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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA

ELECTION PETITION NO. 0004 OF 2016

MADIRA JIMMY _____ PETITIONER

10

=VERSUS=

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1. ETUKA ISSAC JOAKINO

2. ELECTORAL COMMISSION _____ RESPONDENTS

BEFORE

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JUSTICE. JOHN EUDES KEITIRIMA

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JUDGE

17/05/2016:

Mr. Bautu appears for the 2nd Respondent.

The petitioner in court who also happens to be my learned colleague, Mr. Madira Jimmy. My lord I don't know the whereabouts of his counsel but this matter was coming up for scheduling.

Mr. Odama:

5 My lord for the 1st Respondent Alfred Okello Oryem jointly with Henry Odama. 1st Respondent is not in court as earlier on indicated that he is held up in for swearing in exercise in Kampala. And the petitioner is represented by Paul Manzi.

Petitioner:

10 I am represented by Counsel Paul Manzi who lost his son who was serving as a UPSF official in Somalia. Burial is in Kanungu. He says he could earliest be here by Thursday after the burial.

Mr. Bautu: I would pray for Monday or Tuesday

Court: Petition adjourned till 24th May 2016 at 9:00am.

Let parties file their joint scheduling memorandum.

Signed

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17/05/2016

Judge

24/5/2016:

Robert Bautu for the 2nd Respondent.

20 Petitioner and his counsel absent

Mr. Bautu:

This matter was set for scheduling for today. I have not heard anything from the petitioners.

Henry Odama for the 1st respondent appears

Mr. Bautu:

Since the petitioner is not here not his counsel he seems to be unserious with his petitioner. Under the P.E.A, election petitions must be given expeditious hearing. I pray the petition be
5 dismissed with costs.

Counsel for the petitioner Paul Manzi appears. Petitioner also appears in court.

Mr. Manzi: I seek indulgence of this court that this petition be heard on its merits. The respondents will not be prejudiced in any manner by our late coming in a few minutes.

Court: Okay, let the petition be heard on its merits.

10 **Mr. Manzi:**

The petition is for scheduling to agree on the issues. I propose the issue within our view summarizes the petition. It is whether the 1st respondent was validly nominated by 2nd respondent to contest for the elective post of Member of Parliament for upper Madi constituency for the period 2016-2021.

15 The 2nd issue are the remedies available to the parties.

Mr. Odama:

In respect of the 1st respondent we want to propose one additional issue with is whether the outcome of the election for the upper Madi constituency substantially affected the petitioner's bid as Member of Parliament for upper Madi constituency.

20 **Mr. Bautu:**

I agree with my colleague on the first issue. On the 2nd issue I have a problem because the contestation is on the nomination. The petitioner does not contest the outcome but only seeking for a consequential order in (b). I would therefore propose that we only consider the issue of whether the issue of whether the 1st respondent was validly nominated. The first issue would
25 resolve this manner.

Mr. Manzi: I agree with counsel that the 3rd issue is redundant because the main complaint is about the nomination of the 1st respondent and if it is determined the 3rd issue will be reduced redundant

Court:

5 We shall adopt the issues raised by counsel for the petitioner to resolve this petition

Mr. Manzi:

We shall rely on the documents annexed to the petition except in para 7 of the affidavit in support of the petition. The petitioner states the 1st respondent's name, photography and NRM bus symbol were unlawfully included on the nomination paper by the 2nd respondent to the
10 petition's detriment. In that para the petitioner indicated the petition would adduce or produce the ballot paper so that we adduce it in evidence. Unless they concede to that evidence.

Mr. Bautu:

I don't think that is necessary at the moment because what is in issue is the nomination. We are being ambushed to require us produce a document the petitioner ought to have requested for if
15 they knew there was contestation on that. It would be wastage of court time to say we produce the document. If court is inclined to have us produce the document then we be given time to consult the 2nd respondent.

Mr. Manzi:

It's not true the 2nd respondent is ambushed by that request. The request is contained in the
20 affidavit of the petitioner paragraph 7. The 2nd respondent has not said it is impossible to produce a ballot sample paper. It would be necessary for this court to determine this petition when all the material is available and the ballot paper is relevant. Unless the 2nd respondent concedes to that fact.

Mr. Bautu:

25 I concede to that fact and so we do not have to wait for the ballot paper since the 1st respondent stood as an NRM candidate.

