THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS CAUSE NO. 212 OF 2020

MUHUMUZA BEN---------- APPLICANT

VERSUS

1. **ATTORNEY GENERAL OF UGANDA**
2. **MINISTER OF LOCAL GOVERNMENT**
3. **THE ELECTORAL COMMISSION---------- RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for Judicial Review under Article 63 of the Constitution, Section 33 and 36 of the Judicature Act Cap 13, Section 98 of the Civil Procedure Act Cap 71 and Rules 3,4,5,6 &7 of the Judicature (Judicial Review) Rules, 2009 for the following Judicial review orders;

1.) A declaration that the resolution of Parliament of the republic of Uganda approving the creation of 43 new counties in 2015 was irrational, irregular and illegal.

2.) A declaration that the resolution of Parliament of the republic of Uganda passed in June, 2020 approving the creation of 46 new counties was irrational and illegal.

3.) A declaration that the creation of any counties/constituencies after the commencement of Local Government (Amendment) Act 2013 was irrational and illegal.

4.) A declaration that the 3rd respondent's action of declaring and conducting parliamentary elections in the 43 counties created in 2015 was illegal and in contravention of the law.

5.) A declaration that the members of Parliament elected in all constituencies created after the commencement of Local Government (Amendment) Act were elected in contravention of the law.

6.) An Order of Certiorari quashing the decision of the Cabinet of the Republic of Uganda creating new counties without authority.

7.) A permanent injunction restraining the 3rd respondent from conducting any activities concerned with Parliamentary elections in all constituencies created after the commencement of Local Government (Amendment) Act 2013.

8.) A Permanent injunction restraining the 3rd respondent from nominating any individual or candidates for parliamentary elections in all constituencies created after 26th day of July, 2013.

9.) A declaration that the procedure adopted by the 2nd respondent , cabinet and parliament of Uganda in creating counties/constituencies after the commencement of Local Government(Amendment)Act 2013 was illegal.

10) The respondents pay costs of this suit

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavit in support of Muhumuza Ben the applicant but generally and briefly state;

1) That in 2013 the Local Government Act was amended by Act 5 of 2013 and commenced on 26th day of July, 2013.

2) That the administrative level of county was abolished by repealing sections of part V of the Local Government Act Cap 243.

3) That for the Counties to be created the process must be initiated by the administrative level of a county which is no existent.

4) The creation of new counties without any legal backing is illegal and unconstitutional. The actions of both cabinet and parliament are illegal and irrational.

5) The process of demarcating constituencies is the responsibility of the 3rd Respondent not the 2nd respondent.

6) That it is in the interest of justice that this application is allowed with costs.

The respondents opposed this application and the 1st respondent and 2nd filed an affidavit in reply through its Senior Research Officer-Legal Ministry of Local Government Ekyokutagaza Benjamin while 3rd respondent filed an affidavit by Senior Legal Officer- Wettaka Patrick who stated briefly;

1. That a County is one of the constitutional parameters for demarcation of Constituencies. While the county councils were abolished as per the Local Government (Amendment) Act 2013, Counties were preserved as administrative Units and they continue to form a basis for creation and/or demarcation of constituencies.

2. That the mandate to create a county is with a District Council or City Council under the Local governments Act. A County is a creature of the Constitution and cannot be abolished and/or purportedly amended by infection by an Act of Parliament.

3. That the elections of Members of Parliament for the alleged constituencies were organised and conducted in accordance with the Constitution and the law.

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

Three issues were proposed for court's resolution;

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

2. *Whether the resolution of Parliament of the Republic of Uganda approving the creation of 43 counties is 2015 was illegal, irrational and procedurally improper.*

3. *Whether the resolution of Parliament of the republic of Uganda approving the creation of 46 counties in 2020 was illegal, irrational and procedurally improper.*

4. *Whether the applicant is entitled to the remedies sought?*

The applicant was represented by *Mr. Tumwebaze Emmanuel* and *Ms. Nabakooza Margaret* represented the 1st and 2nd respondent.

Whether the application is competently before the court?

The applicant's counsel submitted that the application is a fit and proper suit for judicial review since the creation of 89 counties was tainted by illegality, irrationality and procedural impropriety.

The 1st and 2nd respondent challenged the competency of the application by raising the issue of limitation of action especially for the creation of 43 new constituencies in 2015. The second challenge was premised on suing a wrong party i.e Minister of Local Government of Uganda since the actions of the Minister of Local Government were a collective decision of the cabinet and it was done on behalf of the Government of Uganda.

Analysis

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 application FIRST arose,*** *unless the court considers that there is good reason for extending the period within which the application shall be made.*

The applicant is challenging the creation of 43 constituencies in 2015 and this is clearly out of time or time barred to be brought under judicial review. The applicant out to have sought leave of court to extend the time within which such an application can be brought in respect of the challenge of the 43 constituencies created in 2015.

The time limits set by legislations are matters of substance which ought to be considered in the circumstances of the case. In the case of ***Uganda Revenue Authority v Uganda Consolidated Properties Ltd CACA 31 of 2000;*** The court of Appeal noted that; Time limits set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with. In the case of ***Re Application by Mustapha Ramathan for Orders of certiorari, Prohibition and Injunction Court of Appeal Civil Appeal No. 25 of 1996***, Berko, JA as he then was stated; Statutes of limitation are in their nature strict and inflexible enactments. Their overriding purpose is *interest reipublicaeut sit finis litum,* meaning that litigation shall automatically be stifled after a fixed length of time irrespective of the merits of a particular case.

