

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

CIVIL SUIT NO. 294 OF 2020

OCAYA CHARLES:.....PLAINTIFF

VERSUS

- | | | |
|-----------------------------------------------------------|---|------------------------|
| 1. OTIM BOSMIC JOYCE | } |DEFENDANTS |
| 2. NATIONAL RESISTANCE MOVEMENT (NRM) ORGANISATION | | |
| 3. ELECTORAL COMMISSION | | |

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

BACKGROUND

This plaintiff filed this suit seeking for a declaration and orders that;

1. The 1st defendant does not possess the minimum academic requirement of Uganda Advanced Certificate of Education (UACE), its equivalent or any other higher qualification to qualify to be nominated as a member of parliament.
2. An order cancelling the 1st defendant's nomination by the 2nd defendant as NRM candidate for Member of Parliament Chua West Constituency, Kitgum District.
3. An order directing the 2nd and 3rd defendants not to nominate the 1st defendant to stand as a Member of Parliament without the required academic requirements.

4. A permanent injunction restraining the 1st and 2nd defendant their agents/ servants from presenting and the 3rd defendant, its agents/ servants from accepting the nomination of the 1st defendant to stand as the Member of Parliament for Chua West Constituency Kitgum District, without the minimum academic requirements.
5. General damages and costs of the suit.

The plaintiff is a member of the 2nd defendant and being in possession of the requisite academic requirements was nominated to stand as the 2nd defendant's Member of Parliament candidate in 2021 general elections for Chua West Constituency in Kitgum District. He alleged that the 1st defendant not being in possession of the minimum academic qualifications was irregularly nominated to stand as the 2nd defendant's Member of Parliament at the 2nd defendant's offices. The plaintiff wrote a complaint to the 2nd defendant's Electoral commission chairman protesting the nomination and both parties were invited for a hearing to resolve the irregularity. After the hearing, the 2nd defendant's Electoral Commission manifested loyalty to the 1st defendant and illegally decided that the defendant was rightly nominated on ground that he possessed the minimum requirements to stand as a member of parliament relying on the verification of the results he submitted. The plaintiff wrote to UNEB to clarify whether the 1st defendant possessed the minimum required academic requirement which responded that he did not possess UACE having sat and failed all his papers and was absent for the Economics exams. The plaintiff sought to cancel the nomination of the 1st defendant. He alleged that the chairman of the 2nd defendant's electoral commission Dr. Tang Odoi called security officials who

while lifting him hit his ear and ended up damaging even the right ear. He was dragged out of the 2nd defendant's premises an event that was captured by some media houses and aired on various televisions.

The plaintiff contends that the acts of the 2nd defendant in nominating the 1st defendant as MP well knowing he does not possess the required minimum qualifications is illegal contrary to the law of the 2nd defendant's Electoral Guidelines and those of the 3rd defendant.

The 1st defendant filed its defence and denied all allegations made by the plaintiff. He stated that he shall raise a preliminary objection that the suit discloses no cause of action against him, it is premature, misconceived, bad at law and an abuse of court process. He contended that he possess the requisite academic qualifications to stand as a member of parliament and was therefore regularly nominated as an NRM candidate in the primaries.

The 2nd and 3rd defendants denied all allegations made by the plaintiff and stated that the plaintiff was not entitled to any remedies sought as his suit was frivolous, vexatious and bad in law and should be dismissed with costs.

The plaintiff was represented by counsel *Kazinda Shaffi* whereas the 1st defendant was represented by *Renato Kania* and the 2nd respondent by *Akatorana Kobusingye*.

The 1st and 2nd defendants raised preliminary objections/ points of law that would dispose of the entire suit if sustained by court to the effect that the plaintiff's suit is misconceived, barred at law, premature and an abuse of court process.

Preliminary objection:

The 1st defendant raised a preliminary objection at the hearing to the effect that the plaintiff's suit is misconceived, bad at law and barred by law, premature and abuse of court process.

The parties were ordered to file written submissions; all parties accordingly filed the same. All parties' submissions were considered by this court.

Submissions

The 1st defendant submitted that the plaintiff's suit is misconceived as all the declarations it seeks are predicated on the misconception that the 1st defendant lacks the requisite academic qualifications to be a member of parliament and should not be nominated by the 2nd and 3rd defendants as the 2nd defendant's candidate for Chua West Constituency in the 2021 elections.

Counsel submitted that qualifications for one to be a member of parliament are laid down in Article 80 (1) © of the Constitution of Uganda and are operationalized by section 4 (1) (c) of the Parliamentary Elections Act of 2005. He stated that both provisions provide that a person is qualified to be a member of parliament if he/ she has completed a minimum formal education of Advanced Level standard, or its equivalent.

