

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS CAUSE NO.143 OF 2022

1. NIWABIINE JOSSY
2. MAGANDA JULIUS
3. MIVULE RONALD MUSOKE
4. RUTH KARUNGI TUKAHIRWA
5. ISA KATO
6. NUWAGABA HERBERT
7. DR. ISAAC LWANGA BYANGIRE
8. SAMUEL MUGENYI
9. KYASIIMIRE SHEILAH
10. AMANYA GERMAN
11. KYAGUBA ROBERT
12. ABIGABA ADONIA
13. NAMPWERA AMBROSE----- APPLICANTS
14. RWEBISENGYE L.B
15. KIZITO RICHARD
16. ATEGEKA MOSES
17. WEBALE ROBERT
18. KAWOOYA KIGONGO SAMUEL
19. AGABA GILBERT
20. ASIIMWE MICHEAL
21. DR. KISEMBO EMMANUEL
22. MUTSIKA IVAN
23. BWENGYE LAUBEN

VERSUS

1. NATIONAL RESISTANCE MOVEMENT
2. THE NRM ELECTORAL COMMISSION----- RESPONDENTS

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for Judicial Review under Article 28 (1),42 and 44(c) of the Constitution and Section 33,36 & 38 of the Judicature Act as amended, Articles 9(1)(e), 13(1), 39 (10)(a-e) of the Constitution of the National Resistance Movement (2015) as amended and Rules 3,6, 7 and 8 of the Judicature (Judicial Review) Rules, 2009 for;

1. *A declaration that the resolution by the Central Executive Committee (CEC) a top organ of the 1st respondent to endorse/nominate the incumbent (NRM) Representatives to the East African Legislative Assembly (EALA) as party candidates Flag Bearers for the 2022-2027 EALA term of office without holding valid elections, is tainted with illegality, irrationality, unreasonableness, procedural impropriety, discriminative of the other aspiring contestants and is null and void.*
2. *An Order of certiorari doth issue quashing the impugned CEC resolution ring-fencing EALA (NRM) POSITIONS exclusive to the incumbent NRM EALA Representatives for the 2022-2027 term of office on account of the said illegality, irrationality, unreasonableness, procedural impropriety and discrimination.*
3. *An order of prohibition and or injunction doth issue restraining the respondents from implementing further the impugned CEC resolution, unless the same is amended to allow the nomination and election of the applicants as NRM flag bearers for the positions of members of Parliament of the East African Legislative Assembly.*

4. *An order doth issue directing the 2nd respondent to nominate the applicants as candidates to NRM Parliamentary Caucus for consideration and election as party flag bearers for the positions of Member of Parliament of the East African Legislative Assembly(EALA)*
5. *An order against the respondents to pay damages to the applicants.*
6. *An order that the respondents pay the costs of the application.*

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavit in support of the application by Mivule Ronald Musoke but generally and briefly state that;

1. The Applicants are aspiring candidates for the office of Member of Parliament of East African Legislative Assembly in the on-going primary elections process organized and coordinated by the 2nd respondent to elect party flag bearers.
2. That on the 28th June 2022 the 2nd respondent invited interested and qualified persons to express interest (to participate in the primary election) for the position of NRM Flag Bearer for Member of Parliament to the East African Legislative Assembly (EALA) 2022-2027 term of office.
3. That in response to the said invitation, the applicants tendered in their written expression of interest to contest for the positions.
4. That on the 8th July 2022, the applicants among others were invited to State House at Entebbe to participate in the vetting process and interface with Central Executive Committee of the party.
5. That while at State House Entebbe the applicants were addressed by His Excellency the President of Uganda/Chairman of the 1st respondent and the Chairperson of the 2nd respondent.

