

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NUMBER 33 OF 2016

5 1. JUSTICE ASAPH RUHINDA NTENGYE
 2. JUSTICE LINDA L. TUMUSIIME MUGISHA] PETITIONERS

VERSUS

ATTORNEY GENERAL..... RESPONDENT

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CORAM: HON. MR. JUSTICE S. B. K KAVUMA, JA
HON. MR. JUSTICE RICHARD BUTEERA, JA
HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA
HON. LADY JUSTICE HELLEN OBURA, JA
15 **HON. MR. JUSTICE PAUL KAHAIBALE MUGAMBA, JA**

JUDGMENT OF THE COURT

Introduction

20 The Petitioners seek the interpretation of the Constitution in the manner
 stated in Para. 4 of their Petition and pleaded as follows:

“

 a) That your Petitioners are Judges of Courts of Judicature in accordance
 with Article 129 (1) of the Constitution of the Republic of Uganda.

25 b) That the Industrial Court was established under Section 7 of the Labour
 Disputes (Arbitration and Settlement) Act, No.8 of 2006 which was enacted by
 Parliament in pursuance of their powers under Article 129(1)(d) of the
 Constitution of Uganda.

 c) That Section 10 of the Labour Disputes (Arbitration and Settlement) Act,
 No.8 of 2006 in so far as it limits the tenure of office of your Petitioners to five

(5) years, is inconsistent with and is in contravention of Articles 2, 21(1), & (2), 40(1) (b), 129(1) (a) and 144(1), (2) and (3) of the Constitution and is null and void.

5 d) That the instruments of Appointment of your Petitioners, in as far as they limit the tenure of office of your Petitioners to five (5) years, are inconsistent with and are in contravention of Articles 2, 21(2) & (2), 40(1) (b), 129(1)(a) and 144(1), (2) and (3) of the Constitution and to that extent null and void.

10 e) That your Petitioners, by operation of S. 10(3) of the Labour Disputes (Arbitration and Settlement) Act are being discriminated against in regard to their tenure of office, pension and other benefits enjoyed by other Judges, contrary to Articles 2, 21(1) & (2), 40(1) and (b) and 144(1) of the Constitution of the Republic of Uganda... ”

The background to this Petition is that sometime around 2014, the first and the second Petitioners were invited by the Judicial Service Commission for
15 interviews for the positions of Chief Judge and Judge of the Industrial Court respectively. Consequently, they were appointed to those respective positions and instruments of appointment given to them to that effect. However, in accordance with Section 10(3) of Labour Disputes (Arbitration and Settlement) Act No. 8 of 2006, the instruments of appointment
20 indicated that the Petitioners’ service was for a period of 5 years only. They have now Petitioned this Court for a declaration that that provision of the law is unconstitutional.

The Petitioners seek the following declarations:

“

25 a) A declaration that S. 10(3) of the Labour Disputes (Arbitration and Settlement) Act No. 8 of 2006, in as far as it limits the tenure of office of your Petitioners to (five) 5 years, is inconsistent with and in contravention of Articles 2, 21(1) & (2), 40(1) (b), 129(1)(a) and 144(1), (2) and (3) of the Constitution of the Republic of Uganda.

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b) *A declaration that the instruments of Appointment in respect of your Petitioners issued under S.10 of the Labour Disputes (Arbitration and Settlement) Act No. 8 of 2006, in as far as they restrict your Petitioners' tenure of office to five (5) years, is inconsistent with and in contravention of Articles 2, 21(1) & (2), 40(1) (b), 129(1)(a) and 144(1), (2) and (3) of the Constitution of the Republic of Uganda.*

c) *A declaration that your Petitioners are Judges of the Courts of Judicature in accordance with Article 129(1) of the Constitution and may enjoy the tenure of office of Judicial Officers as prescribed in article 144 of the Constitution..."*

10 The Petitioners further seek an order that the respondent pays the costs of the Petition.

This Petition is supported by two affidavits sworn by the first and the second Petitioners. Two supplementary affidavits dated 25th April 2017 and sworn by the Petitioners were also filed in this Court.

