

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 04 OF 2012

Between

5 Legal Brains Trust (LBT) LtdPetitioner

And

- | | | | |
|----|--|---|-------------|
| 10 | 1. Hassan Basajjabalaba
2. Haba Group (Uganda) Limited
3. Victoria International Trading Company Ltd
4. Sheila Investments Limited
5. Yudaya International Ltd
6. First Merchant International Trading Company Ltd
7. Kampala Capital City Authority
8. The Bank of Uganda
15 9. The Attorney General of Uganda
10. Hon. Syda Bbumba, MP
11. Hon. Prof. Kihiddu Makubuya, MP
12. Prof. Emmanuel Tumusiime-Mutebile
13. United Bank of Africa (Uganda) Ltd
20 14. Orient Bank Ltd
15. Bank of Baroda (Uganda) Ltd
16. Tropical Bank (Uganda) Ltd
17. Mr. James Ssegane
18. Mr. Gordon Mwesigye
25 19. Mr. William Tumwine | } | Respondents |
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CORAM:

HON. MR. JUSTICE KENNETH KAKURU, JCC

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JCC

HON. LADY JUSTICE ELIZABETH MUSOKE, JCC

5 **HON. MR. JUSTICE BARISHAKI CHEBORION, JCC**

HON. MR. JUSTICE STEPHEN MUSOTA, JCC

JUDGMENT OF JUSTICE GEOFFREY KIRYABWIRE

Introduction

10 The Petitioner Legal Brains Trust Ltd is a Civil Society Organisation (hereinafter referred to as “LBT”) and filed this Petition in respect of a series of contractual arrangements entered into between the 1st January 2000 and 31st December, 2011 involving several public properties within Kampala City namely; Nakasero Market; Nakivubo Shauriyako Market; St. Balikuddembe Market (formerly Owino Market);
15 Nakawa Market; and the Constitutional Square (Formerly City Square). These contractual arrangements (herein after referred collectively as the “city markets and square”) will be described in some detail later in this Judgment are the basis for the Petitioner’s request for constitutional interpretation.

The first Respondent Mr. Hassan Basajjabalaba is a businessman and politician. He
20 is said to be a shareholder and Chairman of the second (Haba Group [Uganda Ltd]; third (Victoria International Trading Company Ltd); fourth (Sheila Investments Ltd);

fifth (Yudaya International Ltd); and sixth (First Merchant International Trading Company Ltd) Respondent Companies.

The seventh Respondent (Kampala Capital City Authority) is a statutory authority (established under the Kampala City Act 2010) responsible for Kampala City and is
5 successor to the former Kampala City Council (hereinafter referred to as “KCC”).

The eighth Respondent is the Bank of Uganda (hereinafter referred to as BOU) and is the Central Bank of Uganda.

The ninth Respondent is the Attorney General of Uganda and principal legal adviser to Government of Uganda.

10 The tenth Respondent Hon. Syda Bbumba is a Member of Parliament who at the time of the events constituting this Petition also served as Minister of Gender, Labour and Social Development.

The eleventh Respondent Hon. Prof. Khiddu Makubuya was a Member of Parliament and at the time of the events constituting this Petition also served as
15 Minister of Justice and Constitutional Affairs and Attorney General of the Republic of Uganda.

The twelfth Respondent Prof. Emmanuel Tumusiime Mutebile is the Governor of Bank of Uganda the eighth Respondent.

The thirteenth (United Bank of Africa), fourteenth (Orient Bank), fifteenth (Bank of
20 Baroda) and sixteenth (Tropical Bank) Respondents are all Commercial Banks in Uganda.

The seventeenth Respondent Mr. James Ssegane and eighteenth Respondent Ms. Ruth Kijambu at the time of the events constituting this Petition served as the Town Clerk and acting Town Clerk of KCC.

The nineteenth Respondent Mr Gordon Mwesigye and Twentieth Respondent Mr William Tumwine at time of the events constituting this Petition both served as Served deputy Town Clerks of KCC.

It is the case for the Petitioner that the alleged different actions of these twenty Respondents in the contractual arrangements for the city markets and square violated the 1995 Constitution of Uganda (hereinafter referred to as the “Constitution”) and thus fortify the need for constitutional interpretation.

Brief facts

The facts of this petition are quite involved but can be summarised as hereinafter. It is the case of the Petitioner that the first, second, third, fourth, fifth and sixth Respondents (in which the first Respondent had controlling interests and are hereinafter collectively referred to as the “Haba Group”) between 1st January 2000 and 31st December 2011 entered into a series of contractual arrangements with the seventh Respondent (KCC) for the city markets and square. During this period some of the said contractual arrangements were even extended on expiry. Further it is the general contention of the Petitioner that these contractual arrangements and or their extensions were not subjected to the legal advice or approval of the Attorney General of Uganda (the seventh Respondent) contrary to Article 119 (5) of the Constitution; the proper authorisation of KCC and its Mayor contrary to Section 67 (4) of the Local Government Act (Cap 243 and hereinafter referred to as “LGA”) and Regulation 29 (2) of the Local Government Council Regulations

(hereinafter referred to as “LGCR”) and the concurrence of the of the Central Division of Kampala City contrary to Section 86 (1B) of the LGA. The said contractual arrangements were not subjected to established procurement procedures in force at the time and contravened section 13 (3) of the Leadership Code Act.

5 Furthermore the said contractual arrangements allegedly violated and or threatened the property and business rights of existing market vendors or their associations.

It is also the case for the Petitioner that in the case of M/s Sheila Investment Ltd (the 4th Respondent), it chronically defaulted on its management and joint venture
10 agreements for Nakasero Market leading to termination of the agreements by KCC.

