THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS CAUSE NO.343 OF 2020

AINE GODFREY KAGUTA SODO---------- APPLICANT

VERSUS

1. **NATIONAL RESISTANCE MOVEMENT**
2. **SHARTSI NAYEBARE KUTESA MUSHERURE--- RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for Judicial Review under Article 42 of the Constitution and Section 36 of the Judicature Act as amended, Rules 6, 7 and 8(2) of the Judicature (Judicial Review) Rules, 2009 for the following Judicial review and reliefs/orders;

1. The actions and decisions of the 1st Respondent not to endorse the Applicant as the National Resistance Movement (NRM) flag bearer for the Mawogola North Constituency for the 2021 General elections and yet the Applicant had won the Flag bearer elections and instead declare that the NRM Party did not have a flag bearer for the Mawogola North NRM Parliamentary seat is tainted with illegality, irrationality, procedural impropriety, unfairness and is null and void.

2. The actions and decision of the 1st Respondents' Electoral Commission to delay the hearing and determination of the Complaint made on the 2nd October 2020 against the election of the Applicant a

flag bearer for the Mawogola North NRM Parliamentary seat until the date the of nominations by the National Electoral Commission on the 15th and 16th October 2020 is tainted with illegality, irrationality, procedural impropriety, unfairness and is null and void.

3. The decision of the 1st Respondents' Elections Tribunal to declare that there was no winner of the National Resistance Movement flag bearer for the Mawogola North Constituency elections and refer the matter to the Central Executive Committee of the 1st Respondents for a decision is ultra-vires and is tainted with illegality, irrationality, procedural impropriety, unfairness and is null and void.

4. The actions and decision of the 1st Respondents' Electoral Commission, Elections Tribunal and the Secretary General to declare that there was no winner and hence no flag bearer for the Mawogola North NRM Parliamentary Primaries is tainted with illegality, irrationality, procedural impropriety, unfairness and is null and void.

5. The 1st Respondent has an obligation to follow and comply with its Party Constitution and the Election Regulations in the conduct of its primaries, hearing and determination of disputes arising from Party Primaries.

(B) AN ORDER OF CERTIORARI be issued to call for and quash;

6. The ruling of the Chairman of the NRM Elections Tribunal dated the 15th October 2020.

7. The Letter of the Secretary of the NRM Party dated the 15th October 2020 advising the Applicant to stand as an independent.

8. An Order of Mandamus doth issue requiring and/or compelling the Respondents to endorse the Applicant as the National Resistance Movement flag bearer for the Mawogola North Constituency for the

2021 Parliamentary elections and notify the Electoral Commission of Uganda accordingly.

9. An order that the Respondents pay General damages and costs to the Applicant.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavits in support of the application by Aine Godfrey Kaguta Sodo but generally and briefly state that;

1. The Applicant and the 2nd Respondent together with another person contested for the National Resistance Movement (NRM) flag bearer elections for the Mawogola North Constituency for the 2021 General elections. The elections, which were scheduled for the 4th of September 2020 was postponed several times and eventually held on the 30th September 2020.

2. At the election the Applicant was returned as the winner of the said elections with a total of 17,347 votes representing 46% of the total votes cast while the 2nd Respondent was runner up with 16,104 votes representing 42.7% and Kisekka Salim with 4,274 representing 11.3%.

3. Following declaration of the Applicant as winner, on the 2nd October 2020, the 2nd Respondent Petitioned the 1st Respondent's Elections Tribunal challenging the election of the Applicant. The said Petition was heard by the 1st Respondent's officers called ISAAC KYAGABA and AHMED KALULE MUKASA on the 8th of October 2020. However, no ruling was made on the Petition until the 15th October 2020 which was one of two days set aside for the countrywide nomination of Parliamentary candidates.

4. On the 15th of October 2020 the Applicant was verbally

informed that the Chairman of the NRM Election Disputes Tribunal a one ENOCH BARATA had delivered the decision on the Petition and wherein he had held that the Petition had succeeded and that however, without the proper exercise of voter franchise, the Tribunal is not able to pronounce a winner of the election and recommended the Parties to the Central Executive Committee for directions. On the same night of the 15th October 2020 the Secretary General of the Respondent by letter addressed to the Chairman of the Electoral Commission notified the Chairperson that the NRM would not endorse any candidate to contest and carry its flag for the position of Member of Parliament for Mawogola North Constituency, Sembabule.