15 The affidavits of the Petitioners are essentially to the effect that there is uncertainty created by Section 10 of the Labour Disputes (Arbitration and Settlement) Act No. 8 of 2006, as expressed by the Principal Judge, Courts of Judicature and the Permanent Secretary, Ministry of Public Service. The point of contention is whether by virtue of the first and the second
20 Petitioners' appointment as Chief Judge and Judge of the Industrial Court respectively, for a limited period of five years, they are Judges of the Courts of Judicature. The Petitioners pray that the Constitutional Court should determine and resolve this uncertainty.

The respondent filed an Answer and a supporting affidavit sworn by Nabasa
25 Charity, a State Attorney working in the Attorney General's Chambers. She refutes the Petitioners' allegation of the unconstitutionality of Section 10 of the Labour Disputes (Arbitration and Settlement) Act No. 8 of 2006 stating instead that the said legislation is in compliance with the Constitution and contending that this Petition substantially lacks merit.

At conferencing of the Petition the parties hereto framed three issues to be answered by this Court in resolution of the Petition namely:-

1. Whether S. 10 (3) of the Labour Disputes (Arbitration and Settlement) Act No. 8 of 2006, in as far as it limits the tenure of office of the
5 Petitioners to 5 years, is inconsistent with and in contravention of the Constitution?
2. Whether the Petitioners are Judges of the Courts of Judicature?
3. What are the remedies?

Representations




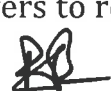

10 Mr. Bamwine Bernard, learned counsel, appeared for the Petitioners. The respondent was represented by Ms. Kukunda Clare. Both counsel adopted the arguments in their written conferencing notes but also made brief oral arguments in clarification which we have considered. We are grateful for the legal authorities provided. We shall now proceed to consider each issue
15 as raised in the conferencing notes of the Petitioners.

Issue No. 1:

**Whether S. 10(3) of the Labour Disputes (Arbitration and Settlement) Act No. 8 of 2006, in as far as it limits the tenure of office of your
20 Petitioners to (five) 5 years, is inconsistent with and in contravention of the Constitution of the Republic of Uganda.**

Argument for the Petitioners

Counsel for the Petitioners made concise arguments on this issue and submitted that s. 10 (3) of the **Labour Disputes (Arbitration and Settlement) Act No. 8 of 2006** is in contravention of the Constitution of the
25 Republic of Uganda which does not limit the tenure of office of Judges as the Act purports to do. He also submitted that the Industrial Court of Uganda is a creature of statute enacted by Parliament of Uganda under Art. 129(1) of the Constitution which does not give the Parliament any powers to restrict



tenure of office of judicial officers. Counsel argued that by limiting the Petitioners' appointment to only five (5) years, this infringes on their rights to serve as Judges on permanent and pensionable terms under Art. 144 of the Constitution.

5 Counsel further submitted that S.10(3) of the **Labour Disputes (Arbitration and Settlement) Act No. 8 of 2006** which limits the tenure of a Judge of the Industrial Court to 5 years only is contrary to Art 128(1) of the Constitution which protects the independence of the Judiciary. Counsel relied on the case of **Attorney General vs Masalu Musene & 3 others,**
10 **Supreme Court Constitutional Appeal No. 07 of 2005** to buttress this point.

He argued that if this Court were to dismiss this Petition, it would give leeway to Parliament to enact laws creating courts with different terms of service from those prescribed under Article 144 of the Constitution which
15 in turn would undermine the independence of the Judiciary.

He stressed that in order to safeguard the independence of Judges and the Judiciary at large, judicial officers should only be appointed in accordance with Art. 129(1) of the Constitution.

Counsel for the Petitioners submitted that given the opinion of the Principal
20 Judge (Annexure "E") and Permanent Secretary of Ministry of Public Service (Annexure "C") vis a vis the Constitution, the Petitioners' status within the hierarchy of the Judiciary is unclear and will remain so if this Court does not grant the declaration sought.

