

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

HCT-00-CV-MC-0040-2016

BAZIL BIDDEMU MWOTA ::::::::::::::::::::::::::::::::::: APPLICANT

- VERSUS -

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| <p>1. ROY SSEMBOGA</p> <p>2. MAKERERE UNIVERSITY COUNCIL</p> <p>3. GUILD ELECTION PETITION TRIBUNAL</p> <p>4. ELECTORAL COMMISSION MAKERERE UNIVERSITY</p> | } | : ::::::::::::::RESPONDENTS |
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BEFORE: HON. JUSTICE STEPHEN MUSOTA

RULING

This is an application for Judicial Review brought by way of Notice of Motion under rules 3, 4 and 5 of the Judicature (Judicial Review) Rules 2009 for orders that:

- 1. *An injunction restraining the Electoral Commission of Makerere University from carrying out fresh elections at the School of Education Scheduled for Wednesday 23rd March 2016 be issued.***

- 2. *That the decision of the Guild Election Tribunal dated 22nd March, 2016 to carry out fresh elections at the School of Education be quashed;***

- 3. *That the applicant be declared the successful candidate of the 7th March 2016 elections;***

4. Costs of the application be provided for.

The Notice of Motion is supported by the affidavit of Bazil Biddemu Mwota, the applicant deponed on 23rd day of March 2016 wherein he averred that:

- (1) That he participated in the 11th March 2016 Makerere University Guild elections as an aspirant alongside other contestants who include the first respondent;***
- (2) That indeed the outcome of the elections left him being declared the winner with 4591 votes followed by the respondent with 4276 votes (Attached is a copy of the declared forms showing the outcome of such elections marked “A”);***
- (3) Consequently the first respondent filed a petition with the Guild Election Tribunal challenging the outcome of the elections praying among others for nullification of results of the polling station at school of education citing vexatious and frivolous irregularities. (Attached is copy of the petition marked “B”);***
- (4) That the Tribunal accordingly sat and made its alleged ruling wherein the tribunal members alongside the election commission officials were later seen on the 21st of March 2016 carrying out a vote recount at the school of education station wherein he still emerged a winner;***
- (5) However, it ought to be noted that there was no order for vote recount that was issued to him or his agents no wonder none of them was present at this activity on that day;***
- (6) More so there was no evidence of safety of the ballot boxes between the period from 11th March 2016 to 21st March 2016, yet the recount was carried out leaving a lot to be desired about how effective the recount was.***

- (7) That he was never given an opportunity to defend himself before the tribunal against all the evidence that was led against him and more so cross examine the witnesses that where leading evidence of the said irregularities;*
- (8) That his constitutional rights to legal representation was also barred with reliance on article 80(10) of the Students Guild Constitution as amended in 2016 which he believes was not fair and just. (A copy of the Students Guild Constitution is hereto attached and marked "C");*
- (9) that he is informed by lawyers that legal representation is a constitutional right provided under the 1995 Constitution of the Republic of Uganda which is the Supreme Law of the land and any other law which is inconsistent with it is void to the extent of such inconsistency.*

The 1st respondent deponed an affidavit in opposition of the petition. For the 2nd, 3rd and 4th respondents Dr. S.B. Maloba, a member of the 2nd respondent and chairperson of the 3rd respondent in an affidavit in reply deponed that:

- 1. He knows on the 11th March 2016 elections of Guild President Makerere University were conducted by the 4th respondent and the applicant was subsequently declared winner of the said elections votes while the 1st respondent was declared runner up;*
- 2. That Dissatisfied with the outcome of the said elections the 1st respondent filed a petition challenging the results from the School of Education that were declared by the 4th respondent;*
- 3. The 1st respondent thus sought for cancellation of the results of the election of Guild President obtained from School of Education and a further order that the said result should be excluded when determining the winner of the said elections;*

4. *The 3rd respondent comprising of him, the chaplains of St. Francis and St. Augustine Chapels Makerere University, the University Imam, a Legal Advisor and Guild Advisor sat on 17th, 18th and 21st day of March 2016 to hear the petition;*
5. *That at no time during the hearing did the applicant request to cross examine the 1st respondent or any other witnesses or request to be allowed to have his legal representatives participate in the 3rd respondent's proceedings;*
6. *That upon reviewing the petition and hearing the testimonies of the various witnesses, the members of the 3rd respondent in order to establish the veracity or otherwise of the 1st respondent's complaints in the petition unanimously resolved to re-examine the electoral registers relied upon during elections at the School of Education, the ballot papers, ballot boxes and identification documents used during voting and other documents which had been mentioned during the petition;*
7. *That although the applicant and the 1st respondent were invited to attend the verification exercise and although the applicant kept promising to attend the said exercise, he did not eventually turn up and his supporters attempted without success to frustrate the said exercise;*
8. *That the 3rd respondent's decision to order fresh elections at the School of Education on 23rd March 2016 was premised on the strict constitutional timelines enshrined under the guild constitution which provided that the swearing in ceremony of the new Guild President should take place before the 26th March 2016;*
9. *That the holding of fresh elections will equally affect all the candidates involved in the elections of Guild President of Makerere University and would not afford any candidate unfair advantage over the others.*

