THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO 52 OF 2017

CORAM: *HON.MR.JUSTICE KENNETH KAKURU, JUSTICE GEOFFREY KIRYABWIRE, JUSTICE BARISHAKI CHEBORION, JUSTICE EZEKIEL MUHANGUZI AND JUSTICE STEPHEN MUSOTA., JJA/JJCC*

UGANDA LAW SOCIETY::PETITIONER

VERSUS

ATTORNEY GENERAL:::RESPONDENT

JUDGMENT OF CHEBORION BARISHAKI, JA/JCC

Brief Facts

The Petitioner is a body corporate set up by an Act of Parliament with objectives, among others, to assist the public in Uganda in matters touching on constitutionalism, rule of law and good governance. It alleges, in the present petition, that the two arms of government namely the Executive and the Legislature have failed, neglected and or refused to render assistance to the other arm of government, the Judiciary, to ensure its effectiveness in the execution of its constitutional mandate.

It is alleged that this state of affairs has arisen specifically in the budgetary processes, with the other two arms of government subjecting the Judiciary`s budget to the direct control of the Minister of Justice and Constitutional Affairs and Secretary to the Treasury in the Ministry of Finance Planning and Economic Development. The Petitioner alleges that as a consequence of this control, the Judiciary is underfunded and its budget is routinely reduced thereby preventing the institution from executing its mandate. It is contended that this offends the constitutional principles of separation of powers and independence of the judiciary.

The Petitioner therefore seeks the following declarations:

(a) That **Sections 9(1), (2), (5) & (11) (3) (a) of the Public Finance Management Act, 2015** are in contravention of and inconsistent with Article 155(2) & (3) of the Constitution in as far as they grant the Secretary to the Treasury powers to issue directives and instructions to all accounting officers including self-accounting institutions such as the judiciary.

(b) The annual practice, by which the Secretary to the Judiciary submits the budget estimates of the Judiciary to the Ministry of Justice and Constitutional Affairs, is inconsistent with Article 155 (2) of the Constitution.

(c) The act of the Minister of Justice and Constitutional Affairs in approving the budgetary framework of the judiciary contravenes Article 128 (1) & 155 (2) of the Constitution.

(d) The act of allocating inadequate resources to the Judiciary, rendering it unable to effectively execute its constitutional mandate contravenes Article 128 (3) of the Constitution.

(e) The subjecting of the already inadequate resources availed to the Judiciary to continuous budget cuts, rendering the Judiciary to be unable to effectively dispense the administration of justice in a fair and timely manner through speedy trials and thus worsening the problem of case backlog contravenes Article 126 (2) (b) & 28 (1) of the constitution.

(f) Section 10 of the Budget Act, 2001 is inconsistent with Articles 128(1), (2),(3),150 (1),79(1) and 155(2) & (3) of the Constitution in as far as it has hindered the passage of the Judiciary (Administration) Bill.

(g) That the actions of the Legislature and the Executive in failing or neglecting to implement the judiciary`s constitutional and self-accounting status by enactment of appropriate laws, or, otherwise is inconsistent with and in contravention of Articles 128 (1), (2), (3),150 (1), 79 (1) and 155 (2) & (3) of the Constitution.

The Petitioner sought for Orders that;

i. The Executive presents the Judiciary (Administration) Bill to parliament within one month from the date of judgment of the court.

ii. The Executive complies with Article 155 of the Constitution.

iii. A permanent injunction does issue restraining the Secretary to the Treasury from issuing budget circulars or any other related orders or requirements to the Secretary to the Judiciary.

iv. The Secretary to the Judiciary reflects the priorities in the judiciary Strategic Development Investment Plans in budget estimates submitted to the President.

v. The Respondent establishes formal mechanisms for submissions of the budget estimates of the judiciary to the president within one month from the date of Judgment.

vi. The Respondent files in court a statement of Compliance with the provisions of the constitution in the budgetary process every financial year for the next five (5) years.

vii. This being a public interest suit each party should bear its own costs of the petition.

The petition is accompanied by Affidavits sworn by Francis Gimara and Dr.Fred Muhumuza an Economist and public finance expert.

Mr Gimara avers that the conduct of the executive in handling the budget estimates of the Judiciary, and in particular revising the expenditure estimates

of the Judiciary, a self-accounting body, when submitted to the President/ Executive contravenes several Articles of the constitution because the constitution makes the Judiciary a self-accounting body whose expenditure estimates should not be subject to revision by the executive.

He contends that the requirement for the accounting officer of the Judiciary, to submit a budget framework regarding the funding of the Judiciary to the Minister of Finance and subject it to approval is inconsistent with the Constitution.

In Francis Gimara's view, Sections of the Public Finance Management Act, 2015 which grant the Secretary to the Treasury powers to issue directives to the Judiciary undermines the independence of the Judiciary and the doctrine of separation of powers. The independence of the judiciary is, he maintains, hampered by the meager allocation of funds and the current average funding represents less than 50% of what the judiciary requires to meaningfully function and as a result only 200 out of the 429 gazzeted courts are operational.

Further, it is stated that in 2012, the executive prepared a Judiciary Administration Bill, 2012 but for unclear reasons, the same was never presented to Parliament. He avers that in April 2014, Hon Felix Okot Ogong was granted leave by parliament to introduce a private member`s bill which was intended to effect article 155 of the constitution but he was not provided with a certificate of financial implications by the Ministry of Finance and for that reason the bill could not be tabled.

Dr. Fred Muhumuza averred, in his supplementary affidavit in support of the petition, that the rule of law is a pillar of the National Development Plan. That the independence and financial autonomy of the judiciary in administering justice and ensuring the rule of law is a core essential in achieving the targets of the National Development Plan.

He states that the Judiciary falls under the Justice, Law and Order Sector (JLOS) which is under the ministry of Justice and Constitutional Affairs, wherefrom its budgetary allocation is controlled and treated as if it is a department in the Civil Service under the Ministry responsible for Public Service.

He deposes that the budget of the Judiciary faces cuts every financial year which renders the judiciary unable to realize the necessary infrastructural and other developments that are essential to the effective execution of its constitutional mandate of administering justice for all.

He avers that Case backlog in the courts of law is attributable to the limited number of judicial officers available to serve the population due to underfunding. There is also shortage of facilities within which the judiciary can undertake its operations. He advises that the budget of the Judiciary as a self-accounting body should be considered independently and not as a mere sub-component under JLOS considering that the judiciary is an equal but separate arm of government with constitutionally guaranteed independence.

The Respondent filed an answer to the petition in which he denied all allegations in the petition and described it as misconceived and bad in law. Further that the

Public Finance Management Act, 2015 does not contravene the Constitution at all. He asserts that the Government Budget follows legal means directing specific sums to specific uses and it provides a system of accountability which the judiciary budget is subjected to and therefore not inconsistent with the Constitution. That the Judiciary budget has always undergone a transparent system of valid and rational adjustments to overall national budget allocations to ensure that the judiciary continues to perform its functions.

The answer is accompanied by two affidavits one sworn by Richard Adrole a Senior state Attorney in the Respondents chambers who deposed inter alia that the act of adjusting the judiciary budget does not in any way impact on the Independence and the constitutional mandate of the judiciary.

The other affidavit in support of the Respondent's answer was sworn by Mr. Keith Muhakanizi Permanent Secretary/Secretary to the Treasury, in the Ministry of Finance Planning and Economic Development who inter alia deposed that the Minister of Finance Planning and Economic Development is required to present a balanced budget in terms of revenue and expenditure and follows the 5 year National Development Plan and the ruling party manifesto.

He states that the government has a limited resource envelope which has to be shared among various government departments and institutions and as such funds must be allocated in a manner that will not starve certain sectors of funding. He further deposed that the budgetary releases to the Judiciary have

not been arbitrarily deducted but rather have gradually and consistently been increased to meet the various needs of the Judiciary.

Representation

Mr. Wandera Ogalo and Mr. Moses Kiyemba, jointly appeared for the Petitioner while Ms. Christine Kaahwa, Director of Civil Litigation in the Attorney General's chambers and Mr. Allan Mukama, State Attorney in the same chambers jointly appeared for the Respondent.

Issues

Counsel for both parties agreed to adopt the following issues which were set out in the Petitioner's conferencing notes:

1. Whether the petition is bad in law, frivolous, prolix and does not raise any issue for interpretation.

2. Whether Sections 9 (1), (2), (5) and 11 (3) (a) of the Public Finance Management Act, 2015 are inconsistent with or in contravention of Article 155 (2) and (3) of the Constitution.

3. Whether the act of submitting the budget framework of the Judiciary to the Minister of Justice and Constitutional Affairs by the Secretary to the Judiciary is in contravention of Article 155 (2) of the Constitution.