Counsel submitted that the reasons advanced by the Permanent Secretary,
25 Ministry of Public Service that since the law does not provide that the appointment of the Chief Judge of the Industrial Court is contractual therefore it followed that the appointment was part of the continuous service on permanent and pensionable terms, in the view of the Petitioners' are wanting and does not put the matter to rest. He argued that

notwithstanding that the law did not state the term of office to be contractual, it does not necessarily mean the Petitioners' service is continuous.

He further contended that S.10(3) of the **Labour Disputes (Arbitration and Settlement) Act No. 8 of 2006** is contrary to Articles 2, 21(2) and 40(1) (b) of the Constitution which provides for Constitutional supremacy, fundamental rights of non-discrimination and equality in payment for equal work. On the authority of **Attorney General vs Uganda Law Society, Supreme Court Constitutional Appeal No. 1 of 2006** counsel prayed that the Petitioners be given full benefit of their fundamental rights under Articles 21 and 40 of the Constitution of the Republic of Uganda.

Arguments for the Respondent

Counsel for the respondent rejected the arguments made for the Petitioners that S.10 (3) of the **Labour Disputes (Arbitration and Settlement) Act No. 8 of 2006** contravenes the Constitution. Rather, she submitted that the five year term of office under Section 10 of the **Labour Disputes (Arbitration and Settlement) Act No. 8 of 2006** specifically applies only to the service in the Industrial Court but not within Judicial Service. She argued that if Parliament had intended to restrict the tenure of the Petitioners serving as Judges in the Judiciary, they would have stated it in the Act.

Counsel submitted that by being Chief Judge and Judge of the Industrial Court, the Petitioners are not barred from being considered as judicial officers within the meaning of Art. 151 of the Constitution of Uganda.

Counsel for the respondent submitted that the process of appointment of the Petitioners to the positions of Chief Judge and Judge of the Industrial Court under S. 10 of Act No. 8 of 2006 is akin to that of appointing Judges under Art. 144 of the Constitution of Uganda. She elaborated that the

Petitioners were appointed by the President of Uganda on the recommendation of Judicial Service Commission and have the same qualifications as a Judge of the High Court which makes them judicial officers according to the Constitution and thus Art. 144 of the Constitution
5 applies to them.

Counsel conceded that the Petitioners are indeed employed on permanent and pensionable terms. In this regard, counsel referred to three letters by the Permanent Secretary, Ministry of Public Service and the Solicitor General which she submitted clarifies the issue of the Petitioners' tenure.

10 Counsel further argued that since the letters from Public Service had been copied to many other bodies including Judicial Service Commission and there being no reply or varying opinion, the Petitioners' tenure of office remains on permanent and pensionable terms.





Counsel dismissed the letter by the Principal Judge of Uganda as being
15 merely a personal opinion from which he derived questions about the Petitioners' tenure of office which opinion is not binding.

Counsel prayed that this Court finds Section 10 of Act 8 of 2006 to be compliant with the Constitution of Uganda and that this declaration should not be granted.

20 **Decision of the Court**

We have considered the submissions of both parties and the legal authorities cited for and against the Petition for which we are thankful.

This Court is clothed with jurisdiction under Art. 137 (3) of the Constitution to interpret any question as to the inconsistency of any Act of Parliament or
25 any other law. It is this jurisdiction that we are seized with in construing the declaration sought.



The principles of Constitutional interpretation under Art. 137 of the Constitution of Uganda 1995 have over the years become more and more settled. We shall apply those principles in resolving this issue.

One such principle applicable to this Petition is that there is a rebuttable presumption that every legislation is Constitutional and the onus of rebutting the presumption rests on the person or persons who is/are challenging its Constitutionality (see: *Davis Wesley Tusingwire V The Attorney General, Constitution Petition No. 02 of 2013* and *Akankwasa Damian V Uganda, Constitution Petition No. 05 of 2011 [Constitutional Court]*). It follows therefore that the burden of proof to state that a legislation is unconstitutional lies with the Petitioner.

Secondly under Art. 2 (2) of the Constitution, if any law is inconsistent with any of the provisions of the Constitution then the Constitution shall prevail and that law shall to the extent of the inconsistency, be void.

