THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

MISC. CAUSE NO. 15 OF 2020

WEMBABAZI BEATRICE:: APPLICANT

VERSUS

1. **THE NRM ELECTION DISPUTES TRIBUNAL**
2. **HON. BUSINGYE HARRIET MUGENYI ::::::::::::::::::::::::: RESPONDENTS**

BEFORE: HON. JUSTICE EMMANUEL BAGUMA

RULING

BACKGROUND

The background of this application is that the applicant and the 2nd respondent were candidates in the National Resistant Movement (**hereinafter referred to as NRM)** party primaries for Hoima district Woman Member of Parliament for the term of 2021-2026. After the election exercise, the returning officer declared the applicant as the winner for Woman Member of Parliament having obtained the highest votes. The 2nd respondent being dissatisfied with the results petitioned the NRM Elections Disputes Tribunal challenging the outcome of the elections.

The NRM Elections Dispute Tribunal heard the petition inter-parties and declared the 2nd respondent as winner of Hoima NRM Woman Member of Parliament. The applicant being aggrieved with the decision of the Tribunal nullifying her victory, filed the instant application by Notice of Motion under **Articles 28 (1),42,44 & 50** of **the constitution**, **S.36 & S.38 of the Judicature Act Cap 13, Rules 3,4,5,6 & 7 of the Judicature (judicial review) Rules SI 11** of **2009** seeking for orders of certiorari, prohibition and declarations.

Before the hearing of the application, both counsel for the 1st and 2ndrespondents jointly raised 4 preliminary objections.

Preliminary objections raised by counsel for the 1st and 2nd respondents

1. **That the 1stRespondent is not a legal entity capable of being sued.**
2. **That the application was filed prematurely without exhausting all the remedies provided by the public body.**
3. **That the application has already been overtaken by events as the applicant already contested and was nominated as an independent candidate.**
4. **That the applicant conceded to the process leading to the decision of the tribunal.**

The applicant was represented by Mr. Simon Kasangaki while the 1st respondent was represented by Mr. Atwijukire Dennis and the 2nd respondent was represented by Mr. Baryabanza Aaron.

All counsel agreed to file written submissions for the raised preliminary objections. Counsel for the 1st and 2nd respondents filed joint submissions on the 4 raised Preliminary objections.

Consideration of the Preliminary objections.

A. ***Preliminary 0bjection 1: That the 1st respondent is not a legal entity capable of being sued.***

Both Counsel for the respondents submitted that the NRM Election Disputes Tribunal as the 1st respondent is not a suable entity since the same is not legally registered. Counsel stated that the tribunal is an Ad hoc one that was established by the NRM-O to handle election related disputes emanating from the NRM primaries and the same is no longer in existence since the work for which it was established was concluded.

Both Counsel also submitted that the effect of suing a non-existent party means that the orders cannot be issued in vain as there is no one to whom they can be enforced against. Counsel referred to the case of **The Registered Trustees of**

Rubaga Miracle Centre V Mulangira Ssimbwa H.C.M.A No. 576/2006 where court held that;

"The law is now settled. A suit in the name of a wrong plaintiff or defendant cannot be cured by amendment…a non-existent defendant could not be substituted because in reality there is no valid plaint."

Both Counsel for the respondents further submitted that a non-existent entity cannot be ordered to enforce a decision of court and for that reason; the said application is frivolous, incompetent, bad in law and an abuse of court process as it seeks orders against a non-existent party and thus should be struck out with costs.

In reply, counsel for the applicant submitted that the 1st respondent can and is amenable to being sued under judicial review proceedings and it would be misleading for the respondent to argue that it is not suable as it is not a registered entity.