It the further case of the Petitioner that in 2001 when KCC attempted to enter into a contractual arrangement with M/s Yudaya International Ltd (5th Respondent) for the redevelopment of the City Square which threatened the interests of the people of Uganda, the then Minister of Local Government intervened and stopped the
15 arrangement while at the same time instituting a Commission of Inquiry (under Legal Notice No. 14 of 2001) into the matter. The Commission of Inquiry recommended against the pending contractual arrangement which was then aborted.

The Petitioner also contends that the contractual arrangements for the city
20 markets and square led to unprecedented popular resistance from market vendors and the public which involved demonstrations and riots. This led to the Government of Uganda terminating and or cancelling the said contracts. It is the case of the Petitioner that the Haba Group thereafter fraudulently, dishonestly or

deceitfully applied to the Government of Uganda for compensation in respect of the terminated and or cancelled contracts.

The Government of Uganda then set up an inter-ministerial technical committee to investigate the claims for compensation from the Haba Group and made its Report on or about the 30th October, 2009. The inter-ministerial technical committee recommended compensation to the Haba Group of Ug Shs 22,770,349,673/= (Twenty Two Billion Seven Hundred Seventy Million Three Hundred Forty Nine Thousand Six Hundred Seventy Three only). This figure was further revised upwards to a final settlement of Ug Shs. 54,690,517,149/= (Fifty Four Billion Six Hundred Ninety Million Five Hundred Seventeen Thousand One Hundred Forty Nine Only) which it is alleged that the Haba Group accepted. It is alleged by the Petitioner that the Haba Group then suddenly changed their minds and rejected the proposed settlement.

It is the further case of the Petitioner that the Attorney General after conflicting correspondence then in a manner prejudicial to the people of Uganda directed the Solicitor General to pay Ug Shs 142, 697,752,244/= (One Hundred Forty Two Billion Six Hundred Ninety Seven Million Seven Hundred Fifty Two Thousand Two Hundred Forty Four Only) to the Haba Group as compensation. This award of compensation led to the Auditor General of Uganda to call for a value for money audit of the said compensation. Such a payment would also require an approved supplementary budget approved by the Parliament of Uganda.

It is the further case for the Petitioner that when the payment of the Ug Shs 142, 697,752,244/= (One Hundred Forty Two Billion Six Hundred Ninety Seven Million Seven Hundred Fifty Two Thousand Two Hundred Forty Four Only) to the Haba

Group as compensation delayed, attempts were made to get the payment effected through the Central Bank and financial Institutions like the thirteenth, fourteenth, fifteenth and sixteenth Respondents. This allegedly involved the procurement of financial instrument like comfort letters, letters of guarantee, letters of assurance, promissory notes, letters of credit to the Financial Institutions herein (being the 13th to 16th Respondents) and consequently resulting in funds being obtained from the consolidated fund of Uganda on various dates between the 1st January, 2009 and 31st December, 2011. Furthermore the Governor of the Central Bank at the request of the Haba Group, gave undertakings to the Uganda Broadcasting Corporation (hereinafter referred to as "UBC") Ug Shs 10,400,000,000/= (Ten Billion Four Hundred Million). The purpose of this undertaking was to enable the Haba Group pay for the purchase of UBC comprised in FRV 211 Folio 18 Plots 8-10, 12-16 and 18-20 being land at Faraday Road in Bugolobi Kampala.

In respect of Nakawa Market, the Petitioner alleges that that Attorney General in a manner prejudicial to the interests of people of Uganda awarded First Merchant International Trading Company Ltd (Sixth Respondent) Ug Shs 26, 816,607,642/= (Twenty Six Billion Eight Hundred Sixteen Million Six Hundred Seven Thousand Six Hundred Forty Two only). This payment was subsequently and quickly authorised to be paid directly by the Central Bank by the then Minister Finance, Planning and Economic Development on the 4th of May 2011.

It is the case for the Petitioner that the Respondents jointly and severally undermined the Rule of law and unjustly enriched themselves or their associates at the expense of people of Uganda and in contravention of the Constitution. The Respondents acted corruptly and abused or misused their power of influence as

public bodies or persons holding political and other public offices to the detriment of the people of Uganda.

Constitutional violations

It is the case of the Petitioner that the above arbitrary acts or omissions of the Respondents jointly or severally had the following constitutional implications as herein after stated.

The Respondents allegedly contravened and threatened the right of the people of Uganda to live free from corruption and abuse or misuse of power and public resources as guaranteed under National Objective XXVI and Articles 8A, 17 (1) (i), 20 (1) (2), 25 (1), 41, 36, 38, 45, 164, 196, 201 and 233 (2) (b) of the Constitution.

The Respondents' arbitrary actions allegedly amounted to prohibited preferential treatment of the Haba Group and prohibited unequal treatment and discrimination of equally interested and eligible persons or group of persons contrary to Articles 21 (1) and (2) of the Constitution.

The Respondent's alleged actions amounted to illegitimate concealment and insider trading of information in the possession of a public body contrary to Article 41 of the Constitution.

The Respondents allegedly caused the acquisition of the ownership, management, control and maintenance over the impugned properties by the Haba Group without the prior written consent of the existing market vendors or other tenants/users without complying with the procedures relating to security of occupancy for lawful or bonafide occupants contrary to Article 237 (8) of the Constitution.

The alleged arbitrary acts or omissions of KCCA, Mr James Ssegane, Ms Ruth Kijjambu, Mr Gordon Mwesigye and Mr William Tumwine which caused the purported acquisition by the Haba Group of the city markets and square without taking appropriate action to empower the existing market vendors or tenants and
5 without giving prompt payment of fair and adequate compensation were inconsistent with Articles 20 (1) (2), 32 (1) and 26 (1) (2) of the Constitution.

Furthermore the alleged arbitrary actions of United Bank of Africa, Orient Bank, Bank of Baroda and Tropical Bank in providing funds to the Haba Group on the basis of financial instruments of comfort and guarantee purportedly to help the
10 Government compensate the Haba Group for the alleged loss arising from the cancellation or termination of the contractual arrangements for the city markets and square and without obtaining the legal advice and approval of the Attorney General was inconsistent with Article 119 (5) of the Constitution.

