

1. AMB. WASSWA BIRIGGWA
2. HON. SALAAMU MUSUMBA
3. HON. BETTY AOL OCAN
4. HON. DENIS ONEKALIT AMERE
5. HON. SSEMURU IBRAHIM NGANDA
6. HON. ROLAND KAGINDA
7. HON. FRANCIS MWIJUKYE
8. H/W DOREEN NYANJURA
9. HON. MUBARAK MUNYANGWA
10. HAROLD KAIJA
11. HON. MICHEAL KABAZIGURUKA
12. HON. ATKINS KATUSABE
13. HON. HAROLD MUHINDO
14. HON. ASINANSI NYAKATO :..... APPLICANTS
15. SAMUEL MAKHOHA
16. DR. DOMINIC WAKABI
17. DR. GEORGE EKWARO
18. DR. NICHOLAS KAMARA THADEUS
19. HON. NABOTH NAMANYA
20. AMON RUBAREMA
21. HAJJ OBEDI KAMULEGEYA
22. PLAN VIRGINIA MUGYENYI
23. KENNEDY OKELLO
24. NANYONJO SUZAN
25. NANGONZI FARIDAH

26. HON. KABUGHO FLORENCE
27. DR. ELIZABETH KYEWALABYE
28. MUTESI ZALIKAH

VERSUS

BONIFACE TOTEREBUKA BAMWENDA:..... RESPONDENT

BEFORE: HON. JUSTICE. SSEKAANA MUSA

RULING

The applicants brought this application by way of Chambers summons against the respondent under Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act, Order 41 r.1 & 9 of the Civil Procedure Rules for orders that;

1. A temporary injunction restraining the respondent, his agents, servants and/or employees and any one acting under him from;
 - i) *Holding the position and/or office of the Chief Electoral Commissioner of the Forum for Democratic Change until the final determination of Civil Suit No. 387 of 2023;*
 - ii) *Further holding, conducting and/or presiding over the internal elections for the leadership of the structures of the Forum for Democratic Change, as the Chief Electoral Commissioner of the FDC until the final determination of Civil Suit No. 287 of 2023.*
 - iii) *Convening the national Delegates Conference slated for 06th October 2023 and also conducting elections of the members of the National Executive Committee at the said conference until the final determination of Civil Suit No. 387 of 2023*
2. Costs of this application be provided for.

The grounds in support of this application are set out in the affidavit of Amb. Wasswa Biriggwa-1st applicant which shall be read and relied upon at the hearing but briefly states;

1. The respondent assumed the position and/or office of the Chief Electoral Commissioner of the Forum for Democratic Change (FDC) and arrogated himself powers of convening the National Delegates contrary to Articles 23(1) (3); 28 (1) (b) and 29 of the Forum for Democratic Change Constitution.
2. The applicants have filed a suit challenging the respondent's actions of holding of the office of the Chief Electoral Commissioner of the Forum for Democratic Change and purporting to conduct and /or preside over the internal elections for the leadership of the structures of the FDC.
3. The applicants have also challenged the respondent's actions of convening a National Delegates Conference scheduled on 06th October 2023 to elect members of the National Executive Committee.
4. The pending civil suit has higher chances of success since among others,
 - (i) The respondent's actions and conduct of holding the position of Chief Electoral Commissioner without the mandate of the Delegates Conference under Article 29(1) of the FDC Constitution are illegal and ultra vires.
 - (ii) The respondent usurped the powers of the Party Chairperson enshrined in Articles 23(1) (3) and 28 (1) (b) of the Party Constitution by purporting to convene a national Delegates conference slated for 06th October 2023 to elect members of the National Executive Committee.
 - (iii) The actions of the respondent of illegally convening a delegates' conference contravened the democratic principles required of a political party under Article 71 (1) of the Constitution of Uganda and the provisions of the Political Parties and Organisations Act.

- (iv) The Delegates Conference slated for the 06th October 2023 will whittle down or completely obliterate the role and authority of the office of the Chairperson and NEC, thereby pugging the party into anarchy, disorder and chaos, much to the detriment of the applicants.
- 5. That before the NEC Retreat could be held to consider the respondent's illegal occupation of the office of the Chief Electoral Commissioner, the respondent unilaterally rolled out a purported election road map culminating into a delegates' conference slated for December 2023.
- 6. Unless the respondent is restrained by the injunctive orders of this honourable court he is hell bent to proceed with his nefarious actions which will inevitably lead to the disintegration and eventual demise of the party thereby causing irreparable damage and/ or injury to the applicants who have immensely contributed to the development of the Party.
- 7. The balance of convenience is in favour of maintaining the status quo by halting the Delegates Conference of 06th October 2023 where the applicants are likely to be illegally relieved of their duties as NEC members.

