

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

MISCELLANEOUS CAUSE NO 177 OF 2020

NAGAMI GLORIA LINDA **=====** **APPLICANT**

VERSUS

1. ATTORNEY GENERAL

2. THE ELECTORAL COMMISSION OF UGANDA===== RESPONDENTS

BEFORE: HON JUSTICE SSEKAANA MUSA

RULING

The Applicant brought this Application under Articles 1(4), 38, 45, 50, 59 of the Constitution , Sections 3(1) and 4 of the Human Rights 9 (Enforcement) Act, 2019, Rules 5, 6, 7, 8, 9, 11 of the Judicature (Fundamental and other Human Rights and Freedoms)(Enforcement procedure) Rules,2019); for orders that;

- a) A declaration that every citizen of Uganda of 18 years and above has the right to vote as guaranteed under the Constitution of the Republic of Uganda.
- b) A declaration that the Electoral Commission's conduct of closing the exercise of updating the voters register one year before the general elections amounts to disenfranchisement of the persons who have attained 18 years of age between December, 2019 and 2020.
- c) A declaration that the Electoral Commissions conduct of depriving them of this right is illegal as it infringes their fundamental and is in violation of articles 1,59 and 21 of the 1995 Constitution of the Republic of Uganda (As amended).

- d) An order that the Respondents immediately take all the necessary steps to ensure that citizens who were affected this process register and exercise their right to vote in the forthcoming and subsequent elections.
- e) A permanent injunction restraining the 2nd Respondent from conducting any elections or referenda in exclusion of this group of Ugandans
- f) Any other relief as the court may deem fit.
- g) Costs of the Application be borne by the Respondents.

The grounds of this application are specifically set out in the affidavit of Nagami Gloria Linda dated 14th July 2020 which briefly states;

1. That the 2nd Respondent is mandated with several duties among which include ensuring the regular, free and fair elections are held, compiling, maintaining, revising and updating the Voters' register.
2. That the 2nd Respondent announced the commencement of the exercise of updating the National Voters Register on 21st November, 2019 to end on 11th December, 2019.
3. That the 2nd Respondent extended the update exercise for five (5) days and a further seven (7) due to bad weather and large numbers of applicants at update sites.
4. That the 2nd Respondent announced the closure of the update exercise as 23rd December, 2019 after which there would be no further extension of the same.
5. That I know that the Respondents actions have disenfranchised **972,400 (Nine Hundred and Seventy Two Thousand, Four Hundred)** Ugandans who have turned 18 years in 2020.
6. That several attempts have been made to the 2nd Respondents to re-open the update exercise in vain.

In opposition to this Application the Respondents through Mwasa Jude a Senior Legal Officer of the 2nd Respondent, an Advocate of all Courts of Judicature duly authorized to practice law filed an affidavit in reply wherein they vehemently opposed the grant of the orders being sought briefly stating that;

1. That the 2nd Respondent opposes the Application brought by the Applicant as the same is incompetent, incurably defective and an abuse of Court process and ought to be dismissed with costs to the 2nd Respondent.
2. That the contents of Paragraphs 5-10 and 12 of the affidavit in support of the Application are not denied.
3. That the contents of Paragraph 11 of the Affidavit in support of the application are denied in part, in as far as unreasonableness is concerned.
4. That the contents of paragraph 13-19 of the Affidavit in support of the application are denied and in response, I state and aver as follows.
5. That the 2nd respondent in pursuit of its Constitutional and Statutory mandate, rolled out the 2020-2021 General Elections Road Map to the Public in preparation for general Elections. 2020-2021.
6. That Parliament enacted the Electoral Commission Act which *inter alia* provides for registration of voters, update and display of the Voters roll.
7. That the 2nd Respondent carried out the exercise of update of the National Voters Register through which all eligible citizens were requested to register for purposes of voting in the 2021 General Elections.