Mr. Manzi: We can proceed without any further delay.

Court: All affidavits read in open court.

Mr. Manzi: I seek directions of court.

Mr. Odama: We shall rely on the documents and affidavits in rebuttal. We can proceed by of
5 written submissions.

Mr. Manzi: I can file by Thursday and serve the respondents by Friday 27th May 2016.

Mr. Bautu: we can also reply by 2nd June 2016.

Mr. Manzi: we can make a rejoinder by 6th June 2016 and serve on the respondents.

Court:

10 Judgement will tentatively be set for the 10th June 2016 at 9:00am. The time frames set are to be followed strictly.

Signed

17/05/2016

Judge

15 **JUDGMENT**

BEFORE: JUSTICE. JOHN EUDES KEITIRIMA

This petition brought under S. 60-63 of the Parliamentary Elections Act, 17 of 2005 (as amended) and Judicature Act, Cap 13 and Rule 6(1) of the Parliamentary Elections Rules s- 141-2.

20 The petitioner brings this petition on the following grounds:

1. That he was duly nominated on 2/12/2015 as a candidate independent of a political organization to contest for the elective post of member of parliament for upper Madi

constituency in Arua district and contested as such in the elections conducted by the 2nd Respondent on 18/2/2016 for upper Madi constituency member of parliament.

2. That the 1st Respondent was neither nominated as a candidate independent of a political organization nor as a flag bearer of MRM and thus was not legally entitled to contest with the petitioner for the elective post of member of parliament for upper Madi constituency in Arua district nor have his name, photograph and NRM symbol on the ballot papers.
3. That there is a restraining court order issued by this court on 1/12/2015 in Mis. Application No. 60 of 2015 forbidding the 1st Respondent to be declared NRM flag bearer which confirms that the 1st Respondent was not entitled to contest as an NRM candidate in the upper Madi Parliamentary Elections.
4. That in view of the above and in view of the decree of this court in Civil suit No. 24 of 2015 and an interim order issued on 17/2/2016 by the Hon. Justice Remy Kasule JA vide Civil Application No. 47 of 2016, the 1st Respondent was not a duly nominated candidate as at 17/02/2016 and thus was not entitled to participate as a candidate nor have his name on the ballot papers as a candidate of member of Parliament Elections for upper Madi constituency.
5. That the 2nd Respondent wrote letters and issued notices stating that the 1st Respondent unlawfully declared and issued General Notice No. 144 of 2016 that was published in the Uganda Gazette volume CIX No. 14 dated 3/03/2016 to the effect that the 1st Respondent is duly elected Member of Parliament for upper Madi constituency.
6. That the petitioner and another candidate Hon. Martin Drito also wrote and served protest letters dated 19/2/2016 to the 2nd Respondent regarding the unlawful inclusion of the 1st Respondent's name on the ballot papers but the 2nd Respondent ignored the petitioner's request to suspend Respondents went ahead to issue a notice in Uganda Gazette stating

that the 1st Respondent is the winner of the Parliamentary elections for upper Madi constituency in Arua district.

- 5
7. That the inclusion of the 1st Respondent's name, photograph and NRM symbol on the ballot papers and other voting materials such as the declaration of results forms by the 2nd Respondents was unlawful. That the unlawful inclusion of the 1st Respondent on the ballot papers by the 2nd Respondent misled the voters in upper Madi constituency who believed that the 1st Respondent instead of voting for the petitioner which substantially affected the outcome of the elections.

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The petitioner is now seeking for the following orders:

1. A declaration that the 1st Respondent was not a duly nominated candidates to contest for the elective post of member of parliament for upper Madi constituency, in Arua district in the 18/2/2016 parliamentary elections.
- 15
2. The election and declaration of the 1st Respondent as the winner of the purported parliamentary elections for upper Madi constituency be set aside and fresh elections be organized by the 2nd Respondent for the duly nominated candidates as set at 17/12/2015 for the elective post of member of parliament for upper Madi constituency in Arua district in accordance with the law.
- 20
3. That a permanent injunction issues restraining the 1st Respondent from acting or holding out and or being sworn as the duly elected member of parliament for upper Madi constituency for the period 2016 to 2012.
- 25
4. That costs of the petitions and interest thereon at 8% per annum be awarded to the petitioner from the date of judgment until payment in full.
5. Any other remedy this court deems appropriate to award in the interests of justice.