4. Whether the act of the Minister of Justice and Constitutional Affairs of approving budgetary framework of the Judiciary and submission of the same to the Minister of Finance contravenes Article 128 (6) and 155 (2) of the Constitution.

5. Whether the practice which requires all Bills to be tabled only with the clearance of the Minister of Finance through a certificate of financial implications is inconsistent with or in contravention of Article 79 of the Constitution.

6. Whether the failure by both the Executive and Legislature to enact a law to implement the Judiciary's autonomy in its budgeting process is inconsistent with and in contravention of articles 128 (3) (b), 150 (1), 79 (1), and 155 (2) and (3) of the Constitution.

7. Whether the act of allocating inadequate resources to Judiciary and subjecting it to budgetary process outside the provision of Article 155 (2) is inconsistent with or in contravention of the Articles 126 (2) (b), 128 (3), 128 (6) of the Constitution.

8. What remedies, if any is the petitioner entitled to?

I have carefully considered the written submissions and oral highlights of both Counsel on the constitutionality of the impugned laws. I have also perused the affidavits as well as the relative provisions of the law and authorities cited by the parties.

The principles of constitutional interpretation have been set out and applied by this court in numerous decisions. It suffices to restate some of them;

1. 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 inconsistencies.
2. The entire Constitution has to be read together as an integral whole with no particular provision destroying the other but each sustaining the other. This is the rule of Harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the written constitution.
3. In determining the Constitutionality of Legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining the constitutionality of either the effect animated by or the object the legislation intends to achieve.
4. All provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument.
5. 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.
6. 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 to it.

7. The words of the written Constitution prevail over all unwritten conventions, precedents and practices.

8. The history of the Country and the Legislative history of the Constitution is also relevant and useful guide to Constitutional Interpretation.

In **Trop Vs Dulles 356 US 86 [1958],** Chief Justice Earl Warren, writing for the majority Justices of the United States Supreme Court opined as follows on the role of courts in constitutional interpretation;

"We are oath bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the constitution...

If we do not, the words of the Constitution become little more than good advice.

When it appears that an Act of congress conflicts with one of those provisions, we have no choice but to enforce the paramount demands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate a challenged legislation We must apply these limits as the constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication."

Issue One

Although this issue was raised in both parties' conferencing notes, it was not canvassed by counsel at the hearing. I take it that it was abandoned. However, I must reiterate the jurisdiction of the Constitutional Court. The jurisdiction of this court is provided under Article 137 of the Constitution and as far as is relevant provides that:

> **"137. Questions as to interpretation of the Constitution**
>
> **1. Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.**
>
> **2 ...**
>
> **3. A person who alleges that**
>
> **a. an Act of Parliament or any other law or anything in or done under the authority of any law; or**
>
> **b. any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.**

Kanyeihamba, JSC in **Attorney General vs. Major General David Tinyefuza Supreme Court Constitutional Appeal No. 1 of 1997** determined the question as to whether a constitutional petition disclosed a cause of action as follows:

"The first ground to be decided by this Court is whether there was a cause of action to be tried by the Constitutional Court. A cause of action is the act or acts committed by the defendant, in this case the state, which gives the plaintiff a cause and a reason to complain. Stroud's Judicial Dictionary defines a cause of action as the entire set of circumstances giving rise to an enforceable claim. This is the principle which justified judicial pronouncements in such cases as Hernaman v. Smith (1885)6 Exch 659, Cook v. Gill (1873) LR8 CP 107 and Abdulla v. Esmail (1969) EALR 111. In Read v. Brown (1888(22) QBD, 128(CA), it was held that a cause of action is every fact that it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the Court."

He held that in determining whether the pleadings disclose a cause of action a court must be satisfied by glancing at the plaint or petition, the affidavits and their annextures, if any, and statement of defence or reply to the petition, without first going into the merits of the arguments for either side.

Commenting on the import of Article 137 the Supreme Court in **Ismail Serugo vs. Kampala City Council & Anor, SCCA No.2 of 1998** per Justice Mulenga JSC (RIP) held that:

"A petition brought under this provision in my opinion, sufficiently discloses a cause of action, if it describes the act or omission complained of and shows the provision of the Constitution with which

the act or omission is alleged to be inconsistent or which is alleged to have been contravened by the act or omission and prays for a declaration to that effect."

A petition therefore discloses a cause of action as long as it has pleaded certain allegations that, if true, would entitle the Petitioner to relief from this court. In the present case, assuming that the contents of this petition are true, it is doubtless that there are several issues for constitutional interpretation regarding the import and application of the Public Finance Management Act 2015. There are also allegations touching on acts as well as omissions of some government officials especially the Secretary to the Treasury and the Minister of Justice and Constitutional Affairs whose constitutionality need to be determined.

The Petitioner alleges that specific sections of the Public Finance Management Act 2015, in as far as they enjoin the Ministers of Finance, Justice and Constitutional Affairs and the Secretary to the Treasury to review the Judiciary Budget, contravene Article 155(2) and (3) of the Constitution.

It is further pleaded that the provision of inadequate resources to the Judiciary contravenes Article 128(3) of the Constitution and that the actions of the Executive and Legislature in failing to pass legislation which would ensure the judiciary's self-accounting status contravcncs Articles 128(1), (2), (3), 150 (1),79 (1) and 155(2) and (3) of the constitution. Thcsc matters all call for interpretation of the constitution. This court is therefore seized with jurisdiction to determine this matter on its merits. It seems to me that the objection claiming that the

petition is incompetent or frivolous was raised by the Respondent as a matter of course. It needs to be discouraged and is an improper mode of pleading.

For the reasons given above, I answer the first issue in the negative, the present petition is not bad in law as it discloses several issues which call for interpretation of several provisions of the constitution.

Issues Two, Three, Four, Six and Seven

The above issues as framed by the parties mainly call for the interpretation of Article 155(2) and its antecedent provisions in the constitution. I have therefore found it convenient to determine them jointly since they are all questions intended to resolve the extent to which the Constitution permits the Judiciary to have financial autonomy in relation to the provisions of the Public Finance Management Act 2015 and the enjoyment of that autonomy, if at all.

Further, the issues address the alleged acts and omissions of the Secretary to the Treasury, the Minister of Justice and Constitutional Affairs in management of the Judiciary budget. In my view, these issues cannot be conveniently addressed separately as they all raise the import and application of similar Constitutional provisions.

The Petitioner's arguments

Counsel for the Petitioner contended that members of the executive habitually interfere with the Judiciary's accounting independence which impinged its independence. In support of his contentions, counsel made reference to the

involvement of the Minister responsible for Justice in the approval of the Judiciary budget as an example of such unwarranted interference from the executive.

In counsel's view, the budget of the Judiciary had to satisfy the said Minister and had to further be in line with the Ministry's budget framework and that the Minister was exercising powers which were ultra vires the constitution.

The petitioner alleges that the practice in the judiciary is that the Permanent Secretary/ Secretary to the Judiciary is the one who prepares the budget of the Judiciary as well as performing other administrative roles in the Judiciary. Counsel asserted that in carrying out the said acts, the Permanent Secretary illegally assumes the functions which are reserved for the Chief Justice under the 1995 Constitution.

Counsel further pointed out that Article 155 (2) of the Constitution envisages that the budget of the Judiciary shall be presented to the president who shall lay it before Parliament without making any revisions. In view of that, counsel asked this Court to declare the Minister's actions unconstitutional. It was further contended for the petitioner that in the context of Article 155 (2), it was the Chief Justice who ought to prepare the relevant Judiciary budget estimates and present them to the president and not a Minister neither the one responsible for finance nor the one responsible for Justice.

Additionally, Counsel submitted that the continuous allocation of inadequate resources to the Judiciary impinged its independence. He referred to the affidavit

of Francis Gimara which was deponed in support of the petition and the relevant annextures thereto, particularly paragraphs 11, 12 and 13 which alleged that the Executive indeed, revises the budget of the Judiciary downwards which causes underfunding in the judiciary. Francis Gimara further deponed that the meager allocation of funds to the judiciary has disabled it from carrying out its constitutional mandate and that a financially non-autonomous judiciary cannot be independent in principle.

Counsel complained that the judiciary is essentially considered as a small department in the Ministry of Justice. He further contended that to appropriately fund the judiciary, approximately 4 % of the National Budget should be allocated to the judiciary which is not the case currently. It was further contended for the petitioner that in essence, the Judiciary's budget is lumped up with that of the Justice, Law and Order Sector (JLOS) under its vote which encompasses police, judiciary, Law Development Centre and Ministry of Justice among others which trivializes the Judiciary as an arm of government.

