

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

CORAM: HON MR. JUSTICE G.M OKELLO, JA HON LADY JUSTICE A.E.N MPAGI-BAHIGEINE, JA HON MR. JUSTICE S. G ENGWAU, JA HON LADY JUSTICE C.K BYAMUGISHA, JA HON MR. JUSTICE SBK KAVUMA, JA

CONSTITUTIONAL PETITION NO. 21 OF 2006

BETWEEN

RUBARAMIRA RURANCA ::::::::::::::::::::PETITIONER

AND

1. ELECTORAL COMMISSION :::::::::::::: RESPONDENTS

2. THE ATTORNEY GENERAL

JUDGEMENT OF THE COURT

Rubaramira Ruranga, the petitioner, is the Secretary for Electoral Affairs in the Forum for Democratic Change Party. He brought this petition under Article 137 (3) of the Constitution and the Constitutional Court (petitions and references) Rules (SL N0.091) 2005, to challenge the constitutionality of certain provisions of the Local Governments Act, (LGA), the National Women's Council Act, (NWCA), the National Youth Council Act, (NYCA) and the Regulations made under these Acts.

The petition also challenged the constitutionality of the guidelines issued by the first respondent in respect of local council. Women council, and Youth council elections under the impugned laws and regulations.

In this petition, the petitioner sought the following reliefs:-

(a) A declaration that section 160 of the Local Governments Act, regulation 12 of Statutory instrument (S1) 318 - 1 and regulation 12 of S1 319 -1 contravene Articles 1(4) and 61(l)(g) of the Constitution.

(b) A declaration that section 161(4) of the Local Governments Act, regulations 14(3) of S 318-1 and regulation 14(3) of SI 319-1, contravene and are inconsistent with Articles 1 (4) and 61 (l)(a) of the Constitution.

(c) A declaration that section 161(2) of the Local Governments Act, regulation 14(1) of SI 318 - I and regulation 14(1) of SI 319-1 are inconsistent with Article 1(4) of the Constitution.

(d) A declaration that sections 46(l)(c) and 160 of the Local Governments Act, 6(1) of the National Women Council Act, 6(1) of the National Youth Council Act, regulation 12(1) of SI 318-1 and regulation 12(1) of S.I 319-1 are inconsistent with Articles 1(4) and 61(l)(a) and (e) of the Constitution.

(e) A declaration that regulation 3, 6(a), 7, 8, 9, and 11, (3) of SI 319-1 are inconsistent with and"contravene Articles 1 (4) and 62 of the Constitution.

(f) A declaration that regulation 23(3) of SI 318-1 is inconsistent with Articles 68(1), 61(l) (a) and 1(4) of the Constitution.

(g) A declaration that regulation 25 of SI 319-1 is inconsistent with and contravenes Articles 1(4), 61(l)(a) and 68(1) of the Constitution.

(h) A declaration that sections 46(c) of the Local Governments Act, 6(1), 2(2) and 5(2) of the National Women's Council Act and 6(1), 2(2) and 6(7) of the National Youth Council Act contravene and are inconsistent with Articles 29(b) and (e), 38(2) and 71(f) of the Constitution.

(i) A declaration that regulations 23 and 22(6) of SI 319-1 and SI 318-1 respectively are inconsistent with Article 1(4) of the Constitution.

(j) A declaration that the guidelines issued by the first respondent contravene Articles 1(4), 72(4), 176(3), 180(3) and 292(1) of the Constitution.

(k) A permanent order restraining the respondents from conducting the Local Council, Women Council and Committee, Youth Council and committee elections using the legal frame work herein above mentioned.

(l) Make such orders as would reflect a multiparty political system in the aforesaid elections.

(m) An order that each party bears its own costs".

The petition was accompanied by an affidavit sworn by the petitioner on the 24th day of July, 2006.

The respondents filed a joint answer in which they denied every allegation contained in the petition. They stated that the impugned provisions of the stated laws and regulations are neither inconsistent with nor contravene any provisions of the Constitution. They pointed out that the first respondent has already suspended the elections for the women's councils and committees as well as the youth councils and committees. According to them, a press statement to that effect (annexture 'A' to the answer to the petition) was issued on 21/7/2006,

The answer was supported by the affidavit of Elisha Bafirawala, a State Attorney in the second respondent's chambers.

