THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[CIVIL DIVISION]

MISCELLANEOUS CAUSE NO. 0120 OF 2022

DR. JOSEPH TINDYEBWA :: APPLICANT

VERSUS

1. **FORUM FOR DEMOCRATIC CHANGE (FDC)**
2. **KAIJA HAROLD :: RESPONDENTS**

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] The Applicant brought this application by Notice of Motion under the provisions of *Section 98 of the Civil Procedure Act Cap 71, Section 33 of the Judicature Act Cap 13, Rule 12 and Appendix B of the Rules of Procedure of the Parliament of Uganda, Article 50 of the Treaty Establishing the East African Community, Section 12 of the East African Legislative Assembly Elections Act 2011 and Order 52 rules 1, 2 and 3 of the Civil Procedure Rules SI 71-1,* seeking for the following orders;

(a) An order setting aside the 1st Respondent's decision declaring the 2nd Respondent as the singular candidate to be nominated by the 1st Respondent to contest for the position of Member of East African Legislative Assembly (EALA) on FDC Party ticket.

(b) An order directing the 1st Respondent political party to declare and nominate the Applicant Dr. Joseph Tindyebwa as the second flag bearer for the 1st Respondent political party to contest for MP EALA as a workers' representative/candidate on the 1st Respondents party ticket.

(c) An order directing the 1st Respondent to amend its party Constitution to streamline party primaries (Election) of candidates for nomination to member of parliament for EALA.
(d) Costs of the application be provided for.

[2] The grounds of the application are set out in the Notice of Motion and in an affidavit sworn in support of the application by the Applicant **Dr. Joseph Tindyebwa**. The grounds sufficiently set out the background to this application but briefly are that the Applicant is a member of the 1st Respondent Political Party who is eligible to contest and compete for any political position within the party. He serves as the Deputy Secretary General Research and Policy in the political party. The 1st Respondent political party is required by law to nominate candidates as its flag bearers for election to the East African Legislative Assembly (EALA). Primaries for the candidates were conducted by the 1st Respondent whereby the 2nd Respondent emerged winner and the Applicant emerged second out of five candidates.

[3] It is averred by the Applicant that the 1st Respondent breached the laws governing the process of determining eligible candidates for nominations by political parties to participate in EALA Member of parliament elections by declaring the 2nd Respondent as a singular candidate for its flag bearer. The Applicant averred that the 1st Respondent ought to have declared the Applicant as the 2nd candidate on its party ticket as well alongside the 2nd Respondent to contest with nominees from other political parties or independents during the elections. The Applicant further stated that the 1st Respondent is by law mandated to declare and nominate more than one candidate on its party ticket to compete with other candidates. He also averred that the 1st Respondent party does not have any legal frame work governing primary elections for nomination of candidates to parliament for MP EALA and that it is in the interests of justice that the application be allowed.

[4] The Respondents opposed the application through two affidavits in reply; the first was deponed to by ***Hon. Nathan Nandala Mafabi***, the Secretary General of the 1st Respondent, and the second by **Kaija Harold**, the 2nd Respondent. Briefly, the grounds for opposing the application are that the decision to send one candidate to the National Parliament to contest for a seat in EALA on the FDC party ticket was reached by the Party's National Executive Committee (NEC), the top organ of the party, in a meeting held on 21/01/2022. It is stated that the Applicant is a member of the NEC and was present at the meeting, participated in making the decision by the party to recommend one candidate to contest for the EALA elections which he never protested and also participated in the elections that were conducted by the 1st Respondent in which he emerged second after the 2nd Respondent who emerged as the winner. It is therefore averred that the decision by NEC was already executed and there is nothing to challenge by this application. The deponents also stated that the decision by NEC was taken in the greater interest of the FDC party. No law was breached since there is no law that requires the party to forward more than one candidates for nomination by the National Parliament.

[5] The Applicant filed an affidavit in rejoinder whose contents I have also taken into consideration.

Representation and Hearing

[6] At the hearing, the Applicant was represented by Mr. Sserunkuma Farouk while the Respondents were represented by Mr. Kafuuzi Kwemara. It was agreed that the hearing proceeds by way of written submissions which were duly filed by both Counsel and have been considered while determining this matter.

