

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPLA
[CIVIL DIVISION]
MISC. APP. NO. 620 OF 2020
(ARISING FROM MISC. CASUE NO. 279 OF 2020)

ASIIMWE ROBERT ::::::::::::::::::::::::::::::: APPLICANT

VERSUS

FORUM FOR DEMOCRATIC CHANGE (FDC)

WILBERFORCE KYAMBADDE ::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE ESTA NAMBAYO

RULING

Asiimwe Robert (the applicant) brought this application under **O.41 rules 2 and 9 of the Civil Procedure Rules** against Forum for Democratic Change[FDC] (the 1st respondent) and Wilberforce Kyambadde (the 2nd respondent) seeking for orders of this Court that:

1. **A temporary injunction be issued restraining the 1st respondent, their leaders, agents, workmen and employees from endorsing the 2nd respondent for nomination by the electoral Commission as FDC flag bearer/contestant for Member of Parliament for Nakawa West Constituency on FDC Ticket.**
2. **Provision be made for costs of this Application.**

Grounds of this application have not been provided. However, the applicant's affidavit has been attached in support of the application. The 2nd respondent opposes the application and has filed an affidavit in reply in opposition. This Court has had the opportunity to read through the two affidavits and considered their contents during the writing of this ruling.

The brief background to this application is that in August, 2020 upon creation of Nakawa West Constituency, the applicant and the 2nd respondent were among the people who expressed interest to represent the Constituency as members of the 1st respondent. All intending candidates for the position of Member of Parliament(MP) on the 1st respondent's ticket were invited to submit their documents of expression of their interest. Three people, namely the applicant, the 2nd respondent and a one Moses Magezi submitted documents expressing interest to contest on the 1st respondent's ticket.

The 1st respondent decided to use the vetting process to select its suitable candidate. It is the applicant's contention that he emerged as best candidate at the Constituency and his name was sent to the 1st respondent's National Electoral Commission for endorsement. That instead of endorsing the applicant, the 1st respondent's National Electoral Commission endorsed the 2nd respondent. The applicant is not satisfied with the decision of the 1st respondent and he has filed for judicial review before this court, hence this application.

When the matter came up for hearing, learned Counsel Gilbert Niwagaba appeared for the applicant while Counsel Golooba represented the respondents. Counsel Golooba raised two preliminary objections on grounds that: -

- 1. The applicant did not exhaust all the available avenues provided for within the party structures before coming to Court**
- 2. The status quo that the applicant seeks to maintain is overtaken by events as the 1st respondent has already nominated and recommended the 2nd respondent for nomination by the Electoral Commission as the 1st respondent's flag bearer for MP West Constituency.**

Submissions

In regard to the 1st Preliminary Objection, Counsel for the applicant submitted that the FDC Constitution provides for avenues to file grievances such as the one in this case before coming to court. That Art. 27(G)iii of the Constitution creates a National Election Tribunal where all disputes arising out of the elections are addressed to the Tribunal for resolution. Counsel explained that the dispute filed in this court is premature and therefore the application is incompetent. He relied on the case of ***Betty Amongi & Anor vs. Olara Otunnu MC. No. 35 of 2015*** where Court held that:

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

Counsel explained that all parties to this case subscribe to the FDC party and Constitution and are bound by the party Constitution and so they should subscribe to the internal Tribunal for resolutions of any disputes arising out of the party's Electoral process before resorting to Court.

In reply, Counsel for the applicant submitted that it is true that the Constitution of the 2nd Respondent provides for a tribunal. That the applicant sought assistance from the party by writing and complaining as per annexures "E" & "F" to the affidavit in support of the application but he was ignored. He was not given a fair hearing in the matter and in essence the Tribunal did not provide any remedy for him. Counsel relied on the case of ***Kirunde Mubarak & Anor vs. FDC MC No. 27/2020*** – High Court at Jinja where Justice Rwakakoko addressed the Constitution of FDC in regard to Rule 7A (1) b of the Judicature (Judicial) Review Rules as amended and stated that there is an exception to Rule 7A (1) b of the Judicature (Judicial Review) Rules. That the Judge cited with approval the Kenyan case of **Republic –v- Fire Arms Licensing Board & Another, Ex- parte Boniface Mwaura, Judicial Review Misc Application No. 47 of 2018** and she concluded that: -