5. The actions and decisions of the 1st Respondent not to endorse the Applicant as the National Resistance Movement (NRM) flag bearer for the Mawogola North Constituency for the 2021 General elections and yet the Applicant had won the Flag bearer elections and instead declare that the NRM Party did not have a flag bearer for the Mawogola North NRM Parliamentary seat is tainted with illegality, irrationality, procedural impropriety, unfairness and is null and void.

6. The actions and decision of the 1st Respondent's Electoral Commission to delay the hearing and determination of the Complaint made on the 2nd October 2020 against the election of the Applicant a flag bearer for the Mawogola North NRM Parliamentary seat until the date the of nominations by the National Electoral Commission on the 15th and 16th October 2020 is tainted with illegality, irrationality, procedural impropriety, unfairness and is null and void.

7. The decision of the 1st Respondent's Elections Tribunal to declare that there was no winner of the National Resistance Movement flag bearer for the Mawogola North Constituency elections and refer the matter to the Central Executive Committee of the 1st Respondent for a decision is ultra-vires and is tainted with illegality, irrationality, procedural impropriety, unfairness and is null and void.

8. The actions and decision of the 1st Respondent's Electoral Commission, Elections Tribunal and the Secretary General to declare that there was no winner and hence no flag bearer for the Mawogola North NRM Parliamentary Primaries is tainted with illegality, irrationality, procedural impropriety, unfairness and is null and void.

9. The 1st Respondent failed its obligation to follow and comply with its Party Constitution and the Election Regulations in the conduct of its primaries, hearing and determination of disputes arising from Party Primaries.

10. That the applicant and 2nd respondent appeared for hearing of the Election dispute before a panel of two advocates; Isaac Kyagaba and Ahmed Mukasa Kalule. They never appeared before Barata Enoch who claims to have heard the complaint and signed the ruling.

The respondents opposed this application and the 1st respondent filed an affidavit in reply through Enock Barata as the Chairman of the Election Disputes Tribunal of the National Resistance Movement (NRM), while the 2nd respondent who applied to be added as party to the application also filed an affidavit.

1. The 1st respondent the applicant was nominated by the NRM Electoral Commission to stand for election as a flag bearer for the NRM Party Mawogola North County, Sembabule District.

2. The elections for choosing a flag bearer were postponed twice on account of the fact that the candidates surrogates and supporters were involved in violent activities that rendered conditions in the Constituency impossible to hold peaceful elections.

3. That after the elections the applicant was returned the winner and the loser petitioned the NRM Election Disputes Tribunal on 2nd October 2020 challenging the election of the applicant as the flag bearer for the NRM in Mawogola North Constituency.

4. That at the hearing of the petition, evidence was brought before me required extensive investigation and consideration required time. I was thus not able to render a considered ruling until 14th October 2020.

5. That my findings were that the NRM primary elections held on the 30th September 2020 were marred by violence, ferrying of voters, omission of results from some villages that voted, lack of election in some villages and a second illegal vote beyond the voting time at one of the polling stations.

6. That the Tribunal made conclusive findings particularly that;
   (a) There was violence and ferrying of voters in particular polling station and the results of those polling stations could not be allowed to stand.

(b) There was ferrying of voters of Kyemambi and Ekizano polling stations which had a combined total of 450 voters.

(c) There was an illegal second vote at kikoma polling station after 5pm in the evening and the number of voters was approximately 1400

(d) That the above substantially affected the result of the election as the margin between the top two contestants was 1580 votes.

(e) In light of the irregularities the election did not determine a winner.

7. That as a consequence thereof I was minded to order a re-election in affected villages in order to determine the actual winner. However, I was also minded that given the time of closure of nominations for the general elections, this order would have been impossible to execute any mindful effect.

8. That I did recommend the parties to the highest organ for directions outside the findings of the Tribunal.

9. That the applicant opted out of the NRM when he opted to be nominated as an Independent candidate. The orders sought by the applicant would be of no legal effect rendering such a decision moot and for academic purposes.