Issues for Determination

[7] At the hearing, three issues were agreed upon for consideration by this court, namely;

(i) Whether the application is properly before the Court.

(ii) Whether the 1st Respondent's action of nominating the 2nd Respondent as a sole candidate was within the law.

(iii) Whether the Applicant is entitled to the remedies prayed for.

Resolution of the Issues

Issue 1: Whether the application is properly before this court.

Submissions by the Applicant's Counsel

[8] Counsel for the Applicant submitted that the application is properly before the Court. He states that the application seeks court to invoke its inherent powers under section 98 of the CPA to debar the Respondents from acting against the law that governs nomination of candidates for elections to the East African Legislative Assembly (EALA). Counsel asserts that this application is not one for judicial review on the basis that the 1st and 2nd Respondents are not public bodies within the precincts and diction of judicial review. Counsel argues that a political party cannot be housed under judicial review and that the Forum for Democratic Change was not established by an Act of Parliament which would make it a public body.

Submissions by the Respondent's Counsel

[9] It was submitted by Counsel for the Respondents that this application is not properly before the Court because the Applicant seeks to set aside prerogative orders of the 1st Respondent political party to wit declaring the 2nd Respondent as a singular candidate to be nominated to contest for EALA Member of Parliament on FDC Party ticket. Counsel submitted that the application is a disguised application for judicial review since the orders being sought were

only available in judicial review. He submitted that the 1st Respondent is a public body whose decisions can be challenged by way of judicial review under the Judicature (Judicial Review) Amendment Rules 2019. Counsel relied on Rule 3(f) which defines a public body to include a political party and prayed that the application be dismissed since it is a judicial review application that was filed out of time. On the inherent powers of court, Counsel submitted that although court is vested with inherent powers under the law, they are only available to a party properly before the court.

Determination by the Court

[10] To begin with, the reliefs sought in this application are mainly available for consideration by the Court in exercise of its prerogative powers under the Judicature Act. Such reliefs include the writs of Certiorari, Mandamus, Prohibition, among others. As such, since the Applicant categorically states that the application is not for judicial review, it means that no order in the category of prerogative remedies would be invoked and can be issued by the Court. This, however, may not in itself make the application incompetent. It would only limit the range of reliefs that could be obtained by the Applicant if he was to succeed in the case on the merits.

[11] It was claimed by the Applicant that the reason he did not bring this application under judicial review was because the Respondents are not public bodies under the law. Counsel for the Applicant argued that for an entity to be a public body, it must be established by an Act of Parliament. With due respect, this is a misdirection by learned Counsel on this position of the law. Under *Rule 3(f) of the Judicature (Judicial Review) (Amendment) Rules 2019*, a public body includes *"a political party, a trade union, a society registered under the Cooperative Societies Act and any council, board, committee or society established by an Act of Parliament for the benefit, regulation and control of any profession and non-government organisations"*. This provision of the Rules is clear. A political party is expressly included in the definition of a public body. If

the argument by the Applicant's Counsel is based on the phrase "established by an Act of Parliament" in the above stated definition, such would still be a misconstruction of that provision. Clearly that phrase is in relation and is only limited to *"… any council, board, committee or society established by an Act of Parliament for the benefit, regulation and control of any profession*". Only those entities must have been established by an Act of Parliament for the benefit, regulation and control of any profession. That phrase does not apply to political party, trade union or non-government organizations, among others named in the provision.

[12] Clearly, therefore, the argument by learned Counsel for the Applicant is not correct. The 1st Respondent as a political party is a public body whose acts or decisions may be challenged in judicial review. Given the intrusive nature of the reliefs sought in this application, in terms of seeking to review the internal workings and operations of the 1st Respondent, this application ought to have been brought as a judicial review application.

