THE REPUBLIC OF UGANDA,

IN THE CONSTITUTONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO 20 OF 2018

(CORAM: OWINY DOLLO, DCJ, KAKURU, EGONDA NTENDE, BARISHAKI, MADRAMA, JJA/JJCC)

EDDIE KWIZERA} ..... PETITIONER

VERSUS

1. **THE ATTORNEY GENERAL}**
2. **THE ELECTORAL COMMISSION} ..... RESPONDENTS**

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JA/JCC

The petitioner filed in this petition under the provisions of Article 137 of the Constitution of the Republic of Uganda for a declaration that the creation of the municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido as constituencies is null and void. Secondly, the petition is for declaration that the holding of elections in those constituencies contravenes article 63 (6) of the Constitution of the Republic of Uganda. Thirdly, it is for declaration that the resolution of Parliament creating constituencies is null and void. Fourthly, the applicant seeks a permanent injunction restraining the second respondent from holding elections in the said municipalities. Finally, the petitioner seeks for costs of the petition.

At the hearing of the petition learned counsel Mr Wandera Ogalo appeared for the petitioner, while learned counsel Mr Wanyama Kodoli Principal State Attorney appeared for the first respondent and learned counsel Mr. Hamidu Lugolobi appeared for the second respondent.

Mr Wandera adopted his written submissions filed on court record on the 7th May, 2019 and give oral highlights of the submissions. Furthermore, learned counsel Mr Wanyama adopted his written submissions contained in the conferencing notes and gave oral highlights thereof. Lastly, Mr Hamidu adopted his written conferencing notes as the submissions for the second respondent and give oral highlights thereof.

The controversies arising from the petition and answers the petition were reduced into issues in the conferencing notes of the parties and was adopted for purposes of addressing the court on the controversies. The basic facts are sufficiently set out in the written conferencing notes of the petitioner's counsel and the second respondent's counsel.

Petitioner's submissions:

Mr. Wandera submitted that on 9th August, 2016 Parliament of Uganda passed a resolution prescribing the number of constituencies in the country to be 296. Six out of the 296 were to come into effect after 9th August, 2016. The rest were simply recognised as having come into existence in or about 2006, 2011 and 2016. In respect of the six, the second respondent went ahead and organised, supervised and conducted elections in July, 2010. The second respondent had earlier on held elections in the others without Parliament having prescribed the numbers of constituencies Uganda should have first.

Issues for resolution:

1. Whether the petition is misconceived and frivolous, vexatious, misconstrued and raises no issue for interpretation by the court?
2. Whether the resolution of Parliament creating 296 constituencies is inconsistent with or in contravention of Articles 61 (1) (c), 63 (2) and 91 (1) of the Constitution?

3. Whether the creation of the municipalities in contention by Parliament without the involvement of the second respondent is inconsistent with Article 63?
4. Whether the resolution complained off and the holding of elections thereafter deprived petitioner on the right of appeal and therefore is inconsistent with Article 64 (2) and (3) of the Constitution?
5. Whether the organising, conducting and supervising mid-term elections which are neither general nor residual is inconsistent with and in contravention of articles 61 (1) (b), 61 (2) and 81 (2) and (3)?
6. Whether the act of Parliament declaring that Uganda is divided into 296 constituencies as at 9th August, 2016 is inconsistent with Article 294 of the constitution?
7. Whether the act of the second respondent in organising, conducting and/or supervising elections in the municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido is inconsistent with and/or contravenes articles 63 (6) of the constitution?

Mr Wandera submitted on whether the petition is misconceived, frivolous, vexatious, misconstrued and raises no issue for interpretation by the court and we do not need to reproduce his submissions on this issue.

Mr Wandera submitted on issues numbers 2 and 3 together. He submitted that it is not in dispute that on 9th August, 2016 Parliament by way of a motion brought into existence six parliamentary constituencies. These are Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido municipalities. He submitted that in doing so, Parliament breached several provisions of the Constitution.

He argued that Article 61 (1) (b) of the Constitution prescribes one of the functions of the Electoral Commission as that of demarcating constituencies in accordance with the provisions of the Constitution. Secondly, Article 63 (2) of the Constitution requires that when the Electoral Commission is demarcating as stated above, it has to ensure that each county has at least

one Member of Parliament. Further, that, the carving of boundaries of constituencies is the preserve of the second respondent. He submitted that Parliament has no authority to change boundaries of constituencies as it did by carving out existing constituencies and designating them as new parliamentary constituencies. He contended that to do so amounted to a naked usurpation of a function of the second respondent. Mr. Wandera submitted that Parliament purported to act under Article 63 (1) of the Constitution as well as section 11 of the Electoral Commission Act but neither of the above cited laws empowers Parliament to demarcate parliamentary constituencies. He contended that the role of Parliament is to determine the number of constituencies that Uganda shall be divided into but Parliament has no power to increase the number of constituencies and proceed to geographically determine where the six of them will be situated. He submitted that failure to allow the Electoral Commission to exercise its mandate to demarcate boundaries is inconsistent with Article 61 (c) of the Constitution. He further submitted that Parliament seemed to acknowledge that its role is limited to declaring the number of constituencies in the wording of the own resolution. He argued that to hold otherwise would be to destroy the power of the second respondent under Article 61 of the Constitution. He submitted that the relevant provisions of the Constitution have to be read in harmony as held by the Supreme Court in **Tusingwire v Attorney General; Constitutional Appeal No. 4 of 2016**.

Mr Wandera further submitted that if the Constituent Assembly had wished Parliament to demarcate constituencies as well, it would have amended Article 63 (2) but did not. It restricted itself to Articles 63 (1) of the Constitution which clearly shows that it would add the second respondent to create constituencies.

Mr Wandera submitted that Article 63 (1) sets the factors the second respondent must take into account when demarcating constituencies. These

include; population, means of communication, geographical features, population density and area. He contended that the boundaries of any constituency cannot be arrived at without taking the above factors into account. He submitted that the motion moved by the Minister speaks for itself. The motion does not pretend to create new constituencies in the title and yet that is exactly what it does without applying the yardstick set by Article 63 (2) - (4) of the Constitution. Counsel further submitted that the resolution of Parliament allows Article 63 (1) to destroy Article 63 (2) to (4). He contended that if this act is allowed to stand, those provisions would be rendered irrelevant. He contended that it would be irrelevant because the process can be completed in Parliament without bothering with the factors mentioned in the above cited articles of the Constitution. In the premises, he contended that the creation of those constituencies usurped the authority of the second respondent and is inconsistent with Article 63 (2) and (4) of the Constitution.

The petitioner's counsel further submitted that Parliament created parliamentary constituencies without the involvement of the second respondent. Further, under Article 63 (5) of the Constitution, the second respondent is required to review the division of Uganda into constituencies within 12 months after publication of results of a population census and may as a result re-demarcate the constituencies. He submitted that the requirement to demarcate after publication of the results of a population census is to enable the second respondent apply the factors stipulated in Article 63 (3) and (4) of the Constitution. He further submitted that this is the practice in outside jurisdictions. For instance, it can be discerned in the decision of the Court of Appeal of Kenya in **Civil Appeal No 281 of 2012; Shaban Mohammed Hassan and others vs Attorney General, Independent Electoral and Boundaries Commission and Others**. The petitioners counsel further submitted that at no time did the second respondent review the division of Uganda nor re-demarcate constituencies

as prescribed. It also did not have opportunity to apply Article 63 (3) and (4). He contended that this omission renders those provisions redundant and if the country is to continue down this path, it may as well amend the Constitution by deleting them. He further contended that the omission if allowed to stand challenges the supremacy of the Constitution.

Mr. Wandera contended that the 10th Parliament in 2016 wished to have additional constituencies according to the list of constituencies provided in the petition. This is because according to the petitioner's affidavit, the President promised the constituencies to take effect in the 10th Parliament. The Minister of Justice and Constitutional Affairs sought to implement that promise. If a census had to be first undertaken, this would not achieve their objectives. He submitted that the respondents' action was a scheme to circumvent the lengthy constitutional process of creating new constituencies. He relied on the case of **Ssemwogerere and another v Attorney General Constitutional Appeal No 1 of 2003**, for the proposition that each provision of the Constitution sustains the others. It follows that Article is 61 (1) (c) and the whole of Article 63 of the Constitution should be read to sustain each other if not, they cannot sustain each other.

Mr Wandera further submitted that under Article 91 (1) of the Constitution the Republic of Uganda, Parliament was required to make laws through the use of Bills passed by Parliament and assented to by the President. Further, he submitted that by that law Parliament prescribed the number of geographical constituencies as being 214 and were named after demarcation by The Electoral Commission in the Schedule. Further, that section 8 of the Parliamentary Elections Act 2001 saved the Schedule thereby maintaining the number of geographical constituencies at the number of 214. He submitted that the Parliamentary Elections Act 2005 repealed the Parliamentary Elections Act 2001 but in section 101 (2) thereof provided that Uganda shall in accordance with section 11 of the Electoral Commission Act be divided

into constituencies set out in the First Schedule to the Parliamentary [Interim Provisions] Statute 1996. He contended that it follows that the law for bringing into effect new constituencies has to be by an Act of Parliament. He submitted that under section 11 of the Electoral Commission Act, Parliament provided that until it prescribes the constituencies under subsection 1 of the section, Uganda shall be divided into the number of constituencies prescribed in the Schedule to the Parliamentary Elections [Interim Provisions] Act. It followed that any change had to be by an Act of Parliament. With further reference to the relevant laws, he contended that what exists now in light of the facts and circumstances is that there are constituencies created by three Acts of Parliament and others are created by way of a Motion. He contended that Parliament therefore purported to amend the Parliamentary Elections Act by a Parliamentary resolution contrary to Article 91 (1) of the Constitution. He further submitted that if the court finds that the wording of Article 91 (1) of the Constitution does not specifically provide for an Act of Parliament to be amended only by way of a Bill, he invited the court to apply the case of **Attorney General v David Tinyefuza; Constitutional Appeal No. 1 of 1997**. He submitted that in that case it was held that where the language of the Constitution is imprecise, a liberal generous or purposeful interpretation should be given. He contended that the purpose of Article 91 (1) is to ensure that laws can only come into being by way of Bills. Adopting a generous interpretation, the submission is that to change a law would involve making another law and therefore the same process must apply. Invited the court to find in the affirmative on framed issues 2 and 3.

Issue four

Whether the resolution complained off and the holding of elections complained of deprived the petitioner of the right of appeal and therefore is inconsistent with article 64 (2) and (3) of the Constitution.

Mr Wandera submitted that the petitioner was not given an opportunity to contest the creation of new constituencies in his capacity as an aggrieved person. He submitted that under Article 64 (2) and (3) of the Constitution, any Ugandan who is dissatisfied with the creation/demarcation of constituencies has an automatic right of appeal to an appeals tribunal and the High Court. Further, that Parliament established the Boundary Demarcation Appeal Tribunal by enactment of section 37 of the Electoral Commission Act and conferred on it powers to confirm, reverse or vary the decisions on demarcation of boundaries. He contended that by demarcating new Parliamentary electoral areas without recourse to the second respondent, the petitioner was deprived of the right of appeal guaranteed by the Constitution. Had the second respondent not abdicated its constitutional responsibility to demarcate constituencies, the petitioner would have exercised his right to appeal to the Boundary Tribunal established under Article 64 (2) of the Constitution with a further right of appeal to the High Court under Article 64 (3) of the Constitution. He invited the court to hold that the petitioner was clothed with a right of appeal against any change in the boundaries of parliamentary constituencies and that he was unable to exercise that right pursuant to the resolution of Parliament. He invited the court to answer issue 1 in the affirmative.

Issue 5

Whether the organising conducting and supervising mid - term elections which are neither general or residual is inconsistent with and in contravention of Article 61 (1) (b), 61 (2) and 81 (2) and (3) of the Constitution.

Mr Wandera submitted that elections could only be held in accordance with the Constitution. Secondly, under Article 61 (1) (b) of the Constitution, it is directed that the second respondent would organise, conduct and supervise elections in accordance with the Constitution. He submitted that the

elections conducted in the new constituencies was a new species of elections unknown in the Constitution. That, the law was that under Article 61, the Electoral Commission shall hold presidential, general parliamentary and local council elections within the first 30 days of the last 90 days before the expiration of the term of the President. Secondly, under Article 81 (2), elections are held where a vacancy occurs in a seat of Parliament. He contended that there was no other provision in the Constitution which authorises the second respondent to organise and conduct elections as it did for the newly created constituencies. He stated that the next general elections as a matter of fact are to be conducted in May, 2021.

Mr. Wandera submitted that the first respondent admitted that the impugned elections were held as a result of the prescription of new constituencies and not otherwise as envisaged by Article 81 (2) of the Constitution. He prayed that the court answers the issue in the affirmative.

Issue 6:

Whether the Act of Parliament declaring that Uganda is divided into 296 constituencies as at 9th August, 2016 is inconsistent with Article 294 of the Constitution?

Mr Wandera relied on Article 294 of the Constitution for the submission that until Parliament prescribes constituencies under Article 63 of the Constitution, the constituencies shall be those into which Uganda was divided before the coming into force of the Constitution [Amendment] Act 2005. With reference to the relevant provisions, he submitted that by 2005 the constituencies in Uganda were 214. He contended that the number of geographical constituencies in Uganda by the time of submissions is 214 constituencies and Parliament has never decided how many constituencies Uganda shall be divided into. Instead Parliament embarked on creating constituencies piecemeal and has ended up with the 296 constituencies. He

contended that the 214 constituencies recognised are the only recognised constituencies and are clearly laid down by the 1996, 2001 and 2005 Acts of Parliament. Further, Mr Wandera submitted that the addition of 1 constituency in 2006, 22 constituencies in 2011, 51 constituencies in 2016 and a further 6 constituencies in 2016 are all illegal constituencies. He contended that in each of the instances, Parliament was not prescribing the number of constituencies Uganda is to be divided into but was demarcating them. He contended that there are 82 constituencies which are illegal parliamentary constituencies.

He further relied on section 11 of the Electoral Commission Act for the proposition that at no time has Parliament ever published in the Gazette the number of constituencies Uganda will be divided into as prescribed by that section. The declaration by Parliament that Uganda shall be divided into 296 constituencies at the time when 290 constituencies were in existence is evidence that there was no prescription by Parliament as envisaged by the constitution. He concluded that as far as the law is concerned, Uganda still has 214 constituencies. He contended that out of the 296 that Parliament has prescribed, 76 were already in existence. Further that one cannot prescribed a new number of six constituencies in addition to the existing 214 constituencies and come up with 296. The correct number should be 220 constituencies. He contended that the number of 296 is at variance with reality. He submitted that what Parliament did was to purport to validate its illegally demarcated constituencies by prescribing the number 296. He submitted that Parliament could not purport to declare a new number into which Uganda would be divided when a large part of the number was already in existence as constituencies. It follows that the declaration offends Article 294 which does not authorise Parliament to include illegally created constituencies into a new number prescribed. The best that Parliament could do was to prescribe a number of 220 constituencies. He invited the court to find for the petitioner on issue number 6.