Also the alleged arbitrary withdraw of funds from the Consolidated Fund under the
15 authority of the Bank of Uganda, The Attorney General, Hon Syda Bbumba, Hon Khiddu Makubuya and Prof Emmanuel Tumusiime Mutebile to help the Government compensate the Haba Group for the alleged loss arising from the cancellation or termination of the contractual arrangements for the city markets and square without the approval of the Auditor General and without complying
20 with the provisions of the of the Public Finance Act of 2003 was inconsistent with or in violation of Articles 154 (3), 160, 163 (3) (a) (b) and 164 of the Constitution.

Furthermore, the alleged arbitrary withdraw of funds from the Consolidated Fund under the authority of the Bank of Uganda, The Attorney General, Hon Syda Bbumba, Hon Khiddu Makubuya and Prof Emmanuel Tumusiime Mutebile to help

the Government compensate the Haba Group for the alleged loss arising from the cancellation or termination of the contractual arrangements for the city markets and square without the authorisation of Parliament through an Appropriation Act or resolution of Parliament was inconsistent with Articles 154 (1) (b), 154 (2), 156,
5 159 (5), 160 and 164 of the Constitution.

That the alleged arbitrary acts of the Bank of Uganda, The Attorney General, Hon Syda Bbumba, Hon Khiddu Makubuya and Prof Emmanuel Tumusiime Mutebile which caused the borrowing, guaranteeing or raising of loans to help the Government compensate the Haba Group for the alleged loss arising from the
10 cancellation or termination of the contractual arrangements for the city markets and square without the authorisation of Parliament through an Appropriation Act or resolution of Parliament was inconsistent with Articles 159 (2), 159 (3) 159 (6) 159 (7), 160 and 164 of the Constitution.

That the alleged arbitrary and disgraceful conduct of the Bank of Uganda and Prof
15 Emmanuel Tumusiime Mutebile in allowing themselves to be used to further the interests of the Presidency and Haba Group and its bankers without subjecting them an independent due diligence, investigation or consultation with other stakeholders and authorities as specified under the laws of Uganda was inconsistent with or in contravention of Article 163 (2) of the Constitution.

20 Finally, the alleged high handed, outrageous, disgraceful and heinous conduct of KCC, Bank of Uganda, The Attorney General, Hon Syda Bbumba, Hon Khiddu Makubuya and Prof Emmanuel Tumusiime Mutebile, United Bank of Africa, Orient Bank, Bank of Baroda and Tropical Bank Mr James Ssegane, Ms Ruth Kijjambu, Mr Gordon Mwesigye and Mr William Tumwine to further the interests of the

Presidency and/or Haba Group in a manner detrimental to the public good, public welfare and good governance undermined the Rule of law and contravened or threatened the right of the people of Uganda to live in a free from corruption and abuse or misuse of power and public resources by politicians and public officers as
5 guaranteed under National Objective XXVI, Articles 8 (A), 17 (1) (i), 20 (1), 25 (1), 41, 36, 38, 45, 118, 164, 196, 201 and 233 (2) (b).

The Declarations and Remedies prayed for.

The Petitioner in the Petition then prayed for the following the declarations and remedies which because of their uniqueness are reproduced in full from the
10 Petition hereinafter.

“...

- (i) ***THAT any and all lease and management agreements or other contract-like documents by whatever name called purportedly concluded, extended or executed by, between or among the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and/or 20th Respondents in respect of the ownership, management, control and maintenance of or other interests in or rights over Nakasero Market, Nakivubo Shauriyako Market, St. Balikuddembe Market (formerly Owino Market), Nakawa Market and Constitution Square (formerly City Square) in Kampala City between 1st January 2000 and 31st December 2011 were illegal, unconstitutional, null and void ab initio for having been concluded without obtaining legal advice and approval from the 9th Respondent in contravention of Article 119(5) of the Constitution;***

(ii) **THAT** the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and 20th Respondents jointly or severally contravened or threatened the right of the people of Uganda to live free from corruption and abuse or misuse of power and public resources by politicians and public officers as guaranteed under National Objective XXVI and Articles 8A, 17(1)(i), 20(1)(2), 21, 25(1), 41, 36, 38, 45, 164, 196, 201 and 233 (2)(b) when they purported to conclude, extend or execute all or any of the lease and management agreements and other contract-like documents described in (i) above without obtaining the appropriate authorization of KCC, its Mayor and the relevant division councils as specified by the relevant laws and regulations relating to local governments, without complying with procurement and disposal laws and regulations then in force, and without obtaining legal advice and approval from the 9th Respondent;

(iii) **THAT** the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and 20th Respondents jointly or severally contravened or threatened the fundamental rights of the people of Uganda guaranteed by Article 21(1) and (2) of the Constitution when they purported to conclude, extend or execute all or any of the lease and management agreements and other contract-like documents described in (i) above without complying with basic principles of public procurement and disposal prescribed by the relevant laws and regulations then in force;

(iv) **THAT** the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and 20th Respondents jointly or severally contravened or threatened the fundamental rights of the people of Uganda guaranteed by Article 41 of the Constitution when

they purported to conclude, extend or execute all or any of the lease and management agreements and other contract-like documents described in (i) above without complying with basic principles of public procurement and disposal prescribed by the relevant laws and regulations then in force;

5 (v) **THAT** the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and 20th Respondents jointly or severally contravened or threatened the right of the people of Uganda to live free from corruption and abuse or misuse of power and public resources by politicians and public officers as guaranteed under National Objective XXVI and Articles 8A, 17(1)(i), 20(1)(2), 21, 25(1), 41,
10 36, 38, 45, 164, 196, 201 and 233(2)(b) of the Constitution when they purported to conclude, extend or execute all or any of the lease and management agreements and other contract-like documents described in (i) above without complying with basic principles of public procurement and disposal prescribed by the relevant laws and regulations then in force;

