

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISC. CAUSE No. 035 OF 2015

1. HON. BETTY AMONGI

2. HON. EBIL FRED ::::::::::: APPLICANTS

- *VERSUS* -

1. DR. OLARA H.E OLARA OTUNNU

2. HON. JACINTO OGWAL

3. THE UGANDA PEOPLE'S CONGRESS

PARTY

::::::::: RESPONDENTS

BEFORE: HON.JUSTICE STEPHEN MUSOTA

RULING

Hon. Betty Amongi and Hon. Ebiru Fred filed this application by way of Notice of Motion under Section 33 of the Judicature Act, rules 3, 4, 6 and 10 of the Judicature (Judicial Review) Rules 2009 and Section 10 of the Political Parties and Other Organizations' Act as well as Order 52 rules 1, 2 and 3 of the Civil Procedure Rules for orders that:

1. An order of Mandamus doth issue compelling the mandated organs of the third respondent Uganda Peoples' Congress to call a delegates conference for the election of a party president of the UPC in line with the party constitution and the Political Parties and

Other Organizations Act 2005 and the Political Parties and Other Organizations Act of 2010.

2. A declaration that the delegation of functions of elected party organs or the party president of powers to the UPC Secretary General and others is void, voidable, null and *ultra vires* the UPC constitution and of no legal effect.
3. An order of prohibition prohibiting the current persons acting on the authority of powers as purportedly delegated by the then party president, any delegation of any party presidential powers to any person or party organ and restraining them from carrying out or purporting to carry out any powers so illegally delegated.
4. An injunction restraining the respondents or any other person purporting to derive authority from them from further usurping of the Uganda Peoples Congress constitution and authority.
5. A declaration that any grassroots elections purportedly conducted by the first respondent in 2011 and 2014 were improper fictitious and an immasculation of the party constitution.
6. An order of certiorari quashing any illegal grassroots elections of UPC that were carried out without the approval of the national council.
7. An injunction restraining the first and second respondent and their appointees or agents from illegally doing administrative work in the party unless dully elected.
8. An order of certiorari quashing and declaring the purported roadmap hand worked by the first and second respondents null and void for illegality.

The application is supported by an affidavit of Hon. Betty Amongi the first applicant wherein she depones as follows;

- a) That she is aware of the facts of and law in regard to election, registration and end of term of the UPC party president and his appointees.
- b) That on the 4th day of March 2015, knowing that his mandate was effectively ending, the first respondent purported to make a resignation speech to the press with cosmetic effect to cover culpable his failure to stir party organs to conduct valid elections of all organs of the party in order to commence a delegates conference for elections of the party president.

- c) That the said resignation speech was intended to and has disillusioned many thus leaving a leadership crisis in the Uganda peoples' congress party yet the first respondent simply changed titles and illegally nominated himself chairperson of the reconciliation committee which is unconstitutional.
- d) That after his purported resignation, the first respondent purported to set a political party roadmap.
- e) That it is only elected and dully mandated organs of the party which can validly make a road map for the party leading up to the 2016 elections.
- f) That in a situation where the terms of office of party president lapses, the transitional provision of the party constitution under article 26.1 only preserves constitutionally elected organs to stir the party till elections are conducted.
- g) That since his election the delegates' conference, national council and all organs of the party have never met at intervals stipulated by Uganda peoples' congress constitution and as mandatorily required by the Political Parties and Other Organizations Act 2005 save for one meeting of the National Council in 2011 to review post election issues.
- h) That the five year tenure of Dr. Olara Otunu and all his appointees, the UPC's president has expired as stipulated in the party's constitution.
- i) That the purported resignation of the first respondent is cosmetic, hound winking and of no legal consequence and contrary to party constitution but most importantly in so far as his term of office lapsed, such purported resignation is a wastage of time and intended to blind fold the eyes of members of UPC and elections of new party leaders.