In the case of **IP MUGUMYA vs ATTORNEY GENERAL HCMC NO. 116 OF 2015**. 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 applicant wanted to invoke the jurisdiction of this it 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 expiry of the time set by law of 3 months.

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.

The part of the application which is out of time is struck out for the said reason of being filed out of the statutory period of 3 months period.
But for completeness, I proceed to determine the rest of the issues.

Whether the applicant has locus standi?
The applicant has stated in his affidavit that he is a lawyer who has taken time to read and internalise laws of Uganda.

Analysis

The question this court has to consider is whether the applicant has sufficient interest in instituting this application for judicial review or is a mere busy body.

Rule 3A of the *Judicature (Judicial Review) (Amendment) Rules, 2019* provides that;
Any person who has <u>direct or sufficient interest</u> in a matter may apply for judicial review
The applicant is a lawyer who has read and internalised the laws of Uganda. He does not state what interest he possesses to lead him to file this application for judicial review. The threshold for instituting an application for judicial review is to show sufficient interest in an application in order to be allowed access to the temple of justice. This would enable the court

assess the level of grievance against what is being challenged and to sieve out hopeless applications.

The interest required by law is not a subjective one; the court is not concerned with the intensity of the applicant's feelings of indignation at the alleged illegal action, but with objectively defined interest. Strong feelings will not suffice on their own although any interest may be accompanied by sentimental considerations. Every litigant who approaches the court, must come forward not only with clean hands but with clean mind, clean heart and with clean objective.

In particular, a citizen's concern with legality of governmental action is not regarded as an interest that is worth protecting in itself. The complainant (petitioner) must be able to point to something beyond mere concern with legality: either a right or to a factual interest. Judicial review applications should be more restrictive to persons with direct and sufficient interest and should not be turned into class actions or *actio popularis* which allow any person to bring an action to defend someone else's interest under Article 50 of the Constitution. See ***Community Justice and Anti-Corruption Forum v Law Council & Sebalu and Lule Advocates High Court Miscellaneous Cause No. 338 of 2020***

The 'unqualified' litigants or persons without direct and sufficient interest (meddlers) are more likely to bring flimsy or weak or half-baked actions/cases and that these are likely to create bad or poor precedents. It may be a bar for other genuine persons with sufficient interest from challenging the actions or decisions affecting them directly. The courts should be satisfied that a party has sufficient interest and ensure that they are presented with concrete disputes, rather than abstract or hypothetical cases. In the case of ***Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others 1996 (1) SA 984 CC para 164*** Chaskalson P stressed that:

"The principal reasons for this objection are that in an adversarial system decisions are best made when there is a genuine dispute in which each party has an interest to protect. There is moreover the need to conserve scarce judicial resources and to apply them to real and not hypothetical disputes."

The court should attach importance to a track record of concern and activity by the applicant in relation to the area of government decision-making body under challenge. Standing in judicial review matters should remain a matter of judicial discretion contingent on a range of factors identified in that decision, for the most part, those factors do not operate to prevent worthy public interest cases being litigated: is there a justiciable issue? Is the applicant raising a serious issue? Does the applicant have genuine interest in the matter? Is this a reasonable and effective setting for the litigation of issues?

In any legal system that is strained with resources, professional litigant and meddlesome interloper who invoke the jurisdiction of the court in matters that do not concern them must be discouraged. An application will have standing to sustain public action only if he fulfils one of the two following qualifications: he must either convince the court that the direction of law has such a real public significance that it involves a public right and an injury to the public interest or he must establish that he has a sufficient interest of his own over and above the general interest of other members of the public bringing the action.

Therefore any citizen who is no more than a wayfarer or officious intervener without any interest or concern beyond what belongs to any one of the citizens in this country; the door of the court will not be ajar for him. But if he or she belongs to an organisation which has special interest in the subject-matter, if he has some concern deeper than that of a busy body, he called be locked out at the gates of the temple of justice.

It is the duty of the courts to protect the scarce state resources and the over-burdened court system by ensuring that litigants who appear in court in matters of judicial review have a direct or sufficient interest to come to court. Precious resources would be wasted on the adjudication and defence of claims if mere busybodies could challenge every minor or alleged minor infraction by the state or public officials. Without sufficient interest threshold for standing the floodgates will open, inundating the courts with vexatious litigation and unnecessary court disputes.

Currently, every person and especially lawyers believe that they best suited with sufficient interest to file applications for judicial review. This is clogging and 'choking' the court system with all manner of applications with competition for fame or recognition. The court should raise the bar and prevent what is now being termed as *'publicity litigation'* in order to entertain justiciable matters by parties with sufficient interest. See ***Aboneka Micheal & another v Attorney General High Court Miscellaneous Cause No. 367 of 2018***

Excessive interference by the judiciary in the functions of the Legislature and Executive is not proper. The machinery of government would not work if it were not allowed some free play in its joints. The requirement of standing provides the judiciary with a means to protect its independence and maintain its legitimacy. On occasion, judges ought to use the rules of standing in order to give effect to the notion of justiciability-that is, the idea that it is not appropriate for certain matters to be adjudicated by a court of law.

On this point alone, this court would decline to exercise its judicial review jurisdiction since the applicant is unable to show the requisite direct or sufficient interest.

In the final result, this application fails for the above reason stated herein and is accordingly dismissed with costs to the respondents.

I so order

SSEKAANA MUSA
JUDGE
24th June 2021