THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 20 OF 2016

1. UGANDA PEOPLES CONGRESS
2. THE UPC ELECTORAL COMMISSION::::::::::::::::::::APPELLANTS

VERSUS

PROFESSOR EDWARD KAKONGE
(Substituted for Joseph Bbosa,
Deceased):::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala (Civil Division) before Nyanzi, J., dated the 11th day of December, 2015 in Miscellaneous Cause No. 0086 of 2015.)

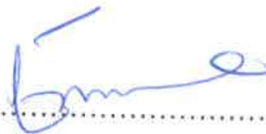
CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA.
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA.
HON. LADY JUSTICE IRENE MULYAGONJA, JA.

JUDGMENT OF ELIZABETH MUSOKE, JA.

I have had the advantage of reading in draft the lead judgment in this matter prepared by my learned sister Hon. Justice Irene Mulyagonja, JA. I agree with it, with nothing useful to add.

As Hon. Justice Christopher Madrama, JA., also agrees, the disposition of this appeal shall be as proposed in the lead judgment of Hon. Justice Irene Mulyagonja, JA.

Dated at Kampala this ......7th...... day of ......Sept...... 2020.



....

Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 20 OF 2016

(Arising from High Court Miscellaneous Cause No. 86 of 2015)

(Coram: Musoke, Madrama & Mulyagonja, JJA)

1. UGANDA PEOPLES CONGRESS}
2. THE UPC ELECTORAL COMMISSION} .... APPELLANTS

VERSUS

PROFESSOR EDWARD KAKONGE} ....RESPONDENT

{Appeal from the Ruling of the High Court of Uganda, the Hon. Yasin Nyanzi, J, dated 11th December 2015}

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned sister Hon Justice Irene Mulyagonja, JA.

I concur with the judgment and I agree that the appeal be dismissed on the terms she has proposed in her reasoned judgment and I have nothing useful to add.

Dated at Kampala the 7th day of Sept 2020

Christopher Madrama Izama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Musoke, Madrama & Mulyagonja, JJA)

CIVIL APPEAL NO. 20 OF 2016

(Arising from High Court Miscellaneous Cause No. 86 of 2015)

1. UGANDA PEOPLES CONGRESS
2. THE UPC ELECTORAL COMMISSION ::::::::::::::::::: APPELLANTS

VERSUS

PROFESSOR EDWARD KAKONGE
(Substituted for Joseph Bbosa,
deceased) :::::::::::::::::::::::::::: RESPONDENT

{Appeal from the Ruling of the High Court of Uganda, the Honourable Yasin Nyanzi, J, dated 11th December 2015}

JUDGMENT OF IRENE MULYAGONJA, JA

Introduction

This is an appeal from the ruling of the High Court in Miscellaneous Cause No. 86 of 2016 in which the respondent sought an order of certiorari to quash the decision of the 2nd appellant declaring James Michael Akena the President-Elect of the 1st appellant (UPC), a declaration that the said decision of the 2nd appellant was inoperative, null and void as it violated the Constitution of the 1st appellant, and an order prohibiting the 1st appellant and its servants or agents from enforcing the impugned decision of the 2nd appellant.

The respondent further sought an order that the 1st appellant do conduct elections of the party president in accordance with the Constitution of the 1st appellant and a further order restraining James Michael Akena from

"parading" himself as the President-Elect of the 1st appellant, as well as an order to evict him and his agents from the party premises at Uganda House in Kampala, and the costs of the application.

The trial judge granted the application, quashed the decision of the 2nd appellant and declared that the 2nd appellant's declaration of James Michael Akena as the President-Elect of the 1st Appellant was illegal, null and void because it violated the Constitution of the 1st appellant. A declaration also issued that the election of James Michael Akena by the Delegates' Conference of the 1st appellant was illegal, void and of no legal consequence because it violated the Constitution of the 1st appellant.

The trial judge finally ordered that the 1st appellant acts in conformity with the decision of the High Court in **Miscellaneous Cause No. 35 of 2015, Hon Betty Amongi & Hon Ebil Fred v. Olara Otunnu & 2 Others,** relating to the UPC Party Presidency elections because in the absence of an appeal to set it aside, the 1st appellant was still bound by it.

The application in the High Court was filed by three parties: the respondent, now deceased, Professor Edward Kakonge and Otto Ishea Amizza. At the hearing of the application, the appellants challenged the standing of the latter two applicants for not filing affidavits in support of the application and the trial Judge, in his wisdom, deemed it fit to strike out two of the parties and retain one applicant, Joseph Bbosa. Unfortunately, after the decision of the High Court was delivered, but during the pendency of this appeal, in September 2019, Joseph Bbosa passed on leaving this appeal in limbo.

On the 9th December 2016, this court, (Kavuma, DCJ, as he then was) granted an interim order for stay of execution of the orders of the High Court, in Court of Appeal Misc. Application No. 26 of 2016. The order

stayed execution and implementation of all orders of the High Court. All persons were ordered to refrain from interfering in the activities of the first appellant, and the exercise of the authority of the 1st applicant under the leadership of Hon Micheal Akena and his Cabinet. The Registrar was ordered to fix the application for stay of execution (**Misc. Application No. 19 of 2016**) without delay. Unfortunately, the application was disposed of on 29th July 2020, just before the disposal of this appeal.

When the parties appeared before this Court for the hearing of the appeal on the 29th July 2020, also before court was **Miscellaneous Application No. 422 of 2020, Professor Edward Kakonge & Another v. Uganda People's Congress & UPC Electoral Commission**, in which the applicants sought to be added as parties in the appeal. By agreement of the parties, Professor Kakonge was substituted as the respondent in this appeal and it proceeded against him.

Grounds of Appeal

The appellants were aggrieved by the whole of the decision of the trial judge and set forth the following grounds in the memorandum of appeal:

1. The learned trial judge erred in law and fact when he failed to properly evaluate the evidence on record and thus arrived at the wrong findings and conclusions which occasioned a miscarriage of justice to the appellants;

2. The learned trial judge erred in law and fact when he declared that Hon James Michael Akena was not lawfully declared President of the 1st respondent (*sic* read appellant).

3. The learned trial judge erred in law and fact when he, premising himself on wrong findings allowed the respondent's claim and granted the reliefs sought by the respondent in the suit.

4. The learned trial judge erred in law and fact when he made declarations including a declaration that the 2nd appellant's declaration of Hon James Michael Akena was illegal, matters which were outside the parties' pleadings and without any amendment to the pleadings.

5. The learned trial judge erred in law and fact when he held that the respondent's cause of action was amenable to judicial review.

The appellants proposed that this court allows the appeal and sets aside or varies part of the orders of the trial court and for the costs of the appeal.

The respondent opposed the appeal and prayed that it be dismissed with costs.

Representation

At the hearing, the appellants were represented by Mr Joseph Kyazze. The respondents were represented by Messrs Fred Businge, Julius Galisonga and Goloba Mohammed.

Court adopted the appellants' conferencing notes filed on the 19th June 2018 as their submissions. The respondent's Advocates filed written submissions on the 3rd August, 2020, in addition to their conferencing notes filed on the 12th July 2018 which too were adopted by Court. The appellant filed submissions in rejoinder on 11th August 2020.

Submissions of Counsel

Counsel for the appellant argued grounds 1 and 3 together, and grounds 2, 4 and 5 separately. Counsel for the respondent responded to the grounds in the same order.

With regard to the first and third grounds, Counsel for the appellant argued that the allegation that there is no provision for the Party Electoral Commission to make any declaration relating to the Presidency of the UPC was not proved by the respondent. He contended that the declaration of the President depended on whether the Electoral Commission had the power to appoint all District Returning Officers who presided over elections at district level and whether these officers had the power to declare the candidate with majority votes as winner for each District Conference, and so announce the final results for each District.

