THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

MISC. APPLICATION NO. 108/2010

OBOTH MARKSONS JACOB……..APPLICANT

VERSUS

NATIONAL RESISTANCE MOVEMENT……RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE MUSOTA STEPHEN

RULING

The applicant Oboth Marksons Jacob hereinafter referred to as the applicant through his lawyers M/s Dagira & Co. Advocates filed this application against the National Resistance Movement (NRM) Party, the respondent, for Judicial Review. The application was filed on 27th August 2010. It is by way of a Notice of Motion under Rules 3 and 6 of the Judicature (Judicial Review) Rules 2009, for orders that:

(a) Certiorari does issue to quash the Voters' Register of the Respondent the National Resistance movement for Iyolwa sub-county because it contains non existent members or ghost voters

(b) Prohibition does issue to prohibit the respondent from using the National Resistance Movement (NRM) Voters' Register for Iyolwa sub-county during the NRM parliamentary primaries for West Budama South as currently constituted.

(c) That an injunction does issue against the respondent and/or its servants or agents restraining them from using the inflated NRM members' Voters' Register for Iyolwa sub-county during the NRM primaries.

The general grounds for the application are that:

(I) The NRM Voters' Register was irregularly made contrary to the NRM Constitution and guidelines on registration of members.

(II) The said NRM members' Voters' Register contain names of unknown and non-existent persons.

(III) It is just and convenient for the injunction to be granted.

(IV) Costs of and occasioned by this motion be provided by the respondent or as court may direct.

The Notice of motion is supported by the affidavit of the applicant in which he reiterates the contents of the Notice of Motion. He adds that the NRM party began compiling the register of its members nationwide on 8 February 2010 as per the guidelines to all NRM District chairpersons dated 1st February 2010 (annex 'B' and 'C'). The registration was carried out by agents of the Respondent at each branch or village in "Yellow Books". That when the applicant obtained a copy of the compiled register for West Budama South Constituency he realized that in the said electoral area there were a number of registered non-existent members and fictitious villages and parishes on the register. The applicant mentions six of such parishes and their voter population as:

(a) Papoli parish - 639
(b) Payameri Parish - 252
(c) Poyemi Parish - 2492
(d) Bisoni/Mugaria Parish - 27
(e) Gule Parish - 944 and
(f) Magola Parish - 1232

The voter population in these parishes is given as is indicated in Annex 'D'
The total ghost villages are given as 124.
The applicant further depons that the correct parishes comprising Iyolwa sub-county are four, to wit:

(i) Payem
(ii) Ojilai
(iii) Pabone and
(iv) Iyolwa

That the applicant lodged a complaint to the District Chairperson NRM Tororo and the NRM Secretary General about the irregularities in the registration of the members/Voters of the NRM party in the Constituency particularly Iyolwa sub-county but the situation was not corrected. The applicant annexed the said complaints comprised in letters dated 29 March 2010 and 29th April 2010 annexed as "F" and "G'.

The applicant went ahead to compare the NRM Party Voters' register with that of the National Voters' Register which gives a difference of 13,791 Voters he refers to as fictitious. These registers are marked as Annex 'H' and 'I'.

The respondent, the NRM Party, represented by M/s Kanyunyuzi & Co. Advocates filed an affidavit in reply by a one Kamuduni Amuzata a registered voter of Iyolwa sub-county who stumbled upon this application as he was "going about his business" in the Registry and was forced to respond to what he called falsehoods peddled by the applicant in his supporting affidavit. He filed an affidavit in reply for the respondent on 17th September 2010. This is the affidavit which came under attack in the submissions by learned counsel for the applicant in his written submissions which court allowed parties to file.

Later in time, one Ms. Felistus Magomu the Chairperson NRM Electoral Commission filed a supplementary affidavit in reply. This affidavit was vehemently criticized by the applicant in his preliminary objection urging court to let it crumble with that of Amuzata.

I will deal with the preliminary points of law before I delve into the main application.

This is an application for orders of certiorari and prohibition as indicated in the Notice of Motion.

According to **Halisbury's Laws of England 4 Edition Vol.1, Paragraph 109** which has often been quoted with approval by this court, certiorari lies to bring the decisions of an inferior court, tribunal, public authority or any other body of persons, before the High Court for review so that the court may determine whether they should be quashed or to quash such decisions.

