THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(CIVIL DIVISION)
MISCELLANEOUS CAUSE NO. 431 OF 2019

1. **HON.LUKWAGO ERIAS**
2. **HON.AMURIAT OBOI PATRICK**
3. **HON.SALAAMU MUSUMBA PROSCOVIA**
4. **HON.NAMBOOZE BETTY**
5. **HON.MICHEAL KABAZIGURUKA**
6. **HON.SABIITI CHRISSY JACK**
7. **HON.WAFULA OGUTTU**
8. **HON.OKELLO ALBERT CHARLES ODUMAN:::::::APPLICANTS**
9. **CLLR. NYANJURA DOREEN**
10. **CLLR.OKELLO KENNEDY**
11. **MS. INGRID TURINAWE**
12. **DR. OKELLO GEORGE EKWARU**
13. **DR. WAKABI DOMINIC**
14. **MS. NABATANZI CISSY**

VERSUS

1. **ELECTORAL COMMISSION**
2. **BYABAKAMA MEGENYI SIMON ::::::::::::::::::RESPONDENTS**
3. **RWAKOOJO SAM**

BEFORE: HON JUSTICE SSEKAANA MUSA

RULING

The application was brought under Section 36 of the Judicature Act, Rules 3(1) & (2), Rule 6(2) & Rule 8 of the judicature (Judicial Review) Rules 2009 seeking the following orders;

(a) A declaration that the 2nd respondent's act of serving as the Chairman of the Electoral Commission before relinquishing his position as a Justice of the Court of Appeal is illegal.

(b) An Order of prohibition restraining and/or stopping the 2nd Respondent from serving in the capacity or position of Chairman Electoral Commission.

(c) An Injunction restraining the 3rd respondent from acting as the Secretary of the Electoral Commission.

(d) A declaration that whatever actions being taken by the 2nd & 3rd Respondents in the capacity of the Chairman & Secretary respectively are illegal, null and void.

(e) A declaration that the 3rd Respondent is not eligible for re-appointment as Secretary of the Electoral Commission.

(f) A writ of certiorari quashing the decision of the 1st respondent setting 11th December as the cut-off date for registration of all eligible voters.

(g) A declaration that the time set by the 1st respondent for revision and updating of the voters' register, vide 21st November 2019 to 11th December 2019, is illegal, irrational, unreasonable and ultra-vires.

(h) An award of costs of this cause and any other relief court may deem fit.

The grounds upon which this application is based are set out in the affidavit in support of Lukwago Erias on behalf of all applicants 14 applicants.

1. That I know that on the 11th day of October, 2015, the 2nd respondent was appointed as a Justice of Court of Appeal and that on the 18th day of November, 2016, he was again appointed as the Chairman of the Electoral Commission, and indeed he assumed office upon being vetted by Parliament.

2. That I know that the 2nd Respondent, on appointment as the Chairman of the 1st respondent never relinquished his position of justice of the Court of Appeal as required by law and therefore he still holds two public offices to-date.

3. That the term of office of the Secretary of Electoral Commission is five years in accordance with 2010 Amendment, renewable once.

4. That I know that during 2001, the 3rd respondent was appointed as secretary of the 1st Respondent, a position he has continuously occupied up to the present moment.

5. That on the 23rd day of September 2009, the said contract was revised and extended for a period of five years and upon expiry of the same on 23rd September 2014, it was further renewed for another period of five years which lapsed on the 23rd of September 2019.

6. That the continued occupation of the office or position of Secretary for the Electoral Commission by the 3rd respondent is illegal and contrary to the law and that he is not eligible for re-appointment to the same position.

7. That on the 21st day of November 2019, the 1st respondent issued a public notice to the effect of registration of all eligible voters as well as updating and revision of the voters' register shall be conducted strictly within 21 days, with a cut-off for all new applicants being 11th December 2019.

8. That the act of the 1st Respondent in arbitrarily setting the 11th day of December, 2019 as deadline for registration of all eligible voters is illegal, irrational, unreasonable and will disenfranchise many eligible

voters and those wishing to contest as candidates in different positions, especially those who will have turned 18 years after the 11th day of December, 2019.