Issue 7

Whether the act of the second respondent in organising, conducting and/or supervising elections in the municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido, is inconsistent with and/or contravenes Article 63 (6) of the Constitution.

Mr Wandera submitted that after the creation of new constituencies as stipulated above, the only way elections would be conducted would be after the dissolution of Parliament. Given that the elections had been held in 2016, the dissolution of parliament under Article 96 of the Constitution would next be in the year 2021. Without regard to the law, the second respondent went ahead and organised, conducted and supervised elections in newly created constituencies in 2018. He submitted that the court should take judicial notice of the Gazette by the second respondent declaring elected candidates in those new constituencies. He invited the court to hold that the acts of the second respondent in conducting the said elections prior to the dissolution of the present Parliament contravened Article 63 (6) of the Constitution of the Republic of Uganda and issue number 7 ought to be answered in the affirmative.

Submissions of the first respondent

Mr Wanyama Kodoli, Principal State Attorney adopted his conferencing notes as the submissions in opposition to the petition by the Attorney General.

Mr Wanyama submitted that there are only two major issues that should be considered namely:

1. Whether or not the acts of Parliament prescribing the constituencies and creating municipalities contravened the provisions of the Constitution of the Republic of Uganda 1995 as amended.

2. Whether or not the petitioner is entitled to the remedies sought.

Mr Wanyama submitted that from the onset the petition is misconceived, frivolous, vexatious and raises no issue for interpretation by the Constitutional Court. He submitted that the first respondent has not by any act or omission violated or infringed any provision of the Constitution. The first respondent denied the averments in the petition and asserts that it has not by any act or omission violated the constitutional provisions relied on by the petitioner. The prescription of the constituencies and the creation of the municipalities by Parliament were done in conformity with the Constitution.

With reference to the wording of the resolution of Parliament, he submitted that on 9th August, 2016, the Parliament of Uganda considered and passed a resolution under Article 63 of the Constitution prescribing the number of constituencies in Uganda. Mr Wanyama submitted that Article 63 (1) of the Constitution of the Republic of Uganda empowers Parliament to prescribe the number of constituencies for purposes of election of members of Parliament. It provides that subject to clause 2 and 3 of the Article, Uganda shall be divided into as many constituencies for purposes of elections of members of Parliament as Parliament may prescribe and each constituency shall be represented by one Member of Parliament. Pursuant to the constitutional provision, the Parliament of Uganda which is constitutionally mandated to prescribe the number of constituencies in Uganda by Article 63 (1) of the Constitution prescribed the number of constituencies.

Mr Wanyama further submitted on the creation of municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido, by Parliament. He submitted that the creation of the municipalities is a mandate of Parliament together with the district councils under article 179 (3) of the Constitution and sections 7 (2) (2A) & (7) of the Local Government Act. He submitted that under Article 179 (3) it is provided that Parliament shall by law empower district councils to alter the boundaries of lower local government units and to create new

local government units within their districts. Further, Mr Wanyama submitted that section 7 (2) of the Local Governments Act provides that the boundaries of a district unit may be altered or a new unit formed, in accordance with Article 179 of the Constitution. Furthermore, section (2A) of the Local Government Act states that the district council may with approval of Parliament, create a municipality within its area of jurisdiction in accordance with paragraph 32 of the Third Schedule to the Act.

Mr Wanyama further relied on the evidence of the first respondent as contained in the affidavit of Mr Ben Kamunya which deposed that: The creation of the aforementioned municipalities was done as demanded by Article 179 (3) of the Constitution. Secondly, Parliament by law under the Local Government Act Cap. 243 empowered district councils to alter boundaries of lower local government units and to create new local government units within their districts. Thirdly, under section 7 (7) of the Local Government Act, a district or a City Council may within its area of jurisdiction and with the approval of Parliament and in consultation with or at the request of the relevant county, council or city division, alter the boundaries of or create a new county or city division. Further, that municipalities were created in strict compliance to Article 179 (3) of the Constitution as well as section 7 (7) of the Local Government Act according to documents attached to the affidavit in support to the answer to the petition. The affidavits further deponed that the respective district councils passed resolutions on the creation of the municipalities in question. In the affidavit it is further stated that the creation of the municipalities was based on the necessity for effective administration and the need to bring services closer to the people. Mr Wanyama submitted that the evidence in the affidavit in support of the answer to the petition was not controverted by the petitioner and should be deemed admitted. He submitted that the creation of the municipalities was done in accordance with the constitutional mandate of Parliament and the respective local government Councils.

On demarcation of constituencies:

Mr Wanyama submitted that the demarcation of the constituencies is the preserve of the Electoral Commission under Articles of 61 and 63 of the Constitution. He contended that he who alleges a fact must prove it (see sections 100 – 4 of the Evidence Act). Further, he submitted that the petitioner only alleged that that Parliamentary usurped the powers of the Electoral Commission when it demarcated the constituencies but provided no evidence of the demarcation or demarcated constituencies by Parliament. He submitted that it is a principle of constitutional interpretation that the Constitution has to be read as a whole. He submitted that Parliament of Uganda in the resolution sought to be nullified did only what it had mandate to do by prescribing constituencies and did not demarcate constituencies as alleged by the petitioner. The said resolution speaks for itself.

In the premises the first respondent's counsel submitted that the principle of interpretation of the Constitution as a whole and the rule of interpretation to the effect that the legislative history of the constitution is irrelevant were cited out of context by the petitioner as there is no evidence adduced to prove that Parliament ever demarcated constituencies at all. He invited the court to dismiss the petition with costs to the first respondent.

Submissions of the second respondent

Mr. Hamidu Lugolobi on behalf of the second respondent submitted that the submissions of the petitioner's counsel that the second respondent abdicated its mandate or failed to demarcate constituencies are misconceived.

Mr Hamidu conceded that it is the constitutional mandate of the second respondent to demarcate constituencies. He submitted that in accordance with the Constituent Assembly Statute 1993, the Commission demarcated Uganda into 214 electoral areas. A county formed the basic unit of a

constituency known as an electoral area comprising about 70,000 inhabitants. According to the Constituent Assembly Statute, where a county had a population of 140,000 or more inhabitants, the commission had to designate out of such a county two or more electoral areas. The five divisions of Kampala were regarded as counties in accordance with the Constituent Assembly Election Rules.

Mr Hamidu further submitted that on the criteria for designation of electoral areas. This is that the country had 149 counties, 13 Municipalities, five division of the city of Kampala which qualified by virtue of the provisions of the Constituent Assembly Statute to be designated as electoral areas. With the exceptions of Jinja Municipality which under the provision of the statute qualified for designation into two electoral areas, 37 of the total of 167 Counties and Municipalities and Divisions of the City of Kampala had a population of 140,000 or more and therefore to be designated into two or more electoral areas so that each electoral area comprised approximately 70,000 inhabitants. He showed that the Electoral Commission designated 214 constituencies by tabulating the re-demarcation of Uganda into 214 constituencies by the Electoral Commission.

Mr Hamidu submitted that the prescription of 214 constituencies was embedded in the Constituent Assembly Statute, the 1995 Constitution, the Parliamentary Elections [Interim Provisions] Act and the Parliamentary Elections Act of 2005 which repealed the Parliamentary Elections (Interim Provisions) Act. He submitted that the demarcation of constituencies by the second respondent followed prescription of constituencies by Parliament. Until 2016 by a resolution of Parliament, no prescription was made by Parliament to prompt demarcation or re–demarcation by the second respondent. Mr Hamidu submitted that the Constitution does not provide for the manner in which the prescription may be made. However, section 11 (1) of the Electoral Commission Act empowers Parliament by resolution to

prescribe constituencies, which Parliament did on 9th August, 2016. He submitted that the mandate to prescribe constituencies is vested in Parliament under Article 63 (1) of the Constitution and it is exercised exclusively by Parliament and not jointly.

Mr Hamidu further submitted that it is not contested that the constituencies that the petitioner seeks to challenge were a creation of both respective district councillors and Parliament exercising its approval mandate. He submitted that there is evidence that Parliament approved counties following a host of petitions from various district councils and requests. The mandate to create municipalities is a joint mandate of both the district councils and Parliament under the relevant provisions of the laws referred to by the first respondent's counsel. Further, a municipality is an administrative unit comprising of municipal divisions like the county which is composed of sub-counties and must be represented from inception or prescription. He submitted that the choice of nomenclature is simply a matter of historical tradition.

Mr Hamidu further submitted that Article 63 (5) is misconstrued in as far as is relevant only where the boundary of the constituency is ordered as a result of a review of the census figures by the second respondent in which case, elections are organised and conducted upon dissolution of the Parliament and the rationale there is to ensure that the Electoral Commission has not engaged in manipulating boundaries for immediate benefit.

Further, the second respondent contends that the second respondent's mandate of demarcation of constituencies only arises where the circumstances prescribed in the Constitution obtained e.g.:

- No constituency should straddle in more than one county;
- No constituency should cut across a district boundary,
- No electoral area should cut across a constituency,

- No unit should cut across an electoral area boundary.

Mr Hamidu submitted that the petitioner did not adduce evidence to prove that any of the above variables occurred warranting the second respondent to execute its constitutional mandate of demarcation. He submitted that another parameter which the second respondent is obliged to consider is the population quota which is arrived at upon publication of the census figures. Further, article 63 (5) of the Constitution provides that the Commission shall review the division of Uganda into constituencies within 12 months after publication of results of a census of the population of Uganda. He submitted that the last time census of the population of Uganda was carried out was in 2014, a year in which also the publication of the said results was published. Until 2016, no prescription of constituencies was made by Parliament and as such any conduct by the second responded would be outside the constitutional period within which a review of the division of Uganda into constituencies must be carried out rendering such an act *ultra vires* and unconstitutional.

With regard to the petitioners right of appeal, Mr Hamidu submitted that the petitioner's right in respect of the demarcation or re-demarcation of the boundaries of constituencies by the Electoral Commission is upon review of the census figures. He contended that the right of appeal cannot be exercised in a vacuum. He further submitted that the fact that the counties came into effect from the time the Parliament approves their creation and prescribes the time from which they attain their efficacy, they become elective offices established under the provisions of the Constitution for which the second respondent is duty bound to ensure that they are represented or avoid a scenario of a vacuum in their representation. Further, Mr Hamidu relied on Article 63 (1) and (2) to submit that each constituency shall be represented by one member of Parliament. Secondly, that the Electoral Commission shall

ensure that each county, as approved by Parliament, has at least one member of Parliament.

Mr Hamidu further submitted that as a matter of constitutional provision that each country as approved by Parliament has to be represented, it imposes an onerous duty on the second respondent to ensure that the constituents are represented in Parliament and this does not have to wait for the dissolution of Parliament like in the situation of alteration of the boundary of a constituency resulting from a review under Article 63 (5) and (6) of the Constitution of the Republic of Uganda.

Finally, Mr Hamidu prayed that this court finds no merit in the petitioner's petition and dismisses it with costs.

Consideration of the petition

I have carefully considered the petitioner's petition together with the affidavit evidence, the answer to the petition and affidavit evidence, the submissions of counsel as set out above and the law.

Under Article 137 (1) of the Constitution, the jurisdiction of the Constitutional Court is restricted to determinations of questions as to interpretation of the Constitution where there is a cause of action. For there to be a cause of action the pleadings and any supporting facts must disclose that an Act of Parliament or any other law or anything in or done under the authority of any law; or any act or omission by any person or authority, is, inconsistent with or in contravention of a provision of the Constitution (see article 137 (3) of the Constitution, **Ismail Serugo v Kampala City Council and Attorney General; Constitutional Appeal No. 2 of 1998**).

The grounds set out in the petition are that the resolution of Parliament dated 9th August, 2016 dividing Uganda into 296 constituencies is inconsistent with and/or in contravention of Articles 61 (1) (c), 63 (2), and 294

of the Constitution. Secondly, the petitioner averred that the act of creating the municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido as constituencies by Parliament without involvement of the second respondent is in contravention of Articles 61 (1) (c), 63 (2), and 294 of the Constitution. Thirdly, the petitioner averred that the act of the second respondent in organising, conducting and/or supervising elections in the municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido is inconsistent with and contravenes article 63 (6) of the Constitution. Fourthly, the petitioner, averred that the act of Parliament demarcating boundaries of constituencies deprived the petitioner his right to appeal and is therefore inconsistent with Article 64 (2) and (3) of the Constitution. On the fifth ground the petitioner avers that the act of the second respondent in organising, conducting or supervising 'a new and curious creation of mid-term elections' is inconsistent with and contravenes Articles 61 (2) and 81 (2) and (3) of the Constitution.

The first respondent in answer to the petition averred that the petition of the petitioner is misconceived, frivolous and vexatious and raises no issue for interpretation. Secondly, that the first respondent has not by any act or omission violated or infringed any provision of the Constitution. Thirdly, that the petition offends the Constitutional Court (Petitions and References) Rules. On matters of fact, the first respondent denied that there was any act or omission which violated Articles 61 (1) (b) (c), 61 (2), 63 (2) (5) and (6), 64 (2) and (3), 91 (1) and 294 of the Constitution as alleged by the petition. Furthermore, that the creation of the municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido was done as stipulated by Article 179 (3) of the Constitution. The first respondent averred that the respective district councils came up with/passed resolutions on the creation of the mentioned municipalities pursuant to which Parliament came up with a resolution creating municipalities on 20th of August, 2015. In the premises, the first respondent averred that the petitioner is not entitled to any of the remedies and reliefs sought and it opposes the petition.

In reply, the second respondent also opposed the petition and contended that at the trial of the petition it would raise a preliminary objection on the ground that the petition is frivolous, vexatious, misconstrued and should be summarily dismissed with costs. In specific answer to the gist of the petition, the second respondent averred that it makes no admission of the contentions of the petitioner (relating to the constitutionality of the act complained about). In relation to the act and conduct of the second respondent in organising or conducting elections for directly elected Members of Parliament in the newly created municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido, the second respondent avers that it did not and does not contravene Article 63 (6) of the Constitution. Further, the second respondent avers that the act or conduct of organising/conducting elections for directly elected members of Parliament in the constituencies of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido is consistent with the Constitution. Further, the prescription of constituencies by the first respondent and the subsequent conduct by the second respondent to organise elections in the said constituencies was in accordance with the law and the elections are legitimate. Further, the second respondent asserts that the petition is premised on misconceptions of the provisions of the Constitution and therefore the petitioner is not entitled to the remedies sought therein. Further, the second respondent averred that the first respondent, under the Constitution of the Republic of Uganda, has the mandate to make prescriptions for constituencies and the said municipalities legally and lawfully came into being and the second respondent's conduct or act of organising elections for directly elected Members of Parliament is consistent with the Constitution. The second respondent prayed that the court finds no merit in the petition and dismisses it with costs.

