THE REPUBLIC OF UGANDA

IN THE HIGH COUT OF UGANDA

AT KAMPALA

MISC CAUSE NO.113 OF 2010

IN THE MATTER OF S.36 OF THE JUDICATURE ACT

CAP.13 LAWS OF UGANDA

AND

IN THE MATTER OF THE DECISION BY ELECTORAL COMMISSION TO DECLINE TO PHASE OUT ARMY POLLING STATIONS LOCATED IN NAKASERO II, KOLOLO II AND III PARISHES IN KAMPALA CENTRAL DIVISION CONSTITUTENCY, KAMPALA DISTRICT AND FAILURE TO GAZETTE PLACES OF DISPLAY OF VOTERS REGISTER.

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF JUDICIAL REVIEW OF MANDUMUS, CERTIORARI AND PROHIBITION

HON. ERIAS LUKWAGO==========================APPLICANT

VERSUS

ELECTORAL COMMISSION======================RESPONDENT

BEFORE: THE HON. MR. JUSTICE YOROKAMU BAMWINE

RULING:

This application for judicial review was brought under Section 39 of the Presidential Elections Act 2005 (as amended by Section 12 of the Presidential Elections (Amendment) Act No. 14 of 2010; Section 38 of the Parliamentary Elections Act (as amended by Section 8 of the Parliamentary Elections Act (Amendment) Act No. 23 of 2010; Section 36 of the Judicature Act, 0.42A(sic) r.6(2) of the Civil Procedure (Amendment) Rules and the Judicature (Judicial Review) Rules S.1 2009 No.11.

It seeks an order of mandamus compelling the Electoral Commission to phase out the following stations, to wit, Summit View Barracks (A - H), Summit View Barracks (I - M), Summit View Barracks (N – Z), Kitante Courts Directorate of Military Intelligence (DMI) (A – L), Kitante Courts Directorate of Military Intelligence (DMI) (M – Z), State House Quarter

Guard (A – L), State House Quarter Guard (M – Z), all located within Nakasero II, Kololo II and Kololo III Parishes in Kampala Central Division Constituency, Kampala District.

It also seeks writ of Certiorari, quashing the decision of the Electoral Commission to display the Voters Register before publishing in the Gazette and in the print media, a list of all places at which a voter's register is required to be displayed within the period of time stipulated under the law; and an order of prohibition, stopping the Electoral Commission from acting ultra vires the Electoral Laws.

The grounds of the application are specifically spelt out in the affidavit of Hon. Erias Lukwago, the applicant, dated 25/8/2010.

These grounds are briefly that the Electoral Commission (the EC) has declined to phase out the impugned polling stations without justifiable reason contrary to the existing electoral laws; that the applicant was denied a fair hearing; that the EC has deliberately failed and/or neglected to publish in the Gazette and print media a list of all places at which a Voter's register is required to be displayed within the period of time stipulated under the law; and, the orders are necessary for the ends of justice.

In reply, the respondent contended that the aforesaid polling stations were not established exclusively for the army and that they had been re-organized in accordance with the law. It was also contended for the respondent that the roadmap to 2011 elections, including the display exercise, was designed in accordance with the law and the places where the voter's register was required to be displayed were gazetted.

In the course of time during the pendency of this application, the parties agreed to relocate the **two** polling stations at State House Quarter Guard to All Saints Cathedral Church land and the 3 polling stations at Kitante Courts (CMI) to Uganda Museum. The respondent rejected the proposal to relocate the 3 polling stations at Summit View Barracks to either Kisementi or Kololo Air Strip or any other convenient place outside the parameters of Summit View Military Barracks. Hence this ruling.

At the conferencing the following issues were framed for determination:

1. Whether the continued existence of the three polling stations within the parameters of Summit View Military Barracks contravenes the electoral laws.

2. Whether the places of display of voters register were gazetted 60 days before the display exercise.
3. Remedies, if any.

Issue No. 1: **Whether the continued existence of the 3 polling stations within the parameters of Summit View Military Barracks contravenes the electoral law.**

It is not in dispute that the EC is empowered to make special provisions for the taking of the votes of patients in hospitals, or persons admitted in sanatoria or houses for the aged and similar institutions and also for persons in restricted areas such as soldiers and other security personnel. Section 39 of the Presidential Elections Act 2005 and Section 38 of the Parliamentary Elections Act 2005 originally provided so. It required the EC to publish in the gazette a list of restricted areas under these two sections.

It is also not in dispute that the said provisions were amended under section 12 of the Presidential Elections (Amendment) Act, No.14 of 2010 and section 8 of the Parliamentary Elections (Amendment) Act, No. 12 of 2010. The amended provisions read as follows:

1. **Subsequent to this Act or any other law, the Commission may make special provisions for the taking of votes of patients in hospitals or persons admitted in sanatoria or homes for the aged and similar institutions and also for persons in operation areas such soldiers and other security personnel, and the Commission shall publish in the Gazette a list of the operation areas referred to in this section.**
2. **Subject to Subsection (1), the Commission shall not create special or separate polling stations exclusively for the army or any other security personnel.**
3. **For the purposes of this section,**

 (a) ‘Operation areas’ includes an area where soldiers and other security personnel are deployed on special duty during an election period and may include restricted areas;

 (b) ‘restricted areas’ include areas experiencing an epidemic, disaster or insecurity.