8. That the 2nd Respondent set the 21st November to 11 of December, 2019 as the cutoff date for the update exercise and later extended and later extended to 23th of December 2019.
9. That I am aware that the National Voters Register cannot be updated endlessly without deadline since Electoral activities move in a single tract and do not overlap each other.
10. That the cut off for registration of voters for purposes of 2020-2021 General Elections is not illegal, irrational and /or unreasonable as alleged by the Applicant.
11. That I know that the 2nd Respondent has not received any complaint in writing alleging any irregularities with any aspect of registration and cut off as electoral processes.
12. That I know that the Applicant in this case has not exhausted the existing remedies available within the article 61(f) of the Constitution as well as the S.15 of the Electoral Commission Act.
13. That I am aware that the 2nd Respondent is mandated to carry out its Constitutional mandate in compliance with the Laws of Uganda and cannot be seen to act outside the same.
14. That I know that the 2nd Respondent has completed the update and display exercises and will be prejudiced.
15. That reopening voter registration process to accommodate the Ugandans who attained the age of 18 years post the update exercise will set a dangerous precedent and will open a can of worms that is prejudicial to the electoral process.
16. That in further, the reopening of the voter registration process will throw the electoral process into a fatal spin as the Constitution of Uganda and the laws made there under put the electoral process in a

straitjacket timetable which if interfered with would scuttle and/or jeopardize the entire process already in its advanced stage.

In the interest of time the court directed the parties to file written submissions which have been considered in this ruling;

Counsel for the Applicant submitted that at the time this matter was fixed for hearing on 29th September, 2020, we informed court that we were abandoning the prayers sought in (d) and (e), since we are cognizant to the fact that the electoral process has already been kicked into motion and thus, they have been overtaken by events. This prayer was not opposed by the Respondents. We were thus left with Declarations sought in (a), (b) and (C); from which we can frame one general issue for this court to resolve; Whether the closing of voter registration in December, 2019, amounted to disenfranchisement and thus infringement of fundamental rights of voters.

Counsel for the Applicant further submitted that the first Respondent replying through State Attorney Sarah Bingi, gave largely general denials to the Applications. The Second Respondent replying through Senior Legal Officer Mwasa Jude noted that the voter registration could not be open endlessly and further that the Applicant had not raised a complaint to them prior to coming to court. It is our submission that the declarations sought can be put to guide the electoral process better especially in the management of all future, subsequent elections.

Counsel for the 1st Respondent objected that and opted to start by raising preliminary points of law regarding the application then proceed to resolve the issue raised by the Applicant. A critical look at the Application, the 1st Respondent noticed that there is no act or omission attributed to the 1st Respondent or any of her agents and as such she submitted that there is no cause of action against the 1st Respondent and hence the Application should be dismissed with costs to the first respondent. Secondly, the 1st Respondent submits 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 2nd Respondents with jurisdiction to hear and determine election complaints arising before and during polling.*

Counsel for the 1st Respondent further objected that *Article 64(1)* provides that any person aggrieved by the decision of 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 Constitutions**, 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 Application, 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*.

Counsel for the 1st Respondent submitted that the cut off for the update of the National Voters Registers which the Applicant sought to challenge is an aspect/integral part of the electoral process and complaints arising there from must as a matter Constitutional requirement first be addressed to and entertained by the 2nd Respondent for determination.

The Applicant stated in her submission that she lodged a complaint to the 2nd Respondent but does not mention the outcome of the same time after the 2nd Respondent handled it. It seems to the 1st Respondent that the Applicant abandoned the complaint without following it up and thus decided to come to Court prematurely. In addition, it was submitted 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*. Therefore we submit that the Application is not properly before this court.

ISSUES

- 1. Whether the closing of voter registration in December, 2019, amounted to disenfranchisement and thus infringement of fundamental rights of voters.**

RESOLUTION

Counsel for the Applicant submitted that the matter before Court is a human rights issue. It hinged on the fundamental rights of people, that is, the right to vote. We are cognizant to the fact that indeed voter registration cannot go on endlessly. The issue is whether the cut off period should be so far away before the process is set in motion.

The Second Respondent which was mandated to maintain the Voters Register only cites practical challenges, but it is our submission that it the duty of the State to provide all necessary resources to ensure that as much people register as possible and thus exercise their right to vote. That is what the Constitution envisaged by “taking all necessary steps,”

Article 1 of the Constitution provides that “all power belongs to the people who shall exercise their sovereignty in line with this Constitution.”

