

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

MISCELLANEOUS CAUSE NO.374 OF 2020

CENTRE FOR CONSTITUTIONAL

GOVERNANCE (CGG)-----APPLICANT

VERSUS

NATIONAL BUREAU FOR NON-GOVERNMENTAL

ORGANISATIONS----- RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant brings this Application for judicial review under *Articles 42, 50* of the Constitution and *Sections 36, 38* of the Judicature Act Cap 13, Rules 3, 6, 7 and 8 of the the Judicature (Judicial Review) Rules, 2009 Rule 4 Judicature (Judicial Review) (Amendment) Rules 2019 for the following orders:

1. An order for **CERTIORARI** be issued to quash the arbitrary decision of the respondent to suspend the operations of the National Election Watch-Uganda which was communicated through a press release made on the 29th day of October 2020.
2. An **INJUNCTION** be issued to restrain the Respondent, its agents and sister agents or servants and any other public body or institution

from enforcing the impugned decision of the Respondent to suspend the activities and operations of National Election Watch-Uganda.

3. An **INJUNCTION** doth issue against the Respondent, its agents and sister agents or servants and any public body or institution from taking any action against the individual members associated with the National Election watch-Uganda basing on the impugned decision of the Respondent.
4. A **DECLARATION** that the Respondent acted ultra vires in suspending the operations of the National Election Watch-Uganda since the NEW-U is not a Non-Governmental Organisation to be regulated and sanctioned by the Respondents and therefore making the decision of the Respondents illegal and unlawful and of no effect to its operations and activities.
5. A **DECLARATION** that the decision to suspend the activities of the National Election Watch -Uganda of the Non- governmental Organisations Bureau was arrived at without following the principles of natural justice thus illegal and of no consequence.

The grounds in support of this application are set out in the affidavit of Sarah Bireete a Director of the applicant which briefly states that;

1. The Applicant is a registered organisation whose objectives are to promote constitutional governance through carrying out of constitutional literacy campaigns and advocacy across East Africa.

2. On the 10th day of September 2020, Citizens and Organisations including the applicant jointly launched the National Election Watch Uganda (referred to NEW-U) a citizen association which aims at bringing citizens and organisations together to have discourses on democratic governance including election related issues.
3. That NEW-U's objectives among others were to use election observation as a tool to promote electoral integrity, enhance citizen confidence and participation, mitigate potential election violence and build sustainable civil society structures for election observation.
4. That, however on the 29th day of October 2020, the National Bureau for Non-Governmental Organisations through a press release dated 29th day of October 2020 by its senior communications person, Patrick Onen Ezaga, suspended the operations of NEW-U stating that it was not registered in Uganda and further threatened to suspend, take legal and disciplinary actions against other single member affiliated to NEW-U.
5. That the respondent has no mandate or any powers whatsoever under its enabling law, the Non-Governmental Organisations Act 2016 or any other law to suspend the operations or activities of the National Election Watch-Uganda which is a citizen association and not a Non-Governmental Organisation.
6. That the decision of the respondent to suspend the operations of the National Election Watch-Uganda was ultra-vires and illegal since it was not based on its mandate under the Non-Governmental Organisation Act or any other law.

7. That the process by which the respondent arrived at the impugned decision to suspend the operations and activities of the National Election Watch-Uganda was irregular since the members of the National Elections Watch were not accorded a fair hearing by the Bureau.
8. That the respondent through the said press release further threatened to take legal action and any other disciplinary action against members of the NEW-U creating eminent danger for all the members of this association.
9. That it is interest of justice that this court issues its prerogative orders to restrain the Respondent from abusing their powers and breaching the rule of law.

In opposition to this Application the Respondent through Celia Nagawa, The Principal Legal Officer and Secretary of the Bureau for the National Bureau for non-Governmental Organisations (NGO Bureau) in the Ministry of Internal Affairs deposed and filed an affidavit in reply wherein she opposed the application briefly stating that;

- (1) The applicant is a registered NGO with a permit to operate under File No. S.5914/13322 whose mandate is to carry out activities in the fields of promoting constitutionalism in Uganda, acting as a centre for policy development, sensitizing policy makers, developing public interest, conducting civic education and developing national and regional structures.
- (2) That the applicant has never made any application to the respondent to review its Permit to operate, mandate and or its activities to include formation of loose unregistered coalitions and Consortiums,

hence the applicant cannot be permitted to operate in activities that cannot be regulated under its formation.