Both the petition and the answers to the petition by the first and second respondents were supported by affidavits whose facts I do not need to set

out herein because the matters dealt in the petition and in the submissions are pure questions of law based on facts which are not in dispute.

In summary, the petitioner's petition sets out several issues for resolution of the petition coupled with prayers for several declarations as well as for redress as set out at the beginning of this judgment. The petition essentially challenges the resolution of Parliament to create new constituencies on the ground that the act of Parliament (being the impugned resolution) is inconsistent with and contravenes Articles 61, 63, 64 and 294 of the Constitution. Secondly, the petition challenges the second respondent's organisation, conducting and supervising of elections in the municipalities or stated parliamentary constituencies of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido being constituencies newly created by resolution of Parliament. In addition, the petitioner challenges the 9th of August, 2016 resolution of Parliament dividing Uganda into 296 constituencies on the ground that it is inconsistent with or contravenes Article 294 of the Constitution. It is the contention of the petitioner that the number of constituencies in Uganda had to be set out in an Act of Parliament and not by a resolution of Parliament.

The resolution of Parliament passed on 9th August, 2016, that the petitioner seeks to be declared a nullity, reads as follows:

> RESOLUTION OF PARLIAMENT UNDER ARTICLE 63 OF THE CONSTITUTION PRESCRIBED THE NUMBER OF CONSTITUENCIES IN UGANDA
>
> (*Moved under Article 63 (1) of the Constitution of the Republic of Uganda, section 11 of the Electoral Commission Act, Cap 140 and Rule 47 of the Rules of Procedure of the Parliament of Uganda*)
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> WHEREAS Article 63 (1) of the Constitution of the Republic of Uganda empowers Parliament to prescribe the number of constituencies for the purposes of election of Members of Parliament;

AND WHEREAS, under the Parliamentary Elections (Interim Provisions) Act, Cap. 141 Parliament prescribed two hundred and fourteen (214) constituencies in Uganda for purposes of election of Members of Parliament;

AND WHEREAS under Article 63 (1) of the Constitution, Uganda is divided into 296 constituencies; and

NOW THEREFORE, be it resolved and prescribed by Parliament that:

The number of constituencies in Uganda shall be 296.

Mover: Hon. Kahinda Otafire - Minister of Justice and Constitutional Affairs

Seconder: Hon. Mwesigwa – Rukutana – Deputy Attorney General⋯

Before resolution of the issues addressed in the petition, it is necessary to set out the principles for interpretation of a constitution.

Principles of interpretation of the Constitution.

Some of the basic principles for interpretation of a constitution are set out in a summary form by the Supreme Court in the judgment of Mwondha JSC in **David Wesley Tusingwire and Attorney General; Constitutional Appeal No. 4 of 2016** at page 20 of her judgment when she stated that:

(i) The constitution is the supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the constitution is null and void to the extent of its inconsistency (see article 2 (2) of the Constitution⋯

(ii) In determining the constitutionality of a legislation, its purpose and effect must be taken into consideration⋯

(iii) The entire constitution has to be read together as an integral whole with no particular provision destroying another but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness⋯

(iv) A constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given dynamic, progressive liberal and flexible interpretation keeping in view the ideals of the people, the social economic and political

cultural values so as to extend the benefit of the same to the maximum possible…

(v) Where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary and natural meaning. The language used must be construed in its natural and ordinary sense.

(vi) Where the language of the Constitution or a statute sought to be interpreted is imprecise or ambiguous, a liberal, general or purposeful interpretation should be given it…

(vii) The history of the country and the legislative history of the Constitution is also relevant and useful guide to constitutional interpretation…

(viii) The national objectives and directive principles of state policy are also a guide in the interpretation of the Constitution. Article 8A of the constitution is instructive for applicability of the objectives.…

I have considered these principles for interpretation of a Constitution in light of the submissions of the petitioner's advocate that the court should apply the rule of harmonisation in construing Articles 61 and 63 as well as 294 of the Constitution which form the core of the Articles sought to be interpreted in addressing the issues in controversy. I have also considered the reference of the second respondent's advocate to Acts of Parliament in establishing whether the act of Parliament in passing a resolution creating new parliamentary constituencies was lawful. Finally, the first respondent's advocate urged the court to consider the principle of supremacy of the Constitution as well as the fact that it is the will of the people.

I agree with Mr. Wanyama Kodoli, Principal State Attorney who appeared for the first respondent, that the Constitution itself gives some of the cardinal principles for interpretation of the Constitution. These include the supremacy of the Constitution as enshrined in Article 2 of the Constitution. Article 2 provides that the Constitution is the supreme law of Uganda and shall have a binding force on all authorities and persons throughout Uganda. Secondly, Article 2 of the Constitution provides that if any other law or custom is inconsistent with any of the provisions of the Constitution, the Constitution

shall prevail and that other law or custom shall to the extent of the inconsistency, be void. It follows that all laws have to be construed in a way that ensures conformity with constitutional provisions and not otherwise. For instance, Article 274 of the Constitution provides that all existing laws at the time of the promulgation of the Constitution including, Acts of Parliament and statutory instruments shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution.

For that reason, the Constitution is not to be construed in light of other Acts of Parliament as had been done by the petitioner and respondents' advocates in relation to how previously constituencies were created but having in mind what the constitution recognised and how future constituencies are to be created. We were particularly asked to construe the powers of Parliament to prescribe constituencies in light of earlier enactments. While the history of the Constitution may be important, it may be irrelevant where the Constitution itself has recognised a particular state of affairs and states so in express terms. Reference to the state of affairs before the coming into force of the Constitution, would not be material because the state of affairs is recognised. Every Constitution has to be construed on the basis of its language as held in **Minister of Home Affairs and another v Fisher and another [1979] 2 All E.R. 21** at 26 by the Privy Council. Lord Wilberforce of the Privy Council stated that generally the principles for interpretation of a Constitution are not the same as that of an Act of Parliament:

> When therefore it becomes necessary to interpret 'the subsequent provisions of' Chapter I (in this case s 11) the question must inevitably be asked whether the appellants' premise, fundamental to their argument, that these provisions are to be construed in the manner and according to the rules which apply to Acts of Parliament, is sound. In their Lordships' view there are two possible answers to this. The first would be to say that, recognising the status of the Constitution as, in

effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship. On the particular question this would require the court to accept as a starting point the general presumption that 'child' means 'legitimate child' but to recognise that this presumption may be more easily displaced. The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.

It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second.

Mr Hamidu, learned counsel for the second respondent referred court to the Acts of Parliament proceeding the promulgation of Article 294 by the year 2005. Furthermore, Mr Wandera, learned counsel for the petitioner also made reference to Acts of Parliament on the question of the creation of constituencies prior to the year 2005. It is pertinent at this stage to set Article 294 of the Constitution for proper contextualisation of the issue before embarking on the process of interpreting Articles 61 and 63 of the Constitution and any other relevant articles. Article 294 of the Constitution provides as follows:

294. Existing constituencies.

Until Parliament prescribes the constituencies under Article 63, the constituencies shall be those into which Uganda was divided before the coming into force of the Constitution (Amendment) Act, 2005.

Article 294 of the Constitution is clear and unambiguous and recognises that before the coming into force of the Constitution (Amendment) Act, 2005, the constituencies into which Uganda shall be divided are those in existence before the coming into force of the Constitution (Amendment) Act, 2005. It follows that any inquiry as to matters of fact to establish the number of constituencies in Uganda would be to establish a factual state of affairs as

the legal number of constituencies immediately prior to the enactment of the Constitution (Amendment) Act 2005. The petitioner's petition in paragraph 2 (k) clearly and unequivocally states a fact (which ended up being undisputed) about the number of constituencies existing in Uganda by the time of enactment of the Constitution (Amendment) Act, 2005 in the following words:

> Article 294 of the Constitution saves the number of constituents existing as at 2005 and numbering 214 until Parliament prescribes a new number of constituencies under article 63.

A clear reading of the above paragraph indicates the number of constituents existing in Uganda as at 2005 is 214 and that fact was not rebutted by the affidavits in reply filed on behalf of the first and second respondents. The next question to be asked is whether Parliament prescribed more constituencies after the enactment of the Constitution (Amendment) Act, 2005. As a matter of fact, is it in dispute that by the time of enactment of the Constitution (Amendment) Act, 2005, that Uganda had 214 constituencies? This question is central in establishing what Articles 61 and 63 provide on the subject of creating or prescribing new constituencies after the enactment of the Constitution (Amendment) Act, 2005. From such a perspective, it may be of crucial importance to embark on analysing relevant provisions of the Constitution using the principle of harmonisation and giving effect to the will of the people after setting out what the constitution recognises in terms of constituencies by 2005.

Mr Wanyama, advocate for the first respondent prayed that the court upholds the will of the people. This again, is a fundamental constitutional principle that springs from Article 1 of the Constitution. Article 1 provides for the principle of sovereignty of the people of Uganda:

> 1. Sovereignty of the people.

(1) All power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.

(2) Without limiting the effect of clause (1) of this article, all authority in the State emanates from the people of Uganda; and the people shall be governed through their will and consent.

(3) All power and authority of Government and its organs derive from this Constitution, which in turn derives its authority from the people who consent to be governed in accordance with this Constitution.

(4) The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.

Article 1 of the Constitution stipulates that all power belongs to the people who shall exercise their sovereignty in accordance with the Constitution. Secondly, it stipulates that state authority emanates from the people of Uganda who shall be governed through their will and consent. Thirdly, Article 1 (3) of the Constitution, in turn provide that all power and authority of government and its organs are derived from the Constitution which in turn derives its authority from the people who consent to be governed in accordance with the Constitution. Finally, Article 1 (4) of the Constitution provides that the people shall express their will and consent on who shall govern them and how they shall be governed through regular, free and fair elections of their representatives or through referenda.

This cardinal principle of sovereignty of the people clearly stipulates that all power belongs to the people and prescribes how that sovereignty of the people shall be exercised. Firstly, the will of the people is reflected in the provisions of the Constitution. Secondly, the will of the people shall be exercised through elections where people choose their representatives. The said elected people's representatives may enact laws for governance though governance is firstly done in accordance with the Constitution which shall

govern and prescribe all power and authority of government and its organs. The primacy of the Constitution in defining authorities and their powers cannot be overstated. The Constitution is the will of the sovereign and governs all organs and agencies of the state. Any matters to do with how constituencies are prescribed in terms of Articles 294, 61 and 63 of the Constitution should be treated with the utmost care as one of the ways in which the people of Uganda chose to express their will through election of the People's representatives in Parliament.

Constitutionally derived powers and the limits of constitutional powers and authority of constitutional bodies or agencies of the state found expression in the judgment of Amissah JP of the Court of Appeal of Botswana in **Dow v Attorney General (of Botswana) [1992] LRC (Const.) 623** at page 632 when he stated that:

> A written constitution is the legislation or compact which establishes the state itself. It paints in broad strokes on a large canvas the institutions of that state; allocating powers, defining relationships between such institutions and between the institutions and the people within the jurisdiction of the state, and between the people themselves. The Constitution often provides for the protection of the rights and freedoms of the people, which rights and freedoms have thus to be respected in all future state action. The existence and powers of the institutions of state, therefore, depend on its terms. The rights and freedoms, where given by it, also depend on it. No institution can claim to be above the Constitution; no person can make any such claim. The Constitution contains not only the design and disposition of the powers of the state which is being established but embodies the hopes and aspirations of the people. It is a document of immense dimensions, portraying, as it does, the vision of the people's future. The makers of a Constitution do not intend that it be amended as often as other legislation; indeed, it is not unusual for provisions of the Constitution to be made amendable only by special procedures imposing more difficult forms and heavier majorities of the members of the legislature. By nature, and definition, even when using ordinary prescriptions of statutory construction, it is impossible to consider a Constitution of this nature on the same footing as any other legislation passed by a legislature which is self-

established, with powers circumscribed, by the constitution. The object it is designed to achieve evolves with the evolving development and aspiration of its people.

On the issue of harmonising Articles 61, 63, and 294 of the Constitution I make reference to the dissenting judgment of Justice White of the Supreme Court of the United States in **South Dakota v North Carolina 192 U.S. 286 (24 S. Ct. 269, 48 L. Ed. 448 (1940)** where he stated at page 465 that:

> I take it to be an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all the others, and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. If, in following this rule, it be found that an asserted construction of any one provision of the Constitution would, if adopted, neutralize a positive prohibition of another provision of that instrument, then it results that such asserted construction is erroneous, since its enforcement would mean, not to give effect to the Constitution, but to destroy a portion thereof.

Similarly, Odoki CJ on the same principle of harmonisation of provisions of a constitution in **National Council for Higher Education v Anifa Kawooya Bangirana Constitutional Appeal No 4 of 2011** stated at page 49 of his judgment:

> The second question is one of harmonisation. The Constitutional Court was in error to hold that it did not have jurisdiction to construe one provision against another in the Constitution. It is not a question of construing one provision as against another but of giving effect to all the provisions of the Constitution. This is because each provision is an integral part of the Constitution and must be given meaning or effect in relation to others. Failure to do so will lead to an apparent conflict within the Constitution

Having set out the relevant principles for interpretation of the Constitution and with particular emphasis on reading Articles 61, 63 and 294 of the

Constitution together, I will now proceed to consider the issues as set out in the conferencing notes of the petitioner's advocate.

1. Whether the petition is misconceived, frivolous, vexatious, misconstrued and raises no issue for interpretation by the court?
2. Whether the resolution of Parliament creating 296 constituencies is inconsistent with or in contravention of articles 61 (1) (c), 63 (2) and 91 (1) of the Constitution?
3. Whether the creation of the municipalities in contention by Parliament without the involvement of the second respondent is inconsistent with article 63?
4. Whether the resolution complained off and the holding of elections deprived the petitioner of the right of appeal and therefore is inconsistent with article 64 (2) and (3) of the Constitution?
5. Whether the organising, conducting and supervising mid-term elections which are neither general nor residual is inconsistent with and in contravention of articles 61 (1) (b), 61 (2) and 81 (2) and (3)?
6. Whether the act of Parliament declaring that Uganda is divided into 296 constituencies as at 9th August, 2016 is inconsistent with Article 294 of the constitution?
7. Whether the act of the second respondent in organising, conducting and/or supervising elections in the municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido is inconsistent with and/or contravenes articles 63 (6) of the constitution?

