**THE REPUBLIC OF UGANDA**
**IN THE HIGH COURT OF UGANDA AT KAMPALA**
**CIVIL DIVISION**

**MISCELLANEOUS CAUSE NO.393 OF 2020**

**LUKWAGO ERIAS---------- APPLICANT**

**VERSUS**

**ELECTORAL COMMISSION----------RESPONDENT**

**BEFORE HON. JUSTICE SSEKAANA MUSA**

**RULING**

This is an application for enforcement of fundamental human rights and freedoms brought under Articles 1, 8A, 20(1), 28, 29, 38 and 50 of the 1995 Uganda Constitution and Section 1, 3, 4 and 9 of the Human Rights (Enforcement) Act, 2019 and the provisions of the Judicature (Fundamental & Other Human Rights & Freedoms)(Enforcement Procedure) Rules. The applicant filed this application seeking the following orders;

1. A declaration that the decision of the Respondent contained in a press statement dated 26th December 2020 wherein the Respondent indefinitely suspended election campaign meetings in Kampala Capital City and some other Districts is illegal, irrational and ultra vires, and constitutes an egregious affront to the applicant's right to associate, assemble and interface with electorate and the entire citizenry which is a cornerstone of a free and fair election.

2. A declaration that the decision of the Respondent contained in a press statement dated 26th December 2020 wherein the Respondent indefinitely suspended election campaign meetings in Kampala Capital City and some other districts amounts to a deprivation and/or violation of candidates' right to disseminate ideas, political platforms or agenda to the electorate which is a vital tenet of electoral democracy.

3. A declaration that the applicant was not accorded the right to a fair hearing and treatment in the process leading to the decision of the respondent contained in a press statement dated 26th December 2020 wherein the respondent indefinitely suspended election campaign meetings in Kampala Capital City and some other districts.

4. An Order quashing the decision of the respondent contained in a press statement dated 26th December 2020 indefinitely suspending election campaigns meetings in Kampala Capital City.

5. An Injunctive Order restraining, stopping and preventing the respondent from suspending election campaign meetings in Kampala Capital City.

6. An award of general, punitive and exemplary damages for the violations of the applicant's rights and freedoms.

7. Costs of the application be provided for.

The grounds of the application where stated in the supporting affidavit sworn by the applicant.

1. The applicant is the political of Kampala and also a candidate in the Lord Mayoral elections for Kampala Capital city Authority.

2. That in a free and democratic society, the applicant has a right to freely associate and convince the people of Kampala to vote for him as Lord Mayor through articulating his manifesto, platform and agenda in public campaign meetings.

3. That the applicant launched his campaigns on 11th November 2020 and has conducted the same under strict observance of the standard Operating Procedures and guidelines issued by the Respondent to wit encouraging the electorate to wear face masks, use sanitizers and wash their hands e.t.c

4. That on the 26th December 2020, the applicant was shocked to learn through the media that the Chairperson of the respondent had indefinitely suspended election campaign meetings in Kampala Capital City and

accordingly directed the Inspector general of Police to ensure that no such meetings are conducted in the city.

5. That the means through which the Respondent has advised Candidates to conduct campaigns in Kampala and other districts by virtual means is not realistic or tenable since no effort has been made by the respondent or Government to distribute radio and television sets and other gadgets to the electorates.

6. That Parliament appropriated funds for radio and television sets but the same have not been procured to-date.

7. That the decision has inordinately disrupted the applicants campaign schedules and subjected the applicant to horrendous inconveniences, loss and cost.

8. That the decision of the Respondent contained in a press statement dated 26th December 2020 wherein the Respondent indefinitely suspended election campaign meetings in Kampala Capital City and some other districts is illegal, irrational and ultra vires and constitutes an egregious affront to the applicant's right to associate, assemble and interface with the electorate and the entire citizenry.

9. That the decision of the respondent contained in a press statement dated 26th December 2020 wherein the Respondent indefinitely suspended election campaign meetings in Kampala Capital City and some other districts amounts to deprivation and/or violation of candidates' rights to disseminate ideas, political platforms or agenda to the electorate which constitutes an essential element of a social contract.

