

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISCELLANEOUS CAUSE 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

THE ELECTORAL COMMISSION RESPONDENT

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

RULING

Chris Tushabe, a local leader and an opinion voice of the community of Kasenda Sub-County in Kabarole District, brought this application by way of Originating Summons under Articles 60 and 61 of the Constitution, The Electoral Commission Act, sections 101 and 180 of the Local Government Act, section 36 of the Judicature Act, and Rule 6 of the Civil Procedure (Amendment) (Judicial Review) Rules – SI No. 75 of 2003, for the remedy of judicial review. He seeks from this Court, the following reliefs:

- (i) An order of certiorari calling and quashing the decision of the Respondent declaring Ms. Mary Nyakwera Baguma as the Woman

Councillor for Kasenda Sub County in the Kabarole District Local Council.

- (ii) An order of certiorari quashing the decision of the Respondent to hold election of a second Woman Councillor for Kasenda Parish in the Kasenda Sub County.
- (iii) An order of mandamus directing the Respondent to hold elections for LC3 Youth Councillors for Kasenda Sub County.
- (iv) An order of mandamus directing the Respondent to hold elections for the Woman Councillor representing Kasenda Sub County in the Kabarole District Council.
- (v) General damages, and costs of the application.

The application was supported by affidavit evidence deposed to by the Applicant himself; and the grounds therefor were, that:

- (1) The Electoral Commission wrongly exercised its discretion in making Mrs. Mary Baguma Nyakwera to represent Kasenda Sub County as the Woman Councillor in the Kabarole District Local Council.
- (2) The Electoral Commission further exercised its discretion wrongly when it failed to conduct elections for the Woman Councillor of Kasenda Sub – County on the said LC5 Local Council.
- (3) The Electoral Commission wrongly and without any justification whatsoever and howsoever failed to conduct Youth Council elections for Kasenda Sub County.
- (4) The Electoral Commission wrongly exercised its discretion when it conducted the elections of Kasenda Parish Woman Councillor.
- (5) The foregoing have caused so much confusion in the local area, that for two years no Local Council 3 and 5 meetings for Kasenda Sub –

County have ever been conducted; thus paralyzing the activities of the area and causing the citizenry to suffer and damage.

- (6) It is just and equitable that the said orders of judicial review should be granted.

This case has neither had a smooth course nor straight path. It initially had five Respondents. However upon preliminary objection raised by the other Respondents, I non-suited the Applicant with regard to those other Respondents; leaving the Electoral Commission as the sole Respondent. The remaining Respondent then raised a number of preliminary objections, the merits of which the Court had to deal with at great length; and thereby occasioning much delay. The Court was therefore diverted from attending to the substantive matter in controversy between the parties as expeditiously as it should have.

Further to this, a myriad of affidavits wrongly termed as supplementary affidavits, but which ought to have properly been presented at the outset as affidavits in reply, as they pertained to facts clearly within the knowledge of the officials of the Respondent at the time of filing their affidavits in reply, characterised the conduct of this application. This was clear manifestation of the ill-preparedness of the Respondent in the conduct of its case; and ordinarily I should have barred it from conducting its case in such a haphazard manner.

I accommodated their counsel, notwithstanding that their dilatory conduct would, as it did, result in much confusion, and occasion much delay in the conduct of the application. I had to do so because of what I stated in my earlier ruling on the preliminary objections, namely that Courts are now mandated by constitutional provision to overlook any defects in procedure and form, and instead to strive to render substantive justice. This is a principle which Courts must adhere to; unless to do so would result in the miscarriage of justice.

As I understand it, the Applicant's grievances are founded on two grounds: first, is the Respondent's exercise of discretion; and then second, the allegation of outright impropriety in its decision or conduct. On the first ground, the case for the Applicant was that Kasenda Sub-County having been created out of Rutete Sub-County which Mrs Baguma Nyakwera Mary had been elected to represent prior to the said creation of Kasenda Sub-County, the Respondent ought to have held fresh elections for the Woman District Councillor for the new Sub-County; and that it had acted wrongly in not doing so.

