

- d) An order compelling the Respondents to immediately register these Ugandans as voters to facilitate their voting in subsequent elections.
 - e) The omission and exclusion of these Ugandans from the voting process is an abuse and failure by the second Respondent to perform its duties, amounts to segregation or discrimination hence illegal.
 - f) Each of the prisons be declared registration polling centers and the second Respondent deploys its officials as returning officials in prisons for the subsequent 2021 elections and referenda.
 - g) The Respondents should liaise with prison authorities and governments with Ugandans living in the diaspora to issue national identity cards for purposes of registration as voters and for safe keeping of the voters cards of the prisoners.
 - h) The non-registration of these Ugandans by the second Respondent amounts to abuse of fundamental human rights of citizens as obligated under article 20 of the Constitution.
 - i) A permanent injunction restraining the Respondents and/or their agents from further illegal/unlawful breach and non-observance of their mandate to register qualified Ugandans for electoral process.
 - j) A permanent injunction restraining the second Respondent from conducting any elections or referenda in exclusion of these Ugandans.
 - k) Any other orders and directions deemed fit, just and appropriate to safeguard the fundamental rights of these Ugandans.
 - l) The second Respondent sets up more polling centers over and above embassies and consulates and deploys electoral officials as returning officers or collaborates with host electoral bodies to provide similar services.
 - m) Costs of the application be borne by the Respondents jointly and/or severally.
3. The Applicant was represented by Ms. Daphne Gunn of Walusimbi & Co. Advocates. The second Respondent was represented by Mr. Lugolobi Hamidu. The first Respondent did not enter appearance in this matter.
4. The application was supported by the affidavits of the Applicant who is a lawyer, Mr. Sezuwa John and Mr. Muwaya Akamadah, who are prisoners in Iganga prison. Briefly the grounds are

that all citizens of majority age have a fundamental right to vote and it's the second Respondent's duty to ensure that they are registered for the same. Since the coming into force of the Constitution in 1995, the second Respondent has conducted five presidential and parliamentary elections in 1996, 2001, 2006, 2011 and 2016, in total disregard/exclusion of Ugandan prisoners and Ugandans living in the diaspora who are 18 years and above. Being convicted, imprisoned, remanded or living in the diaspora does not disqualify a citizen who is of majority age from voting. All Ugandan citizens enjoy equal rights under the law. Ugandan prisoners including those on remand and convicted and Ugandans living in the diaspora have never been given a chance to register or participate in the electoral process. Even previously registered inmates have never been given a chance to vote yet all citizens are mandated to choose or participate in the decision making of who should govern them and in what way.

5. Mr. Muwya and Mr. Sezuwa had the same averments. They deponed that they were inmates at Iganga prison during the presidential and parliamentary elections in February 2016 and they were not registered or even issued with national identity cards. Neither of them or any other inmate participated in the voting process. The second Respondent made no initiative to cater for the registration of prisoners as voters. Allowing their voting rights ensures that their interests and views are catered for and enhances the incorporation of proper rehabilitation laws and policies. The denial of this right amounts to considering prisoners inhumane and denies them the right to vote, makes them adjudged criminals for life which is unrealistic and illegal. They need to vote to naturally defend their own interests which can improve the prison system.
6. The second Respondent opposed this application through the affidavit of Mr. Kugonza Enoch, an advocate of the High Court working as a principal legal officer at the second Respondent. He deponed that the application is incompetent, frivolous, vexatious, defective, bad in and barred by law. At all material time, the elections have been organized and conducted in accordance with the existing legal framework. The current legal framework upon which elections are conducted does not encompass the intricacies associated with being incarcerated. The participation must be in accordance with the law. The existing legal framework makes no provision for voting in diaspora. The second Respondent's duty to organize and conduct free, fair and regular elections is exercised in accordance with the law and the Applicant's prayers are untenable at law.

7. In rejoinder, the Applicant averred that all adult Ugandans have a right to vote and there are no limitations and/or exceptions and this court has powers to grant the prayers sought.
8. The issues raised for resolution are:
 - i. Whether the Ugandans in issue in prison and the diaspora have a right to vote.
 - ii. If so whether this right has been infringed.
 - iii. Whether the acts of the Respondents are illegal.
 - iv. What remedies are available to the parties.

Analysis

9. I will start by recalling some important provisions in the Constitution and international/regional instruments that Uganda has ratified.¹ Article 1 (1) of the Constitution provides that “all power belongs to the people who shall exercise their sovereignty in line with this Constitution.”
10. Article 59 provides the right to vote. It states: (1) Every citizen of Uganda of eighteen years of age or above has a right to vote. (2) It is the duty of every citizen of Uganda of eighteen years of age or above to register as a voter for public elections and referenda. (3) The State shall take all necessary steps to ensure that all citizens qualified to vote register and exercise their right to vote. (4) Parliament shall make laws to provide for the facilitation of citizens with disabilities to register and vote.
11. Article 25 of the International Covenant on Civil and Political Rights (hereinafter the ICCPR) provides that “every citizen shall have the right and the opportunity without any of the distinctions mentioned in Article 2 and without unreasonable restrictions..... (b) to vote and to be