Article 58 provides for the right to vote. It states: (1) Every citizen of Uganda of eighteen years of age or above has a right to vote. (3) The state shall take all necessary steps to ensure that all citizens qualified to vote register and exercise their right to vote. The right to vote and the duty of the State to avoid disenfranchisement was exhaustively discussed by this court in the case of *Kalali Stephen vs Attorney General and Electoral Commission, Misc Cause No 35 of 2018*. Court held

“All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist That statutory right is to fundamental that a broad and liberal interpretation must be given to it. Every reasonable effort should be made not to disenfranchise citizens. Conversely every care should be taken to guard against disenfranchisement”

Court further noted that disenfranchisement is a violation of Section 18 of the Electoral Commission Act, which requires that the Second Respondent includes all persons entitled to vote in any election.

The High Court of Kenya in the case of *Okiya Omtatah Okoiti v Independent Electoral and Boundaries Commission & 2 others*, *Petition No. 47 of 2017*, also noted that;

“...administrative arrangements for registration of votes and conduct of elections should be designed to facilitate and should not deny, a citizen a right to vote or stand for an election.”

Counsel for the Applicant further submitted that from the replies given to this issue, it is our submission that the failure by the State, which is the principal guarantor of all human rights and freedoms, to provide necessary resources for the 2nd Respondent to prepare a voters register as close to the election as possible, for purposes of ensuring that as many people get to exercise their right, is a breach of their Fundamental right to vote and amounts to disenfranchisement. The 2nd Respondent notes that this issue was never first raised with them as is required by *Article 61(I), (f) of the Constitution and Section 15 of the Electoral Commission Act*. This court has also held in the case of *Hon. Erias Lukwago & 13 Ors, Misc, Cause No.431 of 2019*, that electoral complaints should first be addressed to the Second Respondent. It is our submission that actually this complaint was addressed to the Second Respondent through a complaint by the Applicant through her lawyers on 7th July 2020, way before this matter was instituted before this court, and it was duly received as seen through Annexure “H” of her affidavit in reply. To date, no reply has ever been given, and their reply doesn’t not allude to this in any way. Secondly, and without prejudice to the foregoing, the matter before this court is also an alleged infringement on fundamental rights and both the Constitution under Article 50 and the Human Rights Enforcement Act vest this court with instant jurisdiction to hear matters of this nature.

Counsel for the 1st Respondent submitted that we have already submitted on this issue in the preliminary points of law raised. Therefore, we reiterate our submissions that the closure of national voter registration was done in accordance with the law. That said, it follows therefore that no rights of the voters were infringed. The 1st respondent noted that there is a clear distinction that can be drawn from the *Kalali Stephen vs Attorney General and Okiya Omtatah Okoiti vs Independent Electoral and Boundaries Commission & 2 others* cited the Applicant from the instant Application. In conclusion we submit that the application is frivolous, moot, academic and an abuse of Court

process. The 1st Respondent contends that the Applicant is not entitled to any of the remedies sought in the Application. It was counsel's prayer that Court be pleased to invoke its inherited powers under *section 98 of the Civil Procedure Act* to dismiss the same for the reasons mentioned with costs to the 1st respondent.

The application is entirely brought under *Article 50(1) of the Constitution of the Republic of Uganda*. The Application is purely pertaining to an infringement on fundamental rights and freedoms.

Counsel for the Applicant furthermore submitted that, *Section 3(1) of the Human Rights (enforcement) Act, 2019* gives the right for any person alleging an infringement of fundamental right or freedoms guaranteed under the Constitutional to apply to court.

Section 6(5) of the same Act stipulates that "no suit instituted under this Act shall be rejected or otherwise dismissed by the competent court merely for failure to comply with any procedure, form or any technicality."

This court is vested with jurisdiction to hear the application and enforcement of fundamental other human rights. Enforcements of fundamental rights should not be mistaken for an "electoral complaint". The role of courts in enforcement of fundamental rights was quite elaborately discussed by the Supreme Court in the case of *BUKENYA CHURCH vs ATTORNEY GENERAL CONST. APP. NO 3 OF 2011*. The Supreme Court said thus:

"Therefore courts should not condone the violations of fundamental rights and freedoms by turning away litigants from their doors. Such an outcome would also relegate the application and enforcement of the Bill of Rights in our constitution..."