“the available remedy of FDC Constitution is the National Election Tribunal charged with hearing election related complaints. Of note, however, is that the extent of the powers of this Tribunal are not stated in the FDC Constitution and it is not clear whether the tribunal can quash the parties’ Constitution. As such it is unclear whether the Tribunal has powers to grant the orders that the applicant seeks such as overturning or quashing the party’s Electoral Commission’s decision”

Counsel explained that the trial Judge overruled the objection while considering the fact that FDC did not explain why the Tribunal did not take any action and that in this case, the 1st Respondent has not offered any explanation nor filed an affidavit in reply.

Counsel submitted that the Judge also considered **Art. 42 of the Constitution of Uganda** regarding the rights of the parties to be heard. He explained that Hon. Rwakakooko explained that those rights should not be treated lightly and that Judicial Review is aimed at enforcing these rights as per **rule 7A (1) d** and prayed that the objection be overruled.

In re-joinder, Counsel for the respondents submitted that there is no single complaint addressed to the Tribunal. That the article which creates the Tribunal under article 27G sets up the composition of the Tribunal which includes the Deputy President of FDC, the Secretary for Organization and Mobilisation of FDC and the Secretary for Information and Publicity, a representative of the Disciplinary Committee and the Chairman of the Legal Committee. That the Secretary General of FDC is not a member of the Tribunal. Counsel explained that all the letters were addressed to the Secretary General and not the Tribunal and yet the Secretary General is not a member of the Tribunal. That there is no single complaint by the Applicant to the Tribunal. The function of the Tribunal is to resolve all disputes arising out of elections. Counsel emphasized that the internal procedure was not followed by the applicant before coming to court and prayed that the application be dismissed.

Analysis

Rule 3 of the Judicature (Judicial Review) (Amendment) Rules, 2019 defines Judicial Review as the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of subordinate courts, Tribunals and other bodies or persons who carry out quasi – judicial functions or who are charged with the performance of public acts and duties.

The purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he or she has been subjected to **(see the case of Chief Constable of North Wales –v- Evans [1982]3ALLER) 141**

Under Rule 7A of the Judicature (Judicial Review) (Amendment) Rules, 2019, the Court in considering an application for judicial review must satisfy itself that: -

1(a) -

(b) the aggrieved person has exhausted the existing remedies available within the public body or under the law

S. 27 G of the Forum for Democratic Change Constitution, 2015, establishes a National Election Tribunal.

S. 27 G (ii) provides that the function of the Tribunal shall be to resolve disputes arising out of party elections.

Under paragraph 9 of the affidavit in reply, the applicant states that the 1st respondent's District Executive Committee wrote to its Electoral Commission forwarding the names of the Parliamentary aspirants. The Commission then invited the applicant and the 2nd respondent for a meeting. In the meeting, the applicant was told that there were issues with his A- level academic papers and the party had decided to front the 2nd respondent as their flag bearer, see paragraphs 10 and 11 of the affidavit in reply. Under paragraph 12(C), the applicant states that the 1st respondent did not communicate its decision in writing despite the applicant's protest and a petition by all candidates regarding his issue. The applicant relied on annexures "D", "E", "F" and "G".

Under S.27 G(i) of the FDC Constitution, membership of the National Election Tribunal consists of the following: -

- i. One of the Deputy Presidents**
- ii. the Secretary for Organization and Mobilization**
- iii. Secretary for information and Publicity**
- iv. a representative of the Disciplinary Committee and;**
- v. the Chairman of the Legal Committee**

All the annexures that the applicant has relied on are addressed to the Chairman Electoral Commission (annexure "D") and the Secretary General FDC see annexures "E", "F" and "G" respectively). Annexure "F" is the petition addressed to the Secretary General FDC. Both the Chairman of FDC Electoral Commission and the Secretary General are not members of the National Election Tribunal which has the mandate to

resolve disputes arising out of party elections. There is nothing on record to show that the applicant lodged a complaint with the Tribunal.