The 3rd respondent deposed an affidavit on behalf of the Electoral Commission:

1. The application is misconceived, frivolous, vexatious, barred and an abuse of court process and ought to be struck out and or dismissed with costs.

2. That the 2nd respondent was on 7th January 2017 duly appointed Chairman, Electoral Commission.

3. That the 2nd respondent's personal file was moved from the judiciary to the Electoral Commission and is no longer with the Judiciary.

4. That immediately upon appointment of the 2nd respondent stopped performing the functions of a Justice of the Court of Appeal and stopped earning salary from the Judiciary or at all. The 2nd Respondent is at all material times remunerated under the Electoral Commission.

5. That this application has been filed out time after about 2 years from the date of 2nd respondent's appointment.

6. That in 2010, an amendment of the Electoral Commission Act was made to introduce a provision that the secretary shall hold office for a term of five years, renewable once.

7. That since the amendment was made to the Electoral Commission Act, I was first appointed under it on 29th August 2014 for a period of five years renewable once.

8. That on 12th August 2019, I wrote and indicated my willingness to have my contract renewed for the 2nd and last term.

9. That on 20th August the 1st respondent sought an opinion of the Attorney General on whether my contract was renewable in view of the amendment of section 5 of the Electoral Commissions Act.

10. That the Attorney General rendered his opinion to the effect that the amendment was not applicable to the contract of 3rd Respondent that run from 2009 to 2014 as the law did not act retrospectively.

11. That the Attorney General opined that my first term of service under the law as amended was from 2014-2019 and thus I was eligible for renewal of the contract once from 2019.

12. That my contract as Secretary of the Electoral Commission was renewed on 6th November 2019 for a period of 5 years effective 18th December 2019.

13. That the Electoral Commission in fulfillment of its constitutional mandate rolled out 2021 General Elections Road Map to the public in preparation for General Election, 2021.

14. That the 1st respondent is required to update the National voters Register to days appointed by statutory instrument as a date on which updating shall end.

15. That the cut off/deadline within which all persons are required to register as voters was published in National Gazette dated 8th November, 2019 under Vol. CXII No. 57

16. That I am aware that the National Voters Register cannot be updated endlessly without deadline since electoral activities move in a single track and do not overlap each other.

17. That the 1st respondent is required to transmit an electronic copy of the register to the players in time after nomination but before polling and Electoral Commission must print and supply the register to its returning officers upon which to nominate candidates which requires the Register to be ready by April 2020 according to the Roadmap.

18. That from the period of 16th December to April 2020 when the first nomination for Special Interest Groups shall take place, the 1st respondent must have carried out the following activities such as;

    a) Holding of Regional stakeholders workshops on the Display of the National Voters register and Special Interest groups registers by 6th February 2020 to 7th February 2020.
    b) Display of the National Voters' register at each polling station in line with section 24(1) and section 25(1) of the Electoral Commission Act by 19th February 2020 to March 2020.
    c) Display of Special Interest Groups voters register in each village/KCCA/UPDF/EC/Workers office by 19th February 2020 to 28th February 2020.
    d) Display of the Tribunal Recommendations at each parish in line with section 25(1)(a) of the Electoral Commission Act.
    e) Gazette and publishing candidates' nomination dates at each parish in line with Presidential Elections Act section 8(1),

Parliamentary Elections Act section 4(4)(a), section 9(1) and Local Governments Act section 119(1) by 6th April 2020 to 10th April 2020.

f) Nomination of Village Special Interest groups committee candidates (OP, PWD, Youth) by 8th April 2020 to 10th April 2020.

19. That all these activities have to be carried out after the voters register update and registration.

20. That accordingly, the decision of the 1st respondent to put a cut-off date so the activities in above can run smoothly in a timely manner is legal, rational and reasonable in the circumstances.

21. That inclusion of prospective voters on the Roll of voters ahead of time would cause confusion and complication to prospective candidate nominations as each candidate is required by law(where applicable) to be supported by a given number of registered voters to qualify for nomination at the time of nomination.

The 2nd respondent in his affidavit in reply stated that;

1. That I duly relinquished my position in the office of Justice of Appeal in the court of Appeal of Uganda on appointment as Chairman, Electoral Commission and I have since then ceased performing the functions of a Justice of the Court of Appeal.