In the case of *Charles Nsubuga vs Eng Badru Kiggundu and Others, Misc, Cause No 148 of 2015*: Justice Musota notes on page 11 that the purpose of Section 15 of the Electoral Commission Act which Counsel cites was to *"confine such simple electoral complaints to the Electoral Commission,"*

It is the submission of counsel for the Applicant that this is not a simple electoral complaint, but a matter of protection of fundamental rights.

Analysis

Under Article 59 of the Constitution;

- (1) Every citizen of Uganda of 18 years or above has a right to vote.
- (2) It is the duty of every citizen of Uganda of 18 years or above to register as a voter for public elections and referenda.
- (3) The State shall take all necessary steps to ensure that all citizens qualified to vote register and exercise their right to vote.

There cannot be any dispute that the law enjoins the persons qualified to vote to be entered on the roll so as to facilitate their right to vote. This right is exercisable in accordance with the electoral laws which are special laws that give limitations to the exercise of that right. It is for the Legislature to examine and provide provisions relating to validity of election process and jurisdiction of the court would be limited in accordance with such law which creates alternative modes of dispute resolution through Election Tribunal.

The law relating to the National Register and Voters rolls;

Section 18 of the Electoral Commission Act Cap 140 states that;

18(1) *The omission shall compile, maintain and update, on a continuing basis, a national voters register, in this Act referred to as the voters' register, which shall include the names of all persons entitled to vote in any national or local government election.*

(2) *The commission shall maintain as part of the voters registers voter roll for each constituency under this Act.*

(3) *The commission shall maintain as part of the voters' roll for each constituency a voters roll for each polling station within the constituency as prescribed by law."*

18A *The commission shall transmit to every political party and organization taking part in an election, an electronic copy of the voters register immediately after the nomination day but before polling day and as updated paper copy of the register containing photographs of the voters to be used on the polling day, two weeks before polling day.*

Section 19 (1) *Any persons who-*

- (a)*** *Is a citizen of Uganda : and*

(b) Is eighteen years of age or above,

Shall apply to be registered as a voter in a parish or ward where the person

(i) Originates from; or

(ii) Resides

(2) No person shall be qualified to vote at an election if that person is not registered as a voter in accordance with article 59 of the Constitution.

(3) Subject to this Act, a voter has a right to vote in the parish or ward where he or she is registered.

(4) Subject to subsection (1), if a registered voters wishes to vote in a parish or ward other than the one in which he or she is registered, the voter shall apply to transfer his or her registration to the parish or ward where the voter wishes to vote, except that the parish or ward shall be one where the voter-

(a) Originates from; or

(b) Resides

(5) A transfer under subsection (4) may only be effected during any period when the voters register is being revised or updated.

(6) Where a transfer is effected under subsection (4)

(a) the voter shall surrender the voters card issued to him or her at the polling station at which he or she was previously registered and shall have his or her name struck off the voters' roll for that station; and

b) where the transfer is effected to a polling station within a different constituency from the one in which the voter was previously registered, he or she shall have his name struck off the voters roll for the constituency in which he or she was previously registered.

(7) When updating the voters register, the commission shall update it to a date appointed by statutory instrument in accordance with subsection (8) as the date on which the updating shall end.

(8) Where elections are to be held by the commission, the statutory instrument referred (a) in the case of all general elections, by the commission:

(b) in the case of a by-election for election to Parliament, constituency members of Parliament, district women representatives or representatives of special interest groups, by the Minister: and

(c) in the case of by-election to local government councils or committees, by the commission.

Section 25(1) *Before any general elections is held, the commission shall, by notice in the Gazette, appoint a period of not less than twenty-one days during which a copy of the voters roll for each parish or ward shall be displayed for public scrutiny.*

(1a) In addition to the twenty- on days referred to in the subsection(1), the commission shall allow a period of ten days during which any objections or complaints in relation to the names recommended by the tribunal to be included or deleted from the voters roll or in relation to any necessary corrections shall be raised or filed.

