

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISC. CAUSE NO.148 OF 2015

CHARLES NSUBUGA ::: APPLICANT

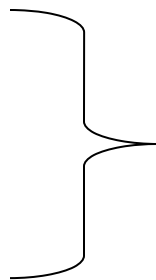
VERSUS

ENG. BADRU KIGGUNDU

JOTHAM TAREMWA

SAM RWAKOOJO

BUKENYA PAUL



::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE STEPHEN MUSOTA

RULING

The applicant Charles Nsubuga through his lawyers M/s Mugisha & Co. Advocates, M/s Akampulira & Partners Advocates, M/s Muwema & Co. Advocates and Solicitors and M/s Twinobusingye Severino & Co. Advocates, filed this application by way of Notice of Motion under Article 50 of the Constitution of the Republic of Uganda (1995), Section 38 of the Judicature Act, Section 98 of the Civil Procedure Act, Orders 52 rr 1&3 of the Civil Procedure Rules as well as Rule 3(1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules (1992) against Eng. Badru Kiguddu, Jotham Taremwa, Sam Rwakoojo and Bukenya Paul.

The orders sought in this application are:-

- (a) A declaration that the respondent's letters, statements/ directives/guidelines made between 17th June 2015 and 14th September 2015 in respect of presidential aspirant consultations do not have the force of law and are void ab: nitio.
- (b) A declaration that the respondent's actions violate provisions of the Constitution of the Republic of Uganda 1995 and more particularly the following provision;
- (i) Objectives ii, xxvi and xxix of the National objectives and Directive Principles of State Policy of the Constitution of the Republic of Uganda.
 - (ii) Articles 20, 21, 23, 24 and 29 of the Constitution of the Republic of Uganda.
- (c) A declaration that the respondents are personally liable for their impugned statements and the resultant violence, loss, damage and the injury suffered by members of the public in various parts of the country as a result of enforcement of the said impugned statements.
- (d) An order restraining the respondents from making any other statements/directives, guidelines or committing any acts or mission which are ultravires the Constitution, Electoral Commission Act, Presidential Elections Act 2005 and other laws related to the Electoral process.
- (e) Costs of this application be provided for.

The application is supported by the affidavit of Charles Nsubuga the applicant which has an elaborate narration of his grievances but are briefly outlined in the Notice of Motion.

The respondents also filed respective submissions in reply.

Eng. Dr. Badru Kiggundu denied committing any illegality, omission, breach of trust, misfeasance, abuse of office or violation of any constitutional right of Ugandans. That all letters, statements, directives (if any) and guidelines were issued lawfully in the respondent's

official capacity for and on behalf of the Electoral Commission and will not negate, derogate or violate any constitutional right of any presidential candidate or aspirant.

In his affidavit in reply, Mr. Jotham Taremwa averred that the application against him is misconceived in so far as he is an officer of the Electoral Commission in the capacity of Public Relations Officer whose duty is to communicate the official position of the commission on official matters and has no personal interest beyond performing his official duties.

In his affidavit in reply, Mr. Paul Bukenya denied violating the Constitution and/or directing or instructing any newspaper or media house to write or publish an article either as alleged or at all. That under the Electoral Commission Act, there is a procedure for resolving any complaint by a member of the public which the applicant has not followed, making this application premature, incompetent, barred in law and an abuse of court process.

As for Mr. Sam Rwakoojo he denied violating the Constitution and deponed that contrary to paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 of the applicant's affidavit he knows that the Electoral Commission has performed its functions in conformity with the provisions of Article 61 of the Constitution and is independent of any other person or authority under Article 62 of the Constitution. That none of the aspirants has petitioned court about the alleged illegalities, breach of trust, abuse of office, violation of his or her rights or any other complaint against the Electoral Commission. Further that no aspirant has petitioned any court to complain about bad faith or malice by the Electoral Commission.

Mr. Rwakoojo further denied either instructing any newspaper to write any article about the matters complained of or directing the Uganda Police to block, arrest, witch hunt, malice, frustrate, detain any political aspirant whether for presidential office or otherwise and he is not responsible for the conduct of the Police and the Electoral Commission is not liable for the

conduct of the Police. That this application is premature, incompetent, barred in law and an abuse of court process.