In his submissions in rejoinder Counsel for the appellants argued that the Party Electoral Commission appointed by the Party President issued a roadmap for the elections in March 2015 with Instructions for convening district conferences for the nomination of Party Presidential Candidates. He asserted that the Party Electoral Commission has the power to declare the candidate with the majority votes as having been nominated by the district conferences. He referred to guidelines 9 and 10 of the Instructions to Convene the District Conferences, Annexure G to the Affidavit of Hon Akena, also referred to here as the Nomination Guidelines.

Counsel for the appellants further submitted that the Party Electoral Commission (PEC) compiled and thereafter announced the final results of the District Conferences where Hon Akena emerged the winner in 63 districts. That the PEC verified the results and declared James Michael

Akena unopposed as the Presidential candidate, without any objection from the members, as stated in the affidavit of Hon Akena.

Counsel went on to submit that the PEC borrowed best and reasonable practices to declare Hon Akena as the party president, unopposed, pursuant to Article 103 (6a) of the Constitution of the Republic of Uganda, read together with Article 21 of the UPC Constitution and clauses 12 and 13 of the Guidelines for Nominations, because all legal instruments of the UPC are silent on what happens when a candidate is nominated unopposed. He asserted that the PEC has the mandate to declare the winner of the Party Presidential Elections where only one candidate is returned unopposed. He referred to Article 21 of the UPC Constitution and clause 12 and 13 of the Nomination Guidelines. Counsel contended that the names of the candidates are only submitted to the Delegates Conference where more than one candidate obtains nominations in 1/3 of the total number of districts in Uganda.

Regarding the absence of a provision for the designation of a "President-Elect" Counsel for the appellants argued that though the UPC Constitution does not provide for it, UPC draws its laws and guidance from the laws of Uganda and international political and democratic practices and norms that enhance the best political practices. Counsel went on to submit that since Hon Akena was unopposed as a candidate, he qualified as the elected President of the UPC on the basis of the Constitution of Uganda which provides that the President-Elect holds office until he is sworn in as President.

With regard to the respondent's contention that Hon Akena was not vested with power to call a high-level meeting such as the Delegates' Conference of the UPC, Counsel for the appellants submitted that Hon Akena did not

call a delegates' conference; he called a consultative meeting which members, of their own motion, constituted into a delegates' conference. He relied on **Sowedi Katongole v. Sentongo Produce & Coffee Farmers Ltd, COA Civil Appeal No. 46 of 2003**; and **Mbagadhi Fredrick Nkayi v. Dr Nabwiso Frank Wilberforce, Election Petition No. 14 of 2011**.

Turning to ground 2, the assertion that the trial judge erred when he declared that the 2nd appellant's declaration that Hon Akena was elected President of UPC was unlawful, Counsel for the appellants submitted that the allegation that the elections were marred with voter bribery was not proved by the respondents. He asserted that the appellants only facilitated District Returning Officers by providing allowances for transport and payment for venues, and that the allowances were duly approved by the UPC Cabinet.

In the submissions in rejoinder, Counsel for the appellants argued that the court made a finding that the PEC did not lawfully declare Hon Akena the President of the UPC without affording him a hearing. That the respondents who sought relief against Hon Akena ought to have added him as a party to the application since he would be affected by the decision of the court. Counsel asserted that though Hon Akena deposed an affidavit on behalf of the appellants, he could not appear and defend himself against personal allegations and reliefs where he (Hon Akena) was not a party. He submitted that since the issue stated for the court's determination was whether Hon Michael James Akena was lawfully declared as President by the UPC Electoral Commission, the trial judge's finding that he was not was faulty because Hon Akena was not a party to the application.

Counsel further submitted that the issue here envisaged that Hon Akena would be a party to the application. That the application was akin to an

election petition being filed against the Electoral Commission without the successful candidate being made a party thereto yet orders would be sought against him. He asserted that Hon Akena was the primary target of the orders sought; his election was challenged and it was sought to have it invalidated. Counsel then asserted that it was mandatory to make him a party to the application. He relied on the decision of the High Court of Kenya in **Lesrima Simeon Saimanga v. Independent Boundary Commission & 2 Others, Petition No 1 of 2017,** for the submission that an election petition is brought against the person whose election is complained of or any other person whose conduct is complained of in relation to an election.

Counsel for the appellants then charged that the decision of the learned trial judge flouted the principles of natural justice in Article 28 (1) and 44 (c) of the Constitution of Uganda; it amounted to condemning Hon Akena without being heard. He relied on the decision in **Carol Turyatemba v. Attorney General, Constitutional Petition No 15 of 2006,** where the Court ruled that the petition before it was only partly competent in as far as it sought reliefs that were between the petitioners and the respondents, but incompetent in respect of those reliefs, which, if granted would affect the interests of third parties in the suit lands, yet those parties were not parties to the petition. He concluded with the assertion that the declaration made by the trial judge could not be the subject of an application for judicial review because the subject purely related to an election matter.

On the 4th ground, Counsel for the appellants submitted that the trial judge made declarations on matters that were not pleaded by the respondent, in particular that the declaration of Hon Akena as President was illegal, without any amendment of the pleadings. In Counsel's opinion,

this was not one of the prayers of the respondents to court and it occasioned an injustice to the appellants. He complained that the appellants' Counsel was constrained by the court to submit on this issue without an amendment of the pleadings and without adding Hon Akena to the application as a party. And that the determination of the question whether Hon Akena was validly elected without making him party to the proceedings rendered the proceedings and declarations of the trial judge a nullity.

In his submissions in rejoinder, Counsel for the appellants added that reliefs are governed by the rules of procedure. That according to Order 7 rule 7 of the Civil Procedure Rules (CPR) reliefs must be set out in the party's pleadings. Further that parties are bound by their pleadings. He cited Order 6 rule 7 CPR for this assertion. Counsel went on to argue that court cannot admit evidence outside the pleadings; neither can it grant reliefs that are not specifically pleaded. He relied on the decision of the Supreme Court in **Goustar Enterprises Ltd. v. John Kokas Ouma, SCCA No 8 of 2003,** where Karokora, JSC concluded that it is well settled that no decision must be made or relief granted by any court of law on a ground which was not pleaded.

Counsel for the appellant concluded this ground with the submission that the learned trial judge's declaration that the 2nd appellant's declaration of Hon Akena as president-elect of UPC was illegal because it offended the rules of pleadings. He invited this court to find that the orders of the trial judge were outside those that were prayed for in the Notice of Motion before him,

With regard to the 5th ground, Counsel for the appellants argued that the respondent's application did not meet the criteria for judicial review but

was essentially an election petition seeking the determination of the rights of the parties, which in his view was outside the purview of judicial review. He asserted that the trial judge did not properly address this objection in the circumstances.

In his submissions in rejoinder, Counsel for the appellants submitted that an action for judicial review cannot be heard and determined as though it were an election petition by an aggrieved party. That the matters raised were those that would be raised in an election petition. He relied on the decision in **Lesrima Simeon** (supra), and submitted that the application before the trial judge was a disguised election petition. He asserted that the trial judge ought to have rejected the application and directed the respondents to file a petition in which he would have been able to legally and factually interrogate the electoral process that was being complained of. He referred to **Simon Tendo Kabenge v. Uganda Law Society, Misc. Cause No 254 of 2013**, where Musota, J, (as he then was) ruled that neither section 36 of the Judicature Act which confers jurisdiction on the High Court to grant prerogative orders, nor rule 3 of the Judicature (Judicial Review) Rules of 2009 provide that judicial review is for purposes of challenging the outcome of an election and dismissed the application.

