THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISCELLANEOUS APPLICATION No. 0089 OF 2008

(Arising from Miscellaneous Cause No. 0079 of 2008)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF MANDAMUS AND CERTIORARI

CHRIS TUSHABE ……. APPLICANT

VERSUS

1. THE ELECTORAL COMMISSION

2. MRS BAGUMA NAKWEERA

3. KABAROLE DISTRICT LOCAL ADMIN. :::::::::::: RESPONDENTS

4. KASENDA SUB COUNTY }

5. KASENDA PARISH }

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY - DOLLO

RULING

When this suit first came up for hearing, counsels for the 2nd, 3rd, 4th, and 5th Respondents raised preliminary points of law asserting that they had been wrongly sued in this suit. I made a ruling by which I upheld the objections and non-suited the Applicant with regard to those Respondents; and thereby left only the 1st Respondent as the rightful defendant to this suit. The matter was then adjourned to the 26th November, 2008 for the next hearing; so as to afford the parties, at their instance, the opportunity to explore avenues for possible amicable settlement.

On the said next hearing date, Mr. Mwasa counsel for the Respondent informed Court that the Respondent was after all, contrary to the earlier intimation, not inclined to pursue a settlement, for the alleged reason that the matter in controversy being of law and facts, should better be determined on the merits. He applied for an adjournment of the case explaining that, save for his having just filed a supplementary affidavit, and with more to come, he was otherwise ready to proceed.

Despite the objection from counsel for the Applicant, Court reluctantly adjourned the suit 'for the last time' to the 8th January, 2009. On the said 8th of January 2009, counsel for the Respondent sprung, on Court, three points of preliminary objection. These are namely that:

1. (a) The suit herein is time-barred hence incompetent for having been instituted outside the three month period provided for in rule 5(1) of O. 42A of the CPR. He contended that from the evidence on record, the cause of action had accrued in July 2006 when the Kasenda Sub – County was created and the electoral area demarcated; and yet the suit was filed two years later. He argued that Court should take cognizance of this irregularity, and decline to assist the Applicant who had slept on his right.

(b) The suit is premature and incompetent for contravening Articles 61 and 64 of the Constitution, and section15 of the Electoral Commission Act which provide, respectively, powers of the Respondent to determine election complaints, and the forum to which an aggrieved person may appeal from any decision of the Respondent arising from the exercise of those powers. He contended that since in the instant

case the Applicant had not availed himself of these provisions, this suit is incompetent.

2. The affidavit sworn by the Applicant in support of the suit contains falsehoods and should therefore be rejected, and the suit thrown out. He cited the case of ***Bitaitana v. Kananura [1977] H.C.B. 34*** as authority for the proposition that a suit founded on false affidavit evidence ought to be rejected.

3. This suit is incompetent as it is a representative action, brought without first obtaining an order of Court in accordance with the provisions of O. 1 rule 8 of the Civil Procedure Rules. He cited the case of ***Sonko and Others v. Haruna and Another [1971] E.A. 443,*** and ***Paul Kanyima v. R. Rugora [1982] H.C.B. 33,*** in support of this contention. He then rested his case by concluding that for the reasons stated in the grounds above, this suit should be struck out with costs to the Respondent.

Mr. Tayebwa, counsel for the Applicant, countered each of the objections aforesaid; and pointed out that in matters of human rights and good governance, it is the overriding principles of liberal approach and the need for pursuit of substantive justice that prevails. He cited the case of ***Denis Birije v. A.G., High Court Misc. Application No 902 of 2004*** (Kampala); and ***Annebrit Aslund v. A.G., High Court Misc. Cause No. 441 of 2004*** (Kampala) as authorities for the said position of the law; and urged Court in this case to be guided by these principles.

On the issue that this suit was time barred, he argued that the causes of action which have given rise to this suit still continue even up to the time of arguing these points of objection; and because of this, every day brings in a fresh cause of action, and therefore the suit is not time barred. He further argued that because of the

administrative pursuits which only turned out to be futile attempts, time could only have begun to run when the Applicant realised that the process could not yield any positive result by reason of the Respondent's intransigence.

On the issue of premature institution of the suit, he contended that this suit is properly before Court, as it is not a complaint regarding the conduct of an election which required the administrative intervention of the Respondent. This suit is about the failure by the respondent to hold due elections; and the blatant imposition of a leader on the population in flagrant disregard to the clear provisions of the law on the matter. There is therefore, he contended, no justification for applying the Constitutional provisions invoked by counsel for the Respondent.

As for the alleged false affidavits sworn by the Applicant, counsel submitted that this is not borne out by the evidence; and that what counsel for the Respondent claims to be false evidence is in fact what is merely contradicted by affidavit evidence sworn on behalf of the Respondent. It would be wrong, he argued, to determine the falsity or truth of any matter deposed to by way of affidavit by simply believing the word of mouth of one witness against the other.

Finally, he attacked the claim by counsel for the Respondent that this is a representative suit. This suit, as is clearly pointed out in his affidavit, has been brought by the Applicant in his capacity as a registered voter of the area and as well in his capacity as a leader. He has vested interest in the matter. True, this suit represents the interests of and is for the benefit of the people of the area; but he does not require their consent to come to Court, or a Court order for that purpose.