15 (vi) **THAT** the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and 20th Respondents jointly or severally contravened Article 237(8) of the Constitution when they purported to conclude, extend or execute all or any of the lease and management agreements and other contract-like documents described in (i) above without obtaining prior written consent from the existing market
20 vendors or other tenants/users of the properties complained of or from their families or spouses, and without giving them or their associations prior notice, sensitization or the first option to make such acquisition, and without complying with other procedures prescribed by the Land Act relating to security of occupancy for lawful or bonafide occupants;

(vii) **THAT** the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and 20th Respondents jointly or severally contravened Articles 20(1)(2), 32(1), 40(2) and 26(1)(2) of the Constitution on account of their failure or refusal to proactively take affirmative action to empower existing market vendors or other tenants/users of the Impugned Properties to acquire enhanced property and business rights or interests in or over the said properties, and also on account of their failure to give prompt payment of fair and adequate compensation to existing market vendors or other tenants/users of the Impugned Properties prior to the purported conclusion, extension or execution of all or any of the lease and management agreements and other contract-like documents described in (i) above;

(viii) **THAT** any and all lease and management agreements or other contract-like documents by whatever name called purportedly concluded, extended or executed by, between or among the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and 20th Respondents in respect of the ownership, management, control and maintenance of or other interests in or rights over Nakasero Market, Nakivubo Shauriyako Market, St. Balikuddembe Market (formerly Owino Market), Nakawa Market and Constitution Square (formerly City Square) in Kampala City between 1st January 2000 and 31st December 2011 were illegal, unconstitutional, null and void ab initio on account of the contraventions of the Constitution and the law specified in (ii), (iii), (iv), (v), (vi) and (vii) above;

(ix) **THAT** any and all letters of comfort, guarantee, indemnity, credit or assurance, promissory notes, cash payment orders, and other financial

instruments, agreements, contracts, covenants and like documents by whatever name called purportedly concluded or executed by, between or among the 8th, 10th, 12th, 13th, 15th and/or 16th Respondents in respect of loans or credit facilities advanced by the 13th, 14th, 15th and /or 16th Respondents to the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents between 1st January 2000 and 31st December 2011 and on the pretext of assisting Government to expedite compensation of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents were illegal, unconstitutional, null and void ab initio for having been concluded without obtaining legal advice and approval from the 9th Respondent contrary to Article 119(5) of the Constitution;

(x) **THAT** the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th Respondents jointly or severally contravened Articles 154(3), 160, 163(3)(a)(b) and 164 of the Constitution when, on the pretext of expediting the implementation of Government's proposals for compensation of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents in respect of the properties complained of in this Petition, they contemplated, rationalized, applied for, facilitated and/or authorized the withdrawal of funds from the Consolidated Fund without obtaining the approval of the Auditor General and without complying with the relevant provisions of the Public Finance and Accountability Act, 2003;

(xi) **THAT** the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th Respondents jointly or severally contravened Articles 154(1)(b), 154(2), 156, 159(5), 160 and 164 of the Constitution when, on the pretext of expediting the implementation of Government's proposals for

compensation of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents in respect of the properties complained of in this Petition, they contemplated, rationalized, applied for, facilitated and/or authorized the withdrawal of funds from the Consolidated Fund or other public funds or public accounts of Uganda other than the Consolidated Fund or elsewhere without the issue of such monies being authorized by Parliament through an Appropriation Act, a supplementary Appropriation Act or a resolution of Parliament;

(xii) **THAT** the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th Respondents jointly or severally contravened Articles 159(2), 159(3), 159(4), 159(5), 159(6), 160 and 164 of the Constitution when, on the pretext of expediting the implementation of Government's proposals for compensation of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents in respect of the properties complained of in this Petition, they contemplated, rationalized, applied for, facilitated and/or authorized the borrowing, guaranteeing raising or giving of loans or grants that were obtained by the 1st, 2nd, 3rd, 4th, 5th and/or 6th without Parliamentary approval and without complying with the relevant provisions of the Public Finance and Accountability Act, 2003 and other laws and procedures intended to control the raising or giving of loans, grants and guarantees by or on behalf of Government or its agencies and organs;

(xiii) **THAT** the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th Respondents jointly or severally contravened Articles 162(2) of the Constitution when, in anticipation of Parliamentary approval and the

Auditor General's clearance of Government's proposals for compensation of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents in respect of properties complained of in this Petition, they directly or indirectly co-opted or otherwise contemplated, rationalized, facilitated and/or authorized the co-opting of the Central Bank in a spurious and unconstitutional loan-and-guarantee scheme aimed at granting them more favourable treatment than is contemplated by the Constitution and the law;

(xiv) **THAT** the 8th and 12th Respondents jointly or severally contravened Article 162(2) of the Constitution when they approved and acted in accordance with illicit, gratuitous and unconstitutional directives, plans or proposals made by the 1st, 2nd, 3rd, 4th, 5th, 6th, 9th, 10th, 11th, 13th, 14th, 15th and/or 16th Respondents with the object of co-opting the Central Bank in a spurious and unconstitutional loan-and-guarantee scheme designed purposely to gain access to the Consolidated Fund and other public funds of Uganda prematurely or in anticipation of Parliamentary approval and the Auditor General's clearance of Government's proposals for compensation of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents;