Counsel for the appellant invited this court to find the decision of the High Court in the **Kabenge case**, especially the distinction between judicial review and election petitions and the procedure applicable thereto applicable to the matter before this court. He submitted that the facts in the **Kabenge case** were on all fours with those in the instant case and asserted that the decision in the **Chief Constable of North Wales Police** cited by the respondents was distinguishable because it did not deal with an election matter.

In reply to the 1st and 3rd grounds, Counsel for the respondent submitted that he agrees with the trial judge's finding that there is no provision that allows the Party Electoral Commission to make any declaration relating to the Presidency of the UPC. He emphasised that as was held by the trial judge the Party Constitution does not provide for a *"President Elect"* with powers to call a Delegates' Conference that binds the UPC. He asserted that under Article 13.2 (5) of the Party Constitution, the Party President must give notice of one month of such meeting or where a special meeting is called, it must be requisitioned by members. Counsel for the respondents further contended that according to Article 13.2 (5) of the UPC Constitution, the Delegates' Conference is the only body that elects the President. He added that Hon Akena admitted this is in paragraph 11 of his affidavit in reply. That the same was also stated in the affidavit of Olara Otunu, ousted President of UPC.

In response to the submission that Hon Akena was properly announced the "President-Elect" of the UPC, Counsel for the respondent stated that the evidence on record was that the Commissioners of the Electoral Commission were made to sign and read to the media a declaration drafted by "the Akena group" designating Hon Akena as the *"President-Elect."* That under that title, Hon Akena issued a letter dated 25th June 2015 inviting delegates to a Consultative Meeting to be held on 1st July 2015. And that Hon Akena in his affidavit in reply to the application *did* state that the delegates sitting at Lugogo constituted themselves into a Delegates' Conference and formaly elected him UPC President.

Counsel for the respondents submitted that the calling of the Delegates' Conference is the sole preserve of the President of the party, according to Article 13.3 (2) of the UPC Constitution. Counsel asserted that it was Ambassador Olara Otunu who could have called such a meeting at the

time. That in addition, the letter calling for the consultative meeting issued by Hon Akena did not state the agenda for the consultative meeting. That as a result, the consultative meeting that was held at Nice Hall in Lugogo on 1st July 2015 did not meet the basic requirements for a Delegates' Conference provided for in the UPC Constitution. Counsel for the respondent went on to contend that even though Hon Akena got 1/3 of the votes during the District Nominations, according to the UPC Constitution, he could only become Party President after a formal election at the Delegates' Conference and the analogy said to be drawn from the Constitution of Uganda could not be used to alter the Constitution of the UPC. Finally, that the statement of Hon Akena that the consultative meeting constituted itself into a Delegates' Conference was a clear admission that the procedures laid out in the UPC Constitution were not followed.

In answer to the 2nd ground, Counsel for the respondent first clarified that the trial judge held that the decision of the UPC Party Electoral Commission to declare Hon Akena as the UPC President Elect was illegal, null and void for violating the UPC Constitution. Whether or not there were malpractices during the District Elections was not material to the finding. Regardless of this, Counsel for the respondent pointed out several irregularities and malpractices during the electoral and nomination process.

He pointed out that according to clause 12 of the Nomination Guidelines, compiling of results was supposed to be by the PEC but the tallying sheet showed that the tallying was conducted by Hon Akena's agents: Lucy Ojok, Ofwono Charles and Oluka Jimmy. That this was also stated in paragraphs 11, 12, 17, 18 and 19 of the affidavit of Joseph Bbosa and paragraph 4 of the affidavit of John Androa Buzu, the Chairman of the

Party Electoral Commission. Further that the verification of the tallying was by virtue of paragraph 13 of the Instructions for Nominations also meant to be done by PEC but was instead done by the faction that supported Hon Akena. Counsel also stated that the declaration of Hon Akena as President was the responsibility of the Delegates Conference, not the PEC.

In answer to the 4th ground, the contention that the trial judge's declaration of Hon Akena was illegal because it went further than the pleadings of the parties without an amendment of the same, counsel submitted that the ground was unfounded because the prayers of the respondent in the Notice of Motion were for the court to quash the decision declaring Hon Akena as President Elect null and void for violating the UPC Constitution. He emphasised that this was the prayer to the court in ground 2 of the Notice of Motion. In response to the submission that Hon Akena was not given an opportunity to be heard on this point, Counsel for the respondent pointed out that Hon Akena deposed an affidavit dated 18th August 2015 in reply to the application.

In answer to the fifth ground, Counsel for the respondent submitted that issues before the High Court were proper matters for judicial review. He cited the decision of Lord Halisham in **Chief Constable of North Wales v. Evans [1982] Vol 3 All ER** where he stated the purpose of judicial review. Counsel also cited the decision of Lord Diplock in **Council of Civil Service Unions v. Minister for Civil Service [1985] AC 374** in which he categorised the grounds for judicial review as illegality, procedural impropriety and irrationality. He affirmed that the trial judge dealt with the subject exhaustively when he ruled that the grounds for judicial review are founded on the said principles and that the applicant must prove either or all three grievances.

Counsel for the respondent also pointed out that the authorities presented by Counsel for the appellant relate to electoral petition and are thus not relevant for resolving issues of judicial review. That the proof of one of the grounds stated above is sufficient for an application for judicial review to succeed and in this case illegality and procedural impropriety were proved.

He then prayed that all grounds of the appeal be disallowed and that this court *do* uphold the decision of the trial judge and dismiss the appeal with costs.

Analysis

According to rule 30 (1) (a) and (b) of the Judicature (Court of Appeal Rules) Directions, SI 13-10, while sitting to consider an appeal from the decision of the High Court in its original jurisdiction, this court may re-appraise the evidence and draw inferences of fact and in its discretion, for sufficient reason take additional evidence or direct that additional evidence be taken by the trial court. The court then makes an independent decision on the matter.

Grounds 1 and 3

In his ruling, the trial judge set out to resolve two issues i.e. whether James Michael Akena was lawfully declared President of the 1st appellant here, by the 2nd appellant; and whether Hon James Michael Akena is the lawfully elected party President of the UPC by the Delegates' Conference held on the 1st of July 2015. In their analysis of the ruling, counsel for the appellants chose to make each of the findings of the trial judge on these two issues a ground of appeal for the determination of this court. The arguments that they presented to court on the issues with regard to grounds 1 and 3 were therefore in answer to the following questions:

i) Whether there is provision in the UPC Constitution for the 2nd appellant to declare the party president and whether the absence of such a provision was proved by the respondent;

ii) Whether there is provision for the designation of a "President-Elect" in the UPC Constitution;

iii) Whether the said "President Elect" had the power to call for a delegates' conference; and if so, whether the consultative meeting called by the "President-Elect" lawfully constituted itself into a delegates' conference; and finally,

iv) Whether that body (consultative meeting turned delegates conference) lawfully declared or elected Hon James Michael Akena as the President of the UPC.

I shall deal with each of these questions in that order considering the evidence on record and taking into consideration the submissions of counsel on each of them.

But before I do so, it is pertinent to make some observations about the record of proceedings that was filed by the appellants in this court. At page 4 of the ruling, the trial judge identified four affidavits that were filed by the appellants (the respondents then) in reply to the application before him; viz: affidavit of James Michael Akena dated August 2015 and filed on 18th August 2015; affidavit of James Michael Akena in response to that of Olara Otunu whose date was not stated; and affidavit of Edward Seganyi in reply to that of John Androa Buzu whose date was also not stated. Apart from the affidavit in reply deposed by James Michael Akena, headed *"1st respondent's affidavit in reply,"* sworn on a date in August 2015 that was not specified, I did not find the other affidavits in reply to the application in the record of appeal.