As pointed out above, this is the second set of preliminary points of objections. I was initially inclined to bar counsel from raising it in view of the history of this case; preferring that the substance of the matter in controversy be looked into

urgently, rather than be bogged down in technicalities. However, given that this was the first time counsel was raising preliminary points, I reluctantly allowed the points to be raised and argued.

On the first point of objection, counsel has raised two directly opposite points; namely that the suit is both premature and, as well, out of time! This fits in well with the proverbial idiom of: *'eating one's cake and craving to have it at the same time'*. Counsel's case was that the suit ought to have been filed in accordance with the provisions of Articles 61 and 64 of the Constitution; and section 15 of the Electoral Commission Act. In this regard, he should have merely argued that the action under judicial review was improperly before Court and should therefore be struck out. In attacking the suit instead on grounds of time bar, he was on a rather insecure footing.

The Applicant is, in fact, in Court seeking an order of mandamus for the alleged breach of Article 61 of the Constitution by the Respondent. I do not quite understand why counsel laboured to call the said Constitutional provision in aid of the Respondent, as he did. The powers of the Respondent to inquire into complaints provided for in clause (1) (f) of the said Article is limited to *'election complaints arising before and during polling';* and so is the appeal envisaged in Article 64 of the Constitution. This suit falls outside the ambit of the said Constitutional provisions.

Furthermore, here, it is the Respondent against whom there is grievance. How would the Respondent then sit in judgment in a matter of this nature? Had I found this matter was improperly before Court I would have, applying the liberal approach in pursuit of substantive justice which is the direction Courts have adopted in matters of this nature, regularised it. I am unable to see what injustice the Respondent would suffer as a consequence of this course of action.

It is now an express provision enshrined in the Constitution enjoining Courts to strive to render substantive justice; and not to allow the due process to be fettered unduly by technicalities. Unless it would result in manifest injustice, defects of a technical nature, or irregularities in the form and manner of procedure must be ignored and, instead, substantive justice done. A suit for judicial review places the matter squarely in the adjudication domain. It affords the Court of judicature the opportunity for expeditious rendering of justice; and this is precisely the reason the rules have provided for this form of action.

And, as was pointed out by counsel for the Applicant, the points of grievance that have given rise to the suit are on-going, and each day, including the very day these points of objection were argued, came with a fresh and extended cause of action; with time beginning to run afresh each time that the cause of action recurred. In a situation such as this, it cannot be said that the cause of action arose only in 2006.

On the other hand, from the evidence on record, there has been a flurry of correspondences and administrative actions such as meetings held between the Applicant and the Respondent; and as well the involvement of the office of the Inspectorate of Government. It cannot be said with certitude or mathematical precision when the Applicant could have realised that the Respondent was in fact unable to administratively address the grievances raised by the Applicant; and therefore justifying and necessitating the commencement of remedial action through Court.

I did point out in my earlier ruling on the first wave of objections that this suit, as I understand it, is about democracy and good governance. The right to representation and the right to determine one's leaders through the democratic process are fundamental; and are firmly enshrined in and secured by the Constitution. Peace

and stability of a country hinge so much on the promotion of and exercise of this right. Court has to take judicial notice of the fact that so much blood has been shed in this country due to real and perceived abuse or denial of the exercise of these rights.

I would be failing in my sworn duty to do, or uphold the cause of justice, if I were to throw out such a plea as this one on the grounds that it was brought out of time. Even if I had found so, I would have most certainly extended the time within which to institute this suit, and proceeded to determine the merits of the case. This however I do not have to do as the suit has been brought both in the correct forum and very much within time provided for in the rules of procedure.

As for the second ground of objection, namely that the affidavit in support of the suit contains false evidence, the only evidence relied on in support of this, is an affidavit sworn on behalf of the Respondent, and in response to the Applicant's affidavit; and which seeks to controvert the evidence adduced by the Applicant.

In an adversarial process such as this, it becomes difficult to establish, in a summary manner where the truth lies. It would be most premature at this stage, without further inquiry, to purport to determine where truth or falsehood lies. Such an allegation of falsehood instead begs the need for trial of this suit on the merits.

Finally, on the alleged representative suit, clearly, this suit does not fall in the category of representative suit as envisaged in the rules cited. There is therefore no need to invoke the rules governing representative suits. The Applicant has stated in no uncertain language that while the suit he has instituted is of public concern and interest; and that in so doing he is representing the popular wishes of the population; he is nonetheless presenting the matter in his personal capacity. To do

so, he neither needs any sanctions by the people with similar vested interests, nor an order of Court.

For the reasons laid out above, I have to over–rule each of the points of objection raised by Counsel for the Respondent. I award costs of the preliminary points of objection to the Applicant in any event. I need reiterate here that, by its very nature, action for judicial review must always receive the greatest attention and be disposed of with urgency, and expeditiously on the merits. I do urge Counsels on either side to hearken to this call so as to enable the fulfilment of an early resolution of the matters in contention herein.

Chigamoy Owiny – Dollo

JUDGE

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