The respondent filed two affidavits in reply sworn by the Acting Secretary Mulekwah Leonard and Lt Col Dr. Henry Kyobe Bosa the National Incident Commander of the National COVID-19 Incident Management Team-a Medical Doctor and Specialist Epidemiologist working under Ministry of Health who briefly stated as follows:

1. That the electoral activities during this election period were supposed to be conducted in accordance with guidelines aligned to Ministry of Health Standard Operating Procedures SOPs aimed at prevention of the spread of the Corona Virus such as person-to-person, person-to-object and object-to-person and this also resulted in banning processions and public/mass rallies.

2. The candidates were allowed to hold campaign meetings in a regulated manner, preferably outdoors, with limited attendance of a maximum of 70 persons to enable the observance of the 2-meters social distancing rule for the persons attending the meeting but which number was later revised to the maximum of 200 persons.

3. The candidates and their agents were advised to use non-contact means like fliers, posters, billboards, radio, television programmes and talk shows, short messaging services, voice messages, digital media platforms and websites among others.

4. That when the campaigns kicked off, the respondent noted with concern the non-compliance by some candidates with the said guidelines and Standard Operating Procedures while conducting campaigns and several engagements were made with some candidates and/or their agents and there has been no improvement as far as compliance with SOPs is concerned.

5. That the Ministry of Health experts in a letter dated 11th December, 2020 expressed great concern over the manner political actors/candidates and their supporters were conducting themselves during campaigns in violation of the Standard Operating Procedures (SOPs).

6. That the experts observed that the pandemic has progressively evolved to sustained community transmission phase with dire consequences to the population and entire health system currently getting overwhelmed. This has seen an increase of reported cases to over 34, 281 Covid-19 infections and 250 deaths with current major hotspot districts being Jinja, Kabale,

Kalungu, Masaka, Tororo, Kampala, Luwero, Wakiso, Mukono, Mbarara, Kabarole, Kasese and Kazo.

7. That further on 21st December, 2020, the said Ministry of Health Experts, sought an urgent meeting with the respondent to discuss and agree on the practical interventions that could mitigate the likely catastrophic outcome of the remaining election period.

8. That the classification of hotspot districts is based on increase in the positivity, and increase in the weekly number of confirmed Covid-19 case. Kampala City alone currently accounts for the highest number of infections representing 47% of the national total and has reported an increasing trend from September 2020 to date.

9. That following the concerns raised by experts from the Ministry of Health, the manner political actors/candidates and supporters were wantonly disregarding guidelines and Standard Operating Procedures, coupled with an upsurge in transmission of the virus and resultant deaths, the Respondent deemed it necessary to suspend campaign meetings of all categories of elections for the 2020/2021 General Elections in some parts of the country, Kampala City inclusive.

10. That the said decision has been publicized and forwarded to all returning Officers in the affected areas for implementation. The manner of campaigns adopted is proportionate to the interest at stake, appropriate and least intrusive option among those that might achieve the result.

11. That the respondent in executing its mandate of organizing elections is duty bound to be mindful of the health of citizens of Uganda under the prevailing pandemic which has afflicted the whole world and in varying degrees.

12. That the guidelines for campaigns issued by the respondent are purely for public health reasons and are reasonable, not arbitrary, and necessary for the protection of public health and response to pressing political needs.

13. The risk posed by political gatherings is distinguishable from other social gatherings for example weddings, burials in the sense that the former are potential super-spreading events owing to the difficulty in maintaining crowd discipline (SOPs) and contact tracing.

14. That the reliefs sought if granted are likely to cause disproportionate harm to the greater public interest. Since the political campaigns were eased in early November 2020, Uganda has witnessed a spike in infections and fatalities with the highest daily record of 1,199 cases reported in a single day on 8th December, 2020.