In addition, though the contents page of the record of appeal referred to page numbers for each of the documents said to be contained therein, the record did not have page numbers, save for those in the original documents that were copied to make the record. The record of appeal also did not contain a Certificate of the Registrar certifying that the record was correct. I was therefore not able to consider the evidence in the affidavits that did not appear in the record of appeal and proceeded to dispose of the appeal with the part of the record that was availed to this court.

I did not see any order under rule 87 (4) of the Rules of this Court to exclude those affidavits from the record. It is important for Counsel and the Registrar to ensure that records of appeal filed in this court are complete and in compliance with the Rules. It was for that reason that the Rules Committee deemed it necessary to give very specific provisions [rule 87 (8)] with regard this very important aspect of every appeal because it is only through a complete record that this court can have a fair view of what transpired in the courts below for it to re-evaluate evidence in cases where it is appropriate.

With regard to the question whether there is a provision in the UPC Constitution that empowers the Electoral Commission to declare a candidate President or "President-Elect," I noted that the Party Electoral Commission, is provided for by Article 21 of the UPC Constitution, and it is useful to reproduce Article 21.1 here for clarity of the analysis:

> *"The Party President shall appoint members of the Party to constitute the Party Electoral Commission which shall process applications from Party members for candidature for Members of Parliament, District Council, Local Council 5 Chairmanship, Local Council 3 Chairmanship, Local Council 2 Chairmanship and Local Council 1 Chairmanship and*

Council members for Local Council 5, 3, 2 and 1 PROVIDED that the Party Electoral Commission shall consult with Party organs on any application or (sic) candidates for the Parliamentary, and Local Council 5, Local Council 3, Local Council 2 and Local Council 1 elections."

The Party Electoral Commission (PEC) also has the power to delegate its functions to the District Executive Committee or other lower organs of the Party by virtue of Article 21.2. The PEC delegated its powers to carry out the nomination process for the Party President to the District structure of the UPC by appointing District Returning Officers, as was provided for in the *"Party Electoral Commission Instructions for convening District Conferences for Nominations of Party Presidential Candidates,"* (hereinafter referred to as the *"PEC Instructions for Nominations" or "the Nomination Guidelines")* **Annexure G** to the affidavit of Hon Akena sworn on an undisclosed date in August 2015.

With regard to the results of that process, clause 12 of the PEC Instructions for Nominations provided as follows:

> *"The Party Electoral Commission shall compile the results from the District Conference to determine* ***the candidates nominated by at least 1/3 of all District Conferences*** *as per the Party Constitution 13.2 (5)."*

The PEC was given 48 hours to verify, and thereafter announce final results of the nominations, by virtue of paragraph 13 of the Guidelines for Nominations. Indeed, the next paragraph of the Guidelines (14) provided that in the event that no candidate secured 1/3 of the nominations, the PEC would report to the Cabinet for further guidance.

It is therefore clear from the Constitution of the UPC and the PEC Instructions for Nominations that the Commission did not have the power to declare results of a president or president-elect. This was proved by the respondent and impliedly admitted by the appellant who produced the Guidelines for Nominations as evidence in the application.

As to whether there was provision for the designation of a *"President-Elect,"* according to paragraph 8 of the affidavit of Hon Akena, on Monday 1st June 2015, the members of the UPC Electoral Commission, including the Vice President, processed and verified the returns from the district conferences and declared Hon James Michael Akena as *"President-Elect,"* he having won by a landslide margin of 67 district out of 106 districts. The impugned declaration dated 1st June 2016 read as follows:

> ***"DECLARATION OF HON AKENA JAMES MICHAEL AS UPC PRESIDENT ELECT TO BE FORWARDED TO THE ANNUAL DELEGATES CONFERENCE***
>
> *The UPC Party Electoral Commission in line with the Party Constitution article 13.2 (5) and Party Election Guidelines herby declares Hon Akena James Michael as UPC President Elect 2015 to be forwarded to Annual Delegates Conference.*
>
> *Hon Akena James Michael this day 1st June 2015 at Uganda House (sic) duly declared as UPC President elect in line with Article 13.2 (5)."*

The declaration was signed by Commissioners Edward Seganyi, Fred Wako, Canon Andrew Nyote, Emmanuel Ziriguma and Obuya John. Attached thereto was a document stated to be the *"Uganda People's Congress Presidential Elections Results Tallying,"* signed by four persons, three of whom were stated to be: Lucy Ojok, Ofwono Charles and Oluka Jimmy. The fourth signatory did not indicate his/her name.

It is my view that the result of this preliminary process was supposed to be an announcement of the successful candidates or candidate with 1/3 of all votes in the nominations at the District Conferences in line with the provisions of Article 13.2 (5) of the UPC Constitution. Instead the Electoral Commission, or what was left of it announced a *"President-Elect."* In paragraph 10 of his affidavit in reply Hon Akena stated:

> *"That the declaration of Hon James Michael Akena as "President-Elect" was to signify that according to his victory margin in relation to other contenders (63.2%) he would be the sole candidate to be presented to the Delegates' Conference as none of the other candidates had obtained the required 1/3 of the votes. The expression "President-Elect" was used to mean "Sole Presidential Candidate" for lack of a better word and was in tandem with the 2015 ballot paper which clearly stated that this was a Party Presidential Election."*

Counsel for the appellants tried to justify the designation by referring court to the provisions of the Constitution of Uganda which he stated has a provision for a president-elect. Article 103 of the Constitution provides that election of the President of Uganda shall be by universal adult suffrage. Clause 4 thereof then provides that a candidate shall not be declared *"elected president"* unless the number of votes cast in favour of that candidate at the presidential election is more than 50 percent of the valid votes cast at the election. It is also provided in clause 6 of Article 103 that the person who obtains the highest number of votes in an election under clause (5) of the same Article shall be declared *"elected president."*

Section 57 (1) of the Presidential Elections Act requires the National Election Commission to ascertain, publish and declare in writing under its seal the results of the presidential elections within 48 hours from the close

of polling. And in tandem with the Constitution, Section 57 (6) of the Act provides that the person who obtains the highest number of votes in an election under subsection (5) shall be the *"elected President."*

What may be similar to the assertions of counsel for the appellant that as the single successful nominee, Hon Akena was properly declared the *"president-elect"* is found in Article 103 (6a) of the Constitution which provides that,

> *"Notwithstanding the provisions of clauses (4) and (5) of this article, where in the presidential election only one candidate is nominated, after the close of nominations, the* ***Electoral Commission shall declare the candidate elected unopposed****."*

Section 19(1) of the Presidential Elections Act also provides that where a candidate is the sole candidate nominated at the time of the close of nominations, the Commission shall publish and declare under its seal within forty-eight hours from the close of nominations, that that candidate is ***elected unopposed,*** with effect from the date fixed for the poll under section 16.

It is important to note that in the national presidential elections, a candidate is declared unopposed where there is only one nomination. This is carried from the Constitution to the Presidential Elections Act. There is no provision for any further verification or election, as is the case in the UPC Constitution which requires the Party Electoral Commission to submit names of successful nominees that garner 1/3 of the votes at the district to the Delegates' Conference for election. Secondly, the Electoral Commission is both by the Constitution and the Presidential Elections Act vested with the power to make the declaration that a nominee was unopposed and so is the *"elected president,"* which when inverted is the

same as the "president-elect." The designation is bestowed on that candidate by law and to concretise it, the form of the declaration is provided for in section 19(2) of the Presidential Elections Act as follows:

DECLARATION OF RESULTS FORMS FORM A

DECLARATION OF UNOPPOSED CANDIDATE ELECTED PRESIDENT

THE PRESIDENTIAL ELECTIONS ACT

WHEREAS the ....day and day of ...., in the year.......... .were appointed nomination days for the Presidential Election scheduled to be held on the ....day of ....in the year 20............................ AND WHEREAS at the close on nominations on the ....day of .... in the year 20... (name of candidate) was the sole candidate nominated; NOW THEREFORE in exercise of the powers conferred on the Electoral Commission by section 19 of the Presidential Elections Act, the commission publishes and declares that .... (name of candidate)............................elected as President of the Republic of Uganda with effect from the dated fixed for the poll for the presidential election namely, the ....day of ....in the year 20.............. DATED this ....day of ....in the year 20................ .... Chairperson

Deputy Chairperson Commissioner

....