In support of the preceding contention, counsel submitted that the Judiciary which is supposed to be an arm of government is not considered on the same level as Parliament or the Executive but is instead taken as a department under the Minister of Justice. Counsel made reference to **In Re Alamance County Court Facilities,** a decision from the Supreme Court of North Carolina, United States **dated 1st June, 1991; 329 N.C 84** and **Commonwealth ex rel. Carroll v. Tate 442 Pa. 45 (1971),** a decision from the Supreme Court of Pennyslavania,

United States and **Mowrer vs. Rusk, 95 N.M 48 (N.M 1980)** and **Smith vs Miller, Colorado Supreme Court, 153 Colo.35** in support of his views.

Counsel further submitted that in view of the National Objectives and Directive Principles of State Policy included in the 1995 Constitution, it is required that adequate resources are granted to the Judiciary to enable it effectively perform its constitutional mandate. He then contended that the said objectives are part and parcel of the Constitution by virtue of **Article 8A** of the Constitution and as such the continued under funding of the judiciary contravenes Article 8A.

Lastly counsel made a general submission that the insufficient funding of the Judiciary causes economic harm to the economy. He referred to the affidavit deponed in support of the petition which revealed that the pending matters in the Commercial Division of the High Court keep billions of Shillings on the Court's shelves instead of out in the economy where they should be. Counsel further alleged that in the financial year 2016/17, the Court of Appeal, which was to hold 4 criminal sessions upcountry only held 2 because of limited funding.

The Respondent's arguments

In her response, Ms. Christine Kaahwa for the Respondent was adamant that the present Petition contained no merit whatsoever as the impugned statutory provisions and the impugned acts of the Minister do not contravene even a single constitutional provision. Counsel was dismissive of her counterpart's allegations

asserting that the government does indeed follow the legal processes set out in the Constitution.

Moreover, counsel submitted that the judiciary's budgeting and expenditure process had to conform to budget priorities prepared by the executive as guided by vision 2040 and the Government's 5 year development plan. It was Ms. Kaahwa's view that the judiciary was associated with the Justice, Law and Order Sector and as such the Ministry responsible for Justice only served to bolster the effective operation of the various arms of government.

It was further the contention for the Respondent that Article 128 from which the Judiciary derives its mandate relates to only independence in exercise of judicial functions and cannot have been intended to concern itself with issues of funding. In support of her foregoing premise, counsel argued that in any case the petitioner had not laid down sufficient, cogent and compelling evidence to show that the lack of funds or inadequate funds has actually compromised the independence of the Judiciary. Counsel further contended that the Petitioner had failed to demonstrate that there was any inaction by the legislature to threaten fiscally or undermine the Judiciary contrary to the assertions by the Petitioner.

Counsel further submitted that the Petitioner should not be granted the declaration respecting the co-relation between underfunding the judiciary and case backlog arguing that there were other factors which contributed to case

backlog like corruption by judicial officers, poor case management and lack of control of court processes among others.

Counsel concluded by asking the Court to dismiss the Petition because judicial independence had not been interfered with by anyone.

Petitioner's rejoinder

In rejoinder, Mr. Wandera Ogalo for the petitioner contended that under **Article 99 (4)** of the **Constitution**, there were instances where the powers of the president could not be delegated and that Article 155 was one such instance. On the assertions by counsel for the respondent that judicial independence only related to exercise of judicial functions, Counsel referred to the authority of **Masalu Musene vs Attorney General, Constitutional Petition No. 5 of 2004** where the Court recognized the Courts require as much assistance as possible in order to ensure effectiveness of the judiciary. Counsel then reiterated his earlier submissions.

Determination of Issues Two, Three, Four, Six and Seven

The petition is premised mainly on the doctrines of separation of powers and independence of the judiciary. It also requires a determination of the scope and extent of the concept of judicial independence as adopted in the 1995 Uganda constitution in regard to financial autonomy and the budgeting process. The Petitioner maintains that the Constitution envisages judicial independence to

include financial autonomy. The Respondent disagrees and contends that judicial independence is confined to the adjudication process.

The 1995 Constitution clearly established Uganda as a Republic with Legislative, Executive and Judicial branches of state. The question as to whether the doctrines of separation of executive, legislative and judicial powers as well as judicial independence are applicable to the Ugandan Constitution has been answered in the affirmative by this Court before. In **Constitutional Petition No. 10 of 2008 Jim Muhwezi & 3 Others vs AG & IGG at page 11** of the unanimous decision of this court, it was determined as follows;

"The Constitution of Uganda makes provision for separation of powers. It is a fact that three organs of state are not rigidly separated in functions and powers. The separation of powers between the executive and the legislative may overlap here and there but the distinction is very clear. However, the Constitution provides for strict separation of powers between the judiciary on one hand and the executive and the legislative on the other hand. The separation is embedded in the doctrine of the independence of the judiciary in article 128 of the Constitution and other constitutional provision contained in Chapter eight thereof."

The Ugandan Constitution therefore recognizes that, the independence of the judiciary is in fact a logical provision to aid the doctrine of separation of powers and that there is a strict separation between the judiciary on one hand and the executive and legislature on the other. It is therefore not in doubt that the

constitution fully recognizes and provides for judicial independence as well as a strict separation of powers.

The next question therefore is to determine the import, meaning and scope of judicial independence as provided for. The Petitioner contends that Articles 128, 150 and 155 of the Constitution prescribe judicial independence and provide a constitutional duty to other arms of government to afford the necessary assistance to the Judiciary.

I will therefore reproduce the said provisions. **Article 128(1) to (3)** of the Constitution provides as follows;

Article 128. Independence of the Judiciary

(1) In the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.

(2) No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions.

(3) All organs and agencies of the State shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts.

The said provisions are subject of the present petition. This court is invited to determine their interpretation and scope. Further Article 133(1) creates the office of Chief Justice and provides as follows;

133. Administrative functions of the Chief Justice

(1) The Chief Justice –

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

(b) may issue orders and directions to the courts necessary for the proper and efficient administration of justice

In regard to finances of the judiciary and the budgeting process of the three arms of government, Article 155(1) to (4) are very instructive. I will similarly reproduce them below;

155. Financial year estimates

(1) The President shall cause to be prepared and laid before Parliament in each financial year, but in any case not later than the fifteenth day before the commencement of the financial year, estimates of revenues and expenditure of Government for the next financial year.

(2) The head of any self-accounting department, commission or organisation set up under this Constitution shall cause to be submitted to the President at least two months before the end of each financial year estimates of administrative and development

expenditure and estimates of revenues of the respective department, commission or organisation for the following year.

(3) The estimates prepared under clause (2) of this article shall be laid before Parliament by the President under clause (1) of this article without revision but with any recommendations that the Government may have on them.

(4) At any time before Parliament considers the estimates of revenues and expenditure laid before it by or on the authority of the President, an appropriate committee of Parliament may discuss and review the estimates and make appropriate recommendations to Parliament.

(5) Notwithstanding the provisions of clause (1) of this article, the President may cause to be prepared and laid before Parliament-

(a) fiscal and monetary programmes and plans for economic and social development covering periods exceeding one year;

(b) estimates of revenues and expenditure covering periods exceeding one year.

(6) Parliament may make laws for giving effect to the provisions of this article.

The Public Finance Management Act 2015 was clearly passed by parliament pursuant to the provisions of Article 155(6) of the constitution. The Petitioner contends that some of its provisions, namely **Sections 9(1), (2), (5)** and **Section**

11(3) a violate Article 155(2) and (3) above and allegedly undermine independence of the judiciary.

I will now consider the meaning of judicial independence as provided for in the constitution particularly in **Article 128 (1) to (2)** before considering the impugned provisions of the Public Finance Management Act 2015.

It is hard to define precisely Judicial Independence but the principles relevant to it, have, however, been refined for a considerable time by courts from many democratic countries from which we can borrow useful precedents. I will therefore review a number of precedents for purposes of placing this petition in its proper context.

In 1985, the Canadian Supreme Court in **Valente v R, [1985] 2 S.C.R. 673** considered the import of the requirement that a trial be conducted before an independent and impartial tribunal as follows:

> **"The word "independent" in s. 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government that rests on objective conditions or guarantees."**

In **Valente (supra)**, the Supreme Court cited with approval the following passage:

"The scope of the status or relationship of judicial independence was defined in a very comprehensive manner by Sir Guy Green, Chief Justice of the State of Tasmania, in "The Rationale and Some Aspects of Judicial Independence," (1985), 59 A.L.J. 135, at p. 135 as follows:

I thus define judicial independence as the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control."

There are two important points to take from the above excerpt, first that the principles relative to judicial independence have to be construed widely, namely, to include any step or action that may be taken to improve the functionality of Courts of law relative to their function of maintaining the rule of law and being custodians of justice and reduce the judiciary's dependence on persons external to it. Secondly, the executive is identified as the arm with the potential to curtail court's independence the most and efforts should be taken to address that.