15. That there is irrefutable evidence from comparable jurisdictions that political campaigns conducted during the pandemic have led to a surge in Covid-19 cases, for example Ghana reported 50,000 new infections during recently concluded elections while experts have warned that response efforts could be wrecked in over 60 countries around the world holding elections during the pandemic and Uganda is no exception.

16. That the decision of the respondent suspending campaign meetings is absolutely warranted, logical, well founded and premised on good sense.

***ISSUES***

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

2. *Whether the decision of the respondent contained in a press statement dated 26th-12-2020 suspending campaign meetings in Kampala Capital City and some other districts is a violation of Freedoms of Expression, Assembly, Association and a right to a fair hearing?*

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

The applicant represented himself and was assisted by *Katumba Chrisestom* and *Ssekajanko Abubaker* while the respondent was represented by *Sabiiti Eric* and *Hamidu Lugoloobi*

The parties made oral submissions and the court has considered them in this ruling.

***Whether the application is competently before this court?***

The applicant in his submissions contended that this application under Article 50 and the Human Rights Enforcement Act which provides and enjoins court not to look at technicalities in matters of enforcement of rights. According to the applicant the court should not lock the doors to people challenging violation of rights. He relied on section 6(5) of the Human Rights (Enforcement) Act and the case of ***Ivan Samuel Ssebaduka versus The Chairman Electoral Commission & 4 Others Supreme Court Presidential Petition No. 1 of 2020.***

The respondent's counsel argued that the High Court is only vested with appellate jurisdiction in election matters after complaints are lodged with the Electoral Commission and after a decision is made they appeal to the High Court. It was counsel's contention that to rely on the Human Rights (Enforcement) Act, the applicant is circumventing the provisions of the Constitution (Article 61 and 64).

***Analysis***

This application was brought as an enforcement of rights under Article 50 of the Constitution arising out of a press release by the respondent indefinitely suspending campaign meetings in Kampala City and some other districts. The grievance seems to be rooted regulation of the nature of campaigns the applicant and other contestants should conduct due to covid-19.

The decision to suspend election campaigns ought to have been challenged by way of lodging a complaint as the Constitution envisages with the respondent. It cannot be argued that Article 50 of the Constitution intended to disregard all available means under it through which electoral disputes/complaints would be determined. Constitutional provisions like Article 50 should not be read as a 'bulldozer' to other provisions of the Constitution so as to supersede the available modes of resolving disputes to other organs it has created for that purpose.

The applicant like all other litigants should not be encouraged to circumvent the provisions made by the Constitution providing a mechanism and procedure to challenge administrative actions during electoral process. Every potential litigant would rush to the court in any manner they deem fit with claims of Enforcement

of rights and thus rendering the Constitutional provisions meaningless and non-existing.

Article 61 (1) (f) of the Constitution vests the 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 applicant's complaint is about the indefinite suspension of campaign meetings in Kampala and some districts by the respondent and this is a decision made as part of electoral process which ought to be lodged with the 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 through other ordinary procedures like for enforcement of rights under Article 50 of the Constitution.

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 disputes under Enforcement of rights/Judicial review or as a court of first instance. The same mandate has been extended by Parliament under the Electoral Commission Act (Section 15) which operationalizes the provisions of the Constitution. See ***Hassan Lwabayi Mudiba & Waidha Fred Moses v Electoral Commission High Court Miscellaneous Application No. 275 of 2018; Hon. Lukwago Erias & 13 others v EC&2 others High Court Miscellaneous Cause No. 431 of 2019***

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. In the case of **Kasirye Zzimula Fred v Bazigatirawo Kibuuka Francis Amooti & EC** Election Petition Appeal No. 1 of 2018, the Court of Appeal held that;

*"From the reading of the above provision of the law, it appears to us that the intention of the legislature in enacting Section 15 of the Electoral Commissions Act 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 specifically provides. Timely complaints will avoid undue expense and inconvenience to the parties inclusive of the electorate who do not have to vote where nomination is contested. Issues of nomination should be resolved before elections"*

The High Court should loathe any interference with elections through Judicial review or other civil suits as original jurisdiction like enforcement of human rights. 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 applicant in this matter would lead an election dispute or 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 would obviously take some time and the entire dispute will be conclusively determined outside the electoral period and it would be moot and may not serve any purpose.