6. That the applicants' saw the document circulating:
"...the 4th Central Executive Committee of the National Resistance Movement, at its 10th Meeting sitting at Entebbe today 8th July 2022, hereby resolves;...that the incumbent EALA members be maintained...to continue their tenure for another term of office as Members of the East African Legislative Assembly (EALA). CEC therefore endorses (incumbents) to the NRM Parliamentary Caucus as NRM Candidates for the position of Member of Parliament of the East African Legislative Assembly (EALA).."
7. That the resolution and the decision by the respondents ring-fence positions of Member of Parliament of EALA is not only reasonable, but also biased, selfish, malicious, illegal and discriminative in nature, yet with no just cause whatsoever.
8. That by reason of the respondents' illegal, unreasonable, biased, selfish resolution and decisions, the applicants have been disenfranchised and denied his right to participate in the NRM party electoral process, and which has caused them to suffer mental anguish and injury for which they claim damages.
9. That the applicants have incurred a lot of expenses in electoral process basing on the political roadmap issued by the 2nd respondent, traversing the whole country conversing for support, and were looking forward to successfully participate in this election as party flag bearers, until the respondents passed a resolution to lock them out of the electoral process, for which they shall claim damages.
10. That the applicants have no alternative remedy other than challenging the respondent's resolution.

The respondents opposed this application and the 1st respondent filed an affidavit in reply through *Oscar John Kihika*-Director Legal and the 2nd respondent filed an affidavit in reply *Dr. Tanga Odoi* the Chairman of the Electoral Commission.

1. The 2nd respondent is not an entity capable of being sued and as such has been wrongly added as a party to this application.
2. That the applicants have not exhausted all the available remedies within the 1st respondent's party structures under the Constitution of the National Resistance Movement-Reprint 2020, The National Resistance Movement Election Regulations 2020, and National Resistance Movement Parliamentary Caucus Rules of Procedure, 2014.
3. That the 1st respondent's Election Regulations provide for an election disputes tribunal that is responsible for all disputes arising from the parties electoral processes.
4. That the application is premature as the 2nd respondent is yet to hold nominations and election of candidates of East African Legislative Assembly.
5. That the procedure for nominations and elections of candidates for the 1st respondent is well documented in the internal documents of the 1st respondent and no nominations have yet taken place.
6. That the date for nominations, campaigns and election of candidates of East African Legislative Assembly and is yet to be communicated by the 2nd respondent.

7. That the Central Executive Committee of the 1st respondent exercised its' authority in accordance with the Constitution of the National Resistance Movement-Reprint 2020, the National Resistance Movement Election Regulations 2020, and National Resistance Movement Parliamentary Caucus Rules of Procedure, 2014.
8. That no member of the 1st respondent has been barred from participating in primary elections for the election of members of the East African Legislative Assembly.
9. That the Central Executive Committee of the 1st respondent has mandate and power to recommend members to the Parliamentary caucus for the election of East African Legislative Assembly.
10. That the resolution of the 4th Central Executive Committee of the 1st respondent is not final within the party structures.
11. That the applicants are not yet candidates within the meaning of the rules of Procedure for the Election of Members of the East African Legislative Assembly.

At the hearing of this application the parties were heard on oral submissions although the applicants' counsel was able to file their written submissions which I have read and considered in the determination of this application.

Three issues were proposed for court's resolution;

1. *Whether the application raises any valid grounds for Judicial Review?*
2. *Whether the applicants were accorded a fair hearing?*

3. Whether applicants are entitled to the remedies sought?

The applicant was represented by *Mr. Robert Rutaroh Muhairwe and Ms Talibba Tracy* whereas the respondents were represented by *Mr. Ssebuufu Usaama, Mr. Bazira Anthony and Mr. Achiba Micheal Edwin*.

The 7th applicant withdrew his name from the list of applicants contending that he was never consulted before he was included on the list of applicants. This court accordingly allowed his withdraw from the proceedings.

After hearing the submissions of the parties I realised the first issue ought to have been: *Whether the application is competently before the court?*

The respondents' submission that the applicant has no merit and it is not a fit and proper application to be brought by way of Judicial Review. Firstly, the NRM Electoral Commission is not a proper party, which should be brought before court in these proceedings and doesn't have a legal personality before the courts of law. The proper person to be sued is the NRM as the political party but not it's departments or organs. The provision of the law is in *Section 6 sub section 3* of the Political Parties and Organization Act. That is the law under which a political party can be sued. My lord the provision only grants corporate personality to a political party and not it's departments. See *Uwimbabazi Beatrice versus The NRM Election District Tribunal and Honorable Busingye Harriet Mugenyi Miscellaneous Cause No. 15 of 2020*. we pray that the application against the NRM EC should be struck out as such my lord.