Counsel submitted that the pending application is for judicial review and the 1st respondent admits that the NRM Election Dispute tribunal is an Ad hoc body or tribunal whose impugned decisions are amenable to judicial review proceeding as was elucidated in the case of **Clear Channel Independent (U) Ltd V Public Procurement & Disposal of Public Assets Authority H.C.M.C No. 156 of 2008 that;**

"Judicial review is *the* ***process by which the High court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions/duties/acts which may affect the rights or liberties of the citizens."***

Counsel for the applicant also relied on the case of **John Jet Tumwebaze vs Makerere University Council & Others H.C Civil Application No. 353 of 2005** where court noted that;

"If the legislature desired that these orders issue only against bodies clothed with corporate personality, the legislature would have expressly stated so. It did not. The wide jurisdiction given to court as to the public bodies and officers at which prerogative orders can be directed must not be narrowed down by restricting their issuance to only those bodies clothed with corporate personality."

Counsel further submitted that the 1st objection must fail as the NRM Election Dispute Tribunal is an Ad hoc body or tribunal whose decision did not only affect the applicant herein but majority will of the electorates in Hoima Municipality.

In rejoinder, counsel for the respondents maintained their submissions that the 1st respondent was an Ad hoc tribunal only established to handle election disputes relating to NRM primaries and the same is no longer in existence since the work for which it was established was concluded.

Analysis of court on preliminary objection No.1

Section 6 (3) of the **Political Parties and Organizations Act 2005** provides that;

"***A political party or organization registered under this act shall be a body corporate and shall have perpetual succession and may sue and be sued in its corporate name."***

Reg 20 (5) (b) (1) of the NRM Election Regulations 2020 is to the effect that the NRM Election Dispute Tribunal was established under the NRM Organization for the purpose of handling election disputes on an ad hoc basis.

In the case of **Fort Hall Bakery Supply Co. V. Frederick Muigai Wangoe : [1959] EA. 474** court held that;

"A non-existent person cannot sue and once the court is made aware that the plaintiff is non-existent, and therefore incapable of maintaining an action it cannot allow the action to proceed."

This same position was enunciated in the case of **Sabric International Ltd V A.G CACA No. 21 of 2015** where court held that;

"…a non-existing entity cannot maintain as a party to the suit a cause of action in law. Any entity or organization to qualify to institute an action in the court of law, that entity or organization must be recognized by law since it is an elementary principle of the law that an unincorporated organization is not a legal entity capable of suing or being sued. A suit by an unincorporated entity is a nullity."

Basing on the above authorities and provisions of the law, the applicant sued NRM Election Disputes Tribunal which is not a legal entity capable of being sued. It's just an Ad hoc that was established by the NRM-O to handle election disputes relating to NRM primaries and the same is no longer in existence since the work for which it was established was concluded.

It is an elementary principle of the law that an unincorporated organization is not a legal entity capable of suing or being sued. A suit by an unincorporated entity is a nullity.

Accordingly, the 1st Preliminary Objection is upheld.

B. ***Preliminary Objection No.2:That the application was filed prematurely without exhausting all the remedies provided by the public body***

Both Counsel for the respondents submitted that **Rule 7 A (1)** of **The Judicature (Judicial review) (Amendment) Rules 2019** provides that;

The court shall, in handling applications for judicial review, satisfy itself of the following;

a) ***That the application is amenable for judicial review.***
b) ***That the aggrieved person has exhausted the existing remedies available within a public body or under the law.***
c) ***That the matter involves an administrative public body or official.***

Counsel for the respondents further submitted that the applicant having been dissatisfied with the decision of the Ad hoc NRM Election Disputes Tribunal ought to have petitioned CEC which is mandated to confirm and indeed it confirmed the implementation of the decisions of the tribunal where the 2nd respondent was endorsed as flag bearer. That it is the decision of CEC that the applicant would have challenged in courts of law.

Both Counsel for the respondents referred to the case of **Hajji Iddi Lubyayi Kisiki V Katushabe Ruth & NRM H.C.M.C No. 26 of 2020** where court held that;

"The application should not have been filed before exhausting the remedies provided under the law. The organization has internal self-correcting mechanisms that should have been applied before coming to this court for judicial review."

In reply, Counsel for the applicant submitted that the circumstances surrounding this application before the election tribunal stifled the applicant's right to a fair hearing and were illegal necessitating invoking the powers of the High Court.

