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**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)**

**MISC. APPLICATION NO. 023 OF 2022
(ARISING FROM CIVIL SUIT NO. 399 OF 2021)**

10 **NATIONAL RESISTANCE MOVEMENT:..... APPLICANT**

VERSUS

HAJJI IDDI LUBYAYI KISIKI:..... RESPONDENT

BEFORE: HON. JUSTICE ESTA NAMBAYO

RULING

15 The Applicant, National Resistance Movement, (NRM), filed this application under **S.7 of the Civil Procedure Act, S.17 (2) of the Judicature Act, Order 7 Rule 11 and Order 52 Rules 1 & 3 of the CPR**, against the Respondent, Hajji Iddi Lubyayi Kisiki, (the Respondent), seeking for orders that;

- 20 **1. Civil Suit No. 399 of 2021; Hajji Iddi Lubyayi Kisiki –v- Katushabe Ruth and National Resistance Movement be struck out on account of the fact that it is res judicata and an abuse of court process.**
- 2. The Applicant be awarded costs of the application.**

The grounds of this application are set out in the affidavit in support of the application by Oscar John Kihika but briefly are that: -

- 25 **i. The Applicant was sued by the Respondent in Civil Suit No. 399 of 2021; Hajji Iddi Lubyayi Kisiki –v- Katushabe Ruth and National Resistance Movement.**

- 30 ii. Prior to filing Civil Suit No. 399 of 2021, the Respondent filed Miscellaneous Cause No. 26 of 2020; Hajji Iddi Lubyayi Kisiki –v- Katushabe Ruth and National Resistance Movement in the High Court-Masaka.
- 35 iii. The case was heard on merit and dismissed by Hon. Justice Victoria N.N. Katamba.
- 40 iv. The parties, the cause of action, the subject matter and reliefs sought in the aforementioned Miscellaneous Cause are wholly and substantially similar with those in the head Suit vide; Civil Suit No. 399 of 2021.
- 45 v. The final determination of Miscellaneous Cause No. 26 of 2020 and the filing of Civil Suit No. 399 of 2021, in this court between the same parties, having the same cause of action, touching the same subject matter and seeking similar reliefs is not only an abuse of court process but is barred by Res Judicata and is prejudicial to the Applicant having to defend multiple claims in different fora over the same subject matter.
- vi. It is in the interest of justice and equity that the Respondent’s pleadings in Civil Suit No. 399 of 2021 be struck out and the suit be dismissed with costs.

45 The Respondent filed an affidavit in reply opposing this application.

Back ground to the application.

50 The brief background to this application is that the Respondent participated in the NRM primaries for Bukomansimbi North County and after he had been declared the winner, Ruth Katushabe, the 1st Defendant in Civil Suit No. 399 of 2021 petitioned the NRM Elections Disputes Tribunal challenging the results. The Tribunal in a decision dated 2nd October, 2020 cancelled the results and declared Ms. Katushabe as the NRM flag bearer for Bukomasimbi North County.

The Respondent being aggrieved with the decision of the Tribunal, filed for Judicial Review at Masaka High Court Circuit and lost. He then decided to contest as an Independent Candidate in the National Parliamentary Elections and lost to Hon. Nandagire Christine Ndiwalana, the National Unity Platform (NUP) Candidate for Bukomasimbi North Constituency. After the election, the Respondent filed a suit against Ruth Katushabe, who also lost the election, in this court seeking for declarations inter alia, that he is the duly elected NRM Parliamentary Candidate for Bukomansimbi North Constituency, hence this application.

Legal representation

Learned Counsel Bazira Anthony represented the Applicant, while the Respondent was represented by Counsel Nyanzi Mathias Yawe. Written submissions have been filed by Counsel for the parties as directed by this court.

Issues raised for trial are: -

- 1. Whether Civil Suit No. 399 of 2021 has become moot.**
- 2. What remedies are available to the parties?**

Resolution of issues

Issue 1: Whether Civil Suit No. 399 of 2021 has become moot.