In opposition to this Application the respondent filed an affidavit in reply wherein he vehemently opposed the grant of the orders being sought briefly stating;

- 1. That as the chairperson of the Party Independent Electoral Commission, is aware that the National Council has over 300 members while the National Executive Committee is comprised of over 76 and therefore the applicants are a small minority and this application is brought in bad faith with the intention of upsetting the decisions arrived at democratically in the party by the party organs.
- 2. That the party has internal party organs, with mandate to resolve any disputes within the party and among members of the party and to rectify any irregularity and/ or anomaly within the party including the allegations contained in the plaint and the same have not been submitted to any party

organs for resolution which makes the suit premature and irregular and thus undermining the internal party processes.

3. That the respondent is the Chairman of the Independent Electoral Commission for the Forum for Democratic Change Party, having been appointed as such by the 14th National Council Meeting held on the 8th day of October 2020 at the party headquarters when Hon Yusuf Nsibambi resigned from the position in year 2020 to concentrate on his campaigns.
4. That I have been exercising my duties with diligence and I have not committed any wrong and any of the actions or grievances will be against the party, which through its organs make a decision on the same including making a resolution to sue me and not the applicants.
5. That the allegations against me are personal and whatever I have done in execution of my duties as the chairman of the party Electoral Commission I have acted for and on behalf and in the name of Forum for Democratic Change and not in personal capacity.
6. That the so called petitions attached to Amb. Biriggwa's affidavit in support are forgeries crafted to support and facilitate the suit and applications arising therefrom, as the party has never received, recorded and /or stamped any of the said petitions to call for an extra-ordinary meeting.
7. That the meeting slated for the 6th October is not my meeting but is a meeting of the Forum for Democratic Change and I'm only acting on behalf of the party and I have no servants or agents as alleged working under me are all employees of the party.
8. That the elections being conducted in the party are in accordance with the party road map agreed upon at the 13th National Council Meeting held on 13th-14th of December 2019 at the party Headquarters and indeed Amb

Wasswa Biriggwa chaired the meeting and indeed on the 28th day of July 2023, the National Council again sat and resolved that elections continue.

9. That in line with the approved roadmap for elections and to beat deadlines for purposes of contesting as Chairperson of the party in the elections slated for the 6th October 2023, Amb. Wasswa Biriggwa actually requested for the nomination papers to be nominated as chairman of the party and indeed paid the requisite fees.
10. That the applicants have been acting in contempt of Orders of this Honourable Court duly served on and binding on the Forum for Democratic Change Party and its members by inter alia, holding a delegates' conference expressly stayed by court and are now issuing a roadmap arising out of illegal proceedings of the so called delegates' conference.
11. That the so called delegate's conference, held in defiance of the court order, the applicants made many resolutions, including issuance of a 'roadmap' which they are now implementing and bringing this application in bad faith to frustrate party activities.
12. That the parties in Uganda are required to hold regular elections, every five years but the Party did not conduct the elections for office bearers whose five-year constitutional mandate had expired in the year 2020 due to the then prevailing covid 19 pandemics.
13. That the elections being conducted in the party and which will be concluded on the 6th day of October 2023, are time bound under the Political Parties and Organisations Act and they were brought forward upon the advice of Counsel Tugume Moses in a working committee meeting and the National Executive Committee of the party, where he noted the term of office, for the office bearers which on account of COVID 19 pandemic had been extended and were due to expire in October 2023, and that elections must be held before then otherwise the party will have a Constitutional crisis.

14. That following the above advice and resolutions, the roadmap was amended to have the final elections on the 6th day of October 2023 and I wrote to Amb. Wasswa Biriggwa on the 19th day of June 2023 advising of the need to call delegates conference and a notice was attached for his signature but he declined to sign the same, for which reason Hon. Kibuuka Mukalazi one of the Party Vice Chairpersons signed the same in order to act within time.
15. That Forum for Democratic Change Party, which would be directly affected by any orders issued by this honourable court is not a party in the main suit and issuing orders against it would be condemning it unheard, which is unconstitutional and against the rules of natural justice.
16. That issuing any order with effect of staying an election which by law is required to be held within a given time would have the effect of perpetuating an illegality and offends the provisions of the Political Parties and Organisations Act.
17. That the main suit does not raise triable issues, there is no imminent threat, as the meeting slated for the 6th October was called way back in July 2023 and the applicants continued to participate in the processes leading to the same, which renders the application to be at large and does not disclose the conditions precedent for court to exercise its discretion to grant a temporary injunction.

