

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
CONSOLIDATED MISC.CAUSES NO. 234 & 238 OF 2018**

**FORUM FOR DEMOCRATIC CHANGE
(FDC) :::::::::::APPLICANT
VERSUS**

**1. ELECTORAL COMMISSION
2. ATTORNEY
GENERAL :::::::::::RESPONDENTS
AND**

**1. ROY NANTEGE
2. SAM
MWANJE :::::::::::APPLICANTS**

VERSUS

**1. ELECTORAL COMMISSION
2. ATTORNEY GENERAL :::::::::::
RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant in the first application filed an application under Article 28, 42, 44 of The Constitution and Section 36 of the Judicature Act as amended, Rules 3(1)(a), 5 & 6 of the Judicature (Judicial Review) Rules, 2009 and Section 137 & 138 of the Local Governments Act, Section 98 of the Civil Procedure Act and O.52 r 2 of the Civil Procedure rules for the following judicial review orders;

- a. An order of Mandamus compelling/directing the 1st respondent to publish in the National Gazette the elected chairpersons of all the villages and village councils in Uganda where elections were conducted on 10th and 11th July 2018 and any other elections.
- b. A declaration that the 1st respondent's actions of not publishing in the National Gazette the elected Chairpersons of villages and village Councils in the Country is illegal and unlawful.
- c. An Order of Injunction be issued against the 2nd respondent restraining the 2nd respondent, their agents or servants or any other public bodies, institutions and personalities from conducting the swearing in of the elected chairpersons and their councils without the names of those persons being published in the National Gazette as by law required.
- d. A declaration that the swearing in of the Elected village council chairpersons and their councils done prior to the publication of the results in the national gazette are null and void.
- e. An order for Aggravated damages.
- f. An Order for Punitive damages.
- g. An Order for General damages.
- h. An Order for costs.

In the second application the applicants sought similar reliefs although they appeared to be worded differently as hereunder;

- a) A declaration that the process of swearing in persons elected as chairpersons for local Council 1 results by the 2nd respondent before gazetting was as required by law was Ultra vires, illegal.
- b) A declaration that the decision by the 1st respondent not to gazette the local council results as required by law was ultra vires, illegal and inconsistent with the law.
- c) An Order that all those Chairpersons of Local Council 1 who were sworn in before being gazetted occupy the office illegally.
- d) An Order for certiorari be issued against the 1st and 2nd respondents jointly and severally quashing the decision to swear in persons elected as Chairpersons of Local Council 1 before the process of gazetting them as directed by law.
- e) An Order of Mandamus be issued directing/compelling the 1st respondent to gazette the recently conducted local council 1 results.
- f) A declaration that the 1st respondent and the 2nd respondents acted ultra vires and illegally and thus occasioned a miscarriage of justice against the applicants when they ignored the provisions of the law as to the process of gazetting and swearing in.
- g) Costs of the suit.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavits in support of the applicants-Hon. Nathan Nandala Mafabi-FDC Secretary General and Kayanja Yakut and the two applicants- Nantenge Roy and Sam Mwanje but generally and briefly state that;

- 1) The 1st respondent-EC on the 10th and 11th July 2018 conducted elections of Local Council 1 village elections throughout the country.
- 2) That the applicant being a Political Party duly registered in Uganda and sponsored various candidates to stand for the position of chairperson LC1 in various villages.
- 3) That many of the applicant's flag bearers lost the elections and would wish to file election Petitions challenging the elections.
- 4) That since the said elections and declaration of winners on the 10th and 11th July 2018 to-date, the 1st respondent has never published in the National Gazette the Chairpersons and their local council members elect yet the 2nd respondent continue to swear in the same.
- 5) That the actions of the 1st respondent are illegal and irrational as it is a requirement of the Electoral laws to publish in the National Gazette the winner of the election before he or she swears in.
- 6) That the said such chairpersons and their councils that were illegally sworn in by the 2nd respondent's officials have since assumed office and are unlawfully executing their duties contrary to the law.
- 7) That without gazetting the winners of the elections for Chairpersons for the local council 1, the party flag bearers who lost in the elections unfairly cannot challenge by way of election petition in courts of Law.

