

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
CIVIL SUIT NO. 06 OF 2016.**

**NICHOLAS KWARIJA ::: PLAINTIFF
VERSUS
NATIONAL RESISTANCE MOVEMENT (NRM) ::::::::::::::::::::::::::::::: DEFENDANT**

**BEFORE: HON. JUSTICE BONIFACE WAMALA
JUDGMENT**

Introduction

[1] The Plaintiff brought this suit against the Defendant seeking a declaration that the elections of the National Vice Chairperson (Western) NRM Youth League conducted on 30/10/2015 in which Nicholas Nuwagira was declared as winner were illegal, null and void, an order nullifying the election of Nuwagira Nicholas as Vice Chairperson (Western) NRM Youth League, for general damages, interest and costs of the suit.

Background and Brief Facts to the Plaintiff's Case

[2] On or about 7th September 2015, the Plaintiff was nominated as a candidate for the post of National Vice Chairperson (Western Uganda) NRM Youth League along with others, namely, Nagasha Johnson, Baguma Charles, Nuwagira Nicholas and Kabundu Elly. The said candidates embarked on campaigns within the 26 districts in Western Uganda which ended with a final joint campaign rally and elections at Namboole on 30th October 2015. The Plaintiff averred that in the course of voting, it was discovered that the Plaintiff's name was not on the ballot paper and that Nicholas Nuwagira, with whom the Plaintiff shares the 1st name, was busy telling the voters that the Plaintiff had pulled out of the race in his favour. The Plaintiff informed the Chairperson of the NRM Electoral Commission, Dr. Tanga Odoi, about the anomaly who upon

ascertaining that indeed the Plaintiff's name was missing from the ballot paper, halted the voting process for a moment and directed that the name of the Plaintiff be written by each remaining voter in hand on the ballot paper. Voting then proceeded but many persons had already voted. The Plaintiff lost the election to Nuwagira Nicholas yet he had invested heavily in the exercise. He stated that, as a result, he suffered loss and damage for which he prays for compensation in damages in addition to the declaration and order stated above.

[3] The Defendant filed a Written Statement of Defence (WSD) in which they denied the Plaintiff's claims and particularly stated that the Plaintiff belongs to the Defendant Party which has internal dispute resolution mechanisms that were not exhausted by the Plaintiff. The Plaintiff had in fact filed a petition with the Defendant that was yet to be heard and determined. It was further stated that the Defendant had taken responsibility of the anomaly and it was resolved in the presence of all candidates that the Plaintiff's name be written in ink on the ballot papers before voting commenced. The defendant also averred that the elections of the National Vice Chairman [Western] NRM Youth League were conducted in a transparent manner, were free and affair, reflected the will of the voters and were held in accordance with the NRM Constitution and the Electoral Commission Regulations for NRM Primary Elections 2015. The Defendant finally averred that the suit was premature, misconceived and contained falsehoods and prayed that the same be dismissed with costs.

Representation and Hearing

[4] At the hearing, the Plaintiff was partly represented by **Mr. Gilbert Nuwagaba** while he partly appeared unrepresented. On the other hand, the Defendant was not represented either by an advocate or any other representative. Because there was sufficient evidence of service of process upon the Defendant, the Court allowed the application of the Plaintiff to proceed with

the hearing of the matter ex parte under Order 9 Rule 20(1) (a) of the CPR. Evidence was adduced by way of witness statements and the Plaintiff led evidence of four witnesses. The Plaintiff made and filed written submissions which I have taken into consideration during the determination of the matter.

Issues for Determination by the Court

[5] Three issues are up for determination by the Court, namely;

- a) Whether the elections of the National Vice Chairperson (Western) NRM Youth League held on 30/10/2015 were free and fair?**
- b) Whether Mr. Nicholas Nuwagira was duly elected as National Vice Chairperson (Western) NRM Youth League?**
- c) Whether the Plaintiff is entitled to the remedies sought?**

Burden and Standard of Proof

[6] In civil proceedings, the burden of proof lies upon he who alleges. Section 101 of the Evidence Act, Cap 6 provides that;

- (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.*
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

[7] Section 103 of the Evidence Act provides that the “*burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person*”. Accordingly, the burden of proof in civil proceedings normally lies upon the plaintiff or claimant. The standard of proof is on a balance of probabilities. The law however goes further to classify between a legal burden and an evidential burden. When a plaintiff has led evidence establishing his/her claim, he/she is said to have executed the legal burden.

The evidential burden thus shifts to the defendant to rebut the plaintiff's claims.

Resolution of the Issues

Issues 1 & 2: Whether the elections of the National Vice Chairperson (Western) NRM Youth League held on 30/10/2015 were free and fair? And Whether Mr. Nicholas Nuwagira was duly elected as National Vice Chairperson (Western) NRM Youth League?