A third relevant principle of Constitutional interpretation is that all provisions of the Constitution must be read together, one provision not negating the other, especially provisions touching on the same subject (see: *Attorney General v Major General Tinyefuza, Supreme Court Constitutional Appeal No.1 of 1997*)

It is the Petitioners' case that S.10 (3) of the **Labour Disputes (Arbitration and Settlement) Act No. 8 of 2006** is inconsistent with the Constitution in so far as it restricts the tenure of Judges of the Industrial Court to 5 years. Section 10(3) provides that:

"(3) The Chief Judge and the Judge shall hold office for a term of five years."

According to the Petitioners' affidavits, the first and the second Petitioners were invited for interview by the Judicial Service Commission for the post of Chief Judge and Judge of the Industrial Court respectively and later

appointed to those positions with Instruments of Appointment to that effect. However to their surprise, they established that their Instruments of Appointment restricted their tenure at the Court to 5 years.

Article 144 of the Constitution which counsel for the Petitioner relied upon provides that a judicial officer may retire after attaining the age of 60 years or in the case of a High Court Judge, at 65 years (save for when a Judge is removed under Art. 144(2) of the Constitution which exception does not apply to the instant case). In this regard, the Petitioners contend that Section 10(3) of Act No. 8 of 2006 contravenes Art. 144 of the Constitution in so far as it restrict the tenure of the Petitioners at the Industrial Court to only 5 years.

The genesis of this question for interpretation is relevant and according to the evidence placed before us arose from a series of correspondence starting with that of the first Petitioner to the Permanent Secretary Ministry of Public Service dated 29th July, 2014 and headed "STREAMLING THE POST OF CHIEF JUDGE OF THE INDUSTRIAL COURT". It is interesting to note that the first Petitioner wrote the said letter on the letter head of the "COURTS OF JUDICATURE". In that letter the first Petitioner raised 3 areas that needed streamlining. He described the said areas as follows:

20 "

(a) I received my appointment as Chief Judge which appointment was based on the same terms as those of Judges of the High Court. Although I accepted the appointment, in my understanding, the post of Chief Judge cannot carry the same benefits including salary and allowances as those of a Judge [sic]. The post is not by deployment but appointment.

25

(b) What is the position of the Chief Judge in the hierarchy of the service? Does the appointment of the Chief Judge place him at the same level with other High Court Judges or does it place him immediately next to the Hon. The Principal Judge?

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(c) I, having been in the judicial service under permanent and pensionable terms, what effect does the appointment of Chief Judge have on the previous appointment? Does such appointment immediately retire me from the judicial service? Does it therefore require me to enter into a local contract under fresh terms of service?"

The Ministry of Public Service four months later responded to the above letter vide theirs of the 5th November, 2014 (signed by Adah K. Muwanga [Mrs]) and answered the Chief Judge's concerns as follows:

"

1. Considering that the position of Chief Judge was determined to be of the same qualifications as of a Judge of the High Court, the decision to pay you a similar salary to that of a High Court Judge was appropriate.
2. Considering that the law did not state the term of office as contractual, your service in the office of the Chief Judge of the Industrial Court should be treated as part of the continuous service on permanent and pensionable terms.
3. The scenario in 2 above implies that upon the lapse of your term of office as Chief Judge, you will appropriately be redeployed elsewhere within the Judicial Service..."

The above response was copied to others including the Principal Judge and in the view of the Ministry of Public Service resolved the issues. However did this opinion of the Ministry actually resolve the issues on the ground? The evidence before us shows it did not. This is because by a letter dated 10th November, 2015 from the Principal Judge to the Chief Registrar on the subject "JUDGES OF INDUSTRIAL COURT" the same issues originally raised by the Chief Judge to the Ministry of Public Service about a year and half ago resurfaced. The Hon. the Principal Judge in his letter had this to say about the Petitioners in this matter:-

"



3. *Their status in the Judicial Service hierarchy is unclear in as far as mainstream Judiciary is concerned. The Chief Judge himself raises that issue in his letter to Permanent Secretary Public Service who in a response dated 5th November 2014 chose not to commit herself. Supervision is a key element in judiciary administration. Put simply, is the Industrial Court one of the Courts of Judicature as per Article 129 of the Constitution?*

In all these circumstances you may wish to seek the views of the Hon. The Chief Justice or your colleague, the Solicitor General, to avoid any mistakes and legal challenges in due course..."