Constitutional provisions like Article 50 are not intended to short circuit or circumvent established procedures and statutory provisions for accessing courts. See ***Article 126(2)(e) of the Constitution***.

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 the responsibility of the High Court as custodian of justice and the Constitution and rule of law to maintain the social balance by interfering where necessary for the sake of justice and refusing to interfere where it is against the social interest and public good.

Limitations in other legislations are intended to restrict access to courts for seeking some other remedy apart from that provided by a statutory provision enacted specifically to deal with particular situations. Matters of procedure are just as important as matters of substance. Procedural matters are part of the due process and cannot be lightly treated.

It is an abuse of court process to use another remedy under the Constitution to avoid a set procedure. In the case of ***Harrikisson v Att-Gen (Trinidad and Tobago)[1980] AC 265 at 268*** *Lord Diplock* underscored the importance of limitation to the constitution right of access to courts:

> "*The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms: but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action….the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate remedy…."*

The applicant in his submissions relied on the case of ***Ivan Samuel Ssebaduka versus The Chairman Electoral Commission & 4 Others Supreme Court Presidential Petition No. 1 of 2020.***

> *"Under the provisions of Article 61 and 64 of the Constitution, all decisions made by the Commission prior to the vote, are actionable in the high Court by way of an appeal. The Other course of action available to the Petitioner if he has any cause of action would be to proceed in the High Court under the provisions of Article 50 of the Constitution which mandates the High Court to enforce rights of any person aggrieved by actions such as the one the Petitioner has erroneously and wrongly brought before this court."*

The above authority buttresses the importance of using the procedure available for accessing courts in election disputes/complaints and it does not allow the applicant to file any matter for enforcement of rights that may arise out of Electoral Commission decisions during an electoral process.

In the case of ***Charles Harry Twagira v AG & 2 others SCCA No. 4 of 2007*** Justice Mulenga noted as follows;

*"Article 50 of the Constitution proclaims the infringement of the rights and freedoms guaranteed under the Constitution to be justitiable. However, the right to apply to a competent court for redress on the ground of such infringement must be construed in the context of the whole Constitution generally and in the context of Chapter 4 in particular. In the instant case, the appellant's right to bring such an application must be construed together with the right and indeed obligation that the State has to prosecute the appellant in a competent court, for any offence he was reasonably suspected to have committed. Neither right could be exercised to defeat the other…."*

Secondly, the applicant was challenging the decision of Electoral Commission in suspending the campaign meetings in Kampala City and some other districts, this in my considered view should have been challenged by way of judicial review for illegality, irrationality or procedural impropriety as the case was indeed argued before court. In the case of ***Hon. Lukwago Erias & 13 others v EC&2 others High Court Miscellaneous Cause No. 431 of 2019 t***his court observed that:

> *"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 appears to be squarely rooted in challenging the decision of Electoral Commission for transgressions of the law and would fall in the exceptional cases where judicial review would be the most appropriate.

This application is incompetently filed before this court and it ought to be dismissed as such. For completeness, I will proceed to determine the application.

***Whether the decision of the respondent contained in a press statement dated 26th-12-2020 suspending campaign meetings in Kampala Capital City and some other districts is a violation of Freedoms of Expression, Assembly, Association and a right to a fair hearing?***

It is the applicants' case that the decision of the Respondent contained in a press statement dated 26th December 2020 wherein the Respondent indefinitely suspended election campaign meetings in Kampala Capital City and some other Districts is illegal, irrational and ultra vires, and constitutes an egregious affront to the applicant's right to associate, assemble and interface with electorate and the entire citizenry which is a cornerstone of a free and fair election.