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The petition is supported by the affidavit of the petitioner who deposes to the said grounds the details of which are on record. The petition is also supported by the affidavit of Onzima Geoffrey and Alioni Patrick Agroga. The details of their averments are also on record.

The 1st Respondent's answer to the petition states that;

- 5 1. The petitioner has no legal grievance within the meaning of S. 61 (1) of the Parliamentary Elections Act.

2. He was duly nominated as a candidate for election as Member of Parliament for upper Madi constituency by the 2nd Respondent in accordance with the law of
10 2nd/December/2015 at 1:10pm, contested and was elected in the 2016 general elections.

3. The referred to orders and decree by the petitioner were overtaken by events when H.C.C.S No. 24 of 2015 was twice dismissed and the 1st Respondent had been duly
15 nominated as the said candidate by the 2nd Respondent in accordance with the law, contested and was elected in 2016 general elections.

4. There is no legal or factual basis for setting aside his election as Member of Parliament for upper Madi Okollo constituency, as the 2nd Respondent fully complied with the
20 provisions of the parliamentary Elections act, and the principles laid down therein and with the principles of the Electoral Commission Act and the constitution in the conduct of the elections.

5. The alleged unlawful participation and inclusion of the 1st Respondent on the ballot
25 papers is misconceived infact and law when it declared the 1st Respondent the elected Member of Parliament for upper Madi constituency and not the petitioner.

6. If there was any noncompliance with the provisions of the parliamentary Elections Act, and the principles laid down therein, and in the provisions of the Electoral Commission

Act and the constitution, such noncompliance did not affect the result of the election in a substantial manner.

- 5 7. The 1st Respondent was at the time of his election qualified for election as Member of Parliament. The 1st Respondent was at the time of his election not disqualified or de-nominated by the 2nd Respondent as alleged or at all. The 2nd Respondent did not disobey any lawful orders of the High Court and the Court of Appeal as alleged or at all.
- 10 8. The affidavits of the petitioner, one Onzima Geoffrey and Alioni Patrick Agroga purported to be in support of the petition do not infact support the petition as they are incurable tainted with misconceptions of the law and facts and outright lies and confusing.
- 15 9. The purported denomination of him as a candidate for election as Member of Parliament for upper Madi constituency was in any case over turned by the 2nd Respondent and his candidature was reinstated prior to his election and reaffirmed in accordance with the law and orders of both the High Court and the Court of Appeal.

20 The answer to the petition is supported by the affidavit of the 1st Respondent the details of which are on record.

The 2nd Respondent's answer to the petition states as follows;

- 25 1. That the 1st Respondent was duly nominated and the petitioner returned as the 4th runner up in the election for upper Madi constituency wherein the petitioner polled 1046 votes whilst the 1st Respondent was declared winner polling 7236 votes.
- 30 2. The electoral process of upper Madi constituency was conducted fairly and legally in compliance with the provisions of the laws of Uganda.
3. The 1st Respondent appeared or was published on the ballot as a result of having been duly nominated.

4. The 1st order dated 1st/December/2015 and the subsequent orders including the Court of Appeal Order in Miscellaneous Application No. 47 of 2016 did not have any legal effect on the nomination of the 1st Respondent and as such the 2nd Respondent having realized the same allowed the 1st Respondent to contest.

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5. The 2nd Respondent declared the results in accordance with the law and the wish of the voters of upper Madi constituency.

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6. In the alternative but without prejudice to the afore-going the Court of Appeal decision stayed all matters that related to Arua High Court Civil Suit No. 2015 that had equally by way of interim order tried to restrain the nomination of the 1st Respondent.

7. That the 2nd Respondent did not obliged to conduct the elections in accordance with the gazette scheduled time and law.

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8. That the 2nd Respondent did not in any way influence the voters of upper Madi constituency to vote for the 1st Respondent.

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9. The petitioner's loss to the 1st Respondent does not imply non-compliance with the electoral principles enshrined in the laws of Uganda.

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10. In the alternative but without prejudice to the above, the 2nd Respondent contends that if there were any irregularities or noncompliance with the electoral laws, such noncompliance or irregularities did not affect the outcome of the election in a substantial manner.

11. The 2nd Respondent admits no liability of any kind and that the reliefs sought by the petitioner are disputed as having no merit.

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12. The 2nd Respondent prays that the petition be dismissed with costs.

