THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCMA NO. 154 OF 2010

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

JULIUS MAGANDA……………………………………APPLICANT

AND

NATIONAL RESISTANCE MOVEMENT………………RESPONDENT

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

RULING

At the commencement of the hearing of this application, Mr. Aggrey Bwire learned counsel for the respondent which through its Secretary General authorized Hon. Opio Gabriel to stand in on its behalf, raised several preliminary objections which court decided to handle prior to hearing the main application hence this ruling.

In the application the applicant Maganda Julius filed this notice of motion through M/s Dagira & Co. Advocates for Judicial review under rules 3 and 6 of the Judicature (Judicial Review) Rules, 2009 for orders that:-

(1) Certiorari does issue to quash the declaration by the respondent of Hon. Opio Gabriel as the NRM Flag bearer for Samia Bugwe South Constituency dated 13th September 2010.

(2) A prerogative order of Mandamus issues to compel the Respondent to take a decision on the applicant's petition dated 13th September 2010.

(3) Prohibition does issue to prohibit the Respondent, its agents/servants from endorsing Honourable Opio Gabriel as its Parliamentary Candidate for Samia Bugwe South Constituency in the coming General Elections.

(4) An injunction does issue against the Respondent and/or its servants or agents restraining them from endorsing, sealing and/or signing nomination papers for Hon. Opio Gabriel as Parliamentary Candidate for Samia Bugwe South Constituency in the pending national General Elections.

The grounds for this application are that:

a) The elections of the NRM Flag bearer on 9 September 2010 for Samia Bugwe South Constituency were marred with serious irregularities and non-compliance with the NRM Constitution, Guidelines and Regulations and the law.

b) The NRM has not come out with a decision on the applicant's petition against the declaration of Hon. Opio Gabriel as its Flag bearer for Samia Bugwe South Constituency.

c) The Respondent's agents/servants acted in bad faith in the conduct of the said elections and thereafter.

d) Because it is just and convenient for the injunction to be granted.

The Notice of Motion is supported by the affidavit of the applicant which reiterates the contents of the application. The Respondent authorized Hon. Opio Gabriel to swear an affidavit in reply opposing the application.

At the commencement of the hearing of this application, Mr. Aggrey Bwire learned counsel for the respondent raised several preliminary objections to this application saying they dispose of the application without going into its merits.

Learned counsel contended that:-

i. The affidavit in support of the application offends O.19 r.3 of the Civil Procedure Rules (CPR) in that it is not based on matters that can be proved by the deponent this being a substantive application. He faulted paragraphs 7,8, 9, 10 and 11 which are not within the deponent's knowledge but in the knowledge of another Ms. Nasirumbi and an disclosed agent to the applicant.

ii. The application is overtaken by events thus making it unnecessary to go into its merits. That going into the merits would make the outcome a moot decision for academic purposes with no practical effect since both parties to this matter have been variously nominated to contest in the coming general elections in Samia Bugwe South Constituency; the applicant as an independent and Hon. Opio Gabriel as Flag bearer for the Respondent. As such the orders sought of Mandamus, Prohibition and injunction will have no effect even if granted.

iii. The applicant has no *locus standi* since he has since been nominated as an independent candidate. That he cannot be an NRM candidate at the same time. That by this action the application waived his *locus standi* in this application.

iv. The applicant ought to have filed a petition instead of a Notice of Motion.

v. The application offends the rules of natural justice since Hon. Opio Gabriel who is to be affected by the decision of this Court was not made a party to the application.

vi. The application does not disclose grounds upon which prerogative orders can be granted by court i.e. procedural irregularity, impropriety, illegality and breach of the rules of natural justice.

