

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA**

**MISCELLANEOUS APPLICATION NO.275 OF 2018**

**(ARISING FROM MISCELLANEOUS CAUSE NO.112 OF 2018**

**1. HASSAN LWABAYI MUDIBA**

**2. WAIDHA FRED MOSES----- APPLICANTS**

**VERSUS**

**ELECTORALCOMMISSION-----RESPONDENT**

**BEFORE HON. JUSTICE SSEKAANA MUSA**

**RULING**

The applicants filed an application for Judicial review seeking to quash the respondent's decision that was communicated in the guidelines for Elections of Workers councillors; they also sought an Order of Mandamus to issue to compel the respondent to hold elections of Workers' Councillors to Local Government Councils, in accordance with the Local Government Act; They further sought an Order of Prohibition against the respondent from further disregarding the enabling laws in directing and conducting elections of Workers Councillors' to Local Government Councils; An Order for damages against the respondent.

The applicants subsequently filed an application for Temporary Injunction seeking to restrain the conduct of the elections until the determination of the main cause. The elections are slated to be conducted on 29<sup>th</sup> May 2018.

When the application came up for hearing on 25<sup>th</sup> May 2018, the respondent's counsel raised a preliminary objection, which in his view would dispose of the entire suit rather than the application for temporary injunction.

The applicants were represented by Mr. Rwaboogo Richard and the respondent was represented by Mr. Sabiiti Eric and Mr. Hamidu Lugoloobi.

The gist of the preliminary objection is that the applicants have used a wrong procedure of seeking to redress the electoral complaints and that the application offends the provisions of section 15 of the Electoral Commission Act and Articles 61(1)(f) and 64(1) of the Constitution.

Mr Sabiiti submitted that Article 61 mandates the respondent to hear and determine any complaints before and during the polling. That section 15 of the Electoral Commission Act equally buttresses this position and sets out the elaborate appeal procedures against such a decision made by the person dissatisfied. That an appeal shall lie to the High court against the decision of Electoral Commission. He further stated that the decision of High Court while sitting as an appellate court shall be final.

He submitted that Indeed, the applicants lodged a complaint with electoral commission and a decision was made but instead of appealing the decision they have opted to file an application for judicial review.

Mr Lugoloobi Hamidu also submitted that the court by entertaining this matter, it would be exercising an original jurisdiction under Article 139 and yet the jurisdiction so vested in it is an appellate jurisdiction vested under Article 64(1) of the same Constitution.

Mr Rwaboogo for the applicants in his brief reply and simple response submitted that this application is brought under the judicial review rules. That judicial review is a mechanism in place available to remedy an abuse of administrative power and not about the decision but rather the decision making process. He further stated that this court has entertained matters of elections as a court of first instance in the case of **Tweheyo vs Electoral Commission**. The applicants' complaint is about not conforming to the law.

I have thoroughly considered the objections raised by the respondent counsel and the submissions made in support together with the applicants' brief submissions.

The issue that this court shall now determine is;

***Whether the High Court has original jurisdiction to hear and determine an application in disregard of the set procedure under the Constitution?***

The question of jurisdiction of court is very important in determining the authority to be exercised by the court as it was explained in **Koboko District Local Government vs Okujjo Swali High Court Miscellaneous Application No. 001 of 2016** where court noted that;

***“One of the “policies of court” is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. Jurisdiction is the first test in the legal authority of a court and its absence disqualifies the court from exercising any of its powers. Jurisdiction means and includes any authority conferred by the law upon the court to decide or adjudicate any dispute between the parties or pass judgment or order. A court cannot entertain a cause which it has no jurisdiction to adjudicate upon.”***

In the present case, the applicants filed an application for judicial review arising from the decision of the Electoral Commission as provided under section 15 of the Electoral Commission Act.