2. That immediately upon appointment as Chairman Electoral Commission while had been cause listed to hear some cases-Election Petition Appeals together with other Justices on various panels, my name was withdrawn and I was removed from the cause list and from handling all the matters and replaced by other Justices.

3. That my personal file was moved from the Judiciary to the Electoral Commission and is no longer in the Judiciary.

4. That I'm advised by my lawyers that the position of a Judge is a special mandate which does not bar the holder of the title from appointment in another capacity subject to relinquishment of his or her judicial functions as provided for under the law.

5. That I'm further advised by my lawyers that as long as the appointment of a Judge in another capacity is not expressly and specifically barred by specific barred by the specific legislation, there is no bar to designating, appointing and employing a Judge in another capacity.

ISSUES

1. **Whether the Application is competently before the court?**

2. **Whether the time frame set by the 1st Respondent for revision and updating of the National Voters Register is illegal, irrational, unreasonable and ultra vires?**

3. **Whether the 2nd Respondent's service as Chairman, Electoral Commission is illegal?**

4. **Whether the 3rd Respondent's service as the Secretary, Electoral Commission is illegal?**

5. **What are the remedies available to the parties?**

The 1st applicant-*Lukwago Erias* represented himself and other applicants together with *Counsel Abubaker Ssekanjako*. While Counsel *Kiryowa Kiwanuka, Kandeebe Ntabirweki & Usaama Ssebuufu* represented the 2nd and 3rd respondent. The 1st respondent-EC was represented by *Kugonza Enoch, Sabiiti Eric and Hamidu Lugoloobi.*

When this matter came up for hearing, the applicant's counsel made an application for recusal of the judge. At that stage it was clear that the parties had closed pleadings and the case was set for hearing and or determination.

The court gave directions for the parties to file submissions within the set timelines. The respondents filed their submissions but the applicant instead opted to file an application for discovery. It is court's view that the application was intended to delay the expeditious disposal of the application. This court shall proceed to determine the application under Order 17 rule 4 of the Civil Procedure Rules.

1. Whether the Application is competently before the court?

The 1st respondent's Counsel submitted that, the Application is incompetent in as far as it contravenes and/or offends Articles 61(1)(f), 64(1)(4), 139(1) of the Constitution of the Uganda and Section 15 of the Electoral Commission Act.

Article 61 (1) (f) vests the 1st Respondent with jurisdiction to hear and determine election complaints arising before and during polling.

Article 64 (1) provides that any person aggrieved by the decision of the Electoral Commission in respect of any of the complaints referred to in Article 61 (1) (f) may appeal to the High Court hence the High Court therefore, in such matter it is strictly an appellate Court.

Article 139 (1), provides that, the High Court shall, **subject to the provisions of the 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.

Pursuant to the foregoing provisions, in relation to elections and specifically to the instant Applications, the High Court is only vested with

appellate jurisdiction which is exercised subsequent to determination of the complaint by the Commission if it has not been satisfactorily resolved at the lower level.

The unlimited original jurisdiction conferred to High Court under Article 139 (1) should be exercised subject to Articles 61 (1) (f) and 64 (1) of the Constitution.

It was their submission that the cut-off for the update of the National Voters Registers which the Applicants sought to challenge is an aspect/integral part of the electoral process and complaints arising therefrom must as a matter of constitutional requirement first be addressed to and entertained by the 1st Respondent for determination.

The application was brought under S.36 of the Judicature Act, Rules 3(1) & (2), Rule 6(2) and Rule 8 of the Judicature (Judicial Review) Rules 2009 which must be construed subject to Articles 61 (1) (f), 64 (1) and 139 (1) of the Constitution.

It was their submission that any law enacted by Parliament under Article 139 cannot exclude the unique and peculiar jurisdiction of the 1st Respondent conferred under Articles 61 and 64 of the Constitution.

The import of Articles 61 (1) (f), 64 (1) and 139 (1) of the Constitution read together, is that, electoral process once started cannot be interfered with at any intermediary stage by Courts except in accordance with Articles 61 (1) (f) and 64 (1) of the Constitution and S.15 of the Electoral Commission Act.