At the commencement of the hearing of this cause, Mr. Enos Tumusiime learned counsel for the 3rd and 4th respondents raised the following preliminary objections to wit that:

1. This application is incompetent for offending Section 15 of the Election Commission Act which provides the procedure of resolving complaints regarding any irregularity with any aspect of the electoral process at any stage. That the electoral process spans the entire period from the time any aspirant decides to run for any elective office to the time when he or she is declare winner or loser. That the time the applicant Mr. Charles Nsubuga has appeared before this court is covered by that part of the provision.

Mr. Tumusiime further submitted that if a complaint is not satisfactorily resolved at the lower level of authority, it shall be examined and decided by the commission. That the commission is empowered to take necessary action to correct the irregularity and any effect that they may have caused and in case of dissatisfaction, an appeal lies to the High Court against the decision of the commission confirming or rejecting the existence if any irregularity. The decision of the high court then is final.

Learned counsel further stated that there is no evidence led to the effect that the applicant has sought to follow this procedure. Further that Section 15 goes to the jurisdiction of this court. That until the procedure under Section 15(1) is exhausted, this court lacks jurisdiction to entertain this application. That therefore this application be struck out with costs.

2. The second objection is that the applicants have not complied with the requirements of Order 6 rules 2, 3, and 5 of the Civil Procedure Rules. That looking at the pleadings, one finds no evidence of bad faith manifested anywhere. That whereas the word bad faith has been used, the applicant has not shown anywhere that the respondents did anything in bad faith. Learned counsel relied on the case of ***Robert Mwesigwa Vs Bank of HCCS 588 of***

2003, for the proposition that bad faith must be pleaded. That this was the same principle enunciated in *Bank of Uganda Vs COWE CA No. 35 of 2007*.

3. In the third objection, Mr. Tumusiime made reference to Section 49 of the Electoral Commission Act to the effect that a member of the commission or an employee of the Commission or any other person performing any function for the Commission under the direction of the Commission shall not be liable to any civil proceedings for any act done in good faith in the performance of those functions. That since in the pleadings, there is no evidence of bad faith manifested anywhere then this complaint is misplaced. That the respondents are accordingly exempted from liability. Finally Mr. Tumusiime contended that whereas the word bad faith has been used, the applicant has not shown anywhere that the respondents did anything in bad faith.
4. The 4th objection in the alternative is that the gist of this Notice of Motion is essentially seeking interpretation of the Constitution. That the provisions of Article 137 of the constitution of Uganda are very clear that any questions relating to the interpretation of the constitution shall be determined by the constitutional court. Therefore this matter ought to have been filed in the Constitutional Court.

Mr. Ntambirweki Kandebe, learned counsel for both the 1st and 2nd respondents associated himself with the submissions by Mr. Tumusiime. He however added another objection number 5 concerning Article 50 of the Constitution.

5. Mr. Kandebe Ntambirweki reasoned that a suit cannot be brought by a Notice of Motion but by plaint. That the reason for this is *inter alia* that you need to particularize certain aspects that you allege in the pleadings yet such aspects cannot be particularized in a Notice of Motion or in an affidavit.

Learned counsel further submitted that the powers of the Electoral Commission have a genesis in Article 61 of the Constitution particularly clause 1(F) spelling out the functions of the

commission to include hearing and determining complaints arising before the election and during polling. If not satisfied with the verdict, then the aggrieved party could appeal to this court under Article 64 whose decision would be final.

According to Mr. Ntambirweki, the applicant by jumping the procedure about pre-election complaints and coming direct to this court is simply stretching simple election complaints into an all blown out litigation which might end up all the way to the Supreme Court. That the framers of the constitution did not intend it that way. They intended that the complaints be resolved by the Electoral Commission with one appeal to this court. That this application is therefore misconceived in as far as it intends to avoid the constitutional requirements of resolving complaints regarding elections under Article 64 of the Constitution.

Regarding suing the respondents, Mr. Ntambirweki is of the view that the applicant ought to have gone against the authority that made the guidelines, directives and statements. That this application is barred in law, incompetent, untenable and ought to be struck out with costs to the 1st and 2nd respondents.

In reply to the preliminary objections, Mr. John Mary Mugisha learned counsel for the applicant submitted that the preliminary objections are grossly misconceived and abuse of court process. He justified his position as follows:

1. That the pleadings indicate that the respondents are sued in their personal capacities and the Electoral Commission has not yet been sued. Therefore the applicant would not take a complaint against individuals to the commission yet the law states that such complaints should be in respect of matters against the commission.