Counsel submitted that from paragraph 4 (iii) of the plaint and Annexure C to the plaint, there is no dispute as to the fact that the 1st defendant completed the Advanced Level Standard of formal education and is therefore suitably qualified to be a member.

He further submitted that the plaintiff misconstrued the provisions of the Constitution and Parliamentary Act to mean that for one to be a member of

parliament, he needs to have an Advanced Level of Education Certificate or to have passed the Advanced Level of Education examination which is neither the spirit or the letter of Article 80(1) (c) of the 1995 of the Constitution.

He therefore submitted that the plaintiff's suit is misconceived and poorly thought out to the extent of their misconstruction of the constitutional and statutory qualifications.

Counsel also submitted that the plaintiff's suit is bad at law and barred by law as his suit is a declaratory suit. He relied on Order 2, Rule 9 of the Civil Procedure Rules that affords declaratory suits protection from objection. He however stated court under the Rules makes declarations of rights which implies that the plaintiff must have a right that he wants the courts to declare in a declaratory judgement.

However, the plaintiff in his suit is not seeking declaration of any right as can be gathered from the prayers of the plaint and thus the suit is not protected under Order 2, Rule 9 and lacks merit for having no basis and is therefore bad and barred by law and should be struck out with costs.

He further submitted that the plaintiff suit is overtaken by events as it seeks an order cancelling the 1st defendant's nomination by the 2nd defendant as the NRM candidate after he was duly nominated, participated in the 2nd defendant's party primaries and won the said party primaries.

The 1st defendant therefore submitted that the plaintiff seeks to cancel a nomination that was concluded, is bad and barred by law and is an academic

exercise since the nomination was long concluded and prayed that court strikes out the plaint with costs.

Counsel further submitted that the plaintiff's suit is premature because it seeks to bar the nomination of the 1st defendant on an assumption that he shall present himself for nomination as a candidate for the 2nd defendant for Chua West Constituency parliamentary seat. He stated that had the 1st defendant taken any steps to be nominated as the 2nd defendant's candidate and either paid nomination fees, picked nomination forms or been endorsed by the 2nd defendant, then the plaintiff would have good ground to seek orders barring nomination of the 1st defendant.

He therefore submitted that the plaintiff's suit is based upon speculative assumption and thus premature and should be struck out.

The 1st defendant submitted that the applicant's case is an abuse of court process as the suit is a pervasion of the process of this court by which the plaintiff is using the process of court to reverse the 1st defendant's party primaries victory by directing the 2nd defendant to declare the plaintiff as the unopposed NRM party flag bearer for the constituency. Counsel relied on *Deox Tibeigana versus Vijay Reddy H.C.M.A No. 55 of 2019* where court defined abuse of court process as a malicious abuse of the legal process when the party employs it for some unlawful object not the purpose which it is intended by the law to effect, in other words, a pervasion of it.

The 1st defendant submitted that the plaintiff is using the process of the court to reverse the election result by having the 2nd defendant declare him unopposed,

which is not the object of the legal process. He stated that the suit is not an election petition which would be the proper procedure for annulling elections and that the plaintiff should have exhausted the internal mechanisms instead of filing this suit.

Counsel therefore submitted that the suit is an abuse of court process and that the plaintiff suit should be struck out with costs.

The 2nd defendant also submitted that the plaintiff's suit should be struck out as it does not disclose a cause of action against the 2nd defendant and is frivolous and vexatious.

Counsel relied on Order 6 Rule 28, CPR, which states that Order 7 Rule 11 (a) and (e), CPR, stated that the plaint shall be rejected where it does not disclose a cause of action or where the suit is shown to be frivolous and/ or vexatious. He stated that on determining whether a suit discloses a cause of action, the court is supposed to limit itself to the plaint (see; *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) 1 EA 696*). Counsel defined a cause of action to mean every fact which is material to be proved to enable the plaintiff to succeed or every fact which if denied, the plaintiff must prove in order to obtain judgment (see *Tororo Cement Co Ltd v Frokina International Ltd Civil Appeal No. 2 of 2001*)

Counsel stated that for the plaintiff to substantiate that he has a cause of action against the defendant, he must prove the existence that he enjoyed a right, the right was violated and by the defendant (see *Auto Garage V Motokov [1971] E.E 514, Uganda Telecom Ltd v ZTE Corporation Civil Appeal No. 03 of 2017.*) The

2nd defendant submitted that the present plaint dose not disclose a cause of action against the 2nd defendant. He relied on Article 80 (1) (c) of the 1995 Constitution and section 4 (e) of the Parliamentary Elections Act, 2005.

