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The Republic of Uganda

In The High Court of Uganda at Soroti

Miscellaneous Application No. 101 of 2022

(Arising from Misc. Application No. 100 of 2022)

(Also Arising from Misc. Application No. 99 of 2022)

10

(And Also Arising from Election Petition No. 10 of 2022)

In The Matter of Section 15 (2), (3), (4) & (5) of The Electoral Commissions
Act, Cap. 140

And

15

In The Matter of an Appeal Against the Decision of The Electoral
Commission Dated 12th July 2022 Under CM. Min 134/2022Ref. No.
Leg/75/79/01 - Communicated to The Petitioners On 15th July 2022

And

In The Matter of the Parliamentary Elections held on the 14th Day of
January 2021 for Soroti City, Soroti West Division Constituency

20

And

In The Matter of the Parliamentary By-Elections scheduled to take place on
the 28th day of July 2022 for Soroti City, Soroti East Division Constituency

Enyangu Micheal Etadu

25

Opio Enoch

Ejoku Aaron

Anwango Mary

..... Applicants

Versus

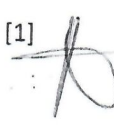
Electoral Commission

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Hon. Ebwalu Jonathan

..... Respondents

[1]





Ruling:

This is an application for a Certificate of Urgency brought under section 98 of The Civil Procedure Act and Rules 3 and 4 of The Judicature (Court Vacation) Rules, seeking orders that a certificate of urgency be issued allowing for the hearing of the Applicants' applications for Interim Injunction, Temporary Injunction and the election petition/appeal during court vacation.

The application is supported by the affidavits of the applicants sworn on 19th and 17th July, 2022 stating the grounds thereof which briefly are that during the 14th January 2021 elections for the directly elected member of parliament for Soroti City, Soroti West Division constituency, the 1st respondent illegally and wrongfully placed the parishes of Aloet and Opilyai in Soroti City West Division constituency instead of Soroti East Division constituency where they rightfully belong.

That this court and the Court of Appeal in two decisions found the 1st respondent's actions illegal and that the two parishes of Aloet and Opilyai be placed in Soroti East Division where they rightfully belong.

That without removing the votes of the voters from Aloet and Opilyai from the declared and gazetted results from Soroti City, West Division where the 1st respondent declared the 2nd respondent winner, the 1st respondent has organized a by-election for the directly elected member of parliament for Soroti City, East Division where the voters from Opilyai and Aloet are slated to participate and vote on 28th of July 2022.

[2]



5 That if the planned election happens without the removal of the votes of the voters from Opilyai and Aloet parishes from the declared and gazetted results it will lead to commission of electoral offences and breach of the constitution, the electoral laws and inevitably amount to contempt of the orders of the various courts of law.

10 The applicants have filed a petition/appeal against the 1st respondent's decision to continue with the impugned by-election and this petition is pending hearing and determination before this Honourable court.

The 2nd respondent in his affidavit in reply stated that in application for a certificate of urgency the applicant is supposed to show exceptional
15 circumstances of peculiar urgency and not a self-created urgency like in the instant case where the decisions in the High Court was delivered in September 2021 and Court of Appeal on 17th of June 2022.

That the applicants have not established any imminent danger to their existing rights that poses a possibility of irreparable harm if the certificate of
20 urgency is not granted.

That the applicants' matter before this court has no realistic prospect as it not arguable on the grounds that the jurisdiction of the High Court under Section 15 of the Electoral Commission Act as a basis from with their temporary and interim orders arise is inapplicable where the elections were
25 concluded, that the applicants have not established their locus standi, the election in Soroti East is being conducted pursuant to the decree and orders of the Court of Appeal and enforcement thereof cannot be enjoined by the High Court and that the petition and resultant applications are not competent on account of being time barred.

[3]



5 Counsel for the applicants submitted on whether this application reveals sufficient ground for the grant of the prayers sought and what remedies are available to the parties.

Counsel submitted that as stated in paragraphs 19 of the each of the Applicants' affidavits in support of this application; on 1st July 2022, by way
10 of a complaint under section 15 (1) of the Electoral Commission Act, Cap 140, the Applicants challenged the legality of the planned by election for the directly elected Member of Parliament for Soroti East Division constituency and the 1st Respondent's failure to fully comply with the two above mentioned decisions of this court and the Court of Appeal.