10 To our mind the Hon. Principal Judge was not satisfied with the letter from the Ministry of Public Service and sought a more authoritative administrative position from the Chief Justice or a legal opinion from the office of the Solicitor General. Clearly the stage at this point, had been set for Constitutional interpretation and this Petition was filed. The situation
15 turned even more confusing when the office of the Solicitor General amazingly instead of providing guidance on the matter once again requested clarification from the Ministry of Public Service in the letter dated 8th February, 2017. In that letter Mr. M. Mwambutsya for the Solicitor General wrote:-

20 "...The purpose of this letter therefore is to request you to clarify on the position of the Petitioners in the Judiciary especially as being Judges of the Industrial Court vis-à-vis being Judges of the High Court is concerned, to enable us determine the most appropriate course of action to adopt..."

The Permanent Secretary Ministry of Public Service in their reply to the
25 letter from the Solicitor General dated 6th March, 2017 made short change of it (rightly so) and stated:-

"...To date, Ministry of Public Service still stands by the clarification provided in 2014, unless guided by you..." (Emphasis ours)



Indeed the Solicitor General being part of the Attorney General's Chambers by virtue of Art. 119 of the Constitution of Uganda are the principal legal adviser to the Government and should not have passed the buck to the Ministry of Public Service thus leaving the situation still as unclear as it was
5 before.

This review of the correspondence and evidence in this matter now gives context to the case for the Petitioners.

On the other hand, Counsel for the respondent argued that the restriction of 5 years tenure, only applies to the Petitioners' service in the Industrial Court
10 after which they can be redeployed to any other office in the Judiciary for which they qualify. The Attorney General in substance adopts the position taken by the Ministry of Public Service. Counsel for the respondent in their notes argue that the Petitioners are Judges of the High Court and that their appointment to the Industrial Court was "a special appointment" and
15 therefore is nothing to stop them from being in the Judicial Service on the expiry of their term at the Industrial Court.

We find that in all these arguments the question posed by the Hon the Principal Judge is pivotal namely:

*"...Put simply, is the Industrial Court one of the Courts of Judicature as per
20 Article 129 of the Constitution?"*

Our answer to that is yes. The Industrial Court is one of the Courts of Judicature as per Article 129 of the Constitution. We say so for the following reasons.

First, Art. 129 (1) (d) of the Constitution of Uganda provides:

25 *"... (1) The Judicial power of Uganda Shall be exercised by the Courts of Judicature which shall consist of -*

(d) Such subordinate courts as Parliament may by law establish..."

The Industrial Court is established by Parliament under Section 7 (1) of the Labour Disputes (Arbitration and Settlement) Act 2006. Furthermore Section 16 (1) of the same Act provides:

5 *"...An award or decision of the Industrial Court shall be enforceable in the same way as a decision in a civil matter in the High Court..."*





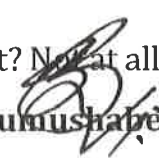
So the Industrial Court is a subordinate court established by Parliament of Uganda under Art. 129 of the Constitution.

Secondly, the position and status of subordinate courts under Art. 129 (1) (d) of the Constitution was well articulated by the Hon Justice Joseph
10 Mulenga (JSC as he then was) in the Supreme Court decision of **Attorney General v Joseph Tumushabe, Constitution Appeal No. 3 of 2005 (SC)** when he held as follows:-

15 *"...There is no provision of the Constitution that restricts Parliament in the exercise of that discretion from vesting in a subordinate court jurisdiction over some matter, which is also within the jurisdiction of the High Court. Indeed that concurrency of jurisdiction is acknowledged in Article 23 (6) (b). In that regard therefore, Parliament may in its discretion place a subordinate court in the appellate hierarchy at the same level as the High Court..."*

In this case the Parliament has clearly in its discretion placed the Industrial
20 Court under the Labour Disputes (Arbitration and Settlement) Act 2006 in the appellate hierarchy at the same level as the High Court. The Industrial Court therefore has concurrent jurisdiction with the High Court. In so legislating, Parliament must also at the same time take cognizance of what the Constitution provides about the appointment and tenure of persons
25 who will serve in such a Court.