Whereas judicial review could issue in some electoral matters if it involves the transgressions of the law or abuse of authority, the present case is not one of such matters. In judicial review proceedings, it is important to remember that the remedy is not intended to detract from properly constituted authorities the discretionary powers vested in them. In simple terms, it is not permitted to substitute the courts as the bodies making the decisions. It is intended however, that the relevant authorities use their powers in a proper manner.

In the case of **R v Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531** Lord Mustill noted;

***“The court must constantly bear in mind that it is the decision maker not the court that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made.”***

The applicants are attempting to run away from the appeal process provided under the Constitution and the Electoral Commission Act.

The jurisdiction of the High Court in such electoral matters is rooted in the Constitutional provisions as submitted by counsel for the respondents. Article 61(1) (f) provides;

**The Electoral Commission shall have the following functions; to hear and determine election complaints arising before and during polling.**

Article 64(1) provides;

**Any person aggrieved by a decision of the Electoral Commission in respect of any of the complaints referred to in article 61(1) (f) of this Constitution may appeal to the High Court.**

Article 64(4) provides;

**A decision of the High Court on an appeal under clause (1) or (3) of this article shall be final.**

The above Articles of the Constitution are further reproduced under Section 15 of Electoral Commission Act as follows;

**(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; where the irregularity is confirmed, the Commission shall take necessary action to correct the irregularity and any effects it may have caused.**

**(2) An appeal shall lie to the High Court against a decision of the commission confirming or rejecting the existence of an irregularity.**

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

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

The sum effect of the above provisions is that High Court is only vested with appellate jurisdiction and any attempt to vest the same court with an original jurisdiction by way of judicial review would be erroneous.

The framers of the Constitution which is the supreme law of the land enacted these provisions on purpose. The purpose was to confine such complaints to the Electoral Commission to ensure effective process before and during polling. If the complaint is not satisfactorily resolved then it would end up at the Court as an appeal and the decision of High Court is final.

The procedure adopted by the applicants would end up in the appeal system from the High Court up to the Supreme Court which was never intended by the framers of the Constitution.

To fortify my decision is the Supreme Court case of **Uganda Revenue Authority vs Rabbo Enterprises (U) Ltd & Mt Elgon Hardwares Ltd Civil Appeal No. 12 of 2004** (decided 2017);

***“Article 139(1) of the Constitution provides that the High Court shall , subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law.***

***My understanding of the above Constitutional provision is that the High Court exercises its unlimited jurisdiction subject to other provisions of the Constitution. One such provision envisaged in Article 139(1) is Article 152(3) of the Constitution which provides for Tax Appeals Tribunal”***

***“It would be bizarre that the legal regime would give the High Court dual jurisdiction”***

I am bound to follow the reasoning and principle of law set out by the Supreme Court, that the High Court in this matter before court only [has an appellate jurisdiction as set out under Article 64(1)(4) and the same court should not exercise original jurisdiction while it is vested with appellate jurisdiction.

The 1<sup>st</sup> applicant as a candidate duly lodged a complaint dated 10<sup>th</sup> May 2018 but was received at the respondent’s head office on 14<sup>th</sup> May 2018. The Electoral Commission on the same day 14<sup>th</sup> May 2018 responded to the complaint, which I believe he duly received since the same is attached to both his affidavit in support of the application for temporary Injunction and main application for judicial review. Accordingly the applicant ought to have followed the procedure that is well set out under Article 64 of the Constitution and Section 15 of the Electoral Commissions Act.

The case of **Charles Nsubuga vs Eng Badru Kiggundu & 3 others Miscalleneous Cause No 148 of 2015** cited by the respondent counsel is not applicable to the present case and quite distinguishable. In that case the applicant had not lodged any complaint at all with Electoral Commission and the same had been brought as an application for enforcement of rights.

The applicants have brought this application and the main cause in disregard of the clear provisions of the Constitution and the Electoral Commissions Act and therefore it is incompetently before court.

In the result this application together with the main application are hereby struck out with no order as to cost.

I so order

**SSEKAANA MUSA  
JUDGE  
28/05/2018**