

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Owiny-Dollo, DCJ; Kakuru, Egonda-Ntende, Barishaki Cheborion & Muhanguzi, JJA)

Constitutional Petition No. 26 of 2011

BETWEEN

MUYAMBI ELLADY PETITIONER

AND

ATTORNEY GENERAL.....RESPONDENT

JUDGMENT OF FREDRICK EGONDA-NTENDE, JCC / JA

Introduction

[1] This petition is brought by Muyambi Ellady, a research Associate of Africa Human Rights Monitoring, a civil society organization fully registered under the laws of Uganda. This Petition is brought under Article 137(3) (a) of the Constitution of Uganda challenging the constitutionality of the representation of the Uganda People's Defence Forces in the Parliament of Uganda under Article 78 of the Constitution.

[2] The respondent opposes this Petition.

[3] The following are the issues for determination by this court:

‘(1) Whether the representation of the army in Parliament is inconsistent with the Constitution.

(2) Whether the Parliament of the Republic of Uganda has reviewed the army representation in Parliament in accordance to Article 78 (2) of the Constitution.’

Submissions of Counsel

- [4] The Petitioner was represented by Mr. Ladislaus Rwakafuzi and the respondent by Mr. Phillip Mwaka, Principal State Attorney, at the hearing of this petition.
- [5] Mr. Rwakafuzi submitted that Article 78 (1) (c) violates the Constitution in so far as it provides for Army representation in Parliament. This contravenes Articles 208 and 79 of the Constitution. He contended that under Article 208 of the Constitution, the Uganda People's Defence Force is supposed to be non-partisan. The army could only be in parliament during the movement system of government and should be in abeyance during the multi-party system of government in accordance with Article 73. Its stay in Parliament during the multi-party system of governance is undemocratic given the role of Parliament under Article 79 of the Constitution. The Army representatives should be subjected to multi-party elections. Mr Rwakafuzi further contended that the continued stay of the army in Parliament violates Article 209 which spells the functions of the army. He cited Karuhanga Gerald & others v Attorney General [2014] UGCC 13, Ssekikubo & 4 Ors v Attorney General & 4 others, [2015] UGSC 19.
- [6] Secondly the Petitioner contends that Article 80 (4) of the Constitution bars public servants from becoming members of Parliament in a multi-party system. The army is part of public service and members of the army are public servants. Their representation in parliament is unconstitutional and should be harmonized with Article 80 (4) of the Constitution.
- [7] On the second issue Mr. Rwakafuzi submitted that the Parliament has not carried out the periodic review of representation by special interest groups to which the army is inclusive as mandated by Article 78 of the Constitution. Due to the failure to comply with this requirement the continued stay of army representatives in the Parliament is unconstitutional.

- [8] Mr Rwakafuzi prayed that this Court finds Article 78 (1) (c) unconstitutional in so far as it allows army representation in Parliament. And the continued stay of army representation in Parliament is unconstitutional as Parliament has failed to carry out its mandate under Article 78(2) of the Constitution.
- [9] In reply the respondent's counsel, Mr Mwaka, contends that this Petition is not justifiable since army representation is provided by the Constitution itself under Article 78 (1) (c) of the Constitution. It is therefore implausible for this court to find that army representation in parliament is inconsistent with the constitution simply because Uganda adopted a multi-party system in 2005. The Constitution must be read as a whole and not in isolation. The rule of harmonization requires all the relevant provisions of the Constitution to be read and considered as an integral whole with each provision complementing the other. An article of the Constitution cannot be amended by implication, deduction or infection. Any amendment of the Constitution would require deliberation and compliance with procedures for amendment of the Constitution. He cited Paul. K. Ssemwogerere & others vs Attorney General, [2004] UGSC 10 and David Wesley Tusingwire vs Attorney General [2017] UGSC 11.
- [10] In reply to the petitioner's contention that the army representation is inconsistent with Articles 78 (1) (c), 80 (4), 208 and 209 of the Constitution, Mr Mwaka submitted that the framers of the Constitution incorporated army representation in parliament fully aware of the above stipulated provisions. He relied on Kasozi Robinson & Others vs Attorney General and others [2015] UGCC 4. In this decision this court recognized that the army could choose its representatives to Parliament without engaging in any political activity during the process.
- [11] Mr Mwaka further submitted that the framers of the Constitution specially provided for army representation in Parliament as a special interest group knowing the unique attributes of the army and recognizing that members of the UPDF are public officers. If representatives of the army are required to