Commissioner

Pursuant to section 59 of the Presidential Elections Act, the person declared president then assumes office within twenty-four hours after the expiration of the term of the predecessor but in any other case, within twenty-four hours after being declared elected President. But Before assuming the duties of the office of President the person elected must take and subscribe to the oath of allegiance and the presidential oath specified in the Fourth Schedule to the Constitution.

The provisions of the UPC Constitution are different from the laws of Uganda exposed above. Article 11.2 of the UPC Constitution provides for the duties of the District Conference. Clause (6) thereof is that the District Conference Nominates, by majority vote, a candidate for the office of party president. It is not clear from the Constitution how this information is transmitted to the Party Electoral Commission but the Guidelines for Nominations provided in paragraph 10 that the District Returning Officer would declare the candidate with the majority vote as soon as counting was over and submit the Results to the Sub Regional Coordinator and the Party Electoral Commission by Short Message Signal (SMS).

According to paragraph 12 of the Guidelines for Nominations, the PEC was to compile the results from the District Conferences to determine the candidates nominated by at least 1/3 of all District Conferences. Paragraph 13 then provided as follows:

> ***"The PEC shall verify results within 48 hours and thereafter announce final results"***

The results from the nominations that were adduced in evidence as unmarked Annexure to the affidavit of James Michael Akena in reply showed that there were nine (9) candidates contending for the position. This was also reflected in Annexure D to the same affidavit, a copy of the Ballot Paper for the UPC Party Presidential Elections of 2015. There was Annexed to Hon Akena's affidavit a document titled *"Uganda Peoples' Congress Party Presidential Elections Results"* signed by Lucy Ojok, Ofwono Charles, Oluka Jimmy and another whose name was not stated in the document. These were not the same persons indicated in the purported declaration of the president-elect as members of the Party Electoral Commission. Nonetheless, the results sheet had the names of the nine

nominees, the number of districts in which they secured votes and their standing as a percentage of 106 districts in which nominations took place.

According to the results sheet, Akena had majority votes in 67 districts (63%), Bbosa 11 districts (10%), Kakonge 2 districts (2%), Musamali 0 districts (0%), Nyote 4 districts (4%), Obua 1 district (1%), Ochen 9 districts (8%), Okello 0 districts (0%), and Pulkol 12 districts (11%). However, their standing as a fraction of the districts in which nominations took place, the requirement in 13.2 (5) of the UPC Constitution, was not indicated in the Results Sheet.

In view of the results reproduced in the immediately preceding paragraph, the argument presented by Counsel for the appellants that Hon Akena was *"unopposed"* during the nominations in the districts was not true. The results in the impugned elections were not consistent with the meaning of a candidate nominated *"unopposed"* in Article 103 (6a) of the Constitution of the Republic of Uganda and s.19 (1) of the Presidential Elections Act. The two provisions are clear on the position that for a candidate to be declared unopposed, there must be no other nomination at all presented to the Commission before the closure of nominations for the position of President.

It is also my opinion that the final results of the nominations to be declared by the PEC should have been comprehensively displayed in the Results Sheet indicating the fractions of the votes that each candidate secured on nomination in the districts, and signed by members of the Party Electoral Commission, not Lucy Ojok, Ofwono Charles and Oluka Jimmy whose capacity to authenticate the results was doubtful. It is this document that the PEC was meant to declare as the "final results" by virtue of clause 13 of the Guidelines for Nominations, not the premature declaration laid out

above where the members of the Party Electoral Commission purported to declare Hon Akena as the *"President-Elect" following* provisions of the Constitution of Uganda and the Presidential Elections Act.

I therefore agree with the trial judge that the declaration made by part of the Electoral Commission of the UPC was not provided for by the UPC Constitution. Neither was it provided for by the *Party Electoral Commission Instructions for convening District Conferences for Nominations of Party Presidential Candidates*. I also agree with the finding of the trial judge that there is no designation of *"President-Elect"* in the UPC Constitution as is the case in the Constitution of the Republic of Uganda and the Presidential Elections Act. If the party members wished to have this included in their Constitution, it ought to have been amended to reflect what is provided for in the Presidential Elections Act and the Constitution of Uganda, or a similar variation. I also find that designation of Hon James Michael Akena as the *"President-Elect"* was a misnomer which led to confusion in the processes of electing the UPC party president, as will be shown below.

As to whether Hon Akena, purported to be the President-Elect, had the power to call a Delegates' Conference, counsel for the appellants reiterated the averments in Hon Akena's affidavit that he did not call a Delegates' Conference but called a Consultative Meeting which the members, of their own motion, constituted into a Delegates' Conference.

The learned trial judge dealt with this matter in great detail citing the relevant provisions of the UPC Party Constitution and found that Hon Akena had no power to call such a conference. Further that the Consultative Meeting that was called could not validly constitute itself into the Delegates' Conference provided for in Article 12 of the UPC Constitution because it did not meet the requirements for such a

conference specified in Article 13.3 of the UPC Constitution. He also referred to the decision in **High Court Miscellaneous Cause 36 of 2015, Betty Amongi & Ebil Fred v. Olara Otunu & 2 Others,** which has never been appealed against, in which Musota, J, (as he then was) ruled that:

> *"The fact of one resigning required concrete evidence than mere assertions in individual affidavits by the applicants. Without such evidence the claim that the first respondent resigned remained unsubstantiated. It is also my finding therefore that the first applicant has never resigned as alleged. ..."*

He then found that since there had been no new elections, the 1st respondent in that application, Olara Otunu, was the *de facto* President of UPC. The decision in **Betty Amongi & Another (supra)** was emphasised by the trial judge and he pointed out that the party ought to have held an election as advised by the Judge in that case, instead of conducting *"a sham election"* which he quashed and declared illegal, void and unconstitutional."

It is also important to note that the members of the UPC, including Hon Akena recognised Mr Olara Orunu as the President of the UPC because they followed the roadmap for the elections for party president up to a point but disregarded his position when it did not please them. Indeed, Hon Akena addressed Ambassador Olara Otunu as such in his letter dated 12th May 2015 in which he appealed to him to be allowed to participate in the elections for party president, Annexure A to his affidavit in reply. Hon Akena changed his mind about the validity of the Mr Otunu's Presidency when he did not agree with the manner in which the elections were conducted. In his letter dated 12th June 2015, in which he addressed all

members of the Delegates' Conference calling for a Consultative Meeting, he stated thus:

> *"Reference is made to the recently concluded successful District Conference elections of 30th May 2015 where you exercised your Constitutional Rights to vote under Article 11.2 (6) of our Party Constitution and in which I was duly nominated unopposed. Subsequently the Party Electoral Commission on 1st June 105 duly declared me as UPC President-Elect in line with Article 13.2 (5) of the UPC Constitution. Since then a lot of controversy and attempts have been made by the outgoing party president to try and nullify this overwhelming win. ...*
>
> *After extensive consultations with Party members throughout the country and in the diaspora, I have decided to invite you as a member of the Delegates Conference for a consultative meeting to seek your guidance on the following issues:*
>
> 1. *Indefinite postponement of the delegates conference which was due on 10th July 2015*
> 2. *The future of the Party participating in the scheduled national elections considering the Youth, PWDs Older Persons and Workers elections program due to beginning 1st July 2015 as per the attached General Elections Roadmap issued by the National Electoral Commission.*
> 3. *The issue of Party Funds.*
>
> *The meeting will take place on 1st July 2015 beginning at 9 am. You are requested to report to the Party Headquarters, 6th Floor, Uganda House by 8 am on the above date for further administrative guidance."*

The letter was signed by Hon James Michael Akena as President-Elect of UPC and copied to Ambassador Olara Otunu.

