

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CV-MA-0226 OF 2009

ELECTORAL COMMISSION AND ANOR :::::::::::::::APPLICANTS

VERSUS

HENRY MAYEGA:::::::::::::RESPONDENT

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

RULING

This is a Chamber Application under Order 26 rule 1, 2 and 3 of the Civil Procedure Rules, and Section 98 of Civil Procedure Act, seeking for an order that the respondent furnishes security for costs before the hearing of HCMA. 606 and HCMC 223 of 2009, and that provision be made for costs. The application is supported by affidavits of Mr. Badru Kiggundu, the Chairman of 1st applicant, and that of the 2nd applicant. The application is opposed by the respondent who filed an affidavit in reply.

The applicants were represented by Mr. Mcdusman Kabega and Mr. Enos Tumusiime, while the respondent was represented by Mr. Akampurira Michael, and Mr. Nester Byamugisha.

The grounds on which the application was based are:

- a) That the applicants/respondents have high chances of success on the defence of Miscellaneous Application No. 606 of 2009, and Miscellaneous Cause No. 223 of 2009.
- b) That the respondent's Miscellaneous Application No. 606 of 2009 and Miscellaneous Cause No 223 of 2009, have no probability of success.
- c) That the applicants will be put to expense to defend a frivolous and vexatious suit which has no chances of succeeding at all.
- d) That in the event that the applicants successfully defend the causes instituted by the respondent, the applicants will not be able to recover their costs as Mr. Henry Mayega means are not known to the applicants and he had no means to satisfy the costs.
- e) That it is in the interests of justice that an Order of Security for Costs be granted.

The background to this application is as follows:

The respondent filed Miscellaneous Cause 223 of 2009 by way of Judicial Review challenging the appointment in 2004 of the 2nd applicant by the 1st applicant, and seeking for the quashing of any subsequent reappointment, among other prayers, on the grounds that he lacked the requisite qualifications, and his appointment was in violation of the Constitution of the Republic of Uganda and the Electoral Commission Act. The respondent also filed an application for interim orders (Misc. Application 607/2009) and for a temporary injunction Misc. Application 606/2009, to halt the re-appointment of the 2nd applicant until the final disposal of the main application.

The respondent abandoned the application for interim orders but before the day the temporary injunction was set for hearing, the applicants filed this application seeking an order that the respondent pays security for costs. The court decided to hear this application before proceeding any further.

Mr. Kabega, while conceding that the granting of the order applied for is in the Court's discretion, referred court to ***G.M. Combined (U) Ltd Vs AK Detergents (U) Ltd. SCCA 34 of 1999,*** and ***Jubilee Insurance Vo. Vs Krediet Jeneve Inc. HCMA 338/01*** where guidelines for court to consider in deciding whether or not to grant the order were laid down.

Counsel referred to the affidavit evidence to the effect that the 2nd applicant, who had already been re-appointed for a 3rd term, possessed the requisite qualifications for the post he held; was legally appointed by the 1st applicant; and his appointment was based on merit. Further, the Solicitor General had given his opinion which had informed the procedure followed by the 1st applicant in the appointment of the 2nd applicant. There was therefore no likelihood that the respondent would succeed as the 2nd applicant has shown that he had a very good defence to the two applications.

Further, the temporary injunction sought in MA 606 of 2009 was incompetent as there was no prayer for an injunction in HCMC 223 of 2009, and the question of the main application raising issues of great public

importance involving high constitutional principles was unmaintainable as this was not a constitutional application.

Lastly, the respondent had completely failed to show that he would be in a position to meet the costs if he lost, as he had not supplied particulars of his properties.

Mr. Wetaka for the 1st respondent added that with respect to MA 606 of 2009, there was no status quo to maintain as the present case the 2nd applicant had already been re-appointed.

It was, therefore, submitted that the applicants had made out a prima facie case for court to order the respondent to deposit security for costs. To guide court, a sum of Shs. 50 million was proposed.

Mr. Akampurira, for the respondent was of a different view. He relied on *Anthony Namboro and Anor Vs Henry Kaala 1975 (HCB) 315*, for the principle that court should consider whether the applicant is being put to undue expense by defending a frivolous or vexatious suit, and whether he has a good defence to the suit and is likely to succeed. It was only after the

above factors had been considered that factors like inability to pay would come in. The applicants had not shown by way of affidavit that the above existed.

On the likelihood of success of the main application for Judicial Review, Mr. Akampurira submitted that the issue being addressed before court was the legality or illegality of the appointment of the 2nd respondent. The court could not close its eyes to an illegality once drawn to it.

Counsel further submitted that the applicants had failed to detail out the good defence in their affidavits, or to show that the suit was frivolous and vexatious. The respondent, being both a citizen of Uganda and an aspiring presidential candidate of UPC, had sufficient interest in seeing how the electoral process in this country was managed. The application for Judicial Review was, therefore, not a frivolous or vexatious application. The mere poverty of the applicant was not by itself a ground for ordering security of costs as long as there was a triable case.(Namboro's case (Supra)). This was a public interest litigation where even principles governing ordinary injunctions should not apply. It raised triable issues.

Lastly, on the constitutionality of the application, Counsel relied on *Kikungwe Issa and Ors Vs Stanbic Bank HCMA 0394 of 2004 & 0395 of 2004*, to say that the duty of Court was to apply the law cited in order to enforce it. He prayed that the application for security of costs be dismissed.