Applicant's submissions

Counsel for the Applicant submitted that there is no actual controversy in this case which makes this whole matter moot. He explained that under the doctrine of moot, courts do not decide cases in which there is no longer any actual controversy. He referred this court to *Black's Law Dictionary, 7th Edition, Bryan, A. Garner, page 1025* and relied on the case of *Republic –v- Kenya Maritime Authority & 2 Others,*

Judicial Review 10 of 2020 at **page 71** on the doctrine of mootness. Counsel submitted that in the instant case, the Respondent having lost in the primaries to Ms. Ruth Katushabe, he decided to run as an Independent candidate in the Parliamentary Elections and further lost and that when he lost the case at Masaka High Court in
80 Miscellaneous Cause No. 26 of 2020, where Ruth Katushabe was confirmed as the flag bearer for the NRM, he never appealed against the ruling of the court. Further, that the Respondent never challenged the outcome of the General Election for Member of Parliament for Bukomansimbi North Constituency in which he lost. That the remedies and prayers that the Respondent/Plaintiff seeks under paragraph 4 and 13 of Civil Suit
85 No. 399 Of 2021 are moot, academic and are overtaken by events. Counsel prayed that this court be pleased to dismiss the plaint in the main suit on that ground.

Respondent's submissions

In reply, Counsel for the Respondent submitted that this application should not have been filed under S.17 (2) of the Judicature Act and Order 7 r.11, Order 52 Rule 1&3
90 of the Civil Procedure Rules. He explained that Section 17 of the Judicature Act has power to prevent abuse of court process but that the section does not confer jurisdiction on this Court to entertain any application which does not fit in the ambit of the law under which it is brought. That the remedies sought in this application are not to prevent abuse of court process by curtailing delays.

95 Counsel emphasized that once a party chooses to initiate a process under a particular law delimiting the Jurisdiction of Court to particular remedies, he/she is bound to those remedies. That the court is not at liberty to entertain and/or grant remedies not provided for in that law. That much as filing an application under a wrong rule of procedure may not vitiate an application, in this case, it is a wrong statutory provision
100 that was applied conferring jurisdiction to Court which is not a mere procedural

default. He relied on the case of ***Nichol Runssos Gulam Hussein Habib Virani –v- Nazimudin Habib Virani, Civil Appeal No. 9 of 1993*** where the Court of Appeal held that the application having been filed under the wrong rule, the High Court was wrong to overrule the objection that the application was incompetent. Counsel averred that
105 in this case, applying for remedies not provided for under the law under which the application was brought would be ultra vires the provisions of S.17 (2) of the Judicature Act. That this application is therefore incompetent and not properly before this Court and should be dismissed on those grounds.

In regard to mootness of this case, Counsel contended that the affidavit in rejoinder
110 is bad in law and incompetent because it raised the issue of “mootness” for the first time which was not raised in the affidavit in reply and as such, it offended the rules of procedure as contained in the Civil Procedure Rules. That the Respondent did not get the opportunity to reply and yet the Applicant by so doing introduced a new cause of action or a new ground of objection which was not in the application that
115 was filed.

Applicant’s submissions in rejoinder

In rejoinder, Counsel for the Applicant submitted that the Respondent seems to give Section 17 (2) of the Judicature Act a very narrow interpretation. He relied on the case of **Lukwago Erias & Anor. –v- Jennifer Musisi, ED KCCA, M.A No. 626 of 2018 at**
120 **pages 8 and 9** where court stated that;

*“The proper reading of Section 17 of the Judicature Act as a whole easily reveals that it is much broader than just the narrow meaning of the wording of the title-head to the section. The section has two limbs embedded in the content of two subsections. In subsection (1) thereof, it specifically relates to the supervisory power of the High
125 court over Magistrates’ courts. On the other hand, under subsection (2), it relates to*

130 *the exercise of inherent powers by the High Court to prevent abuse of the process of the court in both the High Court and Magistrates Courts.....Needless to state, that under rules of statutory interpretation, it is trite law that a heading of a section of the law cannot be read to be interpreted with a meaning contrary to the meaning assigned in the provision of the section."*

Counsel averred that abuse of court process does not have an exhaustive list as the Judicature Act does not define what amounts to abuse of court process but rather speaks of the powers vested in court to prevent abuse of court process. He relied on Black's Law Dictionary, 7th Edition at page 10 and the case of ***Muchanga Investments Limited -v- Safaris Unlimited (Africa) Ltd & 2 Others, Civil Appeal No. 25 of 2002 [2009] KLR 229*** at page 3 where court noted that;

140 *"The term abuse of court has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice....."*

145 Counsel contended that this application is properly before this court as it was brought under Section 17(2) of the Judicature Act and Order 7 rule 11 of the Civil Procedure Rules.