The second ground of opposition to this application is that the applicants have not exhausted the internal party remedies available. The NRM has regulations, which govern their internal party electoral processes. The regulations are called the National Resistance Movement Election Regulations 2020. They provide that there shall be an Election Disputes Tribunal at National level and at lower levels of authority. *Regulation*

20(b)(b) provides for tribunals at national level. The applicants were supposed to exhaust the internal remedies and the internal dispute resolution mechanism within the NRM Constitution, therefore their action before this court was premature. See *Miscellaneous Cause No. 59 of 2020, Semwanga Godfrey and 31 others versus Democratic Party*.

The application is an abuse of court process, the applicants want to eat their cake and have it at the same time. That in law the applicants are approbating and reprobating since they expressed the interests to contest for these positions and it set out the procedure to be followed and they were clearly told that their names shall be submitted to CEC for vetting after which they will go to the Parliamentary caucus. The applicants choose not to object to this at that stage but after the process and procedure they are challenging the very system that invited them to take part. It is undisputed these are party members. Membership to a political party is not forceful, it is contractual, so you agree to be bound by the rules of the party to which you subscribe. Therefore for them to complain after not going through CEC is having their cake and eating it. It is approbation and reprobation, which is not allowed before this honorable court. See *Male H. Mbirizi Kiwanuka versus Attorney General*.

Counsel further submitted that vetting is not new to political party processes, in fact it is a difficult arena for the court to descend into, political parties should be allowed to vet aspirants for different positions. When they are doing it they are carrying out a political act, what they consider is just political expediency and political strategy on how to win an election.

There were 130 NRM members expressed interest for these 6 positions, it is not in the interest of the party to forward the 130 to Parliament for the election. The CEC sat and considered 63, because 67 withdrew their expression of interest. On the 63 as you will see in paragraph 11 of Oscar Kihika's affidavit and Dr. Tanga Odoi, the CEC performed its duty and only recommended 6 and the names are listed. Judicial Review is not about the decision, but the decision making process. The CEC carried out its

mandate, vetted 63 members and it's wisdom and discretion passed only 6. The CEC didn't elect, vetted and recommended 6 for the available positions.

This court should take Judicial Notice that this happens elsewhere in other political parties, there are those vetting organs of those political parties, NUP, DP, FDC they do it differently so we pray that the court doesn't interfere in the exercise of the political mandate or political strategy of the political parties.

The respondents' counsel submitted that applicants did not file the authorization to swear the affidavits in support of the suit. Mr. Mivule doesn't have the authorization to depone this affidavit on behalf of the rest of the applicants. There are 23 applicants in number but the letter of authorisation only has 18 names. It has not been explained why someone that is purporting to swear an affidavit on behalf of the rest no explanation is given to this court as to why the rest of the members have not a penned their signatures. The new Civil Procedure Rules under ***Order 1 Rule 8(1),(2),(3)(b) and (4)***. In these new Civil Procedural Rules of 2019, before a person institutes a suit in the courts of law, they are supposed to get an authorization from every intended party. Counsel submitted that this authorization that was served on the respondents is an afterthought, made to hoodwink court that the applicants there in authorized the deponent herein Mr. Mivule to swear an affidavit on their behalf.

Counsel further submitted that that this court should expunge some of the paragraphs that have been referred to in the affidavit in support. ***Order 19 Rule 3*** of the Civil Procedure Rules, a party is supposed to depone only facts that are within their knowledge. But under this paragraph the deponent herein is cross-examining court, he poses a question, what was the purpose of the 2nd respondent to invite the applicants to express interest to participate in primary elections for the positions of members of Parliament of the East African Legislative Assembly. Affidavits are based on facts and evidence, a party has no chance of cross-examining court.

Paragraphs 6 and 10 of the affidavit in support the said paragraphs are very argumentative, they are too length. It is as if the deponent was submitting in an affidavit in support.

The applicants' counsel submitted that the applicants were intending candidates and the 2nd respondent being the NRM Electoral Commission has the duty under the party Constitution to organize and conduct elections. Therefore, bringing this matter concerning election to court without the 2nd respondent would leave a gap so that is how the 2nd respondent is here.

