

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(CIVIL DIVISION)
MISCELLANEOUS CAUSE NO. 237 OF 2019**

MALE H MABIRIZI K KIWANUKA:..... APPLICANT

VERSUS

ATTORNEY GENERAL:.....RESPONDENT

BEFORE: HON JUSTICE SSEKAANA MUSA

RULING

The applicant-Male Mabirizi Kiwanuka filed this application under Paragraphs I, XXVI, XXIX(a)&(f) of National Objectives and Directive Principles of State Policy, Article 8A, 17(1) (i), 60(1) &(5), 128(1) & (2), 139(1), 257(1)(w-y), 257(2)(a)(i) of the Constitution and Section 33 & 39 of the Judicature Act.

The applicant sought the following Orders;

1. A declaration that the continued holding of the position of Chairperson, Electoral Commission by Hon. Mr. Justice Byabakama Mugenyi Simon, without relinquishing his position of a Justice of Appeal of the Courts of judicature, is illegal.
2. A Permanent injunction restraining Hon. Mr. Justice Byabakama Mugenyi Simon from any further holding of the position of Chairperson, Electoral Commission without relinquishing his position of a Justice of Appeal of the Courts of Judicature.
3. A declaration that the position of chairperson of Electoral Commission is vacant.

4. General Damages to be paid to the applicant for inconveniences caused due to the actions afore stated.
5. The respondent to pay the applicant costs of this application.

The grounds upon which these application are based are set out in the affidavit in support of Male Mabirizi Kiwanuka which briefly are;

1. That upon expiration of the term of office of Eng Badru Kiggundu as Chairperson of Electoral Commission, Hon. Mr Justice Byabakama Mugenyi Simon while serving as a Justice of Appeal of the Courts of Judicature.
2. That Hon. Mr. Justice Byabakama Mugenyi Simon did not and has not relinquished his position of a Justice of Appeal of the Courts of judicature, as required by law.
3. That while carrying out Electoral Commission duties, Hon. Mr. Justice Byabakama Mugenyi Simon executes documents and duties as “ Justice Byabakama Mugenyi Simon”.

The respondent filed an affidavit in reply and opposed the application: Sabiiti Eric swore an affidavit on behalf of the Attorney General.

1. That I know that the Hon. Mr. Justice Byabakama Mugenyi Simon was appointed Chairperson of the Electoral Commission by the appointing authority on 7/01/2017.
2. That I know that prior to his appointment as the Chairperson of the Electoral Commission, the Hon. Mr. Justice Byabakama Mugenyi Simon was a Justice of the Court of Appeal.

3. That upon the appointment as the Chairperson of the Electoral Commission, the Hon. Mr. Justice Byabakama Mugenyi Simon relinquished his right as a Justice of the Court Appeal.
4. That I know that the Hon. Mr. Justice Byabakama Mugenyi Simon no longer performs any functions of a Justice of Appeal and neither attends any workshop or related activities of the Judiciary.
5. That I know that following the Hon. Justice Byabakama Mugenyi Simon's relinquishment of his right as a Judge of the Court of Appeal, I know that his appointment as a Chairperson of the Electoral Commission does not compromise and or interfere with independence of the Judiciary as alleged.

ISSUES

- 1. Whether the Application is competently before the court?**
- 2. Whether the respondent's affidavit in reply is properly before the court?**
- 3. Whether the Hon Justice Byabakama Mugenyi Simon relinquished his position in the office as a Justice of the Court of Appeal upon being appointed as Chairperson Electoral Commission?**
- 4. What remedies are available?**

The applicant *Male Mabirizi Kiwanuka* represented himself and Principal State Attorney *Richard Adrole* represented the Attorney General.

1. Whether the Application is competently before the court?

The applicant has brought the application under the cited laws and clearly there is no set procedure governing the nature of the application.

It is not clear whether it is an application for constitutional interpretation or for enforcement of rights. But it can be deduced from the nature of remedies sought that this application seeks from this court judicial review remedies.