The Court of Appeal has discussed the import of S.15 of the Electoral Commission Act in ***Election Petition Appeal No. 01 of 2018, Kasirye Zzimula Fred vs. Bazigatirawo Kibuuka Francis Amooti & Electoral Commission and noted that, from the reading of S.15 of the Electoral Commission, it appears to us that the intention of the legislature in enacting S.15 was to ensure that all disputes arising prior or during***

nominations before voting are resolved with finality before election date, except where the law otherwise provides.

The above notwithstanding, there is a wealth of authority in modern constitutional jurisprudence which is to the effect that where elections are conducted in accordance with the provisions of the statute and the statute also provides a remedy of settlement of election disputes, it is that remedy alone which should be availed.

In Counsel's view, it would be unconstitutional to invoke the extraordinary jurisdiction of the High Court, when its ordinary jurisdiction has been expressly excluded under Article 139 of the Constitution. Any complaint in regard to any electoral aspect should be brought up only at an appropriate stage in an appropriate manner before a competent Court with jurisdiction and should not be brought up at an intermediate stage before any Court and in any manner unless prescribed.

In light of the foregoing, we submit that the Application is incompetent, improperly before Court and should be struck out with costs.

The 2nd and 3rd respondents' counsel submitted that the Application is incompetently before the court and submit that it is misconceived, frivolous, vexatious, barred, and an abuse of Court process and ought to be struck out and /or dismissed with costs on account of the following:

(a) **The Application is time barred and thus barred by law.**

In their Judicial review Application, the Applicants seek orders (a), (b) and partly (d) as follows;

(a) *A declaration that the 2nd Respondent's act of serving as the Chairman of the Electoral Commission before relinquishing his position as a justice of the court of Appeal is illegal.*
(b) *An order of prohibition restraining and/or stopping the 2nd Respondent from serving in the capacity or position of chairman electoral commission.*
(d) *A declaration that whatever actions being taken by the 2nd and 3rd Respondents in the capacity of chairman and secretary respectively are illegal, null and void.*

The Applicants have brought an application for judicial review against the 2nd Respondent challenging the 2nd Respondent's action of assuming office upon appointment without relinquishing his position in the office of Justice of the Court of Appeal.
The 2nd respondent was appointed on 7th January 2017 and this application was brought on 29th November 2019. It was about after 2 years and 9 months since he assumed the said office.

Rule 5 (1) of the Judicature (Judicial Review) Rules 2009 provides that;

(1) *An application for judicial review shall be made promptly and in any event* ***within three months from the date when the grounds of the application FIRST arose,*** *unless the court considers that there is good reason for extending the period within which the application shall be made. (Emphasis is ours)*

The 2nd & 3rd respondent's counsel relied on the case of **NWOYA DISTRICT LOCAL GOVERNMENT COUNCIL V JOHN PAUL ONYEE CIVIL APPLICATION NO 031 OF 2019 and IP MUGUMYA vs ATTORNEY GENERAL HCMC NO. 116 OF 2015**.

The Application is an abuse of court process on account of the Applicants' failure to exhaust the existing remedies available within the public body or under the Electoral Commission Act as required by law.

We submit that by virtue of the amendment to the Judicature (Judicial Review) Rules 2009, a claimant under judicial review must satisfy court that they have exhausted the existing remedies available within the public body or under the law itself. This position of the law is effective since **31st May 2019** when the **Judicature (Judicial Review) (Amendment) Rules 2019** were gazzetted**.**

Rule 5 of the **Judicature Judicial Review (Amendment) Rules 2019** which introduces **Rule 7A (1) (b)** is couched in the following terms;

> *"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 the public body or under the law;"*

In the Notice of Motion, the Applicants seek orders (f) and (g) against the 1st Respondent in the following terms;

f) A writ of certiorari quashing the decision of the 1st respondent setting 11th December as the cut -off date for registration of all eligible voters.
g) A declaration that the time frame set by the 1st Respondent for revision and updating of the voters register vide 21st November 2019 to 11th December 2019, is illegal, irrational, unreasonable and ultra vires.

The Applicants complain about the 1st Respondent's decision to set a cut-off date and /or deadline for the registration of eligible voters as an aspect of the electoral process.