(1b) In the case of a by- election, the commission shall display the voters roll for a period of ten days and in addition shall allow a period of six days for the display of the recommendations from the tribunal during which objections or complaints in in relation to any necessary corrections shall be raised or filed.

1(c) for purposes of this section, the complaints relating to the voters roll shall be received by the tribunal.

(2) The display of a copy of the voters roll referred to in subsection (1) shall be carried out in a public place within each parish or ward.

(3) During the period of the display of the voters roll under this section, any person may raise an objection against the inclusion in the voters roll of any name of a person on grounds that the person is not qualified to vote or to be registered as a voter in the constituency, parish or ward or that the name of a person qualified to vote or to be registered has been omitted.

The law is clear in providing the right procedure in regards to objections that emanate from the National voters register and voters' rolls, which is the tribunal subject to review by the commission. I further agree with the submissions of the 1st Respondent and find that the Applicant did not follow the right procedures while making any objections and this application would fail on that ground alone. But for completeness I will determine the main issue at hand.

It should be noted that all persons who possess, or will possess on the day of election the Constitutional and Statutory qualifications of voters are entitled on making proper application to the Electoral Commission (Registrar) to have their names registered on the voters register in their respective districts. Conversely, persons not entitled to vote are not entitled to be registered. A qualified voter who has complied with the law and who is registered has a personal right to have his name remain on the voters register in accordance with the law.

A person who has not attained the statutory age is not qualified to be registered and as such no such name can be entered on the register as this would be against the Constitution. Anticipatory registration cannot arise until the person has attained the voting age of 18 years. Therefore the right to vote only arises at the attainment of the voting which must be preceded with an application to register and the name to be entered on the voters' register.

A right to vote is not an automatic right since the enabling electoral laws provide that only persons whose names appear in the national voters register may vote. Even a citizen of majority age whose name is not in the national voters register cannot vote. Therefore, the requirement to have the name in the National voters register means that every citizen must register before they can exercise their right to vote. This is a Constitutional imperative.

The process of registration and voting needs to be managed and regulated in order to ensure that the elections are free and fair. The Electoral Commission was established to manage the electoral process in a systemic manner in order to ensure that the elections are free and fair. The Electoral Commission Act and other Electoral laws make detailed provisions concerning registration, voting and related matters including the way in which voters are to identify themselves in order to register. The detailed provisions of the electoral laws serve the important purpose of ensuring that those who qualify for vote can register as voters and that they can only exercise the right to vote once.

The right to vote is attained upon proper registration process duly verified in accordance with Electoral laws otherwise; the failure to adhere to the provisions of the law could render the exercise of the right to vote nugatory and have grave implications for the fairness of elections. This underscores the importance of the registration process of every person who has attained the voting age of 18 years. There cannot be any disenfranchisement of voters (persons) unless those persons are duly registered voters. The Electoral Commission must have a cut-

off date in order to facilitate a clear electoral exercise with certainty of actual voters.

It bears emphasis that the electoral players including the political parties and candidates and civil society need to use national voters register which is cleaned of nonvoters or dead persons. In the same spirit the voter registration cannot remain open ended since this will be a recipe for electoral disaster if voter registration was allowed even on the last date before elections. The Electoral process started in earnest prior to the set date of national elections in January 2021 and there were elections of lower local councils and interest groups like women youth and disabled person which were conducted much earlier.

Therefore the cut-off date set by the Electoral commission is intended to facilitate smooth management of the elections to avoid electoral irregularities and to avail the different players with a clean National Voters Register. A mere possibility of not including some voters who have not attained the voting age of 18 years will not amount to disenfranchisement.

There is a consensus among judiciary that matters which need discretionary actions (exercise of discretionary power under the Electoral Commissions Act) like postponement of poll, cancellation of Notification or setting election date or timelines under an election road map e.t.c according to circumstances present during election process, on the part of Election Commission, should not be interfered with during electoral process except where exceptional circumstances of a particular matter requires to do so.

This application therefore fails and is dismissed with costs.

I so order.

Dated, signed and delivered be email at Kampala

SSEKAANA MUSA

JUDGE

30th April 2021