Prohibition is an order issued by the High Court to an inferior court, tribunal, or other public authority which forbids that court, tribunal or authority to act in excess of its jurisdiction or contrary to the law. Whereas certiorari is concerned with decisions in the past, prohibition is concerned with those in the future.

It is important to note that certiorari and prohibition are often sought together. Certiorari is sought to quash the decision and prohibition to restrain its execution. These principles were relied on in ***Wheeler v. Leicester City Council [1985] 2 ALL.ER 1106*** and followed in ***John***

Kashaka Muhanguzi v. Kapchorwa District Council & 2 Ors Mbale HCMA 129 of 2000 Per Rugadya J (Unreported).

These remedies are discretionary. They are issued if it is proved on a balance of probabilities that there was exercise of jurisdiction in excess or where there was lack thereof. They are also issued where there is error of the law on the face of the record or breach of the rules of natural justice or where the decision was procured through fraud, collusion or perjury.

Certiorari and prohibition will ordinarily lie to control administrative decisions of statutory authorities or bodies or persons exercising statutory authority. See ***R. Vs. Electricity Commissioners*** exparte ***London Electricity Joint Committee (1929) Ltd (1924) 1 K.B. 171, 205*** wherein Lord Atkin L.J said,

> "*Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of Kings Bench Division exercised in these writs*." (Read High Court).

If an authority has power to decide any questions affecting the rights of subjects he/she is enjoined to act judicially.

With the above statement of the law in mind, I will go ahead to consider this application as a whole.

I have related the same to the submission by respective counsel and the law applicable beginning as I have stated with the preliminary point of law raised by Mr. Dagira learned counsel for the applicant challenging the competence and *locus standi* of one Kamuduni Amuzata to swear and file an affidavit in reply to the application before me. Amuzata describes himself as a registered voter of Iyolwa sub-county and a member of the respondent who while on private business got wind of this application. He on his own volition filed an affidavit in reply to counter "falsehoods" in the applicant's case.

According to the applicant, the said Amuzata had no authority to swear the said affidavit.

On the other hand learned counsel for the respondent submits that the said deponent had the right to depon to and file an affidavit in reply on behalf of the respondent since he did not swear the affidavit in a representative capacity. That the deponent felt duty bound not only as *amicus*

curae (friend of court) but as an interested respondent's voter to correct falsehoods tendered by the applicant so that court may arrive at a fair decision. Further that all persons are competent witnesses. That under rule 10(1) of the Judicature (Judicial Review) Rules, 2009 any person who desires to be heard can be heard even if he or she is not served.

The law governing appearance in court as enacted under O.3 rr.1 and 2 of the Civil Procedure Rules (CPR) provides that such appearance has to be in person or by a recognized agent or advocate. An agent appears through powers of attorney. I agree with the submission by Mr. Dagira that Mr. Amuzata Kamudini does not fall in any of the categories envisaged under the said law.

Article 1(2) of the NRM Constitution provides that the NRM party is a body corporate registered under S.6(3) of the Political Parties and Organizations Act 18 of 2005.
S.6 (3) enacts that:

> "*A political party or organization registered under this Act shall be a body corporate and shall have perpetual succession and may sue and be sued in its corporate name……*"

Under o.29 r.1 CPR

> "*In a suit by or against a corporation any pleading may be signed on behalf of the corporation by the Secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case*."

Obviously, Amuzata Kamudini is not an officer envisaged under O.29 r.1 CPR since he did not depon to be one of such officers the law makers had in mind.

The NRM Constitution under Article 9 spells out rights and duties of members. None of the (18) eighteen rights and duties of members give any member a right to represent the party in court proceedings.

Learned counsel for the respondent rightly submitted in reference to Amuzata's affidavit that anybody is competent as a witness. But for orderly conduct of litigation parties must have the authority to summon their witnesses. One cannot simply walk into a court room and announces himself as a witness unsolicited. Secondly, *amicus curae* means a friend of court. Therefore

court should be left to choose or approve its friends. To ensure orderly proceedings witnesses must be summoned by parties to the suit or court. Amuzata cannot qualify to be *Amicus curae.*

I therefore agree with the submission by Mr. Dagira that since the affidavit in reply does not show that the deponent had authority to swear the said affidavit on behalf of the respondent, the same will be struck off the record and ignored. As a consequence of this, it would have left the respondent with no affidavit in reply implying that the application would go unchallenged. However when the respondent filed its submissions on 5.10.10, the registry admitted onto the file what is headed "Supplementary affidavit in reply" deponed to by one Felistus Magomu, chairperson of the respondent's Electoral Commission. Ordinarily, this belated affidavit would be rejected outright but in the interest of substantive justice I will take into account its contents since the deponent is recognized by the law and the applicants referred to the said affidavit in their submissions.