That Section 15 of the Electoral Commission Act does not in any way oust the inherent powers and jurisdiction of this court as elaborated under Article 139 of the Constitution which provides for unlimited original jurisdiction of this court in all matters. Therefore this matter is properly before this court.

2. Regarding failure to comply with Order 6 r(2) of the Civil Procedure Rules, requiring particularization of the acts complained of, Mr. Mugisha maintained that the perusal of the Motion and the affidavit sufficiently spells out the relevant particulars. That the pleadings and the affidavit in particular disclose proof of bad faith. That those particulars need not to be compartmentalized and/or numbered.

Learned counsel further submitted that the acts by the respondents caused suffering to the public and this will come out when submitting in the main application. He distinguished the COWE case and that of **Robert Mwesigwa and another Vs Bank of Uganda** from the present case because in the instant case, learned counsel claims to have pleaded bad faith.

3. Regarding immunity under Section 49 of the Electoral Commission Act, Mr. Mugisha submitted that this law does not impose total immunity. That it imposes immunity as long as the officers are acting in good faith and within the law. He referred to the case of **Charles Twagira Vs Attorney General & 12 Others SCCA No.4 of 2007** in support of his contention that if one exceeds his or her authority, he or she does not benefit from immunity. That as of now the constitutional court is envisaging a situation where the actual perpetrators of violations of fundamental rights can be brought to court to answer personally. He referred to the recent case of **Behangana Domaro and another Vs Attorney General, Constitutional Petition 53 of 2010.**

Finally learned counsel submitted that the pleadings disclose relevant particulars and in the alternative the respondents have not demonstrated any prejudice and have not taken any step to apply for further and better particulars.

In his submissions Mr. Fred Muwema also for the applicant substantially concurred with Mr. Mugisha. He added that Section 15 of the Electoral Commission Act should be read together with the provisions of the Presidential Elections Act in particular Section 1(2) which states that the Electoral Commission Act shall be construed as one with the Presidential Election Act. That the law dealing with complaints during presidential elections is in the Presidential Elections Act Section 3 thereof. That under this section the only role the Electoral Commission has to play in relation to the aspirant's consultation is to receive a notice of introduction of the aspirant to the

commission only. That the complaints which go to the commission under the Presidential Election Act are those under Sections 4(13), 47, 49, 57 and 59, and these must be during campaigns.

Finally relying on the case of **Mukisa Biscuits Manufacturing Co. Limited and West End Distributors**, learned counsel submitted that a preliminary objection cannot be raised if any fact has to be ascertained in the case. That there is need to ascertain the bad faith and the other facts supporting the application. That the preliminary objections be dismissed as they are seriously wanting in merit.

In rejoinder, Mr. Enos Tumusiime submitted that jurisdiction of this court is subject to the provisions of the Constitution some of which are Articles 64(1) which says that any person aggrieved by a decision of the Electoral Commission in respect of any complaint referred to in Article 61(1)(F) of the Constitution may appeal to the High Court. That the complaint in this suit is one of those envisaged under the constitution. That Articles 64(1) and 61(1)(F) and Section 15 of the Electoral Commission Act are in harmony. That since the respondents are not the Commission the complaint ought to have been lodged with the Commission and if any member is biased such a member would be asked to step aside and not participate in the proceedings. Learned counsel referred to the case of **Taparu Vs Soroille [1968] 1 EA 618** and **Bernard Murage Vs Finserve Africa and Equity Bank, Constitution and Human Rights Division Petition No. 503 of 2014 of the High Court of Kenya P.10.** wherein it was held that court must exercise restraint and must first give an opportunity to the relevant bodies or state organs to deal with the dispute as provided by statute. According to Mr. Tumusiime where there is a clear procedure for redress or a grievance, that procedure should strictly be followed. Regarding reference to the Presidential Elections Act, learned counsel said this case is not about whether one could consult or not. It is about how one goes about complaining in case he or she thinks the Electoral Commission has not acted in accordance with the law. He did not agree with Mr. Muwema's assertion that the Electoral Commission's role starts and stops with Section 3 of the Presidential Elections Act.