Given the provisions of Article 13.3 of the UPC Constitution, I agree with the trial judge that Hon Akena, as nominee for the position of Party President had no legal authority to call a consultative meeting of the members of the delegates' conference and/or a delegates' conference. The only other person that could have called such a meeting was the Vice President of the Party, then Joseph Bbosa (RIP), by virtue of the provisions

of Article 14.4 of the UPC Constitution. However, the Vice President who was a contender for the same position as Hon Akena had already fallen out with members of the Party by challenging the results of the district conferences and the subsequent proceedings held by part of the Party Electoral Commission on 1st June 2015.

It appears that the declaration by the Party-Electoral Commission that Hon James Michael Akena was the President-Elect of UPC lent him confidence and led him to prematurely assume the office of President. By the stroke of a pen, Hon Akena then overthrew the incumbent Party President and without any legal authority called a consultative meeting to determine matters that would have been discussed at a delegates' conference that was scheduled for the 10th July 2015.

The meeting which took place on 1st July 2015 at Lugogo, Nice Exhibition Hall then constituted itself into a Delegates' Conference in which, according to the minutes thereof (Annexure H to the affidavit of Hon Akena), by a show of hands, Hon Akena was *"approved by 479 delegates against none at 14.30 hours."* He was then sworn in by a Commissioner of Oaths as the President of the UPC. This led to the perception that Hon Akena took power from the Party President so that he could manipulate the process and have the unlawful declaration made by the PEC that he was President-Elect confirmed by the party members.

The trial judge found that the meeting could not lawfully constitute itself into the Delegates' Conference that is provided for by the UPC Constitution. I agree with his analysis of the law on that point and find that the meeting was illegal; As a result, its deliberations and resolutions were null and void.

Ground 2

This ground was the assertion that the learned trial judge erred in law and fact when he declared that Hon James Michael Akena was not lawfully declared President of the 1st respondent (now the 1st appellant). Counsel for the appellants argued that Hon Akena should have been made party to the proceedings as a respondent. That because he was not, he was denied the right to be heard.

The main contention for the appellants was that the main issue to be decided by the trial judge was *"Whether Hon James Michael Akena was lawfully declared as the president of the UPC."* That since he was specifically mentioned, he ought to have been a party to the application because his rights as President of UPC were in dispute, which counsel for the appellants thought entitled him to reply, personally, to the application.

I think that the appellants, led by their advocates, totally misunderstood the nature and purpose of judicial review. This is evident from the assertion by Counsel for the appellants that Hon Akena should have been made a party because his individual rights were to be decided upon by the court. In my view, this was neither necessary nor proper because by its very nature judicial review results from a decision taken or not taken by a person or a body that has a legal obligation to do so under law or other regulations. In **Council of Civil Service Unions & Others v. Minister for Civil Service, [1985] AC 374**, *pp 408*, Lord Diplock put it thus:

"Judicial review, now regulated by R.S.C., Ord. 53, provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is ***a decision*** *made by some person (or body of persons) whom I will call the* ***"decision-maker"*** *or else a refusal by him to make a decision.*

*To qualify as a subject for judicial review **the decision** must have consequences which affect some person (or body of persons) other than the **decision-maker**, although it may affect him too. It must affect such other person either:*

(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or

(b) by depriving him of some benefit or advantage …"

[My emphasis]

Lord Diplock went to great lengths to explain the different criteria by which benefit may be deprived and then laid down the categories of decisions that are susceptible to judicial review as follows:

"For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph. The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, i.e., that part of the common law that is given by lawyers the label of "the prerogative."

Over the years the scope of the decisions has grown due to constitutional developments in various jurisdictions and the need to include private organisations in a situation that was defined in **R v. Panel of Takeovers & Mergers, Ex.p Datafin [1987] QB 815** as follows:

> *"...if the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may be sufficient to bring the body within the reach of judicial review."*

The decisions that the respondents challenged in the court below were two: the declaration by the UPC Electoral Commission that the Hon James Michael Akana was the President Elect and thereafter, the declaration by the consultative meeting, called by Hon Akena as "President-Elect", where he was approved as President of the UPC. It is clear that the two decisions were not made by Hon Akena but by the UPC Electoral Commission and the purported delegates conference. Because he was not one of the decision makers, he could not be made one of the respondents. Making him a party to the proceedings would have concretised the perceived conflict of interest that he was very much involved in the making of the two decisions in order to come to the result that he desired.

Counsel for the appellants argued that though Hon Akena deposed an affidavit in support of the application, he was not heard as a party and so a decision about his presidency was made without giving him a hearing against personal allegations and reliefs. The answer to Counsel's quagmire is to be found in the Judicature (Judicial Review) Rules in which rule 10 provides for procedure at the hearing of the application. Rule 10(1) specifically provides that,

> "On the hearing of any motion under rule 6, any person who desires to be heard in opposition to the motion and appears before the court to be a proper person to be heard, shall be heard, notwithstanding that he or she has not been served with notice of the motion or summons."

Hon James Michael Akena deposed two affidavits on behalf of the appellants, one in reply generally, and another specifically in opposition to the deposition of Olara Otunu. Though the latter was evaluated by the trial judge, it was not included in the record of proceeding for re-evaluation by this court.

However, in the affidavit dated August 2015 that was availed to this court, Hon Akena stated in paragraph 20 that he deposed the affidavit in rebuttal to the applicant's application and the supporting affidavit. In his affidavit in specific reply to that of Olara Otunu, Hon Akena must have rebutted what was stated in the said affidavit to challenge his nomination, the tallying of votes, the making of the impugned declaration and the allegations of physical assault of the members of the Commission. I could not envisage any facts that could have been more contentious than those deposed to by Ambassador Olara Otunu who Hon Akena accused, in his letter dated 25th June 2015 calling for the impugned consultative meeting, of trying to *"nullify the overwhelming win."*

Counsel for the appellants submitted that the application against his clients was akin to an electoral petition and cited the decision of the High Court of Kenya in **Lesrima Simeon Saimanga** for the submission that an election petition is brought against the person whose election is complained of or any other person whose conduct is complained of in relation to an election. Further that the application targeted Hon Akena and so making him a party was mandatory.

It is evident from that decision that the court made that finding in relation to an election petition. But the application for judicial review of the actions of the UPC Electoral Commission and the party itself were not an election petition.

I am of the view that issues in elections petitions cannot be made the subject of judicial review because they are clearly complaints of the parties about their results in the election based on electoral offences specified for the particular election. For instance, the Parliamentary Elections Act provides for election petitions in Part X, illegal practices in Part XI and other election offences in Part XII, while the Presidential Elections Act provides for their equivalents in Parts VIII to X. I did not find their equivalents in the UPC Constitution, meaning that a member who is aggrieved by the processes of the election for party president must become innovate and find the procedure that suits his/her situation in order to present their grievances to the High Court, which has unlimited jurisdiction in all matters.