At the scheduling conference that was held inter-partes before the Registrar of this court, the parties agreed on the following issues to be determined by this court:-

1. Whether section 160 of the Local Governments Act, regulation 12(1) of the National Women's Council (Women's Councils and Committees) Elections Regulations and regulation 12 of the National Youth Council (Councils and Committees) Elections Regulations contravene Article 61 (1)(g) of the Constitution.
2. Whether section 161 (4) of the Local Governments Act, regulation 14(3) of the National Women's Council (Women Councils and Committee) Elections Regulations and regulation 14(3) of the National Youth Council (Councils and Committees) Elections Regulations contravene Article 1(4) of the Constitution.
3. Whether section 161(2) of the Local Governments Act, regulation 14(1) of the National Women's Council (Women's Council and Committee) Elections Regulations and regulation 14(1) of the National Youth Council (Council and Committee) Elections Regulations contravene Article 1(4) of the Constitution.
4. Whether sections 46(1)(c) and 160 of the Local Governments Act, section 6(1) of the National Youth Council Act, regulation 12(1) of the National Women's (Council and Committee) Elections Regulations and regulation 12(1) of the National Youth Council (Councils and Committees) Elections Regulations contravene and are inconsistent with Articles 61(1)(a) and (e) and 1(4) of the Constitution.
5. Whether regulations 3,6(a), 7,8,9 and 11(3) of the National Youth Council (Council and Committee) Elections Regulations are inconsistent with and contravene Articles 1 (4) and 62 of the Constitution.
6. Whether regulation 22(3) of SI 319-1 is inconsistent with and contravenes Articles 1(4) 61(1)(a) and 68(1) of the Constitution.

7. Whether regulation 25 of SI 319-1 is inconsistent with and contravenes Articles 1(4), 61(1)(a) and 68(1) of the Constitution.

8. Whether section 46(c) of the Local Governments Act, sections 6(1), 2(2), 5(2) of the National Women's Council Act and sections 6 (1) 2(2) and 6(7) of the National Youth Council Act contravene and are inconsistent with Articles 29(h) and (e), 38(2) and 71(J) of the Constitution.

9. Whether regulation 23 of the National Youth Council (Councils and Committees) Elections Regulations and regulation 22(6) of SI 318-1 National Women's Council (Councils and Committees) Elections Regulations contravene and are inconsistent with Article 1(4) of the Constitution.

10. Whether the guidelines issued by the first respondent in respect of Local, Women and Youth Councils and Committees elections contravene Article 1(4), 72(4), 176(3), 180(3) and 22(1) of the Constitution.

11. Whether the impugned provisions of the Local Governments Act, the National Youth Council Act, the Women's Council Act, regulations of the National Women's Council (Women's Councils and Committees) Elections Regulations and regulations of the National Youth Council (Councils and Committees) Elections Regulations are protected by the provision of Article, 274 of the Constitution which provides for necessary adaptations and qualifications which bring them into conformity with the Constitution.

At the hearing of the petition, Mr. Ogalo-Wandera appeared for the petitioner while Mr. Henry Oluka, Senior State Attorney, represented the respondents. Mr. Ogalo-Wandera referred us to certain principles of constitutional interpretation and urged us to be guided by them. They are:

(1) That words used in the Constitution must be given the widest possible consideration according to their ordinary meaning.

(2) Provisions of the Constitution must be given liberal interpretation unfettered with technicalities.

(3) That fundamental rights provisions must be given dynamic, progressive liberal and flexible interpretation.

(4) We accept those principles. We should add however, that another important principle of Constitutional Interpretation to determine Constitutionality of a statute or any other documents is "purpose and effect".

With these principles in mind, we now proceed to consider the arguments of counsel in respect of each issue starting with NO. 1.

Issue NO. 1

This issue is whether section 160 of the Local Governments Act, Reg. 12(1) of the National Women's (women's council and committee) Elections Regulations and Reg. 12(1) of the National Youth Council (Councils and Committees) Elections Regulations contravene Article 61(l)(g) of the Constitution.

On this issue, Mr. Ogalo-Wandera pointed out that Article 61 (1)(g) of the Constitution requires the Electoral Commission (EC) to formulate and implement voters education programmes relating to elections. He complained that section 160 of the Local Governments Act and leg. 12(1) of SI 318-1, National Women's Council (women's councils and committees) Elections (NWCE) Regulations, and reg. 12(1) of SI 319-1 National Youth Council (councils and committees) (NYCE) Regulations limit the voter's education to the procedure of voting only. He pointed out that even the guidelines (annexure A to C to the petition) that were issued by the first respondent echoed what section 160 of the Local Governments Act and the above regulations have prescribed. He contended that voters education under Article 61(l)(g) was not limited to educating citizens on voting procedure only. It is wider than that. According to him, that article requires the Electoral Commission to formulate the education programme, submit it for public debate, adopt it after the debate and implement it. The programme must include educating the voters' on the purpose of election so as to create a link between a voter and his/ her representative to enable the voter

to hold his/her representative accountable. He stated that without proper knowledge of the purpose of election, a voter may trivialise the criteria for a good candidate to whether or not he/she attends burials, gives out to voters items like sugar, salt, soap, etc. Once a representative met those trivialised criteria, he/she can not be held accountable, by the voters. In counsel's view, that would be a threat to the desired democracy. He submitted that for the voters' education programme under this article to have value, it must be conducted in sufficient time say, two years, before the election is held.