I will now deal with the grounds of the application as argued by the applicant and responded to by the respondent.

Ground one:

Whether the NRM Voters'/members' Register for Iyolwa Sub-county Tororo District was irregularly Constituted

The main issue for contention concerning the contested registered is inclusion of what the applicant calls fictitious villages and parishes in what comprises Iyolwa Sub-county. According to the applicant, the correct parishes in Iyolwa sub-county are 4, that is;

(1) Poyem
(2) Ojilai
(3) Pabone, and,
(4) Iyolwa

That the fictitious parishes included in the register are six that is:

(i) Papoli
(ii) Payameri
(iii) Poyemi
(iv) Bison Mugaria
(v) Gule, and

(vi) Magola

According to the applicant, the fictitious parishes contain 124 (one hundred and twenty four) villages. Therefore all the names of persons appearing on the NRM/Member register are none existent or ghost members. The applicant further submits that the NRM party did not follow its guidelines in compiling the register for Iyolwa Sub-county which was procedurally *ultra vires*.

In reply to the above submission learned counsel for the respondent did not precisely counter the discontent by the applicant regarding ghost parishes. He submitted that the applicant relied on the register as if in itself it is a judicial or quasi judicial body capable of convening and making decisions. That a register is not a body of persons having legal authority to determine questions affecting rights of subjects. That the applicant should have directed this application to the decision of the respondent to compile a Register for its members not the register itself.

I have perused over again the submissions by the respondent and the supplementary affidavit and have not come across a viable explanation to counter the major issue of fictitious parishes/villages. This is the borne of contention which ought to be disproved on a balance of probabilities. I was not impressed by the submissions by learned counsel for the respondent which to me appeared like mortars fired from a canon mounted on a canoe sailing on turbulent waters. His submission on this issue is diversionary. The register in issue is an outcome of a process by the respondent through its authorized officers.

The affidavit evidence by the chairperson electoral commission of the NRM does not deny the existence of ghost parishes as stated by the applicant.
In her paragraph 4 of the supplementary affidavit she depons that,

> "*according to the party register as extracted from the "yellow books" the voter population for Iyolwa Sub-county is 13,746 NRM members. The said party register is attached and marked "A*".

I looked at the said annexture comprising a bulky box file containing the names of the registered members. What attracted me most was the letter dated 30th September 2010 addressed to the chairperson NRM Electoral Commission and written by one Owor Jimmy Raymond LC.III Chairperson Iyolwa sub-county. The letter reads in part as follows:-

"…….I am writing to clarify that Iyolwa sub-county has 30 villages and 30 polling stations and recently NRM election was carried out in 30 villages in 4 parishes……."

It goes ahead to list the parishes as Poyem, Ojilai, Iyolwa and Pobone. These are 4 parishes not 10. This letter does not deny or confirm the existence of the additional six parishes.

The supplementary affidavit does not deny that NRM is public body which was putting into operation its statutory functions under S.10 of the Political Parities and Organizations Act 2005 and Articles 71 and 72 of the Constitution. Compilation of a proper register guarantees internal democracy in a political organization and election of party officials and representatives based on universal suffrage. Where this has not been done then the High Court would intervene by way of review.

The respondent argued that for a body to be a subject of a the prerogative order of certiorari it must have exercised judicial or quasi judicial functions i.e. arriving at its decision after hearing evidence but makes an *ultra vires* decision. Learned counsel referred to the decisions in ***Harriet Grace Bamale through her next Friend Kituma Magala v. The Board of Governors of Makerere College School [1993] KALR 10*** and ***Stephen Byaruhanga v. Mbarara Municipal Council (1995) 4 KALR 62.*** Since the coming into force of the 1995 Constitution and the new and progressive rules governing judicial review, the above decisions are no longer good law. Today Judicial Review powers of the high court cover not only judicial or quasi judicial bodies or persons but also administrative decisions and actions of statutory bodies, authorities or persons exercising statutory authority.