I think that the decisions in election petitions are usually about the winners or losers of the elections and why they should or should not have won or lost. They require a large body of evidence from voters, candidates and authorities in charge to prove offences and malpractices that offend the established legal order. In any event, in the instant case, the trial judge steered clear of nomination malpractices or offences when he stated at page 27 of his ruling that he had decided not to lay emphasis on the allegations that members of the Party Electoral Commission were forced to sign the declaration in which Hon Akena was declared President-Elect. At page 13 the trial judge had earlier stated that he was not concerned with the merits of the decision, but with the decision-making process. He thus disregarded all the allegations relating to illegalities in the nomination process which would amount to evidence in an election petition. The decision in **Lesrima Simeon Saimanga** is therefore not applicable to this case. And even if it was, it would only be in the nature of persuasive

authority because decisions of the High Court are not binding on this court.

Counsel for the appellants also cited the decision of this court in **Carolyn Turyatemba v. Attorney General** *(supra)* to support his contention that Hon Akena was not afforded the right to be heard as described by this court in that case. In that case, this court considered the rights of parties to ownership of land where the Attorney General was sued in his representative capacity in addition to the Uganda Land Commission. The suit was to resolve a dispute between the stated parties, but one of the parties prayed that the court cancel titles issued by the Land Commission that were averse to the interests of the Church of Uganda. This court found that the titles issued to parties who were not party to the suit could not be cancelled without a hearing; to the extent that the declarations sought were as between the petitioners and the respondents and did not affect rights of any third parties not party to the petition, the petition was proper in law and properly before the court. However, reliefs prayed for against parties that were not before court could not be granted because their leases and titles could not be cancelled without them being heard, as is required by Article 28 of the Constitution.

In the case before us, I have already established that the Hon Akena was heard by court in line with the procedure adopted by the parties because he did file two affidavits in reply to the application. It does not make any difference that he filed them as President of the UPC because in the same capacity he was able to defend his personal interest since the matter was a challenge to the procedure by which he came to occupy that office. But in addition, there is often no ***lis inter parte*** in an action for judicial review; there was no dispute before court to determine the personal rights of parties in the application before court. The action was an administrative

or public law matter to determine whether the power to elect the president of the UPC was exercised according to the Constitution of the UPC, the document by which the party was registered under s.7 (1) (a) of the Political Parties and Organisations Act.

I am therefore satisfied that the learned trial judge afforded Hon Akena the right to be heard and so did not contravene the principles in Article 28 (1) and 44 (c) of the Constitution of Uganda. Hon Akena did not have to be a party to the application but could have applied to be an intervener or interested party under rule 10 (1) of the Judicial Review Rules.

Ground 5

Ground five of the appeal challenged the propriety of the decision of the trial judge to entertain this matter as an application for judicial review. Counsel for the appellants argued that the grounds raised were more of grounds in an election petition but he did not assist court to come to the finding that he proposed, because he did not cite any law relating to election petitions for the UPC Presidency and the forum that he deemed appropriate to entertain them.

Before this court, counsel for the appellants cited the decision in the case of **Kabenge v. Uganda Law Society and Another (supra)**, in which Musota, J (as he then was) dismissed an application for judicial review because he was convinced that an election of the President of the Uganda Law Society, a body established by an Act of Parliament with designated offices therein, was not amenable to judicial review. I will not consider that decision of the High Court here because it is not binding on this court.

In the instant case, the trial judge considered the amenability of the UPC election process to judicial review from page 5 to 7 of his ruling and was

satisfied that the grounds stated in the application included grievances about illegality of decisions taken by the appellants here. He emphasised the fact that judicial review is now premised on Article 42 of the Constitution of Uganda, which provides that any person appearing before an administrative body has a right to be treated fairly and justly and has a right to apply to a court of law in respect of any administrative decision taken against him or her. He considered the various decisions of the courts that have expounded the principles and rationale of judicial review and then came to the finding that it applied to the matter before him and proceeded to dispose of it. But there are not many decisions in our jurisdiction that have specifically addressed the amenability of the decisions of political parties and other such private organisations to judicial review. We must therefore look to other jurisdictions where the jurisprudence is more developed in this area.

In **Gus Barron v. Warketin, 2004 ABQB 603**, the Court of Queen's Bench, Alberta, considered an application for judicial review where a prospective candidate stood for nomination by the Progressive Conservative Party of Alberta to represent his constituency in the Provincial Legislative Assembly. The Nomination Committee and the appellate body after it had disqualified him from nomination without assigning reasons for doing so. On considering amenability of his complaint to judicial review and finding it suitable for consideration, the court held that,

> *"While the Nomination Committee is a voluntary or consensual organization as opposed to a statutorily created tribunal, it has decision making authority with enormous public impact. According to the constituency's Constitution and Rules, the Nomination Committee, and it alone, may decide to disqualify a candidate at any time before the general meeting. In this way, this Nomination Committee has the*

unfettered authority to decide which nominees, if any, its members may choose as their candidate in the next provincial election. This Party has been in power in Alberta for more than 30 years and this constituency has elected the Party's candidate for decades, without exception. So this decision is not one with only a theoretical dimension.

[41] In view of this profound impact on the democratic right of the people in Calgary Montrose to elect a candidate of their choice to the Provincial Legislature, I find that this court has the jurisdiction to at least review the decision of the organization which determines who may contest the nomination."

The judge also made pertinent observations about the absence of a forum for the resolution of such disputes,

"[49] Therefore, in view of the nature of the decision at issue, I conclude that this court must have the authority to review the Nomination Committee's decision, particularly in the absence of an impartial "disciplinary" tribunal to review matters such as this and resolve them in accordance with procedural fairness and rules of natural justice.

[50] Currently, the Party does not provide such a process. Without it, there is no effective review mechanism from the decision of the Nomination Committee. In my opinion, such a mechanism is necessary to avoid perversion of the political process and to ensure fair treatment of all those who aspire to be the Party's nominee."

And in **Graaf v. New Democratic Party, 2017 ONSC 3579**, in the Ontario Superior Court of Justice, the applicant wished to be a candidate for the leadership of the New Democratic Party, the respondent. The party held the third highest number of seats in the House of Commons. The Party did

not accept his candidature and offered no reason for its decision. He appealed the decision and his appeal was denied, again without explanation. On appeal to a higher body in the party, reasons were given for the rejection of his candidature, upon which he applied for judicial review. On considering whether the decision of the party organ was amenable to judicial review, the Superior Court of Ontario, finding that the matter was suitable for its consideration because the person to be selected by the party would be offered as the party candidate for the position of Prime Minister and so the selection of a leader by the party carried with it some considerable public importance; the judge observed,

> *"In my view, the decisions that political parties, especially the major political parties, make in terms of the candidates they put forward, the policies they adopt, and the leaders that they choose, do have a very serious effect on the rights and interests of the entire voting public. The respondent's submission, that it is simply a private voluntary association of individuals who, in terms of selecting its leader, is engaged in an entirely internal process, may be a convenient characterization for present purposes, but it ignores the practical public impact of what is really going on. As I have already alluded to, the political parties in this country frame the debate and dictate the policies from which the voting public is expected to choose. From a very practical point of view, there is no "none of the above" option for the voting public. Consequently, the decisions of political parties do have a very serious and exceptional effect on the interests of every Canadian citizen. The voting public, therefore, has a very direct and significant interest in ensuring that the activities of political parties are carried out in a proper, open, and transparent manner. ...*

> *... where the decisions of such associations have a very broad public impact, then the courts have held that those decisions fall within the purview of public law and are reviewable. For the reasons I have set out, this is the type of decision that has such a large public aspect to it as to engage the court's jurisdiction under the judicial review authority. I conclude, therefore, that the decisions here are amenable to review."*

In **Graaf v. New Democratic Party**, the aggrieved candidate had recourse to internal mechanisms within the party to resolve the procedural issues that he encountered in his political aspirations. This is not so for most candidates in Uganda because there is rarely provision for settlement of such disputes within the party.