15 That as stated in paragraphs 22 and 23 of each of the applicants' affidavits in support of this matter, on 15th July 2022, the 1st Respondent dismissed the Applicants' complaint and being dissatisfied with that decision the Applicants filed Election Petition No 10 of 2022, appealing against the 1st Respondent's decision. With **Section 15(5) of the Electoral**
20 **Commissions Act, cap. 140** clearly provides that;

25 ***"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 pending before it. So by virtue of that provision of the law, this honourable court is enjoined to handle the Applicants' petition as expeditiously as possible."***

Counsel further stated that if this application is not granted the Applicants' petition and the two applications for injunctive remedies will be rendered nugatory as no useful remedy will be granted to solve the planned
30 unconstitutional and illegal acts of the 1st Respondent that are detailed in the

[4]



5 Applicants' Petition and the two applications which the Applicants seek to be handled urgently during court vacation.

Counsel also submitted that by their very nature election matters are urgent in nature given the fact that they relate to the very critical issues of the determining who will represent of members of the constituency in
10 parliament which is a corner stone for democracy.

That this is why election matters are governed by strict and short timelines to ensure that they are disposed of expeditiously.

It is also the Applicants' contention in this matter that the impugned by-election is tainted by unconstitutional and illegal acts.

15 Counsel finally prayed that a certificate of urgency and costs of the application be granted.

In reply, the 1st Respondent submitted that the instant Application is incompetent and a classical abuse of court process and should be dismissed with costs.

20 Counsel submitted that the application was brought in bad faith and is a waste of court's valuable time. Counsel relied on ***Male Mabirizi Vs Attorney General Misc. Application No. 921 of 2021*** to support their argument.

Counsel for the 1st respondent further submitted that in the instant case, the
25 Applicants have not demonstrated to Court the existence of rights accrued to them and as such an imminent danger these existing rights and instead, they want this Honourable Court to hear and determine matters already adjudicated upon by the Court of Appeal, the highest Appellate Court in Elections matters.

[5]



5 Counsel submitted that this Honourable Court has no jurisdiction to do so and such cannot grant this Application.

That all the applications herein are a disguised application for stay of execution of the Orders of the Court of Appeal by the 1st Respondent in Election Appeal No. 10 and 021 of 2021 and this court lacks the jurisdiction
10 to do so.

That even if this court had such powers, there was no basis to re-open the case that had already been determined as demonstrated by the Court of Appeal in *Serebe Apollo Vs Electoral Commission Election Petition Application No. 01 of 2021*.

15 Counsel further submitted that although the application arises from an appeal against the decision of the Electoral Commission under **section 15 of the Electoral Commission Act**, it was their firm submission that **section 15 of the Electoral Commission Act** is inapplicable in the current circumstances of the case and that this was fortified by the case of
20 *Byanyima Winnie Versus Ngoma Ngime Civil Revision of Uganda No.0009 of 2001* where his Lordship Honourable Justice V.F. Musoke-Kibuuka held that;

25 *“The electoral process is segmented and the last segment is the segment of vote counting and declaring the winning candidate and it closes with the publishing of the name of the winner in the Uganda gazette.”*

That this was the very last act of the electoral commission in respect of the election of a Member of Parliament. Once the person who is gazetted takes

[6]



5 up his or her seat in Parliament, the Electoral Commission can no longer reach him or her.”

Counsel then stated that having declared the 2nd Respondent as the duly elected Member of Parliament for Soroti West Constituency and gazetted as such by the 1st Respondent, a position confirmed by the Court of Appeal, the
10 1st Respondent is thus *functus officio*. I agree with this point.

On the urgency of the matter, counsel for the 1st respondent submitted that in the instant case the 1st Respondent was preparing to conduct a by-election in Soroti East Constituency and not Soroti West Constituency and as such, there is nothing urgent to warrant Court’s intervention either by way of
15 injunction or otherwise and the question regarding the validity of the election for Member of Parliament for Soroti West had been determined and settled by both Soroti High and Court of Appeal in ***Ameco Anna Grace & Another Versus Electoral Commission & Hon Ebwalu***. The same cannot therefore be re-opened for adjurations by this honourable court.

