

UGANDA / JUDGMENT

Fox Odoi v NRM & Anor (Constitutional Application No. 32 of 2015) [2015] UGCC 7 (1 December 2015)

[2015] UGCC 7

COURT

Constitutional Court of Uganda

BEFORE

Kavuma, JCC, Musoke, JCC

CASE / FILE NUMBER

Constitutional Application No. 32 of 2015

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THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT

KAMPALA

CONSTITUTIONAL APPLICATION NO. 32 OF 2015

(Arising from Constitutional Petition No. 37 of 2015)

BETWEEN

FOX ODOI-OYWELowo :::::::::::::::::::::::::::::::::: PETITIONER

VERSUS

1. NATIONAL RESISTANCE MOVEMENT
2. ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::RESPONDENTS

BEFORE: HON. JUSTICE S. B. K KAVUMA, DCJ

HON. LADY JUSTICE ELIZABETH MUSOKE, JA HON. JUSTICE C. BARISHAKI, JA

RULING OF COURT

This is an application for a temporary injunction brought under Articles 28(1) and (2), 126 and 137 of the

Constitution of the Republic of Uganda, Sections 98 and 64(c) and (e) of the Civil Procedure Act, Cap 71, Section 33 of the Judicature Act Cap 13, Rules 10 and 23 of the Constitutional Court (Petitions and References) Rules SI 91 of 2005, Rules 2(2), 5(b) and 43(1)(2) and 44 of the

Constitutional Court (Petitions and References) Rules SI 91 of 2005, Rules 2(2), 5(b) and 43(1)(2) and 44 of the Judicature (Court of Appeal Rules) Directions SI 13-10. It arises out of Constitutional Petition No.37 of 2015, and it is for orders that;

1. A temporary injunction doth issue staying any proceedings of the respondent and stopping the respondents from continuing with the threatened unconstitutional actions of enforcing threats against the petitioner's position of NRM flag bearer for West Budama North Constituency till the determination of the application for or until further orders of this Court.
2. A temporary injunction doth issue ordering the respondents from proceeding with their unconstitutional actions of acting as a partial tribunal in matters it is **functus officio**, without according the applicant a hearing in breach of his right to a fair trial accorded to him under Articles 28(1) and 44(c) of the Constitution, until determination of the main application or until further orders of this Court.
3. A temporary injunction doth issue ordering the respondents from proceeding with their unconstitutional actions of NRM Electoral Commission continuing with the process of removing the applicant from his elected position of NRM flag bearer, without any hearing or determining the application and the petition in accordance with the Constitution.
4. A temporary injunction doth issue ordering and staying the respondents from continuing with the process of implementing Regulation 20(21) and actions there under, including the hearing and determination of petitions arising out of elections conducted by the NRM Electoral Commission until the determination of the main application or until further orders of this Court.
5. Costs of the application be provided for.

The grounds in support of the application are contained in the affidavit of the applicant. Briefly they are:

1. The applicant has filed a Constitutional Petition challenging the unconstitutional acts of the respondents.
2. Owing to the busy schedule of this court, the hearing and determination of the applicant's petition may take very long and the applicant will be prejudiced.
3. The applicant's Petition has a prima facie case with a high probability of success and raises issues of Constitutional interpretation.
4. Unless restrained, the respondents will continue with the unconstitutional and illegal acts to the applicant's detriment and this will irreparably injure fundamental and constitutional right to a fair hearing before courts duly established under the Constitution.
5. If the application is not granted, there is a danger of the applicant being subjected to an unconstitutional trial without a hearing.

6. If the application is not granted, the petition shall be rendered nugatory and the applicant will be deprived of his right to access courts of law and to a speedy and fair adjudication of his rights. Being subjected to an un constitutional trial without a hearing.

The first respondent filed an affidavit in opposition of the application deposed by Dr. Tanga Odoi the Chair Person of its Election Commission while the second respondent, the Attorney General, did not file a response.

At the hearing of the application Dr. James Akampumuza together with Godfrey Madibo Mafabi appeared for the applicant, while Mr. Didas Nkurunziza together with Mr. Erbert Byenkya appeared for the first respondent and Mr. Kosia Kasibayo Senior State Attorney, appeared for the Attorney General.