[13] The next question thus is, now that the application was not brought as a judicial review application, but rather as one invoking the inherent powers of the court, does that by itself make the application incompetent or improper before the court? The answer is not a straight yes. As I have stated above, there could be circumstances under which a party may sustain an action based on the court's inherent powers and such a party may only lose the benefit of obtaining reliefs that are strictly reserved for instances of exercise of the court's prerogative powers. A party may therefore sustain an ordinary action even where they could best benefit from invocation of prerogative remedies. In such a situation, the court may only award reliefs that are available outside the domain of prerogative remedies.

[14] To determine whether the present application is sustainable within the set out limited purview, the court needs to examine the requirement for

exploration and or exhaustion of available alternative remedies. The position of the law is that where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first. A court's inherent jurisdiction should not be invoked where there is a specific statutory provision which would meet the necessities of the case. The rationale is that such is the only way institutions and their structures will be respected and strengthened. See: ***Sewanyana Jimmy vs Kampala International University, HCMC No.207/2016*** **[per Ssekaana J].** In ***Charles Nsubuga vs Eng. Badru Kiggundu & 3 Others, HC MC No.148 of 2015,*** **Musota J.** (as he then was] while citing with approval the decision of the Constitutional and Human Rights Division of the High Court of Kenya in ***Bernard Mulage v Fineserve Africa Limited & 3 Ors, Petition No. 503 of 2014,*** cited the following passage:

> ***"There is a chain of authorities from the High Court and the Court of Appeal that where a statute has provided for a remedy to a party, this court must exercise restraint and first give an opportunity to the relevant bodies or state organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in Speaker of National Assembly vs Ngenga Karume [2008] 1KLR 425 where it held that 'in our view there is merit ... that where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an act of parliament, that procedure should be followed."***

[15] The import of the foregoing position is that while the court has inherent jurisdiction, in that power arises a duty to safeguard the authority with utmost care and only invoke the same in special and necessary circumstances to avoid abuse of court process. The inherent jurisdiction must be exercised with restraint to avoid opening up a flood gate of suits. It follows therefore that where there is a procedure under the law, the court ought not invoke its

inherent powers in such a manner as to occasion a blatant abuse of the court process.

[16] In the instant case, the procedure adopted by the Applicant is faulty on two fronts. One, is that the reliefs sought in this application are provided for under the realm of judicial review. It is irregular for the Applicant to ignore a fully set out legal infrastructure and attempt to cling onto the court's exercise of its inherent powers. Secondly, it is also a requirement that the Applicant ought to have exhausted the internal procedures of the 1st Respondent before bringing the matter to court. I have in mind the Applicant's averment that he, among others, filed a petition before the 1st Respondent's internal Tribunal and the same was not disposed of within reasonable time. To my mind, this could have prompted the Applicant to navigate the process differently thus leading to the present application. Be that as it may, such would not drive a case such as this outside the realm of judicial review. It would have constituted justification for either seeking leave to file the application out of time or determining the grounds for judicial review.

[17] For the above reasons, this application would fail for having been improperly brought before this Court. Be that as it as may, I will proceed to deal with the other issues raised on the merits of the application for completeness and in the interest of justice.

Issue Two: Whether the 1st Respondent's action of nominating the 2nd Respondent as a sole candidate was within the law.

Submissions by the Applicant's Counsel

[18] It was the Applicant's submission that the decision of the 1st Respondent to nominate the 2nd Respondent as its singular candidate for election to the EALA was done outside the laws that govern nomination of candidates to EALA. Counsel relied on the provisions of Article 50 (1) of the Treaty

Establishing the East African Community and the Rules of Procedure of Parliament of Uganda. Counsel cites the provisions on nomination of candidates under a party ticket to the effect that a political party represented in parliament may nominate candidates for elections to the Assembly in the format prescribed in Schedule 1 and that the nomination of candidates under sub rule 1 shall represent as such as is feasible, other special interest groups. Counsel argued that these provisions oblige the party to nominate candidates and not a candidate since they are phrased in pluralism. Counsel thus argued that nominating one candidate was outside the law. Counsel further argues that the decision was not done in the best interest of the party but rather with favoritism and disregard of the prior practices and customs that the party had used to nominate candidates to EALA as well as lack of guidance from the Clerk to Parliament on conduct of elections. Counsel also relied on the case of ***DP & Mukasa Mbidde vs Secretary General East African Community & AG of Uganda*** to support his proposition that representation in the EALA is no longer on numerical strength and to show that the 1st Respondent's decision was not done in the interest of the party.