Mr. Oluka contended that the impugned provisions of the Local Governments Act and NWCF and NYCF Regulations were in existence when 1995 Constitution was promulgated. He invited us to invoke Article 274 to construe them with the necessary modifications and adoptions to bring them within the Constitution.

He submitted that it was unreasonable to expect voter's education to be conducted two years before holding the election.

Articles 61(1) provides thus:-

"The Electoral commission shall have the following functions":-

(g) to formulate and implement voters educational programmes relating to election —."

The impugned section 160 of the Local Governments Act provides:-

"When the electorate of a county, parish as village council is assembled for purposes of conducting an election, the presiding officer shall address the voters on the procedures of voting".

reg. 12(1) of SI 318-1 reads:-

" When a women's council is assembled for purposes of conducting an election, the presiding officer shall address the women's council, instructing the council how to vote."

Regulation 12(1) of SI 319-1 reads:-

" When a youth council, is assembled, for purposes of conducting an election, the presiding officer shall address the youth council, instructing the council how to vote"

The term " Educational Programmes" in Article 61 (1) (g) above has not been defined by the Constitution. In our view, this is an English phrase which connotes a set of educational instructions on elections. It imports a wide range of educational instructions on election.

Regulations 12(1) of both SI 318-1, SI 319-1 above and section 160 of the Local Governments Act give a narrower meaning to the educational programmes than given by Article 61(l)(g) above. They confine the educational instruction to how to vote only. To determine whether section 160 of the Local Governments Act and regulations 12 (I) above arc inconsistent with and contravene articles 61(1)(g) ,it is necessary to refer to the case THE QUEEN'S VS BIG DRUG MARK LTD (OTHERS INTERVENING 1996 LRC Const.332.

The above is a Canadian case. In that case, the issue for determination was whether the Lords Day Act which prohibited sales on Sundays infringed the Right of Freedom of conscience and religion guaranteed by the Canadian Charter of Rights and Freedom. The Attorney General of Alberta conceded that the Act was religious in its purpose but contended that it is not the purpose but the effect of the Act alone which was relevant to determine its constitutionality.

The Chief Justice of Canada who wrote the leading judgment rejected that view. He said:-.

" I cannot agree. In my view both purpose and effects are relevant in determining Constitutionality; either unconstitutional purpose and unconstitutional effect can invalidate legislation. "

The above principles were adopted by our Supreme Court in Attorney General VS Salvatori Abuki: Constitutional Appeal N0.1 OF 1998. where Oder JSC (RIP) said:-

" In my view, considerations of the purpose and effect of a legislation in determination of the Constitutionality of the legislation is necessary because the object of a legislation is achieved only by its practical applications or enforcement. It is only what effect the application produces that the object of a state can be measured. The effect is the end result of the object. I find these principles applicable to our own determination of the Constitutionality of the Witchcraft Act and orders which may be made there under as the exclusion order made against the respondent.""

This court is bound by the above decision. We shall apply these principles in the instant case, to determine the constitutionality of section of 160 of the Local Governments Act and regulation 12 (1) of both Statutory Instruments 318-1 and319-1.

The purpose of these provisions of the laws is to educate the electorate of the lower council, women's council, and youth council on how to vote in their elections. This purpose is neither inconsistent with nor does it contravene Article 61(l)(g) which provides for the education of voters on elections.

The effect of implementing those impugned provisions is the education of the electorate of the lower council, women's council and youth council on the procedure of voting in election.

We accept Mr Ogalo-Wandera's submission that the effect of implementing the impugned provisions produces limited education of voters to the procedure of voting only. This is narrower than is required under Article 61 (1) (g). The inadequacy of the scope of the education given under the impugned provisions does not perse make the provisions inconsistent with or contravene Article 61(l)(g). Like Article 61(I)(g), the impugned provisions also provide for the education of voters.

The guidelines (annexures A to C) issued by the first respondent did not go beyond what was prescribed by the impugned provisions. They are also inadequate but are neither inconsistent with nor contravene article 61(l)(g) of the Constitution.

We, therefore, answer issue NO. 1 in the negative. Issue N0.2

Mr. Ogalo-Wandera complained in this issue that section 161(4) of the Local Governments Act and regulation 14(3) of, both SI 318-1 and SI 319-1 contravene Articles 1(4) and 61(1) (a) of the Constitution.

He pointed out that the above section and those regulations together with the guidelines (annexures A to C to the petition) issued by the first respondent exclude campaign or give insufficient time for campaign by the candidates for any office at local, women's and youth council and committee elections.

They give the candidates only live minutes to introduce himself or herself to the electorate and must withdraw from the session.

Learned counsel submitted that campaign by political parties was not allowed under these provisions at these levels of election yet campaign as defined by new Webster Law Dictionary " means any course for aggressive action as intended to influence voters in an election". Campaign is therefore the very essence of an election. It is the basis upon which a voter bases his decision to choose which candidate to vote for.