(xv) **THAT** the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th Respondents jointly or severally undermined the Rule of law and contravened or threatened the right of people of Uganda to live free from corruption and abuse or misuse of power and public resources by politicians and public officers as guaranteed under National Objective XXVI and Articles 8A, 17(1)(i), 20(1)(2), 21, 25(1), 41, 36, 38, 45, 164, 196, 201 and 233(2)(b) when, on the pretext of expediting the

implementation of Government's proposals for compensation of the 1st, 2nd, 3rd, 4th and/or 6th Respondents in respect of the properties complained of in this Petition, they failed to conform to the Constitution and scandalously allowed themselves to be used to further the interests of the Presidency and/or the interests of the 1st, 2nd, 3rd, 4th, 5th, 6th, 13th, 14th, 15th and/or 16th Respondents or their associates in the public or private sector in a manner detrimental to the interests of the people of Uganda;

(xvi) **THAT** the purported compensation of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents by the 7th, 8th, 9th, 10th, 11th and/or 12th Respondents in respect of the properties complained of in this Petition was not only illegally, unconstitutional, null and void *ab initio*, but also amounted to an intolerable abuse or misuse of power and public funds;

(xvii) **THAT** the 8th, 13th, 14th, 15th and 16th Respondent Banks jointly or severally contravened Articles 119(5), 154(1)(b), 154(2), 154(3), 156, 159(2), 159(3), 159(4), 159(5), 159(6), 159(7), 160, 163(3)(a)(b) and 164 of the Constitution when they purported to call on, enforce or implement letters of comfort, guarantee, credit or assurance and other contract-like documents that had been unlawfully issued by the 8th and 12th Respondents on the pretext of assisting Government to expedite compensation of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents and in respect of monies lent or given to the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents by the 13th, 14th, 15th and/or 16th Respondent Banks which had been unlawfully secured by public funds;

(xviii) **THAT** the purported compensation of the 13th, 14th, 15th and/or 16th Respondent Banks by the 8th and the 12th Respondents in respect of the impugned guarantee, indemnity or assurance agreements or other contact-like documents concluded by, between or among the 8th, 12th, 13th, 14th, 15th and/or 16th Respondents purportedly to secure the repayment of monies lent or given to the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents by the 13th, 14th, 15th and/or 16th Respondent Banks was not only illegal, unconstitutional, null and void ab initio, but also amounted to an intolerable abuse or misuse of power and public funds;

(xix) **THAT** the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th and 20th Respondents jointly or severally unjustly enriched themselves or their associates in the public or private sector at the expense of the people of Uganda;

(xx) **THAT** the 1st, 10th, 11th, 12th, 17th, 18th, 19th and 20th Respondents jointly or severally contravened Article 164(2) of the Constitution and Section 15(7) of the Leadership Code Act, 2002 when they directed or concurred in the use of public funds contrary to laid down procedures described in this Petition and, as a result of such contravention, each of the 1st, 10th, 11th, 12th, 17th, 18th, 19th and 20th Respondents is personally liable to make good any and all losses arising from his or her conduct complained of in this Petition;

(xxi) **THAT** the impugned conduct of the 1st, 10th, 11th, 12th, 17th, 18th, 19th and 20th Respondents contravened the Oath of Allegiance and/or the oaths of their respective offices which require them to uphold, defend and conform

to the Constitution, and are therefore liable to be dismissed from their respective political or public offices;

5 (xxii) **THAT** *the impugned conduct of the 1st, 10th, 11th, 12th, 17th, 18th, 19th and 20th Respondents contravened Articles 17(1)(d), 17(1)(e) and 17(1)(i) of the Constitution and Sections 13 of the Leadership Code Act, 2002 which require each of them to protect and preserve public property entrusted to his or her respective office, and are therefore liable to be dismissed from their respective office;*

10 (xxiii) **THAT** *the 1st, 10th, 11th, 12th, 17th, 18th, 19th and 20th Respondents are not fit to hold any political or public office in Uganda from a period of 5 (five) years from the date of Judgments;*

15 (xxiv) **THAT** *the 1st, 2nd, 3rd, 4th, 5th, 6th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th and 20th Respondents are not fit and proper persons to participate in public procurement and disposal processes or like businesses with or on behalf of Government or any of its organs and agencies, including the Central Bank, for a period of 5 (five) years from the date of Judgment;*

(b) Grants the following orders:

- 20 (i) *An order for annulment or cancellation of any and all lease and management agreements or other contract-like documents by whatever name called purportedly concluded, extended or executed by, between or among the 1st,*

2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and/or 20th Respondents in respect of the ownership, management, control and maintenance of or other interests in or rights over Nakasero Market, Nakivubo Shauriyako Market, St. Balikuddembe Market (formerly Owino Market), Nakawa Market and the Constitution Square (formerly City Square) in Kampala City between 1st January 2000 and 31st December 2011;

(ii) An order for annulment or cancellation of any and all letters of comfort, guarantee, indemnity, credit or assurance, promissory notes, cash payment orders, and other financial instruments, agreements, contracts, covenants and like documents by whatever name called purportedly concluded or executed by, between or among the 8th, 10th, 12th, 13th, 14th, 15th and/or 16th Respondents in respect of loans or credit facilities advanced by the 13th, 14th, 15th and/or 16th Respondents to the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents between 1st January 2000 and 31st December 2011 and on the pretext of assisting Government to expedite compensation of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents;

(iii) An order for annulment or cancellation of purported compensation of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents by the 7th, 8th, 9th, 10th, 11th and/or 12th Respondents in respect of the properties complained of in this Petition;

(iv) An order for annulment or cancellation of purported compensation of the 13th, 14th, 15th and/or 16th Respondents by the 8th and 12th Respondents in respect of the guarantee, indemnity or assurance agreements or other contract-like documents complained of in this Petition.