resign from the UPDF they can no longer be regarded as representatives of the army. An application of the rule of harmonization would therefore require that the army representatives be seen as representatives from the Uganda People's Defence Forces and at the same time public officers permitted under Article 78(1)(c) to be parliamentary representatives

- [12] In reply to the second issue Mr Mwaka submitted that during every election cycle Parliament has duly reviewed representation of special interest groups and by extension representation by the army in accordance with Article 78 of the Constitution. Parliament has duly complied with its constitutional obligation under Article 78 of the Constitution. The respondent prays that this Petition be dismissed.

Analysis

- [13] Principles of constitutional interpretation have been established in numerous decisions, both local and international, that guide this Court in exercising its jurisdiction. Firstly where words or phrases are clear and unambiguous they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense. The sense must be that which the words used ordinarily bore at the time when the Statute or Constitution was passed. See Paul. K. Ssemwogerere & others vs Attorney General (supra).
- [14] The second principle is that where the language of the Constitution is imprecise or ambiguous, a liberal, generous or purposeful interpretation should be given to it. It is meant to withstand the test of time and any amendments are limited. See Attorney General vs. Major General David Tinyefuza Supreme Court Constitutional Appeal No. 1 of 1997 (unreported).
- [15] In Unity Dow Vs Attorney General of Botswana (1992) LRC 623 Amissah J.P stated:
- ‘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 amendable only by special procedures, imposing more difficult terms of heavier majority of the

legislature. By nature and definition even when using ordinary prescription of statutory interpretation, it is impossible to consider a constitution of this nature on the same footing passed by the legislature which was itself established by the constitution. The object it desires to achieve evolves with the evolving development and aspirations of its people.’

[16] Another important principle governing interpretation of the Constitution is that all provisions of the Constitution concerning an issue should be considered as a whole. In South Dakota vs North Carolina 192, US 268 (1904) L. Ed 448, the U.S supreme court said at page 465:

‘Elementary rule of constitutional construction that no one provision of the constitution to be segregated from all others and considered alone. All provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument.’

[17] I shall apply these principles to the interpretation of the Constitution in the instant case.

Issue 1

[18] Article 78(1)(c) of the Constitution provides;
‘Composition of Parliament.

Parliament shall consist of—

(c) **such numbers of representatives of the army, youth, workers, persons with disabilities and other groups as Parliament may determine.**’

[19] Basically Article 78 (1) (c) of the Constitution provides for representation of special interest groups among which is the army. The Petitioner contends that Article 78 (1) (c) is unconstitutional is so far as it permits representation of the army in the Parliament. The Petitioner has raised two grounds in support of this allegation. The first being that the army should not be represented in

Parliament in a multi-party system of government since Article 208 mandates it to be non-partisan. The Petitioner's main contention on this ground is that upon the return of the multi-party system, Article 78 (1) (c) should have been amended to exclude the army from Parliament.

[20] Article 208 that establishes the Uganda People's Defence Forces, in particular clause 2, states that the armed forces should be nonpartisan. The Petitioner has failed to show how the presence of representatives of the army in Parliament affects its role under Article 79. It is important to put into consideration what the framers of the Constitution had in mind with regard to Army representation in Parliament. This can be drawn from the Report of the Uganda Constitutional Commission chaired by Mr. Justice Benjamin. J. Odoki at pages 298-298. For avoidance of doubt, I have reproduced the excerpt here as follows:

'Representation of the Army

11.62 The issue of possible Army representation in Parliament aroused much debate. While the majority supported the idea, there was a vocal opposing minority view. Those in support noted important differences between the roles and behaviors between of the present army- the National Resistance Army (NRA) – and past armies. They stressed the role of the NRA in bringing the present stability enjoyed by most Uganda and its record of acting in the interest of the people. They argued that if the new Constitution is to be safeguarded, then it was important that the army is fully committed to it. The army was best able to learn to work in partnership with civilian authorities if its representatives were sufficiently involved in major-decision making processes. It would then understand and be committed to both the processes and the decisions made. Some also argued that there was now a tradition of Army representation, beginning with Obote II regime in 1980 and continued under the NRM.

11.62 Those opposing Army representation argued that it offended the principle of democratic participation. They said that the army was expected to show complete neutrality on political matters. Neutrality would be difficult to maintain if the military is represented in Parliament, especially in a multi-party parliament. There was also fear that the Army representatives would tend to

represent the interests of the government of the day as well as those of the Army, perhaps unfairly tilting the balance of support on sensitive issues. The argument that being part of the official processes would commit the Army to decisions made was criticized on the basis that Army involvement in the legislature during the 1980-85 period did not prevent it from overthrowing the Constitution.

11.64 The Commission accepts the need for Army representatives to be closely involved in and so committed to key decision-making processes. Representation should be large enough to ensure that a core group of senior officers are so involved, but not so large as to undermine the principle of a primarily elected body.

11.65 Recommendation

The Armed Forces of Uganda should be represented in Parliament by ten Parliament by ten serving officers elected by the Army Council.’

[21] From the foregoing it is clear that the Constituent Assembly was alive to the contentions raised by the Petitioner. However, it recommended that it was important to have army representation in Parliament. The majority were of the view that having the army represented in Parliament would aid in the execution of its duties and functions. It is also clear that the Constituent Assembly intended for the army to be represented in Parliament during both systems of government. It was never the intention of the framers of the Constitution for the army representation in Parliament to be in abeyance during the multi-party system.

[22] The Petitioner contends that Army representatives ought to resign from the army before taking up positions as members of Parliament. I respectfully disagree. Article 80 (4) of the Constitution as amended by the Constitution (Amendment) Act 11 of 2005 states as follows:

‘Under the multiparty political system, a public officer or a person employed in any Government department or agency of the government or anybody in which government has controlling interest, who

wishes to stand in general election as a member of Parliament shall resign his or her office at least ninety days before nomination day'

- [23] Interpreting Article 80 (4) to include members of the armed forces defeats the purpose of Article 78 (1) (c). I do not think that this was the intention of Parliament. This would have amounted to entirely excluding the army from parliamentary representation and the Parliament can only do so through a constitutional amendment. Once a member of the armed forces resigns, he or she effectively ceases to be a member of the Uganda People's Defence Force and becomes a civilian. This would, by necessary implication, automatically disqualify him or her from representing the army in Parliament because they do not have the authority to do so. Article 78 (1) (c) is clear and specifically provides for army representation. This position is only available to member of the armed forces. In my view Article 80 (4) was not intended to apply to army representatives in light of the rule of harmony in interpreting the Constitution. And drawing from the intention of framers of the Constitution, the representatives of the army were meant to be officers in service as seen below from the report (supra).

'11.65 Recommendation

The Armed Forces of Uganda should be represented in Parliament by ten **servicing officers** elected by the Army Council.'

- [24] L.E.M. Mukasa-Kikonyogo, DCJ in her judgment in Darlington Sakwa & Another v Electoral Commission & 44 Others [2006] UGCC 3 while determining whether article 80 (4) was applicable to members of the armed forces stated:

'However, Parliament could not have intended it because its application to 36-45 respondents would result in absurdity for a number of reasons stated below;

Firstly there is the specific provision under **Article 78 (1) of the Constitution** which provides that:-

"Parliament shall consist of

- a).....
- b).....
- c) *such numbers of representatives of the army, youth, workers, persons with disabilities and other groups as Parliament may determine.”*

Secondly, the ten respondents represent the Army Constituency as a special group envisaged in **Article 78 (supra)**. Requiring them to resign 90 days prior to their nomination would not only disqualify them as candidates but also defeat the purpose for their representation in Parliament.