He submitted that an election that does not allow for campaign is not a free and fair election guaranteed by Article 1(4) of the Constitution. He cited Kwezira Edie VS AG. Constitutional Petition NO. 14 of 2005. He stated that the Electoral Commission by issuing the guidelines that did not allow campaign or did not give sufficient time for campaign contravenes Article 61(1)(a) of the Constitution that enjoins it to ensure a regular free and fair election. He urged us to find that the impugned provisions of the laws are null and void.

Mr. Oluka contended that the impugned provisions give full participation of all people be they at the village, parish, county or other level of the rural or urban areas to nominate candidate of their choice. In doing so, they have exclusive right to choose openly and transparently a candidate of their choice. He stated that elections under these provisions can be conducted within the provisions of the Constitution. He submitted that within the five minutes time limit one was able to state his political ideology.

Article 1(4) of the Constitution provides for a free and fair election in the following way:-

"The people shall express their will and consent on who shall govern them and how they should be governed through regular free and fair elections of their representatives as through referendum. "

The term "free and fair elections" is not defined in the Constitution or in any other law. In Kwezira Eddie VS the AG (supra), this Court quoted the decision of the Supreme Court in Col.(Rtd) Dr. Kiiza Besigye VS Museveni Kaguta Yoweri, Presidential Election Petition N0.1 of 2001. In that case, Odoki CJ commented on the concept of a free and fair election under Article 1(4) of the Constitution as follows:-

".....the concept of free and fair elections is not defined in the Constitution or in any Act of Parliament. To ensure that elections are free and fair, there should be sufficient time given for all stages of elections, nomination, campaign, voting and counting of votes. "

The term "sufficient time " is a relative term. The Supreme Court did not state what length of time is sufficient for nomination, campaign etc. In the instant case, the first complaint is that live minutes allowed to the candidate to introduce himself or herself to the electorate is not sufficient . It was argued that by merely introducing oneself, one would not be able to influence voters because the issues will not have been placed before the electorate.

Mr Oluka on the other hand, contended that within the five minutes time limit, one was able to state one's political ideology.

In a multiparty democracy, which this country has embraced, it is not the individual candidate's merits or demerits that are important. It is rather the programmes of the party which the candidate represents that are important. They are the ones upon which the electorate base their decision to choose a candidate to vote for. Five minutes is, therefore, in our view, not sufficient for a candidate to fairly present to the electorate his party's programmes.

Another complaint is that political parties are not allowed to campaign or participate at this level of elections. Section 161(4) of the Local Governments Act as well as regulation 14(3) of both SI 318-1 and SI 319-1 allow only a five minutes introduction by the candidate of himself or herself to the electorate to be followed by or brief discussion of the candidates by the electorate after the candidates have withdrawn from the session. They do not permit campaign or participation by political parties at this level of elections. We find this to be an anomaly because as the country has embraced multiparty system, any law that restricts or even bars political parties from campaigning or participating in an election at any level is incompatible with the clear intention of the people expressed in the referendum by which they chose multiparty system. Such a law would not meet the standard of a free and fair election stated in Articles 1(4) and 61(1)(a) of the Constitution.

We, therefore, answer issue NO. 2 in the affirmative. Issue NO. 3

The complaint in issue NO. 3 is that section 161(2) of the Local Governments Act and regulation 14(1) of both SI 318 I and SI 319-1 contravene Article 1(4) the Constitution. Mr. Ogalo-Wandera pointed out that section 161(2) provides for oral nomination for elections of a chairperson of Local Council at village and parish level. Under that procedure, nomination is proposed to be oral by an eligible voter and seconded by another voter who is present.

This procedure is also applicable to elections of Women Council and Youth Council under reg. 14(1) of both SI 318-1 and SI 319-1.

Mr. Ogalo-Wandera contended that that procedure is flawed and unconstitutional. He explained that oral nomination excludes political parties from the nomination process. His reason was that political parties are corporate bodies under section 6(3) of the Political Parties and Organization Act. Being non natural persons, political parties can not nominate orally. They can only nominate under the hand and seal of the party after a meeting of its executive members. He submitted that by providing for oral nomination, those provisions have excluded political parties from the election process. The exclusion renders the election process not free and fair. In his view, the provisions, which provided for that procedure contravene Article 1(4) of the Constitution which provides for a free and fair election.

11c further complained that oral nomination on polling day gives no time for objection, if any, let alone time for the Electoral Commission to settle any disputes that may arise from any objection to the nomination. He pointed out that Article 61(f) provides for settlement by the Electoral Commission of disputes arising before and during polling.

Mr. Oluka contended that voters who object to the nomination can express their objection by not voting for that candidate. He stated that political parties can ask one of its members to nominate on its behalf.

The impugned section 161(2) of the Local Government Act reads:-

" The nomination of a candidate for election of a chairperson at the village and parish level shall be orally proposed by an eligible voter and seconded by another voter who is present and shall be submitted to the presiding officer at any time before the election commences".