In reply, Mr. Dagira learned counsel for the application submitted that:-

1. His client has been ambushed by the first objection that the affidavit in support of the application offends O.19 r.3 of the Civil Procedure Rules. That this objection should not be handled at all in the circumstances. Further that court should invoke Article 126 (2) (e) of the Constitution and administer substantive justice without undue regard to technicalities. Mr. Dagira further submitted that since a deponent is not expected to be everywhere at the same time matters based on information in an affidavit should be allowed in evidence. That in the alternative, only the offending paragraphs should be expunged from the affidavit.
2. Mr. Dagira further submitted that this application is not overtaken because the order sought is certiorari, a corrective remedy to correct a passed decision or mistakes done by the respondent. That this cannot be a moot question. Further that the applicant intends to ask for mandamus and demonstrate that he has complaints as per internal Rules and mechanisms as well as regulations governing the NRM party.
3. Regarding prohibition Mr. Dagira submitted conceding that such order would be of no effect since Hon. Opio Gabriel was nominated although this does not collapse the whole case. That court can make a declaratory judgment on the matter before it after which the electoral commission would make a decision on the nomination.
4. Mr. Dagira abandoned the prayer for an injunction but maintained that his client has a *locus standi* because *locus standi* is as at the time proceedings were brought to court so long as the one who came to court is still aggrieved. That the applicant is not estopped from persuing the application because he was nominated as independent since he has a cause of action. That proceedings cannot be struck out because of form.

I have thoroughly considered the points of objection raised by Mr. Aggrey Bwire. I have considered the submissions by both learned counsel and have carefully studied the contents of this entire application. I have also carefully considered the authorities cited for my assistance.

I have found merit in the objections raised by learned counsel for the respondent and the following are my reasons on each of the objections:-

1) Whether this application is overtaken by events

Both parties to this application agree that the applicant Julius Maganda and Hon. Opio Gabriel were nominated to contest in the forthcoming general elections. The duo were nominated by the National Electoral Commission. The applicant was nominated as an independent candidate under Article 72 (4) of the Constitution which provides that:

> "*Any person is free to stand for elections as a candidate independent of a political organization or political party*."

The applicant confirmed this position in paragraph 3 of his affidavit in rejoinder. He depons that:

> "*it is true I was nominated as an independent candidate for Samia Bugwe South Parliamentary Constituency. This was after I had filed my application for Judicial Review challenging the process leading to the election of Gabriel Opio as NRM flag beare*r."

On the other hand, according to annexture 'A' to the affidavit in reply by Hon. Gabriel Opio, he was nominated and sponsored by the National Resistance Movement (NRM) on 23.November.2010 as the party flag bearer for the NRM for

Samia Bugwe South Parliamentary Constituency. The two contestants were officially nominated by the national electoral commission.

This development which came into focus when the national electoral commission allowed these contestants to stand as stated above significantly changed the status quo and put into question the *locus standi* of Mr. Julius Maganda to challenge the internal workings of a party he no longer subscribes to.

Unlike in other situations, it is in my view necessary that for one to challenge the decision of a political party or organization, he or she has to be a member otherwise it would be absurd for any body including outsiders to the organization or party to interfere with the decisions of a grouping with a defined membership. This *locus standi* stands as long as a complainant still pays allegiance to a given political party or organization.

According to the Constitution of the National Resistance Movement (NRM) as amended on 19th November 2005, Article 8(2) thereof, a member is defined thus:-

> "*8(2) Every person who subscribes to the ideals and principles of the movement at the time of registration of NRM shall automatically be a member of NRM unless that person opts out*."

Cessation of membership can also be effective if a member:

> "*8(5) (c) ……….joins another political organization or political party*."

In the instant case, the applicant unequivocally opted out of the NRM party on his own volition and opted to move on as an independent. I agree with Mr. Bwire that

the applicant cannot be an independent and at the same time be a member of the NRM Party. By his actions, the applicant waived his rights to prosecute this application. Even if any of the reliefs sought by the applicant were to be granted, they would be of no legal effect rendering such decision moot and for academic purposes only. The applicant's decision to opt out of the NRM and stand as an independent drove the applicant's case into the silent limbo of legal mootness. This immediately erased his membership of the NRM party. The decision in ***Misc. Application 233 of 2006 In the Matter of An Application for Judicial Review Between:***
Honourable Justice R.O. Okumu Wengi AND Attorney General per Musoke Kibuuka J. illustrates this point very well.

I wholly agree with my learned brother's pronouncements in that decision which was based on facts similar to the ones before me.