Counsel for the 2nd defendant submitted that paragraph 4 (iv) and (vi) of the plaint is to the effect that the 1st defendant was irregularly nominated to stand as the 2nd defendant's member of parliament due to his failure to possess the minimum academic qualifications having sat and failed his senior six.

The 2nd defendant submitted that upon receipt of the plaintiff's complaint in respect of the 1st defendant's academic qualification, it duly heard all the concerned parties and addressing itself to the available evidence found that the 1st defendant completed a minimum formal education of the Advanced Level and on which basis the 1st defendant was permitted to continue with the election. counsel submitted that the plaintiff enjoys a right to contest for elected office and his right to do so was not violated by the 2nd defendant at all. To the contrary, the plaintiff exercised his right to contest for the Member of Parliament on the 2nd defendant's ticket. Counsel therefore prayed that the plaintiff's suit be dismissed with costs for failure to disclose a cause of action against the 2nd defendant and as such it is a nullity and there are no triable issues that warrant adjudication by this court to give a right to the reliefs being sought against the 2nd defendant.

Counsel further submitted that the matter is frivolous if it has no substance, it is fanciful, where a party is trifling with the court or when to put up a defence would be wasting court's time if when it is not capable of reasoned argument.

(see Order 6, Rule 30 (1), *Mavuno Industries Limited & 2 Ors v Kerche Industries Limited Civil Suit No. 122 of 2010*)

Counsel stated that the plaintiff's suit does not set out facts showing how the 2nd defendant's actions violated his rights and thus the suit is lacking in substance.

He therefore submitted that there are no triable issues that warrant adjudication by court and thus the plaint should be rejected and struck out in accordance with Order 6 Rule 30 and Order 7 Rule 11 (a) and (e) of the Civil Procedure Rules.

In reply to the defendants' preliminary objection, the plaintiff submitted that the plaint discloses as cause of action against defendant under paragraph 4 of the plaint as he was not in possession of the minimum academic qualifications and was unlawfully and irregularly nominated to stand as the 2nd defendant's nominated candidate for Chua West constituency. He stated that the executive secretary stated that the 1st defendant sat Uganda Advance Certificate of Education exams but obtained result 9 hence he did not qualify for the award of Uganda Advanced Certificate of Education and that the verification of results was neither certificate nor a replacement of the same.

He stated that whereas the 1st defendant sat the examinations, he failed them and missed the economic paper. This prima facie raises a question which amounts to completion of advance level standard formal education and to determine this question disposes of the case. Counsel for the plaintiff submitted that whereas it is the contention for the defendants that the 1st defendant completed Advance Level standard formal education, this is a flawed interpretation of the law. He

contended that the 1st defendant failed to complete the examinations and thus fell short of the required academic qualification.

The plaintiff submitted that it would be dangerous and arbitrary for this court to qualify an absolute failure with no certificate to qualify upon the mere sitting examinations. The plaintiff relied on the case of Labeja Bob William versus Independent Electoral Commission Election Petition No. 002 of 2015 where court held that if a candidate has an advance level certificate obtained in Uganda, or a qualification higher than the prescribed qualification obtained in Uganda, there shall be no need for the verification of his or her results. He submitted that this is instructive to the effect that the requirement for the Advance Level Certificate is mandatory for someone who has undergone Advanced Level Certificate and in the absence thereof it is required to produce a certificate of equivalence.

The plaintiff submitted that the suit is not premature since the orders and remedies sought are declaratory in nature and even if the 1st respondent has not yet been presented for nomination to the 3rd defendant.

On the suit being an abuse of court process, counsel submitted that the defendant seeking a declaration against the defendant for abuse and one's legal rights and pronouncement on interpretation of the plaintiff and cannot be said to be in abuse of court process as he is entitled to access justice through court.

Determination

The gist of this case is whether the 1st defendant had the required academic qualifications to be nominated and elected a Member of Parliament of the 2nd defendant the time of his election.

Article 80 (1) of the Constitution of Uganda, 1995 (as amended) provides that;

Qualifications and disqualifications of members of Parliament.

(1) A person is qualified to be a Member of Parliament if that person —

(a)

(b)

(c) has completed a minimum formal education of Advanced Level standard or its equivalent.

The plaintiff submitted that much as the 1st defendant sat and examinations for the Advanced level, he failed the same and thus fell short of the required academic qualifications as it would not have been the intention of parliament that one would simply need to study and without necessarily doing any examination or by only doing someone they acquired that standard of education.