In ***Re Bukeni Gyabi Fred HCMA 63/1999 [1999] KALR 921-922***

The NRM is a statutory body which was fulfilling its statutory functions. Therefore its actions, decisions and outcomes are subject to the supervisory role of the High Court and certiorari can lie to quash any of its offending decisions.

Ground 2:

Whether the NRM Register contains names of unknown or non-existent persons

Learned counsel for the applicant answers this ground in the affirmative. On the other hand learned counsel for the respondent answers it in the negative because the applicant relied on uncertified copies of the Register. That it is futile to compare the party register with that of the

national voters register because the party register was less formally done which made it preferable to the cumbersome national registration. That this explains the huge different in the figures for voters in the two registers.

I am least convinced that a statutory body should use informal methods to execute its day to day functions. Informality is unacceptable and a recipe for disaster and abuse. Democracy goes with organization. Whereas I agree that the national register should not with precision tally with a party register, the variance should not be enormous. In this case the figures involved are very big. For example in the six parishes disputed by the applicant, a total of 13359 names appear as registered exclusive of the recognized 4 parishes which constitute Iyolwa sub-county. The respondent therefore took into consideration irrelevant and extraneous matters while compiling the register.

Regarding the complaint by the respondent that the applicant used uncertified copies of the Register, the applicant explained this away in his paragraph 11 of the affidavit in rejoinder. The applicant obtained a soft copy of the NRM register from the Secretariat for the entire West Budama South Constituency after requesting for it from the Secretary General via emails which are annexed as "RJC". This averment has not been disputed in rebuttal. The said soft copy was printed out and photocopied for service onto the respondent. Certification did not arise in the circumstances.

Ground 3

Whether it is just and convenient to issue an injunction

According to learned counsel for the respondent, this remedy cannot issue because the elections took place on 30th August 2010 despite the interim order. That the winner of the election was declared on 9th September 2010. That since the law does not act in vain an injunction would not be granted if it is of no effect. Learned counsel referred to the case of ***Bahemuka v. Anywar [1987] HCB 71*** where court declined to grant an injunction restraining the respondents from entering the suit premises on ground that this would be futile since the respondent were already in the suit premises. That a series of elections have taken place basing on the disputed register including those of sub-county chairpersons and councilors, the District Chairperson and Councillors, District woman member of Parliament, Parish Councillors and village chairpersons etc. That quashing the Register would have the effect of nullifying the said elections since they would have been based on a non-existent register. The respondent's fears went on that the other

political parties competing for the same posts against the candidates would have a field day as there would be no opposition to their bids. That this would disenfranchise over 20,000 voters of the respondent. Paragraph 12 of the Supplementary affidavit in reply echoes this.

On the other hand learned counsel for the applicant argues that this remedy can issue. That the respondent should bear the consequences for ignoring a court order which the respondent contests.

In resolving this ground, I will first deal with the contested legalities of the interim order issued by the learned Registrar. Judicial Review remedy of certiorari, prohibition, mandamus etc are by their nature civil claims. Judicial review proceedings are civil suits governed by both the general law of application i.e. the Civil Procedure Act and the specific law; the Judicature Act Cap.13 Laws of Uganda.

The respondents have not pointed out anywhere in the Judicature Act and the rules which are made there under which prohibits the application of the Civil Procedure Act and Rules made there under to Judicial Review proceedings. In any case Rule 9(3) makes specific reference to Civil Procedure Rules. Under O.50 r. 3 CPR a registrar has powers to deal with preliminary matters including interlocutory applications prior to the trial of a civil matter. The Registrar's interim order was issued pending the hearing of the main application in which a prayer for an injunction was made. Interim remedies are equitable remedies which come in handy to help those in imminent threat of suffering irreparable damage when a judge is not readily available to handle the matter. All parties to disputes need this remedy in deserving cases. Any dissatisfied person can challenge the registrar's order on appeal under O.50 r. 8 CPR. In this case, the registrar's order has never been challenged or vacated.

Going back to the issue of whether an injunction may issue in this matter, I am more persuaded by the submission by the applicant than that of the respondent. The NRM electoral commission was aware that Iyolwa sub-county Register was being challenged in the High Court. They went ahead and conducted the elections despite a standing interim order which had not been vacated.