The applicant in the said case, Hon. Justice Okumu Wengi sought for prerogative orders of certiorari, prohibition declaration and injunction against the respondent Attorney General standing in for the Judicial Service Commission which advised the president to appoint a tribunal to investigate the applicant under Article 144(4) of the Constitution. The president did appoint a tribunal and the applicant was suspended from office of Judge by letter of the Chief Justice dated 24th August 2006. On 31st August 2006 the applicant wrote to the appointing authority requesting for permission for early retirement from holding judicial office. As this process was going on, the applicant filed the application for review on 19th September 2006. As the process of hearing the application was going on and unknown to the court the president had considered the applicant's request for early

retirement and granted it on 24th November 2006, and revoked the instrument appointing the tribunal.

Consequently Musoke Kibuuka J held, and I believe rightly so, that the process of investigating the question of removing the applicant from office was put to a final close because the fact in dispute no longer existed. This finding applies to the case before me *Mutatis mutandis*. After the applicant herein decided to stand as an independent candidate, he opted out of the NRM party and his complaints against it no longer existed.

Courts of law do not decide cases where no live disputes between parties are in existence. Courts do not decide cases or issue orders for academic purposes only. Court orders must have practical effects. They cannot issue orders where the issues in dispute have been removed or merely no longer exist.

In the instant application, the applicant asked for an order of certiorari to quash the declaration of respondent of 13.9.2010. But the respondent subsequently endorsed Hon. Opio Gabriel as flag bearer of the NRM on 23rd November 2010. Even if an order was issued against the decision of 13.9.2010, that of 23rd Nov.2010 would not be affected because the latter decision is not challenged. In the same vain even if orders of Mandamus and prohibition or injunction were issued they would have no legal effect. This is conceded to by Mr. Dagira for the applicant. To compound the problem further is the fact that Hon. Opio Gabriel was nominated by the National Electoral Commission which is governed by another legal regime and not rules governing the NRM Party.

2) Whether the affidavit in support of the application is defective

On this objection I agree with Mr. Bwire Aggrey that the affidavit in support of the application offends O.19 r.3 (1) of the Civil Procedure Rules. It is enacted there under that:-

> "*Affidavits shall be confined to such facts as the deponents is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated*."

Undoubtedly, an application for judicial review is not interlocutory. It is a substantive application which disposes of the rights of the parties finally as a suit. An affidavit to support an application for judicial review must by law contain matters that can be proved by the deponent of his or her own knowledge. In the instant application what comprises the substance of the applicant's deponements are paragraphs 7, 8, 9, 10 and 11 which contain information not within the knowledge of the applicant but rather that of one Rose Nasirumbi. All this information comprised hearsay and offended O.19 r.6 (1) of the Civil Procedure Rules. Matters which are prohibited by Statute are inadmissible in law. In the case of ***MAYERS AND ANOR. V. AKIRA RANCH LTD [1974] EA 169***, the criteria to be applied in determining what is to be excluded from affidavits under the hearsay rule was outlined. While quoting volume 15 P.266 of the Halsbury's Laws of England 3rd Edition the High Court of Kenya and I agree held *inter alia* that:

> "*A witness cannot be called, in proof of a fact, to state that he heard someone else state it to be one. Care must be taken to distinguish between evidence which is tendered to prove that someone else has spoken certain words when the fact of which proof is required is merely the speaking, and evidence which is tendered to prove that*

> *someone else has spoken certain words as leading to a conclusion that the words spoken were true. The former is admissible……..the latter is not*."

The two principal objections to the admission of hearsay would appear to be the lack of an oath administered to the originator of the statement and the absence of opportunity to cross examine him/her.

In the result, the notice of motion is left with no basis for a Judicial review. What the applicant should have done is to bring the people who gave him the information to come to give the information themselves. In that case their evidence would be tested through cross-examination.

3) Regarding the submission by Mr. Dagira that the first preliminary objection is by ambush I am of the considered view that it is not. In their paragraph 14 of the affidavit in reply, Hon. Opio Gabriel depons *inter alia* that:

> "*14………this application is misconceived, bad in law and discloses no reasonable cause of action, is frivolous and vexatious and an abuse of court process and that the same should be dismissed with costs*."