The reasons given for demanding fresh elections are twofold. First, is that the people of the new Sub-County are against Mrs Baguma Nyakwera Mary's continued representation of their interest given that she is a resident of the old Sub-County, and yet Kasenda Sub-County is now an independent political entity. Second, it is reported that the Woman Councillor in issue is, herself, unwilling to represent the new Sub-County on the grounds that the political atmosphere obtaining thereat, since its creation, is not to her liking.

Prior to initiating this Court action, the Applicant had raised these issues with the Respondent itself; and with various authorities inclusive of the office of the Inspectorate of Government (IGG). Following queries made by the office of the IGG, on various issues inclusive of the very subject matter that is now before Court for adjudication, Sam A. Rwakoojo, the Secretary to the Respondent, explained (*annexure E to the affidavit the Applicant deposed to in support of the application*) that, indeed, the Respondent had given audience to the Applicant; and had explained to the latter in the meeting, the reasons behind the decisions that had been taken by the Respondent.

Regarding the issue of election of Woman District Councillor, he explained in that brief to the IGG that Kasenda Sub-County had been created alongside Katebwa

Sub-County. He then set out the criteria the Respondent had based itself on to determine which of the two Sub-Counties would fill the slot of additional Woman Councillor, as follows:

- “(vi) *During the demarcation, the Electoral Commission found out that the creation of the two sub counties had increased the number of electoral areas for Women Councillors by one as per the formula given in the Local Governments Act, 1997 (as amended) and the electoral area had to be assigned to either Katebwa or Kasenda.*
- (vii) *The Commission demarcated Katebwa as the additional electoral area for a District Woman Councillor due to the fact that it had been curved out of two sub counties (Kisomoro & Buheesi) unlike Kasenda which had been curved out of Ruteete.*
- (viii) *Kasenda Sub –County and Ruteete Sub –County were demarcated and remained as one electoral area for the District Woman Councillor who had already been elected.”*

This explanation, which the Secretary to the Respondent reiterated in the belated supplementary affidavit he deposed to in this suit, speaks for itself; and with utmost clarity. The additional Councillor had to come from either, but not both, of the two newly created Sub-Counties. It is reasonable and convincing that Katebwa Sub-County, curved out of two sub-counties, hence hitherto separate electoral areas, had to provide the additional Woman Councillor as they were joined together to constitute a new electoral area.

It is only natural that Mrs Baguma Nyakwera Mary whose constituency was Ruteete Sub-County, which hitherto Kasenda constituted part of at the time of her election, before the latter was curved out, should continue to represent the old electoral area albeit now comprising two sub-counties. Her reported lack of

willingness to continue representing the people of Kasenda is not borne out by the evidence on record. In her affidavit sworn in her capacity as the second Respondent before I struck her name out upon her successful objection, she had this to say:

- “5. *I am the duly elected lady councillor for Ruteete sub–county Electoral area and I was elected on 28th February 2006 ...*
6. *... at that time Kasenda sub–county which was curved out of Ruteete sub–county on the 1st July 2006 was not yet in existence as a sub–county electoral area for purposes of elections and to date for electoral purposes the area comprising Kasenda sub–county is still considered part of Ruteete sub–county electoral area for election purposes ...*
7. *No elections have been organised for lady councillor for the newly created Kasenda sub–county and the people of the said Kasenda sub–county are some of the people who voted me into office and I have an obligation to serve them until I am directed not to do so on account of they having their own councillor.*
8. *It is not true that the people of Kasenda sub–county were disenfranchised and I still represent them effectively as I used to do before the decision was made to create another sub–county out of the bigger Ruteete sub–county.”*

It is therefore clear that the fair lady has never ever lost sight of the fact that she is beholden to the people of what is now Kasenda Sub–County for their precious votes or support which contributed to her being in the District Council in the first place. Otherwise, she would place herself in serious danger of standing accused of having abandoned her statutory duty to her electorate; and risking the peril of losing her position in the District Council altogether should she attempt to restrict her representation to Ruteete Sub–County only.