The applicant was represented by *Erias Lukwago, Tugume Moses and Elotu Jonathan* for two law firms of *M/s Lukwago & Company Advocates* and *M/s Tugume-Byensi & Co. Advocates* while the respondent was represented by *Julius Galisonga, Okot Moses and Wamukota Nandah* of *Galisonga & Co. Advocates*

At the fixing of the date for hearing of this application court directed the parties to file in written submissions which the parties complied. The applicant counsel was allowed to make brief submissions in rejoinder orally within 20 minutes.

I have considered the respective submissions and have established there are some preliminary issues which ought to be considered in this application since they have a serious bearing on the entire case as presented.

PRELIMINARY CONSIDERATIONS

The applicants have brought this suit and application as members of the Forum for Democratic Change against a fellow member whom they confirm is the Chairperson of Party Independent Electoral Commission. The suit leaves out the entity which is a body corporate-FDC for which parties seem to be trying to protect and whose constitution they are vehemently applying to make their respective cases.

Between the applicant and the respondent who is acting for the party or in the best interests of the party? What is the net effect of leaving out the party-FDC in the current proceedings and who will protect the party against the applicants and respondent? The court's view is that the current parties to this suit are fighting for their personal benefits and interests and this may not necessarily be the interest of their party whose membership is national across the country.

The court should be mindful not to issue orders which will affect the Party-Forum for Democratic Change which is not before this court and is not specifically represented in the present proceedings. Anyone whose presence is crucial and fundamental to the resolution of a matter before the court must be made a party to the proceedings. The only reason which makes it necessary to make a person or entity a party to an action is that they should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot effectively and completely unless such a person or entity is a party.

Therefore, Forum for Democratic Change is a proper, desirable and necessary party since they have an interest or may be affected by the result thereof and whatever is being done by either of the parties is in the name of the party and its constitution. The present parties' interests may be adverse to the general spirit of the party nationally and it may have been deliberate to leave it out since its interests are adverse. Any judgment or ruling or orders given against a necessary and desirable party behind its back will be to no avail and it cannot be allowed to stand.

The orders sought against the respondent have dire consequences for the entire Forum for Democratic Change and the court cannot make such orders. The respondent may decide not to attend the meeting slated on 6th October 2023, but the activities will go on with or without him. Therefore, the orders sought will be in vain and baseless.

The second preliminary consideration equally relates to suing then respondent as an individual in matters or actions related to the office of Chairperson of the Party Independent Electoral Commission. The respondent is sued as **BONIFACE TOTEREBUKA BAMWENDA** and not as the Chief Electoral Commissioner of the Forum for Democratic Change or the Chairperson of the Independent Electoral Commission.

The respondent is a holder of that office by virtue of the Constitution of the party and no one has indeed contended that he is an imposter or impersonator to be sued by his name. The actions of conducting elections in the party are by virtue of his office or position he holds in Forum for Democratic Change. It is trite that the issue of capacity or *locus standi* is a point of law which can be raised any stage. The court should determine the capacity to sue or be sued before the court considers the case on merits and this may affect a party in terms of costs. ***See Coleman v Tripollen & Ors [2014] 70 GMJ 20***

The third preliminary consideration is appearance of counsel who is not a party to the application but he is mentioned as one of the potential parties who are being cited in contempt and highly conflicted in the matter. Counsel Erias Lukwago is representing applicants in this matter or suit which is involving the Party-Forum for Democratic Change. This representation is on the borderline of professional misconduct due to his role in the entire conflict.