¹ Dr. Christopher Mbaziira persuasively explained that “Uganda’s performance with respect to international treaties is mainly on the basis of its ratification and domestication of the relevant treaties, standards and codes. This however may be the wrong premise. Ratification and domestication of international standards is one thing; implementation of the standards is quite another. Uganda’s problem appears not to be ratification but implementation.” See Dream deferred? Democracy and Good Governance: An Assessment of the Findings of Uganda’s Country Self Assessment Report under the African Peer Review Mechanism. HURIPPEC Working Paper No. 19 October, 2008.

elected at genuine periodic elections which shall be held by secret ballot, guaranteeing the free expression of the will of electors.”²

12. Under Article 13(1) of the African Charter on Human and People’s rights (hereinafter the ACHPR), “every citizen shall have the right to freely participate in the government of his country either directly or through freely chosen representatives in accordance with the provisions of the law.”³
13. The second Respondent submits that the two categories of Ugandan citizens in issue cannot vote because the current legal framework does not cater for intricacies connected with voting in incarceration or the diaspora. I have read this over and over. The more I read it, the more it pales in the face of Article 59. In fact, it sounds disconnected when read against clause 3 which requires the state to take all necessary steps to ensure that all citizens qualified to vote register and exercise their right to vote.
14. These Ugandans are part of the citizens envisaged in Article 59. As the supreme law of the land, all other laws must be in consonance with the Constitution. In the same way, all government entities must act in accordance with the Constitution. However the response of the second Respondent does not demonstrate in any way that there has been any effort to give life to Article 59 in regard to these two categories of Ugandan citizens.
15. Maybe for my discernment the second Respondent should have pointed more specifically to these intricacies related to prisoners voting. Nonetheless, I cannot imagine anything that can take away the constitutional right to vote for prisoners and Ugandans in the diaspora.
16. It is disturbing that the second Respondent cites the absence of an enabling law as some kind of defence for its failure to ensure these groups exercise their constitutional right to vote. The second Respondent as the government entity vested with this voting mandate, should have raised

² Uganda ratified the ICCPR on 21 June 1995.

³ Uganda ratified the African Charter on Human and People’s Rights on 27 March 1986.

any issues of law reform timely⁴. There is however no evidence that this has ever been done since 1995 when the Constitution came into force. Moreover any enabling law would have to mandatorily read from article 59 of the Constitution, the parent law.

17. The continued disenfranchisement of these Ugandans is also a violation of Article 25 of the ICCPR and article 13 of the African Charter which guarantee the right to vote for all citizens. Being a prisoner or in the diaspora do not take away one's citizenship. It follows therefore that these statuses also do not take away the rights, like the right to vote, that result from one's citizenship under the constitution.

18. Whichever way I look at it, to disenfranchise these citizens is to discriminate them in contravention of article 21 of the Constitution which guarantees equality and freedom from discrimination⁵. Clause 2 therein prohibits, in more specific terms among others, discrimination on the ground of social status. The social status of being a prisoner or living in the diaspora must not be used arbitrarily to deprive them of their constitutional right to vote. This discrimination is also prohibited under article 2 and 2 of the ICCPR and ACHPR respectively.

19. For the right to vote to be meaningful, there must be access to information regarding who is standing, for what positions, their manifestos and other information relevant to voting. This right

⁴ According to Mujuzi Jamil, this means, *inter alia*, that the Electoral Commission has a constitutional obligation to make sure that arrangements are made for prisoners to cast their votes. See Controlling Consent Uganda's 2016 Elections edited by Oloka Onyango and Josephine Ahikire, Chapter 12 by Jamil Ddamulira Mujuzi "The right of prisoners to vote: Historical and contemporary concerns."p.270.

⁵ Equality and freedom from discrimination.

(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.(3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.(4) Nothing in this article shall prevent Parliament from enacting laws that are necessary for— (a) implementing policies and programmes aimed at redressing social, economic, educational or other imbalance in society; or (b) making such provision as is required or authorised to be made under this Constitution; or (c) providing for any matter acceptable and demonstrably justified in a free and democratic society.(5) Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Constitution.

of access to information is provided under Article 41 of the Constitution and is only restricted where release of information is likely to prejudice the security or sovereignty of the state or interfere with the right to privacy of any other person.

20. The right to vote is not a non-derogable right under Article 44 of the Constitution⁶. To the extent it is found in chapter 5 it is not affected by the general limitation on fundamental and other human rights and freedoms in chapter 4 that Article 43 creates in its clause 1⁷. However clause 2(c) brings the right to vote within the ambit of the public interest limitation test therein, because it forms part of the Constitution.⁸

21. After subjecting it to this test, I find that nothing in the right to vote as envisaged in article 59 runs contrary to any part of article 43. It doesn't prejudice the fundamental rights and freedoms of others and it is not against the public interest. Limiting the right to vote for these Ugandans is not easily acceptable as demonstrably justifiable in a free and democratic society and it rises beyond what is provided in any part of the Constitution.