Reg14 (1) of SI 318-1 provides:-

"The nomination of every candidate for election shall be orally proposed by a member and be seconded by another member of the women's council present and shall be submitted to the presiding officer at any time before the election commences."

Regulation 14(1) of SI 319-1 are worded identically as the above regulation save for the words "Youth " instead of "Women V.

We have already pointed out earlier in this judgment that Article 1(4) of the Constitution provides for " free and fair elections". The term " free and fair elections" was expounded by Odoki Chief Justice in Col.. (Rtd) Dr. Kizza case (supra) to mean giving " sufficient time" for

all stages of elections, nomination, campaign, voting and counting votes"

The above impugned provisions provide for oral nomination on polling day itself. This procedure clearly does not allow political parties that are not natural persons to participate in the nomination process. Political parties being bodies corporate under section 6(3) of the Political Parties and Organizations Act, can only nominate in writing under hand and seal of the party.

In a multiparty system, any law that denies political parties from participating in any public election renders the election not free and fair as required under article 1(4). The above impugned provisions fall under this category of laws.

They do not give time for the Electoral Commission US settle any dispute that may arise from any objection to the nomination. Yet, Article 61(f) requires the Electoral Commission to hear and determine election complaints arising before and during polling.

We are aware that the impugned provisions were in existence when the 1995 Constitution was promulgated. However, these provisions are not possible to be modified and adopted by this Court to bring them within this Constitution under article 273(1) of this Constitution as amended. It requires the Executive to initiate in Parliament an amendment of these laws to reflect multiparty system.

The argument that voters who object to the nomination can express their objection by not voting for the candidates they object to is not tenable. The Constitution provides for settlement of disputes that may arise before or during polling. That envisaged complaint that may give rise to disputes. Such a dispute is expected to be heard and determined by the Electoral Commission. To do this, there is need for sufficient time for nomination etc and settling of any disputes arising therefrom.

We accordingly answer issue NO. 3 in the affirmative. Issue NO.4

The petitioner complained in paragraph (d) of the petition that sections 46(1)(c) and 160 of the Local Governments Act and section 6(1) of the National Women's Council Act and section 6(1) of the National Youth Council Act. regulation 12(1) of both SI 318-1 and SI 319-1 are inconsistent with Articles 61(a) and (c) and 1(4) of the Constitution.

Mr. Ogalo- Wandera pointed out that the impugned section 46(1)(c) of the Local Governments' Act compels every person of 18 years and above residing in a village to belong to a body known as Local Council I. Section 6(1) of the National Women's Council Act, compels every woman residing in a village to belong to a body known as the village Women's Council. Section 6(1) of the National Youth Council Act compels every person between eighteen and thirty years resident in a village to belong to a body known as the village Youth Council.

Learned counsel submitted firstly, that the impugned provisions contravene the Constitution in as much they take away the affected people's freedom to decide whether or not to join a particular association. Secondly that regulation 12(1) of both SI 318-1 and SI 319-1 do not allow for identification of voters at these levels of elections. They merely conscript every category who resides in the village into being a voter. He stated that a mechanism that does not provide for registration of voters is flawed. He submitted that the so called list of village residents' attached to Elisha's affidavit is not a voter register within Article 61(1)(e) of the Constitution. In fact, there is no law that authorizes compiling of village residents' list.

Mr. Oluka did not agree. He submitted that the impugned provisions are existing laws. He urged us to find under Article 274 that elections held under the impugned provisions can be

conducted within the Constitution. He stated that one can opt out of these bodies by not participating in them.

The issue here, as we understand it, is not about freedom of speech and expression but rather about freedom of association which is guaranteed by Article 29(1)(e) as follows:

" Every person shall have the right to:-

(e) Freedom of association which shall include the freedom to form and join association as unions, including trade unions and political and other civil organizations."

Section 46(1)(c) provides thus:-

" The council shall consist of:-

At the village level, all persons of eighteen years of age and above residing in that village."

Section 6(1) of the National Women's Council Act provides:-

" A village women's council shall consist of every woman resident in the village".

Section 6(1) of the National Youth Council Act provides:-

" A village Youth Council shall consist of every person who has attained the age of eighteen years but is below the age of thirty years and is a resident of the village."

Our understanding of the above section 46(1)(c) of the Local Governments Act, sections 6(1) of both the National Women's Council Act and the National Youth Council Act is that they respectively conscript their members from persons of certain age and/or sex resident in a village. The word "shall" in these provisions imports the conscription message. It gives a member no choice whether or not to join the body. That is contrary to the clear spirit of Article 29(1)(e) of the Constitution.

Mr. Oluka argued that a person who does not want can opt out of the body by not participating in it. We do not accept that argument because there is no provision in those

Acts allowing a person to opt out if he does not want to be a member though there is no penalty provision for failure to comply.