In rejoinder Mr. Ntambirweki associated himself with the submissions of Mr. Tumusiime. Regarding the recent decision in The **Behangana Vs Attorney General** (supra), learned counsel submitted that for it to apply there must be a principle party, and in this case the Electoral Commission before perpetrators and supervisors can be added as parties in violation of certain rights. That by the applicants invoking Article 50 of the Constitution, he is trying to use a back door by bringing his complaint as if it is an enforcement of a fundamental human right yet it is a complaint about the conduct of an office of the commission arising before polling which if allowed would circumvent the mandatory provisions of Article 64 of the Constitution. That this was intended to limit pre-election and pre-polling complaints within a manageable level so that they do not escalate to become ordinary litigation.

I have carefully considered the objections raised by both Mr. Enos Tumusiime learned counsel for the 3rd and 4th respondents and Mr. Kandebe Ntambirweki for the 1st and 2nd respondents and their respective submissions in justification of the said objections. I have also considered the reply by learned counsel for the applicant especially Mr. John Mary Mugisha and Mr. Muwema. I have studied the laws cited by both sides and the respective case authorities cited for my assistance. I will now go ahead and resolve the objections as argued by learned counsel for the respondents starting with:

1. Whether this application is incompetent for offending section 15 of the Electoral Commission Act.

Section 15 of the Electoral Commission Act enacts as follows:

15. Powers of the commission to resolve complaints; appeals.

(1) Any complaint submitted in writing alleging any irregularity with any aspect of the Electoral process at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided by the commission; and where the irregularity is

confirmed, the commission shall take necessary action to correct the irregularity and any effects it may have caused.

(2) Any appeal shall rely to the High Court against the decision of the commission confirming or rejecting the existence of an irregularity.

(3) The appeal shall be by way of petition supported by affidavit evidence which shall clearly specify the declaration that the High Court is being requested to make.

(4) On hearing a petition under (2), the High Court may make such orders as it thinks fit, and its decision shall be final.

(5) The High Court shall proceed to hear and determine an appeal under this section as expeditiously as possible and may for that purpose suspend any other matter pending before it.

The above quoted Section is couched in clear terms. It provides the procedure of resolving complaints regarding any irregularity with any aspect of the Electoral process at any stage and if not satisfactorily resolved at a lower level of authority. As rightly submitted by Mr. Tumusiime, the Electoral process spans the entire period from the time any aspirant decides to run for any elective office to the time when he/she is declared winner or loser. The commission is enjoined to investigate the complaint and if it is confirmed, it must take necessary action to correct the irregularity and any effects it may have caused. Subsection (2) and (3) of Section 15 provide that if the complainant is not satisfied with the decision of the Electoral Commission, an appeal shall lie to the High Court against the decision of the Commission confirming or rejecting the existence of the irregularity. The decision of the appellate High Court is final.

In the proceedings before me, there is no indication that the applicant followed the above procedure before coming to this court which is the foundation for the jurisdiction of this court in complaints relating to the process of elections.

The powers of the Electoral Commission in this respect have a genesis in Article 61 of the Constitution, particularly sub Article 1(F) spelling out the functions of the Electoral Commission which includes hearing and determining complaints arising before elections and during elections. Article 61(1)(F) of the Constitution stipulates that:

“(1) The Electoral Commission shall have the following functions- (f) to hear and determine election complaints arising before and during polling.....”

The framers of the Constitution which is the supreme law of this land enacted these provisions on purpose. As rightly submitted by Mr. Kandebe Ntambirweki, the purpose was to confine such simple complaints to the Electoral Commission. Therefore by jumping this procedure about pre-election complaints, the applicant has turned his complaint into an all blown out litigation which might end up in higher courts. The intension was to ensure that these complaints if not resolved at the lower level would go to the Commission and finally to the High Court on appeal.

To fortify my decision is the decision of the Kenya Constitution and Human Rights Division of the High Court of Kenya in the case of **Bernard Mulage Vs Fineserve Africa Limited & 3 others Petition No. 503 of 2014** with which I am in agreement. It was held *inter alia* that:

“There is now a chain of authorities from the High Court and the Court of Appeal that where a statute has provided a remedy to a party, this court must exercise restraint and first give an opportunity to the relevant bodies or state organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in Speaker of National Assembly versus Ngenga Karume [2008] 1 KLR425 where it was held that: In our view there is merit..... that where there is clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of parliament, that procedure should be strictly followed”.

