THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT

AND

IN THE MATTER OF THE ELECTIONS (ELECTION PETITION) RULES 2006

AND

IN THE MATTER OF THE PARLIAMENTARY ELECTION HELD ON THE 18TH DAY OF FEBRUARY 2016

AND

IN THE MATTER OF AN ELECTION PETITION BY WALIGGO AISHA NULUYATI

MISCELLANEOUS APPLICATION NO 70 OF 2016

(Arising From Election Petition No. 004 of 2016)

WALIGGO AISHA NULUYATI :::::::::::::::::::: APPLICANT

VERSUS

1. **SEKINDI AISHA**
2. **ELECTORAL COMMISSION :::::::::::::::::::: RESPONDENTS**

BEFORE HON. MR. JUSTICE MICHAEL ELUBU

RULING

The applicant, Waliggo Aisha Nuluyati, brings this application by Notice of Motion under S. 98 of the **Civil Procedure Act**, rr 17 and 24 of **the Parliamentary Election (Election Petitions) Rules (PEEPR)**, O 1 rr 10 (2) and O 52 rr 1 & 3 of **the Civil Procedure Rules**. The respondents are Sekindi Aisha and The Electoral Commission.

This application is for orders that:

a) The National Council for Higher Education (NCHE) be added as a necessary respondent to the petition and as a party to all applications/matters arising therefrom
b) Costs of this application be provided for.

The grounds on which the application is based are that the presence of the NCHE before the Court is necessary in order to enable the Court effectually and completely adjudicate and settle all questions involved in the petition; that the respondents shall not be prejudiced in any way by the addition of NCHE as a party and finally that the ends of justice require that the NCHE be added as a respondent.

Waliggo Aisha, the applicant, swore an affidavit in support of the application in which she states that she filed an election petition against the respondent's election as the Woman Member of Parliament for Kalungu District. That from answers to the petition it became apparent that the presence of the NCHE was necessary and then she repeats the grounds in her Notice of Motion

The respondents oppose the application and the 1st respondent swore an affidavit in reply. She avers that the applicant has always known that the 1st respondent was nominated on the basis of a certificate of equivalence from the NCHE and could have inspected those documents. She deposes farther that the 30 days within which a petition should be filed have elapsed and if she wished to join the NCHE they should have been added at the filing of the petition. Lastly, that the NCHE cannot be added as a party as it was not the one that declared the results of the election.

It is against this background that this application is brought.

Ms Faridah Nabakibi appeared for the applicant while Mr. Kandeebe Ntambirweki appearing with Mr. Wasswa Joseph represents both respondents.

It was the submission of Ms Nabakibi who first went through the pleadings that there are various allegations made that require the presence of the NCHE because the 1st respondent would not be in a position to effectively render answers as the required answers are not in her knowledge. Additionally that the reputation of the NCHE has come into issue and it would be vital that it has an opportunity to defend itself. She cited **Kampala Bottlers LimitedVs.**

Damanico SCCA 22/92 where the Supreme Court held that it is important that before someone's reputation is besmirched, he has had an opportunity to defend himself. The officials here might have explained the confusion in their action.

Counsel argued that the addition of the NCHE is not by way offiling of a new petition but simply an amendment of the existing pleadings.The question of time does not therefore arise. She contends that under rule 10 (2) of Order 1 of **the Civil Procedure Rules** the court has the discretion to add a party at any stage of proceedings where it appears to the Court to benecessary to effectually and completely adjudicate upon and settle all questions involved in the suit.

Finally that NCHE should be added because as the Supreme Court has held a party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter (see **Departed Asians Property Custodian Board V Jaffer Brothers Limited SCCA 9/98)**. She contends it is for the same reason that a prayer is sought to add the NCHE in this case.

Mr Ntambirweki Kandeebe for the respondent in opposition submitted that the application is untenable in law. Firstly that it does not state what the NCHE will be required to clear that cannot be clearedwithin the available petition evidence.That the applicant has always known that the respondent was nominated on a certificate from the NCHE and that the applicant duly inspected her papers.

More importantly that looking at Rule 3 of the **PEEPR** the NCHE cannot be named as a party because the law envisages respondents to be the person of whose election a complaint is made in a petition, and where the petition complains of the conduct of the Electoral Commission or the returning officer it includes the commission or returning officer. Therefore the respondents have been set by statute and the NCHE is not one of them.

It was argued farther that there are no remedies sought from the NCHE either in the petition or that can be envisaged to be following an amendment after adding the NCHE and as such they cannot be a party but only witnesses.