The application should have been an application for judicial review since the applicant contends that Hon. Justice Byabakama Mugenyi Simon never relinquished his position of Justice of Court of Appeal upon appointment as the Chairperson of Electoral Commission.

The applicant has opted to run away from the strict rules of procedure after he realised that his application was well beyond the 3 months period prescribed for any application for judicial review.

Rule 5 (1) of the Judicature (Judicial Review) Rules 2009 provides that;

(1) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of the application FIRST arose, unless the court considers that there is good reason for extending the period within which the application shall be made.(Emphasis added)

This court will not allow such a litigant to devise alternative procedure in order to circumvent the set procedure. He is only trying to access court through the window instead of the door that has been prescribed by the Constitution.

Justice is to be rendered in accordance with the law and set principles and procedure. The Constitution is silent as to the procedure to be followed or how to access courts to seek redress outside constitutional interpretation and enforcement of human rights.

The necessary procedure must be followed from the existing legislation like the Judicature Act or Civil Procedure Act and not to invent any procedure the applicant finds convenient or comes to his imagination.

The nature of judicial review procedure is based on some clear policy consideration such that the state machinery or administrators are not bogged down with endless litigation over their actions. Judicial review thus is a fundamental mechanism for keeping public authorities within the due bounds and for upholding the rule of law. See *Wade & Forsyth Administrative Law 10th Edition*

Excessive interference by the judiciary in the functions of the executive is not proper. The machinery of government would not work if it were not allowed some free play in its joints.

This therefore means that if the applicant wants to invoke the jurisdiction of a court, he should come to court at the earliest reasonably possible opportunity. Inordinate delay in making the application for judicial review will indeed be a ground for refusing to exercise such discretionary jurisdiction.

The underlying object of this principle is not to encourage agitation of stale claims and exhumed matters which have already been disposed of or settled or where rights of 3rd parties have accrued in the meantime.

There is no proper limit and there is a lower limit of 3 months when a person can come to court. The court is allowed to exercise discretion depending on the facts to determine whether to extend the time to file/apply for judicial review. It will depend on how the delay arose.

The applicant in this case ought to have applied for judicial review within 3 months after the appointment of the Chairperson of the Electoral Commission i.e by 7th April 2017 but instead the applicant filed this application on 12th August 2019 after over 2 years.

The court is empowered to refuse relief and deny access to the judicial review reliefs on ground of laches because of several considerations e.g it is

not desirable to allow stale claims to be canvassed before the court; there should be finality to litigation.

It cannot be argued that the Constitution intended to disregard all procedural rules in relation to access to justice or grant of reliefs and allow applications filed after inordinate delay. Constitutional provisions are not intended to supersede the available modes of obtaining relief before a civil court or deny the defences legitimately open in such actions.

The applicant like all other litigants should not be encouraged to circumvent the provisions made by a Statute providing a mechanism and procedure to challenge administrative action. Every potential litigant would rush to the court in any manner they deem fit and thus rendering the statutory provisions meaningless and non existing.

Constitutional provisions are not intended to short circuit or circumvent established procedures and statutory provisions for accessing courts. See Article 126(2)(e) of the Constitution.

Every litigant who approaches the court, must come forward not only with clean hands but with clean mind, clean heart and with clean objective.

The court must come with a very heavy hand on a litigant who seeks to abuse the process of the court; as the Supreme Court of India has observed;

"No litigant has a right to unlimited drought on the court time and public money in order to get his affairs settled in the manner he wishes. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions". **Budhi Kota Subbarao v K. Parasarab**, AIR 1996 SC 2687;(1996) 5 SCC 530.

It is the responsibility of the High Court as custodian of justice and the Constitution and rule of law to maintain the social balance by interfering where necessary for the sake of justice and refusing to interfere where it is against the social interest and public good.

This court declines to entertain the application since it was not brought under any known procedure and it was made to avoid the time limit of 3 months within which an application for judicial review should have been brought.

The application is dismissed with costs.

I so Order

Ssekaana Musa

Judge

21st Febraury 2020.