Counsel referred to **Article 42 of the Constitution** which provides that;

"Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him/her."

Counsel also cited **Article 139 of the Constitution** which confers unlimited jurisdiction on the High Court in all matters.

Counsel for the applicant further submitted that having irregularly denied the applicant a right to a fair hearing by the NRM Election Dispute Tribunal, it was only just, reasonable and necessary in the circumstances to invoke the supervisory powers of this honorable court given its unfettered jurisdiction.

In rejoinder, both Counsel for the respondents reiterated their earlier submissions that this application was filed without exhausting the internal mechanisms of the NRM party.

Analysis of court on preliminary objection No. 2

Rule 7 A (1) of **The Judicature (Judicial review) (Amendment) Rules 2019** provides that;

The court shall, in handling applications for judicial review, satisfy itself of the following;

a) That the application is amenable for judicial review.

b) That the aggrieved person has exhausted the existing remedies available within a public body or under the law.

c) That the matter involves an administrative public body or official.

Rule 7A (1) (b) above entails a party to first exhaust the existing remedies available within the public body or under the law before resorting to Judicial review.

In the Court of Appeal case of **Speaker of National Assembly V Ngenga Karume [2008] 1 KLR 425** court held that:-

"***Where there is a clear procedure for redress of any particular grievance prescribed by the constitution or act of parliament, that procedure should be strictly followed."***

Also in the case of **Hajji Iddi Lubyayi Kisiki V Katushabe Ruth & NRM H.C.M.C No. 26 of 2020** court held that;

"The application for judicial review should not have been filed before exhausting the remedies provided under the law. The organization has internal self-correcting mechanisms that should have been applied before coming to this court for judicial review."

In view of the above authorities and provisions of the law, the applicant who is the aggrieved person in this matter has not adduced evidence that she exhausted the existing remedies available within the party, where there was a clear procedure for redress, of any particular grievance like in her case.

In the circumstances, I find that this application was filed prematurely since the applicant had not exhausted all the remedies provided in her party. The 2nd Preliminary Objection is also upheld.

C. ***Preliminary Objection No. 3: That the application has already been overtaken by events as the applicant already contested and was nominated as an independent candidate.***

Both Counsel for the respondents submitted that the applicant was nominated and is contesting as an independent candidate. That this averment is supported by certified copies of nomination papers obtained from the National Electoral Commission confirming the status of the candidature of the applicant attached to counsel's submissions and **marked 'A.'**

Both Counsel also submitted that the applicant cannot be an independent candidate and at the same time be a member of the NRM party. That by her actions, she had waived her rights to prosecute this application and even if the reliefs sought were to be granted, they would be of no legal effect rendering such a decision moot and for academic purposes only.

Both Counselrelied on the case of **Atukwasa Rita Bwanika V NRM & Anor H.C.M.C EP No. 6 of 2020** where it was held that;

"It follows that the orders the applicant seeks are no longer available to her because they have already been overtaken by events."

In reply,Counsel for the applicant submitted that the instant application seeks general damages and an order setting aside the decision of the 1st respondent from public records and is beyond the nomination of parties. Counsel submitted that the applicant is entitled to adjudication on those questions and a decision of this court on merits.

In rejoinder, both Counsel for the respondents maintained their earlier submissions that the application has already been overtaken by events.

Analysis of court on preliminary objection No. 3

In the case of **Julius Maganda V NRM. H.C.M.C No. 154/2010,** Court held that;

"Courts of law do not decide cases where no live disputes between parties are in existence. Courts do not decide cases or issue orders for academic purposes only. Court orders must have practical effects. They cannot issue orders where the issues in dispute have been removed or merely no longer exist."

Further, in the case of **Atukwasa Rita Bwanika V NRM & Anor H.C.E.P No. 6 of 2020** court held that;

"It follows that the orders the applicant seeks are no longer available to her because they have already been overtaken by events."