It should be noted that the 1st Respondent is mandated to ensure that regular, free and fair elections are held and also to organize, conduct and supervise elections and referenda in accordance with the Constitution and in the fulfillment of the foregoing constitutional mandate, the 1st Respondent rolled out the 2021 General Elections Road Map in

preparation for General Elections pursuant to which the cutoff date is premised.

The 1st Respondent is by law required to update the National Voters Register to a date appointed by statutory instrument as a date on which updating shall end. The law further provides for the registration of voters and requires the Electoral Commission to update the voters register in the case of all general elections, to a date appointed by statutory instrument made by the Commission.

The 2nd and 3rd respondent's counsel also cited the same provisions of the law as the 1st respondent's counsel.

They contended that the Applicants have not exhausted the remedies provided for under section 15 of the Electoral Commission Act section and Article 61 (1) (f) and 64(1) of the Constitution. In the circumstances of this case, the High Court only has appellate jurisdiction. It is trite law that jurisdiction is a creature of statute.

In SEWANYANA JIMMY VS KAMPALA INTERNATIONAL UNIVERSITY HCMC NO. 207 OF 2016. The court dismissing a similar application for failure to exhaust existing remedies within the body held that;

> *Where there exists an alternative remedy through statutory law then it is desirable that such statutory remedy should be pursued first. A court's inherent jurisdiction should not be invoked where there is a specific statutory provision which would meet the necessities of the case. This is the only way institutions and there structures will be strengthened and respected.*

See also the case of **OKELLO VS KYAMBOGO UNIVERSITY & ANOR (MISCELLANEOUS CAUSE NO.23 OF 2017)**

The Applicants are by this application challenging the employment of the 3rd Respondent as secretary of the Electoral Commission. They have in their

pleadings raised questions against the validity of the 3rd Respondent's employment contract.

The Applicants seek orders (c), (d) and (e) against the 3rd Respondent as listed in the Notice of Motion.

It was their submission that this is not a matter for judicial review. Judicial review is about the decision- making process. The Applicants' allegations are contentious substantive law questions of voidability of employment contract, correctness of the Attorney general's advice to the 1st Respondent and effect of the Attorney General's advice to the public body.

We contend that determining this issue requires intricate questions of statutory interpretation and construction of statutes for which judicial review was not intended.

The Applicants' challenge of the service of the 2nd Respondent as Chairperson, Electoral Commission involves intricate questions of constitutional interpretation and statutory interpretation which is not a fit and proper matter to be dealt with by way of Judicial Review.

As shall be submitted and demonstrated under issue No.3, the Applicants case is that the 2nd Respondent did not relinquish office as required under Article 60(5) of the Constitution.

We submit that Article 60 (5) of the constitution does not require the 2nd Respondent to **"relinquish his office"** or **"vacate his office"** as alleged by the Applicants in their pleadings. Article 60 (5) only requires the 2nd Respondent to **"*relinquish his or her position in that office*"**

For clarity, Article 60 (5) provides that;

"A person holding any of the following offices shall ***relinquish his or her position in that office*** on appointment as a member of the commission –

(a) a member of parliament;
(b) a member of a local government council; or
(c) a member of the executive of a political party or political organization; or
(d) a public officer

It is our submission that determination of this question does not involve any decision making process susceptible to judicial review but rather substantive questions of declaration of rights, vindication of rights.

It involves an inquiry into the meaning of the words "***relinquish his or her position in that office on appointment as a member of the commission "under*** Article 60(5) of the constitution in light of the 2nd Respondents actions taken upon appointment as Chairman of the 1st Respondent.

This requires construction of the constitution and statutory interpretation which judicial review was not intended for. Judicial Review powers are discretionary and thus limited in scope as they are only intended to deal with excesses of public bodies in decision making processes.

Resolution

The application is being challenged for competence since it has an element of challenging the road map made by the Electoral Commission. It is indeed true that the Electoral Commission is mandated to organize Elections in Uganda by the Constitution and other Electoral laws. The Electoral body is bestowed with special mandate under those laws to resolve any complaints that may arise during the electoral process.

Article 61 (1) (f) of the Constitution vests the 1st Respondent with jurisdiction to hear and determine election complaints arising before and during polling.