The respondents opposed this application and the 1st respondent filed an affidavit in reply through Hon Steven

Tashobya a Commissioner of the 1st respondent and the 2nd respondent through a State Attorney in Attorney General's Chamber- Ms Cheptoris Slyvia.

The 1st respondent contended the Electoral Commission is not necessarily required to gazette election results of LC 1 Elections as alleged by the applicants.

That in the alternative, the Electoral Commission is still in the process of ascertaining and compiling results of the said election having conducted the same on various dates. The process of ascertaining, and compilation of results of over 60,799 villages requires longer time.

That to date, some villages are yet to carry out their elections due to reasons beyond the Electoral Commissions control.

That right now there are around 124 petitions before the Magistrates Courts spread across the country and these political parties cut across all political divide.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

Three issues were framed by the applicant for court's determination;

Agreed Issues;

1. *Whether the application raises a cause of action against the 2nd Respondent.*

2. *Whether failure to gazette the Local Council 1 election results by the first Respondent was illegal.*

3. *If so, whether the swearing in of elected L.C 1 Chairpersons before results are published in the gazette was unlawful.*

4. *What remedies are available?*

I shall resolve this application in the order of the issues so raised. The 1st applicant-FDC was represented by *Mr Mudiobole Abed Nasser & Berna Mutamba and Mr Dennis Atwijukire for the 2nd & 3rd Applicants (Nantege Roy and Mwase Samuel)* whereas the 1st respondent was represented by *Mr Jude Mwasa* and for the 2nd Respondent was represented by *Ms Maureen Ijang and Ms Adong Imelda*

In Uganda, the principles governing Judicial Review are well settled. Judicial review is not concerned with the decision in issue but with the decision making process through which the decision was made. It is rather concerned with the courts' supervisory jurisdiction to check and control the exercise of power by those in Public offices or person/bodies exercising quasi-judicial functions by the granting of Prerogative orders as the case may fall. It is pertinent to note that the orders sought under Judicial Review do not determine private rights. The said orders are discretionary in nature and court is at liberty to grant them depending on the circumstances of the case where there has been violation of the principles of natural Justice. The purpose is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected to. ***See; John Jet Tumwebaze vs Makerere University Council & 2 Others Misc Cause No. 353 of 2005, DOTT Services Ltd vs Attorney General Misc Cause No.125 of 2009, Balondemu David vs The Law Development Centre Misc Cause No.61 of 2016.***

For one to succeed under Judicial Review it is trite law that he must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

The respondent as a public body is subject to judicial review to test the legality of its decisions if they affect the public.

ISSUE ONE

1. Whether the application raises a cause of action against the 2nd Respondent.

The applicants' contended that the act of swearing in the Chairpersons without gazetting the results was illegal and that was the basis of challenging the 2nd respondent.

The respondent denied and contended that the districts are responsible for the swearing of the local councils and therefore it is the local governments who are responsible for the swearing in.

This is an application for judicial review challenging the actions of the respective districts who swore in office bearers for local councils.

The law does not empower each district to conduct an election in their respective districts. This implies that an election is not conducted in accordance with the directives of the respective district councils but rather it is a national event with the Central government at the centre of its implementation.

Likewise the swearing of the respective local councils was not an act of the respective districts but rather the Central government through the line Ministry of Local Government.

The Chief Administrative Officer as the head of the Public Service in every district was responsible for the swearing of the respective elected office bearers of the local council.

The applicants had a complaint against the person responsible for taking the oaths of the different local councils. This court takes judicial notice of the events and persons responsible for the whole exercise through out the country. Otherwise it would not

have been conducted on the same day or within the same period. Therefore there is a cause of action against the 2nd respondent.

ISSUE TWO

Whether failure to gazette the Local Council 1 election results by the first Respondent was illegal.

The applicant contended that the 1st respondent had a duty to conduct the elections in Uganda and also to have the results declared and publicized. The only way the public would know is through publication of the said results in the gazette.

According to the applicants section 137 of the Local Government Act “ ***the Electoral Commission shall, as soon as practicable after the election, ascertain, declare and, in writing under its seal, publish in the gazette the results of the election in each constituency***”

The applicants counsel further submitted that the Candidate is said to be validly elected by having his or her name published in the gazette. That the said provision is couched in mandatory terms and the 1st respondent cannot abrogate that obligation under the Local Government Act.