The 2nd Respondent's answer to the petition is supported by the affidavit of the chairman of the 2nd Respondent the details of which are on record.

At the scheduling conference the following issues were raised

1. Whether the 1st Respondent was validly nominated by the 2nd Respondent to contest for
5 the elective post on Member of Parliament for upper Madi constituency for the period
2016-2021.
2. The remedies available to the parties.

With regard to the 1st issue, counsel for the Petitioner submitted that the 1st Respondent was
not validly nominated by the 2nd Respondent to contest as a candidate for the elective post of
10 Member of Parliament for Upper Madi constituency for the period 2016 to 2021. That the 1st
Respondent was neither nominated as a candidate independent of a political organization nor
as a flag bearer of NRM and thus was not legally entitled to contest with the Petitioner for the
elective post of Member of Parliament for Upper Madi Constituency in Arua District nor
have his name, photograph and NRM symbol on the ballot papers. That the Court issued a
15 restraining order on 01/12/2015 in Misc.Application No.060 of 2015 forbidding the 1st
Respondent to be declared NRM flag bearer. That in spite of the said order, the 1st
Respondent on 02/12/2015 presented himself for nomination as the NRM flag bearer in the
said elections and before the nomination could be completed, the returning officer received
the said restraining order. Later the returning officer realized her mistake and cancelled the
20 nomination.

Counsel for the Petitioner further submitted that once the restraining order was issued by the
court on 01/12/2015 it took immediate effect. That therefore on the 02/12/2015 the 1st
Respondent could not be nominated as an NRM flag bearer. Counsel for the Petitioner
emphasized that a court order must be obeyed. Counsel for the petitioner cited many
25 authorities to buttress his submission. The Petitioner contended that the Respondents were
aware of the restraining order issued by this Court and were expected to obey it and that the
2nd Respondent was in contempt of court when it allowed the 1st Respondent's name to
remain on the ballot papers as NRM flag bearer. Counsel for the Petitioner emphasized that
the 1st Respondent was aware of the restraining order forbidding the declaration of any

person as the NRM flag bearer because the 1st Respondent applied to Court which issued a consequential order in Civil Suit No.24 of 2015 that the 2nd Respondent re-nominates the 1st Respondent. That execution of that order was stayed in Misc. Application 078 of 2015 by this court. That the decree of this court vide Civil Suit No.24 of 2015 ordering inter alia that the elections be frozen to enable the 1st Respondent to be re-nominated as the official NRM flag bearer is further proof that by that date the 1st Respondent was aware that he was not yet nominated as the NRM flag bearer. That this decree was stayed by the interim order of the Court of Appeal in Misc. Application No.47 of 2016 which ordered that the elections proceed for the duly nominated candidates of which the 1st Respondent was not one of them.

Counsel for the Petitioner further submitted that there is no evidence of the re-nomination by the 1st Respondent by the 2nd Respondent as the 1st Respondent seems to allege.

With regard to the 2nd issue, Counsel for the Petitioner submitted that this court should declare that the 1st Respondent was not a duly nominated candidate to contest for the elective post of Member of Parliament for Upper Madi Constituency in Arua District in the 18th /02/2016 Parliamentary elections.

That Court should also declare that the election and declaration of the 1st Respondent as the winner of the purported Parliamentary Elections for Upper Madi Constituency be set aside and a fresh election be organized by the 2nd Respondent for the duly nominated candidates as at 17th /12/2015 for the elective post of Member of Parliament for Upper Madi Constituency in Arua District.

The Petitioner further prays that a permanent injunction issues restraining the 1st Respondent from acting or holding out and or being sworn as the duly elected Member of Parliament for Upper Madi Constituency for the period 2016-2021.

The Petitioner further submitted that the costs of the Petition and interest thereon at 8% per annum be awarded to the Petitioner from the date of Judgment until payment in full.

The Petitioner also prays for any other remedy this court deems appropriate to award in the interest of justice.

The 1st Respondent submitted with regard to issue 1 that Section 61(1) of the PEA NO.17 of 2005 as amended, specifies the grounds upon which the election of a Member of Parliament may be set aside. That in the instant case the basis of the Petition is Section 61(1) (d) of the PEA which provides that the election of a candidate as a Member of Parliament shall only be set aside if proved to the satisfaction of the Court that the candidate was at the time of his or her election not qualified or disqualified for election as a Member of Parliament. Qualification and disqualification for election as a Member of Parliament are provided for under Article 80 of the Constitution, and Section 4 of the PEA. That in the instant case, the entire grievance of the Petitioner is based on sponsorship, nomination and election of the 1st Respondent as NRM flag bearer. That invariably Section 11(2) of the PEA on sponsorship of a candidate by a political party and Section 13 of the PEA on factors which may invalidate a nomination are applicable.