The applicant also submitted that the decision of the Respondent contained in a press statement dated 26th December 2020 wherein the Respondent indefinitely suspended election campaign meetings in Kampala Capital City and some other districts amounts to a deprivation and/or violation of candidates' right to disseminate ideas, political platforms or agenda to the electorate which is a vital tenet of electoral democracy

It was the applicant's contention that the Chairperson decision contained in the press release is purporting to be the giver of these rights which is illegal and he was overstepping his mandate under the Constitution. He cited several cases of *Onyango Obbo & Another vs AG Constitutional Appeal No. 2 of 2002: Muwanga Kivumbi v AG Constitutional Petition No. 9 of 2005 and Rubaramira Ruranga v EC & AG Constitutional Petition No. 21 of 2006*

It was the applicant's argument that an infringement can only be justified if a state of emergency is declared under Article 110 of the Constitution and there are grounds to warrant any such state of emergency in order to restrict freedoms and that the restrictions must have a force of law since the Press release is overriding a constitutional provision.

The applicant further contends that the provisions of the provisions cited under the Presidential Elections Act and Parliamentary Elections Act only give the electoral commission regulatory powers but not the powers to prohibit campaigns completely. The fight against covid-19 is vested with the Ministry of Health and regulations made by Minister are regulating gatherings during the covid period, therefore it was wrong for the Electoral Commission to rescind the instruments issued by Ministry of Health.

The applicant argued that the decision of electoral commission is a breach of his legitimate expectation and the alternative modes of campaign given by EC are not tenable since the government has not distributed radios to the public.

The applicant's counsel submitted that the applicant was not accorded the right to a fair hearing and treatment in the process leading to the decision of the respondent contained in a press statement dated 26th December 2020 wherein the respondent indefinitely suspended election campaign meetings in Kampala Capital City and some other districts. He cited the case of *Thugitho Festo vs Nebbi Municipal Council HC Misc. Application No. 15 of 2017 and United Reflexology of Uganda Ltd v Hon Stephen Malinga Minister of Health HCT-00-CC-MC-12-2011*

The respondent's counsel submitted that the authorities cited by counsel for the applicant are indeed good law on principles of freedom of expression and assembly. However, the principles set out therein are applicable in a normal situation and not in the current situation which is abnormal.

The respondent was justified to take immediate decision as guided by health experts in order to address an eminent danger due to the spike in corona virus spread in Uganda. It was his contention that the need for expeditious redress necessitated taking the decision without necessarily waiting for the gazette and the same was waived. He relied on Section 50 of Electoral Commission Act.

The respondent counsel submitted that since there is a pandemic and death all around, the respondent took the right and rational decision in suspending public meeting and this was supported by evidence of medical experts as opposed to the applicant's newspaper evidence that was presented.

***Analysis***

Both counsel are in agreement with the principles enunciated in the case of ***Onyango Obbo & Another v AG*** on principles and protection of Human rights;

> *Protection of Human rights therefore is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the hallmark of democracy, is only assured through optimal exercise of expression. This is true in the new democracies as it is in the old ones. ……..However, the strongest evidence, which is without doubt common knowledge, is the outpouring vigour and enthusiasm with which not only the media, but also the public at large, exercise the freedom of expression in practice. In my view, it is because of that commitment, and the importance of the freedom of expression to democracy, that restriction on the exercise of freedom is permitted in special circumstances.*
>
> *……..The co-existence in the same constitution, of protection and limitation of rights, necessarily generates two competing interests. On one hand, there is the interest to uphold and protect the rights guaranteed under the Constitution. On the other hand, there is the interest to keep the enjoyment of the individual rights in check, on social considerations, which are also set out in the Constitution. Where there is conflict between the two interests, the court resolves it having regard to the different objectives of the Constitution."*

Therefore, while freedom of assembly and association is not an absolute right, it can limited in exceptional circumstances, but only to the extent that the limitation is reasonable, justifiable in an open democratic society. Any limitation must be subject to a three part test:-

1. A limitation will only be acceptable when '**prescribed by law**;
2. When it is **necessary and proportionate**; and
3. When the limitation **pursues a legitimate aim**.

