluded that in the present case, there was no sufficient ground for the Respondent to rely on fraud when making their decision, moreover without affording the Applicant a hearing.

Determination by the Court

[10] Counsel for the Respondent raised two preliminary points of objection under this issue, namely; that the application is incompetent for failure by the Applicant to exhaust existing remedies under the law and, secondly, that the application was brought in abuse of the court process. I will deal with the preliminary points under separate heads.

Failure by the Applicant to exhaust existing remedies under the law

[11] Rule 7A(1)(b) of the Judicature (Judicial Review) (Amendment) Rules, No. 32 of 2019 provides that one of the factors to be considered by the court when

dealing with an application for judicial review is that *"the aggrieved person has exhausted the existing remedies available within the public body or under the law"*.

[12] In the present case, Counsel for the Respondent cited the provisions under Article 61(f) of the Constitution and Section 15 of the Electoral Commission Act which availed to the Applicant an option to lodge a complaint in writing with the Respondent and, if dissatisfied with the decision, appeal to the High Court. The relevant part of Section 15 of the Electoral Commission Act Cap 140 states as follows;

> *"Power of the commission to resolve complaints; appeals*
>
> *(1) Any complaint submitted in writing alleging any irregularity with any aspect of the electoral process at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided by the commission; and where the irregularity is confirmed, the commission shall take necessary action to correct the irregularity and any effects it may have caused.*
>
> *(2) An appeal shall lie to the High Court against a decision of the commission confirming or rejecting the existence of an irregularity.*
>
> *(3) The appeal shall be made by way of a petition, supported by affidavits of evidence, which shall clearly specify the declaration that the High Court is being requested to make.*
>
> *(4) On hearing a petition under subsection (2), the High Court may make such order as it thinks fit, and its decision shall be final.*
>
> *(5) The High Court shall proceed to hear and determine an appeal under this section as expeditiously as possible and may, for that purpose, suspend any other matter before it."*

[13] The position of the law is that where there exists an alternative remedy through statutory law or any procedures within the public body, then it is desirable that the alternative remedy should be pursued first. As such, the alternative remedy ought to be legally provided for and as or more effective

than judicial review. See: *Leads Insurance Company Ltd v Insurance Regulatory Authority, CACA No. 237 of 2015*. It is also a well-known principle of the law that judicial review is a remedy of last resort. Where alternative remedies exist, they ought to be exhausted first unless, exceptionally, such alternative remedies are ineffective or inappropriate to address the substance of the complaint in issue. Where an appeal process exists within the administrative body, an aggrieved party must exhaust the appeal process before filing an application for judicial review. See: *Mujuni Nicodemus & 3 Others v Umeme HCMA No. 0056 of 2015*.

[14] In *Leads Insurance Limited v Insurance Regulatory Authority & Another CACA No. 237 of 2015,* the Court of Appeal approved the statement of the law by the Learned Trial Judge where he had stated thus: "*The remedy by way of judicial review is not available where an alternative remedy exists. This is a preposition of great importance. Judicial review is a collateral challenge; it is not an appeal. Where Parliament has provided by statute appeal procedures, it will only be very rarely that the court will allow the collateral process of judicial review to be used to attack an appealable decision.''*

[15] On the matter before me, Article 61(f) of the Constitution of Uganda mandates the Electoral Commission (the Respondent) "to hear and determine election complaints arising before and during polling". Section 15(1) of the Electoral Commission Act provides that *"Any complaint submitted in writing alleging any irregularity with any aspect of the electoral process at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided by the commission; and where the irregularity is confirmed, the commission shall take necessary action to correct the irregularity and any effects it may have caused"*. Under Section 15(2) of the Electoral Commission Act, a party dissatisfied with the decision of the Electoral Commission has an option to appeal to the High Court.

[16] In this case, it is claimed by the Applicant that he only got to learn of the decision nullifying his nomination on the day of voting. He then wrote a letter through his lawyers of M/s Nsibambi & Nsibambi Advocates dated 25th January 2021 that is attached to his affidavit in support of the application as Annexure "G". This evidence is controverted by the Respondent who states that the alleged complaint by way of the said letter was never received by the Respondent which is evidenced by the fact that the said letter bears no evidence of acknowledgement of receipt. Incidentally, the Applicant led no evidence challenging this rebuttal by the Respondent either by way of an affidavit in rejoinder or otherwise. Indeed, the letter (Annexure G) bears no evidence of acknowledgment of receipt of the complaint by the Respondent. In view of the clear rebuttal by the Respondent, I find no evidence to prove that the Applicant ever lodged any complaint with the Respondent as provided for under Article 61(f) and Section 15 of the Electoral Commission Act.

[17] It is clear that the complaint by the Applicant falls within the ambit of complaints arising "before and during polling". It was thus one of those complaints that had to be lodged with the Commission under the law. Failure to file the complaint as required under the law constituted a failure by the Applicant to exhaust an existing remedy under the law; having the consequence of making any action in judicial review, such as this, premature and incompetent before the court. It ought to be noted that the provisions in issue are of the Constitution and an Act of Parliament. They thus cannot be otherwise subjected to any exercise of discretion or the general inherent powers of the court.

[18] In the case of *Ssemakula William George v Electoral Commission, HCMC No. 94 of 2021 [Per Odoki Phillip J],* the court was faced with almost similar facts on all aspects except one, being that in that case, there was evidence that the

applicant had lodged a complaint with the Electoral Commission and the latter had neither considered the complaint nor made any decision over the same. As such, there was no decision against which the applicant could have appealed. The Court found, therefore, that the applicant had exhausted the available remedy in the circumstances. In the present case, there is no evidence that the Applicant filed a complaint as required under the law. The Court cannot, therefore, arrive at the same finding as was in the above cited case.

[19] On the above premises, therefore, since non-exhaustion of existing remedies is a complete bar to an application for judicial review, the inevitable conclusion is that the application before the Court is incompetent on account of having been brought prematurely. The other matters raised thus only remain academic and I find no value in taking that academic voyage. I accordingly strike out this application.

[20] Regarding costs, the law under Section 27 of the CPA is that costs follow the event unless, for good cause, the court decides otherwise. In this case, the facts indicate that the Respondent was not innocent either in the entire set of circumstances. While the Respondent made a decision nullifying the Applicant's nomination in October 2020, the decision was never communicated to the Applicant until he found out the same by the fact of the absence of his name and other particulars on the ballot box on 25th January 2021. To my mind, this has a contribution towards the decision taken by the Applicant in bringing this action. If the decision had been communicated in time, the Applicant would have exercised better judgment before instituting this application. For that reason, I will order that each party bears their own costs of the application.

It is so ordered.

Dated, signed and delivered by email this 4th day of January, 2024.

Boniface Wamala
JUDGE

Application of the Slip Rule

Court: In accordance with the provision under Section 99 of the Civil Procedure Act Cap 71, a clerical error in this Ruling delivered on 4th January 2024 is hereby corrected. The error was the omission of the court case reference number in the title of the Ruling. The case reference, to wit **"Miscellaneous Cause No. 093 of 2021"**, is hereby included. Let the corrected copy be circulated accordingly.

Dated and signed this 15th day of January, 2024.

Boniface Wamala
JUDGE