The 1st Respondent submitted that prior to his nomination as a candidate, the 1st Respondent contested for political party sponsorship of the NRM party for the election. The 1st Respondent won by defeating Hon. Martin Drito who then challenged the results of the NRM primaries election in Civil Suit No.24 of 2015. That out of the said suit several interlocutory orders were issued and that the basis of this petition is on the interlocutory orders arising from the said suit. That however the main suit was dismissed prior to the election of the 1st Respondent and the interlocutory orders affecting the 1st Respondent's nomination as NRM flag bearer going into the election were vacated. That the final decree of the said suit ordered the 2nd Respondent to ensure that the 1st Respondent participates in the election as the NRM flag bearer. That similarly the Court of Appeal issued an interlocutory order that all persons nominated as candidates for election must be allowed to participate.

The 1st Respondent further submitted that the 1st Respondent was duly nominated by the 2nd Respondent on 02/12/2015 before the 2nd Respondent was served with a Court order to preserve the status quo. That it was clear that the order was received by the NRM Secretariat Legal department on 04/12/2015 which order was received under protest as nominations ended on 03/12/2015. That the contention that the 2nd Respondent was aware of the order before it went ahead to nominate the 1st Respondent was aimed at misleading Court. That by letter dated 03rd December 2015 written by the Returning Officer of the 2nd Respondent to the

secretary of the 2nd Respondent clearly stated that she realized she had made a mistake after she had nominated the 1st Respondent at 1:10pm and he had already left. That the said Returning Officer also stated that the restraining order was brought to her table but did not note the time. That this leaves the question as to whether the said restraining order was brought to the attention of the 2nd Respondent Returning Officer before the nomination or after nomination and whether it was served to the right officer authorized to receive process at the electoral commission. That the said restraining order was not meant to act retrospectively.

The 1st Respondent contended that the subsequent denomination of the 1st Respondent by the 2nd Respondent was of no legal consequence since it was void abinitio. That Party sponsorship was not a qualification for election as a Member of Parliament and loss of party sponsorship does not lead to nullification of election to Parliament. The 1st Respondent cited the case of *Hon.Theodore Ssekikubo & 4 others versus The Attorney General-Constitutional Appeal No. 1 of 2015* to support his submission. That it follows that the 2nd Respondent never had any basis to denominate the 1st Respondent from the election completely as it purported to do. That even the Public Notice issued by the 2nd Respondent to that effect was based on the error of the 2nd Respondent.

The 1st Respondent further submitted that the authorities cited by the Petitioner with regard to disrespect of court orders were misplaced since the 1st Respondent did not respect or breach any Court order. That the 1st Respondent was never a party to the main suit and the application for a restraining order. That the 1st Respondent was never served with the restraining order at the time he presented himself for nomination on the 2nd December 2015 before the 2nd Respondent.

It was the 1st Respondent's submission that he was lawfully nominated on the 2nd day of December 2015 and the Court of Appeal ordered for the elections to proceed on 18th February 2016. The 1st Respondent validly participated in the election which he won as seen from the return form for transmission of results that was tendered in evidence.

With regard to the second issue, the 1st Respondent submitted that the Court dismisses the Petition with costs to the 1st Respondent.

The 2nd Respondent submitted with regard to the 1st issue that Section 11 of the Parliamentary Elections Act provides that nomination of a candidate shall be made on the nomination day by two registered voters tendering to the returning officer a nomination paper in duplicate containing among others a statement on oath , a statement signed by a nominated agent of the candidate accepting the appointment, a minimum of ten names and signatures of persons supporting the nomination of the candidate and a statement on oath verifying that the candidate is among others a citizen and of adult age. Where a candidate is sponsored by a political party, the nomination paper shall be endorsed and bear the seal of that party. Section 11(2) of the Parliamentary Elections Act.