I am bound to follow that principle of law since it flows from the other important principle that not each and every violation of the law must be raised before the High Court despite the fact that this court has unlimited jurisdiction in all civil and criminal matters. Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first. A court's inherent jurisdiction should not be invoked where there is a specific statutory provision which would meet the necessities of the case. This is the only way institutions will be strengthened and respected.

In the applicant's submissions especially by Mr. John Mary Mugisha, he emphasized that this matter is properly before this court since the matter is brought under Article 50 of the Constitution which clothes this court with requisite jurisdiction to entertain matters relating to enforcement of fundamental rights and freedoms. When I thoroughly studied this application, I concluded that the use of Article 50 of the Constitution was a mere veil but the crux of the complaint relates to statements, directives and guidelines which were allegedly *ultra vires* to the Constitution, the Electoral Commission Act, the Presidential Elections Act and other laws related to the electoral process in order to ensure a free and fair elections.

Whereas I agree that any person can bring public interest litigation under Article 50 of the Constitution this provision of the law should be guarded from abuse. The right to apply to the High Court under Article 50 for redress when any human right of fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for normal procedures for invoking judicial control of administrative action. It should not be used for purposes of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative actions which involves no contravention of any human right or fundamental freedom.

As rightly submitted by Mr. Kandebe Ntambirweki, the applicant is trying to use a back door by bringing his complaint against individuals as if it is an enforcement of a fundamental right yet it is a complaint about the conduct of officers of the commission arising before polling. It is this court's duty to lift that veil. If this is allowed it would circumvent the mandatory provisions of Article 61 and 64 of the Constitution. As already stated the framers of the Constitution had it in mind to limit pre-election and pre-polling complaints to keep them at manageable level so that they do not escalate into becoming ordinary litigation.

Mr. Muwema learned counsel for the applicant submitted that they could not complain to the Electoral Commission because under the Presidential Election Act Section 3 thereof, deals with complaints under that Act. He stated that under that Act the only role of the Commission in relation to an aspirant's consultation is to receive a notice of introduction of the aspirant to the Commission only. With due respect, I do not agree because the Presidential Elections Act has to be read together with Electoral Commission Act. Under Section 12(1)(f) of that Act.

Under S. 12(1)

The commission shall have the following powers;

(f) to take steps to ensure that there are secure conditions necessary for the conduct of an election in accordance with this Act and any other law.

(j) to ensure compliance by all electoral officers and candidates with the provisions of this Act and any other law.

(p) to discharge such other functions as are conferred upon the Commission by this Act or any other law made under this Act or as a necessary for the proper carrying of the purposes of this Act.

Clearly these are wide powers which the commission exercises before and during the elections. Since the electoral process begins before nomination of candidates, it cannot be said that aspirants are not under the Electoral Commission at any one time. To decide otherwise would

be to render the Electoral Commission impotent and unable to impose its authority under the elaborate electoral legal regime put in place for its implementation.

For the reasons I have given, I will uphold the first preliminary objection that this application is incompetent for offending the provisions of Section 15 of the Electoral Commission Act.

The resolution of the first objection would have resolved this matter. However I will go ahead and consider the other objections had the application been properly in this court.

2. Whether the applicants complied with the provisions of Order 6 rr 2,3, and 5 of the Civil Procedure Rules.

Order 6 r 2 of the Civil Procedure Rules provides as follows:

“Every pleading shall be accompanied by brief summary of evidence to be adduced, a list of witnesses, a list of documents, and a list of authorities to be relied on; except that an additional list of authorities may be provided later with the leave of court.”

Order 6 r(3) of the Civil Procedure Rules provides that:

“In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default or undue influence, and in all other cases in which particulars may be necessary, the particulars with the dates shall be stated in the pleading.

Order 6 r(5) of the Civil Procedure Rules provides that:

“Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his or her pleading by the plaintiff or defendant as the case may be and subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the defendant shall be implied in his or her pleading”.

