

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS CAUSE NO.396 OF 2020

TUMWEBAZE KENNETH----- APPLICANT

VERSUS

- 1. ELECTORAL COMMISSION**
- 2. MUGABE ROBERT ----- RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for Judicial Review under Section 33,36,38 of the Judicature Act as amended, Rules 3,5,6,7 and 10 of the Judicature (Judicial Review) Rules, 2009 seeking orders that;

- a) An order of Mandamus doth issue compelling the 1st respondent to exercise powers under Section 15(1) of the Electoral Commission Act to make/give a decision over a complaint raised by the applicant and heard by the 1st respondent on the 23rd and 26th October 2020 before the forth coming general elections.
- b) A declaration that the 1st respondent's nomination of the 2nd respondent is in breach of the Provisions of the Local Government Act as amended and Section(4)(c) of the Parliamentary Elections Act as the 2nd respondent does not possess the minimum academic qualification as required by law.
- c) The costs of this application be provided for.

The grounds in support of this application were stated in the supporting affidavit of the applicant but generally and briefly state that;

- I) The applicant lodged his complaint to the 1st respondent by virtue of section 15 of the Electoral Commission Act challenging the nomination of the 2nd respondent as a candidate for LC 5 Kitagwenda District in the upcoming general elections on ground that the 2nd Respondent does not possess the requisite academic qualifications.
- II) That the 1st respondent heard the applicant's complaint between 23rd and 26th October 2020 interparty and promised to communicate its decision to the parties in writing as soon as practicable.
- III) That despite the reminders by the applicant to the 1st respondent, they have refused or ignored to render the same hence this application.
- IV) That the nomination of the 2nd respondent is illegal and contrary to the law and the 1st respondent is perpetrating an illegality. They are aware that the 2nd respondent's academic documents were cancelled by UNEB.
- V) That the refusal by the 1st respondent to render a decision after the hearing of the complaint is unfair and unreasonable in the circumstances.
- VI) That the delayed decision by the 1st respondent greatly prejudices the applicant who has a vested interest in the forthcoming general elections.

The respondent opposed this application and filed an affidavit in reply by *Lugoloobi Hamidu* wherein he contended;

1. That the application actually came up for hearing on 28th October 2020 and 12th November 2020.

2. That even after the formal interpartes hearing, it is true the parties before the 1st respondent have continued to furnish and/introduce new pieces of evidence.
3. That the applicant has kept on introducing new pieces of evidence (documents) which the 1st respondent cannot ignore.
4. That the applicant still have cases pending in courts in respect of the instant matter.

The 2nd respondent filed an affidavit in reply and seems not to oppose the applicant and equally stated that he was advised by 1st respondent to be patient and will soon have the decision since they were working on so many petitions.

At the hearing of this application the court ordered the application to proceed ex parte since the 1st respondent who did not appear in court;

1. Whether the 1st respondent has a duty to determine the complaint in a timely manner?

2. Whether the applicant is entitled to the remedies sought?

The applicant was represented by *Mr. Ochieng Evans* while the 1st respondent was represented by *Mr. Kugonza Enock* whereas the 2nd respondent was represented by *Mr. Mujurizi Jamil and Mr. Tumwesigye Humphrey*.

ISSUE ONE

1. Whether the 1st respondent has a duty to determine the complaint in a timely manner?

The applicant's counsel submitted that the respondent has a duty to handle complaints arising before and during polling and they have failed to execute the said mandate. It was their contention that this inordinate delay denies the applicant his rights granted under section 1592) of the Electoral Petition Act.

Analysis

The Electoral Commission is a high powered and independent body which was intended by the framers of the Constitution, to be kept completely free from any pull and pressures that may be brought through political influence in a democracy run on a party system.

Article 62 of the Constitution and Section 13 of the Electoral Commission Act provides that;

Subject to the Constitution, the commission shall be independent and shall, in the performance of its functions, not be subject to the direction or control of any person or authority.

Article 61(1)(f) provides for the functions of the Electoral Commission;

To hear and determine election complaints arising before and during polling.

This is one of the core duties of the Electoral Commission and must be executed diligently in a timely manner to achieve a free and fair election. The failure to address complaints becomes a breach of duty of the commission and impacts on the core mandate of holding a free and fair election. Therefore, Electoral Commission is a guardian of democracy since the country is always in the hands of the elected representatives of the people who get in those positions through free and fair elections.

It is of utmost importance that the Electoral Commission should be comprised of persons with experience and of confirmed integrity, possessing firm moral character and also having adequate knowledge of law governing their official duties. The Commission should be conscious of the fact that conduct of elections fairly and strictly in accordance with law is of utmost importance because if the complaints are not handled adequately and in a timely manner then too many election petitions will arise after elections and this is very expensive to the Government and to the contestants and it also reflects discredibly on the efficiency of the election administration.

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 court underscored the importance of resolving election disputes in a timely manner and also to stop the uncertainty among the contestants and the voters created by the complaint which remains undetermined.

The respondent in this case received a complaint from the applicant on 13th October 2020 and the same was heard between 23rd and 26th October 2020. The applicant has not received a ruling or decision from the Electoral Commission since that time until the time of hearing this application on 12th January 2021 and yet the elections are due on 14th January 2021.

This court is aware that the Electoral Commission is independent in execution of its duties but the delay in taking decisions or handling complaints is the justifications for the parties interested to seek judicial review to compel them take a decision. The court would be inclined to lean in favour of compelling the Electoral Commission to perform a particular duty that the Constitution has commanded it to do.

The applicant has a judicially enforceable right since there is a legal duty imposed on the Electoral Commission to handle election complaints in a timely manner before elections and it has failed to perform the duty. The applicant has a legal right to compel the performance of this duty by way of *mandamus*.

Thus a party seeking mandamus must show that he/she demanded justice from the authority concerned by performing his/her duty and that the demand was refused. Likewise prolonged delay even without a demand would be inferred as a refusal to act or execute a stated duty. The failure to do so within a reasonable time would imply that the concerned authority had failed or abdicated its responsibility or duty.

Public officers can be compelled to perform a statutory duty as obligated by any law. See *John Jet Tumwebaze vs Makerere University & 2 others HC Civil Application No. 78 of 2005*.

The applicant has satisfied this court that the respondent is in breach of its duty to take a decision in a timely manner and this is a breach of duty as provided under the Constitution.

Whether the applicant is entitled to the remedies sought?

The applicant is before court seeking an order of Mandamus. Under Rule 3(1)(a) and 6(1) of the Judicature (Judicial Review) Rules 2009 this court is mandated to issue an order of Mandamus.

An Order of Mandamus does issue compelling the respondent to make a decision or ruling in a complaint made by Tumwebaze Kenneth against the 2nd respondent within 5 days.

The 1st respondent shall meet the costs of this application for both the applicant and 2nd respondent.

I so order

SSEKAANA MUSA
JUDGE
13th January 2021