Mr Kandeebe contends that both the applicant and the respondent seek to rely on the NCHE as in Para 5(iii) of the Affidavit in support the applicant challenges the certificate of A level

equivalence presented by the respondent which is the very same that is relied on the respondent. The NCHE can therefore be a witness for either party.

The respondents contend that any amendment to add a party should have been made within 30days of the publication of the election results in the Uganda Gazette which is the time in S. 60 (3) the PEA for filing a petition. Any action against the NCHE expired after the 30 days had elapsed. There can be no time extension in this regard in which case the action is time barred and would prejudice the respondents. It is also trite law that amendment cannot be allowed where the cause of action is time barred.

I shall turn now to the determination of the issues here. The question is whether the National Council for Higher Education can be added as a respondent. The Civil Procedure Rules provide in rule 10 (2) of Order 1 that,

> *The court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.*

It is clear by this provision that any party may at any time of the proceedings apply to join another party whose presence is necessary in order to enable the court effectually and completely adjudicate all the matters before it. The applicant was therefore well within her rights to lodge this application as long as the Court in exercise of its discretion under Order 1 r 10 (2) ensures that its order is not prejudicial to any party or based on a wrong principle.

It was stated in opposition to this application that the application is caught by time and the limitation period operates against the amendment. Limitation would certainly be one of the grounds that may prejudice an intended respondent in determining whether that party has been properly added. Thus the limitation period for purposes of this application must be resolved; it is30 days from the publication of the results in the gazette as set out in Section 60 (3) of the PEA which provides,

> *'Every Election petition shall be filed within 30 days after the day on which the result of the election is published by the commission in the Gazette'*.

It is the contention of the applicant that the instant case is only an amendment of the pleadings and limitation should not apply. The Court however must take the limitation period into account when determining whether it is proper to add a party. Rule 10(5) of Order 1 states,

> *For the purpose of limitation, the proceedings against any person added or substituted as defendant shall be deemed to have begun only on the service of the summons on him or her.*

Therefore limitation is to be calculated, and will be tallied from the time of service of summons on the added party. In this case if the application were granted then limitation would be considered from the time service of notice of the presentation of the petition and the petition was made on the added party. In **Eastern Bakery V Castelino [1958] EA 461** the Court held that an amendment would not be allowed where it would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ.

In the instant case, the petition was filed on the 1st of April 2016. The results of the election were gazetted in the Uganda Gazette on the 23rd of March 2016. The 30 days within which to file a petition provided for in S. 60 (3) of the PEA, counted from the 23rd of March 2016, expired on the 22ndof April 2016.

It is true that the **PEEPR** provide for an extension of time in Rule 19, but this is only for time limits set in the rules and not those set in the parent Act.

> *'The court may of its own motion or on application by any party to the proceedings, and upon such terms as the justice of the case may require, enlarge or abridge the time <u>appointed by the rules</u> for the doing of any act if, in the opinion of the court, there exists such special circumstances as make it expedient to do so'. (*Emphasis mine).

The period of 30 days within which to file a petition is set by statute and this Court has no residual power or inherent jurisdiction to enlarge a period laid down by statute (see **Makula International V Cardinal Nsubuga 1982 HCB 11**). To that end this Court cannot extend that statutory time limit within which to file a petition.

In these circumstances can the Court exercise its discretion to allow an amendment adding a party after the expiry of the limit on time set to file a petition? This is the very same question faced by the East African Court of Appeal in **Gulamabbas v Ebrahimji and others [1971] 1 EA 22.** These were proceedings under the Trustees Act where a challenge to an order made under the Act had to be filed in Court within 30 days of the making of the impugned order. An order had been made to substitute a Minister of Minerals, as a respondent to an action, with another person, 6 months after the order appealed from was made. The Court held inter alia,

> The order substituting the present appellant as respondent for the Minister in the High Court was **made after the period of limitation had expired in terms of sub-r. 5 of O. 1, r. 10 of the Civil Procedure Code**. In such an event Fuad, J., could not exercise his inherent powers, as he purported to do, to override the period of limitation laid down by statute. The order of substitution was clearly made outside the period of limitation and cannot stand.

By the guidance of this decision I find that this Court cannot make an order under Order 1 r 10 to add a party tothe petition after the lapse of the statutory limitation period. In the present case the Petitioner seeks leave to add the NCHE as a respondent more than 30 days after the limitation period set by S. 60 (3) of the PEA had expired. This Court has such no powers.

This finding effectively disposes of the application and I shall accordingly not go into the other grounds raised.

In the result this application fails with costs to the respondent.

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Michael Elubu

Judge

25.5.16