Does this then make the Industrial Court as a Superior Court? Not at all. This point was also discussed by Justice Mulenga in the **Joseph Tumushabe case** (*supra*). Referring to the Tribunal established under Section 15 of the Non-



Performing Assets Recovery Trust Act (Cap 95) where appeals lie to the Court of Appeal he held:-

"... That does not render the Tribunal a superior court."

It follows therefore that it is possible to have a subordinate court (which is
5 a Court of Judicature) that is in the appellate hierarchy equal to that of the High Court while at the same time not being a superior court. That answers the Hon the Principal Judge's question.




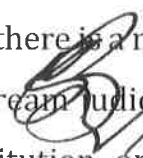
Now the next issue then is in relation to those who serve in Courts of Judicature. Art. 151 (a) of the Constitution defines who a judicial officer is
10 in the following terms:-

"

(a) a judge or any person who presides over a court or tribunal howsoever described..."

15 This definition we find covers the Petitioners. They are judicial officers however described. Section 10 (2) of the Labour Disputes (Arbitration and Settlement) Act 2006 which provides that the Petitioners should have qualifications similar to those of a Judge of the High Court is therefore in harmony with Art. 151 (a).

20 The Principal Judge in his letter to the Chief Registrar of the Courts of Judicature dated 10th November, 2015 did observe that the status of the Petitioners in the hierarchy of the mainstream Judiciary was unclear and that supervision is a key element in judiciary administration. This observation begs the question as to whether there is a nexus between the
25 Judges of the Industrial Court and those of the mainstream judiciary with regard to their administration and supervision. We find that there is a nexus between the Judges of the Industrial Court and the mainstream Judiciary. We find so because first, Art 133 (1) (a) of the Constitution on the administrative functions of the Chief Justice provides:-



“... (1) The Chief Justice-

- (a) shall be the head of the judiciary and shall be responsible for the administration and supervision of all courts in Uganda...”

(Emphasis ours)

5 The reference to the words “all courts” in this article, in our view means that the Chief Justice is responsible for the administration and supervision of all courts mentioned in Art 129 (1) of the Constitution which we have found includes the Industrial Court and not just the mainstream courts.

Secondly, while providing for the administrative functions of the Principal
10 Judge the Constitution in Art 141 provides:-

“... (1) Subject to the provisions of article 133 of this Constitution, the Principal Judge shall-

- (a) be the head of the High Court, and shall in that capacity, assist the Chief Justice in the administration of the High Court and subordinate courts; and
15

- (b) perform such other functions as may be delegated or assigned to him by the Chief Justice...” (Emphasis ours)

We have already found that the reference to subordinate courts in Art 129 (1) (d) includes such courts as are established by the Parliament like the
20 Industrial Court. So in that regard the Principal Judge actually assists the Chief Justice in the administration and supervision of the subordinate courts in the mainstream judiciary and those set up by Act of Parliament. Furthermore, the Chief Justice in this regard may delegate or assign the Principal Judge such other functions in relation to all courts as he sees fit.

25 It follows that the status of the Petitioners and their administration and or supervision is provided for under the Constitution and is therefore not “unclear”. What probably has been the problem here is to read the words “subordinate courts” so as to mean the Magistrates Courts only. This is not

what the Constitution intended. The Petitioners being judicial officers are supervised by the Chief Justice and Principal Judge and have the same status associated with all other judicial officers provided for under the Constitution.