It is the contention of Counsel for the respondent that the applicant did not exhaust the existing remedies available for dispute resolution within the structures of the 1st respondent as provided for under its Constitution before coming to court. I agree with Counsel's submission and find that this preliminary objection has merit and it is hereby upheld.

The second preliminary objection is that the 1st respondent had already endorsed the 2nd respondent as the FDC flag bearer for Member of Parliament before the application for a Temporary Injunction was filed. Counsel relied on Annexure "A" to the affidavit in reply, at pg. 4 showing the endorsement date as 15/9/2020 and explained that the status quo is that the 2nd respondent is already endorsed by the 1st respondent as its flag bearer for Nakawa West Constituency and he is only awaiting nominations as opposed to the 2/10/2020 when this application was filed in Court. That granting this application as sought will reverse the status quo. Counsel submitted that the Essence of a Temporary Injunction is to maintain the status quo, he relied on the case of ***Uganda Super League Ltd. vs. FUFA, SCCA No. 67/275 at page 6, and MA 1474/2017 Mitende Baker Maigo David vs. URA page 3.*** Counsel emphasized that the status quo changed long ago, the application is frivolous, vexatious and over taken by events and prayed that the same be dismissed with costs.

In reply, Counsel for applicant explained that at the time this application was filed nomination for MP by the National Electoral Commission were scheduled for the 12th and the 13th of October, 2020. The nominations have since been extended to the 14th and 15th, 2020. That the applicant has not been sponsored for nomination by the FDC, what is present is that a form though filled and signed by the Secretary General of the 2nd Respondent, the nomination takes place upon being registered. That is when the sponsorship becomes relevant. The 2nd Respondent has not yet been sponsored

or nominated by FDC as its National Flag Bearer, neither has he been nominated as the representative of Nakawa West Constituency. Counsel prayed that this objection be overruled so that the application is heard on merit.

Analysis

Section 38 (1) of the Judicature Act empowers this Court to grant an injunction to restrain any person from doing any act as may be specified by this court.

In the case of **Titus Tayebwa vs Fred Bogere and Eric Mukasa Civil Appeal No.3 of 2009**, Court held that where there is a legal right either at law or in equity, the court has power to grant an injunction in protection of that right. It is also important to note that a party is entitled to apply for an injunction as soon as his or her legal right is invaded.

The major purpose of granting an injunction is for preservation of the status quo until the question to be investigated in the suit can finally be disposed of; see the case of **E.L.T Kiyimba – Kagwa – v- Hajji Katende Abdul Nasser Civil Suit No. 2109 of 1984**.

In this case, page 3 of annexure "A" to the affidavit in reply shows that the 1st respondent appointed the 2nd respondent as its appointed official agent for MP on the 15th/9/2020. Page 4 shows that the 2nd respondent is sponsored for nomination for MP by FDC. So, that is the status quo. The application seeks to restrain the 1st respondent from endorsing the 2nd respondent for nomination by the Electoral Commission for MP for Nakawa West Constituency. The 1st respondent has already endorsed nomination for the 2nd respondent.

In the case of **Mitanda Bakale Masso David – v- Uganda Revenue Authority MA NO. 1424 of 2017[Commercial Court] Hon. Justice Kainamura** held that where the status quo has changed, then any order issued by the Court would not maintain the status quo but reverse the status quo. (See also the case of **The Uganda Super League Limited –v- Federation of Uganda Football Association (FUFA) limited CA**

NO. 67 of 2015) Similarly, I would decline to grant this application as any orders made in this case in line with this application would reverse the status quo. Therefore, I uphold the preliminary objection raised by Counsel for the respondents in regard to this issue and in the result, I dismiss this application for a Temporary Injunction and the application for Judicial review with costs.

I so order

Dated, signed and delivered by e-mail at Kampala, this 15th day, of October, 2020

ESTA NAMBAYO

JUDGE

15/10/2020