The 2nd Respondent relies on paragraph 4 of the affidavit of its Chairman Eng. Dr. Badru Kiggundu where he avers that the 1st Respondent was legally nominated and evidence to that effect was contained in Annexure B to the 1st Respondent's affidavit in support of the answer to the Petition which is a copy of the nomination paper for the 1st Respondent as a contestant for the seat of Member of Parliament for Upper Madi, Constituency dated 2nd December 2015. The 2nd Respondent contends that since the affidavit of its Chairman was not disputed, it is deemed to be admitted. The 2nd Respondent cited the case of *Samwiri Masa versus Rose Achieng 1978 HCB 297* and Section 57 of the Evidence Act to support his submission. The 1st Respondent also cited the case of *Co-operative Bank in Liquidation versus Mugwanya Sajjabi T/A Mugwanya Enterprise HCMA 716 of 2005* where it was held that unchallenged evidence must intrinsically be tenable on its own.

The 2nd Respondent further submitted that the NRM declared its flag bearer on the 25th November 2015 and the order restraining the NRM from declaring a flag bearer was issued five days later on the 1st December 2015 that therefore the restraining order was of no consequence since it was received by the 2nd Respondent after nominating the 1st Respondent.

The 2nd respondent cited the case of *Afro-Ugandan Bros versus Mpologoma Bros [1987] HCB 93 and Esso Kenya Ltd. versus Mark Makwata Okiya-Civil Appeal 69 of 1991* which held to the effect an injunction sought for purposes of restraining could cease to exist by effluxion of time. The 2nd Respondent emphasized that no order of Court requiring a person to do or restrain him or her from doing any act may be enforced unless a copy of the order has been served personally on the person required to abstain from doing the act in question.

The 2nd Respondent cited the case of *Nyamongo &Anor versus Kenya Posts and Telecommunications Cooperation (1990-1994) EALR P.464* to support her submission. That therefore even the de-nomination of the 1st Respondent was inconsequential since it was premised on a court order which was overtaken by events.

5 The 2nd Respondent further submitted that the Petitioner in paragraph 9 of his affidavit suggests that the 1st Respondent was nominated for the Constituency of Upper Madi Okollo instead of Upper Madi the former being non-existent. That it was a mere irregularity as to the name of the Constituency which did not render the nomination invalid. That it was held in the case of *Kizza Besigye versus Museveni-Election Petition No.1 of 2006* that the Court
10 cannot annul an election on the basis that some irregularities had occurred. That Section 13 of the Parliamentary Elections Act No.17 of 2005 lists factors which may invalidate a nomination. That where there are no factors invalidating a nomination cited, the said nomination is deemed to be valid.

In the alternative but without prejudice to the above, the 2nd Respondent submitted that the
15 Order of the Court issued in Misc. Application No.60 and the directions in 0024 of 2015, Hon.Martin Drito versus National Resistance Movement were stayed by the Court of Appeal order of interim stay of execution and as such there was no order restraining the nomination of the 1st Respondent.

The 2nd Respondent emphasized that the 1st Respondent was duly nominated as NRM
20 candidate for Upper Madi Constituency in accordance with the Parliamentary Elections Act and as per Court of Appeal order in Misc. Application 47 of 2016 where the 1st Respondent was allowed to participate in the race as a duly nominated candidate. That nomination is a fact not a matter of law and the 1st Respondent was nominated on 2nd December 2015 and therefore the consequent Court of Appeal Order readily recognized in fact those nominated
25 by the 17th of February 2016.

With regard to the 2nd issue, the 2nd Respondent submitted that the Petition should be dismissed with costs as the Petitioner is not entitled to any of the prayers he sought for from court. That the 1st Respondent should be declared the directly elected Member of Parliament for Upper Madi Constituency.

The Petitioner made submissions in rejoinder basically reiterating his earlier submissions. His emphasis was that the 1st Respondent was not validly nominated as an NRM flag bearer and should have sought nomination as a candidate independent of any political organization. That the 1st Respondent instead purported to be the official flag bearer of the NRM in contempt and violation of the restraining order of this court. That even by the time H.C.C.SNO.24 OF 2015 was dismissed on 10/02/2016, the 1st Respondent was not a nominated candidate.

RESOLUTION

1ISSUE ONE: WHETHER THE FIRST RESPONDENT WAS VALIDLY NOMINATED BY THE 2ND RESPONDENT TO CONTEST AS A CANDIDATE FOR THE ELECTIVE POST OF MEMBER OF PARLIAMENT FOR UPPER MADI CONSTITUENCY FOR THE PERIOD 2016 TO 2021.