The independence of the judiciary is not an end in itself. It is intended to protect the right of an individual to have his rights and freedoms determined by an independent and impartial judge and founded on the doctrine of rule of law.

Judicial independence is therefore, an integral component of any progressive democracy and in the **Valente case (supra),** the Court observed that ***judicial***

independence involves <u>both individual and institutional relationships</u>: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government. **That *judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions.***

The concept of judicial independence evolves and its evolution must be positive and as such any action that tends to impair its realization must be avoided as much as possible. The **Lithuania Constitutional Court in its ruling dated 21st December, 1999, Constitutional Justice Case No.16/98 of 21 December 1999** made a significant pronouncement on judicial independence that is worth reproducing in extenso;

"The independence of judges and courts is one of essential principles of a democratic state ... It needs to be noted that the independence of judges and courts is not an end in itself: this is a necessary condition of protection of human rights and freedoms...

it is possible to distinguish two inseparable aspects of the principle of the independence of judges and courts.

This principle, first of all, means the independence of judges and courts when they administer justice. Under Article 109 of the Constitution, while considering cases, judges shall be independent and obey only the law...

The procedural independence of judges is a necessary condition of an impartial and fair consideration of a case.

On the other hand, judges and courts are not sufficiently independent if the independence of courts as the system of the institutions of the judiciary is not ensured. According to the principle of the separation of powers, all branches of power are autonomous, independent, and capable of counterbalancing each other. The judiciary, being independent, may not be dependent on the other branches of power also because of the fact that it is the only branch of power formed on the professional but not political basis. Only being autonomous and independent of the other branches of power, the judiciary may implement its function, which is administration of justice.

The full-fledgedness and independence of the judiciary presupposes its self-government. The self-government of the judiciary also includes organisation of the work of courts and the activities of the professional corps of judges.

- **The organisational independence of courts and their self-government are the main guarantees of the actual independence of the judiciary. A constitutional duty of the other institutions of authority is to**

respect the independence of courts established in the Constitution. It needs to be noted that the activities of courts are guaranteed by the Constitution, and the laws and other legal acts that are in conformity with the Constitution. A duty of the state is to create proper work conditions for courts. However, this does not mean that, in the course of establishing particular powers of the other state institutions as regards their relations with the judiciary, the denying of both the separation of powers established in the Constitution and the essence of the judiciary as a fully-fledged branch of power which acts independently from the other branches of power is allowed.

While ensuring the independence of judges and courts, it is of much importance to separate the activity of courts from that of the executive.The Constitution prohibits the executive from interfering with administration of justice, from exerting any influence on courts or from assessing the work of courts regarding the consideration of cases, let alone giving instructions as to how justice must be administered.

Supervision of courts and application of disciplinary measures to judges must be organised in such a manner so that the actual independence of judges might not be violated.

Under the Constitution, the activity of courts is not and may not be considered an area of administration of any institution of the executive. Only the powers designated to create conditions for the work of courts may

be granted to institutions of the executive. For their activities the courts are not accountable to any other institutions of power nor any officials. It is only an independent institutional system of courts that may guarantee the organisational independence of courts and the procedural independence of judges.

The material basis of the organisational independence of courts is their financial independence of any decisions of the executive. It needs to be noted that the financial independence of courts is ensured by such legal regulation when finances for the system of courts and every court are allocated in the state budget approved by law. The guarantee of the organisational independence of courts is one of essential conditions for ensuring human rights."

The above ruling explains that there is a dual classification of judicial independence. First, there is procedural independence, which relates to actual court room decision making and the notion that each Judicial officer must obey only the law when making a decision on a case before him/her. Secondly, organizational independence which promotes the principle that the judiciary should be an autonomous organ of the state having minimal intrusion from the executive or the legislative branches of the state.

The Colorado Supreme Court, in **Smith v Miller, 153 Colo.35 (Colo.1963)** similarly emphasized the twin doctrines of separation of powers and judicial independence and held that the logical consequence of these doctrines is that

the courts have inherent powers to carry out their work independently without restriction or impairment by the acts or conduct of another department. Article III of the Colorado constitution divided the powers of its government into three departments; executive, legislature and judiciary with each department entitled to exercise its powers without interference.

In particular, the Court held that, **"It is an ingrained principle in our government that the three branches of government are coordinate and shall co-operate with and complement, and at the same time act as checks and balances against one another but shall not interfere with or encroach on the authority or within the province of the other. The legislative and executive departments have their functions and their exclusive powers, including the "purse" and the "sword". The judiciary has its exclusive powers and functions... in their responsibilities and duties, the courts must have complete independence. It is not only axiomatic, it is the genius of our government that the courts must be independent, unfettered, and free from directives, influence, or interference from any extraneous source."**

Further, the Supreme Court of Colorado emphasized that courts could not be compelled to depend upon the vagaries of an extrinsic will in their operations and had the powers to operate independently including incurring necessary and reasonable expenses in performance of their judicial duties. The Court upheld the orders fixing salaries of court employees in El Paso County and determined that the judiciary had inherent and statutory power to fix salaries of their court

employees as long as they did not act unreasonably, arbitrarily, or capriciously in fixing such salaries and the salaries so fixed were reasonable in amounts.

In regard to the question of intrusion from the executive branch in matters of budgeting for the Judiciary, the Supreme Court of New Mexico in **Mowrer vs Rusk, 95 N.M. 48(N.M.1980). 618 P.2d 886, decided Oct 22,1980**, held that any municipal ordinance or statute which required the Judiciary to submit its budget first to any part of the executive branch of government prior to submitting the same to the legislative branch of government is unconstitutional.

Similarly, it was held in **Deddens v. Cochise County, 113 Ariz. 75, 77-78, 546 P.2d 811,814 (1976)** that for the Judiciary to play an undiminished role as an independent and equal coordinate branch of government nothing must impede the immediate, necessary, efficient and basic functioning of the courts.

Similarly, it has been held that courts do possess inherent jurisdiction to compel proper and fair allocation of funds to the Judiciary to ensure that they are able to execute their constitutional mandate in the administration of justice. In **Com Ex Rel. Carroll vs Tate, 442 Pa. 45(1971),** the Supreme Court of Pennsylvania ruled that the Courts have inherent jurisdiction to compel proper allocation of resources to them that enable administration of justice including their operations. The Court upheld a writ of mandamus issued against the Mayor and City Council of Philadelphia to appropriate additional funds to the Courts for their necessary operations.

They upheld the following statements of the law;

"It is a basic precept of our Constitutional form of Republican Government that the Judiciary is an independent and co-equal Branch of Government, along with the Executive and Legislative Branches... Because of the basic functions and inherent powers of the three co-equal Branches of Government, the co-equal independent Judiciary must possess rights and powers co-equal with its functions and duties, including the right and power to protect itself againt any impairment thereof."

They additionally held that, **"If a Court is unable to provide an efficient administration of Justice because of insufficient funds to have adequate personnel, or reasonable salaries for personnel, or for other necessary Court administration services, or for construction and maintenance of essential Court facilities, then our whole system of Justice and its administration will undoubtedly be greatly impaired, if not destroyed."**

On the other hand, courts have rejected attempts by the Judiciary, in some cases, to utilize its judicial powers to compel allocation of funds. For instance in **Judges for the Third Judicial Circuit v. County of Wayne 383 Mich.10, 172 N.W.2d 436 (1969)** the supreme court of Michigan held that inherent power of the court to compel allocation of funds should be used only when inadequate appropriations would impair the effectively continuing function of the Court.

Similarly, in his concurring opinion in **Com Ex Rel. Carroll vs Tate, 442 Pa. 45(1971),** Justice Jones criticized the majority for not considering the financial

plight of the city. He implicitly endorsed the principle that like other branches, the judicial branch should work within the framework of realistic fiscal policy.

The sum total of the above precedents is that judicial independence includes judicial financial autonomy. The Judiciary must be able to control its own finances, budgeting processes as well as its funding needs. This is a logical consequence of the doctrine of separation of powers.

The **Consultative Council of European Judges (CCJE)** a council of eminent judges affiliated to the European Union in its **Opinion No. 2 for the attention of the Committee of Ministers of The Council Of Europe on the funding and management of courts with reference to the efficiency of the Judiciary** and to **Article 6 of The European Convention On Human Rights** made the following observations:

"2. The CCJE recognised that the funding of courts is closely linked to the issue of the independence of judges in that it determines the conditions in which the courts perform their functions.

3. Moreover, there is an obvious link between, on the one hand, the funding and management of courts and, on the other, the principles of the European Convention on Human Rights: access to justice and the right to fair proceedings are not properly guaranteed if a case cannot be considered within a reasonable time by a court that has appropriate funds and resources at its disposal in order to perform efficiently.