Article 64 (1) provides that any person aggrieved by the decision of the Electoral Commission in respect of any of the complaints referred to in Article 61 (1) (f) may appeal to the High Court hence the High Court therefore, in such matter it is strictly an appellate Court.

The applicants' complaint is about the time frame set by Electoral Commission for revision and updating of the voter's register.

The nature of the complaint is clearly part of an electoral process which ought to be lodged with the 1st respondent.

The Election meaning as set out under the Constitution connotes in its wider sense the entire process of election beginning the preparation stage of the voters register until candidates are elected. Any act of challenging the validity or legality of the acts forming part of the election process is barred by the Constitution and the available electoral laws.

The High Court in such matters is vested with an appellate jurisdiction to hear appeals emanating from decisions of the Electoral Commission and does not have original jurisdiction to handle such electoral matters under Judicial review or as a court of first instance. The same mandate has been extended by Parliament under the Electoral Commission Act which operationalizes the provisions of the Constitution. See ***Hassan Lwabayi Mudiba & Waidha Fred Moses v Electoral Commission High Court Miscellanoeus Application No. 275 of 2018***

The Electoral legislations provide for an elaborate procedure for handling of complaints and trial of election petitions as an appeal by the High Court under section 15 of the Electoral Commission Act.

The High Court should loathe any interference with elections through Judicial review or other civil suits as original jurisdiction. This judicial stance ensures that undue delay may not be caused in completing the electoral process and that the handling of electoral complaints is also handled under the special legal regimes which ensures expeditious disposal of electoral disputes or appeals. Section 15(5) of the Electoral Commission Act provides; ***The High Court shall proceed to hear and determine an appeal under this section as expeditiously as possible and may, for that purpose, suspend any other matter pending before it***.

The framers of the Constitution which is the supreme law of the land enacted the provisions of handling election complaints for a 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 handled or resolved then it would end up at the High Court as an appeal and the decision of the high Court is final. See ***Hassan Lwabayi Mudiba & Waidha Fred Moses v Electoral Commission High Court Miscellanoeus Application No. 275 of 2018***

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

This court also realizes that the nature of the complaint seems to be made by a group of political activists, rather than the actual persons directly aggrieved by the timelines set by the Electoral Commission. This form of public interest litigation challenging non-inclusion of names in the Electoral register should be discouraged and is not maintainable. But a political party should be the best complainant in such matters rather than political activists. See ***P.Lakshmi Narain v Chief Election Commissioner, AIR 1997 Madras 125***

However, this court is aware that there may be circumstances which would justify judicial review of decisions or acts which would be glaringly illegal,

irrational or procedurally improper. The onus would be on the applicant to satisfy the court that there are such peculiar circumstances.

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.

This application would to that extent be incompetently filed before this court and it ought to be dismissed as such.

In addition, the Application is challenged for being an abuse of court process on account of the Applicants' failure to exhaust the existing remedies available within the public body or under the Electoral Commission Act as required by law.

It is a well-established proposition that where a right or liability is created by statute which gives a special remedy for enforcing the same, the remedy provided by statute must be availed of in the first instance.

Rule 5 of the **Judicature Judicial Review (Amendment) Rules 2019** which introduces **Rule 7A (1) (b)** is couched in the following terms;

> *"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 the public body or under the law;"*

This court has pronounced itself in matters where applications where filed without exhausting available remedies. In **SEWANYANA JIMMY v KAMPALA INTERNATIONAL UNIVERSITY HCMC NO. 207 OF 2016**. The court dismissing a similar application for failure to exhaust existing remedies within the body held that;

> *Where there exists an alternative remedy through statutory law then it is desirable that such statutory remedy should be pursued first. A court's inherent jurisdiction should not be invoked where there is a specific statutory provision which would meet the necessities of the case. This is the only way institutions and there structures will be strengthened and respected.*

See also the case of **OKELLO v KYAMBOGO UNIVERSITY & ANOR (MISCELLANEOUS CAUSE NO.23 OF 2017).**

The present application seems to be avoiding the existing remedy or procedures set out under the Constitution and electoral laws.

Every litigant who approaches the court, must come forward not only with clean hands but with clean mind, clean heart and with clean objective.