The gist of the Petitioner's submission on this issue is that by the time the 1st Respondent was nominated by the 2nd Respondent, there was a restraining order from court exempting the 1st Respondent from standing as a candidate for the 18th February 2016 Parliamentary Elections for Upper Madi Constituency which the 2nd Respondent ignored. The said order is vide Misc. Application no.0060 of 2015 arising from H.C.C.S No.024 of 2015.

In his affidavit in support to the answer to the petition by the 2nd Respondent, the chairman of the 2nd Respondent averred that the 1st Respondent was legally nominated by the 2nd Respondent on the 2nd day of December 2015 and that the Court of Appeal decision vide Misc. Application No.47 of 2016 allowed the 2nd Respondent to conduct the elections with all the duly nominated candidates.

The restraining order issued which is annexure E1 of the affidavit in support of the Petition was meant to restrain the NRM and any person working under them from declaring an NRM flag bearer for Member of Parliament Upper Madi Constituency until the final disposal of the Misc. Cause application 004 of 2015. The Purpose of this injunction or restraining order as is characteristic with injunctions of this nature is to maintain the status quo. Status quo means simply the existing state of things existing before a particular point of time. Once the status quo has changed the interlocutory

injunction will not serve any purpose. It is not meant to have a retrospective effect. The letter of the returning officer to the secretary election commission annexed as E.2 to the Petitioner's affidavit clearly indicates that the 1st Respondent was already nominated by the time the returning officer realized that there was a restraining order and went ahead to cancel the nomination.

Annexure A of the affidavit of the 1st Respondent in support to the answer to the Petition clearly indicates that the 1st Respondent had by the 28th October 2015 been declared as the NRM Party flag bearer and the 2nd Respondent had been notified of that fact. That was the status quo by the time the impugned restraining order was issued on the 1st December 2015. It is also clear that the restraining order was received by the NRM secretariat on the 4th December 2015 under protest since the nomination of the 1st Respondent had already taken effect as NRM flag bearer. In any case the main suit out of which the impugned restraining order arose was finally dismissed prior to the election of the 1st Respondent and the interlocutory orders affecting the 1st Respondent's nomination as NRM party flag bearer were vacated. However as I have already observed the restraining order was of no effect on the nomination of the 1st Respondent as it came after the event.

Much as I agree that a Court order is a Court order and should be respected, that cannot apply to an interim injunction that was issued on the 1st December 2015 purporting to restrain the NRM from nominating its party flag bearer which had already been done. The restraining order would have served the purpose if it had been issued before the NRM had nominated the 1st Respondent as its flag bearer. The subsequent purported denomination of the 1st Respondent by the 2nd Respondent as long as it was based on the said restraining order which had been overtaken by events was therefore inconsequential.

After nominating the 1st Respondent the only grounds available to the returning officer or even the 2nd Respondent to denominate the 1st Respondent were under the provisions of Section 13 of the Parliamentary Elections Act [17 of 2005] or a final court order. The status quo the said restraining order was meant to preserve had already been overtaken by

events. The restraining order had ceased to exist by effluxion of time. There is no evidence from the NRM party that they never presented the 1st Respondent as their Party flag bearer.

5 I find that the 1st Respondent had been duly nominated by the 2nd Respondent and the 2nd Respondent had clearly followed the provisions of Section 11 of the Parliamentary Elections Act [17 of 2005] as the evidence on record reveals.

10 The Court of Appeal Order vide Miscellaneous Application 47 Of 2016 allowed all candidates duly nominated for Parliamentary Elections as of 17th February 2016 in Upper Madi Constituency to be voted by the voters in said constituency. The 1st Respondent had been duly nominated on the 2nd December 2015 and the said Court of Appeal Order did not restrain the 1st Respondent from being voted for. This is so because the said restraining order had been overtaken by events and therefore the administrative actions
15 taken by the 2nd Respondent based on the said order by denominating the 1st Respondent were of no legal consequence.

ISSUE 2: REMEDIES AVAILABLE TO THE PARTIES.

20 The 1st Respondent is the directly elected Member of Parliament for Upper Madi Constituency having polled the highest votes and having resolved that he was validly nominated.

The Petition will therefore be dismissed with costs to the Respondents.

Hon. Justice John Eudes Keitirima

17/06/2016