The first respondent in an affidavit in reply states as follows;

1. That he is informed by his advocate that there is the pending Civil Application in the High Court of Uganda, Misc. cause No.37 of 2014 in which most of the matters in issue are also directly and substantially in issue in this Misc. Application between parties with similar interests where the applicants in the said matters would have litigated together against the respondents who are the same or have similar interests and that such multiplicity of suits is barred and or discouraged by law.
2. The prayers in paragraphs B and C of the application are misconceived and paragraph 6 of the application is false because he is not delegated powers as alleged therein.

3. That he is informed by his lawyers that prayers B and C are misconceived and paragraph 6 of the application is false because the constitution of Uganda Peoples' congress party in its article 14.3 (C) allows the president to delegate his or her powers under that article to the vice president, secretary general and any other member of the cabinet and so such action would neither be void, voidable, null, illegal, a mockery of party structures nor *ultra vires* to the constitution as falsely stated.
4. That paragraph 2 of the application and 12 of the supporting affidavit are false because his tenure of office as president of the third respondent has not expired. Para. 3, 4 and 5 of the application and para.4, 5 and 14 of the said affidavit are false in that he has never made a speech resigning from his position as president of the third respondent but he declared his position and intention as at that point in time not to stand for election in the next relevant elections.

At the hearing of the application, the applicants were represented by Mr. Turinawe and Mr. Kamba assisted by Mr. Rekyaraho while the respondents were represented by Mr. Opwonya.

Three issues were framed by the parties for determination by this court and these were;

1. Whether the applicants are entitled to Mandamus to compel the mandated organs of the third respondent to call a delegates conference to organize elections in accordance with the law.
2. Whether the respondent acted illegally and *ultra vires* to the constitution by continuing to hold out after his term of office expired.
3. Reliefs available to the parties.

The issues raised in 1 and 2 appear very broad. I have broken them into sub issues for ease of determining the controversy between the parties hereto as follows;

1. Whether the first respondents' term of office expired.
2. Whether the first respondent had powers to delegate his functions and if so what would be the legal effect of such delegation.

3. Whether the first respondent resigned.
4. What remedies are available to the parties?

I must note that this is an application for judicial review. In order for one to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality, and procedural impropriety. Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act the subject of the complaint. Acting without jurisdiction or *ultra vires* or contrary to the provisions of the law or its principles are instances of illegality and irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic, and acceptable moral standards. Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in the non-observance of the rules of natural justice or to act with procedural unfairness towards one to be affected by the decision.

It may also involve failure to adhere and observe procedural rules expressly laid down in statute or legislative instrument by which such authority exercises the jurisdiction to make a decision.

From the above parameters, it is apparent that judicial review is concerned not with the private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that an individual is given a fair treatment by an authority to which he or she has been subjected. See: **Republic Vs Secretary of State for Education and Science ex-parte Avon County [1991] 1 All ER 282.**

Now, do the complaints by the applicants fall within these parameters?

I have considered the application as a whole, the supporting affidavits and those in reply as well as the submissions by respective counsel.

It is undisputed that the first respondent assumed office on 13th March 2010.

According to the applicants the term of office of the first respondent Dr. Olara Otunu expired on 4th March 2015 because he had already served his five year term under the constitution. From the record, I have noted that the 1970 constitution of the third respondent was amended and the amended constitution was adopted by the annual delegate's conference on 22nd November 2008 but was gazzeted on 13th January 2012 thus giving it effect. This means that the first respondent was elected in 2010 after the new constitution was adopted but before it was gazzeted.

This means that the term of office of the first respondent is governed by Article 26 of the new UPC constitution which provides that the president elected under the old constitution for a term of seven years shall continue to hold that office for a term not exceeding five years from the time of his or her election and thereafter until new elections are held under the new constitution.

The transitional provision under Article 26.1 of the UPC constitution provides that:

“When this constitution comes into force, all persons holding offices under the previous constitution shall subject to this constitution continue to hold such offices until new elections are held under this constitution”.