Submissions by the Respondents' Counsel

[19] In response, Counsel for the Respondents submitted that the National Executive Committee of the 1st Respondent made a decision to send one candidate to the National Parliament to contest on its ticket for a seat in EALA and that the elections were to be done by secret ballot. Counsel stated that the Applicant did not protest that decision and went ahead to contest in the said elections that were conducted on 8th February 2022 where the 2nd Respondent emerged winner and the Applicant was the second. Counsel submitted that the 1st Respondent did not violate any law in deciding to send only one candidate and that it was done in the best interest of the party in consideration of their numerical strength in Parliament. Counsel relied on the cases of ***Anita Annet Among vs the Secretary General of East African Community and Attorney General of Uganda Ref No. 6/2012*** to support the proposition that the laws

on nomination of MPs to EALA do not regulate representation basing on special interest groups. Counsel also referred the Court to the case of ***Niwabiine & 22 Others vs NRM & Anor, Miscellaneous Cause No. 143 of 2022*** to support the position that courts are limited on interfering with the internal affairs of political parties.

Determination by Court

[20] The Applicant alleged that the 1st Respondent acted in non-compliance with the law when it nominated the 2nd Respondent as a sole candidate for secondment to Parliament of Uganda for nomination and election to EALA. The Applicant pointed out three areas of non-compliance with the law, namely; **failure to follow the laws on nominations, failure to act in the interest of the party and failure to follow previous custom and practices on nominations**.

[21] Regarding the allegation of **failure to follow the laws on nominations**, it was averred by the Applicant that the decision to nominate one candidate was a total violation of Articles 28, 29, 38 and 42 of the Constitution of Uganda, Rules 12 (1) & (2) of the Rules of Procedure of the Parliament of Uganda, Article 50 of the Treaty Establishing the East African Community, Section 12 of the East African Legislative Assembly Elections Act, and the Constitution of the FDC Party. It was also averred that the decision was taken in breach of the law for having been taken without guidance from the Clerk to Parliament.

[22] It is clear from a reading of the provisions of the law cited by the Applicant that none of them set out the criteria to be followed when selecting candidates for nomination by Parliament for representation to EALA. Indeed, as pointed out by the letter from the Clerk to Parliament dated 18th March 2022 addressed to the Applicant, (Annexture "C" to the 1st Respondent's affidavit in reply), the Rules of Procedure of Parliament have not provided for the manner of nomination of party members by the respective political parties. The rules only

provide for submission of names to Parliament of persons seconded by the parties. The letter categorically states that the rules of procedure do not govern internal party processes. Secondly, neither the Treaty nor the EALA Elections Act have any stipulation on how the persons who get to be nominated for election by the National Assembly are selected. The Treaty and its interpretation through a number of decided cases emphasize the consideration of different shades of opinion and status at the level of election in the National Parliament and do not dictate that each shade of opinion or each status must as of right be represented. See: ***Anyang Nyong'o & East African Institute for Trade and Policy and Law vs Secretary General East African Community Ref No. 9/2012; Abdu Katuntu vs Secretary General of East African Community & Attorney General of Uganda;*** and ***Anita Annet Among vs Secretary General of East African Community & AG of Uganda Ref No. 6/2012***.

[23] Section 4(3) of the East African Legislative Assembly Elections Act provides that the members elected by each National Assembly shall in as much as it is feasible represent political parties represented in Parliament, shades of opinion, gender and special interest groups in that partner state. In line with the interpretation that has been made in the above cited cases, the above provision does not and is not intended to dictate criteria to be used by a partner state when choosing its representatives. All it does is to spell out what the partner state has to take into consideration. The Applicant's construction of the above provision appears to be that each of the named category must present a representative; that is, a person representing a political party, another for different shades of opinion, another for gender, others for the special interest groups. Apart from this construction being flawed and misguided, it is also impracticable. Each state has a limited number to present and in any case, a political party has no say in the criteria that the Parliament adopts when the matter is taken to the floor of Parliament. It is therefore a wild

imagination to expect a party to select its candidate on basis of the different interest groups.