Court allowed respective counsel to file written submissions in support of their respective cases. At the hearing, the applicant was represented by Mrs. Sheila Birungi; the 1st respondent was

represented by Mr. Isaac Semakadde. While the 2nd, 3rd and 4th respondents were represented by Mr. Dennis Wamala.

Although no issues were framed at the beginning, counsel for the applicant in his submissions framed issues which learned counsel for the respondents responded to. These were:

- 1. *Whether the applicant was afforded a fair hearing;***
- 2. *Whether the 3rd respondent in reaching the decisions made against the applicant acted with illegality, irrationality and procedural impropriety;***
- 3. *What remedies are available?***

It is trite law that Judicial Review is an arm of administrative law which involves an assessment of the matter in which a decision is made. It is not an appeal. Its jurisdiction is exercised in a supervisory manner to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality. If the High Court finds that anybody holding public office acted illegally, unfairly and irrationally it would intervene to put matters right.

For an application for Judicial Review to succeed, there must be proof of illegality, irrationality and procedural impropriety.

These terms have been severally defined by this court as follows:

1. Illegality arises when a decision making authority commits an error of law in the process of making a decision, for instance, where an authority exercises power that is not vested in it or has acted without jurisdiction or in an ultravires manner. It is also an illegality if a decision maker incorrectly informs himself/herself as to the law or acts contrary to the principles of the law.

Irrationality refers to a situation when the decision made is outrageous in its defiance of logic or of acceptable moral standards that no reasonable person could have arrived at that decision. It

refers to a situation when a decision making authority acts unreasonably that in the eyes of court, no reasonable authority addressing itself to the facts and law before it would have made such a decision.

Procedural impropriety occurs when a decision making authority fails to act fairly in the process of its decision making. It includes failure to observe the rules of natural justice towards one to be affected by the decision. It also involves failure by administrative authority or tribunal to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

I will now go ahead and address the issues as argued by respective counsel.

Issue I: Whether the applicant was afforded a fair hearing:

Learned counsel for the applicant submitted that Article 28 of the Constitution entitles a person to a fair, speedy and public hearing before an independent tribunal in determination of civil rights. According to Article 44, any person appearing before an administrative official or body has a right to be treated justly and fairly and has a right to apply to a court of law in respect of any Administrative decision taken against him or her. Learned counsel relied on the case of **Rose Mary Nalwadda Vs Uganda Aids Commission HCMC 0045 of 2910 (unreported)** where it was held that a fair trial, or a fair hearing, under this Article 28 of the Constitution means that a party should be afforded opportunity interalia to hear the witnesses testify and even cross-examine them, that he/she should be given opportunity to give his own evidence if he/she chooses in his defence and that he/she should if he/she so wishes, call witnesses to support his/her case.

Learned counsel further submitted that it is the applicant's contention in paragraph 8 and 9 of the affidavit in support of the application and paragraph 4 and 5 of the affidavit in rejoinder that he was not given an opportunity to not only cross-examine the witnesses of the 1st respondent but was also denied the right to call his own witnesses and also get legal representation. He

submitted that the legality of SBM4 is under question as elaborated by the applicant under paragraph 7 of the affidavit in rejoinder. He contended that a close look at the minutes indicates that 10 members of the tribunal attended the hearing but Minutes were signed by 2 persons to wit the Chairperson and Secretary of the 3rd respondent and one wonders why the other members did not sign these Minutes and that the absence of other members' signatures on the Minutes points to a possible connivance between the Chairperson and the Secretary to alter these Minutes to intentionally omit the applicant's pleas. He further submitted that the applicant was not given a hearing and that the fact that the applicant filed a written statement of defence does not take away his constitutional right to a fair hearing.