Article 72 (4) of the Constitution of Uganda provides that:-

"**Any person is free to stand for an election as a candidate, independent of a political organization or political party."**

In the instant case, It is not in dispute that the applicant herein opted to stand as an independent candidate as evidenced in her nomination papers dated **13th October 2020 marked as annexure 'A'** to the submissions by counsel for the respondents.

It is also not in dispute that the 2nd respondent has already been nominated by NRM party as the flag bearer for Woman representative Hoima district. **(See annexure 'A' dated 7th October 2020, to the 2nd respondent's affidavit in reply).**

It's my considered view and opinion that the applicant cannot be an independent and at the same time want to be a flag bearer of the NRM Party. The orders the applicant seeks are no longer available to her and even if any of

the reliefs sought by the applicant were to be granted, they would be of no legal effect rendering such decision of no use. Courts of law do not decide cases where no live disputes between the parties are in existence.

In any case, both the applicant and 2nd respondent were nominated as independent and flag bearer NRM respectively hence, the people's court will decide accordingly.

In light of the above, I find that this application has been overtaken by events thus I uphold the 3rdPreliminary Objection raised by counsel for the respondents.

D. Preliminary Objection No. 4: That the applicant conceded to the process leading to the decision of the tribunal.

Both Counsel for the respondents submitted that the applicant conceded to having participated in the process that led to the decision of the tribunal and cannot therefore turn around to challenge the same process that led to the decision marked as annexure**'D'**and **'E'** to her affidavit in support.

Counsel for the respondents submitted that the concessions of the applicant are contained in **paragraphs 6, 7,10,13,15 and 20** of her affidavit in support of the application, and that the supplementary affidavit of Oscar John Kihika also enumerates the concessions made by the applicant as having participated in the process that led to the decision.

Both Counsel for the respondents referred to the case of **Atukwasa Ritah Bwanika V NRM & Anor (supra)** where court stated that;

"Judicial review is concerned with the decision making process and not the decision. It involves an assessment of the manner, in which the decision is made…"

In reply, Counsel for the applicant submitted that it is misleading for the respondent to submit that the applicant conceded to the procedural

irregularities that surrounded the making of the impugned decision by the NRM Election Dispute Tribunal.

Counsel also submitted that the applicant has proved to the satisfaction of court on a balance of probabilities that the decision by the 1st respondent of not according the applicant sufficient time to prepare and present her defence and evidence, the decision of cancelling her victory as NRM flag bearer for Hoima district Woman member of parliament based on the petition and/or complaint of the 2nd respondent which was not supported by evidence at all was irregular and illegal.

Further, that the 1st respondent descending into the arena to investigate the complaints of the 2nd respondent in the absence of the applicant was a sham and of low standard not expected of a tribunal and/or a quasi-judicial body.

Analysis of court on preliminary objection No. 4

In the case of **Koluo Joseph Andres & 2 Ors Vs Attorney General H.C Misc. Cause No. 106 of 2010** it was held that;

"It is trite law that Judicial Review is not concerned with the decision in issue per se but with the decision making process. Essentially Judicial Review involves the assessment of the manner in which the decision is made. It is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality.

In the instant case I find that the applicant fully participated in the process leading to the decision of the tribunal since the same was heard inter-parties as seen in **paragraph 6** of her affidavit in support where she stated that she filed an answer to the petition of the 2nd respondent.

Having analyzed the above evidence, the decision making process was exercised in accordance with the basic standard of legality, fairness and rationality.

It goes without saying that every litigation must have an end. The parties herein have been before the tribunal and gone through the process where both parties had an opportunity to be heard using internal remedies.

In the final result,the applicant conceded to the process leading to the decision of the tribunal thus I uphold the 4th preliminary objection.

In conclusion, the 4 raised preliminary objections by both counsel for the respondents are hereby upheld and its effect is that they dispose off the main application.

In the premises, the application is dismissed.

Basing on the nature and circumstances of the case, I am reluctant to grant costs.

I so order.

……..

Emmanuel Baguma

Judge

27/11/2020