Freedom of speech, assemble and Associate are the basic features of a democratic system. The people of a democratic country like ours have a right to raise their voice against the decisions and actions of the Government or even to express their resentment over the actions of the government on any subject of social or national importance. Further to freely express new ideas and to put forward opinions during political campaigns in a normal situation without any restrictions.

In the case of ***Charles Onyango Obbo and Anor v. Attorney General, Constitutional Appeal No.2 of 2002 t***he Supreme Court unanimously emphasized that:

I. Where a law prohibits an act, which is otherwise an exercise of a protected right, that prohibition is valid only if it fits within the parameters of **Article 43 of the Constitution**.

II. In **clause (2) (c) of Article 43, the Constitution** sets out an **OBJECTIVE STANDARD** against which every limitation on the enjoyment of rights is measured for validity. The provision in clause (2) (c) clearly presupposes the existence of universal democratic values and principles, to which every democratic society adheres. It also underscores the fact that by her Constitution, Uganda is a democratic state committed to adhere to those values and principles, and therefore, to that set standard. While there may be variations in application, the democratic values and principles remain the same.

III. Legislation in Uganda that seeks to limit the enjoyment of the right to freedom of expression is not valid under the Constitution, unless it is in accord with the universal democratic values and principles that every free and democratic society adheres to. The court must construe the standard objectively.

IV. Under **Article 43(2)** democratic values and principles are the criteria on which any limitation on the enjoyment of rights and freedoms guaranteed by the Constitution has to be justified.

The respondent has imposed restrictions on freedom of expression and right to associate and assemble during the campaign period and this has to be addressed in light of the restrictions set under Article 43. The restrictions must be reasonable and it is the duty of the court to determine what is reasonable by taking into consideration both substantive as well as the procedural aspects of the law and restrictions in question.

Secondly, a restriction to be valid must have a rational relation with any of the purposes for which the restriction can be imposed under the relevant constitutional provision.

The reasonableness of the restrictions imposed on freedom of expression, assemble and associate is supported by evidence available on court record where the two deponents have shown the gravity of the corona pandemic and how it is likely spread during the political gatherings as opposed to other gatherings.
*"The pandemic has progressively evolved to sustained community transmission phase with dire consequences to population and the entire health system is currently getting overwhelmed.*
*That currently the country has reported 34,281 COVID-19 infections and 250 deaths with current major hotspot districts being Jinja, Kabale, Kalungu, Masaka, Tororo, Kampala, Luwero, Wakiso, Mukono, Mbarara, Kabalore, Kasese and Kazo due to increased positivity rate and increase in weekly number of confirmed cases.*
*Kampala City alone currently accounts for the highest number of infections representing 47% of the national total."*

This evidence presented before this court confirms the justification of the restrictions imposed in order to avert a potential danger and the said restrictions imposed are made in public interest or to protect the public from infecting themselves or becoming a danger to others.

On the other hand, in the affidavit in reply sworn Lt Col Dr. Kyobe Bosa presents a potential risk that arises from political gatherings as opposed to other social gatherings that have been allowed during this pandemic.
*"The risk posed by political gatherings is distinguishable from social gatherings, for example weddings, burials in the sense that the former are potential super-spreading events owing to difficulty in maintaining crowd discipline (SOPs) and contact tracing.*

*That the political events tend to raise emotions with supporters singing, screaming, dancing which atmosphere makes physical campaigns much riskier as they have the potential to trigger non-compliance to SOPs.*

*That ever since the restrictions on political campaigns were eased in early November 2020, Uganda has witnessed a spike in infections and fatalities with the highest daily record of 1,199 cases reported in a single day on 8th December, 2020"*

The respondent has placed before this court expert evidence that guided the decision taken to suspend election campaigns in Kampala and some districts. This evidence according to court is uncontroverted since the applicant filed a supplementary affidavit with a Daily Monitor newspaper as his evidence to counter the evidence of an upsurge in corona virus spread. However, this court cannot rely on hearsay evidence contained in the newspaper since the author has not deposed any affidavit and the newspaper evidence is not under oath or the reporter is not known to be a medical expert and has not deposed any affidavit to support the case made in the daily monitor.