The 2nd respondent who was added as a party upon an application filed an affidavit in reply and stated as follows:-

1. That the tribunal chaired by Enoch Barata, in its decision of 14th October 2020 found that indeed there had been irregularities such as violence and ferrying of voters in certain polling stations and as such the results in the affected polling station could not stand. But since the re-election was not given viable timelines set by the National

Independent Electoral Commission, the tribunal could not pronounce a winner and therefore forwarded the issue to the Central Executive Committee.

2. That the tribunal and Secretary General of NRM acted within their powers to entertain the dispute and decide for the NRM not to endorse any candidate to contest and carry its flag for the position of Member of Parliament of Mawogola North Constituency, Sembabule District.

3. That the applicant was at all times party to the proceedings of the Tribunal and the Secretary General of NRM and was given a fair hearing during the process of arriving at the decisions.

4. That the courts of law do not decide cases where no live disputes between parties are in existence. That the court orders must have practical effects and not be for academic purposes only unlike the current application.

5. That there is no live dispute between the parties to be decided by this honourable court as NRM nominations for the Parliamentary candidates for Mawogola North Constituency and all other constituencies have already been closed as such this application is overtaken by events.

6. That the applicant sought and obtained the Independent Electoral Commission's nomination to run and is currently running for member of Parliament for Mawogola North Constituency, Sembabule District as an Independent candidate, as such, the applicant is without

locus as he waived his rights to prosecute this application as a member of NRM. That this renders this application moot.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

Four issues were proposed for court's resolution;

1. Whether the application is competently before the court?

2. Whether the actions and or decisions of the 1st respondent are illegal irrational and procedurally improper?

3. What are the remedies available to the applicant?

The applicant was represented by *Mr. Paul Kutesa* whereas the 1st respondent was represented by *Mr. Kihika Oscar* and the 2nd respondent was represented by *Mr. David Mpanga.*

Whether the application is competently before the court?

The applicant's counsel submitted that the 1st and 2nd Respondents have in their affidavits erroneously contended that the application is not competent by reason that the Applicant ceased being a member of the 1st Respondent Party the moment he was nominated as an independent and thus has no *locus standi* and that the Application is moot as a result.

It was his submission that the Applicant by standing as independent Member of Parliament act of leaving the 1st Respondent Party. Article 8(4) of the Constitution of the 1st Respondent stipulated the grounds of cessation of membership of the Party and being nominated as independent is not one of the grounds.

The applicant's counsel contended that the peculiar facts of this matter are such that the Applicant was pushed by the illegal and irrational acts of the 1st Respondent to contest as an independent candidate. See the letter of the Secretary General of the 1st Respondent. It is therefore disingenuous for the 1st Respondent to argue that the Applicant left the Party when the Applicant was virtually forced to stand as independent by the actions of the Party.

This application and the resultant decision would not in any way be moot. In PINE PHARMACY LTD & ANOR –V- NATIONAL DRUG AUTHORITY HCMC 0142 of 2016, Musota J interlia held that an appeal would not be moot if has the effect of resolving the controversy affecting the rights of the Parties. Indeed the 2nd Respondent made an application to join this application on the basis that the decision of this Court would invariably affect her rights. A moot application would not have had the effect of affecting her rights.

The 1st respondent submitted that in the affidavit in reply to the application sworn by Enoch Barata on the 30th of November 2020, it is stated therein that as a consequence of his findings, he was minded to order a re-election. However, he further states, he was mindful that given the time of closure of nominations for the general elections, this order would have been impossible to execute with any meaningful effect.

The ruling of the Deponent in effect meant that the NRM as a party was not in a position to endorse the Applicant or the 2nd Respondent as its flag bearer for Mawogola North Constituency in the general elections. Indeed, the Secretary General informed the Chairperson of the National Electoral Commission as such in her letter dated 15th of October 2020.

If this Honorable Court were to quash the ruling of the NRM Elections Tribunal, it in effect would mean that the Applicant would then have to be nominated the NRM flag bearer for Mawogola North Constituency. The Applicant has indeed prayed for an order of Mandamus compelling the 1st Respondent to endorse the Applicant as its flag bearer.

The 1st respondent further contended that nominations for the position of Member of Parliament were held on the 15th and 16th of October 2020 and were closed. The Applicant did present himself for nomination as an Independent. The campaigns are now well underway. The National Electoral Commission cannot at this stage reopen the nomination process to nominate the applicant as flag bearer.