Whether the petition is misconceived and frivolous, vexatious, misconstrued and raises no issue for interpretation by the court?

On the issue of whether the petitioners petition is misconceived and frivolous, vexatious, misconstrued and raises no issue for interpretation by the court, I will not spend much time to resolve the issue since it was not substantially raised in the written submissions of the respondents. The

petitioner alleged that the act of Parliament in passing a resolution creating new constituencies contravened Articles 61 and 63 of the Constitution. The submissions of counsel indicate that there is a controversy as to the interpretation of the Constitution in terms of Article 137 (1) of the Constitution to the extent that learned counsel for the first respondent agreed with the petitioner's counsel that the court should adopt the rule of harmonisation and read the Constitution as a whole to resolve the controversy. In the premises, the petition is not misconceived, frivolous or vexatious and the question of any misconstruction by any of the parties is a matter that can be resolved on the merits of the petition. Issue number one is resolved in the negative in that the petition is not misconceived, frivolous, vexatious, misconstrued or does not raise the question for interpretation of the constitution. The objections of the respondents are overruled.

Secondly, the respondent's counsel raised the corollary issue of whether the petitioner could raise other questions not arising from the pleadings in the petition itself. The contention is that the respondents counsel is trying to smuggle in an argument that over 82 constituencies beyond the 214 constituencies which were considered as being recognised under Article 294 were not lawful constituencies and that Parliament had no authority to recognise them by resolution as it did on 9th of August 2016. I will consider the resolution on the merits. Suffice it to state that the petition itself in paragraph 1 (a) challenges the resolution of Parliament dated 9th of August 2016 dividing Uganda into 296 constituencies as been inconsistent with and in contravention of articles 61, 63 and 294 of the Constitution. Secondly, it challenges the act of creating certain municipalities in paragraph 1 (b) of the petition. Thirdly, the petition asserts that the act of Parliament demarcating boundaries of constituencies deprives the petitioner the right of appeal and is inconsistent with Article 64 (2) and (3) of the Constitution. In paragraph 3, the petitioner challenges the creation of new constituencies by Parliament by resolution and seeks the remedy of declaration that the act is

unconstitutional or in contravention of certain articles of the Constitution. In the premises, the question of whether the petitioner is within his rights to challenge the resolution of Parliament which also has an effect of challenging any constituencies over and above the 214 constituencies recognised under Article 294 of the Constitution can be handled after consideration of the merits and not on a preliminary point of law.

Issues number 2 and 3 are intertwined in that they deal with whether the creation of the constituencies in contention by Parliament and the creation of new constituencies without involvement of the second respondent is unconstitutional and contravenes Articles 61, 63 and 91 of the Constitution. Issues numbers 2 and 3 are as follows:

Whether the resolution of Parliament creating 296 constituencies is inconsistent with or in contravention of Articles 61 (1) (c), 63 (2) and 91 (1) of the Constitution?

Whether the creation of the municipalities in contention by Parliament without the involvement of the second respondent is inconsistent with Article 63?

As far as issue 2 on whether the resolution of Parliament creating 296 constituencies is inconsistent with or in contravention of Articles and 61, 63 and 91 of the Constitution is concerned, I have set out previously the impugned resolution of Parliament. The resolution indicates that it is made pursuant to the powers of Parliament under Article 63 of the Constitution to prescribe the number of constituencies in Uganda. The petitioner's counsel argued that Parliament had usurped the powers of the second respondent to demarcate constituencies as set out in Article 63 (2) of the Constitution.

Article 63 (1) of the Constitution has to be read having in mind Article 294 which recognises the number of constituencies Uganda is divided into and also indicates that Parliament may prescribe otherwise.

From all the submissions, the first question of law to be considered is whether the prescription of constituencies by Parliament had to be by an Act of Parliament. The petition was filed on 18th May 2018 and by that time, Article 294 of the Constitution was in force. Article 294 provides that:

> 294. Existing constituencies.
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> Until Parliament prescribes the constituencies under Article 63, the constituencies shall be those into which Uganda was divided before the coming into force of the Constitution (Amendment) Act, 2005.

It is a principle of constitutional interpretation that where words and phrases in any constitutional article are clear and unambiguous; *"they must be given their primary, plain or ordinary meaning"* (See Mwondha JSC in **David Wesley Tusingwire v Attorney General** (supra). I addressed the begging question as to the number of constituencies Uganda was divided into before the coming into force of the Constitution (Amendment) Act, 2005 and resolved that there were 214 constituencies as a matter of fact and this fact is not a fact in dispute at all. From that resolution Article 294 of the Constitution clearly stipulates that until Parliament prescribes the constituencies under Article 63, the constituencies shall be those into which Uganda was divided before the coming into force of the Constitution (Amendment) Act, 2005. The petitioner is not challenging the law establishing the number of constituencies Uganda was divided into by the time of the Constitution (Amendment) Act, 2005.

Number of Constituencies into which Uganda was divided by the time of enactment of the Constitution (Amendment) Act, 2005.

As a matter of history, there are two major statutes to consider on the question of the number of constituencies into which Uganda was divided before the coming into force of the Constitution (Amendment) Act, 2005. This is primarily the Parliamentary Elections (Interim Provisions) Statute, Statute 4 of 1996 which under section 13 provided that:

> 13.(1) Subject to article 263 and 264 of the Constitution, for the purposes of article 63 of the Constitution, Uganda shall be divided into two hundred and fourteen constituencies for the election of members of Parliament as specified in the First Schedule to this Statute; and each constituency shall be represented by one member of Parliament.
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> (2) The Minister may, on the recommendations of the Commission and with the approval of the Legislature, by statutory instrument, amend the First Schedule to this Statute.

It is therefore expressly provided that Uganda shall be divided into 214 constituencies for election of members of Parliament as specified in the First Schedule. Parliament delegated powers to the Minister to amend the schedule on the recommendations of the Commission and with the approval of Legislature. The First Schedule of the Parliamentary Elections (Interim Provisions) Statute had counties as constituencies and certain municipalities. These constituencies or counties were within districts which are also specified in the First Schedule (supra).

The second provision can be traced to the Electoral Commission Act, 1997, Act 2 of 1997. Section 11 thereof provided *inter alia* that subject to article 63 of The Constitution, Uganda shall be divided into such number of constituencies as Parliament may, by resolution prescribe and the constituencies as prescribed by Parliament shall be demarcated by the Commission under that article. Secondly, the number of constituencies prescribed shall be published in the *Gazette*. Last but not least, the 214 constituencies of Uganda are reproduced in the Revised Edition of the laws

of Uganda 2000 and is cited as the Parliamentary Elections (Interim Provisions) Act Cap. 141. In it, it is written by the Law Revision Commission that the Parliamentary Elections (Interim Provisions) Act was repealed by Parliamentary Elections Act, Act 8/2001. However, the Parliamentary Elections Act saved the First Schedule to the Parliamentary Elections (Interim Provisions) Act until Parliament prescribes new constituencies under Article 63 of the Constitution. In other words, the First Schedule would remain valid and specifies the number of constituencies into which Uganda is divided until Parliament prescribes any new number of constituencies under article 63 of the Constitution. Section 100 of the Parliamentary Elections Act, Act 8/2001 provides that:

> 100. (1) The Parliamentary Elections (Interim Provisions) Statute, 1996 is the repealed.
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> (2) Notwithstanding the repeal effected by this section, until constituencies are prescribed by Parliament and demarcated by the Commission under article 63 of the Constitution, Uganda shall, in accordance with section 11 of the Electoral Commission Act, 1997, be divided into the constituencies set out in the First Schedule to the Parliamentary Elections (Interim Provisions) Statute, 1996.

What is material for consideration is that Article 294 of the Constitution provides that until Parliament prescribes the constituencies under Article 63, a certain number of constituencies were recognised. It is envisaged that Parliament would prescribe constituencies under Article 63 for there to be any changes by prescription of Parliament in number of 214 constituencies set out above.

For the above reasons the wording of Article 63 of the Constitution is of crucial relevance. The petitioner's advocate however submitted on the basis of Article 61 that by passing a resolution creating 296 constituencies, Parliament had usurped the powers of the second respondent to demarcate constituencies.

It follows that the issue for consideration *inter alia* is whether Parliament by passing such a resolution usurped the powers of the second respondent to demarcate constituencies under Article 61 (1) (c) of the Constitution. This also requires the court to consider, as I shall do in the course of this judgment, whether Parliament carried out any demarcation of constituencies as a matter of fact or effect thereby usurping the powers of the second respondent. Article 61 (1) (c) of the Constitution relied on by the petitioner's advocate sets out the functions of the Electoral Commission. The said Article 61 (1) (c) of the Constitution is not even referred to under Article 294 of the Constitution. In other words, Parliament in enacting Article 294 of the Constitution only envisaged more constituencies or less to be prescribed by Parliament under Article 63 of the Constitution. What may therefore be envisaged for consideration below is whether the role of Parliament is restricted to only prescribe the number of constituencies into which Uganda shall be divided under article 63 of the Constitution.

The above notwithstanding, Article 61 of the Constitution gives the functions of the Electoral Commission:

> 61. Functions of the Electoral Commission.
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> The Electoral Commission shall have the following functions—
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> (a) to ensure that regular, free and fair elections are held;
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> (b) to organise, conduct and supervise elections and referenda in accordance with this Constitution;
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> (c) to demarcate constituencies in accordance with the provisions of this Constitution;
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> (d) to ascertain, publish and declare in writing under its seal the results of the elections and referenda;
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> (e) to compile, maintain, revise and update the voters register;

(f) to hear and determine election complaints arising before and during polling;

(g) to formulate and implement civic educational programmes relating to elections; and

(h) to perform such other functions as may be prescribed by Parliament by law.

The material function in issue is found under Article 61 (c) of the Constitution being the function:

to demarcate constituencies in accordance with the provisions of this Constitution.

It is therefore material to establish how that function of demarcating constituencies by the second respondent is spelt out in the Constitution. The second respondent's function in demarcating constituencies is further clarified by Article 63 (2) of the Constitution. For purposes of reading Article 61 (1) (c) as well as Article 63 of the Constitution together, it is necessary to immediately set out below the whole of Article 63 of the Constitution which provides that:

63. Constituencies.

(1) Subject to clauses (2) and (3) of this article, Uganda shall be divided into as many constituencies for the purpose of election of members of Parliament as Parliament may prescribe; and each constituency shall be represented by one member of Parliament.

(2) When demarcating constituencies for the purposes of clause (1) of this article, the Electoral Commission shall ensure that each county, as approved by Parliament, has at least one member of Parliament; except that no constituency shall fall within more than one county.

(3) Subject to clause (2) of this article, the boundary of a constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota.

(4) For the purposes of clause (3) of this article, the number of inhabitants of a constituency may be greater or less than the population quota in order to take account of means of communication, geographical features, density of population, area and boundaries of districts.

(5) Subject to clause (1) of this article, the commission shall review the division of Uganda into constituencies within twelve months after the publication of results of a census of the population of Uganda and may as a result re-demarcate the constituencies.

(6) Where the boundary of a constituency established under this article is altered as a result of a review, the alteration shall come into effect upon the next dissolution of Parliament.

(7) For the purposes of this article, "population quota" means the number obtained by dividing the number of inhabitants of Uganda by the number of constituencies into which Uganda is to be divided under this article.

Article 63 (1) of the Constitution clearly stipulates that Uganda shall be divided into as many constituencies for the purposes of election of members of Parliament as Parliament may prescribe and that each constituency shall be represented by one member of Parliament.

Mr Wandera submitted *inter alia* that that Parliament had to make the prescription of the number of constituencies in Uganda by enacting a law that states the number of constituencies and not by resolution. I shall come to this point later on after considering the role of the second respondent under Article 63 of the Constitution but will first consider whether Parliament usurped the powers of the second respondent to demarcate constituencies by the mere act of passing the impugned resolution.

Mr. Wandera's submissions are hinged on an assertion of fact that Parliament had demarcated constituencies. Pursuant to this assertion he argued that the demarcation was without authority and that it was the role of the second respondent to demarcate constituencies. He submitted that only the 2nd

respondent had power to demarcate constituencies while the role of Parliament is restricted to prescribing the number of constituencies that Uganda shall be divided into. Article 63 (2) only provides that when demarcating constituencies for purposes of clause 1 of the same article, the Electoral Commission shall ensure that each county as approved by Parliament, has at least one member of Parliament, except that no constituency shall fall within more than one county.

A literal reading of article 63 (2) clearly and unequivocally gives direction to the Electoral Commission when demarcating constituencies for purposes of the prescription by Parliament under clause 1 of Article 63 of the Constitution. It presupposes that Parliament has prescribed the number of constituencies into which Uganda shall be divided for purposes of election of members of Parliament. The only problem with the clause is the use of the word "County" approved by Parliament. As I noted earlier when setting out the history of the 214 constituencies into which Uganda was divided by the time of the enactment of the Constitution (Amendment) Act, 2005, it is apparent in the First Schedule of the Parliamentary Elections (Interim Provisions) Act, Cap.141 that each county was a constituency.

It is the duty of the Electoral Commission to ensure that each county as approved by Parliament has at least one member of Parliament. The problem only arises because article 63 (1) of the Constitution in the event Parliament prescribe the number of constituencies, avoided the use of the word "County". It only prescribes that Uganda shall be divided into as many constituencies for purposes of election of members of Parliament as Parliament may prescribe and that each constituency shall be represented by one member of Parliament. By introducing the word "County" in article 63 (2) of the Constitution, it introduces another category of direction to the Electoral Commission in the process of demarcation of boundaries of constituencies. This is a directive that the Electoral Commission shall ensure

that each county, as approved by Parliament, has at least one member of Parliament except that no constituency shall fall within more than one county. It shows that even counties are approved by Parliament. In numerical terms, each county must have at least one member of Parliament. It follows that if the number of counties is increased without having first increased the number of constituencies, the Electoral Commission might be obliged to ensure that each county is represented by at least one member of Parliament. We shall further explore this in the judgment at a later stage.

The subsequent clause (2) of article 63 which gives the role of the Electoral Commission, clearly indicates the factors to be taken into account by the Electoral Commission when carrying out its role of demarcation of the constituencies prescribed by Parliament under Article 63 (1) of the Constitution. It provides that when carrying out the role of demarcation, the Electoral Commission shall ensure that at least one member of Parliament would represent each constituency.