The respondents' submission that the application is premature or that, the applicants didn't exhaust all available remedies internally is baseless. The nature of the claim by the applicants is that, there are no readily available remedies under the law governing the NRM. The Central Executive Committee which passed the resolution is the highest organ of the party. It only compares to the Supreme Court in the hierarchy of Courts of Judicature that when the decision is taken by the Central Executive Committee of the NRM, you can't challenge it anywhere within the party. It can only be the court, which have the long arm of the law that can now touch and investigate the decision of the Central Executive Committee. But with the NRM nobody, it is the submission of the applicants unless the respondents to prove me otherwise that the Central Executive Committee decision is final in NRM Matter. So the applicants had nowhere to go because the decisions are taken at the top. They had no remedies to exhaust in the party.

The NRM Electoral tribunal has no jurisdiction in this matter, this is a decision of the Central Executive Committee effectively stopping the applicants from taking part in the election and so the applicants could not again start going to the election tribunal.

The tribunal has no jurisdiction in this matter where CEC has taken a decision, stopping the applicants from participating. Otherwise the tribunal would have jurisdiction if the applicants had taken part in an election and

they are disgruntled with the results of the election, then they would run to the tribunal.

Analysis

The respondents counsel submitted that the 2nd respondent was wrongly joined as a party to proceedings and that it is not a body corporate to be sued in its name. The 2nd respondent is The NRM Electoral Commission and is only part of the structures of NRM party to manage and conduct elections within the party.

This court agrees entirely with counsel for the respondents that the 2nd respondent is not a body corporate and cannot be sued in its name. Section 6(3) of the *Political Parties and Organisations Act 2005* provides that; *A political party or organisation registered under this Act shall be a body corporate and shall have perpetual succession and may sue or be sued in its corporate name.*

Therefore, a political party in the eyes of the law and under the Constitution is a corporate legal entity represented by its National Officers not sectional branches or segments or ad-hoc committees which do not qualify as a political party. Therefore a cursory reading of section 6 of Political Parties and Organisations Act recognizes one political party registered as one corporate entity. See *Wembabazi Beatrice v The NRM Election Disputes Tribunal & Hon. Busingye Harriet Mugenyi High Court Miscellaneous Cause No. 15 of 2020(Masindi)*.

The 2nd respondent was wrongly sued and is accordingly struck off with costs

Secondly, the Application is challenged for being an abuse of court process on account of the Applicants' failure to exhaust the existing remedies available within the party or under the Political Parties and organisations Act.

It is a well-established proposition that where a right or liability is created by statute or instruments which gives a special remedy for enforcing the same, the remedy provided by statute or instrument must be availed of in the first instance.

Rule 5 of the **Judicature Judicial Review (Amendment) Rules 2019** which introduces **Rule 7A (1) (b)** is couched in the following terms;

“The court shall in handling applications for judicial review, satisfy itself of the following;

- a) That the Application is amenable for judicial review;*
- b) That the aggrieved person has exhausted the existing remedies available within the public body or under the law;”*

This court has pronounced itself in matters where applications were filed without exhausting available remedies. In **Sewanyana Jimmy v Kampala International University HMC No. 207 of 2016**. The court dismissing a similar application for failure to exhaust existing remedies within the body held 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. This is the only way institutions and their structures will be strengthened and respected.

See also the case of **Okello v Kyambogo University & Anor (Miscellaneous Cause No.23 of 2017)**.

The present application seems to be avoiding the existing remedy or procedures set out under the NRM Party constitution. The party NRM has regulations, which govern their internal party electoral processes. The regulations are called the National Resistance Movement Election Regulations 2020. They provide that there shall be an Election Disputes Tribunal at National level and at lower levels of authority. **Regulation 20(b)(b)** provides for tribunals at national level. The applicants were supposed to exhaust the internal remedies and the internal dispute

resolution mechanism within the NRM Constitution, therefore their action before this court was premature and baseless. The Constitutional court has upheld the NRM Primary Elections regulations and the systems available to challenge the decisions or elections in the case of *Fox Odoi-Oywelowo v NRM & AG Constitutional Petition No. 0037 of 2015 (27th April 2021)* as being constitutional.

Every litigant who approaches the court, must come forward not only with clean hands but with clean mind, clean heart and with clean objective. It is a settled principle that where there is an effective alternative remedy under the statute, the High Court does not exercise its jurisdiction as a self-imposed restriction.