Indeed, in paragraph 18 of the 1st Respondent's affidavit in reply, it is stated that *"if any of the reliefs sought by the applicant were to be granted, they would be of no legal effect rendering such decision moot and for academic purposes only given that nominations for parliamentary candidates have already been closed."*

Given the above, it is thus contended that if court were to issue such an order it would be for academic purposes only without practical effect. In effect the application before this Honorable Court is a futile exercise. It is for all intent and purpose a moot exercise.

Further, the applicant concedes in his **affidavit in rejoinder to the 1st and 2nd respondents' affidavits in reply** in **paragraph 15** where he states that, *"…I was nominated as an independent candidate…"*

The respondents submitted that the applicant is estopped from disputing the decisions of the tribunal as he lacks locus standi on account of the fact that he opted to be nominated as an independent candidate.

It is not disputed that the Applicant opted to stand as an independent candidate. He did so on his own volution. He however falsely claims that he was advised to do so by the Secretary General of the NRM.

The applicant therefore voluntarily relinquished his legal right and advantage when he opted to be nominated as independent candidate hence waiving his rights to challenge the internal workings of the said party. He accordingly has no locus to challenge the decisions of a Party to which he no longer belongs.

Analysis

This court does not agree with the argument of mootness of the case since the parties are both still interested in the resolution of the matter or dispute which attaches some rights of continuing to associate with the NRM as big political brand.

In the case of ***Julius Maganda vs NRM. H.C.M.C No. 154/2010,*** Hon Justice Musota Stephen 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."

Additionally, in the case of ***Pine Pharmacy Ltd and 8 others v National Drug Authority Misc. Application 0142 of 2016*** Hon. Justice Stephen Musota cited ***Joseph Borowski vs Attorney General of Canada (1989) 1 S.C.R*** in which it was held that;

"The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. Accordingly, if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot."

In the present case the applicant is still aggrieved since his party refused to nominate him and seeks to challenge the decision of the party which to that extent vests him with some rights emanating from the Constitution of the party. These rights still accrue to the applicant and are not moot as contended by both the respondents.

The Constitution of the NRM party provides as follows;

9 (1) Subject to the provision of this Constitution, every member of NRM shall have a right to:

a) Take a full and active part in the discussion, formulation and implementation of policies of NRM at the organ where he or she belongs;

b) Attend meetings of the relevant organs where he/she is a member;

c) Receive and disseminate information on all aspects of NRM policies and activities.

d) Offer constructive criticism of any member, official, policy, programme or activity within the organs of NRM.

e) Take part in elections and be eligible for election to any elective office within the structures of NRM or appointment to any committee, structure, commission or delegation of NRM;

f) Submit proposals or statements to the National Conference, or the National Executive Council (NEC) provided such proposals or statements are submitted through the appropriate structures.

In addition the applicant by virtue of being associated with the NRM party as a member or a flag bearer would become a direct member of Parliamentary NRM Caucus under *Article 10(d)(i) of the Constitution*.

Secondly, the applicant will also become a member of the National Conference as either an NRM Member of Parliament or NRM flag bearer under *Article 11(2)(j)(p) of the NRM Constitution*.

Thirdly, the applicant would become a member of National Executive Committee as an NRM Member of Parliament or NRM Parliamentary flag bearer as provided under *Article 12(2)(e)(f) of the Constitution*.

The above positions are attained by virtue of being an NRM flag bearer and it entitles the applicant once declared as to automatically become member and take part in the policies and activities of the NRM party.

This application is not moot as contended by the respondents since there are several rights that would accrue to the applicant once declared as an NRM Flag bearer. If the application is moot as the respondents contend why did the 2nd respondent apply to be joined in an application which is hypothetical, academic and or moot?

The second ground of competency is whether the applicant has locus to challenge the decision of the party since he was nominated to contest as an Independent candidate.

The circumstances of this case are quite unique and are applicable to this case alone and any earlier decisions as presented by the respondent would not be applicable. The applicant was declared a winner with 46% of the votes until when the 1st runner up challenged the victory and subjected the win to NRM Election Disputes Tribunal.

The decision was never made about the outcome of the election as the Chairperson of the tribunal communicated but rather belatedly the final decision was to be made on or after 16th October and yet it was the closing date of nominations of the National Parliamentary Elections.