From the evidence, the three polling stations were originally called Summit View Barracks (A – H), Summit View Barracks (L - M), and Summit View Barracks (N - Z), implying that they were located in the Barracks. Following the amendment of the laws, the “Barracks’ was

removed from the names of the polling stations. However, the polling stations remained where they originally were.

Learned counsel for the respondents has submitted that the two pieces of legislation prohibit creation of polling stations exclusively for the army and other security personnel; that the laws came into effect on 25/6/10; and, that since the enactment of these laws the respondent has never created any polling station in contravention of the law. Hence the argument that the existence of he disputed polling stations does not contravene electoral laws.

I think this argument is ingenious but fanciful. It is as fanciful as the argument being advanced for the respondent that since the names of the polling stations (usually derived from the location of the polling station) seem to have been misunderstood, the naming of the polling stations had been adjusted and re-named: Summit View (A – H); Summit View (I – M); and Summit View (N – Z); or that the polling stations are not for army personnel only but also for their wives, children and dependant relatives.

Clearly, whereas the respondent appreciates that the original names of the polling stations were derived from their locations, that is, Summit View Barracks, the respondent has failed to appreciate the source of the problem which was not the names per se but the location of those polling stations.

I would in this regard accept the submission of learned counsel for the applicant that the concerns of the framers of the said amended legislation were not merely about change of the names of the polling stations but to get them away from the precincts of military Barracks. The rationale is that electoral processes must be conducted in a free and fair environment, an environment not characterized by restrictions as to what the voters should see when they are there and what they should not see or do. The core mandate of the respondent is to organize and conduct free and fair elections. They cannot be free and fair when the atmosphere is tense and restrictive. At the hearing there was an indication that there are over 1500 registered voters inside the barracks.
However, candidates are not allowed to campaign and pin posters therein and from the evidence of the applicant, the road leading to Summit View polling station is full of military personnel and there is unnecessary checking and questioning by military personnel before

accessing the polling stations. This in my view is to be expected of any military establishment. The three polling stations cannot be the exception.

Court visited the locus in quo on 4-10-2010. I did observe that the 3 polling stations were within the four corners of the Summit View Military Barracks. The Quarter Guard is within easy reach of the polling centers which are in open space outside the Quarter Guard. Accordingly if the truth is to be told, and there cannot be mincing of words about this, the three polling stations at Summit View are located within the Military Barracks. Save for the change of names, it cannot be true that there has been a re-organization exercise of the polling stations at Summit View within the meaning of the amendment to the electoral laws.

We walked around the area in the company of the EC Chairman, Eng. Badru Kiggundu, the Secretary of the Commission, Mr. Rwakoojo, among others. True the area is evidently heavily built up, but I am unable to accept the argument of the EC officials that the only space available in the entire parish is the Barracks or that taking the stations to places outside the Barracks will confuse or inconvenience the voters come voting day. Kisementi Parking Yard is in the same Parish. It currently accommodates 2 polling stations. The area is wide enough to accommodate even more and there is still time for voter sensitization.

Kololo Airstrip is yet another area within easy reach of the residents of Summit View. For a heart willing to accommodate change, there are several such open slots in the parish. For as long as the polling stations are not shifted from one parish to another, the argument that voters will be made to walk long distances is cheap and untenable.

As Lord Denning observed in **Engineering Industry Training Board Vs Samuel Talbot [1969], 1 All E.R. 480,** courts no longer construe Acts of Parliament according to their literal meaning. They construe them according to their object and intent.

The object and intent of the amendment to the law was in my view not only to prohibit the creation of polling stations exclusively for security personnel but to phase out the existing ones as well to ensure that security personnel and civilians use the same facilities outside military establishments. To sustain the argument that the impugned polling stations were not created after the enactment of the new law and should therefore not be re-organized would be to perpetuate an absurdity and to frustrate the very object and intent of the law. Court is

satisfied; therefore, that the continued existence of the 3 polling stations is in contravention of the Electoral Laws.

I would answer the first issue in the affirmative and I have done so.

Issue No.2: **Whether the places of display of voters register were gazetted 60 days before the display exercise**.

Section 33 of the Electoral Commission Act (as amended by Section 7 of the Electoral Commission (Amendment) Act No.15 of 2010) provides (subsection 3 thereof):

"**The Commission shall publish in the Gazette and in the print media, a list of all places at which a voters register is required to be displayed and a list of all polling stations, at least sixty days before the date of display or polling day"**

From the evidence, the law came into force on 25/06/2010. From the evidence also the display of the voters register commenced on 11/08/2010. In paragraph 13 of the affidavit of Mr. Mulekwah (dated 8/9/(10), he avers that the list of places where the display of the voters Register was displayed was published in the gazette as prescribed by law.