- (v) An order for refund or payment of all monies previously given to the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents by or under the authority of the 7th, 8th, 9th, 10th, 11th and/or 12th Respondents on the pretext of compensation in respect of the properties complained of in this Petition, together with interest thereon at 30% p.a., to the Uganda Consolidated Fund Account no later than 6 (six) months from the date of Judgment;
- (vi) An order for refund or payment of all monies previously given to the 13th, 14th, 15th and/or 16th Respondents by the 8th and 12th Respondents in respect of the guarantee, indemnity or assurance agreements or other contract-like documents complained of in this Petition, together with interest thereon at 30% p.a., to the Uganda Consolidated Fund Account no later than 6 (six) months from the date of Judgment;
- (vii) An order directing the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents jointly or severally to pay an additional sum of **UGX 994,039,186/= (Uganda Shillings Nine Hundred Ninety Four Million Thirty Nine Thousand One Hundred Eighty Six Only)** together with interest thereon at 30% p.a., to the Uganda Consolidated Fund Account no later than 6 (six) months from the date of Judgment pursuant to the findings and recommendations of the Auditor General;
- (viii) An order directing the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th and 20th Respondents jointly or severally to pay **UGX 169, 514, 359, 886/= (Uganda Shillings One Hundred Sixty Nine Billion Five Hundred Fourteen Million Three Hundred Fifty Nine Thousand Eight Hundred Eighty Six Only)** as general and exemplary damages to the Uganda

Consolidated Fund Account for the loss caused to the people of Uganda by their impugned conduct;

(ix) *A permanent injunction to restrain Government or any of its organs, agencies and functionaries, including the 7th and 8th Respondents or their officers, servants, agents or any of them or otherwise howsoever, from giving or authorizing the giving of any monies, loans, grants or guarantees to all or any of the 1st, 2nd, 3rd, 4th, 5th, 6th, 13th, 14th, 15th and 16th Respondents or their directors, officers, servants, agents, bankers, lenders, assignees, associates, successors-in-title or any of them or otherwise howsoever on the pretext of compensation in respect of the properties complained of in this Petition without obtaining the approval of both the Auditor General and the Legislature in accordance with the Constitution and the law;*

(x) *A permanent injunction to restrain the 8th, 13th, 14th, 15th and 16th Respondent Banks, whether by themselves or their officers, servants, agents or any of them or otherwise howsoever called, from soliciting, negotiating, entering into, concluding, executing, calling on or otherwise enforcing any letters of comfort, indemnity, guarantee, credit or assurance or other agreements, instruments and documents of like nature in respect of the Uganda Consolidated Fund Account or other public accounts or public funds of Uganda or authorizing any of the acts aforesaid without obtaining legal advice and approval from the 9th Respondent and without obtaining approval from the Auditor General and the Legislature in accordance with the Constitution and the law;*

(xi) *An order directing that the 1st, 10th, 11th, 12th, 17th, 18th, 19th and 20th Respondents be dismissed or removed from any and all political or public offices which they presently hold;*

(xii) *An order directing that the 1st, 10th, 11th, 12th, 17th, 18th, 19th and 20th Respondents be barred or prohibited from holding any political or public office in Uganda for a period of 5 (five) years from the date of Judgment;*

(xiii) *An order directing that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th and 20th Respondents be barred or prohibited from participating in public procurement and disposal processes, functions or like businesses with or on behalf of Government or any of its organs and agencies, including the Central Bank, for a period of 5 (five) years from the date of Judgment;*

(xiv) *An order granting the costs of this Petition to your Petitioner..."*

The Replies by the Respondents

Most of the Respondents (1st -6th; 7th; 8th; 10th; 11th – 20th) in their answers to the petition, opposed the Petition on the grounds that I shall go into detail later. Some of the Respondents prayed that the declarations sought by the Petitioner not be allowed and the Petition be dismissed with costs. On the other hand, the 9th Respondent (The Attorney General of Uganda) in substance supported the petition in two respects. First, that the contractual arrangements for the city markets and city square were procured unconstitutionally inter alia without the advice and approval of the Attorney General contrary to Article 119 (5) of the Constitution and there for were void ab initio. Secondly, by reason of this non-compliance with the

Constitution, the money paid to the 1st – 6th Respondents through the 13th – 16th Respondents should be refunded. The Attorney General as a result save for the form in which the answer to the Petition was drafted does not object to the jurisdiction of this Court.

- 5 Whereas most of the parties filed scheduling notes, the issues for determination were not fully harmonised so I shall not reproduce them in this Judgment but rather rely on the grounds in the Petition itself.

Representations.

The Petitioner was represented by Mr. Isaac Ssemakadde. Mr David F. K. Mpanga
10 represented the 16th Respondent; Mr. Caleb Alaka and Joseph Kyazze represented the 1st to 6th Respondents; Mr. Dennis Byaruhanga represented the 7th Respondent; Mr. Albert Byamugisha represented the 8th and 12th Respondents; Mr. Philip Mwaka and Patricia Mutesi represented the 9th Respondent; Mr. Dennis Wamala represented the 13th and 15th Respondents; Mr. Nicholas Mwasame (holding brief
15 for Mr. Andrew Kibaya) represented the 14th Respondent and Ms. Ikimaana represented the 20th Respondent. The 10th 17th 18th 19th and 20th Respondents were not in court and were not represented by counsel.

Duty of the Court

Before I delve into this petition, it is important that I recall the Role of a Constitution
20 Court and the principles that guide its decisions.

Article 126 of the Constitution provides that judicial power which is derived from the people shall be exercised by the Courts established under the Constitution in the name of the people and in conformity with law and with the values, norms and

aspirations of the people. In adjudicating cases, the Courts shall, subject to the law, apply certain principles including the concepts that Justice shall be done to all irrespective of their social or economic status, promotion of reconciliation between the parties and the administration of justice without undue regards to technicalities.

With regard to principles of constitutional interpretation Article 137 (1) of the Constitution provides:

"...Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court..."