And article 26.2 of the UPC constitution provides that;

“When this constitution comes into force, the president elected under the old constitution for a term of seven years shall continue to hold that office for a term not exceeding five years from the time of his or her election.”

The constitution was worded in such a way as to avoid absurdities when it clearly provided for the transition in the event that term of office would expire and elections are not held and brings

the holders of office in conformity with the provisions of Article 14.1 para. 3 which requires that the party president has to hold office for a period of five years. The constitution is however silent on what happens when the term of office of the president of the party, in this case the first respondent, expires. It only provides that the president shall relinquish office on being voted out by two thirds majority at the delegate's conference or when he/she resigns, dies or is declared a person of unsound mind by a committee of psychiatrist doctors. See: **Article 14.1 (4)** of the constitution.

Much as the constitution provides for a term of five years, as long as new elections have not been held the holder of the office would continue to act in such position until elections are conducted. This means that as of now since no new elections have been held, the first respondent is the *defacto* president of the UPC.

As regards the question of delegation of powers by the first respondent, the first respondent swore that he has never delegated powers to any person as alleged. That in any case, even if this were to be true, the constitution under Article 14.3(e) allows the party president to delegate powers to the Vice President, Secretary General and any other member of the cabinet. This averment and evidence by the first respondent that he has never delegated his powers was not controverted by the applicants by affidavits in rebuttal to show to the contrary that the first respondent indeed delegated his powers and to who he did so. I will therefore find that contrary to the allegations by the applicant, the first respondent has never delegated his powers to anybody.

On the issue of resignation by the first respondent as president of the third respondent, the applicants claim that the applicant purported to resign by verbally tendering his resignation. However the first respondent deponed denying ever resigning. He averred that he only declared his position and intention not to stand for re-election in the next elections for president of the party. No evidence was adduced by the applicant to support the assertion that the first respondent

resigned. The fact of one resigning required concrete evidence than mere assertions in individual affidavits by the applicants. Without such evidence the claim that the first respondent resigned remained unsubstantiated. It is my finding therefore that the first applicant has never resigned as alleged.

What remedies are available?

In their pleadings, the applicants seek for prerogative orders of mandamus, declarations, prohibition, certiorari and injunction to issue against the respondent. The power of court to issue prerogative orders is derived from Section 36 (1) of the Judicature Act Cap 13 of the Laws of Uganda. In our legal regime this is actuated in the Judicial Review proceedings. The remedy of judicial review was well articulated in the often quoted case of ***John Jet Tumwebaze Vs Makerere University Council and 3 others Civil Application No. 253 of 2005*** (unreported) as per Kasule Ag. J (as he then was) thus:

“The orders be they for declaration, mandamus, certiorari or prohibition are discretionary in nature. In exercising its discretion with respect to prerogative orders, the court must act judicially and according to settled principles. Such principles may include common sense and justice. Whether the applicant is meritorious, whether there is reasonableness, vagilance and not any waiver of the rights by the applicant.”

The learned judge went on and pointed out that:

“Prerogative orders look to the control of exercise and abuse of power by those in public offices rather than at providing final determination of private rights which is done in normal civil suits.....”

As I have stated herein above and was pronounced in another case of ***Kuluo Joseph Andrew and 2 others Vs Attorney General and 6 others, Misc. Cause No. 106 of 2010*** (unreported) by Justice Yorokamu Bamwine (as he then was) it was stated as follows and I agree:

“It is trite that Judicial Review is not concerned with decisions in issue per se but with the decision making process. Essentially Judicial Review involves the assessment of the manner in which the decision is made and it is not an appeal. The jurisdiction is exercised in a supervisory manner, not to vindicate the rights as such but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality”.

In the instant application, the complaints by the applicants substantially concern not what has been done by the respondents but rather what the first respondent and the co respondents have not done or ought to have done which offend the scope of Judicial Review.