- (3) That it is the respondent's routine mandate to oversee activities of all legally registered NGO's in the country, the Respondent learnt of the Existence of the National Election Watch-Uganda(NEW-U) from two press statements released by it on September 6th and 15th and its launch on September 10th, 2020.
- (4) That NEW-U is being unregistered entity which had commenced its activities through meetings, work plans, guiding/project documents. The National Election Watch Uganda Strategy and various unlawful activities which was in contravention of the Laws of Uganda.
- (5) That for any Association or body to operate in Uganda, it is a requirement that it should be incorporated in Uganda with URSB which was not the case with NEW-U as an Association or Coalition to govern members of this Consortium.
- (6) That the respondent as a regulator is mandated under section 5 and its functions are provided for under section 6 of the NGO Act, 2016 to regulate, register, supervise, coordinate and monitor organisations in Uganda so the actions taken on 29th October, 2020.
- (7) That the activities of NEW-U whose composition has some members that are not incorporated, not registered and not regulated under any law in Uganda and the Non-Governmental Organisations Act, 2016.
- (8) That the activities under NEW-U cannot be legally maintained since they cannot be regulated under any law in Uganda. The respondent

has not taken any disciplinary action against any NGO or applicant in order to determine the lawfulness and right to fair hearing

(10)The status quo is that NEW-U activities were suspended by the respondent.

In the interest of time the respective counsel were directed to file written submissions and i have considered the respective submissions. The applicant was represented by *Mr. Micheal Aboneka* while the respondent was represented *Mr. Moses Mugisha* holding brief of *Ms. Nabaasa Charity (SA)*.

ISSUES

- 1) *Whether the respondent's decision to suspend the operations of NEW-U was illegal?*
- 2) *Whether the respondent in reaching upon the decision to suspend the operations of NEW-U applied principles of natural justice.*
- 3) *Whether the applicant is entitled to the remedies sought?*

Issue One

Whether the respondent's decision to suspend the operations of NEW-U was illegal?

The Applicant argues in ground 3 of the Application that the Respondent has/had no powers whatsoever under its enabling law, the Non-Governmental Organisations Act 2016 or any other law to suspend the operations and activities of the National Election Watch- Uganda which is an association of Civil Society Organisations but not an NGO. In ground 4 of the application the Applicant further argues that the decision of the Respondent to suspend the operations of the National Election Watch-Uganda was ultra vires and illegal since it was not based on its mandate

under the Non-Governmental Organisations Act 2016 or any other law. This is supported by paragraphs 11, 12, and 13, 14 of the affidavit in support for ground 3 and 4 respectively. The Respondent did not quote any law while banning the NEW-U neither did it point to any in its Affidavit in rejoinder.

It is the Applicant's contention that NEW-U is a citizen and Organisation association on electoral monitoring which is lawfully permitted in the country as validly carried out by the Applicant within its objectives. NEW-U is not a Non-Governmental Organization (NGO) as defined within the meaning of section 3 of the Non- Governmental Organisations Act 2016 so as to be regulated by the Respondent. Section 3 of the Act defines organisation as;

'organization' means a legally constituted non-governmental organisation under this Act, which may be a private voluntary grouping of individuals or associations established to provide voluntary services to the community or any part, but not for profit or commercial purposes.'

For avoidance of any doubt, NEW-U is not an NGO but an association of Civil Society Organisations and citizens of Uganda, some organisations that constitute this association are NGO's whereas others are not. What binds them is their guiding principles which govern their conduct and activities and motives. The member organisations of NEW-U are legally in existence in Uganda and are doing work legally permissible with the Applicant having a valid operational permit granted to them by the Respondent and they have the right to form this kind of association by virtue of *Article 29(1)(e)* of the Constitution of the Republic of Uganda which guarantees them a right to freedom of association.

As long as the individual organisations that agreed to associate complied with the law which governs their structure and nature of organization - that is if they are companies duly incorporated and registered under the company registry, and if they are non-governmental organisations they

further register with the Non-governmental Organisations Bureau and get a license and permit, then the Respondent has/had no right to interfere with their freedom of association.

Furthermore, as regards to their right to associate, the law fully allows them to do so under article 29(1)(e) of the Constitution of the Republic of Uganda. *Article 29(1)(e)* provides that every person shall have a right to freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organisations. NEW-U is/was composed of artificial persons recognized under the law who were entitled and had the freedom to associate.