The question remains whether there is a distinction between the creation of new constituencies and the demarcation of constituencies? One clear conclusion is that such a distinction, if any, has nothing to do with the prescription of the number of constituencies by Parliament. Demarcation of constituencies is done after the prescription of the number of constituencies into which Uganda shall be divided by Parliament. Prima facie, there is no conflict between article 63 (1) and article 63 (2) of the Constitution which each confer distinct and different roles on Parliament and on the second respondent respectively. The two distinct roles of the prescription of the number of constituencies and the demarcation of constituencies should not be mixed up. Clause 1 of article 63 deals with the power of Parliament to prescribe the number of constituencies for purposes of election of members of Parliament as Parliament may prescribe. Clause 2 of the article 63 deals with demarcation of the constituencies which have been prescribed by

Parliament under clause 1 of article 63. The rest of article 63 of the Constitution deals with the considerations that the Electoral Commission shall have regard to in demarcating boundaries of constituencies.

A further argument of the petitioner's counsel, as I understand it, is that the role of Parliament was strictly to prescribe the number of constituencies under article 63 (1) of the Constitution and not to name or prescribe specific constituencies or demarcate constituencies. From that perspective, the petitioner contends that the creation of the municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido amounted to a demarcation of constituencies and not prescription of the number of constituencies. The petitioner maintained that the role of Parliament was only to determine the number of constituencies that Uganda shall be divided into and not to get involved in demarcation of boundaries. The respondents on the other hand relied on the provisions of article 179 of the Constitution to argue that the creation of municipalities was authorised by Parliament. It is evident that anybody can easily get caught up in arguments based on erroneous premises of the creation of new local government units as opposed to the creation of constituencies which are dealt with under separate and severable articles of the Constitution of the Republic of Uganda. The problem arises from the role of the Electoral Commission under article 63 of the Constitution.

In the meantime, the principles that may be applied by the Electoral Commission in the demarcation of constituencies are distinct and may be discerned or got from the subsequent provisions of Article 63 after clause 1 and are the following:

- The second respondent/Electoral Commission shall ensure that each county as approved by Parliament has at least one member of Parliament. It prescribes that no constituency shall fall within more than one county. It follows that a county can accommodate more than one constituency but no constituency shall fall within more than one

county. Thirdly, each county shall have a minimum of one member of Parliament. The problems that can arise is that counties are approved by Parliament and the applicant distinctly from constituencies. What if Parliament creates counties or approves more counties as enabled by the Constitution without increasing the number of constituencies? What if there are more counties approved than the number of constituencies prescribed by Parliament? What is the process of approving counties? The Electoral Commission is under a duty to ensure that each county is at least represented by one member of Parliament. Secondly, no constituency shall fall within more than one county. The moment the number of counties is increased, there would be need to make demarcation of boundaries of constituencies to ensure that no constituency covers more than one county. We therefore have to consider the process of approval of counties as well.

- Secondly, clause 3 of Article 63 of the Constitution provides that the boundary of a constituency shall be such that the number of inhabitants in the constituency is as nearly as possible equal to the population quota. In this category, we have to consider the effect of a population census on the role of the Electoral Commission in the demarcation of boundaries of constituencies.
- It is further provided that the number of inhabitants of a constituency may be greater or less than the population quota in order to take account of means of communication, geographical features, density of population, area and boundaries of districts.
- In clause 5 it is provided that the Electoral Commissions shall review the division of Uganda into constituencies within 12 months after the publication of results of a census of the population of Uganda and it may as a result re-demarcate the constituencies.

It was strongly submitted for the petitioner, that it is only the Electoral Commission which has the constitutional mandate to demarcate boundaries

pursuant to a review. On the other hand, the second respondent's counsel submitted that the demarcation of boundaries pursuant to a national census does not apply in the circumstances of this petition. This is because the demarcation follows a prescription of Parliament.

Mr Hamidu submitted that there is a distinction between the prescription of Parliament under clause 1 of article 63 of the Constitution and the demarcation by the Electoral Commission pursuant to a population census. The distinction is of great importance because the petitioner's counsel argued that the right of the petitioner to appeal the decision of the Electoral Commission upon demarcation of boundaries was obliterated by Parliament prescribing and demarcating boundaries leaving the petitioner with no remedy by way of a right of appeal as prescribed by article 64, to appeal against a demarcation of boundaries by the Electoral Commission to the tribunal established under article 64 of the Constitution. Article 64 of the Constitution in clause 2 thereof clearly provides that a person aggrieved by a decision of the Electoral Commission in respect of the demarcation of a boundary may appeal to a tribunal consisting of three persons appointed by the Chief Justice; and the Commission shall give effect to the decision of the tribunal. A person aggrieved by the decision of the tribunal may appeal to the High Court and the decision of the High Court on appeal shall be final.

The above article 64 clearly stipulates that an aggrieved person has a right of appeal upon the demarcation of a boundary. The question which could not be resolved on a matter of fact is whether the second respondent demarcated boundaries. The second respondent's counsel submitted that boundaries were demarcated by gazetting. We do not have the benefit of the Gazette though court may take judicial notice of gazetting if a particular date of the relevant Gazette was made available to the court. This factual controversy also engages the issue of the distinction between demarcation of boundaries and prescription of constituencies. Is this a question as to

interpretation of the Constitution? The Constitution clearly under clause 1 of article 63 provides that Parliament may prescribe the number of constituencies which shall each be represented by one member of Parliament. Clause 2 of article 63 deals with demarcation of constituencies for purposes of clause 1 of article 63. It can be concluded without much ado that clause 1 of article 63 of the Constitution gives powers to Parliament prescribe the number of constituencies into which Uganda shall be divided. On the other hand, clause 2 of article 63 gives power to the second respondent to demarcate the boundaries of constituencies. Demarcation of boundaries of constituencies is therefore a different thing from the prescription of the number of constituencies.

We were engaged by counsel on the fine distinctions as to whether by naming certain constituencies in the municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido Parliament was demarcating constituencies and usurping the functions of the Electoral Commission under Article 63 (2) of the Constitution. As a question of fact, I have carefully read through the resolution attached to the petition of the petitioner. In paragraph 1 (a), (b) and (c) of the petition, the petitioner averred that:

(a) The resolution of Parliament dated 9th August, 2016 dividing Uganda into ('396' this was an error) 296 constituencies is inconsistent with and/or in contravention of articles of 61 (1) (c), 63 (2) and 294 of the Constitution.

(b) The act of creating Apac Municipality, Sheema Municipality, Ibanda Municipality, Nebbi Municipality, Bugiri Municipality and Kotido Municipality as constituencies by Parliament without involvement of the second respondent is in contravention of articles and 61 (1) (c), 63 (2) and (5), and 294 of the Constitution.

(c) The act of the second respondent in organising, conducting and/or supervising elections in the municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido is inconsistent with and contravenes article 63 (6) of the Constitution.

In paragraph (d) the petitioner avers that the act of Parliament demarcating boundaries of constituencies deprives the petitioner the right of appeal and is therefore inconsistent with article 64 (2) and (3) of the Constitution. However, as a question of fact, the petitioner's counsel could not show how Parliament demarcated the boundaries of the municipalities. As a question of fact, the resolution of Parliament dated 9th August, 2016 is clearly entitled resolution of Parliament under Article 63 of the Constitution to prescribe the number of constituencies in Uganda. It goes in part to provide that:

> NOW THEREFORE, be it resolved and prescribed by Parliament that:
>
> The number of constituencies in Uganda shall be 296.

By the resolution alone, Parliament had not demarcated any boundaries. Also attached to the petitioner's affidavit is a letter written by the Clerk to Parliament addressed to the Attorney General, Ministry of Justice and Constitutional Affairs and also addressed to the Minister of Justice and Constitutional Affairs and dated 10th August, 2016 copied to several other offices which clearly writes in the only one paragraph of the letter as follows:

> Attached herewith find the above resolution which was duly considered and passed by Parliament on Tuesday 9th, 2016 for your information.

The resolution does not name any municipalities. As far as the resolution of Parliament is concerned, there was absolutely no evidence of demarcation of boundaries. Parliament clearly purported to act on a mandate to prescribe constituencies under article 63 (1) of the Constitution.

I would immediately consider the second aspect of the controversy as to whether under clause 1 of articles 63 of the Constitution, a prescription by Parliament had to be by way of an Act of Parliament. Article 294 does not on the face of it indicate how the prescription of Parliament of the number of consistencies is supposed to be embodied. It only provides inter alia; *Until Parliament prescribe the constituencies under article 63*. It does not indicate

how the prescription of Parliament is supposed to be embodied. The petitioner's counsel urged the court to follow historical antecedents where the number of constituencies Uganda is divided into was set out in an Act of Parliament. Having carefully considered the matter, I have found it necessary to first refer to the functions of Parliament under the Constitution. The functions of Parliament are set out under Article 79 of the Constitution which provides that:

> 79. Functions of Parliament.
>
> (1) Subject to the provisions of this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda.
>
> (2) Except as provided in this Constitution, no person or body other than Parliament shall have power to make provisions having the force of law in Uganda except under authority conferred by an Act of Parliament.
>
> (3) Parliament shall protect this Constitution and promote the democratic governance of Uganda.

The main function of Parliament under article 79 (1) of the Constitution is to make law on any matter for the peace, order, development and good governance of Uganda. Article 79 (2) of the Constitution forbids any other person other than Parliament from making any provisions having the force of law in Uganda except under authority conferred by an Act of Parliament. Furthermore, the function of Parliament to make laws for election are specifically set out by article 76 of the Constitution as follows:

> 76. Parliament to enact laws on elections.
>
> Parliament may, subject to the provisions of this Constitution, enact such laws as may be necessary for the purposes of this Chapter, including laws for the registration of voters, the conduct of public elections and referenda and, where necessary, making provision for voting by proxy.

Chapter Five of the Constitution under which articles 61, 62 and 76 falls is entitled "Representation of the People". It may be argued that Parliament chose a strange way to prescribe the number of constituencies into which Uganda shall be divided instead of doing so by enacting a law amending earlier laws where constituencies are scheduled and thereby setting out the number of constituencies. However, a closer scrutiny of Article 79 (2) of the Constitution clearly allows Parliament to pass an Act of Parliament permitting any other person to make provisions having the force of law. In the circumstances of this petition, Parliament enacted the Electoral Commission Act, Cap. 140 laws of Uganda using its specific mandate under Article 76 to enact laws for election of the people's representatives and its general mandate under article 79 (2) of the Constitution to enact laws on any matter for the peace, order, development and good governance of Uganda. Section 11 of the Electoral Commission Act, so enacted, allows Parliament to prescribe the number of constituencies by resolution.

The appellant's petition does not purport to seek the nullification of section 11 of the Electoral Commission Act which provides as follows:

> 11. Constituencies.
>
> (1) Subject to article 63 of the Constitution, Uganda shall be divided into such number of constituencies as Parliament may by resolution prescribe, and the constituencies as prescribed by Parliament shall be demarcated by the commission under that article.
>
> (2) The number of constituencies prescribed under subsection (1) shall be published in the Gazette.
>
> (3) Notwithstanding the repeal of section 11 of the Parliamentary Elections (Interim Provisions) Statute, until Parliament prescribes the constituencies under subsection (1) of this section, Uganda shall be divided into the number of constituencies prescribed by section 11 of the Parliamentary Elections (Interim Provisions) Statute.

Clearly section 11 (1) of the Electoral Commission Act, Cap. 140 laws of Uganda, allows Parliament by resolution, to prescribe the number of constituencies into which Uganda shall be divided. Without nullifying section 11 (1) of the Electoral Commission Act, the act of Parliament prescribing by resolution the number of constituencies is *prima facie* authorised by an Act of Parliament. In light of the law-making function of Parliament, it cannot be said that Parliament had no authority to relegate its function of prescription of constituencies to another Act of Parliament. In any case the petitioner has not challenged the constitutionality of section 11 of the Electoral Commission Act which allows Parliament to prescribe constituencies by resolution. In the premises, the resolution of Parliament does not on the face of it infringe Article 61 (1) (c) of the Constitution which prescribes the function of the second respondent to demarcate constituencies. Secondly, the act of Parliament prescribing the number of constituencies by resolution does not infringe article 63 (2) of the Constitution which provides the function of demarcating constituencies for purposes of the prescription of Parliament of constituencies and confers such demarcating function on the second respondent. Finally, the resolution of Parliament prescribing constituencies does not infringe Article 91 (1) of the Constitution which provides that the power of Parliament to make laws to be exercisable by bills passed by parliament and assented to by the President. Parliament passed a law allowing it to make the prescription of constituencies by resolution.

In the premises, issue number two has to be and is answered in the negative.

With regard to issue number 3, the controversy is about whether the creation of the municipalities in contention by Parliament without involvement of the second respondent is inconsistent with Article 63. I have failed to perceive how such an issue arises from the exercise of powers of Parliament to prescribe the number of constituencies under article 63 (1) of the

Constitution. The creation of municipalities as submitted by the first respondent's counsel is separately enabled by and made under Article 179 of the Constitution which deals with the alteration of boundaries of districts, lower local government units and the creation of new districts and lower local government units. Article 179 provides as follows:

> 179. Boundaries of local government units.
>
> (1) Subject to the provisions of this Constitution, Parliament may—
>
> (a) alter the boundaries of districts; and
>
> (b) create new districts.
>
> (2) Any measure to alter the boundary of a district or to create a new district shall be supported by a majority of all the members of Parliament.
>
> (3) Parliament shall by law empower district councils to alter the boundaries of lower local government units and to create new local government units within their districts.
>
> (4) Any measure for the alteration of the boundaries of or the creation of districts or administrative units shall be based on the necessity for effective administration and the need to bring services closer to the people, and it may take into account the means of communication, geographical features, density of population, economic viability and the wishes of the people concerned.

Article 179 of the Constitution empowers Parliament to alter boundaries of districts and to create new districts. Secondly, any measure to alter the boundary of a district or to create a new district shall be supported by a majority of all members of Parliament. Parliament further has authority to empower district councils to alter the boundaries of lower local government units and to create new local government units within their districts. Article 179 (4) of the Constitution clearly provides for the criteria for the alteration of boundaries of a district and the creation of new districts or administrative units and provides that it shall be based on the necessity for effective

administration and to bring services closer to the people. Furthermore, it is provided that the alteration or creation may take into account the means of communication, geographical features, density of population, economic viability and the wishes of the people concerned.

Districts can only be created with approval of Parliament and provision is also made for the creation of new lower local government units under articles 176 and 177 of the Constitution which provide that:

> 176. Local government system.
>
> (1) The system of local government in Uganda shall be based on the district as a unit under which there shall be such lower local governments and administrative units as Parliament may by law provide.
>
> 177. Districts of Uganda.
>
> (1) Subject to the provisions of this Constitution, for the purposes of local government, Uganda shall be divided into the districts referred to in article 5(2) of this Constitution.
>
> (2) The districts referred to in clause (1) of this article shall be taken to have been divided into the lower local government units which existed immediately before the coming into force of this Constitution.

