

- iv. An order doth issue attaching the salaries of the 3rd & 5th respondents/contemnors and paying the same to the applicant until such time as when they have purged themselves of the contempt of this court's orders.
- v. An order doth issue directing the 1st, 2nd & 4th respondents/contemnors jointly and severally to pay the applicant damages and compensation to the tune of UGX. 100,000,000/= (Uganda Shillings One Hundred Million only).
- vi. An order doth issue directing the respondents/contemnors jointly and severally to pay a fine of shs. 10,000,000/= (Uganda Shillings Ten Million only).
- vii. Costs of this application be provided for.
- viii. A certificate be issued for two (2) counsel.

The grounds of the application are that:-

1. The contemnors/respondents acted in contempt and/or breach of this court's orders finding the contemnors/respondents in contempt of its orders and directing that the 5th respondent vacates office of the chairman LCIII Rutete Sub-county and that the 1st, 2nd & 3rd contemnors ensure that this is done and the 4th respondent organizes and conducts a fresh election for the said post;
2. On 7-10-2014, this court found the respondents in contempt and ordered that the respondents purge themselves by promptly complying with the court order by ensuring that the 5th respondent vacates the office of Chairman LCIII Rutete Sub-county within 7 days from 7th October 2014 which ended on 13-10-2014 and organize fresh elections as ordered by the Judge earlier on;
3. The court also ordered that in the event of failure of the respondents/contemnors to promptly purging themselves by complying with the court's orders, the applicant is to

promptly move court for orders that the contemnors show cause why they should not be committed to civil prison;

4. The respondents/contemnors have jointly and severally ignored and disobeyed this court's orders and have failed to ensure that the 5th respondent vacates the office of the Chairman LCIII Rutete County within 7 days from 7th October being 13th October 2014;
5. The contemnors have absolutely no defence for the continued contempt of this Honourable Court's orders beyond four (4) years even when the court has found them in contempt and advised them to promptly purge themselves against the contempt;
6. It is fair and equitable that an order doth issue directing the respondents/contemnors jointly and severally to pay the applicant damages and compensation to the tune of UGX. 100,000,000/= (Uganda Shillings One Hundred Million only) for the losses he suffered and incurred because of the respondents/contemnors' conduct and in order to purge the contempt.
7. It is fair and equitable that an order doeth issue directing the respondents jointly and severally to pay a fine to the tune of UGX. 10,000,000/= (Uganda Shillings Ten Million only) for the contumacious conduct and in order to purge the continued blatant contempt.
8. The orders are necessary for purposes of ensuring justice to the applicant through a fair trial.
9. It is in the interest of justice and ensuring that court orders issued by this court are obeyed and complied with that the applicant is granted the orders prayed for.

The affidavit in reply on behalf of the 1st respondent was deposed by Bafirawala Elisha, for the 2nd respondent the deponent was Monday Jane, the 3rd respondent swore an affidavit in person, that of the 4th respondent was deposed by Kayondo Nagirinya Dora and the 5th respondent did not file any affidavit.

At the hearing, the applicant was represented by Dr. Akampumuza while Mr. Kamugisha Vincent appeared for the 2nd and 3rd respondents, and Mr. Hamidu Lugolobi appeared for the 4th respondent.

Counsel of both sides were directed to file written submissions in the given timelines.

Briefly, the background facts are that the election of the 5th respondent to the position of Chairman LCIII Rutete Sub-county, was nullified by this court vide Election Petition No. 0009 of 2011. Court that was presided over by Kwesiga J ordered, inter alia, that the 4th respondent (Electoral Commission) should conduct fresh elections for the said post. The orders were issued on 16-11-2011.

On 20-2-2013 the present applicant filed Misc. Appl. No. 0012/2013 against the 1st, 2nd, 4th & 5th respondents herein for orders, inter alia, that the respondents and their officials show cause why they should not be committed to civil prison for contempt of court orders in Election Petition No. 0009/2011. This was prompted by the failure of the 4th respondent to conduct fresh elections as had been ordered by court.