It is a settled principle that where there is an effective alternative remedy under the statute, the High Court does not exercise its jurisdiction as a self-imposed restriction. But, then, there may be circumstances when the High court may interfere.
Where Constitutional validity of an Act or a rule affecting the election challenged, or where an error in exercising such jurisdiction or *mala fides* or non-compliance of the rules of natural justice is established, or the election law provides no remedy for the specific defect in the election process, the High Court can exercise its power of judicial review in election matters.

In judicial review proceedings, it is important to remember that the remedy is not intended to detract properly constituted authorities the discretionary powers vested in them. In simple terms, it is not permitted to substitute the courts as the bodies making 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 of how the decision is made"

It would not be appropriate under judicial review to determine whether the time frame set by Electoral Commission in exercise of their constitutional mandate or discretion is reasonable or irrational. The available alternative procedure to challenge their decision is the most appropriate since it is an election complaint.

The present application does not fall within the exceptions and is therefore incompetently filed. To the extent of the remedies sought;

f) *A writ of certiorari quashing the decision of the 1st respondent setting 11th December as the cut -off date for registration of all eligible voters.*
g) *A declaration that the time frame set by the 1st Respondent for revision and updating of the voters register vide 21st November 2019 to 11th December 2019, is illegal, irrational, unreasonable and ultra vires.*

The application fails on these two remedies and is dismissed with costs to the respondents.

Whether the application is time barred and thus barred in law.
The applicants are challenging the appointment of Justice Byabakama Mugenyi Simon as the Chairperson of Electoral Commission.

It is clear from the evidence on record that he was appointed to the said position on 7th January 2017. The applicant filed this application on 29 November 2019. This means that it was after a period of about 2 years and 10 months.

Under Rule 5 (1) of the Judicature (Judicial Review) Rules 2009 provides that;

> *(1) An application for judicial review shall be made promptly and in any event* ***within three months from the date when the grounds of the***

> ***<u>application FIRST arose,</u>*** *unless the court considers that there is good reason for extending the period within which the application shall be made. (Emphasis is ours)*

The applicants either inadvertently or ignorantly did not seek leave of court to extend the time within which such an application can be brought.

In the case of **<u>IP MUGUMYA vs ATTORNEY GENERAL HCMC NO. 116 OF 2015</u>**. The Applicant challenged an interdiction which occurred on 6th July 2011 by an application for judicial review filed on 11th August 2015. **Hon Justice Steven Musota** (as he then was) dismissing the application for being filed out of time contrary to Rule 5(1) of the Judicature (Judicial Review) Rules 2009 had this to state;

> *It is clear from the above that an application for judicial review has to be filed within three months from the date when the grounds of the application first arose unless an application is made for extension of time…the time limits stipulated in the Rules apply and are still good law.*

The court ought not to consider stale claims by persons who have slept on their rights. Any application brought under the Constitution or by way of judicial review could not be entertained if presented after lapse of a period fixed by limitation legislation.

If the applicants wanted to invoke the jurisdiction of this court they should have come at the earliest reasonably possible opportunity or sought leave of the court to file their application out of time but not to file the same as of right after such a long time of almost 3 years. The court could have exercised its discretion to extend the time depending on the facts to determine whether to extend the time to file for judicial review depending on the reasons on how the delay arose.

Inordinate delay in making an application for judicial review will always be a good ground for refusing to exercise such discretionary jurisdiction of this court to entertain the application. The court refuses relief to an applicant on ground of laches because of several consideration e.g it is not

desirable to allow stale claims to be canvassed before the court; there should be finality to litigation.

Excessive interference by the judiciary in the functions of the Executive is not proper. The machinery of government would not work if it were not allowed some free play in its joints.

This application is dismissed against the orders sought against the 2nd respondent for being filed out of the statutory period of 3 months period.

Whether the 3rd Respondent's service as the Secretary, Electoral Commission is illegal?

The Applicants challenged the legality of the 3rd Respondent's contract as Secretary, Electoral Commission on the ground that he has served beyond the statutory two 5 year terms contrary to section 5(3a) of the Electoral Commission Act as amended in 2010**.**

The 3rd respondent's counsel submitted that the Respondent's service as Secretary of the 1st respondent is not illegal.