4. All the general principles and standards of the Council of Europe on the funding and management of courts place a duty on states to make financial resources available that match the needs of the different judicial systems.

5. The CCJE agreed that although the funding of courts is part of the State budget presented to Parliament by the Ministry of Finances, such funding should not be subject to political fluctuations. Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence."

The above principles are in line with the precedents reviewed from other jurisdictions. Lastly, this Court recently upheld this judicial reasoning in **Constitutional Petition No.30 of 2017 Krispus Ayena Odongo vs Attorney General & Parliamentary Commission which concerned the manner of withdrawal of funds from the consolidated fund for the Judiciary**. It was held that the Constitution envisages an independent judiciary in relation to administration and financial management. At **page 41** of the lead Judgment by my learned brother, Christopher Madrama JA/JCC, he held as follows,

"Save for the requirement to present financial year estimates which are not to be reviewed before laying before Parliament by the President and which

shall be presented by the President to Parliament every financial year for purposes of the next financial year, the Executive is not involved in the preparation and review of a budget of Parliament or the Judiciary for approval by Parliament. The only time and only way the Executive gets involved is in making comments supporting the laying in Parliament of financial year estimates of revenue and expenditure of Government by the President. Secondly it is the president to lay financial year estimates of revenue and expenditure of Government before Parliament. Under article 257(1) of the Constitution, the term "Government" means the Government of Uganda. this is inclusive of all organs of Government which include the Judiciary and the Parliament. The said financial year estimates are presented by the President without revision to Parliament every financial year."

At page 47, he concluded as follows;

"It follows that the judiciary should be permitted and is it entitled to present its budget to the President for laying before Parliament without amendment an only with comments of the President to accompany it. (sic) It is the Judicial Service Commission to make recommendations with regard to the administrative expenses of the Judiciary in terms of salaries, allowances, gratuities and pensions payable in respect of persons serving in the Judiciary and which expenses are charged on the Consolidated Fund. Unlike Parliament, such expenses have not been enacted in an Act of

Parliament. This does not stop the judiciary from dealing with the Ministry of finance in respect of its finances without interference."

In the captioned decision, this Court also held that it is unlawful for the funding of the Judiciary to be processed through an Appropriation Act. It is worth noting that the lead Judgment of Madrama JCC was unanimously approved by his fellow Justices of the Constitutional Court.

While there is no internationally agreed threshold at which the judiciary must be funded, there is consensus that adequate resources must be extended to it and in a budgeting process that does not compromise its independence. The key question of budgeting without interference has already been settled by the cited decision of this court. I need not say more about it.

In my view, this is what **Article 128(1) and (2)** intended to achieve among other aspects of judicial independence. It is impossible for an arm of government wholly dependent for its financial decisions and budgeting processes on another arm to be described as independent in any sense. Read together with Article 155(3) which prohibits the revision by the executive of budgets of self-accounting entities, it is clear that the framers of the constitution provided for financial autonomy of the Judiciary.

I respectfully reject the notion advanced by the Respondent that independence is restricted to decision making and does not extend to financial autonomy. As I have highlighted above, all precedents spanning different decades and

jurisdictions with a similar separation of powers clause support the view that financial autonomy is part and parcel of judicial independence.

It is very unfortunate that a situation, in which the Judiciary is reduced to a department under the Ministry of Justice during the budgeting processes, as described in this petition and defended by the Attorney General has been allowed to persist for two decades since enactment of the Constitution.

The Judiciary, as an arm of government, is supposed to take control of its budgeting processes without any interference from the executive. The executive's role is to forward the Judiciary's budget estimates to parliament for consideration. Article 155(3) allows the executive room to make recommendations to parliament on the Judiciary budget estimates at that point but not to tamper with the same before they are forwarded to parliament.

There is no doubt that the manner in which the Judiciary's financial autonomy is exercised would have been best clarified by an appropriate Act of Parliament. However, the absence of the requisite Act of Parliament is not an excuse for the executive to continue to intrude into the Judiciary's financial decisions through the actions of the Ministers of Finance, Justice and the Secretary to the Treasury.

Fidelity to law, in this case **Articles 128(1), (2) and 155(3) of our constitution,** must be respected even when there is a sort of legislative vacuum that the law makers have failed or neglected to address. **Article 133** provides for the administrative head of the Judiciary who is the Chief Justice. The Chief Justice is the head of an arm of government.

The administrative head of the Judiciary is the Chief Justice. The head of parliament is the Speaker while the President heads the executive and is the head of State. The word "administrative" is an adjective that is closely related to the noun "administration." According to the **Oxford Advanced Learner's Dictionary, 6th Edition:**

> **"Administration refers to the activities that are done in order to plan, organize and run a business, school or other institution."**

In the same dictionary, administrative is defined as:

> **"...connected with organizing the work of a business of a business or an institution."**

Taking the natural meaning of the words in question it must follow that the role of planning for, organizing and running the judiciary is vested solely by the Constitution in the hands of the Chief Justice and in his absence, the Deputy Chief Justice.

The framers of the Constitution were alive to the principles of judicial independence. This explains why they proposed that in order to promote institutional independence of the judiciary, it was ill-advised to place the administrative functioning of the judiciary in the hands of a person external to it.

Accordingly, the accounting and expenditure process of the judiciary, as well as other similar administrative functions should be carried out by the Chief Justice or any one delegated accordingly by him or her and no one else.

I take judicial notice of the fact that the Judiciary has a Permanent Secretary/Secretary to the Judiciary appointed by the executive. Permanent Secretaries are provided for under Article 174 of the Constitution. It provides as follows;

The said provision states:

"174. Permanent Secretaries

1. Subject to the provisions of this Constitution, a ministry or department of the Government of Uganda shall be under the supervision of a Permanent Secretary whose office shall be a public office.

2. A Permanent Secretary shall be appointed by the President acting in accordance with the advice of the Public Service Commission.

3. The functions of a Permanent Secretary under this article include

a. organisation and operation of the department or ministry;

b. tendering advice to the responsible Minister in respect of the business of the department or ministry;

c. implementation of the policies of the Government of Uganda;

d. subject to article 164 of this Constitution, responsibility for the proper expenditure of public funds by or in connection with the department or ministry."

There is no evidence that the Permanent Secretary/Secretary to Judiciary in assuming control of the judiciary's expenditure and accounting roles and other administrative roles acts as a delegate of the Chief Justice. As such, I assume that the powers exercised by the Permanent Secretary/ Secretary to the Judiciary are derived from Article 174 which prescribes the role of the Permanent Secretary.

Clearly, there is no doubt in my mind that the powers of the Chief Justice under **Article 133 of the Constitution** have, in practice, been usurped by the Secretary to the Judiciary. This is the clearest indication yet that the Judiciary is treated as a department under a Ministry as opposed to an arm of government. The absence of legislation to clarify the accounting function and personnel matters for the Judiciary is partly responsible for this confusion. However, the legislative vacuum cannot be an excuse for compromising the independence of the Judiciary.

I am mindful of the fact that the status of the Secretary to the Judiciary is not part of this petition. However, the determination of this petition has a bearing on the office of Secretary to the Judiciary as the heart of the dispute herein is financial autonomy of the Judiciary. It is impossible to determine the question of financial autonomy without addressing the existence of the Secretary to the

Judiciary who performs the roles in **Article 174 of the Constitution** in the Judiciary.

It is worth noting that Article 174 opens with an introductory proviso that it is to be subject to other relevant constitutional provisions. This to my mind would mean that in ordinary ministries or government departments, it would be justified for the Permanent Secretary to assume the relevant organizational and operational roles.

However, in my view, the role of the Permanent Secretary ought not to extend to the Judiciary which is an independent arm of Government because article 174 is subject to Article 133 (1) which appoints the Chief Justice as the in charge of the Judiciary. The framers of the 1995 Constitution could not have intended that the Permanent Secretary who is a public officer and senior officer of the executive should handle the administrative functionality of the Judiciary in light of the trite principle of institutional independence of the Judiciary. Accordingly, the Permanent Secretary responsible for the judiciary ought not to lawfully assume control of the judiciary in the terms provided in Article 174.

In my view, the Permanent Secretary/Secretary to the Judiciary must operate under the supervision of the Chief Justice. He or She should report to the Chief Justice and not the executive arm.

The Petitioner challenged the role of the Minister responsible for Justice and constitutional Affairs in approving the budgetary framework and submission of the same to the Minister of Finance. He supported his argument with evidence

by Mr. Francis Gimara who deposed that the Budget Framework Paper for the Judiciary is reviewed by the Minister of Justice and Constitutional Affairs before it is sent to the Ministry of Finance.