By doing so, the NRM Electoral Commission acted without jurisdiction. The respondent was bent on circumventing a decision the High Court would come up with. It was held by Rugadya J in ***Muhanguzi Kashaka's case (supra)*** and I agree, that an authority having jurisdiction in the

first place exceeds its jurisdiction if it proceeds to arrogate an authority withheld from it by court.

By going ahead with the primary elections using the disputed Iyolwa sub-county NRM Register the respondent perpetuated a major error of procedure well knowing the matter was before the High Court for determination and an interim order existed. Such a decision was arrived at without jurisdiction.

The respondent cannot be heard to plead that several elections were conducted basing on the said register and that if the register is quashed it will cause hardship to the respondent to conduct re-runs for individuals who are neither parties to this application nor aggrieved by the same. All processes of court took place prior to the elections and the respondent was aware that a higher tribunal had taken charge of the matter. The actions of the respondent were null and void *abi initio.* I will therefore set aside the election results of Iyolwa Sub-county based on the faulty Register as far as they affect the applicant.

In her paragraph 13 the Chairperson NRM Electoral Commission depons that:

> "*I am informed by my lawyers M/s Kanyunyuzi & co. Advocates that the applicant was as a mandatory requirement, supposed to have effected service of this application upon the person I declared winner since he is directly affected but I have talked to Hon. Otaala who denies service ever being effected on him.*"

As I have already held, this application was filed on 27th August 2010. Pleadings went on and hearing was on 29.9.10. Parties to this application had to be determined by the applicant. There is no way that persons who came into picture after the interim order was issued could turn up and claim a right to be party or be heard. They came in after participating in a process that had been stopped by court. By the time court issued the order there was no cause of action against any of such people. They are an outcome of a process done without jurisdiction.

In the passing, I will make comments on other issues raised on by the parties to this application.

(1) The chronology of events prior to the hearing of this application are not as outlined by learned counsel for the respondent. What learned counsel for the applicant stated in rejoinder is the correct position. Both parties were heard..

(2) It is not mandatory that pleadings in judicial review proceedings must be completed within 56 days. For ease of reference, I will reproduce the sub rule which deals with the time of filing proceedings.

"*7 (3) Any respondent who intends to use any affidavit at the hearing shall file it with the Registrar of the High Court* ***AS SOON AS PRACTICAL AND IN ANY EVENT, UNLESS THE COURT OTHERWISE DIRECTS, WITHIN FIFTY SIX DAYS*** *after service upon the respondent of the documents required to be served by sub rule I*".

From the wording of this rule court has authority to direct otherwise like I did, given the nature of the application and the rigid electoral time table.

This rule rhymes with Rule 6(3) and 4 of the Judicature (Judicial Review) Rule 2009 which provides as follows in relation to review of civil or criminal cases before a lower court.

"(*3) Unless court otherwise directed <u>there shall be at least 10 days</u> between the service of the notice of motion and the hearing.*

(4) A motion shall be fixed for hearing within 14 days after service of the Notice of Motion."

Therefore whatever this court did in respect of this application was within the law.

(3) Regarding whether this application was time barred Rule 5(1) of the Judicature (Judicial Review) Rules 2009 provides that an application must be made within 3 months from the date when the grounds of the application first arose. However court still has the right to extend the period within which to file the application if satisfied that there is good reason to do so.

In the instant case, I agree with the applicant that time started running when he first obtained the register complained of on 11th July 2010. This was when the respondent came up with a definite decision to adopt and use the register as its authentic register for Iyolwa sub-county.

For the reasons I have given hereinabove, this application succeeds. An order of certiorari shall issue to quash the Voters' Register for NRM members in Iyolwa sub-county and the decision of

the respondent to use a faulty member's register for Iyolwa sub-county as far as it affects the applicant.

An order of prohibition shall issue to prevent the respondent from using the said register in its present form henceforth.

An injunction is issued against the respondent, its servants or agents from using the register of Iyolwa sub-county in its present form to conduct primaries in the constituency.

The applicant shall get the taxed costs of this application if a negotiated settlement with the respondent fails. I so order.

Musota Stephen

JUDGE

19.10.10

19.10.2010

Applicant in court.

Dagira for Applicant.

Kimono Interpreter.

Respondent and representative absent.

Dagira: The matter is for ruling and we are ready to receive it.

Court: Ruling delivered.

Musota Stephen

JUDGE

19.10.10