In neighbouring Kenya, Parliament recognised the *lacuna* in the law with regard to disputes or contestations within political parties. The Political Parties Act of 2007 establishes the Political Parties Disputes Tribunal. It consists of 5 members appointed by the Chief Justice, and its chairperson is a person qualified to be a judge of the High Court. The Tribunal considers disputes between members of a political party, political parties forming coalitions and appeals from decisions of the registrar under the Act. Decisions of the Tribunal are final. The courts therefore do not have to consider whether such disputes are justiciable under judicial review or not because there is an appropriate forum established by law.

In the instant case, though the UPC Constitution provides for an electoral process within the party, there is no provision for an internal process that would consider the concerns of members that are aggrieved or who perceive the process as unfair or as failing to meet the standards set in the party constitution. In this case the stop gap measure that the Party President put in place, the Electoral Review Commission, was ignored or

side-lined. It was considered an illegal body that had not been mandated by members in the Party Constitution. The Disciplinary Committee that is provided for in Article 24 of the UPC Constitution does not seem to be attuned to resolving electoral disputes within the party.

Turning back to the general situation in Uganda, the question whether a body is amenable to judicial review is one that judges have grappled with in resolving disputes about process in both private and public bodies. I believe it is for that reason that the categories of bodies that are amenable to judicial review and the matters to which it applies were set out in the *Judicature (Judicial Review) (Amendment) Rules, SI 32 of 2019.* Although this amendment to the Judicature (Judicial Review) Rules of 2019 cannot apply retrospectively to this application, it confirms that political parties in Uganda do need interventions in the internal mechanisms of decision-making and so must be amenable to judicial review.

The *Judicature (Judicial Review) (Amendment) Rules* state that they are to clarify the objectives of judicial review by inserting a new rule 1A, which provides for the objectives as follows:

a) to ensure that individuals receive fair treatment by the authorities to which they have been subjected;

b) to ensure that public powers are exercised in accordance with the basic standards of legality, fairness, rationality and that the option of an individual judge is not construed as that of the authority;

c) to ensure clarity, consistency and uniformity in handing applications for judicial review; and

d) *to ensure adherence to the constitutional right to a fair trial and expeditious hearing.*

The amendment also provides a definition of *"judicial review"* in the following terms:

> ***"judicial review means the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of subordinate courts, tribunals and other bodies and persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties."***

By dint of this definition therefore, judicial review does not only apply to public bodies in the central or local governments. It spans over a large section of the lives of citizens, so capturing the intention of the legislature in Article 42 of the Constitution. The amendment defines ***"public body"*** to include in rule 2 of the principle rules item (f) which reads as follows:

> *"**a political party**, a trade union, a society registered under the cooperative Societies Act, a council, board, committee or society established by an Act of Parliament for the benefit, regulation and control of any professional and non-governmental organisation."*

In conclusion of this ground, the observations made in **Graaf (supra)** properly reflect the situation in Uganda. The decisions that political parties make about candidates elected into office or put forward for the voters to elect, the policies that they adopt, and the leaders that they choose have a very serious effect on the rights and interests of the voting public. Political parties may be private bodies with their own internal rules, but the consequences of their decisions are often public. In the circumstances, judicial review is a useful and appropriate tool for allowing courts to exercise some degree of oversight, as has been recognised by the judicial review regulations in Uganda.

The trial judge therefore came to the correct finding and so exercised his jurisdiction appropriately when he entertained the application for judicial review. The 5th ground of this appeal therefore also fails.

With regard to the remedies prayed for, counsel for the appellants submitted that this court has the jurisdiction to determine the application before the lower court as though it were an original matter before and dismiss the application before the lower court. Further that they do concede that it is at the delegates conference that the president can be elected. That since the appellants followed the roadmap issued by the President, Ambassador Olara Otunu and Hon Akena was validly elected by the District Conference, this court ought to uphold part of the process and order that a delegates' conference be called to complete the process, not uphold the decision of the trial judge who nullified the entire process.

Counsel for the respondent's reply was that this court should uphold the entire decision of the trial judge and dismiss the appeal with costs.

The trial judge emphasised the decision of Musota, J (as he then was) in, **Betty Among & Ebil Fred v. Olara Otunu & 2 Others Msc. Cause No 36 of 2015** to the effect that at the time of the ruling, Ambassador Olara Otunu was the *de facto* President of the UPC and that the party should observe that in their processes since there was still a binding order in the absence of an order to set it aside. Further that the Constitution of the UPC binds all party members since it is the contract between the UPC members and the party. The trial judge then stated thus:

> *"Consequently, all members of UPC including UPC institutions are bound to obey this constitution. Instead of ordering UPC to conduct elections, **I leave it** to the institution of the UPC **itself** to implement the provisions of s.10 of the Political Parties and Organisations Act,*

2005, Articles 71 of the Constitution of Uganda, Articles 11.2 (6), 11.3 (5), 13.3 (2) of the Constitution of the Uganda Peoples Congress."

[My emphasis]

I think that the court cannot leave a party that has failed, refused or neglected to follow lawful process to their own devices in the hope that they will now observer the law or rules in place, because the court has now proclaimed it. Orders must have language that compels parties to respect the decisions of the court; they must represent the coercive nature of the directions given by the court.

According to s.2 (o) of the Civil Procedure Act, *"order"* means the formal expression of any decision of a civil court which is not a decree. It appears that the paragraph above was the final expression of the court on the matter. Interestingly, it was not reflected in the decree/order that was extracted by Counsel for the parties. Instead what seemed to be the final expression was the decision of Musota, J in the **Amongi & Ebil case** because the decree/order finally states that it was ordered and directed that:

> *"The Uganda Peoples Congress Party acts in conformity with the decision of this court in* ***Miscellaneous Cause No 35/2015, Hon Betty Amongi & Hon Ebil Fred versus Olara Otunu & 2 Others*** *relating to the UPC Party Presidency and elections as it binds them in the absence of any appeal."*

The main prayer of the respondents in the application was that having made the declarations and other orders prayed for and quashed the decisions of the appellants which resulted in installing James Michael Akena as President of the UPC, the court was supposed to order the UPC

to conduct elections of the Party President in accordance with the Constitution of the UPC, the order specifically prayed for in paragraph (e) of the notice of motion. The judge shied away from unequivocally making that order.

What he did instead was to encourage the UPC to conduct fresh elections under the leadership of Ambassador Olara Otunu who was the *de facto* President of the UPC, either by conducting fresh nominations at the district level and then holding a delegates' conference to determine who takes the UPC Presidency; or carry on from where the process was impugned and hold a delegates' conference called for by the *de facto* President, Ambassador Olara Otunu, on the basis of the results of the nominations at the district conferences held in May 2015. With due respect, the final pronouncement of the trial judge was ambiguous and left the matter in the hands of the parties to decipher what should be done about the presidency of the UPC following his ruling.

The UPC continued to carry on its business on the basis of an interim order issued by this court on 9th December 2016 to stay the execution of the orders of the High Court appealed against in this matter. It is now 5 years down the road and Hon Akena continues to execute the duties of the President of the party, albeit resulting from an illegal process which was quashed in 2015.

It is important for members of the UPC to note that the credibility of the UPC will continue to be in doubt if its leadership is not brought into office in conformity with provisions of its Constitution, the Political Parties and Organisations Act and the Constitution of the Republic of Uganda.

In conclusion, this appeal is dismissed with orders that:

a) The members of Uganda Peoples Congress conduct nominations and elect a President in conformity with the provisions the Constitution of the Uganda Peoples Congress.

b) Each party to bear its costs.

Dated at Kampala this 31st day of August, 2020

Irene Mulyagonja

JUSTICE OF APPEAL