I note that the Secretary to the Treasury, Keith Muhakanizi, in his affidavit in reply does not deny the contents of the affidavit in support of the Petition. His evidence serves to clarify the budgeting process. He states that government has a limited resource envelope which has to be shared among various government departments and institutions and as such funds must be allocated in a manner that will not starve certain sectors of funding.

I have perused the affidavits in reply to the petition and I did not find a single averment that contradicted the averments in the affidavit in support of the petition about the role played by the Minister responsible for Justice in respect of the budgeting process of the Judiciary. Those averments are not contradicted and I take it that they are true and for that reason I find that the Minister responsible for Justice superintends over the Judiciary's budgeting process. He directs and owns the process by which the Judiciary's budget gets to be considered by parliament.

It is apparent from **Article 155** that a Minister who purports to handle the budgetary estimates of a self-accounting department, commission or organization would be acting ultra vires.

Article 128 (6) of the Constitution provides that:

"The Judiciary shall be self-accounting and may deal directly with the Ministry responsible for finance in relation to its finances."

It is clear from the above provision that it is not mandatory for the Judiciary to deal with the Ministry responsible for Finance as it enjoys a self-accounting status. Reading Articles 99 (4), 128 (6) and 155 together, it is clear that the framers of the Constitution gave the judiciary the special status it deserves as an organ of the state.

As a self-accounting organ, the Judiciary is required to submit its budgetary estimates through the Chief Justice in respect of each financial year directly to the president and not anyone else. The said budget must be prepared by the Chief Justice or his delegate and not anyone else, and once presented to the president, it must be tabled before Parliament without revision.

It was submitted for the Respondent that the involvement of the Minister responsible for Justice is provided for under the Public Finance Management ACT, 2015 and is therefore justified. I have referred to that Act. It provides for fiscal and macro-economic management and section 9 which was referred to provides that:

"9. Budget Framework Paper.

(1) Each Accounting Officer shall, in consultation with the relevant stakeholders, prepare a Budget Framework Paper for the vote, taking into

consideration balanced development, gender and equity responsiveness and shall submit the Budget Framework Paper to the Minister.

(2) For the purposes of subsection (1), each Accounting Officer shall prepare and submit a Budget Framework Paper by 15th November of the financial year preceding the financial year to which the Budget Framework Paper relates.

(3) The Minister shall for each financial year, prepare a Budget Framework Paper which shall be consistent with the National Development Plan and with the Charter for Fiscal Responsibility.

(4) The Budget Framework Paper shall be in the format prescribed in Schedule 3.

(5) The Minister shall, with the approval of Cabinet, submit the Budget Framework Paper to Parliament by the 31st of December of the financial year preceding the financial year to which the Budget Framework Paper relates.

(6) The Minister shall, in consultation with the Equal Opportunities Commission, issue a certificate—

(a) certifying that the budget framework paper is gender and equity responsive; and

(b) specifying measures taken to equalize opportunities for women, men, persons with disabilities and other marginalized groups.

(7) The Speaker shall refer the budget framework paper to the relevant committee for consideration.

(8) Parliament shall review and approve the Budget Framework Paper by 1st February of the financial year preceding the financial year to which the Budget Framework Paper relates."

I have already discussed the constitutionally ordained process relating to the Judiciary's Budget process. I shall not repeat it here except to reiterate that under the Constitution, the Judiciary is a self-accounting organ of government headed by the Chief Justice who is the sole person responsible for making its budgets.

As such, Section 9 (1) above does not apply to the Judiciary. If it did, then the accounting officer would have assumed the Chief Justice's role to prepare the Budget framework paper for the Judiciary in contravention of the Constitution. Henceforth, that Section shall be construed to allow the Chief Justice to submit the relevant budget framework paper to the President for tabling before Parliament in accordance with Article 155 (2).

The aforementioned provisions of Section 9 of the Public Finance Management Act cannot apply to the Judiciary on account of its constitutional status as an arm of government. I decline to hold that the provision per se is unconstitutional because it is lawfully applied to other government departments and agencies.

It was submitted for the Respondent that the involvement of the Permanent Secretary in the Ministry responsible for Finance was justified under **Section 11** of the **Public Finance Management Act, 2015**. The section which relates to the functions of the Secretary to the Treasury provides thus;

"11. Appointment and functions of the Secretary to the Treasury.

(1) There is a Secretary to the Treasury appointed by the President on the recommendation of the Public Service Commission.

(2) The Secretary to the Treasury shall—

(a) advise the Minister on economic, budgetary, and financial matters;

(b) coordinate the preparation of the Charter for Fiscal Responsibility, the annual budgeting process including the preparation of the Budget Framework Paper, the budget estimates and the Appropriation Bill;

(c) promote and enforce transparent, efficient, and effective management of the revenue and expenditure and the assets and liabilities of votes;

(d) set standards for the financial management systems and monitor the performance of those systems;

(e) ensure that the internal audit function of each vote and public corporation is appropriate to the needs of the vote or public corporation concerned and conforms to internationally recognized standards, in respect of its status and procedures;

(f) manage the Consolidated Fund and any other fund as may be assigned by the Minister;

(g) appoint or designate accounting officers in accordance with this Act, except that the Secretary to the Treasury shall not appoint or designate a person an accounting officer where, according to the report of an Internal Auditor General or the Auditor-General, that person has not accounted for the public resources or assets of the vote for a financial year;

(h) issue the annual cashflow plan of Government as a basis for commitment of expenditure by Accounting Officers;

(i) mobilise resources including assistance from development partners and integrate the funds into the planning, budgeting, reporting and accountability processes prescribed by this Act;

(j) monitor the financial and related performance of the votes;

(k) where necessary, create a vote;

(l) provide the framework for conducting banking and cash management for Government, local governments and the other votes governed by this Act;

(m) prepare the Treasury memorandum; and

(n) every three months, prepare for the Minister, a report on the execution of the annual budget by the Government.

(3) In the discharge of the functions in subsection (2), the Secretary to the Treasury may—

(a) issue directives and instructions to Accounting Officers;

(b) in writing, require an Accounting Officer or an Accounting Officer of a local government to supply any information that the Secretary to the Treasury considers necessary for the purposes of this Act; and

(c) inspect during working hours, the office of a vote and gain access to any information the Secretary to the Treasury may require, with regard to the money and records regulated by this Act."

The role of the Secretary to the Treasury in as far as he or she helps to coordinate the finances of the government cannot be unconstitutional. It helps to maintain the cooperation between the different arms of government while also maintaining their effectiveness.

However, the provisions of subsection 3 of section 11, in as far as they require the Secretary to the Treasury to give instructions to accounting officers can not apply to the Chief Justice as the administrative head of the Judiciary.

I would therefore agree with the Petitioner and find that sub-section 3 of section 11 of the Public Finance Management Act, 2015 is to the extent discussed above inconsistent with and in contravention of Articles 128, 133 and 155 (2) of the Constitution if applied to the Judiciary as an organ. The said provision is lawfully applied to other government departments save for self-accounting entities. For

that reason, I decline to expunge it. I will only make appropriate declarations and orders in regard to its application.

The Petitioner adduced evidence to prove that attempts were made in Parliament to enact legislation which would implement the constitutional provisions relating to the financial autonomy of the judiciary but without much success. It is stated that in the year 2012, the executive under the Minister of Justice and Constitutional Affairs prepared a Judiciary Administration Bill 2012.

The object of the Act for which the Bill was prepared was to operationalize the provisions of the Constitution relating among others the independence and provision of funds to the courts but the same was never presented to parliament according to the unchallenged affidavit evidence of the Petitioner's witness Francis Gimara.

Further, it is also averred that in 2014, Honourable Felix Okot Ogong, a Member of Parliament, was granted leave by Parliament to introduce a Private Members' Bill titled the Judiciary Administration Bill 2014. The object of the Bill was to among others operationalize the provisions of the Constitution relating to the administration of justice and strengthen the independence of the judiciary.

It was never debated because the certificate of financial implications was never issued to enable the bill to be tabled in Parliament. These averments are unchallenged and I take them to be true. It is therefore clear that there is laxity on the part of the other two arms of state to ensure that the Judiciary becomes fully independent as the other arms of state.

I have already established above that the principles of judicial independence extend to the adequate funding which must be accorded to the Courts as established in Objective VIII of the National Objectives and Directive Principles of State Policy, Article 8A and Article 128 (3) of the Constitution.

I adopt as highly persuasive the decision from the Lithuania Constitutional Court that in handling its finances, the Judiciary should have minimal intrusion from the executive branch. I went into an extensive discussion of the above and I need not repeat it here. Further, it has been stated that there is a co-relation between resource allocation to the judiciary and judicial independence.