On the question of lack of voter's registers for this level of election, we accept Mr. Ogalo-Wandera's argument that there is no law that requires the Electoral Commission to compile a register of village voters at these levels of election. The village residents' list attached to Elisha's affidavit is not a

product of any law. Any election mechanism that does not provide for voter's register in terms of Article 61(1)(e) of the Constitution is flawed because it is susceptible to manipulation and unfairness.

We, therefore, answer issue NO. 4 in the affirmative in that sections 46(1)(c) of the Local Governments Act, section 6(1) of the National Women's Council Act, section 6(1) of the National Youth Council Act and regulation 12(1) of both SI 318-1 and SI 319-1 are inconsistent with articles 29(1)(e) and 1(4) of the Constitution.

Issue NO. 5

This issue is whether regulations 3, 6(a), 7,8,9, and 11(3) of SI 319-1 are inconsistent with Articles 1(4), 62 and 65 of the Constitution.

Mr.Ogalo-Wandera pointed out that the essence of the impugned provisions is that the Returning Officer in Local Council elections at district level is the Chief administrative officer, while at county, sub county, parish, and village levels the presiding officers are respectively the county, sub county, and parish chiefs.

He stated that these officials are employees of the Government. They are promoted and disciplined by a sitting Government. While contesting elections at these levels, the governing political party through the Government has direct control over these officials. This generates perceived bias on the part of these officers in favour of the governing party.

Learned counsel submitted that for an election to be free and fair as required under Article 1(4) of the Constitution, the Electoral Commission must itself be impartial and independent in the conduct of the election. Article 65 enjoins the Electoral Commission to appoint, in consultation with the Public Service Commission, its own employees. The Chief administrative officers, county chiefs, sub county chiefs and parish chiefs who preside over elections in their areas of jurisdiction are not employees of the Electoral Commission. They do so under the law by virtue of their offices. Counsel submitted that any law that imposes employees and staffs on the electoral Commission is inconsistent with Article 65 of the Constitution.

Mr. Oluka disagreed. He contended that these officials are public servants. They act as returning or presiding officers at elections within their areas of jurisdiction by virtue of their offices that would render them impartial.

The issue here as we understand it, is whether the impugned regulations that make these officers returning or presiding officers in their respective areas of jurisdiction, and for that purpose employees of the Electoral Commission, are inconsistent with Article 65 of the Constitution

Article 62 provides for the independence of the Electoral Commission in the performance of its functions. Article 65 enjoins the Electoral Commission to appoint, in consultation with the Public Service Commission, its own officers and employees.

Article 62 provides.

" Subject to the provisions of this Constitution, the Commission shall be independent and shall, in the performance of its functions not be subject to the direction or control of any person or authority".

Article 65 provides;-

"The appointment of officers and employees of the Electoral Commission shall be made by the Commission acting in consultation with the Public Service Commission. "

It was contended for the petitioner that any law that imposes employees and staffs on the Electoral Commission is inconsistent with Article 65 above. The impugned regulations provide as follows;-

Regulation 3:

"The chief administrative Officer shall be the returning officer for the District for which he or she is the head for the purpose of any election held in accordance with these Regulations".

Regulation 6:

" The returning officer shall"-

- (a) Generally give direction and supervision in the conduct of elections and ensure fairness, impartiality and compliance with these Regulations by Assistant Returning officers and elections officers, after consultation with the election secretariat;
- (b) Issue to election officers such instructions as he or she may consider necessary.
- (c) Perform all duties that these regulations impose on him or her". Regulation 7:-

" The county chief shall be the presiding officer of all elections taking place at the county level and shall be under the overall supervision of the returning officer or any other officer authorized by the returning officer".

Regulation 8:-

"The sub-county chief shall be the presiding officer at the elections at the sub county women's council and shall be under the overall presiding supervision of the returning officer or any person authorized by the returning officer".

Regulation 9:- " The parish chief shall be the presiding officer at all elections taking place at the parish and village level and shall be under the overall supervision of the sub county chief".

Regulation 11(3) provides that:-

" The returning officer together with the county chief sub county chief and parish chief shall identify the polling stations at parish level'

"Returning officer" is defined in section 1(8) of the Electoral Commission Act to mean " Any person appointed under any law relating to any elections to be in charge of an electoral district for the purposes of any such election or for the purpose of the registration of voters within the district".

In our view, that definition is faulty because Article 65 enjoins only the Electoral Commission, in consultation with the Public Service Commission, to appoint the Commission's employees.

A returning officer is for that purpose an employee of the commission. Under Article 65 , he must be appointed by the Commission, in consultation with the Public Service. Regulation 3 that appoints the Chief administrative officers as returning officers for all elections held under these regulations within his or her district, imposes the officers on the Electoral commission. That is inconsistent with the clear provision of Article 65. That act is also inconsistent with the independence of the Electoral. Commission guaranteed by Article 62.