NEW-U being an unincorporated association, it has no legal capacity on its own and it cannot sue or be sued its own name except that of the individual members. Neither can it hold or own property in its own name.

The respondent in their submissions contended that in their routine mandate to oversee activities of all legally registered NGO's in Uganda, learnt of the existence of National Election Watch-Uganda (NEW-U) from two press statements released by it on September 6th and 15th, 2020 with a secretariat at the Uganda National NGO Forum (UNNGOF). It was established that the organization did not exist legally and was not registered.

The respondent established that NEW-U was a loose coalition that was formed by 60 organisations which proceeded to commence its operations without incorporation, registration and permission to operate within the laws of Uganda. It therefore lacked the legal authority/ basis to transact any activity in its own capacity since it would not be held liable for its actions.

NEW-U was operating as an association which brought it under the ambit of the NGO Act, 2016 by definition but it was not registered at the time and was operating illegally. That some of the organisations that constitute this association are NGO's whereas other are not while others have had their permits expired without renewal.

That the applicant should not seek protection under Article 29(1)(e) of the Constitution by claiming freedom to associate and join associations or other civil organisations. The associations the applicant was seeking to join which are regulated by the NGO Act, as provided for under Section 3, had to be fully registered with valid permits to operate, failure of which was illegal and unlawful.

It was the submission of the respondent that when it summoned UNNGOF to explain to the respondent, the existence of NEW-U at its offices as a Secretariat, indeed representatives of the organization duly attended the meeting. Therefore, the suspension of NEW-U was conducted legally by observing the mandate granted under the NGO Act, 2016

Analysis

The applicant is challenging the action and decision of the respondent on grounds of legality. The Non-Governmental Organisations Act defines an organization to mean; *'organization' means a legally constituted non-governmental organisation under this Act, which may be a private voluntary grouping of individuals or associations established to provide voluntary services to the community or any part, but not for profit or commercial purposes.'*

The long title to the Non-Governmental Organisations Act and Section 4 provide for the general objects and policy of the Act as follows;

The objects of this Act are to--

- (a) establish an administrative and regulatory framework within which organisations can conduct their affairs;*
- (b) promote and require organisations to maintain high standards of governance, transparency and accountability;*
- (c) promote a spirit of cooperation, mutual partnership and shared responsibility between the organisations sector, the Ministries, Departments and Agencies of Government and other stakeholders dealing with organisations;*

- (d) provide the development of strong organisations and to facilitate the formation and effective function of organisations for public benefit purposes;*
- (e) promote and strengthen the capacity of the organisations sector that is sustainable and able to deliver services professionally;*
- (f) promote the development of self-regulation among organisations;*
- (g) provide an enabling environment for the organisations sector;*
- (h) strengthen the capacity of the Bureau; and*
- (i) promote and develop a charity culture that is voluntary, non-partisan and relevant to the needs and aspirations of the people of Uganda.*

The Act as seen from the above objectives gives the respondent wide object in relation to the regulation of organisations registered under the At and this is buttressed with the functions and powers of the National Bureau of Non-Governmental Organisation Act which the regulatory body. The exercise of power to achieve the object of the Act confers discretionary powers in order to attain the goals and purpose of the Act.

When an authority is clothed with powers to regulate an activity and it is accompanied with sanctions, the courts look carefully at the restrictions to ensure that they are within the policy and objects of the Act. The National Bureau of Non-Governmental Organisations is mandated to regulate all organisations registered under it or operate upon a permit. This broad mandate invites it to look into the affairs of the organisations in order to exercise its statutory role as a regulator.

The respondent used the power for the purpose for which it was conferred under the NGO Act, 2016 and achieved a subsidiary purpose of regulating an 'organisation' which was not registered since it is their core purpose to issue permits to operate in Uganda and any association (like NEW-U) that tries to circumvent the existing legal framework to operate must be restrained or stopped. Whenever the actor pursues two or more purposes where only one is expressly or impliedly permitted, the legality of the act is determined by reference to the dominant purpose. The dominant purpose in this case is the regulation and ensuring that all manner of organisations

or Associations that ought to operate in Uganda must be have a permit issued by National Bureau of Non-Organisations Act and this brings them squarely within the purview of the Act. See *R v Southwark Crown Court Ex p. Bowles [1998] AC 641: Attorney General v Ireland [2002] 2 NZLR 220*

This court does not accept the argument of the applicant that National Election Watch-Uganda (NEW-U) was free to operate in Uganda without any regulation simply because they were not registered under the NGO Act, 2016 or that they were not a body corporate with capacity to sue or be sued. An illegal activity cannot be validated by arguments of failure to be registered or to bring yourself within the legal regime governing your activity.