[24] Counsel for the Applicant also cited Rule 4 of Appendix B to the Rules of Procedure of Parliament which provides that a political party represented in parliament may nominate candidates for election to the Assembly and that the nomination of candidates shall represent in as much as it is feasible gender and other special interest groups. Counsel stated that the above rule makes provision for nomination of "candidates" and not a "candidate". With all due respect, this argument by Applicant's Counsel is not only misdirected but is also trivial. To begin with, the provision uses the term "may" and, as such, it is not mandatory. Secondly, when it states that "a political party may nominate candidates" it means a party may choose one, more or may even not nominate any. It is purely a question of choice and discretion and does not dictate to a party whether to nominate any or if they do, how many they can nominate.

[25] In the circumstances, the Applicant has not established that the 1st Respondent breached any law by opting to select one candidate for nomination before the National Parliament. The 1st Respondent was within their authority and discretion when they set their own rules and procedures for internal management of its conduct of primary elections for the EALA flag bearer. There is uncontested evidence that the decision was taken by the National Executive Committee (NEC) which is the highest decision making body of the Party. The 1st Respondent therefore acted within the law and the Applicant's challenge under this ground fails.

[26] Regarding the allegation of **failure to act in the interest of the party and failure to follow previous custom and practices on nominations**, it was argued for the Applicant that the 1st Respondent's decision was not in the best interest of the party and disregarded the previous custom and practice where the 1st Respondent had consistently seconded two candidates for EALA

nominations. On the other hand, it was argued for the Respondents that the decision was taken in the interest of the party and after realizing that the previous custom and practice of sending two candidates had proved unsuccessful and not strategic in the prevailing circumstances. It was stated for the Respondents that the party's interest in the circumstances was to ensure that it attains a slot amongst the members that would be voted by the National Parliament and the best way to achieve this was by seconding a singular candidate.

[27] I am in agreement with the argument made by the Respondents on this point. A political party exists and survives by devising winning strategies. They cannot afford to be bound by practices and customs that have before failed to achieve a purpose. Where they agree on a procedure to be adopted internally, it would be in the rarest of the rare that the court would interfere. In a suit, such as this, based on exercise of inherent powers of the court, the action or decision of the party must manifest illegal or unreasonable exercise of discretion if the court is to be called upon to interfere with such decision making process. I have found no evidence of such conduct on the case before me.

[28] I have also found as instructive the position adopted by my Learned Brother **Ssekaana J.** in the case of **Niwabiine Jossy & 22 Ors vs National Resistance Movement & Anor, HCMC No. 143/2022** wherein he stated as follows:

> **"*It is settled in a plethora of decisions of this court that the issue of nomination of candidates for elections is an exclusive preserve or jurisdiction of political parties concerned. The courts are loath to interfere and decide for a political party who to nominate and who not to nominate for an election. A step leading to the conduct of elections is through party decisions which may include party primaries or ring fencing positions or any other mode that may***

appear strategic for the party … the party using its structures can choose a candidate in a political position for strategic reasons and in the best interest of the party and they may refuse to nominate candidates for any position."

[29] In view of the foregoing, having already found that the decision to second one candidate to the National Assembly to be nominated for EALA MP was done within the law, I have also found that there is no evidence that the decision was not in the best interest of the party. I agree that the decision was done in good faith and for strategic reasons. As such, even if the case had not failed on the first issue, I would have found no reason to interfere with the 1st Respondent's internal workings and management. The Applicant's case also fails on the second issue.

Issue 3: Whether the Applicant is entitled to the remedies prayed for.

[30] In light of the above findings, the application by the Applicant wholly fails. The Applicant is, therefore, not entitled to any of the remedies sought in the application. The application is accordingly dismissed with costs to the Respondents.

It is so ordered.

Dated, signed and delivered by email this 6th day of October, 2022.

Boniface Wamala
JUDGE