From the immediately foregoing articles, the local government system shall be based on the district as a unit under which there shall be lower local government units and administrative units as prescribed by Parliament. Secondly, as far as districts are concerned, Uganda is to be divided into districts as set out under article 5 of the Constitution. Further, from articles 176 and 177 of the Constitution it is also clear that the creation or alteration of district boundaries or lower local government units has nothing to do with the prescription of new constituencies or the prescription of the number of constituencies into which Uganda shall be divided. Secondly, the rationales for the creation of new districts or the alteration of boundaries of districts is

not all the same as the rationales for the creation of constituencies though there may be common ground between the two.

Furthermore, it is at the demarcation of constituencies that the actual sizes and populations of constituencies are considered by the second respondent and not by Parliament.

There is no evidence anywhere that Parliament created the municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido as constituencies *per se* to be represented by members of Parliament. The resolution of Parliament dated 9th, August 2016 does not on the face of the written word create municipalities or constituencies named as the above-mentioned municipalities. Even if Parliament mentioned the municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido as constituencies in the resolution according to an attached list annexed to the petition, it did not amount to demarcation of constituencies and the second respondent would still have a duty to demarcate the boundaries of the named constituencies under Article 63 (2) of the Constitution. Prescription of constituencies is not the same thing as demarcation of the boundaries of such constituencies. The two roles under articles 63 (1) for prescription of constituencies and Article 63 (2) for demarcation of boundaries for purposes of prescribed constituencies can be and have to be read in harmony.

This brings me to the complex issue of the role of the second respondent under article 63 (2) of the Constitution to ensure that; *each county, as approved by Parliament, has at least one member of Parliament; except that no constituencies shall fall within more than one county*. Apparently, a county is a local government unit which falls under a district. Unfortunately, the word county can also be used in relation to constituencies historically. As we noted under article 179 of the Constitution, the creation of new districts or alteration of boundaries of districts may be done by Parliament.

Secondly, article 179 (3) of the Constitution clearly stipulates that Parliament shall by law empower district councils to alter the boundaries of local government units and to create new local government units within their districts. Following the issue of division of the districts and lower local government units, I found no definition of a county under article 257 of the Constitution. The definition of a county is therefore left to the Local Governments Act. The word "county" is not defined by the interpretation section 1 of the Local Governments Act Cap 243 though the word council composed of people representing a local government unit is defined. The meaning of the word 'county' can however be established from section 45 of the Local Government Act. The word 'council' on the other hand is defined by section 1 (1) (b) to mean:

> (b) "council" includes all councils referred to under sections 3 and 45;

Secondly, the phrase "local government" and "lower local government" are defined by section 1 (1) (i) and (j) to mean:

> (i) "local government" means the local councils established under section 3(2) to (5);
>
> j) "lower local government" includes a municipality, town, division and subcounty councils;

Further, sections 3 – 5 of the Local Government Act, are set out below to establish the context of the use of the word 'county' in the relevant units referred to under the Act:

> 3. Local governments.
>
> (1) The system of local government shall be based on the district as a unit under which there shall be lower local governments and administrative units.
>
> (2) The local governments in a district rural area shall be—
>
> (a) the district council;

(b) the subcounty councils.

(3) The local governments in a city shall be—

(a) the city council;

(b) the city division councils.

(4) The local governments in a municipality shall be—

(a) the municipal council;

(b) the municipal division councils.

(5) The local government in a town shall be the town council.

A local government in a rural district area is the district council and the sub county council. Presumably, by some oversight, the word "county" has not been included in this category. Secondly, local government in the city shall be the city council and the city division councils. Again, and presumably, due to some oversight, the word "county" has not been used. Further, a municipality shall be composed of the municipal council and the municipal division Council. Finally, a local government in a town shall be composed of the town council. A city is the equivalent of a district under section 4 of the Local Government Act:

4. City to be equivalent to a district.

For purposes of this Act—

(a) a city shall be equivalent to a district, and a city council shall exercise all functions and powers conferred upon a district council within its area of jurisdiction;

(b) a division shall be equivalent to a subcounty, and shall exercise all relevant functions and powers conferred upon a subcounty.

It is clearly stipulated under section 4 (a) of the Act that a city council shall exercise the functions conferred upon a district council. However, a division

in a city is the equivalent of a subcounty. It is only by deduction that one may conclude that a division may be equivalent to a county. What is material in this petition is section 5 of the Local Governments Act which prescribes that a municipality and a town are to be lower local governments:

> 5. Municipality and town to be lower local governments.
>
> Subject to article 197 of the Constitution and section 79 of this Act, a municipal or a town council shall be a lower local government of the district in which it is situated.

Sections 3, 4 and 5 of the Local Governments Act do not have the expression "county" though they stipulate what a subcounty, under the local government system, is supposed to be. I further examined the sections creating administrative units, councils and committees under sections 45 and 46 of the Local Governments Act which provides as follows:

> 45. Administrative units, councils and committees.
>
> (1) There shall be administrative units based on—
>
> (a) in rural areas—
>
> (i) the county;
>
> (ii) the parish; and
>
> (iii) the village;
>
> (b) in urban areas—
>
> (i) the parish or ward; and
>
> (ii) the village.
>
> (2) There shall be a council at each level of the administrative units.

It is only under section 45 that the expression "county" is found as one of the administrative units in rural areas. From section 45 quoted above, the parish

is below the county and the village is below the parish. In urban areas, administrative units shall consist the parish or the ward and the village. Finally, at the county level, all members of the subcounty executive committees in the county shall compose an administrative unit council. Furthermore, all district councillors representing constituencies in the county are ex officio members of the county council. Section 46 of the Local Governments Act provides that:

> 46. Composition of administrative unit councils.
>
> (1) The council shall consist of—
>
> (a) at the county level, all the members of the subcounty executive committees in the county;
>
> (b) at the parish level, all the members of the village executive committees in the parish;
>
> (c) at the village level, all persons of eighteen years of age or above residing in that village.
>
> (2) There shall be the following ex officio members—
>
> (a) at the county level, all district councillors representing constituencies in the county;
>
> (b) at the parish level, all subcounty councillors representing constituencies in the parish.

It can be deduced that the county is composed of sub counties. Parliament has authority under article 176 (1) of the Constitution at its discretion to prescribe such local governments and administrative units as it deems fit by law.

It therefore follows that the counties are prescribed by Parliament under its mandate conferred by article 176 of the Constitution or are created under a law prescribed by Parliament by the district councils as local government

units which must have at least one member of Parliament according to the direction to the second respondent under article 63 (2) of the Constitution. Secondly, each county has to be approved by Parliament. Further, it is clearly stipulated that no constituency shall fall within more than one county. It is therefore possible to have more than one constituency in a county but not one constituency straddling more than one county. A municipality is a lower local government unit and the question is whether a municipality is a county for purposes of article 63 (2) of the Constitution. Historically the word county has been used synonymously with the word constituency. This is clear from the First Schedule to the Parliamentary Elections (Interim Provisions) Act, Cap 141 which refers to constituencies in rural areas as counties and separately municipalities as counties. An example can be taken from Gulu District, Kabarole District and Kampala District on the issues of counties stated in the First Schedule (supra).

Gulu District code is 05 and it had the following constituencies:

1. Aswa County
2. Kilak County
3. Nwoya County
4. Omoro County and
5. Gulu Municipality.

Kabarole District whose code is 10 had:

1. Bunyangabu County
2. Burahya County
3. Kibale County
4. Kitagwenda County
5. Kyaka County
6. Mwenge County North
7. Mwenge County South and

8. Fort Portal Municipality

In Kampala, the constituencies are referred to as Divisions. These are stated as:

1. Kampala Central
2. Kawempe Division North
3. Kawempe Division South
4. Makindye Division East
5. Makindye Division west
6. Rubaga Division North
7. Rubaga Division South and
8. Nakawa Division

Gulu as a municipal council was a constituency. Fort Portal as a municipal council was a constituency while Kampala City was divided into 8 divisions which were all constituencies. Mr Hamidu submitted for the second respondent that the second respondent was under obligation to ensure that each county has at least one member of Parliament. That such a duty is placed on the second respondent by article 63 (2) of the Constitution of the Republic of Uganda. The controversy is whether, upon the creation of any municipality as a unit of local government, the second respondent was under obligation to hold or supervise elections in such a new municipality. There is no evidence in the resolution of parliament that the six municipalities were created as a prescription by parliament of constituencies rather than as local government units. The role to create is different from the role to demarcate. Demarcation in the law is the role of the second respondent and deals with boundaries of constituencies. Parliament when creating a municipality in a local government system does not at the same time demarcate its boundaries by the mere act of creation, approval or alteration.

For the moment, **issue number 3 of whether the creation of municipalities in contention by Parliament without the involvement of the second respondent is inconsistent with article 63, is answered in the negative.**

The obligation of Parliament to approve lower local government units or the creation of a local government units is a different function dealing with a system of local government and not a system of elections for members of Parliament. Article 179 clearly and explicitly provides that Parliament may alter the boundaries of districts and create new districts. Secondly, Parliament may by law empower district councils to alter the boundaries of lower local government units and to create new local government units within their districts. Parliament enacted section 7 of the Local Government Act and empowered the local government units accordingly;

> 7. Boundaries of local council units.
>
> (1) The boundaries of a local government or of an administrative unit shall be those which existed immediately before the coming into force of this Act.
>
> (2) Boundaries of a district unit may be altered or new district units formed, in accordance with article 179 of the Constitution.
>
> (3) Subject to the Town and Country Planning Act, the Minister may, in consultation with the district with the approval of Cabinet after satisfying himself or herself that the requirements under paragraph 32 of the Third Schedule are met, declare an area to be a town.
>
> (4) A district may with the approval of the Minister, within its area of jurisdiction, at the request of or in consultation with the relevant municipal council, alter the boundaries of or create a new municipal division council.
>
> (5) A district council may, within its area of jurisdiction and with the approval of the Minister at the request of or in consultation with the relevant subcounty councils, alter the boundaries of or create a new subcounty.

(6) A subcounty or city division council may, within its area of jurisdiction with the approval of the district or city council and at the request of or in consultation with the relevant parishes or wards, alter the boundaries of or create a new parish or ward.

(7) A district or city council may, within its area of jurisdiction with the approval of Parliament and in consultation with or at the request of the relevant county council or city division council, alter the boundaries of or create a new county or a city division.

(8) A municipal division or town council may, within its area of jurisdiction and at the request of or in consultation with the relevant wards, alter the boundaries of or create a new ward.

(9) A parish or ward council may, with the approval of a subcounty, division or town council and at the request of or in consultation with the relevant villages as the case may be, alter the boundaries of or create a new village.

(10) Where an approval required under this section is not given, the authority withholding its approval shall, in writing, give reasons for its action.

It follows that it is not function of Parliament alone, to create municipalities because it is the function of the district local governments with approval of Parliament under the Local Government Act.

Issue 4

Whether the resolution complained of and the holding of elections thereafter deprived the petitioner of a right of appeal and therefore is inconsistent with article 64 (2) and (3) of the Constitution?

I have carefully considered the issue 4 and I have already resolved that the impugned resolution of Parliament does not infringe or violate article 63 of the Constitution. Article 64 on the other hand deals with the right of appeal of a person who is aggrieved by a decision of the Electoral Commission in respect of any of the complaint referred to it in article 61 (1) (f) of the Constitution. Generally, article 61 of the Constitution sets out the functions

of the Electoral Commission. Particularly article 61 (1) of the Constitution deals with the function to hear and determine election complaints arising before and during polling.

There was no election complaint arising before or during polling disclosed in this petition. The petitioner's petition challenges the act of Parliament by resolution of creating 296 constituencies into which Uganda should be divided. Secondly, the petitioner is challenging the resolution of Parliament on the ground that it usurped the powers of the Electoral Commission to demarcate boundaries. A separate provision of the Constitution deals with grievances pursuant to a decision of the Commission in respect of the demarcation of a boundary. It follows that article 64 (1) of the Constitution is inapplicable to the facts of the petition. The applicable provision is article 64 (2) of the Constitution which provides that a person aggrieved by a decision of the Commission in respect of the demarcation of the boundary has a right of appeal to a tribunal consisting of three persons appointed by the Chief Justice and the Commission shall give effect to the decision of the tribunal.

The petitioner was unable to show any particular decision of the Electoral Commission in respect of demarcation of a boundary. The petitioner's counsel submitted that the evidence could be in the Gazette but no Gazette was exhibited. In any case section 11 (2) of the Electoral Commission Act provides that:

> (2) The number of constituencies prescribed under subsection (1) shall be published in the Gazette.

The section deals with the number of constituencies and one cannot establish the demarcation of any constituencies just by naming it.

Secondly, the second respondent's counsel was equally unable to point to any particular decision of the Commission demarcating a boundary. No

particular demarcation was mentioned in the petition itself. In paragraph 1 (d) of the petition, the petitioner averred that:

> The act of Parliament demarcating boundaries of constituencies deprives the petitioner the right to appeal and is therefore inconsistent with article 64 (2) and (3) of the Constitution.

The burden was on the petitioner to adduce evidence of any demarcation by Parliament. In the affidavit in support of the petition, the petitioner deponed an affidavit in which he stated that the President of the Republic of Uganda held a rally in Bufumbira at the end of 2015. That the President promised to split the constituency into two so as to have two members in the current Parliament. He further stated that he heard the President make similar promises in other parts of the country through radio and television but does not give instances or specific facts about those other parts of the country such as the name of the constituency affected etc. Under sections 101, 102 and 103 of the Evidence Act, Cap. 6, the burden is on the petitioner to prove his assertions of fact alleging the splitting of constituencies and particularly the fact of demarcation of boundaries as alleged by him. Sections 101, 102 and 103 of the Evidence Act provide that:

> 101. Burden of proof.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> 102. On whom burden of proof lies.
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 103. Burden of proof as to particular fact.

> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

From the above quoted provisions of the Evidence Act, the burden is on the petitioner on the basis that any judgment in favour of the petitioner depends on the existence of the fact of demarcation of boundaries by the Electoral Commission. Secondly, the issue of breach of the right of appeal of the petitioner pursuant to a decision of the Electoral Commission cannot succeed unless the fact of a decision of the Electoral Commission on demarcation of boundaries is established. A decision should be embodied in something. Was it in writing or could it be proved from the acts? Thirdly, the onus to prove a particular fact of which of the constituency boundaries were demarcated lay on the petitioner. The pleadings disclosed that the petitioner alleges demarcation and alteration of boundaries by resolution of Parliament and not by decision of the Electoral Commission. In those circumstances, the right of appeal which springs from a decision made by the Electoral Commission in the demarcation of boundaries cannot arise.

Further, the petitioner stated that after elections Parliament passed a resolution making municipalities constituencies. In paragraph 8 of his affidavit this is what the petitioner stated:

> I have carefully read the resolution and noted that it is not based on any demarcation carried out by the second respondent.

