

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
CIVIL SUIT NO. 198 OF 2010

RUTH ASIIMWE KANYARUJU ::::::::::::::::::::
PLAINTIFF

VERSUS

HON GRACE NAMARA & N.R.M ::::::::::::::::::::
DEFENDANTS

BEFORE: HON. MR. JUSTICE ELDAD MWANGUSYA

RULING

The plaintiff Ruth Asiimwe Kanyaruju and the defendant Hon. Grace Namara were both candidates in the National Resistance Movement conducted Primary elections for Woman Member of Parliament for Lyantonde District. The Plaintiff filed a suit against the defendant challenging HER candidature in those elections because according to her she did not have the requisite Academic qualifications to be nominated for elections as a Member of Parliament. She had joined the National Resistance Movement as a defendant but she later withdrew the suit against the Party. The defendant defended her candidature in those primary elections contending that she was possessed of the

requisite academic qualifications to stand as a member of parliament. Incidentally she is currently a Woman Member of Parliament representing Lyantonde District in the eighth Parliament.

On the 13th of the January 2011 a Scheduling Conference was conducted. The parties agreed on one issue but were not agreed on another issue Court framed both issues for its determination. The agreed issue was as to whether or not the defendant lawfully holds a minimum formal education of Advance Level Standard and the disputed issue was as whether the defendant fraudulently procures herself to be admitted to O-Level at Kampala Secondary School. After the scheduling conference the suit was set down for hearing on 27th day of January 2011.

When the case was called for hearing on 27-01-2011 Mr. Kanduho, Counsel for defendant raised a Preliminary Objection which is the subject of this ruling. Mr. Babigumira, Counsel for the plaintiff raised the issue of the timing of the preliminary objection and cited the case of **NASSAN WASSWA & 9 OTHERS VS- UGANDA RAYON TEXTILES [1982] HCB 137** for his proposition that a preliminary objection should be raised at the earliest opportunity and not when the case has been called a number of times and a scheduling conference has been completed. The third holding of this case cited which I reproduce hereunder is as follows:-

“The preliminary objection itself was misconceived as it was raised at the wrong time. A preliminary objection by its very nature should be raised at the commencement of the proceedings. Since it is proper to bring to the notice of the Court as alleged irregularity which must be cured before the case proceeds. In the present case, it was raised when Court had concluded hearing the case during the course of submissions by Counsel. Further it contravenes the provisions of O. 6 rule 6 of the Civil Procedure Rules in that it was a clear departure from the original proceedings”

I agree that ideally the preliminary objection should have been raised at the scheduling conference but I wouldn't go as far as saying that if the preliminary objection raised an irregularity that requires a cure before the actual hearing of the Suit this Court cannot entertain it. What distinguishes this case from the one cited is that the irregularity had been pleaded and unlike the case cited the hearing of this case has not been concluded. In my view it would be futile to proceed with the hearing of the suit and it was later found that the irregularity was incurable. I would rather determine the preliminary objection on its own merit.

As I understand Mr. Kanduh's preliminary objection he contends that following the conclusion of the NRM elections and the withdrawal of the suit against the NRM, the suit which was filed on 31-08-2010 during the tenure of the NRM Primary elections in

the plaintiff's capacity as one of the nominated candidates contesting the NRM Primary elections is untenable and irrelevant.

But as he rightly pointed out what becomes irrelevant is the prayer for declaration that the Defendant's nomination for election as the NRM's Parliamentary Candidate or Flag Bearer in the 2011 parliamentary elections is illegal and therefore null and void. The prayer for a declaration that the 1st defendant has not completed a minimum formal education of Advanced Level standard is alive. This is what this Court is required to try and forms the subject of what the parties failed to agree as an issue. It is an issue that Court has to investigate and determine irrespective of whether the elections were concluded or not. That is what made the presence of the NRM irrelevant.

The second leg of Mr. Kanduhó's submissions was that this was a pre-polling petition which is incompetent before this Court because all complaints to do with pre-polling matters have to be lodged with the Electoral Commission whose decision is appeal

lable to the High Court. He cited the authority of **MUZOORA AMON R.K VS- THE NATIONAL RESISTANCE MOVEMENT ORGANISATION & 2 OTHERS** where his Lordship V.T Zehurikize discussed at length the application of section 15 of the Electoral Commission Act and Articles 64(1) and 61(1) (f) of the Constitution of the Republic of Uganda and came to the

conclusion that the Electoral commission had the mandate to hear complaints arising out of any irregularity in a pre-polling process.

If I may reproduce the provision of S. 15 of the Electoral Commission Act it provides as follows:-

“(1) Any complaint submitting in writing alleging an irregularity with any aspect of the electoral process at any stage, if not satisfactorily restored at a lower level of authority, shall be examined and decided by the Commission, and where the irregularity is confirmed, the Commission shall take necessary action to correct the irregularity and any effects it may have caused.

(2) An appeal shall be to the High Court against the decision of the commission confirming or rejecting the existence of an irregularity.

(3) The appeal shall be made as way of petition, supported by affidavits of evidence which shall clearly specify the declaration that the High Court is being asked to make.”

This Court is not being asked to try an irregularity that would be within the exclusive jurisdiction of the Electoral Commission. It is being asked to investigate an alleged illegality where both parties

have lined up a number of witnesses. The trial may entail cross examination of these witnesses which may not have been envisaged when the Electoral Commission is addressing complaints alleging irregularities. I do not agree that if this Court proceeded to hear this suit it would have ousted itself of its appellate jurisdiction to hear appeals from the Electoral Commission and that it would have opened flood gates for pre-polling election petitions. This Court would, like in the case of **Amon Muzoora Vs- The National Resistance Movement Organisation and two others** (supra) throw out these matters that the Electoral Commission has the mandate to handle without necessarily ousting itself of its own unlimited jurisdiction.

In conclusion I find that the preliminary objection raised by Counsel for the defendant has no basis and it is dismissed. The costs will abide the outcome of the main suit.

Eldad Mwangusya

J U D G E

17/02/2011

Parties absent

Kanduho for defendant in Court

Court: Ruling read

John Keitirima

DEPUTY REGISTRAR