The actions of the 1st respondent pushed both parties in a tricky situation and the only practical thing to do was to stand as independent candidates since the party had declined to nominate either of the parties as they awaited the decision of the Central Executive Committee.

The 1st respondent who refused to take a final decision on who is the proper flag bearer is cannot turn around and claim that the applicant decided to leave the party. Surprisingly, the 2nd respondent who is also an Independent candidate is also making the same argument of lack of locus to make the application and yet she has applied to join the application when she is also standing as an independent candidate. Is this not a case of double standards? What is good for the goose is good for the gander?

The 2nd respondent was comfortable with there being no flag bearer for the party and never challenged, but rather woke up to join proceedings when her opponent went to court. The applicant has *locus standi* to challenge the decision which is depriving him of the rights that accrue from the NRM party. The decision of the NRM Election disputes tribunal gives the applicant every right to subject the same to judicial review for illegality, procedural impropriety and irrationality.

Whether the actions and or decisions of the 1st respondent are illegal irrational and procedurally improper?

In Uganda, the principles governing Judicial Review are well settled. Judicial review is not concerned with the decision in issue but with the decision making process through which the decision was made. It is rather concerned with the courts' supervisory jurisdiction to check and control the exercise of power by those in Public offices or person/bodies exercising quasi-judicial functions by the granting of Prerogative orders as the case my fall. It is pertinent to note that the orders sought under Judicial Review do not determine private rights. The said orders are discretionary in nature and court is at liberty to grant them depending on the circumstances of the case where there has been violation of the principles of natural Justice. The purpose is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected to. ***See; John Jet Tumwebaze vs Makerere University Council & 2 Others Misc Cause No. 353 of 2005, DOTT Services Ltd vs Attorney General Misc Cause No.125 of 2009, Balondemu David vs The Law Development Centre Misc Cause No.61 of 2016.***

For one to succeed under Judicial Review it trite law that he/she must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

The dominant consideration in administrative decision making is that public power should be exercised to benefit the public interest. In that process, the officials exercising such powers have a duty to accord citizens their rights, including the right to fair and equal treatment.

Judicial review may be regarded as a mechanism to ensure that public authorities act lawfully in accordance with the law. The review court concerns itself with the legality of exercise of power to ensure that the actions of the authority are taken lawfully within the legal limits of power, that the statutory provisions are lawfully construed by it.

The applicant's counsel submitted that the actions and/or decision of the leading to the declaration that the 1st Respondent were illegal, irrational and procedurally improper. The ruling made 1st Respondent's Elections Disputes Tribunal was in contravention of the rules of natural Justice and in contravention of the 1st Respondent's Election Regulations 2020 and hence an illegality.

The 1st Respondent in her decision making committed blatant illegalities that render the final outcome a nullity. First the ruling of the 1st Respondent's election disputes Tribunal which purported to annul the victory of Applicant was signed by a one Mr. Enoch Barata. However, the Applicant states in his affidavit in rejoinder that Mr. Enoch Barata did not preside over the hearing of the dispute but it was rather Mr. Isaac Kyagaba and Mr. Ahmed Kalule Mukasa who did.

It was the applicant's contention that it is a complete and total illegality for a person that did not hear a dispute to render a ruling on the same dispute which he did not hear and to determine the rights of the Parties.

Secondly, that the 1st Respondent's Election disputes Tribunal in violation of its own rules the National Resistance Movement Election Regulations 2020 to the affidavit in support of the Application failed to make definitive

decision on the Petition and instead referred it to the Central Executive Committee of the Party.

Regulation 22(2) of the National Resistance Movement Election Regulations 2020 provides that:

> *"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 Tribunal; and where the irregularity is confirmed, the Tribunal shall make recommendations to the Commission which shall take necessary action to correct the irregularity and any effects it may have caused".*

The Tribunal had to investigate the complaint and if confirmed, had to recommend to the electoral commission of the Party the actions to take to correct the irregularity and its effects. Instead in this case, the Tribunal did not direct the Commission on the steps to take to resolve the matter but instead sent the Parties to the Central Executive Committee of the Party for Directions. This was a complete violation of the Parties own prescribed procedure and rendered the decision an illegality and procedurally improper.