20 That the by-election being organized by the 1st Respondent is in compliance with the Court of Appeal orders in the consolidated Appeal of ***Attal Moses & Electoral Commission versus Ariko Herbert Edmund***, where the Court of Appeal ordered for a by election to be held in Soroti East inclusive of the two parishes of Aloet and Opilyai.

25 That the Court of Appeal further found and held that the voters of the two parishes were disenfranchised when they were denied the opportunity to participate in voting for Member of Parliament in Soroti East Constituency.

Counsel finally submitted that the Applicants are not entitled to the remedies sought and prayed that this application be disallowed with costs.

[7]



5 Counsel for the 2nd respondent submitted in reply that in the instant case, as far as the 2nd Respondent and Soroti West Division Constituency were concerned where the Applicants have sought through the appeal/petition to have a by-election, there is no election planned and as such, there is nothing warranting Court's intervention either by way of injunction or otherwise that
10 should be certified as urgent.

That regarding the *prima facie* merits of the Petition, it was their argument that the Petition lacked merit and **section 15 of the Electoral Commission Act** through which it is brought is inapplicable to the 2nd Respondent as he was not subject to the control or administrative powers of
15 the Electoral Commission anymore.

In making this assertion, Counsel relied on *Byanyima Winnie Versus Nome Ngime Civil Revision of Uganda No. 0009 of 2001, Mwesigye Enock Vs Electoral Commission, High Court Miscellaneous Cause No.62 of 1998* and *Ikiror Kevin v Orot Ismael Election Petition Appeal No.105 of 2016*.
20

Counsel for the 2nd respondent further submitted that the petition is incompetent as the applicants have not proved locus standi to file it as required by **section 60 (2) (b) of the Parliamentary Election Act** and it has also been filed out of time per **section 60 (3) of the Parliamentary Elections Act**.
25

Counsel finally submitted that the applications and petitions brought by the applicants are frivolous, vexatious and incompetent and therefore not worthy of Court's urgent attention in this court vacation and finally prayed that this Application is dismissed with costs to the Respondents.



- 5 In resolving this application, it should be borne in mind that a matter brought to be considered under a certificate of urgency, is trite that such urgency which involves mainly the abridgment of time prescribed by the rules and the departure from the established filing and sitting times of the Court be justified.
- 10 This is because once the court goes into civil vacation, it can only be brought out of that civil recess only if an applicant proves that there was a matter which cannot possibly wait consideration until after the end of the civil vacation and so the court may set the matter down forthwith for hearing at any reasonably convenient time within the court vacation.
- 15 It should be noted that court will not grant a certificate of urgency as a matter of course. To merit consideration, the application should disclose exceptional circumstances of peculiar urgency.

It is for that reason that **Rule 4 of The Judicature (Court Vacation) Rules** contemplates that in applications of this nature, the applicant should

20 explicitly set out the circumstances which he or she avers render the matter urgent and the reason why he or she claims that he or she cannot be afforded substantial relief in a hearing in due course after the vacation, thus calling for the rules relating to the restriction on civil proceedings during the High Court vacation to be dispensed with.

- 25 There are degrees of urgency and consequently the courts deal with the question of urgency according to the merits of each case. A distinction necessarily has to be made between those matters that ought to be heard urgently and those to which some delay would not cause harm which would not be compensated by the relief eventually granted to such litigant.



- 5 An applicant wishing the matter to be treated as urgent has to show that the infringement of such interest if not redressed immediately would be the cause of harm to him or her which any relief in the future would render an ineffectual legal judgment (*brutum fumen*). (see: ***Lakony vs Gulu District Service Commission [2018] UGHCCD 236***)
- 10 In considering this instant application, I note that it is true that the applicants in their affidavits, on the face of it, appears to establish a case of urgency in so far as they disclose that there is an impending by-election slated for 28th July 2022 in which the Member of Parliament for Soroti City East Division is scheduled to be directly voted for by the voters of Soroti East
- 15 Division constituency inclusive of the voters from Opilyai and Aloet parishes who ostensibly did also vote for the directly elected MP for Soroti City West Division in 2021.