In judicial review proceedings, it is important to remember that the remedy is not intended to detract properly constituted authorities the discretionary powers vested in them. In simple terms, it is not permitted to substitute the courts as the bodies making decisions. It is intended however, that the relevant authorities use their powers in a proper manner.

In the case of *R v Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531* Lord Mustill noted;

“The court must constantly bear in mind that it is the decision maker not the court that Parliament has entrusted not only the making of the decision but also the choice of how the decision is made”

Therefore, the question of jurisdiction of this court in judicial review matters under political parties and organisations is predicated on the reading of the Political Parties and Organisations Act and party's constitutions.

It is now trite that the issue of selection/nomination and or sponsorship of a candidate for an election fall squarely within the ambit of domestic affairs and decision of a political party. This court agrees with submissions of counsel Ssebuufu Usaama for the respondents *“that vetting is not new to political party processes, in fact it is a difficult arena for the court to descend into, political parties should be allowed to vet, aspirants for different positions. When*

they are doing it they are carrying out a political act, what they consider is just political expediency and political strategy on how to win an election”

It is settled in a plethora of decisions of this court that the issue of nomination of candidates for election is exclusive preserve or jurisdiction of political parties concerned. The courts are loathed 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 election is through party decisions which may include party primaries or ring-fencing positions or any other mode that may appear strategic for their party. It is in this area that the courts have very limited jurisdiction in the area of nomination of candidates by their political parties.

The NRM party Central Executive Committee has vetted and recommended certain candidates for the East African Legislative Assembly, the applicants are at liberty to present their names to the NRM Parliamentary Caucus rather than rushing to court to stop the top organ from vetting candidates whom they think are better candidates to take the party forward. There is no individual merit in political party politics and the party using its structures can choose a candidate in political position for strategic reasons and in the best interests of the party and they may refuse to nominate candidates for any position. This court agrees that there is need for some form of balanced regulation in activities of political parties in order not to stifle their growth or weakening the democratic culture.

The NRM party has a Constitution which sets out the mechanism for resolving electoral disputes. The internal processes must be explored in order to avoid court interference in internal politics. The law should not leave the political parties unregulated or unmonitored since this may eventually make democratic system unmanageable as to become a hindrance to progress, national unity, good government and growth of a healthy democratic culture. Such interference should be with caution and circumspection depending on the nature of decision made by a political party.

Matters relating to nomination of a candidate of a political party are regarded as domestic affairs and are generally treated as not justiciable. The courts have no power to compel a political party to sponsor a candidate outside the thin and limited powers conferred under the Political Parties and Organisations Act. The question of nomination of candidates for elective offices from members of a political party is governed by the rules guidelines and constitution of the political party concerned. Therefore it is a question which is not justiciable in a court of law because it is a domestic (that is internal) affair of the party. It is a political question. A member who is aggrieved has no cause of action which can raise any question as to the rights and obligations of the member determinable by a court of law. See *Emenike v P.D.P (2012) 12 NWLR (pt 1315) p. 556(SC); Onouha v Okafor (1983) SCNLR 244; Dalhatu v Turaki (2003) 15 NWLR (pt 843) 310*

The vetting of candidates was necessary and it is not in the interest of the NRM party to forward the 130 names to Parliament for the election. The CEC sat and considered 63 contestants, after 67 contestants withdrew their expression of interest. Out of the 63 as stated in paragraph 11 of Oscar Kihika's affidavit and Dr. Tanga Odoi, the CEC performed its duty by vetting and only recommending 6 Contestants and the names are listed. The applicants accepted to take part in the electoral process through the party guidelines which required vetting by Central Executive Committee, they cannot approbate and reprobate by challenging the same system they allowed to be part of at this later stage.

It would not be appropriate under judicial review to determine whether the decision of the party-CEC is illegal. The NRM party Central Executive Committee in exercise of their constitutional mandate or discretion took a decision in the best interests of the party. The available alternative procedure to challenge their decision is the most appropriate since it is an election complaint with the party structures. If the applicants are aggrieved by the decision of CEC and they feel that they cannot politically 'breathe', then they are at liberty to leave the party in order to breathe freely.

The application fails and the preliminary points of law and objections are upheld. The application is dismissed with costs to the respondents.

I so order

SSEKAANA MUSA

JUDGE

02nd August 2022