In reply, Mr. Kabega stressed that although according to Namboro's case mere poverty of respondent was said not to be a good ground for ordering security for costs, court had gone ahead to say the respondent had a triable case, which was not the case here. Moreover, public interest litigation should not be by way of Judicial Review.

Mr. Wetaka added that if the respondent was suing on behalf of others in public interest, he qualified to be a nominal litigant, who ought to pay security for costs.

I have considered the submissions of learned Counsel for the applicant and for the respondent, the pleadings and documents in all the relevant applications, the law and authorities referred to.

Order 26 under which this application is brought states as follows:

“ 1. Security fo costs;

The court may if it deems fit order a plaintiff in any suit to give security for payment of all costs incurred by any defendant”.

It is clear from the above provision that the court has an unfettered discretion. Such discretion is exercised in order to do justice as between the parties. In weighing the interests of justice, the court has to consider, among others, the nature of the main application/suit.

The applicant in the head suit, which came by way of Judicial Review, sought for declarations inter-alia, that the appointment and/or re-appointment of the 2nd applicant as Secretary to the 1st applicant, was illegal. He also sought orders of Certiorari to quash the appointment if already re-appointed, and Prohibition, prohibiting the 1st applicant from re-appointing the 2nd applicant and the 2nd applicant from acting as Secretary of the 1st Respondent.

It is common ground that one of the main consideration for court to take into account in applications for security for costs is the prima facie case of both the applicant and that of the respondent . See ***GM Combined Ltd Vs AK Detergents Ltd. (Supra)***.

The applicant submitted that they had a good defence to the suit based on the affidavits in reply of the 1st and 2nd applicant/respondent in Miscellaneous Cause 223 of 2009 and Miscellaneous Application 606 of 2009, and hence a high likelihood of success. The affidavit evidence was to the effect that the 2nd defendant was legally appointed for the 3rd term, he had the requisite qualifications for the post in question, and his appointment was based on merit. Even the Solicitor General had endorsed the procedure. So had the respondent/appellant filed a frivolous and vexatious application?

Antony Namboro's case (Supra) laid down another principle for consideration by court to be whether the defendant will be put to undue expense by defending a frivolous or vexatious suit. Then the factors of inability to pay would come in.

In considering whether the applicant has a good defence to the application and whether the lead suit is frivolous and vexatious, the court in this case has to be careful not to finally determine the merits of the application without hearing the arguments from both sides. This is because whereas in ordinary suits such an application is heard before the main evidence is

adduced at trial, in Judicial Review all evidence is by affidavit, which in the case of HCMC 223 of 2009 have all been filed by now. In the circumstances, I will do the best I can.

From the pleadings filed in the lead suit, the main issue appears to be the legality or otherwise of the appointment of the 2nd applicant. The attachments to the applicants'/respondents' affidavits in reply in HCMC223/09 were stated by Mr Kabega to show that the applicant possessed the qualifications mentioned in his curriculum vitae, (also attached); that he was legally appointed by the first applicant; and that his appointment was based on merit. To me, further issues would arise as to whether such qualifications are the requisite ones for the post; whether the 2nd applicant/ 2nd respondent was appointed in accordance with the law; and what constitutes appointment on merit. These, among others, would be the issues rotating around the main issue which need to be investigated at the hearing. There is a triable case based on the above triable issues.

As to whether the main application is frivolous and vexatious, the applicant, who is a citizen of Uganda, and also a presidential aspirant, has a right to enquire into whether those that are charged with the duty of running public

affairs don't abuse the powers entrusted in them; that prescribed procedures are followed; and that decisions are taken decisions in accordance with the law. If not such decisions can be challenged by way of Judicial Review, whereby the persons who feel aggrieved by the decisions of public bodies and /or public officers, seek relief by way of prerogative orders.

Prerogative orders are remedies for the control of the exercise of powers by those in public offices, and the remedy is available to give relief where a private person is challenging the conduct of a public authority or public body, or anyone acting in the exercise of a public duty. The fact of the head suit not being an ordinary suit is a factor that has a bearing on the determination whether to grant this application.

I have further noted that the validity of the 2nd applicant's appointment is of such great importance that it formed part of an investigation by a Select Committee of Parliament and part of its report. (See Annexure 'B' to the affidavit in support in MC 223/2009). It also featured prominently in a recent report of The National Research Team of the National Resistance Movement Secretariat. (See Annexure 'BB' to the said affidavit in support).

It is, therefore, indeed a matter of great public interest. The weight to be attached to these reports, and the Solicitor General's opinion, is a matter court expects to be addressed on at the hearing of the main application.

On the question of lack of means by the respondent, it is true that he has not indicated his means of livelihood, place of abode, or the properties he owns. However, bearing in mind the importance of the subject matter of the main application, I am of the view that the resolution of the concerns raised therein should not be stifled by the respondent's/applicant's apparent lack of means. In any case, there are other legal ways of enforcing judgement against the respondent by the applicants other than through attachment of property, in case the respondent loses HCMC 223 of 2009.

Looking at the totality of the matter, I have reached the conclusion that on balance, I ought allow the main application to be heard without making orders that are likely to have the effect of nipping it in the bud. There are triable issues of great public interest which the respondent/applicant should not be forced to abandon, which would happen if the orders sought were to be granted.

In conclusion, I exercise my discretion to refuse to grant the order applied for. And since Miscellaneous Application 606 of 2009 has since been withdrawn by consent of the parties, the main application may be fixed for scheduling. Each party will bear their own costs for this application.

Elizabeth Musoke

JUDGE

17/12/2009

Ruling delivered in the presence of:

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