Thus in respect of 2nd Respondent and Soroti West Division Constituency is concerned, the Applicants seek through an appeal / petition to have a bye-

20 election. However, there is no election planned that constituency warranting Court's intervention either by way of injunction or otherwise that can be certified as urgent.

Further regarding the *prima facie* merits of the appeal/ petition, the issues raised by the applicants anchored on **section 15 of the Electoral**

25 **Commission Act** are in regard to matters which the 1st Respondent has jurisdiction to hear and determine and which this court, may by way of an appeal hear which does not subject the 2nd respondent to the control or administrative powers of the Electoral Commission as was pointed in ***Byanyima Winnie Versus Ngoma Ngime Civil Revision of***

[10]



5 **Uganda No.0009 of 2001** where his Lordship Honourable Justice V.F. Musoke-Kibuuka held that;

10 *“the electoral process is segmented and the last segment is the segment of vote counting and declaring the winning Candidate and it closes with the publishing of the name of the winner in the Uganda gazette. That is the very last act of the electoral commission in respect of the election of a Member of Parliament. Once the person who is gazetted takes up his or her seat in Parliament, the Electoral Commission can no longer reach him or her.”*

15 This was the position of this court in the case of **Mwesigye Enock Vs Electoral Commission, High Court Miscellaneous Cause No. 62 of 1998**, in which the Electoral Commission had attempted to remove a sitting Councilor and declare a different person as elected instead, the High Court held;

20 *“The role of the Electoral Commission to act administratively in relation to any candidate closes the very moment the candidate takes his or her seat as a Counselor or as Member of Parliament. The Electoral Commission’s powers can only be exercised in relation to*
25 *candidates’ and not to councilors or Members of Parliament. A person who has been declared the winner of an election or even the one who has lost one is no longer a Candidate. He or she is beyond the administrative reach of the Commission. The Commission can only reach him*
30 *through a court order. To attempt to extend those powers to*

[11]



5 ***Councilors and Members parliament is to act in excess of jurisdiction and any decision or action is ultra vires the Electoral Commission's Act.***

Based on the above decisions, it is my considered opinion that section 15 of the Election Commission Act through which the Applicants lodged their
10 complaint resulting to an appeal/petition is inapplicable to the 2nd Respondent who has already been sworn as a Member of Parliament with the 1st Respondent having no powers over him as he was no longer a candidate as was clearly made out by The Electoral Commission in its decision attached to this application in paragraph (e) of their decision dated 12th July 2022,
15 when it stated;

“That following the Court of Appeal decision on the placement of the two parishes in Soroti East Division, the commission is not possessed with the powers to cancel the electoral outcome in Soroti City West Constituency.”

20 Additionally, the perusal of the decision of the Court of Appeal in respect of Soroti East Constituency does not it itself reveal that it made an infective decision that, given the reinstatement of the parishes of Aloet and Opilyai to Soroti East Constituency, then the election of the member of parliament for Soroti City West Constituency was affected by its decision and as such must
25 be redone.

So given the fact that the Court of Appeal did not in its wisdom nullify the election of the 2nd Respondent and thereafter directed fresh elections be carried out in Soroti City West constituency, this honourable would wanting of powers to entertain matters relating to the holding of elections affecting
30 Soroti City East constituency hand in hand with that of Soroti City West

[12]



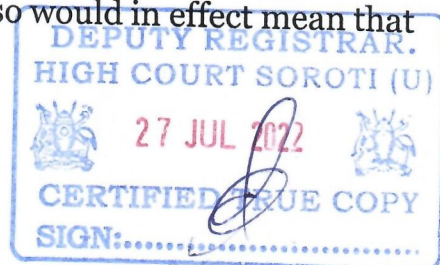
5 constituency given the reality that the election of the Member of Parliament for Soroti West is not currently ordered to be repeated .