The respondent contended that the association of members under a new umbrella involved different players some of whom are not registered as Non-governmental organisations and others had not renewed their permits or they were expired. This therefore implied that National Election Watch-Uganda (NEW-U) had legal and illegal persons coming together which was wholly illegal and contrary to the NGO Act. The argument that they were associating under Article 29 of the Constitution is so pedestrian and only made as an afterthought after being caught on the wrong side of the law.

The evidence on record is clear that National Election Watch-Uganda (NEW-U) was operating under a registered NGO-(UNNGOF) and all its activities and intentions were crafted as a Non-Governmental Organisation which must have been issued with a permit to operate. The respondent was right-legally to halt the operations of National Election Watch-Uganda (NEW-U) in the circumstances of this case.

Whether the respondent in reaching upon the decision to suspend the operations of NEW-U applied principles of natural justice.

The applicant contended that process by which the respondent arrived at the impugned decision to suspend the operations and activities of National

Election Watch-Uganda (NEW-U) was irregular since members of National Election Watch-Uganda (NEW-U) were not accorded a hearing. Therefore the respondent acted arbitrary and in total disregard of the law, equity and justice.

The respondent in their submission stated that they duly applied principles of natural justice when a meeting was held with UNNGOF and Members of National Election Watch-Uganda (NEW-U) who included the Executive Director of NGO forum Dr. Moses Isooba, Executive Director of Uganda Women's Network (UWONET) Mrs Rita Aciro Lakor, Fr. Constantine Mbonabingi and Mr. Kwatsibwe Chris all of whom were members of NEW-U and voluntarily disclosed and even shared all documentations regarding the launch and existence of NEW-U.

Analysis

It is also well settled that the concept of 'natural justice' is not a fixed one. It has many colours, shades, shapes and forms. Rules of natural justice (fairness) are not embodied rules and they cannot be imprisoned within a strait jacket formula.

In order to sustain a complaint of non-compliance with principles of natural justice, one must establish that one has been prejudiced thereby for non-compliance with principles of natural justice.

The question whether the principles of natural justice have to be applied or not, is considered bearing in mind the express language and basic scheme of the provision conferring the power; the nature of the power conferred and the purpose for which the power is conferred and the final effect of the exercise of the power. It is only upon a consideration of all these matters that the question of application of the principles of natural justice can properly be determined. See *Sahara India(Firm), Lucknow v Commissioner of Income Tax, Central-1, [2008] 14 SCC 151*

Section 7 of the Non-Governmental Organisations Act provides that; Before taking a decision the National Bureau of Non-Governmental Organisation shall give an opportunity to be heard.

In the present case, the respondent invited the NGO Forum and some members all of whom were members of NEW-U attended the meeting and indeed availed information which formed the basis of the decision as can be evidenced from the Press Statement;

“.....The NGO Bureau then invited the NGO Forum together with representatives of the NEW-U for a meeting which was held on Thursday October 22, 2020. The main purpose of the meeting was to ascertain the legal status of NEW-U in Uganda. The following were established from the meeting;

- 1. NEW-U is a loose coalition that was established by 60(sixty) organisations which proceeded to commence operations without incorporation, registration and permission to operate within the laws of Uganda. It therefore lacks the legal authority/basis to transact any activity in its own capacity since it would not be held liable for its actions.*
- 2. UNNGOF was providing Secretariat for the otherwise illegal entity, NEW-U*
- 3. Whereas UNNGOF and some of the organisation which are valid were accredited by the Electoral Commission in their own right to be Election Observers in the forthcoming national polls, there was no such accreditation for NEW-U”*

The law requires the respondent to given the applicant an opportunity to be heard and this will vary depending on the circumstances of the case.

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.

The meeting in which the UNNGOF and other members of National Election Watch-Uganda (NEW-U) attended was sufficient and adequate opportunity to be heard and satisfies the requirements of the Act in these circumstances.

This application fails in the circumstances and is dismissed with no order as to costs

I so order

SSEKAANA MUSA

JUDGE

30th July 2021