Learned counsel cited Article 80 of the Guild Constitution providing that no candidate or any member of the guild shall be allowed to have legal representation when putting his or her case but the tribunal shall observe the principles of natural justice. He contended that the above Article is in conformity with the applicant's evidence that when he requested for legal representation he was referred to Article 80(10) of the Students Guild Constitution and accordingly his request was denied. Finally the applicants counsel submitted that a party has a right to know the nature of evidence produced against him and that failure to disclose to the applicant a list of the 415 signatures accompanying the petition and being ambushed with this list at the hearing was unfair and unjust and therefore contravened his right to a fair hearing.

In reply, learned counsel for the respondents submitted that a clear reading of the Tribunal's record of proceedings (Annexure SBM4 of the affidavit of Dr. S.B. Maloba in reply) shows that at no time during the hearing of the petition did the applicant apply to call any witness in support of his defence to the petition or to cross-examine any of the witnesses that appeared before the 3rd respondent. During the hearing of the petition or request to appear with his legal representative during the said hearing. That the applicant's complaint in this respect could only be legally tenable if the said request had been made and denied by the 3rd respondent. There was no way the 3rd respondent could have anticipated the applicant's alleged intention to call or cross-examine witnesses or to appear with his lawyer during the hearing of the petition.

Learned counsel submitted further that in any event, it is not enough for the applicant to merely complain about the alleged failure to be allowed to cross-examine witnesses or appear with a lawyer at the hearing of the petition. The applicant ought to have demonstrated in his pleadings the substantial prejudice occasioned to him. That it is clear from the evidence on record that the applicant was able to articulate his defence by filing a comprehensive 36 paragraph reply to the petition (Annexure RS2 of the 1st respondent's affidavit in reply) and by appearing in person to give evidence. (See pages 9-11 of Annexure SBM2 of the affidavit of Dr. S.B. Maloba).

Learned counsel for the respondents further contended that it is also clear that the same standard was applied by the 3rd respondent in dealing with the 1st respondent's claims under the petition. He further submitted that the right to obtain legal representation and/or to cross-examine witness while appearing before a tribunal such as the 3rd respondent is not inalienable. That in Uganda, the said rights are only inalienable in respect of criminal proceedings as per Article 25 (3), (c), (d), (e) and (g) of the 1995 Constitution. That the absence of such tenets in the proceedings before a tribunal such as the 3rd respondent does not automatically mean that the said proceedings were unfair. The applicant ought to show how absence of such tenets has caused him unfairness or prejudice for an application for Judicial Review to succeed on the said ground. That it is therefore not true as contended in the applicant's pleadings that the 3rd respondent's proceedings in any way infringed his constitutional rights to a fair hearing.

For the 1st respondent, it was submitted that the applicant and 1st respondent were given equal opportunity to address the tribunal and call additional witnesses in support of their respective cases. That the applicant's complaint that the Minutes of the tribunal were not signed by all members of the tribunal is inconsequential.

From the pleadings, the applicant in his affidavit in support of the motion paragraph 8 averred that he was give an opportunity to defend himself before the tribunal but was never given opportunity to defend himself before the tribunal against all the evidence that was laid against him and more so to cross-examine the witnesses that were leading evidence of the said irregularities. I find this averment false and untruthful. Annexure B to the affidavit in reply are

the Minutes of the Election Tribunal and on page 9 thereof, the applicant was called upon to present his case. He did present his case and was asked questions which he responded to. When the petition was lodged, the same applicant put in his answer to the petition stating his case clearly. It is absurd for the same applicant to turn around and allege that he was never given an opportunity to defend himself. What more opportunity did he want?

Learned counsel for the applicant tried in his submissions to discredit the Minutes on grounds that they were signed by only two members out of the ten who attended the proceedings and he submitted that they were so signed and drafted intentionally to omit the applicant's pleas. There was no proof brought to court to show that the Minutes had to be signed by all members and failure by some members to sign invalidated the proceedings. It is common knowledge that minutes of any meetings are signed by both the Secretary and Chairperson not by all members who attend meetings who may be as many as 300. Therefore failure by some members to sign is not enough to discredit the proceedings. This complaint is inconsequential and misplaced and is dismissed with contempt. The connivance alleged by counsel for the applicant remained unsubstantiated.

I am not satisfied and do not agree with learned counsel for the applicant in his allegation that the chairperson and secretary intentionally omitted the pleas of the applicant because nothing could point at any personal interest by the two in the proceedings before them.

I am in agreement with the respondents' counsel that the applicant did not demonstrate the prejudice he suffered when he failed to cross-examine the witnesses and to get legal representation. That notwithstanding, it should be noted that proceedings before a University Tribunal cannot be equated to proceedings before court under the Civil Procedure Rules. The said tribunal is a quasi judicial forum which may determine its own procedure. Therefore the 3rd respondent did not necessarily have to follow the legal requirement since its proceedings are taken to be simple and clear.