Similarly, regulations 7, 8. and 9 that respectively appoint the county chief, sub county chief and the parish chief presiding officers at elections held within their respective areas of jurisdiction in accordance with these Regulations are also inconsistent with Article 65. They are also inconsistent with the independence of the Electoral Commission enshrined in Article 62.

Regulation 6 which enjoins the returning officer, not appointed by the Electoral Commission, to give general direction and supervision in the conduct of elections without consulting the Electoral Commission whose constitutional mandate is to organize and conduct all public elections in this country is inconsistent with the independence of the Electoral Commission guaranteed by Article 62.

We also find that regulation 11(3) that enjoins the returning officer together with the county chief, sub county chief and parish chief to identify polling stations at village level without involving the Electoral Commission is inconsistent with the independence of the Electoral Commission guaranteed by Article 62.

We accordingly answer issue NO. 5 in the affirmative. Issues NO.6 and 7

This now brings us to issues NO. 6 and 7, We propose to consider these issues together because they are related. The complaint in both issues is about the method of voting at the election of women's council and youth council in accordance with the Regulations.

The impugned regulations provide for voting at these elections by lining up behind one's candidate of choice. It was submitted for the petitioner that the regulations that provide for that method of voting were inconsistent with Article 68(1) of the Constitution. The Article provides that:

" At a public election or referendum, voting shall, subject to the provisions of this Constitution, be by secret ballot...."

Learned counsel for the petitioner further stated that those regulations are also inconsistent with Articles 1(4) and 61(1)(a) of the Constitution. These Articles provide for " free fair elections".

Mr. Oluka disagreed. He contended that those regulations that provide for voting by lining behind one's candidate of choice were supported by Article 68(6) of the Constitution. Clause 6 of Article 68 provides that:-

" Parliament may by law exempt any public election, other than a Presidential or parliamentary election, from the requirements of clause (1) that it shall be held by secret ballot".

We accept Mr. Oluka's contention that clause 6 of Article 68 empowers Parliament by law to exempt any public elections save those excluded, from voting by secret ballot. These impugned regulations do not relate to Presidential or Parliamentary elections that are exempted. We have not been persuaded that Parliament did not have a say in the making of those regulations.

We find no merit in this complaint.

We accordingly answer issues NO. 6 and 7 in the negative. Issue NO. 8

This issue is whether section 46(c) of the Local Governments Act, section 6(1), 2(2),5(2) of the National Women's Council Act and section 6(1), 2(2) and 6(7) of the National Youth

Council Act contravene and are inconsistent with Articles 29(b) and (e), 38(2) and 71(1) of the Constitution.

Section 46(c) of the Local Governments Act, section 6(1) of the National Women's Council Act and section 6(1) of the National Youth Council Act respectively provide for the composition of village council (Local Council 1) village women's council and village youth council. According to section 46(1)(c) of the Local Governments Act, all persons of eighteen years of age and above residing in a village shall be members of the village council. Section 6(1) of the National Women's Council Act provides that a village women's council shall consist of every woman resident in the village. Similarly, section 6(1) of the National Youth Council Act provides that a village youth council shall consist of every person who has attained the age of eighteen years but is below the age of thirty years and is a resident of the village.

It is clear from those provisions that the membership of Local Council 1, village women's council or committee and village youth council or committee is a matter of law not by choice. We accept that conscripting persons into membership of these bodies is contrary to Article 29(e) of the Constitution. This article guarantees freedom to form and/or join an association.

Mr. Ogalo-Wandera pointed out that at district and national levels, women's and youth councils are corporate bodies. We accept this because sections 2(2) and 5(2) of the National Women's Council Act respectively provide that the national and district women's council " shall be a body corporate".

Section 2(2) and 6(7) of the National Youth Council Act also respectively provide that the national and district youth council " shall be a body corporate."

Mr. Ogalo-Wandera stated that at a village level where an election takes place, the voters are represented by a body corporate. In his view, this contravenes Articles 38 (2) and 29(b) of the Constitution.

Mr. Oluka contended that civil rights are exercised in a given forum. He stated that if one wants to exercise his/her civil rights, then these councils are the fora.

Article 38(2) guarantees the right to participate in peaceful activities to influence the policies of government through civil organization. We accept Mr. Oluka's argument that civil rights are exercised in civil organisations. • However, we are of the view that membership of such an organization must be voluntary. Any law that conscripts or compels people into membership of an organization is incompatible with Article 38(2) of the Constitution. This is the view we hold of sections 46(c) of the Local Governments Act, section 6(1) of the National Women's Council Act and section 6 (1) of the National Youth Council Act. They are, therefore, inconsistent with Article 38(2) of the Constitution.

We accordingly answer issue NO. 8 in the affirmative.