Dr. Akampumuza submitted that the application seeks for five orders four of which were injunctive. Briefly the orders sought are:

1. The 1st Respondent be stopped from enforcing its threats of stopping the applicant from being nominated the 1st respondent's flag bearer in the next national elections.
2. That the 1st Respondent Electoral Commission be stopped from acting as a partial tribunal and that the said Electoral Commission is functus officio.
3. That the 1st respondent be stopped from implementing Regulation No. 20(21) of its Regulations for NRM Primary Elections 2015 as the said regulation is unconstitutional.
4. That the NRM be stopped from not declaring the applicant as its flag bearer without giving him a hearing.
5. That the costs of the application be provided for.

Dr. Akampumuza contended that the Electoral Commission of the 1st respondent had constituted itself into a tribunal for elections for NRM primaries and yet the said Commission had participated in organizing the party elections for West Budama North Constituency where the applicant was declared the winner. He referred to annexure C to the Notice of Motion where details of results in the Declaration Form showed Fox Odoi, the applicant, with 12,453 votes and Otheino Okoth with 12,258 votes.

According to Annexure E to the affidavit of the applicant, one Othieno Okoth Richard petitioned the Chairman of the NRM Electoral Commission on 28th October 2015. In the petition, he complained that he should have been declared the winner because he had obtained more votes than the applicant.

In his affidavit in reply Dr. Tanga Odoi, the Chairperson of the 1st respondent's Electoral Commission averred, among other things, that a complaint was lodged against the decision of the election official who had declared that the applicant had won the elections. The Commission handled the complaint and found that the results had not been completed. A count and re-tally was carried out and the result was that the applicant had, in fact, lost the election and Mr. Othieno was the winner.

It is settled law that in considering an application for a temporary injunction the following principles must be taken into account;

1. The applicant must show the existence of a prima facie case with a probability of success.
2. That the applicant stands to suffer irreparable injury not likely to be adequately compensated for by an award of damages, and
3. That, if court is in doubt of any of the above two principles, it will decide the application on a balance of convenience.

(See *Humphrey Nzei Versus Bank of Uganda & Anor*, Constitutional Application No. 001/2013, *Hon. Andrew Baryayanga Versus The Attorney General*, Constitutional Application No.04 of 2013, *America Cyanamid Versus Ethicon Ltd* [1975]JAC 396.)

Regarding a prima facie case with a probability of success, Dr. Akampumuza argued that there were many issues that required interpretation by the Constitutional Court and were likely to succeed.

Counsel submitted that Regulation 20 (21) of the NRM Primary Elections Regulations was unconstitutional because it was the same Electoral Commission which organized and conducted the disputed elections and at the same time it was to handle the disputes arising from those elections. This was contrary to Articles 28(1) and 44(c) of the Constitution. Moreover, the chairman of the Electoral Commission was also the chairman of the Tribunal. Counsel contended that this amounted to him being a judge in his own cause, which in his opinion, was unconstitutional. Further, that the said Chairperson had previously shown interest in contesting for Parliament in the same constituency.

In response, Mr Byenkya, counsel for the 1st respondent submitted that the petition was a disguised Election Petition which should have been filed in the High Court.

Counsel further submitted that sponsorship of a person by a party as a flag bearer was not a civic right, but a voluntary

act. Therefore, allegations raised by the applicant could not form the basis of a prima facie case for interpretation of the Constitution by this Court. The position would have been different if the applicant had been denied the right to contest as an independent candidate as provided under Section 10 of the Parliamentary Elections Act, 2005, as this was a right vested in any qualified citizen; and if anyone threatened such a right, there would be a prima facie case for the Constitutional Court to determine.

The issue as to which matters should be referred to the Constitutional Court has previously been dealt with by Courts. In *Ismail Serugo VS Kampala City Council and Another* Constitutional Appeal No 2 of 1998, and *Uganda National Roads Authority Versus Irumba Asuman and Peter Magela*, Supreme Court Constitutional Appeal No.2 of 2008, the Supreme court held that a case for constitutional interpretation is made out once a petitioner makes allegations which fit within the provisions of Article 137(3) (a) and (b) of the Constitution of the Republic of Uganda, 1995.

In the instant application, the applicant raises issues of violation of his right to a fair hearing which is a no

derogable right under Article 44(c) and 28(1) of the Constitution. The applicant also challenges the constitutionality of Regulation 20(21), among others of the NRM Primary Elections Regulations, 2015. In our opinion, such matters that raise issues of violation of rights basing on an alleged unconstitutional law/regulation or act cannot be ignored by this Court.