In addition the decision of the 1st Respondent's Secretary General as contained in her letter of 15th October 2020 not endorse the Applicant as the flag bearer for Mawogola North is illegal and irrational. This is because the Secretary in the very same letter had stated that the Party's elections Tribunal had not been able to conclusively determine the Petition on its merits due to time constraints. We submit that since no conclusive determination on the merit had been made then the election and declaration of the Applicant as the winner of the primaries stood. The Secretary General did not have the power to refuse to endorse the Applicant since no determination of the Petition had been made.

The applicant contended further that the actions and/or the decisions made by 1st Respondent's Elections Disputes Tribunal and Secretary General in

refusing to endorse the Applicant as the 1st Respondent's flag bearer for Mawogola North Constituency was irrational and unfair.

The 1st Respondent's election disputes Tribunal in deliberately failed and/or refused to hear and make a decision in dispute from the time it was instituted on the 2nd of October 2020 and only belatedly delivering its decision on the 15th October 2020 was irrational and unfair. This is especially so given that the 1st Respondent was aware whole exercise was to serve the sole purpose of the party selecting its flag bearer in time for the nominations that were scheduled for the 15th and 16th October 2020. To wait to deliver a ruling until the day of nominations was in obvious defiance of logic.

The 1st respondent in their submission stated that the tribunal rendered a ruling and found that the applicant's election as flag bearer had been marred by irregularities and although an order for a re-election was appropriate it was not practical in the circumstances.

In the affidavit of the 2nd respondent, states that, *the election was marred by various irregularities including, but not limited to violence; unrecorded and uncounted votes; influx of ineligible voters; and procedural irregularities* as such the victory of the Applicant could not stand.

Therefore the decision of the tribunal to declare that the position of flag bearer for the NRM party Member of parliament for Mawogola North Constituency, Sembabule District is not illegal as there was no error of law in the process of making the decision but rather the decision was made on the basis that the elections were marred with irregularities.

In addition, the tribunal was minded to order a re-election in the affected villages however, this could not be achieved as the NRM nominations had already closed and the electoral commission could not at this stage reopen the nomination process to nominate the applicant as flag bearer.

It is contended that being the Chairman of the Tribunal he was involved in the investigation and evaluation of the evidence that was presented before the tribunal. Indeed, in paragraph 9 of his affidavit he deposes that the evidence brought before him required extensive investigation and consideration which required time.

It is thus contended that there was nothing illegal about Enoch Barata delivering the ruling.

Given the above circumstances, it is submitted that the decision by the 1st Respondent and Secretary General in refusing to endorse the any candidate as the NRM flag bearer for Mawogola North Constituency to be fair and just as it was not practical. This is more so given that the conduct of the Applicant in the run up to the primary elections is what caused their postponement in the first place.

The 2nd respondent submitted that the National Resistance Movement Election Regulations do not prescribe who should sign the rulings and decisions of the tribunal. According to counsel, the chairman of the Tribunal would be a proper person to sign the rulings or decision.

The tribunal was alive to the fact that it would ordinarily have ordered for a re-election in the affected polling stations but which remedy it could not grant because of the time to the close of nominations for the general elections. It could not make an academic order which would serve no purpose. It therefore recommended the CEC to give directions something CEC is empowered to do under the NRM Constitution. Therefore according to 2nd respondent's counsel the tribunal was right to seek the guidance of the CEC in a situation where the default recommendation of a re-election was not practically sensible in light to the time that was left to the close of the nominations.

The 2nd respondent's counsel further submitted that the applicant does not point to any determination, whether oral or written, by which the tribunal declared its intention not to hear the matter. He contended that the applicant's submission is utter speculation and suspicion. There is no proof that the tribunal deliberately failed or decided not to hear the matter that time. Speculation may be understandable, suspicion is inevitable but it is not proof. Ultimately there was no decision capable of being called irrational.

Since there was no time to conduct a re-election, it was a fair compromise not to endorse any candidate. The decision not to endorse any candidate was rational and fair and cannot be impugned.

Analysis

The applicant contended that the person who took the decision did not hear the parties and this according him was illegal. Indeed this is not disputed and the respondents seem to concede to this and have in their submissions justified why Enoch Barata who never heard the election petition decided instead of Isaac Kyagaba and Ahmed Kalule Mukasa.