5 It is also clear under Art. 128 (7) that the salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other officer exercising judicial power shall not be varied to his or her disadvantage. Art. 144 (1) of the Constitution provides for the tenure of judicial officers and provides:-

10 *"... A judicial officer may retire at any time after attaining the age of sixty years, and shall vacate his or her office—*

(a) in the case of the Chief Justice, the Deputy Chief Justice, a justice of the Supreme Court and a justice of Appeal, on attaining the age of seventy years; and

15 *(b) in the case of the Principal Judge and a judge of the High Court, on attaining the age of sixty-five years; or*

(c) in each case, subject to article 128(7) this Constitution, on attaining such other age as may be prescribed by Parliament by law;

20 *but a judicial officer may continue in office after attaining the age at which he or she is required by this clause to vacate office, for a period not exceeding three months necessary to enable him or her to complete any work pending before him or her..."*

The Constitution is clear that a judicial officer shall only vacate his or her office against reaching a certain age qualification. In this case Section 10 (3) of Labour Disputes (Arbitration and Settlement) Act 2006 provides that:-

25

"...The Chief Judge and the Judge shall hold office for a term of five years..."

This provision is clearly inconsistent with the Constitution to the extent that the Petitioners would be deemed to have vacated their offices and or had their term of office lapse after a period of five years regardless of their age.

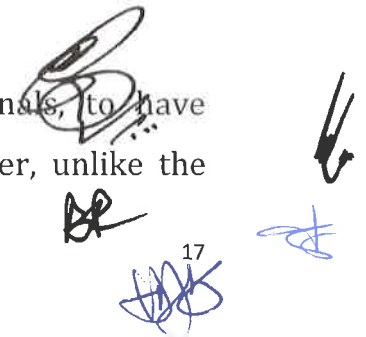
30 Such an inconsistency under Art. 2 (2) of the Constitution would make the said provision of the Act null and void. It would be strange to think of a term of judicial officer lapsing and then be subject to redeployment like was

intimated by the Ministry of Public Service, as would be in the regular civil service. The terms of service of judicial officers in our view, are more protected in this regard than those of the regular civil servants who can easily be redeployed at will from Ministry to Ministry within the service.

5 How would such redeployment be done “within the Judicial Service” as suggested by The Ministry of Public Service and by whom (the Judicial Service Commission or the Mainstream Judiciary)? The Labour Disputes (Arbitration and Settlement) Act 2006 is silent on all this. Perhaps the redeployment of the Petitioners within the mainstream Judicial Service
10 would have been easier after their 5 years term of office if the Industrial Court was a Division of the High Court as is the case in Ghana (see www.judicial.gov.gh accessed 07th July 2017). This is what the independence of the judiciary is all about and strives to achieve under Art. 128 of the Constitution; that is certainty. This was well espoused in the case
15 of **Attorney General vs Masalu Musene & 3 Ors, (supra)** where it was held as follows:

*“...The underlying principle of the entire Article 128 is the issue of judicial independence and security of tenure, the latter being among the traditional safeguards of the former. This means amongst other things
20 that the term of office, emoluments and other conditions of service of judicial officers generally shall not be varied or altered to their detriment or disadvantage. This is an elementary safeguard to be found in most developed legal systems where it took many historic struggles to establish on a firm footing as the most fundamental of all safeguards of judicial
25 officers’ security of tenure. When this safeguard is destroyed by whittling away the provisions of Article 128(7) and judicial officers are put at the sufferance of the executive or at the whims of the legislature, the independence of the judiciary is the first victim...”*

The Petitioners are expected, like in many other Tribunals, to have
30 qualifications similar to that of High Court Judges. However, unlike the



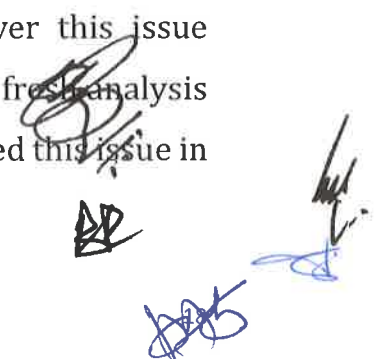
chairman of the Tax Appeals Tribunal who is also expected to have the qualifications to be a Judge of the High Court (Section 3 Tax Appeals Tribunal Act 1998) and is appointed by the Minister responsible for Finance on the recommendation of the Judicial Service Commission, the Petitioners
5 in this matter [under Section 10 (2) of the Labour Disputes (Arbitration and Settlement) Act 2006] are appointed by the President on the advice of the Judicial Service Commission. This puts the Petitioners on the same footing as a High Court Judge in terms of their appointment. Their tenure of office therefore should be no different. It follows that the Petitioners like Judges
10 of the High Court under Article 144 of the Constitution may retire at any time after attaining the age of sixty years but shall vacate their judicial offices on attaining the ages of sixty five. The Labour Disputes (Arbitration and Settlement) Act 2006 cannot in any way vary that cardinal term of service put in place by the Constitution in 1995 by establishing a time
15 delineated tenure instead of an age tenure. The Petitioner's appointments having been specifically made under the Labour Disputes (Arbitration and Settlement) Act 2006 and not deployment from the mainstream judiciary, it follows that the Petitioners will remain in service at the Industrial Court until they individually attain the ages of sixty five or like Judges of the High
20 Court are given an opportunity to be elevated to higher Courts.