The non-compliance with Section 137 of the Local Government Act by the Electoral Commission is illegal and as such cannot be condoned by this Honourable court.

It's the contention of the applicants that failure to gazette the Local Council 1 results by the 1st respondent as required by law was ultra vires, illegal and inconsistent with the law and specifically the Local Government Amendment Act. The 1st respondent has a statutory role to gazette the results of the election.

In the submission of the 1st respondent they contend that it is not a legal requirement to gazette the LC1 election results. They rely on the evidence in the affidavit of Mr. Steven Tashobya specifically in his affidavit in reply and that failure to gazette the said results is not unlawful and that the 1st respondent is not necessarily required to gazette the said results.

The respondent's counsel further submitted that Sections 137 and 138 of the Local Government Act that the applicants are making reference to is to the effect that those provisions do not apply to elections of lower administrative units elections.

Part X of the Local Government's Act that provides for elections is segmented into two parts that are parallel to each other and are devoid of any ambiguity or conflict.

Part A whose heading is Local Government Councils Elections starts from Section 116 to Section 158 of the local Government Act sets out the entire electoral process for local Government Councils which include District/City Chairpersons and sub-County /Division Chairpersons and their Councils.

The second part whose heading is Elections at administrative lower council's elections that deals with Elections of lower administrative Units like Chairpersons and their committees. The uniqueness of the two categories of electoral process is evidently contained in the procedures for polling, declaration of results and procedures and jurisdiction for challenging the election results.

For, instance whereas under section **128 (1) of LGA**, polling for all local government council elections is by secret ballot, in cases of administrative unit elections, polling is by lining up behind candidates. Note that with regard to nominations, both categories provide for publication of nomination dates in the gazette and local media. **See sections 119 & 161(3)** of the LGA respectively

Secondly with regard to declaration of results, whereas section **137(1)** of the LGA that governs local government council elections provides that “The Electoral Commission shall, as soon as practicable after the election, ascertain, declare and, in writing under its seal, publish in the Gazette the results of the election in each constituency.”, Section 163 (1) of the LGA that provides for declaration of results for administrative unit elections and which is the equivalent of 137(1) provides that the “the Returning Officer shall declare a candidate a winner if that candidate has obtained the largest number of votes cast or has been elected unopposed’.

Section **137 (1) of the LGA**, section **163(1)** of the same act does not make reference or require the electoral commission to gazette Local Council 1 Chairperson election results and other Lower administrative Unit elections as alleged by the Applicants. For clarity, lower administrative council election includes County, Parish and village council elections.

Thirdly, with regard to conditions for challenging results of the elections, again you will note the legislature categorically provided peculiar conditions for challenging results for both categories of elections.

Section **138(4) of the LGA** which was submitted on earlier that it does not apply to elections of Local Council 1 Chairpersons election, provides as follows;

(1) An aggrieved candidate for chairperson may petition the High Court for an order that a candidate declared elected as chairperson of a local government council was not validly elected.

(2) A person qualified to petition under subsection (3) who is aggrieved by a declaration of the results of a councilor may petition the chief magistrate’s court having jurisdiction in the constituency.

(3) An election petition may be filed

(4) An election petition shall be filed within fourteen days after the day on which the results of the election has been notified by the Electoral Commission in the Gazette.

Section 168 of the LGA on the contrary provides that an election Petition relating to elections at a village, parish or county shall be filed in the Magistrate Grade 1 court having jurisdiction in the constituency.

1st respondent contended that from this it can be seen from the above analogy, that unlike under Section 138(4) that conditions aggrieved candidates who lost in local governments' council elections to file election petitions within fourteen days after notification of results by the Electoral Commission in the gazette, **Section 168 of the LGA does NOT.**

It was their submission that its trite law of the Literal Rule of statutory interpretation that statutes should be interpreted using the ordinary meaning of the language of the statute unless a statute explicitly defines some of its terms otherwise. In other words, the law should be read, word for word and should not divert from its true meaning. If the words are clear, they must be applied, even though the intention of the legislator may have been different or the result is harsh or undesirable.

The respondent's counsel therefore prayed that the court be pleased to answer this issue in affirmative.