The above deposition clearly discloses that the second respondent never carried out any demarcation. If there was no demarcation, it follows that there was no decision of the second respondent in respect of demarcation of the boundary of any constituency or constituencies.

Further, Mr Wandera submitted that the crux of the issue was that the petitioner was denied the right of appeal. I have already held that Parliament

has the right to prescribe the number of constituencies into which Uganda shall be divided. The question of whether there was a demarcation of boundaries therefore could not be proved. In any case, the petitioner has challenged the holding of elections in newly created municipalities though he stated that they are newly created constituencies. In paragraphs 9, 10, 11, 12 and 13 of the affidavit of Mr. Eddie Kwizera, the petitioner, states that:

> 9. The second respondent has now embarked on the process of holding elections in the newly created constituencies.
> 10. I am aware of only two types of elections namely the general parliamentary elections and by – elections.
> 11. The mid-term elections will bring into Parliament new members before the dissolution of the current Parliament.
> 12. I am aware that demarcation of constituencies is a function of the Electoral Commission and not Parliament.
> 13. I wanted to present a case for creation of another constituency demarcated out of Bufumbira East but there was no opportunity provided for me to do so nor could I lodge a complaint.

It is clear that the word demarcation is used in the sense of division or alteration of boundaries. The article 63 (2) clearly provides for the demarcation of boundaries to fulfil the prescription of Parliament under article 63 (1) of the Constitution. **Since there is no evidence of any decision of the Electoral Commission, issue number 4 has to be and is hereby answered in the negative**. This cannot stop the petitioner from arguing that the demarcation by Parliament, if any, was unconstitutional. However, there is no evidence of demarcation of any constituency by Parliament as what has been adduced in evidence is a resolution prescribing the number of constituencies into which Uganda shall be divided.

Issue 5

Whether the organising, conducting and supervising mid-term elections which are neither general or residual is inconsistent with and in contravention of article 61 (1) (b), 61 (2) and 81 (2) and (3)?

I have carefully considered issue number 5 and I find it more convenient to have it considered concurrently with issue number 7. Issue number 7 is:

Issue 7

Whether the act of the second respondent in organising, conducting and/or supervising elections in the municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido is inconsistent with and/or contravenes articles 63 (6) of the Constitution?

I note that by the time of filing the petition on 18th May, 2018, the petitioner wanted to challenge the act of the second respondent to hold elections in the municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido. He avers in paragraph 2 (g) of the petition that the Electoral Commission has embarked on the process of conducting elections in the six constituencies (municipalities) created. In paragraph 2 (h) the petitioner averred as follows:

> The said Electoral Commission did not demarcate constituencies nor did Parliament amend the law to include the new constituencies but simply passed a resolution to amend its own Act of Parliament.

I further noted that article 81 (2) of the Constitution provides that whenever a vacancy existed in Parliament, the Clerk to Parliament shall notify the Electoral Commission in writing within 10 days after the vacancy has occurred.

It must foremostly be stated that the creation of new constituencies does not lead to any vacancy in representation in Parliament of the newly created

constituency when the creation is made after the holding of general elections. This is because, before a constituency is split into two or more constituencies, a member of Parliament is elected for the whole region which is subsequently split into two or more constituencies. So long as the Member of Parliament remains in Parliament, he is under obligation to represent all the people in the constituency which elected him or her into Parliament before it was split into two or more constituencies. It is therefore erroneous to suggest that any vacancy can arise as a result of re-demarcation of constituencies after elections have been held and an MP elected to represent that constituency before it was split. For emphasis, articles 83 and 84 of the Constitution clearly stipulate the grounds upon which a member of Parliament shall vacate his or her seat in Parliament. For further emphasis, before he or she vacates his or her seat in Parliament, he or she represents the electorate of that constituency from which he or she got the majority vote before any alteration or demarcation of boundaries. Articles 83 and 84 of the Constitution on the issue of any vacancy in the office of an MP, stipulates as follows:

> 83. Tenure of office of members of Parliament.
>
> (1) A member of Parliament shall vacate his or her seat in Parliament—
>
> (a) if he or she resigns his or her office in writing signed by him or her and addressed to the Speaker;
>
> (b) if such circumstances arise that if that person were not a member of Parliament would cause that person to be disqualified for election as a member of Parliament under article 80 of this Constitution;
>
> (c) subject to the provisions of this Constitution, upon dissolution of Parliament;
>
> (d) if that person is absent from fifteen sittings of Parliament without permission in writing of the Speaker during any period when Parliament is continuously meeting and is unable to offer satisfactory explanation to the relevant parliamentary committee for his or her absence;

(e) if that person is found guilty by the appropriate tribunal of violation of the Leadership Code of Conduct and the punishment imposed is or includes the vacation of the office of a member of Parliament;

(f) if recalled by the electorate in his or her constituency in accordance with this Constitution;

(g) if that person leaves the political party for which he or she stood as a candidate for election to Parliament to join another party or to remain in Parliament as an independent member;

(h) if, having been elected to Parliament as an independent candidate, that person joins a political party;

(i) if that person is appointed a public officer.

(2) Notwithstanding clause (1)(g) and (h) of this article, membership of a coalition government of which his or her original political party forms part shall not affect the status of any member of Parliament.

(3) The provisions of clauses (1)(g) and (h) and (2) of this article shall only apply during any period when the multiparty system of government is in operation.

Under article 83 quoted above, there is no basis for any member of Parliament to vacate his or her seat upon any demarcation of any constituency into one or more constituencies. Similarly, there is no basis for any member of Parliament to vacate his or her seat or to cease representing the electorate upon any alteration of boundaries. We shall further note that any demarcation or alteration of boundaries can only take effect in the next general elections unless the seat is vacated earlier. Furthermore, a member of Parliament may also vacate his or her seat upon the exercise of the power of the right of recall by the electorate. Article 84 of the Constitution is set out herein below for ease of reference:

84. Right of recall.

(1) Subject to the provisions of this article, the electorate of any constituency and of any interest group referred to in article 78 of this Constitution have the right to recall their member of Parliament before the expiry of the term of Parliament.

(2) A member of Parliament may be recalled from that office on any of the following grounds—

(a) physical or mental incapacity rendering that member incapable of performing the functions of the office;

(b) misconduct or misbehaviour likely to bring hatred, ridicule, contempt or disrepute to the office; or

(c) persistent deserting of the electorate without reasonable cause.

(3) The recall of a member of Parliament shall be initiated by a petition in writing setting out the grounds relied on and signed by at least two-thirds of the registered voters of the constituency or of the interest group referred to in clause (l) of this article, and shall be delivered to the Speaker.

(4) On receipt of the petition referred to in clause (3) of this article, the Speaker shall, within seven days require the Electoral Commission to conduct a public inquiry into the matters alleged in the petition and the Electoral Commission shall expeditiously conduct the necessary inquiry and report its findings to the Speaker.

(5) The Speaker shall—

(a) declare the seat vacant, if the Electoral Commission reports that it is satisfied from the inquiry, with the genuineness of the petition; or

(b) declare immediately that the petition was unjustified, if the commission reports that it is not satisfied with the genuineness of the petition.

(6) Subject to the provisions of clauses (2), (3), (4) and (5) of this article, Parliament shall, by law prescribe the procedure to be followed for the recall of a member of Parliament.

From the immediately foregoing, there is no evidence that the Speaker to Parliament has declared any seat vacant and on the basis of the factors on which it may be declared vacant.

The conducting of elections without any vacancy in any seat of Parliament is not envisaged by the Constitution and is therefore clearly unconstitutional. I note that an MP who has already been elected by majority vote cannot and should not be asked to offer himself or herself to the electorate again to compete for a portion of his or her previous constituency before expiry of the first mandate given by his or her electorate. Secondly, issue number seven concludes issue number 5. Article 63 (6) of the Constitution is very explicit about when to conduct the next elections upon a review, or alteration. It stipulates as follows:

> (6) Where the boundary of a constituency established under this article is altered as a result of a review, the alteration shall come into effect upon the next dissolution of Parliament.

It was strongly submitted for the respondents that the above article is only concerned with alteration of boundaries upon a review by the Electoral Commission and that a review is only carried out as a result of a population census. On the face of it, the argument is plausible and can stand. It however, does not overcome or deal with other situations I pointed out above that the demarcation of a constituency does not lead to a vacancy because there is an existing member of Parliament representing the entire constituency before the demarcation. Elections cannot be held where there is no vacancy and a vacancy can only occur upon the next dissolution of Parliament or upon recall or the declaration of vacancy by the Speaker in situations discussed above. To hold otherwise would lead to a situation where the proportions of representation in Parliament can be multiplied or decreased for particular political parties depending on where certain majorities are popular after the holding of general elections. This has the potential to alter the outcome of the general elections in terms of the proportions of political parties represented in Parliament because general elections generally give proportions of representation of political parties notwithstanding any subsequent outcome of any by-elections whenever a vacancy is declared.

This, is made even clearer as an obvious intention of Parliament, in the Electoral Commission Act. Section 20 of the Electoral Commission Act Cap. 140 provides that:

> 20. Electoral districts.
>
> (1) For the purposes of this Act, there shall be as many electoral districts as there are administrative districts.
>
> (2) Where a district is established after proceedings for an election in the area of the district have commenced, the new district shall only become an electoral district for subsequent elections.

Clearly Parliament envisaged the above situation and provided under section 20 (2) of the Electoral Commission Act that where a district is established after proceedings of an election in the area of the district have commenced, the new district shall become an electoral district for subsequent elections. It should be noted further that a "district" is defined as an electoral district and "election" means election of a member of Parliament under section 1 (1) of the Parliamentary Elections Act 2005.

The rationale is clear, for cases of MPs, the member of Parliament who has already been elected in any existing constituency shall represent the entire electoral area comprising of one constituency before the constituency is split or altered in accordance with the law.

In the premises, and without much ado, issues number 5 and 7 are answered in the affirmative. The question remains as to whether to grant the remedies prayed for in light of the circumstances. I shall presently consider the question of whether, such elections can be nullified after the public have elected members of Parliament who invested their time, resources and possibly forewent other opportunities in life and were elected.

In the meantime, I shall proceed to consider the last issue which is issue number 6 before concluding on the question of remedies.

Issue 6

Whether the act of Parliament declaring that Uganda is divided into 296 constituencies as at 9th August, 2016 is inconsistent with Article 294 of the Constitution?

Article 294 of the Constitution has already been considered in addressing issues numbers 2 and 3. Article 294 deals with existing constituencies by the time of coming into force of the Constitution (Amendment) Act, 2005. It was established as a question of fact that by time of coming into force of the Constitution (Amendment) Act, 2005, Uganda had been divided into 214 constituencies and that question of fact was not in dispute. Secondly, article 294 of the Constitution clearly stipulates that until Parliament prescribes the constituencies under article 63, the constituencies shall be those into which Uganda was divided before the coming into force of the Constitution (Amendment) Act, 2005. I have already established from the law that Uganda was divided into 214 constituencies by 2005.

Mr Wandera submitted that there was no valid creation of constituencies. He based his argument on the same premises that Parliament had no authority to demarcate constituencies. He could not point out any evidence adduced to prove any demarcation of any constituency by Parliament. None of the parties produced the Gazette evidence. Mr. Wandera also submitted that the number of constituencies can only be prescribed by an Act of Parliament. We have already established that section 11 of the Electoral Commission Act is a law enacted by Parliament and it empowers Parliament to make the prescription of constituencies by resolution. The petitioner did not purport to challenge the powers of Parliament under section 11 of the Electoral Commission Act or even to challenge the constitutionality of section 11 of the Electoral Commission Act. It follows that the prescription by Parliament of 296 constituencies into which Uganda shall be divided is a prescription that falls within the purview of article 63 (1) of the Constitution and as

envisaged by article 294 of the Constitution because it allows Parliament to prescribe the number of constituencies into which Uganda shall be divided.

It is the import of the submissions of Mr. Wandera Ogalo that the resolution of Parliament purported to validate existing constituencies beyond the 214 constituencies recognised under article 294 of the Constitution. In a roundabout way, the petitioner's counsel sought to obtain a decision nullifying 82 constituencies and elections. The gist of the petition however only challenges six constituencies comprising of municipalities which were specifically named.

Both the first respondent and the second respondent's counsel objected to the submissions of the appellant's counsel. We were faced with the obvious question of whether the court can turn a blind eye to the implications or import of the submissions which may affect, and depending on proof of material facts, other constituencies beyond the 214 constituencies recognised by article 294 of the Constitution. Further, it was not suggested that there was a specific point of law which could be argued as a pure point of law without reference to the facts. Mr Wandera urged the court to take judicial notice of what is in the Gazette for purposes of establishing demarcation by Parliament or the conduct of elections in newly created constituencies after general elections of 2016 but never offered any Gazette evidence to prove any demarcation of Uganda into 296 constituencies. In any case, gazetting of constituencies does not constitute demarcation. Demarcation indicates the boundaries of any constituency and will be able to show whether any administrative unit or village or cell falls within one constituency or another. As noted above, demarcation of boundaries is a different thing from prescription of the number of boundaries. Naming of constituencies or municipalities does not per se constitute demarcation of boundaries of those municipalities. Similarly, gazetting of constituencies and

such evidence may not indicate which villages fall within which constituency. On the face of it, the prescription of Parliament is valid and constitutional.

The ultimate effect of the petition is that the petitioner's counsel therefore only challenges the act of the second respondent to conduct elections in unnamed constituencies other than the 6 constituencies comprising municipalities specifically named as Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido. The respondent's counsel submitted that there could be an explanation by the second respondent but the second respondent was not given any opportunity to adduce evidence as to what actually happened because the petition does not disclose the issue.

In my judgment, the matter can be resolved by an examination of the petition itself. Paragraph 1 (a) of the petition clearly challenges the resolution of Parliament dated 9th August, 2016 dividing Uganda into 296 constituencies. Secondly, paragraph 1 (f) of the petition clearly challenges the holding of elections which are neither residual, by – elections or general elections as being inconsistent with article 61 (1) (b) of the Constitution. Following these averments, there are no specific particulars disclosed in the pleading of the constituencies which are affected. There is no averment as to whether elections were held after the general elections of 2016 had been conducted.

In a petition alleging such a grave and serious matter of public importance, it is of crucial importance that the affected areas are specified. Which constituencies are affected? The Electoral Commission cannot be generally directed and the petition only discloses a challenge to elections conducted in the municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido. This is because the resolution of Parliament is lawful. As far as the municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido are concerned, section 20 of the Electoral Commission Act is specific that elections can only be conducted in the next elections if no vacancy had been declared by the Speaker. The conduct of elections in such areas would be unlawful before

vacancies are declared or fall vacant by virtue of the dissolution next before the election of new members of Parliament in general elections after the expiry of the term of Parliament.