It was alleged for the Petitioner that the Judiciary is so terribly underfunded that in the Financial Year 2017/18, the monies allocated to it represent less than 50% of the revenue required for it to function meaningfully. The Petitioner further alleged that the Chief Justice often takes to pleading for funds from the Executive as he did in his speech at the New Law year 2017 (Annexture B to the Affidavit in Support of the Petition) opening when he said that:

"The success of the Judiciary requires the commitment of all from Judicial officers and Judiciary staff; JLOS actors; the public and most importantly support from the Legislature and Executive for resources and facilities.

Adequate Resources to fund the Judiciary's Investment Plan and transformation plan is critical to sustaining and transforming the Judiciary."

The speech by the Chief Justice referenced in the affidavit of Mr Gimara is evident of the real concerns about the inadequate funding in the Judiciary and points to actual and apparent dependency of the judiciary on the executive.

However, Mr. Keith Muhakanizi the Secretary to the Treasury, in his affidavit, believes it is false to say that the Judiciary is inadequately funded. He deposed that not only is the budget for the Judiciary protected from budgetary cuts but that it has in the past received funds in excess of its budgetary allocations as for example in the Financial Year 2015/16 when 104 billion shillings were released to it yet it had a budgetary allocation of 92.56 billion Shillings.

He further deponed that the foregoing trend continued in 2016/17 where the Judiciary secured releases of Shs. 117.86 billion yet it had been allocated Shs 116.55 billion Shillings only.

I note that the evidence of Muhakanizi is somewhat diversionary as it does not directly answer the concerns raised by the Chief Justice that the Judiciary is underfunded. He instead discusses issues connected to supplementary appropriation of monies to the Judiciary which is not helpful. It would have been helpful to compare with the budgets and relevant releases to the executive and legislature in order to determine whether or not the Judiciary receives the funding it deserves as a key arm of the Government.

In the Budget Framework Paper for Financial Year 2017/18, the Judiciary was allocated Shs. 172,085,000,000/= out of the National Budget of Shs. 29,000,000,000,000/=. This represented about 0.59% of the Budget for the

financial year despite the recognition in the Budget Framework Paper that economic development and transformation cannot thrive if citizens and investors have no confidence in the rule of law and the justice system.

The rule of law regulates economic activity, defines and affirms rights and obligations, therefore clarifying for investors the laws and institutional environment for doing business. Increasing the impact of efficient and effective justice delivery is therefore fundamental for poverty reduction, economic development and growth.

It is clear from the above that the Judiciary plays an important role in the social and National transformation. It is demeaning to one of the three arms of state that funding of 0.59% of the National Budget can be deemed sufficient for such a key sector.

It was deponed for the Respondent that there is a limited resource envelope for the Government and therefore the Judiciary must be allocated the meagre resources it receives to avoid starving certain sectors of funding. It must be appreciated that the role of appropriating public resources belongs to parliament and not the executive. It is therefore not correct for the Secretary to the Treasury to usurp a legislative role and dictate the share of the national budget that should be taken by each self-accounting entity without proper decision from the legislature.

I understand the attitude portrayed by Mr. Muhakanizi to mean that there are other key sectors of the economy and government which must be sufficiently

funded before the Judiciary is. Not only is such an attitude contrary to the Constitution which requires that adequate resources be given to the Judiciary as an equal arm of government but he seems to communicate a government position that the Judiciary should be content with meagre resources allocated to it as it may not be part of "certain sectors which should not be starved". I have already discussed **Objective VIII of the National Objectives and Directive Principles of State Policy** which provides that:

"The distribution of powers and functions as well as checks and balances provided for in the Constitution among various organs and institutions of government shall be supported through the provision of adequate resources for their effective functioning at all levels."

Furthermore, I earlier discussed Article 128 (3) which provides that:

"All organs and agencies of the State shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts."

The averments by Mr. Muhakanizi do not conform to the constitutional requirement to treat the Judiciary as an equal arm of Government which has the dual role of ensuring checks and balances to the executive and legislature and dispensing justice. Instead he seems to trivialize the importance of the Judiciary. This is wholly in contravention of **Article 8A, 128 (3), of the 1995** Constitution.

Mr.Keith Muhakanizi averred that the available state resources were not adequate to fund all Government requirements and there had to be reasonable

distribution. This is certainly not in dispute. The question is whether the distribution of the available resources is done in an equitable and reasonable manner taking into account the unique needs of each arm of Government in a manner consistent with the Constitution.

What ought to be done is to distribute the available resources equitably between the three arms of state since all of them play vital roles required for national development. This however is not happening. For instance, the legislature has previously unilaterally increased its emoluments without doing the same for the other arms. They did so under the mandate of Section 5 of the Parliamentary (Remuneration of Members) Act. See the decision of the Supreme Court in **Parliamentary Commission vs Mwesigye Wilson, Constitutional Appeal No.8 of 2016** which nullified the said provision on grounds that it was inconsistent with Article 93.

The Constitution directs that the necessary steps be taken to ensure that adequate assistance is given to the Judiciary. This must necessarily mean that the legislature must expeditiously table laws for the purpose of ensuring that adequate assistance, whether financial or otherwise is rendered to the Judiciary. This, unfortunately, has not been done.

Consequently, I answer issues 3, 4, 6 and 7 in the affirmative. In regard to Issue 2, the provisions of the Public Finance Management Act are not unconstitutional but they are inapplicable to the Judiciary. I would have been inclined to expunge the said provisions but this could potentially unfairly disable the work of the

Secretary to the Treasury in dealing with various other accounting agencies which are lawfully under the mandate of his office.

It is therefore declared that any attempt to apply the impugned provisions, namely Sections 9 and 11 of the Public Finance Management Act, to the Judiciary is unconstitutional.

Issue Five

The Petitioner contends that the requirement of a certificate of financial implications prior to presenting of any bill to Parliament is unconstitutional as it fetters parliament's legislative discretion. It is therefore argued that the legal provisions which provide for it under **Section 10 of the Budget Act, 2001** and **Section 76 of the Public Finance Management Act, 2015**. The Respondent disagrees and maintains that the said legal requirement is not unconstitutional.

I have addressed my mind to Article 79 (2) of the Constitution which empowers parliament to make laws on any matter for the peace, order, development and good governance of Uganda and Article 93 and 94 of the Constitution, which respectively restrict parliament's action on bills on financial matters and permit private members' bills. I form the opinion that Article 93 prohibits parliament from proceeding on a private member's bill regarding financial matters unless it is brought by the Government.

Therefore, in view of Articles 93 and 94, a private member's bill may only be brought if it does not touch on financial matters because of the restriction by

Article 93. A bill that imposes a charge on the consolidated fund can only be brought by the Government. This is the import of the Supreme Court's recent decision in **Constitutional Appeal No.8 of 2016, Parliamentary Commission vs Mwesigye Wilson.** It is binding on this court and I need not say more.

There is no explicit provision in the constitution which requires a certificate of financial implications as a prerequisite for presentation of a bill. **Section 10 of the Budget Act 2001 provides as follows;**

> **10.Cost estimates for Bills provides that;**
>
> **Every Bill introduced in parliament shall be accompanied by its indicative financial implications, if any, on revenue and expenditure over the period of not less than two years after coming into effect.**

This provision is reinforced **under Section 76 of the Public Finance Management Act, 2015** which provides that:

"76. Cost estimates for Bills.

(1) Every Bill introduced in Parliament shall be accompanied by a certificate of financial implications issued by the Minister.

(2) The certificate of financial implications issued under subsection (1) shall indicate the estimates of revenue and expenditure over the period of not less than two years after the coming into effect of the Bill when passed.

(3) In addition to the requirements under subsection (2) the certificate of financial implications shall indicate the impact of the Bill on the economy.

(4) Notwithstanding sub sections (1), (2) and (3), a certificate of financial implication shall be deemed to have been issued after 60 days from the date of request for the certificate."

In view of **Article 93** and its interpretation by the Supreme Court in **Parliamentary Commission vs Wilson Mwesigye (supra)**, Section 76 can only curtail a private members' bill which imposes a charge on the consolidated fund. Section 76 is simply some sort of operationalization of Article 93.

In conclusion, I would find that the practice of requiring the issuance of a certificate of financial implications is not provided for under the 1995 Constitution but is provided for under section 76 of the Public Finance Management Act, 2015. It may be construed as a of government policy related to the presentation of bills in the manner envisaged under Article 93.

The law does not give the minister discretion to issue or not to issue the certificate. The moment a bill is before Parliament and a request for a certificate has been made he has to issue it no matter the contents. The certificate advises on the financial implications of the intended legislation. I consider this prudent in the management of public finance. Accordingly, the impugned practice is not inconsistent with and/or in contravention of the 1995 Constitution.