Thirdly Mr. Mpanga’s submission that representation could consist of retired officers is not tenable. When a soldier retires, he or she ceases to be governed by the institutional laws in place. He effectively becomes a civilian.

Additionally, as observed above a general amendment similar to the present one (**Clause 4**) cannot, in the absence of a specific provision, override a specific enactment or provision of the Constitution for example **Articles 78(1) (c) or 175 or 257 (2) (b)** in the present petition.’

[25] I am persuaded to follow the decision of this court in Darlington Sakwa & Another v Electoral Commission & 44 Others (supra).

[26] In conclusion Article 78 (1) (c) is not unconstitutional and does not contravene Articles 79, 80 (4), 208 and 209 of the Constitution.

Issue 2

[27] Article 78 (2) of the Constitution states:

‘Upon the expiration of a period of ten years after the commencement of this Constitution and thereafter, every five years, Parliament shall review the representation under clause (1)(b) and (c) of this article for the purposes of retaining, increasing or abolishing any such representation and any other matter incidental to it.’

[28] Section 8 of the Parliamentary Elections Act, 2005 operationalized this provision. In particular section 8 (3) of the Act provides:

‘In accordance with article 78 (2) of the Constitution, Parliament shall review the representation under article 78 (1) (b) and (c) of the Constitution and may by resolution supported by not less than two thirds of all members of Parliament, retain, increase or abolish any such representation.’

[29] Under article 78 (2), Parliament had the constitutional obligation which was mandatory to review the status of representation for special interest groups upon the expiration of 10 years from the date of the promulgation of the Constitution. Due to the fact that the Constitution was promulgated on 8th October 2005, this duty accrued on 7th October 2005.

[30] Attached to the additional affidavit of the respondent deposed by Mr. Mwesigwa Rukutana, the Deputy Attorney General, is annexure RC1 which contains a copy of the Parliamentary Hansard of 13th December 2015. At page 24, the then Minister of state for Justice and Constitutional Affairs Mr. Adolf Mwesigye moved a motion for a resolution of Parliament under section 8 (3) of the Parliamentary Elections Act of 2005 to maintain the representation of special interest groups in accordance with Section 8 (2) of the Act upon review of the representation of special interest groups under Article 78 (1) (b) and (c) of the Constitution. Annexures RC2, RC3, RC4 and RC5 contain the debates of Parliament on the matter. Upon deliberation by the members of Parliament the resolution was passed on 4th January 2006.

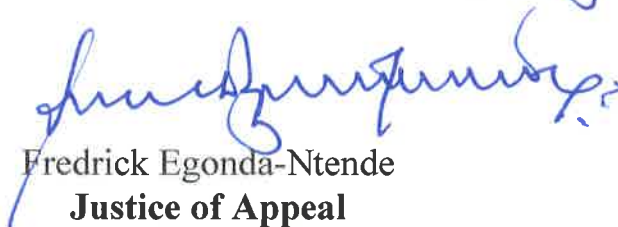
[31] In light of the foregoing Parliament duly complied with and executed its obligation under article 78 (2) of the Constitution upon the expiration of ten years from the date of promulgation of the Constitution.

[32] Thereafter Parliament was to periodically review the representation of the special interest groups in Parliament for purposes of retaining, increasing or abolishing the representation. This was to be done after every five years. Looking at annexure RE1, on 10th November 2010, the then Minister for Justice and Constitutional Affairs/ Attorney General, Dr. Khiddu Makubuya moved a motion to retain the parliamentary representation for all the special interest groups. Similarly, attached to the additional affidavit of the respondent is a copy of the Notice of Intention to move a Motion for a Resolution of Parliament dated 14th October 2015 marked annexure RF1. This motion was moved by Mr. Fredrick Ruhindi, the then Attorney General on 15th November 2015. The motion proposed to maintain the status quo of the representation of special interest groups in Parliament. Annexure RF2 is the Parliamentary Hansard containing the Annexure debates of members of Parliament while reviewing Article 78(1) (c) of the Constitution. The motion was passed on 28th December 2015.