This averment was enough notice to the applicant that points of law in objection would be raised by the respondent. This notice notwithstanding, it is trite law as put by Mr. Bwire that preliminary points of law need not be pleaded in the ordinary way of pleadings. Matters of law can be raised at any time of the proceedings and may be pointed out or raised by court on its own motion.

4) Another objection for consideration is the failure by the applicant to add Gabriel Opio as co-respondent to the application yet the outcome of this application would adversely affect him. I agree with Mr. Bwire that it was necessary that Hon. Opio Gabriel was sued since he would be affected by the outcome of this application. In a recent constitutional court case of Hon. Anifa Bangirana Kawooya vs. (1) Attorney General (2) National Council for Higher Education Constitutional Misc. Application No. 42 of 2010, the Constitutional Court held *inter alia* that:

> "*There are important triable issues in the Constitutional Petition now pending in court notably the applicant's complaint that her Constitutional right to be heard in accordance with Article 28 (1) and 44(c) of the Constitution continues to be violated. The applicant's right to a fair hearing is sacrosanct and non-derogable.*"

In that case, the applicant had not been served with the court order issued in an earlier High Court application, nor was she a party thereto.

In the instant application, Hon. Gabriel Opio and the applicant took part in primary elections of the NRM party for Samia Bugwe South Constituency. Each was vying to be the flag bearer for the NRM. At the end of polling Wandera George the Returning Officer NRM District office declared Hon. Gabriel Opio Winner of the primary polls with 21,354 votes against 20,324 for the applicant, Maganda Julius. It was after this result which was declared on 13.9.2010 that the applicant complained to the party about the conduct of the said primaries. Despite the complaints, the NRM went ahead and seconded Hon. Opio Gabriel for nomination as flag bearer for the NRM by the National Electoral Commission on 23rd

November 2010 (see Annex A). As of now, Opio Gabriel is the official NRM flag bearer for the constituency.

This application was filed on 9th November 2010. In the circumstances, since Hon. Opio Gabriel held the victory, the applicant ought to have joined him in a bid to deny him that victory.

Mr. Dagira referred to a recent application to this court by **Mr. Jacob Oboth under Mbale Misc. Application 108 of 2010** to try and justify the exclusion of Hon. Gabriel Opio from the instant application. The facts of the said application are clearly distinguishable from the instant one. In Oboth's application (supra) the NRM party was planning to conduct primaries. The said primaries had not been conducted and court issued an interim order stopping the primaries. Contrary to the court order, the NRM went ahead and conducted primaries when an application against it was pending resolution by court. Primary elections had not taken place, there was a court order to stop the same and no winner had been declared at the time of filing the application. The applicant could not be faulted for not joining candidates who fell into the NRM's trap after disobeying a court order. This is not the case here for in the instant application the process of voting was done.

In the instant application therefore, the application violated Hon. Gabriel Opio's right to be heard which is sacrosanct and non-derogable.

Finally, the submission by Mr. Dagira that this court can make a declaratory judgment in this application does not arise since the same has not been asked for the pleadings.

For the reasons given herein above, I am of the considered view that the applicant's cause of action no longer exists. By vying for election as an independent, and Hon. Opio Gabriel having been nominated by the National Electoral Commission as an NRM flag bearer, Julius Maganda's application has been rendered moot.

The application will be dismissed on that account.

Considering the facts and circumstances of the entire case and the need to nurture our nascent democracy, court is of the view that each party should bear its own costs.
I so order.

Musota Stephen
JUDGE
11.1.2011

11/1/2011
Applicant is present.
No representative for the respondent.
Court Clerk Hadija.

Dagira: I appear for the applicant. The counsel for the respondent, Mr. Bwire from Musamali & Co. Advocates is also not in court, so is Mr. Hon. Gabriel Opio who appeared from the respondent party. The matter is for ruling and we are ready to receive it.

Court: Ruling read.

My instructions were to read this ruling and I have done so.

Lillian C.N. Mwandha

ASSISTANT REGISTRAR

11.01.2011