10 In this Petition it is alleged that certain persons both natural and legal by their actions or omissions acted inconsistently or in violation of the Constitution. As to such actions and omissions Article 137 (2) (b) provides:

"...any act or omission by any person or authority,

...is inconsistent with or in contravention of a provision of this Constitution, may
15 *petition the constitutional court for a declaration to that effect, and for redress where appropriate..."*

As to remedies Article 137 (4) provides:

"...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
20 *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 above provisions set the jurisdiction and parameters for the interpretation by the Constitutional Court. However Jurisdiction is not enough as it is also settled that the Petition so filed must in addition disclose a cause of action. In the case of **Baku Raphael Obudra and Obiga Kania V Attorney General** Constitutional Appeal No 1 of 2003 Justice Mulenga (JSC as he then was recalling his holding in **Ismail Serugo V Kampala City Council & Attorney General** Constitutional Appeal No 2 of 1998) held that a petition 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 alleged to have contravened by the act or omission and prays for a declaration to that effect. In **Wycliffe Kiggundu V Attorney General** Civil Appeal No 27 of 1993 Hon. Justice W.W. Wambuzi (Chief Justice as then was) held that it is not sufficient on the face of it to have an allegation of the breach of or inconsistency of an Article or Articles of the Constitution with any act, omission or law which would have merely fulfilled the requirement to plead so under Article 137 (3) of the Constitution. In other words there must be a controversy involving interpretation before the matter can be referred to the constitutional Court. In **Davis Wesley Tusingwire V Attorney General** Constitutional Petition 2 of 2013 this Court however held:

*“... that a liberal and broader interpretation should be given to a constitutional petition than is given to a plaint in a normal civil suit when determining whether a cause of action has been established (**Baku Raphael Obudra and Another v Attorney General Constitutional Appeal No. 1 of 2003 (SC)**). The same principal applies to subsidiary legislation...”*

It can also be deduced from the decisions of **Serugo; Raphael Baku and Wycliffe Kiggundu** (Supra) that it is evident that the onus to prove that there is a controversy involving interpretation lies with the Petitioner.

At the hearing of the Petition, Mr Alaka (Counsel for the 1st-6th Respondents raised
5 an objection as to the jurisdiction of this Court to hear the Petition. He was supported by Mr. Byaruhanga (counsel for the 7th Respondent), Mr Byamugisha (Counsel for the 8th and 12th Respondents), Mr Wamala (Counsel for the 13th and 15th Respondents), Mr. Mwasame (Counsel for the 14th Respondent) and Mr. Mpanga (Counsel for the 16th Respondent). I shall first address these objections and
10 merge as many of the similar arguments as I can to avoid repeating myself.

Objections as to jurisdiction.

I shall highlight the objections in the order in which they were argued.

Arguments of the first to sixth Respondents.

The first to sixth Respondents in their answer to the Petition put the Court on notice that it would raise five preliminary points of law and objections. These objections were cross cutting on all six issues put before Court by the parties for consideration.

20 I shall broadly outline these objections.

First that the Petition offends the Rules of this Court as the paragraphs prolix, argumentative, lacking in detail and cite Articles of the Constitution that do not exist.

Secondly, that the Petition is misconceived and an abuse of court process as it seeks remedies which can be sought in ordinary suits by way of plaint. The Petition is also brought for the enforcement of rights as opposed to interpretation of a constitutional question.

5 Thirdly, the Petition is vexatious.

Fourthly, that the transaction complained about are of a commercial and not constitutional nature.

Fifthly, that the Petition is bad in law and is barred in law. The Reply goes on to list a number of items namely that the first Respondent was wrongly added to the
10 Petition; the Petition seeks to take over the role of the Inspector General of Government; the Petition relies on a draft report of the Auditor General; the Petition seeks to recover Ug shs 142 billion on the allegations of fraud which should have been tried by ordinary plaint; the Attorney General is estopped from conceding to the Petition when he approved the impugned payments and the
15 Petition seeks remedies that offend the right to compensation of the first to sixth Respondents.

Expounding on these objections, Counsel for the 1st -6th Respondents raised three points. First he submitted that the Petitioner seeks throughout his Petition to enforce the rights of Ugandans to live in a corruption free environment without the
20 abuse of power and or public resources (He highlighted in this regard Para 14 A, 14 B, and 14 C of the Petition). Counsel further elaborated that the rights sought to be enforced were those of equal treatment and none discrimination (Art. 21); the right to information (Art 41); the rights of market vendors, tenants and other users of the impugned properties; and property interests in markets. He further argued that

this Court is not concerned with matters of violation of rights for which the parties seek redress alone and not interpretation. He in this regard referred us to the decisions in **Kikonda Butema Farm Ltd V Attorney General Constitutional Petition No. 10 of 2012** and **Eng. Edward Turyomugendo & other V Attorney General Constitutional Petition No. 25 of 2009**. In this Petition, Counsel argued that Court is nowhere being invited to interpret any article of the Constitution. He argued that the appropriate remedy for the Petitioner would be to seek redress under Article 50 of the Constitution.

Secondly, counsel submitted that the Petition alleges violations of the Constitution and other laws which in itself does not require any constitutional interpretation. He argued that instead of constitutional interpretation, the Petitioner has invited this Court to make various findings of fact. He gave examples like issues raised as to whether there was misuse of Government resources; whether there was violation of Acts of Parliament in the process of awarding the 1st – 6th Respondents compensation and whether there was illegitimate concealment and insider trading in the award of contractual arrangements for the city markets and square. These issues in his view again were for investigation for purposes of enforcement and not interpretation. He relied on the decision of Justice Kenneth Kakuru in the matter of **Mbabali Jude V Kiwanuka Ssekandi Constitutional Petition No 28 of 2012** for the proposition that there is a difference between enforce of constitutional rights and their interpretation.

Thirdly, counsel argued in conclusion that the Petition was in itself incompetent.

Arguments of the seventh Respondent.