[33] In light of the above Parliament has duly complied with its constitutional obligation under Article 78 of the Constitution.

[34] I would find that this Petition lacks merit. I would dismiss it with no order as to costs given that the action was a citizen's attempt to ensure that our public institutions act in conformity with the Constitution. The clarification as to what is the true import of the Constitution is of public benefit.

Signed, dated and delivered at Kampala this 10th day of July 2019


Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
(Coram: Owiny-Dollo, DCJ; Kakuru, Egonda-Ntende, Barishaki Cheborion & Muhanguzi, JJA)

Constitutional Petition No. 26 of 2011

BETWEEN

MUYAMBI ELLADY PETITIONER

AND

ATTORNEY GENERAL.....RESPONDENT

JUDGMENT OF ALFONSE C. OWINY-DOLLO, DCJ

- [1] I have had the opportunity to read in draft the judgment of my brother, Egonda-Ntende, JCC/ JA. I agree with it.

- [2] As Kakuru, Barishaki-Cheborion and Muhanguzi, JJA, agree this petition is dismissed with no order as to costs.

Dated, signed and delivered at Kampala this 10th day of July 2019



Alfonse C. Owiny-Dollo
Deputy Chief Justice

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO 26 OF 2011

MUYAMBI ELLADY.....PETITIONER

VERSUS

ATTORNEY GENERAL.....RESPONDENT

CORAM: Hon. Mr. Justice Alfonse C. Owiny-Dollo, DCJ
Hon. Mr. Justice Kenneth Kakuru, JA/ JCC
Hon. Mr. Justice F.M.S Egonda-Ntende JA/ JCC
Hon. Mr. Justice Cheborion Barishaki JA/ JCC
Hon. Mr. Justice Ezekiel Muhanguzi JA/ JCC

JUDGMENT OF JUSTICE KENNETH KAKURU, JA/ JCC

I have had the benefit of reading in draft the Judgment of my learned brother The Hon. Mr. Justice F.M.S Egonda-Ntende.

I agree with him that this petition has no merit and ought to be dismissed.

I also agree with him, that the petition having been brought in public interest and not being frivolous no order be made as to costs.

Dated at Kampala this16th.....day ofJuly.....2019.



.....
Kenneth Kakuru

JUSTICE OF APPEAL/ JUSTICE CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE APPEAL COURT OF UGANDA AT KAMPALA

(Coram: Owinyi Dollo, Kakuru Kenneth, Egonda – Ntende, Barishaki
Cheborion & Muhanguzi, JJA)

Constitutional Petition No. 26 of 2011

BETWEEN

MUYAMBI ELLADY===== Applicant

AND

ATTORNEY GENERAL=====Respondent

JUDGMENT OF BARISHAKI CHEBORION, JA.

I have read in draft the Judgment of my brother, Egonda- Ntende JA, and I agree that this petition lacks merit and should be dismissed with no order as to costs it being a matter of public interest.

Dated at Kampala this 10th day of... July 2019



Justice Barishaki Cheborion

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

*(Coram: Owiny-Dollo, DCJ, Kakuru, Egonda-Ntende, Cheborion & Muhanguzi,
JJA/JCC)*

CONSTITUTIONAL PETITION NO. 26 OF 2011

MUYAMBI ELLADY.....PETITIONER

VERUS

ATTORNEY GENERAL.....RESPONDENT

JUDGMENT OF EZEKIEL MUHANGUZI, JA/JCC

I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Fredrick Egonda-Ntende, JA/JCC.

I agree with the reasons advanced and orders proposed and have nothing more useful to add.

Dated at Kampala this.....10th.....day of.....July.....2019.

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Ezekiel Muhanguzi
Justice of Appeal/ Constitutional Court.