Any good system of administration of justice is based on the maxim that the '*one who decides must hear*', meaning thereby that one and the same person must hear and decide, and that hearing and deciding functions should not be bifurcated.

That a person who hears must decide and that divided responsibility is destructive of the concept of a fair hearing. If one person hears and another decides like in this present case, then personal hearing becomes an empty formality. See ***Automotive Tyre Manufacturers Association v designated Authority [2011] 2 SCC 258****(paras 83 and 84)*

Personal hearing enables the decision maker/authority concerned to watch the demeanour of the witnesses and clear up his doubts during the court of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. It needs to be pointed out that it is settled principle of Administrative law that the decision-making function cannot be delegated to another official unless the adjudicatory body concerned is authorised to do so either expressly or impliedly by the relevant statute. However, the function of enquiry can be assigned to another official with several precautions being put in place to ensure a fair hearing.

The procedural safeguards made by the NRM party in the resolution of disputes required a hearing before the tribunal and a decision being taken by the same persons who had heard the complaint. The nature of the rules governing the determination of election disputes involved tendering of evidence and making oral arguments to support the respective case. This required the principle of "*the one who hears must decide*" to be strictly adhered to avoid greater injustice. Therefore, the principle implies a duty to act fairly i.e fair in action.

The facts as presented clearly indicate that the person who made the decision as he stated in his affidavit in reply, indeed never heard the parties. This a total breach of the duty act fairly and thus puts the said decision in question for being illegal and in breach of rules of fairness as enshrined in both the National Constitution as well as the NRM Constitution.

It is cardinal principle of our judicial system that a case should be decided by the authority hearing the arguments and a successor cannot decide a case without hearing the argument afresh on the ground that arguments

have already be advanced before the predecessor who left the case without deciding it himself.

The decision of the 1st respondent is therefore illegal and tainted with procedural impropriety.

What are the remedies available to the applicant?

The grant of judicial review remedies remains discretionary and it does not automatically follow that if there are grounds of review to question any decision or action or omission, then the court should issue any remedies available. The court may not grant any such remedies even where the applicant may have a strong case on the merits, so the courts would weigh various factors to determine whether they should lie in any particular case. See ***R vs Aston University Senate ex p Roffey [1969] 2 QB 558, R vs Secretary of State for Health ex p Furneaux [1994] 2 All ER 652***

This court issues an ***Order of Certiorari*** quashing both decisions of the 1st Respondent i.e the NRM Election Disputes Tribunal and that of the Secretary General of NRM since it was based on an illegal decision of the Election Disputes Tribunal.

Under judicial review proceedings, once a decision has been proved to be illegal, the resulting effect of certiorari would therefore be to quash the said ultra vires and/or illegal decision and deprive the said decision of any effect whatsoever. In ***Cooks v Thanet District Council [1983] 2 AC 286*** the court held that;

> "*By quashing the decision, certiorari confirms that the decision is a nullity and is to be deprived of all effect*"

The effect of certiorari in most instances is to make it clear that the public body and public law powers have been exercised unlawfully, and consequently, to deprive the public body's act of any legal basis.

The effect of granting an order of *certiorari* is to establish that a decision is illegal or ultra vires, and to set the decision aside. The decision is retrospectively invalidated and deprived of any legal effect since its inception.

The court can only ensure that a decision has been reached lawfully, and if not quash the unlawful decision. The court cannot substitute an alternative decision for that of the decision-maker. In many circumstances, the decision maker will be free to reconsider the matter and make a fresh decision (which may even be the same as the original decision) provided that in doing so he/she does not repeat the error or make any further reviewable errors. ***Dr Ssesimba Badru v Chief Administrative Officer Nakaseke District Administration & Another High Court Miscellaneous Cause No. 380 of 2020***

A decision-maker will not, however, be able to retake the decision where the court held he has no power to take the decision in question. Nor will he be able to reach an identical second decision if the initial decision was so unreasonable or irrational that no reasonable authority could have taken such decision unless possibly, circumstances have changed since the time the first decision was taken. See ***R v Liverpool Crown Court, Ex p Lennon and Hongkins [1991] C.O.D 127.***

The application is allowed with to costs to the applicant.

SSEKAANA MUSA
JUDGE
21st/12/2020