In order to make any of the respondents liable for contravening Section 49 of the Electoral Commission Act the pleadings must particularize aspects of bad faith which the respondents breached. I agree with learned counsel for the respondents that a look at the applicant's pleadings does not show that bad faith is manifest anywhere. It has not been particularized that any of the respondents did any act or acts in bad faith despite the assertion by Mr. Mugisha that their pleadings reveals acts of bad faith on the part of the respondents. It is trite law that a cause of action based on bad faith or fraud must particularize aspects that constitute those allegations to give the respondent or defendant opportunity to prepare defense. It was held by the Supreme Court of Uganda in the case of **Fredrick J. K Zaabwe Vs Orient Bank & 5 Others SCCA No.4 of 2006** *inter alia* that; 'Bad faith' and fraud are synonymous and also synonymous of dishonesty, infidelity, faithlessness, perfidy, unfairness etc." Like it was in the case of **Robert Mwesigwa & Another Vs Bank of Uganda** in the instant case, the applicant's case is based on alleged acts of bad faith. The purported acts of bad faith are not pleaded. I never came across any acts of bad faith in the Notice of Motion and supporting affidavit by the applicant implying that there was no way further and better particulars would be asked for. No single instance is pointed out as an act of bad faith on the part of the respondents.

On the need to particularize aspects of bad faith in pleadings, I am in agreement with the holding in the case of **Robert Mwesigwa & Another Vs Bank of Uganda HCCS 588 of 2003** per Bamwine J. (as he then was) that the applicant's case is based on acts of bad faith but the acts of bad faith are not pleaded. No single instance is pointed out as an act of bad faith on the part of the respondents. Most of the alleged breaches relate to the work of the electoral commission. It is a requirement under the law not only to plead bad faith but also particularize it. This has a sound jurisprudential foundation. The rationale for pleading and particularizing particulars of bad faith is to enable the respondent to know how to counter them. Imputing bad faith to someone be it an artificial or natural person is a grave matter. It goes to the person's reputation and professionalism.

Accordingly, under Order 6 r 2 of the Civil Procedure Rules it is required that a person alleging bad faith which the applicant appears to be alleging herein, he/she must give particulars of bad faith in issue so that the respondents prepare themselves to answer the allegation. Therefore in as far as these pleadings do not particularize particulars of bad faith, like it would be in the case of alleging fraud, the application is barred by law because it is mandatory that those particulars have to be pleaded. See: *Sun Air Ltd Vs Nanam Transport Company Ltd HCCS 229 of 2009*, per Madrama J.

It is important to note that if a litigant owns up the omission and seeks leave to amend the pleadings within the limits of the law court can allow this to be done on such terms as it deems fit. In the instant case, however, the applicant seems not to think of having such option explored.

3. Immunity under section 49 of the Electoral Commission Act.

It is enacted under 49 of this Act that:

“A member of the Commission or an employee of the Commission or any other person performing any function of the Commission under the direction of the Commission shall not be personally liable to any civil proceedings for any act done in good faith in the performance of those functions”.

On the application of this section, I agree with the interpretation by Mr. John Mary Mugisha that this law does not impose total immunity. It imposes immunity as long as the officers are acting in good faith and within the law. If an officer exceeds his or her authority he/she does not benefit from immunity. However, when a complainant opts to institute civil proceedings against any member of the commission or an employee or any other person performing any function of the Commission then particulars of bad faith or *ultravires* actions have to be pleaded and particularized.

In the instant case it may have been difficult for the applicant to particularize instances of bad faith because as rightly submitted by Mr. Kandebe Ntambirweki, the applicant ought to have gone against the authority that made the guidelines, directions and statements.

4. The fourth objection was raised in the alternative as to whether the application ought to have been filed in the constitutional court.

Had this matter been properly filed in this court under Article 50 of the constitution, this court would have had jurisdiction to handle it because causes for purely enforcement of fundamental rights and freedoms can be filed in the High Court. This however has to be by plaint and not Notice of Motion. The constitutional basis for all suits that are filed in all courts every day and procedure to be followed is found in Article 50 of the Constitution. See: **Charles Twagira Vs Attorney General and 2 others CA 61 of 2002.**

As rightly pointed out by Mr. Kandebe Ntambirweki, the reason for filing a suit under Article 50 of the Constitution by plaint is that you have to particularize certain aspects that you allege which cannot be done in a Notice of Motion or an affidavit.

For the reasons I have given herein and given that I have upheld most of the preliminary objections raised by learned counsel for the respondents, I will find that this application is not properly before this court. It is barred in law, incompetent and untenable. If the applicant so wishes he should refer his complaint to the Electoral Commission against the respondents.

This application is struck out with costs to the respondents. I so order.

Stephen Musota

J U D G E

04.11.2015.