The court cannot question a decision taken by the respondent upon guidance of medical experts in absence of any evidence to the contrary. This is buttressed by the decision in the case of ***Simon Dolan,Lauren Monks & AB(by his litigation friend CD) v Secretary of State for Health and Social Care & Secretary of State for Education[2020]EWCA Civ 1605*** court noted as follows;

> *"We also bear in mind that this is an area in which the Secretary of State had to make difficult judgments about medical and scientific issues and did so after taking advice from relevant experts. Although this case does not arise under European Union law, we consider that an analogy can be drawn with what was said by Lord Bingham of Cornhill CJ in R v Secretary of State for Health, ex parte Eastside Cheese Co [1999]3 CMLR 123, at para 47: "on public health issues which require the evaluation of complex scientific evidence, the national court may and should be slow to interfere with a decision which a responsible decision-maker has reached after consultation with its expert advisers"*

The actions and decision of the respondent to suspend political meeting was made in public interest so as to protect the spread of the deadly covid-19 and this is supported by evidence of experts. In my view, this is within the parameters of

Article 43 of the Constitution. It is therefore demonstrably justifiable to impose the restrictions on the freedom of expression, and associate and the right to assemble. In the case of ***S v Makwanyane and Another (CCT3/94) [1995] ZAAC 3; 1995 (6)BCLR 665*** *Justice Chaskalson P* stated the following:

> *"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing of competing values, and ultimately an assessment based on proportionality. That fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the principle of proportionality, which call for the balancing of different interests."*

In the present case, it is not in dispute that the Press Release by the Chairperson of Electoral Commission limits on the protected rights of Association, freedom of expression and Assemble. The question for the court to determine is whether it is demonstrably justifiable. Limitation of rights may only be justifiable only if they are authorized by a law of general application.

The Electoral Commission is given special powers in case of any emergency under section 50 Electoral Commission Act. The object of the residuary power conferred on the Electoral Commission under this section is intended to meet unforeseen contingencies or designed to protect the constitutional goal of electoral democracy and failure of constitutional machinery. In such circumstances, the Electoral commission has to act in a manner that strikes the balance and that such discretionary exercise of power cannot be said to be unfettered and non-reviewable.

The discretion to invoke those powers is to be formed on the basis of the relevant matter discarding the irrelevant one and one thing is to be remembered that the power has to be exercised cautiously in a compelling circumstance and the decision must be objective. Such a power can only be exercised on the existence of proof and sufficient ground and not any other basis. Otherwise the concept of the constitutional goal of democracy will be jeopardized.

The decision of Electoral Commission is premised on the increased numbers of infections of Covid-19 and this is uncontested as the same could still be taken judicial notice of supported by the current worldwide spike of a new wave of corona infection which has seen other countries getting in the 2nd lockdown.

The justification depends on factual material and the respondent has established facts on which its justification depended and this court is satisfied with it. The respondent has discharged the burden placed on it for the limitation of rights and freedoms of expression, Assembly and Association.

*Fair hearing*.
The applicant contended that the Press release violated his right to a fair hearing which in his view it is fundamental and a non-derogable right. Therefore the decision was reached without giving the applicant and other political actors a hearing.

It appears the applicant's argument is rooted in the belief that in every case a person must be given a fair hearing and thus the reliance on Article 28 of the Constitution. The said Article on the right fair hearing does not apply in decision making process but rather the right to just and fair treatment in administrative decisions.

A distinction must be drawn between Article 28 and Article 42 of the Constitution. There is tendency by many advocates to confuse the two rights and argue as the applicant has done that his right to fair hearing was violated and yet the right that is violated is one of just and fair treatment in administrative decisions.