He attached a copy of the Uganda Gazette (vol. CIII No. 48) dated 6/8/10. I have already indicated that the display exercise started on 11/08/2010, four days after the publication of the gazette. He did not attach the list of the polling stations itself but even then the publication is very clear that the schedule related to the list of polling stations, not **the list of all places at which a voters register was required to be displayed.**

There is no mention of publication of the same in the print media. Since the publication came out on 06/08/10 and the display exercise commenced on 11/08/10, it cannot be said that the 60 days rule was complied with.

In paragraph 13 of the applicant's affidavit dated 09/09/10, he avers that there has been an increment of polling stations in his Constituency from the original 112 to 141. He does not know the location of the additional polling stations. This would not have been a problem if the list of all such places had been published as the law requires.

Although learned counsel for the applicant has alleged that the Gazette titled ‘Gazette Extraordinary, General Notice No.261of 2010, Vol. CIII No. 40 is not on record, insinuating perhaps that it is non-existent, court has accessed it. It was issued on 21/06/10 and published on 28/06/10. It related to Publication of Display period of the Voters Register, not list of places at which Voters Registers would be displayed.

Accordingly no evidence has been adduced to court to show that places of display were ever published in the print media or Gazette as required by law.
It is possible that the legislation did not come out in time as anticipated by the respondent in its roadmap to the 2011 elections.

Be that as it may, since 11/08/2010 was not fixed by law to raise inference that failure to comply with it would be in breach of the law, the respondent had all the time after 25/06/2010 to publish in the Gazette, and in the media the places of display of the voters register in accordance with the new electoral law. The respondent did not.

Learned counsel for the respondent has submitted that the law was not meant to operate retrospectively. I do not think that this submission can be sustained. The law requiring the respondent to publish the impugned list became operational on 25/06/2010. This was many months before the next general elections in 2011. The law was clearly meant to guide the respondent through the 2011 general elections. There was no need for it to act retrospectively. As indicated in the law itself, the 60 days period is before **the date of display** or **polling day**. The polling day is still several months ahead, implying that even now the respondent still has time to put into effect the requirement of the law.

I would answer the second issue in the negative and I do so.

Issue No.3: **Remedies:**

There are two main concepts in judicial review, that of natural justice and that of ultra vires. That of natural justice includes the right to have one’s case considered – **audi alteram partem**. The concept of ultra vires is one to control the actions by public bodies not authorized necessarily, or by implication, by law. Thus since anything done not authorized by law is ultra vires, judicial review will stop the unlawful action. An example of an ultra vires

action was that of the Fulham Corporation in **Attorney General Vs Fulham Corporation [1992] 1 Ch. 440,** where a laundry
(a place where clothes are washed by the corporation) was maintained when all that was authorized by statute was a wash-house (a place where one washes one's clothes one's self).

As regards the first issue, I have already indicated that the continued existence of polling stations within the parameters of Summit View Barracks, despite under changed names, contravenes the electoral laws. I would accordingly grant the prayer in the Notice of Motion by issuing the prerogative order directing the respondent to comply with the electoral laws by relocating the **three** polling stations in Summit View Barracks. It is not the duty of court to dictate where the same shall be re-located.

As regards the respondent's failure to publish the places of display in the gazette and print media, the ever rising complaints of vote rigging in this country can only be checked through a display exercise conducted in a transparent manner. Hence the wisdom of the law maker in directing the EC to publish all places of display 60 days before the date of display or polling day.

It is trite that in case an inferior court, or tribunal or public body acted in excess of its jurisdiction, it is said to have made jurisdictional error. The question of the court is not whether the error can be corrected but whether such a decision is reviewable. Where the High Court finds such an error, the order of mandamus may be issued compelling the body to do its duty. In case it did not have jurisdiction, its decision may be quashed by issuing the order of certiorari.

In the instant case the applicant herein has prayed for a writ of certiorari quashing the decision of eh Electoral Commission to display the Voters Register in Kampala Central Division Constituency, Kampala District, before publishing in the Gazette and in the print media, a list of all places at which a voters register is required to be displayed within the period of time stipulated under the law.
In view of what I have said above, I would grant this prayer. I do so.

It is also prayed that an order of prohibition issues stopping the EC from acting ultra vires the electoral laws. This in my view is also a well grounded prayer. It is granted.

In the result the application is allowed.

As regards costs, in view of the concessions made by the respondent with regard to the first ground herein, the applicant shall have two-thirds of the taxed costs of the application certified for one counsel.

Dated at Kampala this 22nd day of October 2010.

Yorokamu Bamwine
JUDGE

Order: The Deputy Registrar shall deliver this ruling on my behalf on the due date.

Yorokamu Bamwine
JUDGE