Submissions by the Plaintiff

[8] It was submitted for the Plaintiff that the elections were not free and affair on account of having been held irregularly and being riddled with illegalities. It was stated that the conduct of the elections by the Defendant at 11:00 pm was contrary to the Regulation 20(12) of the NRM Primary Elections Regulations 2015 which required the voting time to be between 9:00 am to 4:00 pm. It was also stated that the directive by the Chairperson of the Defendant's Electoral Commission to write the Plaintiff's name on the ballot paper in pen yet the elections were supposed to be by ticking in a box in front of the name of the candidate of one's choice was irregular and created an uneven ground.

[9] The Plaintiff further submitted that as seen from the evidence of PW4, Mr. Charles Baguma, who was one of the candidates for the same position, many of the Plaintiff's voters simply voted Nuwagira Nicholas by writing the first name "Nicholas" which he shared with the said Nuwagira. The Plaintiff stated that, in totality, the elections were so irregular and riddled with illegal practices contrary to Regulation No. 22(5), (6) and (9). The Plaintiff concluded that the election could not by any standard be deemed to have been free and fair in the circumstances where the candidate's name was willfully omitted from the ballot papers and his right to a free and fair election violated by the Defendant's

Electoral Commission. The Plaintiff prayed that the Defendant ought to be held liable.

Determination by the Court

[10] I will begin with the contention by the Plaintiff that the impugned elections were tainted with illegalities on account of having been held in contravention of the named rules of the NRM Primary Elections Regulations 2015. The long title to the said Regulations states that they were made “to regulate the conduct of NRM Primaries whenever they shall be held to determine NRM electoral candidates as herein specifically provided”. According to regulation 3.3.4, a “Candidate” within the meaning of the Regulations means a person duly nominated by the Commission as candidate for flag bearer for any elective position in the NRM. According to regulations 10 and 15 thereof, the elective positions for which NRM Primaries may be conducted are set out and they are clearly for purpose of identifying flag bearers for the national and local government offices.

[11] In the present case, the Plaintiff contested for the position of National Vice Chairperson (Western) NRM Youth League. This was not a primary election. It was an election for a position on a standing organ of the party in line with Article 29 of the Party Constitution. As such, the election could not have been conducted within the ambit of the Primary Elections Regulations. Unlike primary elections whose purpose is to choose NRM flag bearers in national and local government elections, the election subject of the present suit was for a party national level elective position, conducted at the National Conference by the NRM Electoral Commission. There is no indication as to whether the party has guide lines for this category of elections. There is also no indication of any resolution or decision to the effect that for purpose of the subject election, the party Election Commission was authorized to use the Primary Elections Regulations. In absence of such evidence, my finding is that the Primary

Elections Regulations 2015 were inapplicable to the election subject of this suit. As such, the contention raised by the Plaintiff to the effect that the election was irregular for contravening the NRM Primary Elections Regulations is misconceived and devoid of merit. The allegations in that regard accordingly fail.

[12] I will now turn to the alleged irregularities concerning the omission of the Plaintiff's name on the ballot paper. I need to point out that the procedure adopted by the Plaintiff in this suit is not the recommended procedure for challenging an election result. I believe the Plaintiff opted for this procedure because of an apparent absence of a specific law under which to bring his challenge. The Plaintiff chose to invoke the inherent power of the court to provide required remedies. This Court would allow to exercise jurisdiction in the matter with the caution that it may only provide those remedies that are sustainable under the adopted procedure. In that regard, it would be unsustainable to vitiate an election under the present proceedings since the successful candidate was not made party to the suit. The Court cannot make an order affecting his victory without him being heard on any allegations made by the Plaintiff.

[13] Secondly, I note that this case has taken so long in the court system. Apparently, according to the facts as stated in the Plaintiff's submissions, the term of Mr. Nuwagira Nicholas lapsed in 2021. Even if it were possible to overturn the election, the same would still have been overtaken by events and the dispute in that regard has been rendered moot. It is of course very unfortunate that the case has taken this long having been brought in 2016 but this has been due to a combination of factors which cannot be blamed on one particular player. As a court, however, the injustice that has been occasioned, particularly to the Plaintiff, is sincerely regrettable.

[14] Be that as it may, the claim for damages is still alive and the same will be considered by the Court. Issues 1 and 2, however, will not be considered on their merits on account of having been rendered moot. I will proceed to consider the aspect of damages under Issue 3.

Issue 3: Whether the Plaintiff is entitled to the remedies sought?