It was the argument by Counsel for the 1st respondent that the position of an NRM flag bearer is a privilege and not a civic right guaranteed by the Constitution of the Republic of Uganda. We find that NRM is a political party established under the Political Organizations Act. It has a Constitution of its own with regulations and guidelines for its operations and activities including how the party can choose a flag bearer for National Elections. It is our view that the activities carried out under the party ought to meet the standards set by the National Constitution, and to argue otherwise would be absurd. Therefore, the impugned NRM Regulations may be the subject of adjudication by this Court.

In our view, the allegations raised by the applicant above meet the requirements of Article 137(3) (a) and (b) of the Constitution. This court is, therefore, satisfied that the

Constitutional Petition from which this application arises raises serious issues that necessitates the Court to address. We, therefore, find that the Petition raises a prima facie case to be determined by this Court. However, as to whether the rights of the applicant were violated, that will be determined at the hearing of the Petition.

As to whether the applicant would suffer irreparable injury, it was argued for him that if the temporary injunction is not granted, it will amount to his being ejected from the NRM political party which would be an infringement on his constitutional right to be in a political party of his choice. As a result, his Petition would be rendered nugatory.

We find instructive the decision in *American Cyanamide Versus Ethicon* [1975] 2 WLR 326 as to what amounts to irreparable injury, where court stated as follows;

“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 b

enjoined between the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted

In the instant application, the applicant did not demonstrate how he shall cease to be a member of the NRM party in case he is not declared a flag bearer in the upcoming nominations. Counsel for the applicant did not cite any provisions of the NRM constitution or any other legal provision to support his contention that in case the applicant is not declared a flag bearer, he shall suffer irreparable damage.

By his own affidavit, the applicant states that he is a Member of Parliament representing West Budama North Constituency. In paragraph 18 of his affidavit in reply, Dr. Tanga Odoi states that the Applicant was an independent member of Parliament after failing to become the flag bearer of the 1st respondent in 2011.

We are not persuaded that the applicant will suffer irreparable damage if the application is not granted.

As to the status quo, this Court, in *Andrew Baryayanga Versus The Attorney General* (Supra), while citing *Nzei Versus Bank of Uganda & Anor* (Supra) defined status quo as the existing state of affairs, things or circumstances during the period immediately preceding the application for an interlocutory injunction.

In the instant application, the applicant seeks for orders restraining the 1st respondent from removing him from his position as the NRM flag bearer, while using an unconstitutional regulation. According to the applicant, he is the rightfully elected flag bearer for NRM for the 2016 elections having so been declared by the presiding officer as indicated in Annexure C to his affidavit in support of the application.

In the affidavit in reply, it was averred by the Chairman of the 1st respondent's Electoral Commission that after the District Registrar had declared the results pronouncing the applicant as the winner, a complaint was lodged challenging the validity of the final results as announced. He further avers that all the concerned parties were duly informed of the complaint and it was subsequently found by the NRM

Electoral Commission that Mr. Othieno was the winner and not the applicant.

In this country, one is free to join any political party of one's choice or to remain independent. By joining a party, one signifies one's acceptance of its constitution, regulations and practices.

According to the affidavit of the 1st respondents Electoral Commission chairperson, once the Commission has handled a complaint, it issues a declaration to that effect.

In our view, it is clear from Regulation 20(21) of the Regulations for the NRM Primary Elections that the finality of the results declared by the District Registrar is only conclusive where there is no dispute or complaint. Where there is a complaint, it is the declaration by the NRM Electoral Commission, upon handling the petition, that brings the matter to finality.

In the instant case there was a dispute, and therefore, the final result was that declared by the Electoral Commission. In our view therefore, the status quo to be maintained is the final declaration made by the 1st respondent's Electoral Commission.

We, therefore, find that the order sought by the applicant for court to restrain the respondents from removing him from his position as the NRM flag bearer has been overtaken by events and there is no status quo to be maintained in that regard.

Regarding the balance of convenience, it is averred in paragraph 9(a) of the affidavit of the Chairperson of the 1st respondent's Electoral Commission that the national nomination dates for Members of Parliament are the 2nd and the 3rd December, 2015. This being so, it would, in our view, be virtually impossible for the 1st respondent to conduct elections to secure a flag bearer within these remaining few hours.

We are persuaded, therefore, that the balance of convenience tilts in favour of the 1st respondent.

Accordingly, this application is dismissed. The costs shall abide the result of the Petition.

It is so ordered.

Dated at Kampala this 1st day of December, 2015.

HON. S. B. K KAVUMA

DEPUTY CHIEF JUSTICE

HON. ELIZABETH MUSOKE, JA

HON. CHEBORION BARISHAKI, JA

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