

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
CIVIL SUIT NO. 006 OF 2021

ISINGOMA WILSON MUGIMBA ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. THE ELECTORAL COMMISSION

2. BYARUHANGA COSMAS ::::::::::::::::::::::::::::::::::: DEFENDANTS

RULING

BEFORE: HON. JUSTICE ALEX MACKAY AJIJI

The Plaintiff, **Isingoma Wilson Mugimba** instituted this matter against the Defendants, **The Electoral Commission** and **Byaruhanga Cosmas** seeking the following reliefs: -

- a) An order declaring the actions and decision of the 1st defendant contemptuous;
- b) An order declaring that the nomination and subsequent election of the 2nd defendant as the NRM Flag bearer for LC5 Chairperson Masindi District was null and void;
- c) An order declaring the whole process of the election of the election null and void;
- d) An order directing the 1st defendant to pay special damages;
- e) An order for general damages;
- f) Interest;
- g) Costs of the suit.

Background

The brief facts forming the background to this matter are that, the Plaintiff together with the 2nd Defendant contested to be flag bearer of the National Resistance Movement (hereinafter referred to as "NRM") party in the party primaries for the position of LC5 Chairperson Masindi District.

After the election, the returning officer declared the 2nd Defendant as the winner and the duly elected NRM flag bearer having polled the highest number of votes of 24,744 representing 54.44 percent against the Plaintiff's 20,708 representing 45.6 percent. The Plaintiff being dissatisfied with the decision of the returning officer in declaring the 2nd Defendant as the NRM flag bearer for LC5 Masindi District, petitioned the NRM Elections Dispute Tribunal challenging the outcome of the election.

The NRM Elections Dispute Tribunal heard the Petition inter-party and declared the Plaintiff (Isingoma Wilson Mugimba) as the NRM flag bearer for LC5 Masindi District. The NRM Election Commission thereafter forwarded the name of the Plaintiff to the NRM Secretary General as the duly elected party flag bearer.

Aggrieved by the decision of the NRM Elections Dispute Tribunal, the 2nd Defendant filed an application for Judicial Review at the High Court in Masindi vide HCMC NO.14 of 2020 against the NRM Elections Dispute Tribunal and the Plaintiff. At the same time, the 2nd Defendant successfully sought an interim order stopping the nomination of the Plaintiff as the NRM flag bearer which order was later vacated.

Meanwhile, the 1st Defendant nominated the 2nd Defendant as the NRM flag bear while the Plaintiff sought nomination as an independent.

The Plaintiff lodged a complaint to the 1st Defendant on their decision to nominate the 2nd Defendant as the NRM flag bearer contrary to the decision of the NRM Elections Dispute Tribunal and the NRM Electoral Commission. The 1st Defendant invited both parties for hearing of the complaint and advised them to await the decision of the Court in Misc. Cause No.14 of 2020. The Court subsequently heard the application for Judicial review and dismissed it.

It is gainful to restate here that the Plaintiff and the 2nd Defendant proceeded to take part in the general elections of LC5 Chairperson Masindi district organized by the 1st Defendant where the 2nd Defendant emerged winner. Aggrieved by the outcome of that election, the Plaintiff filed the instant suit seeking for the orders stated above.

Representation

The Plaintiff was jointly represented by Counsel Caleb Amany and Denise Atwijukire from M/s Pace Advocates and M/s MACB Advocates, the 1st Defendant was represented by Counsel John

Paul Baigana and the 2nd Defendant was represented by Counsel Simon Kasangaki of M/s Kasangaki & Co. Advocates.

When the matter came up for scheduling, the Defendants indicated to Court that they intended to raise preliminary objections to the effect that; -

1. The suit is disguised as an election petition;
2. The suit was overtaken by events;
3. The suit is premature.

On the 23rd of August 2021, when the matter came up for hearing Counsel Atwijuke Denis submitted that they had filed a civil suit against the Defendants that sought damages arising out of the contempt of a Court order and that this Court had categorized it as an election petition which in their opinion was a mistake to have been categorized as such.

That following the guidance of this Court, they had a meeting with the Plaintiff and they came into a consensus to withdraw this suit against the 1st and 2nd Defendants since this Court is handling election petitions and the matter before this Court is not an election petition.

Counsel therefore prayed that Court grants the Plaintiff leave and be pleased to allow them withdraw this suit under Order 25 of the Civil Procedure Rules SI 71-1 with no order as to costs against the Plaintiff.

In reply counsel Gertrude Nabwire submitted that she had no objection if counsel had decided to withdraw the suit however, she prayed that it is done with costs to the 2nd Defendant since he has incurred costs to pay them.

Decision of the Court

I have had the honour of listening to the counsel for the Plaintiff and I have had the prayer for the withdrawal of the suit which has not been objected to by counsel for the defendants save that their prayer is that it be withdrawn with costs.

Black's law Dictionary 9th Edition by Bryan Granar at page 1739 defines the term "Withdraw" to mean "*...taking back something presented, granted, enjoyed, possessed or allowed, to retract, to refrain from proceeding or prosecuting an action or to terminate.*"

Going by the above definition, I note that the Plaintiff has taken the right course of action to withdraw this suit.

This is a matter which was filed by Counsel albeit using the wrong procedure unknown to the regime of election petitions, with due respect to counsel for the Plaintiff and the Plaintiff himself, I find that they saw maturity in their decision to withdraw this suit and I wish to applaud their action.

However, Section 144 (4) of the Local Government Act Cap 243 and the rules therein provide for withdrawal of this kind which should be with costs as follows;

"If a petition is withdrawn, the petitioner shall be liable to pay costs of the respondent."

Therefore, even when the Plaintiff seeks that the withdrawal should not be with costs, for which I know their reference is to Order 25 rules 1(1), (2), (3) and (4) of the Civil Procedure Rules SI 71-1, that provision equally provides that costs must be paid by the party withdrawing the matter unless the matter was raised in chambers.

For the above reason therefore, the withdrawal is allowed but with costs only to the extent of the lawyer's fees to ameliorate the suffering of the 2nd Defendant. Costs in a withdrawn matter are very important even where withdrawal is by consent.

Therefore, the net effect of this withdrawal is that the 2nd Defendant remains the elected LC5 Chairperson of Masindi District and consequently, costs are awarded to the Defendants only to the extent of the lawyers' fees of both Defendants.

By this order the Registrar is directed to forward the withdrawal for gazetting in accordance with section 142 (5)(b) (ii) of the Local Government Act Cap 142.

It is so ordered on this 23rd day of August, 2021.



Alex Mackay Ajiji

JUDGE