The only question that can possibly arise would be whether the member of Parliament for Soroti City West constituency was validly elected after the Court of Appeal decision in regard to the impugned parishes but that is for
10 another time and can only be determined by the High Court upon a proper petition being presented in accordance of the provisions of **section 60 to 68 of the Parliamentary Elections Act** and not through an appeal from a complaint through Electoral Commission or through a petition /appeal as is in the instant case. **See: *Ikiror Kevin v Orot Ismael Election***
15 ***Petition Appeal No.105 of 2016***

Furthermore, it should be borne in mind that the High Court under **section 15 of the Electoral Commission Act** has no powers under the law when the procedure under the said section is invoked to order for a bye-election as its power is limited to resolving administrative issues of candidates that the
20 Electoral Commission had failed to resolve adequately before any elections are conducted which decision by the High Court under **section 15 of the Electoral Commission Act** would be final yet a decision nullifying a seat of a Member of Parliament by the High Court is appealable to the Court of Appeal.

25 It is thus worth noting as averred by the 2nd Respondent (see Para 7(a) Affidavit in reply), that the Court of Appeal has since made a final determination vide **Election Petition Appeal No.021 of 2021** and as such the High Court cannot reopen an investigation and or entertain a petition to determine the validity of the 2nd respondent election which has
30 been confirmed by the Court of Appeal as doing so would in effect mean that

[13]



5 the High Court was assuming jurisdiction over the Court of Appeal which would be illegal as it being a lower court cannot reverse the decision of the Court of Appeal which is a higher court with any purported act by the High Court to reverse a decision of the Court of Appeal being gravely unconstitutional.

10 The Court of Appeal has also made a determination regarding the election in Soroti City East Division constituency which decision is final and that decision has resulted in a by-election in that constituency. That decision is final and is not open to either the Electoral Commission or to the High Court to investigate or re-adjudicate since under **section 66 of the**
15 **Parliamentary Elections Act** as amended, the decision of the Court of Appeal is final in that aspect and bind the entire world including the Applicants, the Respondents, the Electoral Commission, the Courts and all the electorates with the common adage being that litigation must invariably at one time or another come to a conclusion.

20 Finally, though the Petition from which application arise is intended to challenge the elections of the 2nd Respondent, I note the applications for a Temporary Injunction and Interim order are seeking injunctive reliefs in matters relating to the constituency of Soroti City East Division for which the Court of Appeal made conclusive orders binding on all authorities including
25 this court.

However, weighing the merits of this application side by side with what is contained in the petition and the resultant applications, this court would conclude that there is nothing worthy of this court's urgent attention during court vacation so that the court would certify the same as being urgent as no
30 *prima facie* merits have been shown.

[14]



5 Accordingly, I would order that the petition be heard and considered outside
court vacation as there is no eminent danger to existing rights of the
applicants and there is no evidence adduced of the possibility of irreparable
harm and or damages which cannot be atoned by any other remedies as was
held in **Lakony Jana vs Gulu District Commission, Miscellaneous**
10 **Civil Application No. 0110 of 2018**. This position is fortified by the
holding by Mubiru J in the same **Lakony case**, where the learned judge
pointed out that;

15 *"In certifying the matter as urgent, the court is not
supposed to take verbatim what the Applicant is saying
regarding perceived urgency but is required to apply its
mind to the circumstances of the case and reach an
independent Judgment as to its urgency alongside the
prima facie merits of the matter. The matter believed to be
urgent must be a matter of substance rather than form. The
Court should be satisfied that the matter sought to be
20 brought to its attention during the vacation prima facie has
merit. There should be a realistic prospect that the matter
intended to be brought before court is arguable."*

The above principles apply to the instant matter and so my conclusion is that
25 the appeal/petition herein is not worthy of court's urgent attention during
court civil vacation as the applicants have not proved that there were any
eminent danger and or that they would have no alternative remedy to
warrant the grant of a certificate of urgency given the fact that theirs is a
petition is in regard to Soroti City West constituency where there is no
30 impending electoral action though they would wish by infection to have the

[15]



- 5 election in Soroti City East constituency injected by this court which act would be contrary to the decision and orders of the Court of Appeal.

The applicants are thus not entitled to the remedies sought and therefore, this application for the grant of a certificate of urgency is denied with no order as to costs.

- 10 I so order.



.....
Hon. Justice Dr Henry Peter Adonyo

- 15

Judge

27th July 2022