Whereas in the year 2010, an amendment of section 5 of the Electoral Commissions Act was made to introduce a provision that the Secretary shall hold office for a term of five years, renewable once. The amendment of the Electoral Commission Act in 2010 did not retrospectively affect the 3rd Respondent's existing employment contract which was executed in 2009. The 3rd respondent's counsel contends that since the amendment in 2010, the 3rd Respondent was first appointed under the law as amended on 29th August 2014 for a period of five years renewable once.

It is against the same background that the Electoral Commission sought the opinion of the Attorney General on whether the contract of the 3rd Respondent was renewable in view of the amendment of section 5 of the Electoral Commissions Act whose opinion was to the effect that the

amendment was not applicable to the contract of the 3rd Respondent that run from 2009 to 2014 as the law did not act retrospectively.

The 3rd Respondent's contract as Secretary of the Electoral Commission was renewed on 6th November 2019 for a period of 5 years effective 18th December 2019.

It is trite law that laws do not have retrospective application unless expressly provided for.

The 1st Respondent acted lawfully when it sought the advice of the Attorney General which was given and followed before the current renewal. The 1st Respondent's implementation of the advice of the Attorney General cannot be said to be illegal.

Resolution

It is not in dispute that the 3rd respondent was a holder of office by the time the amendment was introduced in the Electoral Commission Act to provide for term limits for the position of Secretary.

By the time the amendment was made, the applicant had a subsisting contract which was to run for a period of five years having commenced in 2009 until 2014.

In effect the amendment had to take effect after the expiry of the contract that was running until 2014. If the law had wanted to have an immediate effect, it would have been a question of agreement between the 3rd respondent and Electoral Commission to have the old contract rescinded and a new one signed in accordance with the Amended Electoral Commission Act. This was never done and supposing the 3rd respondent was not competent to hold that office as per the new law, such contract would never have been granted to him.

The direct inference as can be deduced from the applicant's case is that the 3rd respondent has already served the two terms envisaged under the law and therefore it was illegal to have the current new term of five years.

It would mean by implication that when the amendment was made to the Electoral Commission Act, it had a retrospective effect to the 3rd respondent's existing contract which had commenced in 2009. I do not agree with such inference since it is against ordinary rules of interpretation of Statutes.

The ordinary rule of interpretation of Statute is that an enactment or a rule having a force of law is not to be taken retrospectively, unless such intention appears clearly from the language of the enactment or the rule.

It is a fundamental rule of interpretation that a Statute other than one dealing with procedure shall be construed so as to have retrospective effect unless the intention of the Legislature that it should have such effect appears in terms or by clear and necessary implication

,

Therefore, a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter or procedure, unless that effect cannot be avoided without doing violence to the language or the enactment.

The interpretation which the applicants' are trying to give to the amendment has the effect to taking away the rights of the applicant that accrued to the 3rd respondent in his contract of employment of 2009.

This principle is based on the notion that legislature does not intend what is unjust. The rule is embodied in the maxim *nova constitutio futuris formam imponere debet non praeteritis* which means that every new enactment should affect future and not past times.

Consequently, a statute is presumed to apply to facts or circumstances which have come into existence after the existence of the statute unless it can be concluded unequivocally that the legislature intended to operate.

Retrospective operation is generally not given to such statutes as would lay new duties or attach new disabilities in respect or transactions already past or would interfere with obligations under a contract or would interfere with vested rights or in which legality or past transactions would be involved.
Section 42 of the Interpretation Act also buttresses this point on vested right as it provides;
Every Act which affects or benefits some particular person or association or body corporate shall be deemed to contain provision saving the rights of Government, of all bodies politic and corporate and of all other persons except persons affected or benefitted by the Act and those claiming by or under them.

A natural corollary of the general principle against retrospective operation is that a statute should not be interpreted in such a manner as to have a greater retrospective operation than is clearly deducible from the terms of the statute. Similarly, if there are two possible constructions of a statute, one giving it a prospective and the other a retrospective operation, the court shall interpret it prospectively.

The 3rd applicant was eligible for re-appointment for the 2nd and last term of office as a Secretary of the Electoral Commission and is therefore not illegally holding office as contended by the applicant.

The application entirely fails and is dismissed with costs to the respondents.
I so Order

Ssekaana Musa
Judge
21st February 2020.