Remedies

The Petitioner asked this Court to order the Executive to present the Judiciary (Administration) Bill to Parliament within one month from the date of this Judgment. It is a constitutional imperative that the judiciary should operate as an autonomous arm of government. For this to happen, the executive ought to table a bill in Parliament. However, I will not provide a rigid time frame in which this ought to be done as that would be an unnecessary intrusion into the manner in which the executive and legislature conduct their affairs.

I will only order that the Attorney General shall report to court, once every 3 months, on the steps taken to pass the said legislation. Depending on the nature of the report made, this court may make further orders or directions as it deems fit to prevent the use of a legislative vacuum being utilized to undermine financial autonomy of the Judiciary.

In paragraph 9 (b) (ii), (iii), (iv), (v) & (vi) the Petitioner wants this Court to order the Executive to comply with Article 155 of the 1995 Constitution. The starting point is Article 137 (4) which provides that:

"Where upon determination of the petition under clause (3) of this article the Constitutional Court considers that there is need for redress in addition to the declaration sought, the Constitutional Court may

a. grant an order of redress; or

b. refer the matter to the High Court to investigate and determine the appropriate redress."

The scope of directions which the Constitutional Court may make pursuant to the above Article is, on the face of it, unfettered. However, as with any judicial decision, in exercising its powers to grant any orders. This Court must act judiciously.

Separation of powers is meant to ensure that the different arms of government function smoothly and with minimal intrusion from the others. As such, I would refrain from ordering the executive to present legislation even though in exercise of this court's powers, I will require the executive to report every 3 months on the actions taken to ensure passage of the necessary legislation.

It therefore follows that the impugned conduct of treating budgetary processes for the Judiciary in a manner similar to that of other government departments must stop forthwith and I would issue injunctive relief to that effect. I am mindful of the potential administrative vacuum that could result given the ingrained culture of operating the Judiciary's budgeting processes like those of any department under the Justice, Law and Order Sector.

The administrative functions of the Judiciary (whether they be related to budgeting or otherwise) should be handed over to the Honourable Chief Justice or any of the Judiciary staff that he will choose to delegate certain tasks too such as the Secretary to the Judiciary. Ensuring that the transitional period runs smoothly would necessitate that this Court makes rules for that effect.

I note that in certain circumstances, Courts may make rules in what is normally called "judge-made law". Proponents of judge made law point out that it is

necessary to fill gaps which must be addressed in any field until suitable legislation is enacted. **See: Vishaka & Others vs State of Rajasthan & Others, Supreme Court of India Decision on 13th August, 1997 (unreported).**

Accordingly, I order that the following declarations and orders shall be binding until legislation is enacted for the purpose they relate to:

"1. The administration of the Judiciary shall be the responsibility of the Chief Justice, who may delegate any matter relating to the administration of the Judiciary to any other Public Officer such as the Secretary to the Judiciary.

2. Without prejudice to the generality of the above rule, the management and distribution of finances in the Judiciary shall be the responsibility of the Chief Justice who may be assisted in this role by public officers attached to the Judiciary such as the Secretary to the Judiciary.

3. Until arrangements are made to give effect to rule 2, any person, who for the time being is responsible for making authorization relative to the judiciary's finances shall continue to do so, under the supervision and approval of the Chief Justice.

4. Steps should be taken, and a report made to court within 6 months, to place all employees under the Judiciary within the jurisdiction of the Judicial Service Commission.

5. The Chief Justice shall make such further guidelines respecting the administration of the Judiciary as he/she may deem fit."

In addition, the Executive and the Legislature shall render all necessary assistance as requested by the Chief Justice to ensure that the transition is effected smoothly and in a reasonable time.

In view of the above analysis, and in view of the declarations sought in the petition, I would make the following additional declarations and orders

(a) The mandatory involvement of the Minister responsible for Finance and the Permanent Secretary/Secretary to the Treasury to the extent discussed above is inconsistent with and in contravention of Articles 128 (1), (3) & (6) and 155 (2) & (3) of the 1995 Constitution.

(b) The involvement of the Minister responsible for Justice in the budgeting process of the Judiciary is inconsistent with and in contravention of Articles 128 (1), (3) & (6) and 155 (2) & (3) of the 1995 Constitution.

(c) The involvement of the Permanent Secretary / Secretary to the judiciary in the budgeting process of the Judiciary, beyond providing technical advice that may be considered or disregarded, is inconsistent with and in contravention of Articles 128 (1), (3) & (6),

133 (1), 155 (2) and (3) of the 1995 Constitution and is void to the extent of such inconsistence.

(d) The failure by the Executive and Parliament to take steps in a reasonable time to enact a law to implement the judiciary's autonomy contravenes Articles 8A and National Objective and Directive Principles of State Policy VIII and Article 128 (3) of the 1995 Constitution.

(e) The allocation of inadequate resources to the Judiciary is inconsistent with and in contravention of Articles 8A and National Objective and Directive Principles of State Policy VIII, and 128 (3) of the 1995 Constitution.

The practice of requiring the issuance of a certificate of financial implications before tabling a bill is not inconsistent with and/or in contravention of Articles 79 and 93 of the 1995 Constitution.

I therefore allow the present Petition in part with no order as to costs. I so order.

Dated at Kampala this 10th day of March 2020

CHEBORION BARISHAKI

JUSTICE OF APPEAL/ CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 52 OF 2017

UGANDA LAW SOCIETY ..... PETITIONER

VERSUS

ATTORNEY GENERAL ..... RESPONDENT

CORAM : Hon. Mr. Justice Kenneth Kakuru, JA/JCC

Hon. Mr. Justice Geoffrey Kiryabwire, JA/ JCC

Hon. Mr. Justice Cheborion Barishaki, JA/JCC

Hon. Mr. Justice Ezekiel Muhanguzi, JA/JCC

Hon. Mr. Justice Stephen Musota, JA/JCC

JUDGMENT OF JUSTICE KENNETH KAKURU, JA/ JCC

I have had the benefit of reading in draft the judgment of my learned and able brother The Hon. Mr. Justice Cheborion Barishaki, JA/JCC.

I agree with him that this petition ought to succeed for the reasons he has ably set out in his Judgment. I also agree with the declarations and orders he has proposed.

I have nothing useful to add.

As Kiryabwire, Muhanguzi and Musota, JJA/JJCC also agree. It is so ordered.

I would like to note that although Muhanguzi, JA/JCC (as he then was) participated in the hearing of this petition and agreed with the decision of the Court as set out in the draft Judgment of Cheborion Barishaki, JA/JCC. He was however, unable to avail his own concurring Judgment as he was elevated to the Supreme Court before the signing of the final draft.

Dated at **Kampala** this 10th day of March 2020.

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Kenneth Kakuru

JUSTICE OF APPEAL/ CONSTITUTIONAL COURT

THE REUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

CONSTITUTIONAL PETITION NO.52 OF 2017

UGANDA LAW SOCIETY:: PETITONER

VERSUS

ATTORNEY GENERAL:::RESPONDENT

CORAM: HON.MR.JUSTICE KENNETH KAKURU, JCC

HON.MR.JUSTICE GEOFFREY KIRYABWIRE, JC

HON.MR.JUSTICE CHEBORION BARISHAKI, JCC

HON.MR.JUSTICE EZEKIEL MUHANGUZI, JCC

HON.MR.JUSTICE STEPHEN MUSOTA, JCC

JUDGEMENT OF JUSTICE GEOFFREY KIRYABWIRE

I have had the benefit of reading in draft the Judgment of my Brother Hon. Mr. Justice Cheborian Barishaki, JCC. I agree with his analysis, findings and the orders he has proposed.

Dated at Kampala this 10th day March 2020.

Geoffrey Kiryabwire

Justice of Appeal /Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 52 OF 2017

UGANDA LAW SOCIETY :: PETITIONER

VERSUS

ATTORNEY GENERAL :: RESPONDENT

CORAM: HON. JUSTICE KENNETH KAKURU, JA/JCC

HON. JUSTICE GEOFFREY KIRYABWIRE, JA/JCC

HON. JUSTICE CHEBORION BARISHAKI, JA/JCC

HON. JUSTICE EZEKIEL MUHANGUZI, JA/JCC

HON. JUSTICE STEPHEN MUSOTA, JA/JCC

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA/JCC

I have had the benefit of reading in draft the judgment by my brother Justice Cheborion Barishaki, JA/JCC.

I agree with his analysis and declarations he has made in the draft and the orders he has made in the draft and the orders he has proposed. These will go along way in strengthening the independence of the judiciary.

I have nothing useful to add.

Dated this 10th day of March 2020

Signed

Hon. Stephen Musota
JUSTICE OF APPEAL