Owing to the fact that the Respondent is a Constitutional body; with responsibility to make administrative decisions that impact on the rights of society, it is clothed with quasi-judicial powers in the exercise of that responsibility. It is therefore responsible to society; hence, when cogent evidence is adduced in proof of its haven fallen short of the expectations placed on it in its exercise of that responsibility – namely that it has acted unreasonably, unfairly, irrationally, or with impropriety; in other words in contravention of the law – the Court of law called upon to intervene by way of remedy of judicial review is enjoined to do so.

However, for the sound reasons given above, I cannot fault the Respondent's exercise of discretion. I am unable to find that in this regard, the Respondent in any way acted with any impropriety at all. Therefore, I decline to issue an order of certiorari to call and quash its decision to retain Mrs Baguma Nyakwera Mary as the Woman Councillor for the electoral area which is now constituted by Kasenda and Ruteete Sub-Counties in the Kabarole District Council. Accordingly, I disallow the Applicant's prayer for an order of mandamus to issue for the election of a Woman Councillor for Kasenda Sub-County in the Kabarole District (LCV) Local Council.

On the prayer for an order of mandamus directing the Respondent to carry out elections for Youth Councillors for Kasenda Sub-County (LCIII) Local Council, the Respondent's case was somewhat ambivalent. On the one hand, in his affidavit in reply to the application, Leonard Mulekwah, the Respondent's Director of Operations, explained that the Respondent's failure to conduct the said elections was partly due to financial constraints, and the on-going investigations into creation of Kasenda Sub-County by the office of the IGG. In support of this contention, relevant correspondences from the IGG was appended to his affidavit. The Respondent's other contention was that its failure to conduct the Youth elections was due to the absence of an enabling law; owing to the declaration by the

Constitutional Court that the then existing law governing Youth elections contravened the provisions of the Constitution.

If indeed the failure of the Respondent to conduct Youth elections in the newly created Kasenda Sub-County were owing simply to financial constraints, or merely that the creation of the Sub-County was under investigations by the office of the IGG, this Court would have accorded the matter the seriousness it deserves and made decisive remedial intervention. It would have made appropriate orders for finances to be promptly availed to the Respondent for this well deserved purpose. Investigations by the office of the IGG into malpractices, or the circumstances surrounding the creation of Kasenda Sub-County cannot constitute a bar to the Court's sworn duty to intervene and render appropriate remedial justice.

However, in the light of the fact that the Respondent has conducted a number of by-elections since the 2006 General Elections, its plea of financial constraints cannot stand. Society's right to enfranchisement and the determination of elective leadership – principles which are securely entrenched in our Constitution, and are highly cherished by society – have to be zealously guarded. The Respondent must accord all elective positions equal treatment. Leadership at every strata of society is of great importance in the democratic process and governance. None is more important than the other. They complement each other; and this makes for the wholeness of the body polity of any country.

As for the Respondent's other plea, namely that owing to the decision of the Constitutional Court in the case of *Rubaramira Ruranga vs. The Electoral Commission and Anor., Constitutional Petition No. 21 of 2006*, the laws under which the earlier Youth elections had been conducted were expunged – and therefore until Parliament amends the relevant laws to bring them in conformity with the provisions of the Constitution the Respondent's hands are tied – this is

sound, and has merits. Once a competent Court of law, as the Constitutional Court is, has invalidated any legislation or Executive decision, and it has not been upset on appeal, all actors operating under the law are bound.

Accordingly then, I find my hands equally tied. I am unable to make an order of mandamus for the conducting of the said Youth elections. This of course is unfortunate and hard on the people of Kasenda who yearn for their deserved right to representation. However, Court must not make orders in vain. The effective course of action the Applicant could have pursued was to bear on the Executive to initiate the necessary amendments of the existing law, and bring them in conformity with the Constitution as decided by the Constitutional Court. It is only after this that the Court's intervention could be sought if the Respondent still failed to perform its duties; regardless.