Allowing legal representation would violate Article 80 (10) of the Guild Constitution and the applicant ought to have known this. The applicant is well aware of the rules to which he subscribed in advance while seeking nomination. For him to turn around and complain is unacceptable.

According to the proceedings the 1st respondent in this matter did not appear by his legal team. He represented himself. Therefore the treatment that was given to him was the same as that given to the applicant.

I am satisfied that parties were all treated equally and the hearing procedure was fair to all the parties. I will answer issue I in the affirmative.

Issue 2: Whether the 3rd respondent in reaching the decisions made against the applicant acted with illegality, irrationality and procedural impropriety:

Regarding the issue of illegality learned counsel for the applicant reiterated the submissions he made on Issue I. As I have already found, there was no illegality committed by the respondents since in reaching its decision it was exercising its vested powers.

Regarding irrationality, learned counsel for the applicant submitted that the applicant contests the rationality of the decision of the 3rd respondent in paragraphs 13 and 14 of his affidavit in support of the applicant. That it beats all sense and reason for the 3rd respondent to deliver its ruling on 22nd day of March 2016 at 9.30 a.m and ordering the re-election to be conducted the next day on 23rd day of March 2016.

Learned counsel contended that a re-election is not a one day activity as it requires time not only by the 4th respondent to re-organize but also by the candidates to mobilize their support. That the

ordering of the re-election in less than 12 hours to its commencement fits well within the definition of irrationality.

In reply learned counsel for the respondent submitted that it is very critical to note that the applicant does not object to the holding of a re-election, but simply the timelines in which the re-election was to be held.

I agree with the submissions by counsel for the respondents that there was never any irrationality in the decision by the 3rd respondent. In paragraph 13 of the affidavit in opposition, Dr. Maloba stated that:

“13. I know that the 3rd respondent’s decision to order for fresh elections at the School of Education on 23rd March 2016 was premised on the strict constitutional timelines enshrined under the guild constitution which provided that the swearing in ceremony of the new Guild President should take place before the 26th March 2016”

A decision is irrational when it is outrageous in its defiance of logic or acceptable moral standards that no reasonable person could have arrived at such a decision. See **Philadelphia Trade and Industry Ltd Vs Kampala Capital City Authority CR 15 of 2012.**

The applicant complains of the limited timelines and he bases on that to contend that the decision was irrational.

I think the explanation by Dr. Maloba vindicates the 3rd respondent. The timeline was dictated by a constitutional requirement hence the speed at which the decision was made. The Tribunal cannot be faulted for this. Likewise, it is not the applicant who was singularly targeted. All candidates are affected and by 23rd March 2016 the applicant, 1st respondent and their rivals had

had sufficient time to canvass for support since this was not a by-election. It was therefore not necessary to give the candidates extra time to canvass for support.

I also agree that it would be in fact the 1st respondent to be prejudiced and not the applicant since the applicant is a student in the School of Education who would hold an advantage over the 1st respondent who is a 4th year Medical Student.

Regarding the submissions by counsel for the applicant that it was procedurally improper for the 3rd respondent to proceed with a vote re-count and/or verification exercise in the absence of the applicant, who hadn't been invited to attend the same, Dr. Maloba in paragraph 9 of the affidavit in reply stated that the 3rd respondent had invited the applicant and the 1st respondent to attend the verification exercise but the applicant never showed up.

In Minute 2.8.2 line 3 of the 3rd respondent's proceedings (Annexure SBM1), it is stated that:

“The Tribunal issued a written note to the Petitioner, the Police and the 1st respondent to allow the ballot boxes to be brought to the Senior Common Room at the main building.”

However, the applicant in his affidavit in rejoinder denied such notice. I am inclined to believe the respondent than the applicant since they had no vested benefit at all in favouring one candidate against the other. This explains why supporters of the applicant were present at the time of the re-opening of the ballot boxes.

On page 6 paragraph 3 of the ruling of the 3rd respondent, it was held that it ordered the ballot boxes to be opened in the presence of the petitioner, 1st respondent, 2nd respondent and the Police but that the applicant did not turn up. Therefore his failure to honour the calls to be present when the ballot boxes were opened cannot be blamed on the respondents. I accordingly resolve issue 2 in the negative.

Issue 3: Since both issues 1 and 2 have failed, I will find that the applicant is not entitled to any remedies. The decision by the 3rd respondent is accordingly upheld.

I will consequently dismiss this application with costs.

Stephen Musota

J U D G E

02.06.2016.