The inviolable right to fair hearing provided under Article 28 of the Constitution is clearly for an Independent and impartial court or tribunal established by law. This is the non-derogable right for which every court or tribunal must uphold and not every public decision making bodies. The Constitution merely enjoins administrative official or body to treat persons justly and fairly before decisions are taken.

In this case the applicant was aggrieved by the administrative decision taken by the respondent as the manager of the electoral process, therefore cannot claim that he should have been granted a fair hearing. The Electoral Commission in

taking that decision was not sitting as a tribunal and the applicant should have made a complaint before them in order to be accorded a fair hearing that is protected under Article 28 and that right as stated is protected under Article 44 of the Constitution.

What is required in procedural fairness is inherently flexible and its content depends on the circumstances to which it is applied. What is required in any particular case is incapable of definition in abstract terms. In the case of ***Lloyd v Mc Mahon [1987] AC 625 at 702*** *Lord Bridge* succinctly put it:

> *" the so called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirement of fairness demands when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making, the kind of decision it has to make and the statutory or other framework in which it operates."*

Because of the flexibility of the concept, the administrator or decision maker has to make determination of what is procedurally fair in the specific circumstances. It is not necessary in every case to afford a person a trial-type hearing before making a decision that affects that person. Sometimes the hearing may impede effective and expeditious decision making.

Even though the right to be treated fairly and justly is provided under the Constitution, it can be restricted in certain instances for example; in emergency situations and where it is administratively impracticable to have a hearing.

*Whenever a public authority has to act very urgently, then it may be exempted from offering a hearing beforehand. In* ***R v Secretary for State for Transport ex parte Pegasus Holidays (London) Ltd [1988] 1 WLR 1990*** *where the Court held the Secretary of State's decision to suspend the licences of Romanian Pilots without giving them a hearing was justified in circumstances in which he feared an immediate threat to air safety (pilots had failed a civil aviation authority test).* **(Public law in East Africa by Ssekaana Musa pg 139-140)**

However, the right to be heard if envisaged cannot be sacrificed in the name of urgency unless the clearest case of public injury flowing from the least delay is self-evident.

The second instance is where it is administratively impracticable to hold a hearing. *This can be reason for the court's to refuse a remedy even where a prima facie right to hearing exists. In* ***R v Secretary for state for social services ex-parte Association of Metropolitan Authorities [1986] WLR 1****, even though the secretary of state had failed in his statutory duty to consult before making regulations, the court would not quash the regulations because, by the time of the court's decision, the regulations had been in force for some while and would have caused great confusion to revoke them at that stage.* **(Public law in East Africa by Ssekaana Musa pg 140)**

In the present case the respondent was trying to stop the spread of deadly covid-19 and this is justifiable reason not to accord a hearing since it was acting in an emergency. Otherwise the intended purpose would have been defeated if the respondent was to delay the decision. Secondly, where it impractical to give a hearing to all affected parties like in this case, a right to be heard may be suspended.

Right to a hearing may excluded if prompt action needs to be taken by administration in the interest of public safety, public health, or public morality, or broadly in public interest. The reason is that hearing may delay administrative action, defeating the very purpose of taking action in the specific situation. In such situations, like the spread of Covid-19, it may not have been possible to give a hearing to the applicant and all the affected political players because of the urgency with which the administrative action needed to be taken by Electoral Commission; here the need for immediate and rapid action outweighs the need for providing procedural safeguards to the persons affected.

The decision of the Respondent contained in a press statement dated 26th December 2020 indefinitely suspending campaign meetings in Kampala Capital City and some other districts is a violation of freedoms of expression, Assemble and association but the limitation of the enjoyment of those freedoms is demonstrably justifiable due to the prevailing Covid-19 infections in those areas.

There was no breach of right to a fair hearing since the respondent was not sitting as a tribunal. There was justification for dispensing with the right to be heard due to urgency and emergency in order to stop the spread of the corona virus.

In the premises, I find the application devoid of merit and thereby dismiss it with no order as to costs.

It is so ordered.

***SSEKAANA MUSA***
***JUDGE***
***11th January 2021***