However I am of the considered opinion that the plain or literal meaning of the provision is that a person qualifies to be a Member of Parliament, on proof of having completed or gone through A-level education or its equivalent, as the minimum level of education. It could not have been the intention of the legislature, that for one to be said to have attained A-level education, that person had to prove whether he/ she passed or failed the examinations. The Uganda Advanced Certificate of Education Examinations is prima facie evidence that one

has acquired the qualifications of the Advanced level standard. This was evidenced by the plaintiff's letter to Uganda National Examinations Board (UNEB) to clarify whether the 1st defendant possessed a UACE and UNEB responded showed that indeed the 1st defendant possessed the UACE certificate.

I have considered **Article 80 (1) (c) of the Constitution and Section 4 (1) (c) of the Parliamentary Elections Act 17 of 2005** in detail. The **Article** and **section** both provide that a person is qualified to be a Member of Parliament if that person has completed a minimum formal education of Advanced level standard or its equivalent and I am in agreement with the counsel for the 1st defendant that the plaintiff's suit is misconceived since the 1st defendant acquired the Advance level standard as evidenced by his UNEB certificate attached to the plaint as Annexure C.

As to whether the suit disclosed a cause of action against the 2nd defendant, a cause of action is said to be disclosed if in the pleadings there are averments showing the existence of the plaintiff's right, the violation of that right and of the defendant's liability for the violation. (See: *Supreme Court Constitutional Appeal No.2 of 1998: Ismail Serugo Vs Kampala City Council & Another.*)

When a court is considering whether a pleading raises a cause of action or not, it must only look at that pleading. (See: *Wycliffe Kiggundu Vs Attorney General: Supreme Court Civil Appeal No.27/1992.*)

I am persuaded by Counsel for the 2nd defendants' submission that, O.7 R.1(e) Civil Procedure Rules requires a plaint to disclose facts constituting the cause of action and when it arose. Consequently, once a plaint discloses a cause of action,

it cannot be said that the suit is frivolous and vexatious. I also agree with counsel regarding what constitutes a cause of action. Ultimately, in order to succeed on this issue, it must be clear that the plaintiff does not disclose material facts constituting the cause of action against the defendant.

Having carefully looked at the entire plaintiff and its annexures, my conclusion is that the plaintiff does not disclose that the plaintiff enjoyed a right which was violated by either of the defendants. The plaintiff has a right to participate in the elections of this country either as a voter or a candidate. From the reading of the plaintiff and annexures thereto, it can be seen that plaintiff exercised his right and this was not violated by any of the defendants.

Consequently, plaintiff's suit against the defendants is not worthy of serious attention and; thus frivolous and vexatious. This issue is answered in the affirmative.

I do find that this suit is also an abuse of court process. In *Conform Uganda Limited vs Megha Industries (U) Ltd (Miscellaneous Application No. 1000 of 2014)*. It was held that the term "abuse of court process" was defined in the case of *Uganda Land Commission vs James Mark Kamoga & Anor Supreme Court Civil Application No 08 of 2004*, where Justice Mulenga, (as he then was), said that it "involves the use of the process for an improper purpose." In this case I do not see what the proper purpose of the suit is.

In *Karuhanga & Anor vs Attorney General & 2 Ors (Misc. Cause NO. 060 of 2015)*, this court held that the concept of abuse of court process is not very precise

but the Nigerian case of *R-Benkay Nigeria Ltd vs Cadbury Nigerian PLC SC 29 of 2006* outlines circumstances which give rise to abuse of court process and these include:

- a) *Instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of actions on the same matter between the same parties where there exists a right to begin the action;*
- b) *Instituting different actions between the same parties simultaneously in different courts even though on different grounds;*
- c) *Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and the respondents' notice;*
- d) *Where an application for adjournment is sought by a party to an action to bring an application to court for leave to raise issues of fact already decided by a lower court;*
- e) *Where there is no law supporting a court process or where it is premised on frivolity and recklessness.*
- f) *Where a party has adopted the system of forum shopping in the enforcement of a conceived right (emphasis mine).*
- g) *Where two actions are commenced, the second asking for a relief which may have been obtained in the first. In that case the second action is prima facie, vexatious and an abuse of court process.*

In a nutshell, the common feature of an abuse is in the improper use of the judicial process by a party in litigation.

In this case the plaintiff misused the court process by bringing this suit for declaratory orders that sought to reverse the 1st defendant's victory in the 2nd defendant's party primaries through court yet he participated in the same elections. The plaintiff adopted the system of forum shopping in the enforcement of a conceived right that was clearly never violated by any of the defendants.

For the reasons in this ruling, the preliminary points of law raised by the 1st and 2nd defendants are upheld.

Consequently, the plaint is struck out and suit dismissed with costs.

I so order.

SSEKAANA MUSA
JUDGE
18th December 2020