Under regulation 9 of ***the Advocates (Professional Conduct) Regulations*** provides that; *No advocate may appear before any court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by affidavit; and if, while appearing in any matter, it becomes apparent that he or she will be required as a witness to give evidence....*

It would appear some of the office bearers are now the advocates this would mean that in most of the party matters they would be potential witnesses. It would be improper for them to appear in court matters involving the party since they would be highly conflicted and would lose objectivity in handling the party matters both as advocates, interested parties and also potential witnesses. ***See Democratic Party v Ssekubuge Rajab & 12 Ors HCMA No. 167 of 2020***

The present counsel has been cited for contempt after he was allegedly involved in a 'party coup' which saw him become the ***'Interim President of Forum for Democratic Change'***. As the matter progresses it will become clear that he is a potential witness in the matter. The representation by office bearers directly impacts on his appearance as counsel and he is potentially conflicted.

Determination

Whether the application satisfies the grounds for the grant of a temporary injunction?

The law on granting temporary injunctions in Uganda has since been well settled in the Classic case of ***E.L.T Kiyimba Kaggwa vs Haji Abdu Nasser Katende [1985] HCB 43*** where **Odoki J** (as he then was) laid down the rules for granting a temporary Injunction; thus:-

The granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve the matters in the status quo until the question to be investigated in the main suit is finally disposed of.

The conditions for the grant of the interlocutory injunction are;

- i. Firstly that, the applicant must show a prima facie case with a probability of success.**
- ii. Secondly, such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.**

- iii. Thirdly if the Court is in doubt, it would decide an application on the balance of convenience.

I will now consider the above principles in the determination of this application.

Ground 1. The Applicant must show a prima facie case with a probability of success.

I have had the occasion of meticulously reading the Applicant's pleadings and the respondents' replies to this application and have carefully evaluated the parties' affidavit evidence on record before arriving at my decision.

When considering this ground all that the applicant has to prove to court is whether there exists a triable issue for the court to resolve in the main suit.

I must state that it is not that every dispute between private parties that should be amenable to litigation. If it were so the court would be so laden with all forms of disputes that do not necessarily necessitate the adjudication of court. It is for this reason that before the consideration of an application for temporary injunction, the applicant needs to satisfy court that there is a triable issue in the main cause.

The consideration of whether there is a triable issue is the exercise of judicial discretion.

Lord Diplock in ***American Cyanamide Versus Ethicon [1975] ALLER 504*** had this to say about the exercise of judicial discretion when considering establishment of a prima facie case, for which I am in agreement with;

"Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as "a probability", "a prima facie case", or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried."

In that regard, I have labored to discern from the applicants' affidavit evidence together with their pleadings as to what the real complaint is whether; it is a claim for upholding the Constitution of the party or a case to stop the delegates' conference which is slated for 6th October, 2023 or a case to stop election of new office bearers.

The applicants can sustain any claims against individual members when the party FDC is a non-party to the proceedings. As not earlier the triable issues should only be resolved within the framework of the party constitution and not through one faction suing the other as this would cause party confusion and disunity. The party should be at the forefront of their dispute or else the different party members may sue each for selfish interests which may impact on the party.

It is trite law that courts of law do not make determinations on mere prepositions and suggestions but on facts. The facts before the court clearly shows that there is a party dispute between two factions and indeed each of the faction claims legitimacy in office. The alleged triable issues should only be determined in entirety and by considering the circumstances of case.

In this regard at this stage the law does not require Court to delve into the merits of the main suit. All that is required to be proved is that there is a serious issue which is not frivolous nor vexatious to be tried by court. The nature of the serious issues to be determined in the main suit are suspicious and questionable since the party-Forum for Democratic Change is not a party. The grievances appear to be between the members or the parties to this application which should not be used to stifle the activities of the party and other members.

However, in **Kiyimba Kagwa (supra)** the purpose for granting a temporary injunction is to preserve the matters in the status quo until the question to be investigated in the main suit is finally disposed of.

The status quo in this case as alluded to in submissions of the respective parties is that the respondent as the Chairperson of the Independent Electoral Commission is conducting party elections in accordance with the roadmap agreed upon by the members at the National Council meeting chaired by the 1st applicant.

This court deprecates the practice of granting temporary injunctions which practically give the principal relief sought in the main application for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, public interest and a host of other considerations. Where there is a serious dispute on the facts, it cannot be said that a prima facie case had been made out for the grant of temporary injunction. ***See Yo-Uganda Ltd & 2 Others vs URA HCCA No. ML. 0009 of 2023***

The sum effect of this application for a temporary injunction is to put the entire party (FDC) in a limbo without office bearers or to facilitate the ‘coup leaders’ to take over the party affairs until the court will determine this suit in 3 or 4 years away which may be an absurdity with a lot of unintended consequences.