Remedies

The remaining question is whether the provisions under which the petitioner sought to impeach elections should be considered mandatory or directory for purposes of what has occurred so far. The argument of the respondent's counsel that article 63 (2) imposes a duty on the second respondent to ensure that each county is represented cannot be sustained because as I have demonstrated above, the division of any constituency by demarcation does not lead to a vacancy and will only take effect in the next general elections. The members of Parliament who had already been elected before the splitting of the constituency would continue to represent the electorate.

I must state from the onset that Article 63 (6) of the Constitution is mandatory for purposes of compliance. It should further be noted that article 63 (6) of the Constitution deals with situations where the boundary has been altered as a result of review by the Electoral Commission. The circumstances in which the Electoral Commission could conduct a review do not exist in this petition as there was none. No review had been conducted by the Electoral Commission as a matter of fact and pursuant to a census of the population of Uganda. Article 63 (6) of the Constitution is not applicable to the petitioner's petition.

The only issue remaining is whether the act of holding elections and the election of Members of Parliament for the new created municipalities which were considered as constituencies is a nullity. Article 63 (2) requires the Electoral Commission to ensure that each county is represented by at least one member of Parliament. The duty of the Electoral Commission under

article 61 (1) (b) of the Constitution is to conduct elections in accordance with the Constitution. It provides as follows:

> (b) to organise, conduct and supervise elections and referenda in accordance with this Constitution;

The second respondent did not conduct elections in accordance with the Constitution in the six constituencies stated to be municipalities. Non – compliance with a mandatory provision of a statute was considered by H.W.R. Wade in, **Administrative Law; Fifth Edition** at page 218:

> Non-observance of a mandatory condition is fatal to the validity of the action. But if the condition is held to be merely directory, its non-observance will not matter for this purpose.

Secondly, H.W.R. Wade (supra) wrote that the same condition may be mandatory and directory at the same time; it may be mandatory as to substantial compliance, but directory as to precise compliance. Thirdly, according to H.W.R. Wade (supra), at page 219, very often legislature does not prescribe the consequences of non-compliance and he stated that the court must determine the question:

> It is a question of construction, to be settled by looking at the whole scheme and purpose of the Act and by weighing the importance of the condition, the prejudice to private rights and the claims of the public interest.

Further, he stated that the distinction between mandatory and directory enactments or rules is not quite clear cut: *... since the same condition may be both mandatory and directory; mandatory as to substantial compliance, but directory as to precise compliance.*

According to **Halsbury's Laws of England; Fourth Edition Reissue Volume 44 (1) paragraph 1238**:

> Requirements are construed as directory if they relate to the performance of a public duty, and the case is such that to hold void acts done in neglect of them

would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, without at the same time promoting the main object of legislature…

If the requirement is found to be mandatory, then in a case where a duty to implement it is imposed directly on a person, non-compliance will normally constitute the tort of breach of statutory duty, while in a case where it is to be implemented as part of a specified procedure, non-compliance will normally render the act done invalid. If the requirement is found to be directory only then in either case the non-compliance would be without direct legal effect, though there might be indirect consequences such as an award of costs against the offender. It has been said that the mandatory provisions must be fulfilled exactly, whereas it is sufficient if directory provisions are substantially fulfilled.

The above rule is stated in several English authorities. **In Cullimore v Lyme Regis Corporation [1961] 3 All ER 1008** Edmund Davies J quoted the applicable general principles from Maxwell on Interpretation of Statutes (10th Edition), at p 376 *inter alia* at page 1011 that:

> … A strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty and where they relate to a privilege or power. Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the legislature. But when a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative.
>
> At 381
>
> …On the other hand, where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in

neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. (See Sir Arthur Channell, in Montreal Street Ry Co v Normandin ([1917] AC at pp 174, 175)

What happens if the failure to comply with a statute renders the act of non – compliance an illegal or invalid act? In **Vita Food Products Inc v Unus Shipping Co Ltd (in Liquidation) [1939] 1 All ER 513** Lord Wright of the Privy Council stated that:

> Illegality is a concept of so many varying and diverse applications that in each case it is necessary to scrutinise the particular circumstances with precision in order to determine if there is illegality, and, if so, what is its effect. As Lord Campbell LC, said in reference to statutory prohibitions in Liverpool Borough Bank v Turner, at pp 507, 508:
>
> > 'No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.'

All these salutary principles can be weighed *inter alia* against one cardinal principle of interpretation of Constitutions, which is that of the supremacy of the Constitution. This may be deduced from the wording of article 2 of the Constitution which provides that:

> 2. Supremacy of the Constitution.
>
> (1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.

The first principle is that the Constitution shall have binding force on all authorities and persons throughout Uganda. In other words, the provisions of the Constitution are binding on the Electoral Commission. The simple question that follows is what happens if the Electoral Commission acts in breach of any provision of the Constitution? Secondly, article 2 (2) of the Constitution provides that any other law or custom which is inconsistent with any of the provisions of the Constitution shall to the extent of the inconsistency be void. A closer scrutiny of this provision demonstrates that it deals with any other law or custom but not with an act or omission which is inconsistent with the Constitution. On the other hand article 137 (3) of the Constitution deals with inconsistency by an act or omission of an authority. For instance, the matters complained about in this Constitution include the actions of the Electoral Commission to hold elections after the creation of new constituencies carved out of existing constituencies. The Electoral Commission is culpable but their culpability may lead to sanctions against them in the form of damages, injunctions etc.

I have further considered the effect of nullification on innocent third parties. What I need to emphasise is the fact that the Electoral Commission does have a duty under article 63 (2) of the Constitution to ensure that each county, as approved by Parliament, has at least one Member of Parliament. Mr Hamidu submitted that the second respondent was under obligation to conduct elections in the constituencies which had been created. However, it is clear that such a duty cannot be applied in breach of the provisions of the constitution which stipulates how elections are to be conducted and when a vacancy can be declared.

I must first conclude that there was no evidence from the petitioner or the second respondent as to the specific constituencies which had been created after the enactment of the Constitution (Amendment) Act, 2005. The petitioner attached a list of existing constituencies in Uganda which has a list of existing constituencies in Uganda since the 1996 general elections. The list is attached to the petition itself and there is no clear explanation as to who generated or released the list in the first place. The list is not annexed to the affidavit in support of the petition and should be regarded as part of the pleading only and not evidence. The attached list is juxtaposed next to a letter addressed to the Attorney General by the Clerk to Parliament dated 10th August, 2016. A perusal of the letter of the Clerk to Parliament does not indicate anywhere that the list of constituencies in Uganda since the 1996 general elections is part of the letter. On the other hand, the letter clearly indicates that what is attached is the resolution of Parliament made on Tuesday 9th of August, 2016 for information of the Attorney General and of the Minister of Justice and Constitutional Affairs. In any case, in that list annexed to the petition itself, there is a last paragraph which only lists six additional parliamentary constituencies after the 2016 general elections. Going by the petitioner's attached list of constituencies leads to the conclusion that apart from six municipalities which were created after the 2016 elections, the rest of the constituencies were created before the 2016 elections and therefore elections took place in all the rest of the constituencies after the dissolution of Parliament. In the absence of any evidence to the contrary or in the affirmative, such a conclusion cannot be made by this court since it is only based on pleadings and not based on evidence. In the premises, the only affected constituencies are the six municipalities specifically mentioned in the petition. The petitioner is bound by his pleadings. In **Ismail Serugo v Kampala City Council and the Attorney General; Constitutional Appeal No. 2 of 1998**, the Supreme Court following earlier precedents stated that in establishing whether a

petition discloses a cause of action, only the plaint (or petition or pleading) shall be examined. Wambuzi CJ stated that:

> In my view, it is important to note that both respondents asked the Constitutional Court to strike out the petition and that was the remedy granted. The relevant provisions in this regard would appear to be Order 7 Rule 11 or Order 6 Rule 29.
>
> Order 7 Rule 11 provides as follows in so far as is relevant: 'The plaint shall be rejected in the following cases-
>
> where it does not disclose a cause of action…
>
> (d) where the suit appears from the statement in the plaint to be barred by any law…
>
> and in so far as is relevant Order 6 Rule 29 provides as follows;
>
> The court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action and, in such case, may order the suit to be stayed or dismissed or judgment to be entered accordingly…
>
> I agree that in either case, that is whether or not there is a cause of action under Order 7 Rule 11 or a reasonable cause of action under Order 6 Rule 29 only the plaint can be looked at..."

In **Attorney General v Oluoch (1972) EA 392**, Spry Ag of the then East African Court of Appeal, stated at page 394 that:

> In deciding whether or not a suit discloses a cause of action, one looks, ordinarily, only at the plaint (Jeroj Shariff & Co v Chotai Family Stores (1960 EA 374) and assumes that the facts alleged in it are true.

The conclusion is that the petitioner's petition only challenges the creation and holding of elections in six listed municipalities but provides no evidence in relation to demarcation of those municipalities into constituencies.

Several conclusions may be drawn from the above state of affairs;

The main object of legislature is to ensure that the people are represented in Parliament by those who are lawfully elected. Secondly, Parliament clearly intends that interested or aggrieved parties should have a chance to challenge persons declared as duly elected as Members of Parliament within time lines stipulated in the Parliamentary Elections Act, 2005. As to the quota which is to be represented by any Member of Parliament, the intention of legislature is that the material numbers of constituencies into which Uganda should be divided is to be determined by Parliament and further guidelines have been set on the population quota to be considered in demarcation of boundaries of constituencies by the second respondent. Thirdly, the demarcation of boundaries pursuant to a population census is meant to ensure proportional representation in Parliament for all the people of Uganda.

Fourthly, failure to comply with mandatory provisions to hold elections in accordance with the Constitution violated the principle of sovereignty of the people under article 1 of the Constitution which clearly stipulates that the people agree to be governed in accordance with the Constitution and their sovereignty will shall be exercised through their representatives elected in accordance with the Constitution.

I must observe that the second respondent is culpable and may have inconvenienced innocent third parties by not complying with the timelines for the holding of elections in the manner envisaged in the Constitution. This is because certain members of Parliament stood for and were elected after they were made aware of new constituencies with vacancies for office of MP and for elections to be conducted in them and they presumably had to forego whatever they were doing in order to contest for a seat in Parliament in newly created a municipalities.

The order sought in the petition is the nullification of elections held in the contested constituencies without opportunity made available to persons

affected to be heard. The Parliamentary Elections Act, 2005 envisages elections that are conducted in accordance with the Constitution and under the laws prescribed by Parliament for the election of Members of Parliament. Such elections can be challenged under section 61 of the Parliamentary Elections Act, 2005.

In the circumstances of this petition, the elections that were conducted in the six municipalities are not elections envisaged in the Parliamentary Elections Act, 2005. First of all as we have held above, there was no vacancy existing or created in Parliament by the mere fact of creation of municipalities. The mandate of Parliament was established with the conclusion of the general elections in 2016 and was supposed to endure for a period of five years until the next general elections. Under article 81 (2) where a vacancy exists in Parliament, a by election will be held within 60 days after a vacancy has occurred provided it is not less than after six months from the conclusion of general elections. No vacancy had occurred because as noted above, all existing constituencies had been represented in the 2016 general elections.

Vacancies can occur as stipulated by article 83 or 84 of the Constitution. Finally elections could only be supervised and held for newly created municipalities in the next general elections since the areas comprising the municipalities were already represented by the elected Members of Parliament pursuant to general elections held in Uganda in the year 2016 and much before the municipalities were created in the year 2018.

I am mindful of the fact that the MPs affected in the six constituencies affect by this petition were not heard in this petition and if their election was for a vacancy, it could have been challenged within the time stipulated in the Parliamentary Elections Act, 2005. The right to a hearing is however not violated because what is being asked of this court is whether the office of MP in the contested the municipalities exists in terms of a vacancy under the Constitution before the next general elections.

The right to a hearing and a fair one at that is enshrined in article 28 (1) of the Constitution and cannot be derogated from under article 44 (c) of the Constitution if an order of nullification is to be made. Any nullification of the seat of a Member of Parliament without affording the MP affected a right to be heard would in theory derogate from the right to a fair hearing contrary to articles 28 (1) and 44 (c) of the Constitution. Such a right can only be asserted if there was a lawful vacancy in an office of MP that had been contested for. Secondly, the right is available in the process of challenging a person who had been elected in an office envisaged in the Constitution. Where the office of MP does not exist, then it is sufficient for this court to find that the elections conducted in the municipalities were premature, null and void and for a non-existent vacancy.

In the premises, I would hold that the elections conducted in the sixth affected municipalities mentioned in this judgement are not elections for an office of Member of Parliament existing under the Constitution because they are not general elections or by elections. Secondly, the seats contested for did not have a vacancy and were already represented by the elected MPs in the general elections of 2016.

In the premises, the elections already conducted in the municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido are for non - existent vacancies or seats in Parliament and cannot stand. I would find that article 61 (1) (b) that places a duty on the second respondent to conduct elections in accordance with the Constitution and its duty to ensure that each county is represented in Parliament as stipulated by article 62 (2) of the Constitution can only be exercised where there is a vacancy. Vacancies would occur in the municipalities of Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido with the necessary demarcation by the second respondent and would be available for contest in the next general elections upon dissolution of the sitting

Parliament or unless, any particular existing seat in Parliament becomes vacant under articles 83 and 84 of the Constitution.

I also find that the said articles are mandatory for compliance in any future elections in this country if elections conducted are to comply with article 1 (1) and (4) of the Constitution of the Republic of Uganda which stipulates that:

> (1) All power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.
>
> (4) The people shall express their will and consent on who shall govern them and how they should be governed, though regular, free and fair elections of their representative or through referenda.

It follows that the sovereignty of the people can only be exercised through the elections envisaged in the Constitution. No seats should be created by creating more constituencies after general elections have been held and concluded for Members of Parliament except in accordance with the Constitution. The Constitution envisages that any vacancies created by division or creation of more constituencies or alteration of boundaries of constituencies shall take effect in the next general elections.

I would further order that in the next elections, article 63 and article 294 of the Constitution shall be complied with and any elections held in disregard thereof shall be void *ab initio*.

The second respondent shall, within one year, file in court evidence of the prescription of Parliament dividing Uganda into the number of constituencies pursuant to the mandate exercised by Parliament under article 294 and 63 (1) of the Constitution for the next general elections. Secondly, the second respondent shall file in court evidence that it has demarcated the boundaries of constituencies in accordance with the prescription of

Parliament under article 63 at least 10 months before the next general elections.

Last but not least, I would find that the petitioner's petition has succeeded in part as herein stated above and in in the premises, the petitioner shall be paid half the taxed costs of the petition by the second respondent.

Dated at Kampala the __ day of _____, 2019

Christopher Madrama Izama

Justice of Appeal