On the issue of the elections of the additional Woman Councillor for Kasenda parish to the Kasenda Sub-County Local Council III, the Applicant's contention is first, that this was done without the endorsement or knowledge of the relevant organs of the Applicant's party (the NRM-O) at the Sub-County, and without the involvement of the electorate in the process; and second, that the demarcation of Kasenda parish, if it was in fact done, was effected irregularly; with the result that Kasenda parish now has two Women Councillors to the Sub-County Council. In support of this contention was the affidavit of the Applicant and the one sworn by the LCII Chairperson.

Attached to the affidavit the Applicant deposed to in support of the application is annexure 'A'; which is a report by the Respondent's Desk Officer, Mid Western, Silver Mugenyi, on the alleged abuse of office by Kabarole District Returning Officer regarding Kasenda Sub-County elections. This report followed his meetings and interviews with a host of stakeholders on the ground. With regard to

the issue of election of the additional Woman Councillor for Kasenda parish, the complaint made to him was that the process had not been done with enough publicity because of the remoteness of the area, hence participation was limited; and further, that there was no clear indication of what constituted Kasenda 'A' and 'B'.

In a supplementary affidavit deposed to by Charles Mugenyi Mugerwa who was the Respondent's assistant Returning Officer of Kabarole District at the time the nominations for the filling of the electoral vacancies in Kasenda Sub-County were conducted, he stated that the Respondent had demarcated Kasenda parish into Kasenda I and Kasenda II; and that the nomination of Ms. Kabasambu Grace was done in accordance with the law, and with the secondment of the Kabarole District NRM-O party. Appended to this affidavit are election documents that I set out hereunder.

The election documents are: first, 'Nomination Paper' for the Sub-County Councillors Election. This is a Form for the election of Women Councillors forming one third of the Council. The endorsements in it are that it was for the election of Woman Councillor for Kasenda II Electoral area in Kasenda Sub-County, Kabarole District. It contains the hand written particulars and signature of the candidate as Grace Kabasambu, together with the particulars of the persons proposing and seconding her nomination; and that she was sponsored by the National Resistance Movement, with the said party's Kabarole District stamp evident.

The second document is a Form containing the particulars of ten persons from the Electoral area in issue. This too is endorsed by the NRM party at the Kabarole District level, and dated 17th April 2007. The third document is a Form in which the candidate appointed her official agent. It is also dated 17th April 2007. Next, is a

Form on which is evidence that the candidate's official agent accepted the appointment. In it the candidate took oath before a Magistrate Fort Portal Court on 17th April 2007 authenticating the correctness and truthfulness of the information she had provided in the said Form.

The final document is a Form containing a statement under oath, made by the said candidate before a Magistrate at Fort Portal Court on the 17th April 2007, in which her deposition was that she qualified under the laws of Uganda to be nominated as a Sub-County Councillor. The next document is a Form dated the 17th April 2007, showing consent by the candidate to her nomination as candidate for the Kasenda II election.

Attached to the Applicant's affidavit in support of the application is *Annexure 'C'*. This was submissions of nomination returns by the Returning Officer, Kabarole, to the Respondent's Director, Elections Management. It is shown here that the directly elected Councillors of Nyabweya parish, Kasenda parish itself, and the Male Councillor for Persons with Disability were all in the same category with Grace Kabasambu as elections that went unopposed. It is therefore clear that the disputed election of the Woman Councillor for Kasenda II was not the only one that went unopposed in that Sub-County.

In the same vein, attached to the Applicant's said affidavit is *Annexure 'D'*, which is the return dated 7th of June 2007, and made to the Chief Administration Officer, Kabarole, by the Respondent's Returning Officer, Kabarole, regarding the elections in Kasenda and Katebwa Sub-Counties. In it he is consistent that the elections for the posts of Chairperson LCIII Kasenda Sub-County, directly elected LCV Councillor for the Sub-County, Councillor for Persons with Disability (PWD), and then the directly elected Councillor, and the Woman Councillor for Kasenda parish, all went unopposed.