22. The public interest test in clause 2(c) only reinforces the right to vote as a justifiable and protected right. The clause is therefore a shield, and not a sword, for the right to vote of these Ugandans.

23. By disenfranchising these Ugandans, there is also a violation of article 1 of the Constitution which stipulates that all power belongs to the people who shall exercise their sovereignty in accordance with the Constitution; all authority in the state emanates from the people of Uganda

⁶ The Bill of rights in the Constitution is chapter four. It runs from Article 20 to 45. Article 44 provides the non-derogation of particular rights and freedoms. However the right to vote is not included. This right is provided on its own under Article 59 which is under chapter 5 of the constitution.

⁷ Article 43 titled "General limitation on fundamental and other human rights and freedoms" provides thus: (1) in the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest. (2) Public interest under this article shall not permit- a) political persecution; b) detention without trial; c) any limitation of the enjoyment of the rights and freedoms prescribed by this chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, **or what is provided in this Constitution** (emphasis mine).

⁸ Ibid.

and the people shall be governed through their will and consent; all power and authority of government and its organs derive from the Constitution, which in turn derives its authority from the people who consent to be governed by the Constitution.

24. Clause 4 of article 1 is most profound in this case. It provides that the people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda. It ties in well with objective II (i) of the National objectives and Directive principles of state policy which provides that the state shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance. This is the foundation of the right to vote. Needless to say, it is difficult to comprehend that article 1 is complied with as required when the citizens in issue do not exercise their right to vote.
25. I am persuaded by Sachs .J in the August case in the South African Constitutional court when he relied on Cory J of the Canadian Supreme Court to say: “All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is a proud badge of freedom. While the Charter guarantees certain electoral rights, the right to vote is generally granted and defined by statute. That statutory right is so fundamental that a broad and liberal interpretation must be given to it. Every reasonable effort should be made to enfranchise citizens. Conversely every care should be taken to guard against disenfranchisement.”⁹
26. Sachs J also referred to Arbour JA in *Sauvé v Canada (Attorney General)* 7 OR (3rd) 481 (CAO) at 488 to explain that “incarceration conditions should be made, as far as possible, compatible with the fullest possible exercise of the right to vote rather than advanced as a reason to deny that right altogether.”¹⁰ I have nothing useful to add.

⁹ Sachs J in *Arnold Keith August & Anor v. The Electoral Commission & Others* (1999) ZACC 3 at page 23 para 17. See also Cory .J in *Haig v Canada* 105 DLR (4th) 577 SCC) at 613.

¹⁰ *Ibid.* Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) & others.

27. Universality of the franchise is important not only for nationhood and democracy.¹¹ The vote of each and every citizen is a badge of dignity and the personhood. Everybody counts. It binds us all in a single interactive polity. Any interpretation of the right to vote that disenfranchises must be knocked down and that which enfranchises upheld as being in line with the constitution.
28. The Prisons Act of 2006 - which came into force after the 1995 Constitution, presented an opportunity to conform to article 59 of the Constitution in unequivocal terms. However this was not the case. It is silent on prisoners' right to vote.¹² Nonetheless it also does not remove the prisoners' constitutional right to vote.
29. The disenfranchisement of these Ugandans is a violation of Section 18 of the Electoral Commission Act which requires the inclusion by the second Respondent of all persons entitled to vote in any election in the voter's register. It also fetters these citizens duty to register for elections under section 19 of this Act.
30. Even a comparative analysis demonstrates that several other democracies enforce the right to vote for prisoners and those in the diaspora. South Africa, Ghana, Kenya, Nigeria and Zambia allow these categories of citizens to vote.
31. From the above, I find no justification for the second Respondent's continued violation of the named Ugandans constitutional rights. I am disinclined to consider that the application is frivolous or in any way barred by law. Issues i, ii, and iii are resolved in the affirmative. The application succeeds with the following declarations and orders:

¹¹ Supra Sachs .J in the August case.

¹² This is regardless of the fact that when it was introduced in Parliament as a Bill, it's objective was stated as "to bring the law governing the prisons service in conformity with the Constitution of Uganda" (Parliament of Uganda, Hansard May 2, 2006: 17187). See Mujuzi Jamil, (supra) p.268. However the drafters of the Constitution envisaged and stipulated that prisoners enjoyed all rights of citizens, including the right to vote.

- i) As citizens, Ugandans of eighteen years and above who are in prison or the diaspora have the right to vote under article 59 of the Constitution.
- ii) The second Respondent's conduct of depriving them of this right is illegal as it infringes their rights in violation of articles 1, 59 and 21 of the Constitution.
- iii) The second Respondent is accordingly directed to comply with its obligation under article 59 clause 3, to wit, take all necessary steps to ensure that as citizens, they register and exercise their right to vote.
- iv) Given the public interest nature of this case and the fact that the Applicant was not directly affected as a prisoner or Ugandan in the diaspora, I will not award him costs.

I so order.

Lydia Mugambe.

Judge.

17 June 2020.