We therefore agree with the position of the Petitioners that Section 10(3) of Act No. 8 of 2006 contravenes Articles 128, 129 and 144 of the Constitution. It is therefore unconstitutional and consequently null and void.

Issue No 2:

25 Whether the Petitioners are Judges of the Courts of Judicature?

In resolving the first issue, it became necessary to answer this issue concurrently. It is therefore not necessary for us to make a fresh analysis of the arguments made and make a finding again. We answered this issue in



the affirmative that the Petitioners are Judges of the Courts of Judicature within the meaning of Article 129 (1) (d).

Issue 3: Remedies

Based on our findings above we shall now address the declarations and remedies sought under the Petition.

Decision

From the foregoing, we hereby grant the declarations and remedies sought by the Petitioners as follows:-

a) Declarations that Section 10(3) of the Labour Disputes (Arbitration and Settlement) Act No. 8 of 2006, in as far as it limits the tenure of office of your Petitioners to (five) 5 years, is inconsistent with the following provisions of the Constitution:-

i.) Article 2 Supremacy of the Constitution.

We declare that Section 10(3) of the Labour Disputes (Arbitration and Settlement) Act No. 8 of 2006 is inconsistent with this provision of the Constitution and is therefore void.

ii.) Article 21 (1) and (2) Equality and Freedom from discrimination.

No case was made out under these provisions of the Constitution and so we make no declaration relating to inconsistency with regard to these provisions.

iii.) Article 40 (1) (b) on Equal Payment for equal work without discrimination.

No case was made out under this provision of the Constitution and so we make no declaration relating to inconsistency with regard to this provision.

iv.) Article 129 (1) (b) on the establishment of subordinates Courts by Parliament.

We declare that Section 10(3) of the Labour Disputes (Arbitration and Settlement) Act No. 8 of 2006 is inconsistent with this provision of the Constitution to the extent that it limits the Petitioners term of office to 5 years.

v.) Articles 144 (1), (2) and (3) on Tenure of office for Judicial Officers.

We declare that Section 10(3) of the Labour Disputes (Arbitration and Settlement) Act No. 8 of 2006 is inconsistent with these provisions of the Constitution to the extent that it limits the Petitioners term of office to 5 years.

b) We declare that the Petitioners are Judges of the Courts of Judicature in accordance with Article 129(1) of the Constitution and may enjoy the tenure of office of Judicial Officers at the level of High Court Judges as prescribed in article 144 of the Constitution.

c) As to costs we find that given that this Petition sought to clarify the Constitutional position of the Petitioners as Judges of the Industrial Court with the ultimate aim of aligning the law with the Constitution we find it appropriate that each party bears its own costs.

We so Declare and Order.

Dated at Kampala, this 22nd day of December 2017

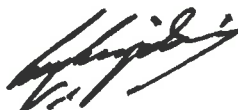

HON. MR. JUSTICE S. B. K. KAVUMA
Justice of Appeal



HON. MR. JUSTICE RICHARD BUTEERA

Justice of Appeal

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HON. MR. JUSTICE GEOFFREY KIRYABWIRE

Justice of Appeal

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HON. LADY JUSTICE HELLEN OBURA

Justice of Appeal

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HON. MR. JUSTICE PAUL KAHAIBALE MUGAMBA, JA

Justice of Appeal