In the ruling delivered by the Assistant Registrar on 7-10-2014, Hon. Justice Ochan found the four respondents mentioned in the preceding paragraph were jointly guilty of contempt of court and required the contemnors to purge themselves of their contempt by complying with the court orders. They were specifically ordered to comply with the orders issued by Kwesiga J in the following terms:-

- i. 4th respondent (then), Samuel Nirere, vacates office of Chairman LCIII Rutete Sub-county within 7 days from today's date (i.e. 7-10-2011).
- ii. The 1st & 2nd respondent (Attorney General & Kibaale District Local Council respectively), specifically the CAO Kibaale District to ensure that the 4th respondent vacates office as ordered within the time period laid in paragraph (i) above.

- iii. The 3rd respondent (Electoral Commission) complies with court orders as per annexure “C”.

After the ruling, the Electoral Commission filed Misc. Appl. No. 0122 of 2014, on the 21-10-2014, seeking leave to appeal against the orders of Ochan J.

On the 4-11-2014 the applicant herein filed the instant application after the 7 days mentioned in (i) above had lapsed.

In the submissions, counsel for the applicant raised preliminary points of law related to the respondents’ affidavit in reply on three aspects, viz:-

1. That they were not sworn before any Commissioner for Oaths;
2. The affidavit of Bafirawala Elisha (for 1st respondent) and Kayondo Nagirinya (for 4th respondent) are laden with hearsay and falsehoods;
3. The averments in the two affidavits mentioned above are barred on account of res judicata and contempt of court by the contemnors.

I have looked at the impugned affidavit and I must state I am unable to appreciate counsel’s claim. Each of the three affidavits has a jurrat showing they were respectively sworn before a Commissioner for Oaths on the dates mentioned. Learned counsel also pointed out one of the affidavits shows it was commissioned on 12-03-2014 a whole year before it was filed in court on 13-1-2015. Counsel did not single out the particular affidavit, but I guess he was referring to the affidavit of Ssenoga Emmanuel, the 3rd respondent and also the Chief Administrative Officer of Kibaale District Local Government (2nd respondent).

The said affidavit shows it was sworn on 2nd January 2014. In my view, the year 2014 appears to have been a topographical error due to the following factors:-

1. The instant application was filed on 4-11-2014 together with the supporting affidavit. It is therefore inconceivable Ssenoga's affidavit in reply was deposed ten months earlier.
2. The orders of Ochan J that gave rise to this application were issued on 7-10-2014. In paragraph 5 of Ssenoga's affidavit, reference is made to the said orders and the date of issuance (7-10-2014). It cannot therefore be argued that Ssenoga's affidavit was sworn in January 2014 yet he made reference to orders issued by court in October 2014.

I therefore find untenable the contention that the affidavit is incurably defective on account of the apparent error which is clearly curable.

The other contention by counsel for the appellant was that the affidavit of Bafirawala and Kayondo Nagirinya contain hearsays and falsehoods, since neither of them were involved in the Election Petitions or applications that arose therefrom.

In the affidavit of Bafirawala Elisha it was averred he is a Senior State Attorney (then) in the Attorney General's Chambers and, that he read and understood the judgment and orders issued by Hon. Justice Ralph Ochan in Misc. Appl. No. 12/2013, and he is conversant with the facts that led to the Election Petition out of which it arose.

As for the affidavit of Kayondo Nagirinya, she averred she is a Legal Officer of the Electoral Commission as well as an Advocate of the High Court. She went on to say she had read and understood the ruling in Misc. Appl. No. 0012/2013 and centred the other averments on the said ruling.

I have studied the two affidavits and I am unable to conclude they contain hearsays and falsehoods. I accordingly find no merit in the second preliminary objection.

I will address the third point of law while considering the grounds of this application.

I have considered at length the submissions of counsel for both sides and the numerous authorities cited.

To begin with, in the ruling of this court in Misc. Appl. No. 0122/2014 where the Electoral Commission was granted leave to appeal against the orders of Ochan J, court laid out in detail the evidence that was presented by the Electoral Commission in Misc. Appl. No. 012/2013 showing a defence of impossibility to comply with the order to hold fresh elections, on account of the absence of Parish Tribunals.