[15] From the foregoing, the declaration and orders sought by the Plaintiff regarding the validity of the election are not available owing to my finding above. Under this issue, I will only consider the claim for damages. It was indicated in evidence by the Plaintiff that he was duly nominated by the Party's Electoral Commission. He conducted campaigns in 26 districts of western Uganda and expected to win. He invested considerable resources in the campaigns. Unfortunately, on the day of elections, his name was not on the ballot paper. When he notified the Chairperson of the Electoral Commission, the solution he came up with was that for the voters that were yet to vote, they could write the Plaintiff's name on the ballot paper and tick it accordingly. The evidence by the Plaintiff is that by that time, many persons had already voted; one of the candidates who shared a first name with the Plaintiff had used the opportunity to convince the voters that the Plaintiff had stepped down in his favour and he actually became the winner of the election. The Plaintiff also stated that when the Electoral Commission Chairperson made the announcement, some voters did not hear the instruction of writing the Plaintiff's name in ink.

[16] Consequently, the Plaintiff had to lose the election for no fault of his. The Defendant in the WSD admitted the occurrence of the Plaintiff's name missing on the ballot paper and giving the verbal instruction to voters to write the Plaintiff's name in ink. The occurrence was, no doubt, a mistake of the

Defendant. The Defendant is therefore liable for the loss and damage suffered by the Plaintiff. It was shown by the Plaintiff that he incurred expenses during the campaigns totaling to a sum of UGX. 230,150,000/=. He further stated that he also suffered inconvenience, anguish and injured feelings for which he prayed for general damages which he proposed at UGX 300,000,000/=.

[17] The Plaintiff conceded that he did not plead the sum of UGX 230,150,000/= as special damages. In evidence, however, he attempted to adduce evidence specifically proving the expenses. The law is that special damages have to be specially pleaded and specifically proved in evidence. If one of the two requirements is not met, a sum cannot be deemed proved as special damages. At the same time, if particular claims fail the test of special damages, their purported proof cannot be transposed onto the court for award as general damages. General damages are in the discretion of the court and their assessment follows particular principles.

[18] The law is that the purpose of general damages is to restore the aggrieved person to the position they would have been in had the breach or wrong not occurred. See: *Hadley v Baxendale (1894) 9 Exch 341*; *Charles Acire v M. Engola, HC Civil Suit No. 143 of 1993* and *Kibimba Rice Ltd v Umar Salim, SC Civil Appeal No. 17 of 1992*. In the assessment of general damages, the court should be guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered. See: *Uganda Commercial bank v. Kigozi [2002] 1 EA 305*. The damages available for breach of contract are measured in a similar way as loss due to personal injury.

[19] On the case before me, the Plaintiff has proved on a balance of probabilities that he suffered loss and inconvenience as a result of the conduct attributed to the Defendant's Electoral Commission. His loss and pain ought

not to go un-remedied. The sum proposed by the Plaintiff is, however, on the higher side. In my estimation, a sum of UGX 50,000,000/= (Uganda Shillings Fifty Million only) will suffice to meet the ends of justice in the matter. I award the same as general damages to the Plaintiff.

[20] The Plaintiff also prayed for interest. The discretion of court regarding award of interest is provided for under Section 26(2) of the Civil Procedure Act. The basis of an award of interest is that the defendant has kept the plaintiff out of his money and the defendant has had the use of it himself and ought to compensate the plaintiff accordingly. See: *Premchandra Shenoji and Anor v Maximov Oleg Petrovich*, SCCA No. 9 of 2003 and *Harbutt's 'plasticine' Ltd v Wayne tank & pump Co. Ltd* [1970] QB 447. In determining a just and reasonable rate of interest, court takes into account the ever rising inflation and drastic depreciation of the currency. A plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of currency in the event that the money awarded is not promptly paid when it falls due. See: *Kinyera v the Management Committee of Laroo Building Primary School*, HCCS No. 099 of 2013. In this case, I will award interest to the Plaintiff on the general damages at the rate of 12% per annum from the date of judgment until payment in full.

[21] Regarding costs of the suit, under Section 27 of the Civil Procedure Act, costs follow the event unless the court upon good cause determines otherwise. The suit by the Plaintiff has partly succeeded. I award the Plaintiff half the costs of the suit.

[22] In all, therefore, the suit by the Plaintiff partly succeeds with the following orders;

- a) The declaration and orders sought by the Plaintiff regarding the validity of the election of the National Vice Chairperson (Western) NRM Youth League conducted on 30/10/2015 are not granted since the claim in that regard has since been rendered moot.
- b) The Plaintiff is awarded a sum of UGX 50,000,000/= as general damages for loss and inconvenience occasioned to him owing to the Defendant's conduct.
- c) The Plaintiff is awarded interest on (b) above at the rate of 12% per annum from the date of judgment until full payment.
- d) The Plaintiff is awarded half the costs of the suit.

It is so ordered.

Dated, signed and delivered by email this 1st day of November, 2023.



Boniface Wamala

JUDGE