Issue NO.9 was abandoned. We now proceed to consider issue NO. 10. The gist of the complaint in this issue is that the guidelines, annexures 'A' to 'C' to the petition, that were issued by the first respondent in respect of Local Council I, village women council and village youth council elections contravene Articles 1(4), 72(4), 176(3) 180(3) and 22(1) of the Constitution.

Mr. Ogalo Wandera slated that the guidelines provide for oral nomination for these elections and exclude political parties from participation in these elections. He submitted that in that regard they are inconsistent with the stated articles of the Constitution.

Mr. Oluka contended that these guidelines do not contravene any provisions of the Constitution. According to him, they are fair because they ensure that these elections are free and fair. Candidates have the right to contest for any position.

We studied the impugned guidelines. In our view, they echoed the procedure of nomination, campaign and voting as prescribed in the impugned provisions of the law and regulations slated earlier in this judgment. These guidelines have no force of law. They are general administrative directions by the Electoral Commission, the body mandated to organise and conduct public elections in this country. According to the guidelines all persons of eighteen years and above resident in a village are members of Local Council I, of that village. In our view, this is inconsistent with Article 180(3) which excludes non citizens from membership of a Local Government Council. The term " all persons of eighteen years of age and above resident in a given village" is wide enough to include even non citizens of that age group

resident in the village. This would be contrary to the clear provision of Article 180(3) of the Constitution. We therefore answer this issue partially in the affirmative.

Finally we now turn to issue NO. 11. This issue is whether the impugned provisions of the Local Governments Act (Cap 242), The National Women's Council Act (Cap 318) and the National Youth Council Act (Cap 319) SI 318-1 and SI 319-1 are protected by Article 274 of the Constitution.

Article 274 empowered the first President who was elected under this Constitution, to within twelve months after assuming office as President, by statutory instrument, make such provisions as they may appear necessary for repealing, modifying, adding to or adapting any law for bringing into conformity within this Constitution or otherwise for giving effect to this Constitution.

That article has however been repealed by the Constitution (amendment) Act, 2005 and replaced by Article 291. Mr. Oluka did not suggest that such a Statutory Instrument had been issued. We however accept his submissions, that Article 273 enables all courts to construe legislations that existed before the Constitution with such modifications and adaptations to bring them into conformity with the Constitution.

All these Acts, The Local Governments' Act (Cap 212), the National Women's Council Act (Cap 318), the National Youth Council Act(Cap 319), SI 318-1 and SI 319-1 are existing laws. They were in existence when the 1995 Constitution was promulgated. They are therefore, subject to Article 273.

We have already pointed out earlier in this judgment, that the Executive need to initiate an amendment in Parliament of the impugned provisions of these laws to reflect the embraced multiparty system.

In the result, by a majority of four to one, Kavuma JA dissenting, we allow the petition in part and make the following declarations and orders:- Declarations.

1. Section 160 of the Local Governments' Act, regulation 12(1) of the National Women's Council (council and committee) Elections

Regulations are inconsistent with Article 61(1)(g) of the Constitution.

2. Section 161(4) of the Local Governments' Act regulation 14(3) of both SI 318-1 and SI 319 -1 are inconsistent with Article 1(4) of the Constitution.

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3. Section 161(2) of the Local Governments' Act, regulation 14(1) of both SI 318-1 of SI 319-1 are inconsistent with Article 1(4) of the Constitution.

4. Sections 46(l)(c) and 160 of the Local Governments' Act, Section 6(1) of the National Youth Council Act,'regulation 12(1) of SI 318-1 and Regulation 12(1) of SI 319-1 are inconsistent with articles 61(1)(a) and (e) and 1(4) of the Constitution.

5. Regulations 3, 6(l)(a), 7,8,9, and 11(3) of the National Youth Council (Councils and Committees) Elections Regulations are inconsistent with, Articles 1 (4) and 62 of the Constitution.

6. Regulation 22(4) of SI 318-1 is neither inconsistent with nor contravenes Articles 1 (4), 61(1)(a) and 68(1) of the Constitution.

7. Regulation 25 of SI 319-1 is neither inconsistent with nor contravenes Articles 1(4), 61(1)(a) and 68(1) of the Constitution.

8. Section 46(c) of the Local Governments' Act, sections 6(1), 2(2), 5(2), of the National Women's Council Act and sections 6(1), 2(2),

9. The guidelines issued by the Electoral Commission are inconsistent with Articles 1(4) and 180(3) of the Constitution.

10.The impugned provisions of the Local Government's Act, the National Youth Council Act, the National Women's Council Act, and certain regulations of SI 318-1 and SI 319-1 as existing laws, arc subject to Article 273.

ORDERS

Each party to bear its own costs.

Dated at Kampala this 3rd day of April 2007.

GM OKELLO

JUSTICE OF APPEAL

A.E.N. MPAGI-BAHIGEINE

JUSTICE OF APPEAL

S.G. ENGWAU,

JUSTICE OF APPEAL

C.K. BYAMUGISHA

JUSTICE OF APPEAL