The setting up of the said Tribunals being a pre-requisite under section 25 (5) of the Electoral Commission Act before bye-elections could be held, and, the setting up of such Tribunals being outside the mandate of the Electoral Commission but a preserve of the Judiciary who categorically stated their inability to appoint the Tribunals due to scarce resources, the fundamental issue requiring determination on appeal is whether the learned Judge correctly found the Electoral Commission were in contempt by not holding fresh elections.

Let me pose a rhetoric question; how were the Electoral Commission expected to purge themselves when the process of doing so was encumbered by inaction on the part of the Judiciary?

I wish to refer to the words of caution expressed by the Judge in **RE MARIA ANNIE DAVIS (1888) 21 QBD 236 AT 239** that:-

“It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject.....”

I think it was with such caution in mind that the Court of Appeal of Kenya in **GATHARIA K. MUTITIKA & OTHERS VERSUS BAHARINI FARM LTD (1982-88) 1 KAR 863** stated:-

“In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to a standard which is higher than proof on balance of probabilities but as high as proof beyond reasonable doubt.”

Learned counsel for the applicant in the instant matter argued that, since the same reasons given by the Electoral Commission were rejected by the court in Misc. Appl. No. 012/2013, the matter is res judicata. I respectfully, disagree. All they are saying is that they need the appellate court to determine whether it was correct for the trial Judge to find them guilty of contempt in light of the evidence that was before court.

As for the 2nd & 3rd respondents, the affidavit of the 3rd respondent (Ssenoga) is to the effect they have taken steps to purge themselves by implementing the orders of 7-10-2014. Annexure ‘A’ to the said affidavit is a communication by the 3rd respondent, dated 10-10-2014, addressed to the Sub-county Chief Rutete directing him to implement the court order. Annexure ‘B’ dated 10-10-2014, is from the 3rd respondent addressed to the Secretary of the Electoral Commission, notifying him the office of the Chairman LCIII Rutete Sub-county was still vacant following the order of court and there was need to conduct by-elections to fill the same. Annexure ‘D’ dated 13-10-2014 is a communication from the Sub-county Chief to the CAO informing him Samuel Nirere was no longer in office.

Learned counsel for the applicant attacked the said evidence arguing that it was manufactured and in furtherance of the contemnors’ continued contempt of court orders.

I do not appreciate counsel’s argument. The actions indicated in the said correspondences relate to the period after 7-10-2014 when the court ordered the respondents to purge themselves. All these were done within 7 days as ordered by court. Further, annexure ‘E’ to the supplementary affidavit of the 3rd respondent states:-

“CERTIFICATION OF REMOVAL OF NIRERE SAMUEL AND YOMBO MICHAEL FROM THE PAYROLL.

We have examined the payroll of Kibaale District Local Government and hereby certify that Nirere Samuel and Yombo Michael are no longer on the payroll.”

The said certification was signed by four officials mentioned as PHRO, DHIA, DHF & CAO.

No evidence was brought to rebut the assertion reflected in annexure ‘E’ above. It is not enough for the applicant’s counsel to merely assert the evidence is manufactured without adducing evidence in that regard.

On the evidence before me, I am unable to say the 2nd & 3rd respondents have not purged themselves of contempt.

While it is correct under Article 119(4) (a) of the Constitution the Attorney is mandated to represent Government in all legal matters, it has not been demonstrated they omitted/neglected to execute their duty with particular reference to the orders of this court. In my view, when the 2nd & 3rd respondents complied with the orders of court of 7-10-2014, the role of the 1st respondent became irrelevant. As for the holding of fresh elections which the 4th respondent has not been able to do for reasons that are the subject of an intended appeal by the 4th respondent, my view is that the appointment of Tribunals is the domain of the Judiciary which is an independent arm of Government, not subject to the direction or control of the 1st respondent.

As for the 5th respondent, the evidence on record is to the effect he has since vacated office.

On the whole, I find no merit in the instant application and court is unable to grant the orders sought.

The same is accordingly dismissed with costs to the 1st, 2nd, 3rd & 4th respondents. I so order.

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BYABAKAMA MUGENYI SIMON

JUDGE

8-1-2016