The applicants are seeking for mandamus to compel the mandated organs of the third respondent to call a delegates conference to organize elections in accordance with the law. It is the evidence of the applicants that the first respondent has not regularly held meetings as mandated by the law. According to paragraph 11 of Hon. Amongi’s affidavit in support of the application, the delegates conference, national council and all organs have never met at the intervals stipulated in the constitution of the UPC and as mandatorily required by the Political Parties and Other Organizations Act. However, attached to the said affidavit is annexure U-1 which is a roadmap to the 2016 general elections. I therefore agree with learned counsel for the respondents that there is already in place a plan outlining the activities to be done. The plan for the national delegates conference and other organs’ meetings are all included in the roadmap. It would therefore be of no effect for this court to go ahead and issue mandamus when the delegates’ conference is already in the pipeline and provided for in the road map. The essence of the prerogative writ of mandamus is to command the doing of something which the authority or body supposed to do the thing or public duty has omitted or refused to do it: ***The King Vs Port of London Authority Ex-Parte Keynoch Limited [1919] 1 KB 176, 186.***

It is on that basis that this court finds that there exists a remedy which the applicants are seeking in this application among others.

The applicants also sought for certiorari. Certiorari lies to bring the decision of an inferior court, tribunal, public authority or any other body of persons before the High Court for review so that the court may determine whether they should be quashed or to quash such decisions.

The applicants also sought for an order of prohibition. Prohibition is an order issued by the High Court to an inferior court, tribunal or other public authority which forbids the inferior court, tribunal or authority to act in excess of its jurisdiction or contrary to the law. Whereas certiorari is concerned with decisions in the past, prohibition is concerned with those in the future, both are usually sought together. The former quashes the decision while prohibition restrains its execution. ***Wheeler Vs Leicesta City Council [1985] 2 All ER 1106*** which was followed in ***John Kashaka Muhanguzi Vs Kapchorwa District Council and two others Mbale High Court Misc. Application No. 129 of 2000.***

Having held as stipulated herein, there is no basis upon which I can grant the order of certiorari. It has not been proved on a balance of probabilities that the first respondent exercised jurisdiction in excess or without jurisdiction. The applicants have not proved on a balance of probabilities that there is a record on the face of which there is a breach of any rules of natural justice against the applicants or that any decision by the first applicant was procured through fraud, collusion or perjury.

The UPC constitution under Article 24 creates a disciplinary committee where grievances within the party should be referred first before resorting to litigation.

It is provided for under Article 24.1 para. 1 that all party members without exception and employees of the party must abide by the party constitution, Rules and Regulations, bye laws and the code of ethics as adopted and amended from time to time.

Under Article 24.1 para. 2; There shall be a National Disciplinary Committee and Subcounty Disciplinary Committees which shall be set up under the regulations prescribed by the National Council.

Under Article 24.1 para. 3; the National Council shall provide a frame work for disciplinary actions, procedures and penalties.

Article 24.2 provides for fair hearing. It states that in all their proceedings, the Disciplinary Committees shall observe and apply the principles of fair hearing, natural justice and fundamental justice.

Therefore before running to court, these available procedures ought to have been exhausted first. Failure to comply with the party constitutional provisions and running to court was not envisaged by framers of the UPC constitution. Court is of the view that a party constitution binds the party and party members. All subscribers to it are bound to observe all the provisions in it, the same way the Memorandum and Articles of Association binds the company and its members. The effect of this is to create a statutory contract between the members themselves and between the members and the party. See: **Ocheng SC Peter & others Vs President General of DP & others Misc. Cause 217 of 2008.**

Having resolved that the first respondent is legally holding office and that he never resigned as was alleged, I decline to grant the orders sought. I will accordingly dismiss the application with no orders as to costs since as members of UPC all parties to this application should amicably settle their differences. Each party shall meet its costs.

Stephen Musota

J U D G E

06.05.2015