In this regard, in as much as the applicants have contended that there are serious issues to be tried, this court should not merely issue a temporary injunction without being mindful of the entire party.

Ground 2: That the applicant will suffer irreparable injury which cannot be atoned for by award of damages.

Court in ***Kiyimba Kaggwa vs. Hajji Abdu Nasser Katende (supra)***, observed that irreparable injury does not mean that there must not be physical possibility of repairing the injury but means that the injury must be a substantial or material one that is one that cannot be adequately compensated for in damages.

Counsel for the Applicant submitted that the applicants as members of NEC will suffer to lose their positions as NEC members in Forum for Democratic Change. They have cited the different authorities which point to the fact that losing a position in the party cannot be atoned for by any amount of damages.

Lord Diplock in ***American Cyanamide (supra)*** laid down the determining test when he held that;

“the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages

for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared at that stage."

The interests of the applicants must be weighed against the general membership of the party and they do not have overriding interests against the others members. The potential positions or numbers of the membership of NEC is not mentioned, but the applicants are 27 members as against the number which the respondent has mentioned of 76 for the National Executive Committee. This implies that applicants are just 35% of the NEC and this would be against the majority membership and the entire party membership. The right of the applicants to be protected has to be weighed against the corresponding need for the respondent to ensure that he exercises his mandate as granted by the party constitution and other party structures.

In the circumstances of this application, the applicants potential irreparable damage is far below the other party members who are desirous of taking part in the said election.

Ground 3. If the Court is in doubt, it would decide an application on the balance of convenience

It is trite law that if the Court is in doubt on any of the above two principles, it will decide the application on the balance of convenience. The term balance of convenience literally means that if the risk of doing an injustice is going to make the applicants suffer then probably the balance of convenience is favourable to him/her and the Court would most likely be inclined to grant to him/her the application for a temporary injunction.

In other words, if the applicant fails to establish a prima facie case with likelihood of success, irreparable injury and need to preserve the status-quo, then he/she must show that the balance of convenience was in his favour.

Counsel for the applicant submitted that the balance of convenience is in the applicants, favour as they seek to restrain and prohibit alleged unconstitutional acts of the Respondent. To the contrary Counsel for the respondent submitted and contended that if the injunctions were to be granted that they would have far reaching inconvenience to the Respondent and in particular the party which is not part of these proceedings.

Balance of convenience was defined in the case of ***Uganda Electricity Distribution Company Limited v Citi Bank Uganda Limited and 2 Others*** by Mubiru J to mean comparative mischief or inconvenience that may be caused to either party in the event of refusal or grant of injunction. It is necessary to assess the harm to the applicant if there is no injunction, and the prejudice or harm to the respondent if an injunction is imposed. The courts examine a variety of factors, including the harm likely to be suffered by both parties from the granting or refusal of the injunction, and the current status quo as at the time of the injunction. The court should then take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong.” It is thus necessary to weigh the balance of convenience for the public interest as well as the interest of the parties.

The party’s interest should supersede the applicants as NEC members who merely comprise of 35% of the entire NEC. This is equally weighed against the entire party membership nationwide. The members have already arrived to attend the delegates conference and money has already been expended for the purpose, it would be unfair to stop the conference and this would have both financial and economic loss in addition to the general confusion to the party membership.

This court further observes that the actions of the applicants to seek a temporary injunction as belated as they did was an act of bad faith. As the respondent stated in his affidavit that the date of delegates conference of 6th/10/2023 was set in July 2023. The applicants have offered no explanation as to why they decided to file an application for temporary injunction on 3rd October 2023 2 days to the function/conference-. The applicants were trying to stampede the court with applications for interim within such a short time. A delay in filing of an application

is equally a strong ground to deny a temporary injunction since it is a discretionary and equitable remedy.

The applicants had an unfettered duty to satisfy the court that this equitable remedy granted at discretion of court was available to them. They also had a duty to satisfy the court that in the special circumstance of the case they are entitled to the relief of temporary injunction which in my view they have failed to discharge.

This application fails on the preliminary considerations set out herein and also on the grounds adumbrated for the grant of temporary of temporary injunction. The court would not in any event have granted any orders which would have affected party FDC when it is not a party.

In the result for the reasons stated herein above this application has no merit and is hereby dismissed with no order as to costs.

It is so ordered.

SSEKAANA MUSA

JUDGE

5th October 2023