In regard to the affidavit in rejoinder, Counsel submitted that the main grounds for this application were res judicata and abuse of court process. That he raised the issue of mootness of the suit as an abuse of court process for purposes of being specific. He emphasized that the current suit is an abuse of court process as the prayers sought in Civil Suit No. 399 of 2021 are similar to those that were sought and addressed in

Miscellaneous Cause No. 26/2020. He prayed that this court be pleased to allow this application and dismiss Civil Suit No. 399 of 2021.

Analysis

Section 7 of the Civil Procedure Act provides that;

155 *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by*
160 *that court."*

In the case of ***Akuku Ebifania versus Victoria Munia & Registered Trustees of Arua Diocese HCCA No.027 of 2016***, court held that;

"The basis of the rule of res judicata is that an individual should not be vexed twice for the same cause. A person should not be twice vexed in respect of the same contest as to his or her rights and on the other hand, the time of the Courts should not be
165 *wasted by trying the same matter several times. The plea of "res judicata" is in its nature an "estoppel" against the losing party from again litigating matters involved in previous action but does not have that effect as to matters transpiring subsequently. The judgment in first action operates as an "estoppel" only as to those matters which*
170 *were in issue and actually or substantially litigated. It is a matter of public concern that solemn adjudications of the courts should not be disturbed. Therefore, where a point, question or subject-matter which was in controversy or dispute has been authoritatively and finally settled by the decision of a court, the decision is conclusive as between parties in the same action or their privies in subsequent proceedings. A*

175 *final judgment or decree on merits by court of competent jurisdiction is conclusive of*
rights of parties or their privies in all later suits on points and matters determined in
the former suit. In short, once a dispute has been finally adjudicated by a court of
competent jurisdiction, the same dispute cannot be adjudicated again in another suit
afresh (see; In the Matter of Mwariki Farmers Company Limited –v- Companies Act
180 *Section 339 and others [2007] 2 EA 185). By res judicata, the subsequent court does*
not have jurisdiction.”

In the instant case, it is not in dispute that the Respondent filed Miscellaneous Cause
No. 026 of 2020 at Masaka High Court against Katushabe Ruth in respect of the NRM
Primaries and lost the case. After losing in court, the Respondent stood as an
185 Independent Candidate in the Parliamentary Elections for Member of Parliament for
Bukomansimbi North County against Katushabe Ruth who was the NRM Candidate
and Nandagire Christine Ndiwalana for the National Unity Platform and the two, the
Respondent and Katushabe Ruth lost to Hon. Nandagire Christine of NUP. The
Respondent was satisfied with his loss as he was when he lost a case in Court against
190 Ruth Katushabe. In the case of **Julius Maganda –v- National Resistance Movement,**
MA No. 154 of 2010, court noted that;

“courts of law do not decide cases where no live disputes between parties are in
existence. Courts do not decide cases or issue orders for academic purposes only.
Court orders must have practical effects. They cannot issue orders where the issues in
195 *dispute have been removed or merely no longer exist.”*

In the instant case, the dispute between the parties in this case was already dealt with
at Masaka High Court vide MC No. 026 of 2020. The High Court case at Masaka dealt
with the same issues that the Respondent has raised here in Civil Suit No. 399 of 2021.
The Respondent did not appeal against the finding of the High Court at Masaka.

200 I find that this case is res judicata, it is over taken by events and only moot as submitted by Counsel for the Applicant. This application is therefore allowed with orders that: -

- 1. Civil Suit No. 399 of 2021 be and is hereby struck out for being Res Judicata.**
- 2. The Respondent pays costs of this application.**

205 I so order

Dated, signed and delivered by mail at Kampala this 10th day of October, 2022.

Esta Nambayo

JUDGE

210 **10th/10/2022.**