I have subjected these documents to careful scrutiny for any possible falsification; but have not discerned any. The Applicant himself does not challenge their authenticity. Instead, his complaint is that the electoral process was neither done with the endorsement of the party at the Sub-County level, nor with the participation of the electorate. As for the issue of Party support, the Applicant did not adduce any evidence before me to show that under the NRM Party rules it was not permissible for such endorsement to be done by the party organ at the District level.

It is therefore quite instructive that out of all these elections, it is only that of Kabasambu Grace which the Applicant has impugned. I am inclined to think that this has been so because of what the Respondent's Desk Officer Mid Western found out in the course of investigating the Applicant's complaint lodged with the Respondent; namely that the new Kasenda Sub-County is bedevilled with serious political strife which have even attracted the attention of the office of the IGG; and this stems from such factors as tribal conflict, dispute over the name of the Sub-County, and the location of its headquarters;.

The said Desk Officer, Mid Western, established that a rift has emerged in the Sub-County resulting into two camps; with the unfortunate consequence that no successful Council Meeting has ever been held in the Sub-County. This finding is borne out by the terse letter of the Chief Administration Officer, Kabarole, to the Sub County Chief, Kasenda Sub-County, dated the 18th March 2008 (*attachment 'D' to Annexure E to the Applicant's affidavit in support of the application*); in which he decried the breakdown in the operations of the Sub-County on account of the rampant political intrigues and divisions obtaining in the of the Sub-County.

It would appear from the above then, that the problem of Kasenda Sub-County goes far beyond the impugned elections, which apparently are mere symptoms of the turbulence characterising the politics of the Sub-County; and therefore, any administrative failure or ineptitude on the part of the Respondent may not be of such consequence as the Applicant would want this Court to believe. Indeed, I am satisfied that within the circumstance of the geographical remoteness of Kasenda Sub-County, and its endemic political malady, the Respondent has not done or failed to do anything that would warrant the intervention of this Court.

If the complaint pertains to the identities of the villages in Kasenda parish that constitute Kasenda II, then the Respondent is under duty to explain so. This, however, does not warrant the quashing of an election which, from the evidence, was not any different from the others in the same category; but towards which the Applicant is apparently not ill disposed. It is not every lapse or failure in administrative action that will always merit Court intervention. It has to be proved that in the exercise of its quasi-judicial functions the Respondent has acted in a manner that derogates from those functions. In the instant case, this has clearly not been so.

In any case, there was an immediate and better suited remedial course of action available, to challenge the election of Kabasambu Grace. Any aggrieved member of the electorate of the area could have brought an instant petition when, as the Applicant contends, the electorate discovered at the time she was being sworn into office, that she had been elected without their knowledge or participation. Actions for judicial review of administrative action ought to be resorted to where it is clear there is no other suitable avenue for judicial redress available.

For the reasons laid out above then, I decline to issue an order of certiorari to quash the election of Grace Kabasambu, or an order of mandamus directing the

Respondent to conduct fresh elections for the Woman Councillor for Kasenda parish in Kasenda LCIII Council. In the result, it is clear that I am not persuaded to grant any of the reliefs sought by the Applicant; and ordinarily, as is the practice, costs should follow the event.

However, as was clear from my ruling regarding the preliminary objections, the Applicant has not instituted this suit for his personal or individual benefit. Apart from holding an elective Party office in his area, he has come to Court as the voice of the masses. A person, such as the Applicant, who offers himself in the pursuit of the greater good of society are rare in Society, and therefore not easy to come by; and yet they play a vital role in the development of the democratic process and promotion of good governance.

It would be most unfortunate if such a person were to be scared away from standing up for the people, inclusive of instituting Court action, for fear of the risks that such noble action could attract the burden of costs of litigation that may result from their failure to succeed in Court. In any case, in the instant case, the complaints the Applicant brought before Court were neither frivolous nor vexatious at all. For this reason then, except for the costs which were earlier awarded herein, each party shall bear their costs of the suit.

Chigamoy Owiny – Dollo

JUDGE

10 – 02 – 2010