The main contention in this application is a question of interpretation between two provisions in the same legislation i.e Section 137 and 168 of the Local Government's Act and/or Local government council elections and Elections at Lower administrative councils.

The latin phrase/maxim ***Expressum facit cessare tacitum*** is applicable to this present case and it means that in face of

express provision there is no rule for reading an implication into any legislation.

The Local Government Act is a special statute and while interpreting such a statute which is self-contained, the court must consider the intention of the Legislature. The reason for this fidelity towards the legislative intent is that the Statute has been enacted with a special purpose, which must be measured from the wording of the Statute strictly construed.

The court cannot legislate on the subject under the guise of interpretation against the will expressed in the enactment itself. It is not open to the court to usurp the functions of the Legislature. Nor is it open to the court to place an unnatural interpretation on the language used by the Legislature, and impute to it an intention which cannot be inferred from the language used by it by basing on the ideas derived from other laws.

Intention of the legislative history and mischief sought to be remedied should be examined. The object and purpose sought to be achieved should be taken care of. The Court is only concerned with interpreting the law, and if it is valid to apply the law as it finds it and not to enter upon a discussion as to what the law should be.

The current challenge before the court is about the publication of the results in the gazette. The two provisions seem to be in conflict but it is the duty of this court to find out the middle ground for application of the law. In case of conflict between two provisions, they should be interpreted in such a way that effect is given to both.

When the words are perfectly clear, their simple literal sense is to be followed and grammatical construction need not be gone into. Which do not exist in a statute or provision cannot be read into it. Where the language used in the relevant provisions are

clear and unambiguous, the said provision should be interpreted by adopting literal construction.

Section 168 of the Local Government Act provides for an Election petition for a village or parish;

An election petition relating to elections at a village or parish shall be filed in the magistrate grade 1 having jurisdiction in that constituency.

While section 138 of the Local Government Act provides for an Election petition against a declared elected candidate;

(4) An election petition shall be filed within fourteen days after the day on which the results of the election have been notified by the Electoral Commission in the Gazette.

It is well settled that the provisions of a Statute must be read harmoniously together. However if it is not possible, then it is settled law that were there is a conflict between two sections, and one cannot reconcile the other, one has to determine which is the leading provision and which is the subordinate provision, and which must give way to the other. This position was reiterated in the case of ***Institute of Patents Agents v Joseph Lockwood [1894] AC 347*** at 360 Lord Herschell, L.C stated thus:

“Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best as you may. If you cannot, you have to determine which is the leading provision and which is the subordinate provision, and which must give way to the other.”

A close scrutiny of these two provisions shows that the one envisages results to be notified in the gazette while the other does not envisage the notification of the results in the gazette. It would be absurd to read into Section 168 of the Local

Government Act “Publication of results in the gazette” As noted earlier Court should not usurp the legislative powers of Parliament.

In order to further resolve this case, this court has called into aid the headings and sub-headings in the Local Government Act. Section 137 of the local Government Act under which the publication of the results in the Gazette is found is under a main heading; PART X-LOCAL GOVERNMENT COUNCILS ELECTIONS. There is sub-heading of Election of Chairperson and then Local government Councils elections, Voting and announcement of results, Election petitions and Illegal practices and offences.

The election of the village and parish councils are specifically provided for under a different sub-heading ; Election at administrative lower councils

Section 159A provides;

For the purposes of the village, parish and ward elections to be held immediately after the commencement of this Act.....

It would appear that the village elections are held under a different legal regime within the same legislation and it appears they have no provision for the publication of the results in the national gazette.

It is legitimate and indeed proper to have recourse to the heading and sub heading given to a group of sections in an Act of Parliament to find guidance for the construction of the words in a Statute. Coupled with this, one can advantageously refer to known cannon of construction that every section of a Statute is to be construed with reference to the context and other sections of the Act, so as, as far as possible, to make consistent enactment of the whole Statute.

This court agrees with the 1st respondent's counsel submission that the failure to gazette the Local Council 1 results was not illegal since it is not provided for under the law.

Any petition challenging the local council 1 result was properly filed in the respective magistrates courts and are not affected by non-publication of the results in the gazette.

The application is dismissed with no order as to costs.

I so Order.

SSEKAANA MUSA
JUDGE
7th /12/2018