The seventh Respondent (KCCA) also filed an answer to the Petition. It pleaded that the Petition is baseless, prolix and offended the Rules of this court. The reply to the Petition however does not deny that the contractual arrangements for the city markets and square at some time existed. The answer however interestingly points out that as a result of litigation in the courts (Para 5 thereof), Victoria international Trading Company (third Respondent) and The Attorney General (Ninth Respondent) owe KCCA the sum of Ug Shs 2,164,029,816 (VAT inclusive) being accumulated outstanding arrears on the contract sum with interest at 15% p.a. (from 7th May 2007) to date.

Kampala City Council in their answer to the Petition (Para 14) concede that some of the contractual arrangements entered into with the second to sixth Respondents were executed without the advice of the Attorney General.

However as to the objections as to the competence of this Petition, counsel for the seventh Petitioner associated himself with the submissions of Counsel for the 1st-6th Petitioners.

Arguments of the eighth and twelfth Respondents

The Bank of Uganda (eight Respondent) and The Governor of Bank of Uganda (twelfth Respondent) filed a joint answer to the Petition and retained the same counsel.

The answer points out affidavit in support of the Petition does not comply with the Rules of this Court because it is argumentative, contains hearsay, narratives and conjectures. It therefore should be struck out.

Secondly, the answer denies that the Petition raises any question for constitutional interpretation. Both Respondents however do not deny that they issued letters of

comfort for the 1st – 6th Respondents but add that they did so as an agent of Government upon the request of the Minister of Finance Planning and Economic Development.

Counsel for the 7th and 8th Respondents on the objections associated himself with the submissions of counsel for the 1st to 6th Respondents. He only added that it was wrong to add Prof Emmanuel Tumusiime Mutebile as Governor to the Petition as the Bank of Uganda is controlled by its Board of Directors.

Arguments of the thirteenth and fiftieth Respondents.

The United Bank of Africa (thirteenth Respondent) and Bank of Baroda (fiftieth Respondent) filed separate answers to the Petition but engaged the same counsel.

The answers for both the United Bank of Africa and Bank of Baroda are similar (Para 8 therefore) and state that the Petition does not disclose a cause of Action against them and is founded on bad faith.

Counsel for the Banks with regard to the objections also associated himself with arguments of counsel for the 1st to 6th Respondents.

Arguments of the fourteenth Respondents.

Orient Bank (fourteenth Respondent) filed an answer to the Petition. The answer states (Para 17 to 19 thereof) that the affidavit in support of the Petition is incurably defective and is full of hearsay and is argumentative. The answer further states (Para 20 thereof) that the Petition does not disclose a cause of action and or any issue for constitutional interpretation.

Counsel for the Bank did not add to those pleadings in argument.

Arguments of the sixteenth Respondent.

Tropical Bank (sixteenth Respondent) filed an answer to the Petition. The answer to the Petition states as a preliminary matter (para 4 thereof) that the Petition is misconceived, incompetent, an abuse of court process and offends the rules of pleadings in that it is prolix, argumentative and pleads evidence.

- 5 Counsel for the Bank submitted that this is not one of fact finding but rather interpretation. He argued that this Petition required complex fact finding as it raised allegations of conspiracy which requires proof beyond the ordinary standard of balance of probabilities.

Counsel further argued that it was wrong for the Petitioner to have paragraphs of
10 long narrative and to simply lump sections and articles of the Constitution in the hope that the Court would sort them out. In this regard he referred us to the case of **Perez Kakumu V Attorney General and National Forest Authority** Constitutional Petition No 7 of 2003.

Arguments of the twentieth Respondent.

- 15 Mr William Tumwine (twentieth Respondent) filed an answer to the Petition. The answer to the Petition simply stated (para 12 thereof) that the petition was misconceived and without merit.

Counsel for the twentieth Respondent with regard to the objections as to the competency of the Petition associated herself with the submissions of counsel for
20 the 1st to 6th Petitioner.

Arguments of the ninth Respondent.

The Attorney General of Uganda (ninth Respondent) filed an answer to the Petition. The answer to the Petition states that the Petition is prolix, argumentative and offends the Rules of this court.

The answer to the Petition however goes further to concede that the contractual arrangements for the city markets and square were entered into without the prior approval of the Attorney General; contrary to Article 119 (5) of the Constitution. The Attorney General further concedes the monies transactions leading to the
5 payments to the 1st to 6th Respondents through the 13th, 14th 15th and 16th Respondents contravened the provisions of Article 159 (2) and 119 (5) of the Constitution; Sections 25 of the Public Finance and Accountability Act and Section 29 of the Bank of Uganda Act. The answer to the Petition further states that all these public monies should be returned. The answer to the Petition further states
10 that the 1st, 2nd, 3rd, 4th, 5th, 6th 13th, 14th, 15th and 16th Respondents were unjustly enriched by the impugned transactions and should refund all the monies they received with interest at commercial rate.

Counsel for the Attorney General then adopted their conferencing notes as written submissions which did not raise the issue of this court's jurisdiction.

15 I shall not review the answers to the Petition of the other Respondents who did not bother to appear in person or by counsel though they were all served.

Resolution by the Court of the preliminary objection

I have considered the Petition and the answers to it. I have also considered the submissions of various counsel and the authorities that have provided for which I
20 am grateful.

This Petition is unique in its content and prayers for remedies. It is awash with violation after violation of the Constitution and other statutory laws with regard to the contractual arrangements for the city markets and square. I must however keep sight of the Role of this Court which is interpretation of the Constitution as provided

for under Article 137 of the Constitution. I shall now recall further decisions on the issue of the jurisdiction of this Court. The Constitutional Court no doubt under Article 137 (3) has concurrent jurisdiction with those of other courts. However in the **Tinyefuza Petition** (Supra; SC) Justice George Kanyeihamba made an important distinction as how this concurrent jurisdiction would come into play and found:

*“...in other words, the concurrent original jurisdiction can only arise and be exercised if the Petition also raises questions as to the interpretation or construction of the constitution as **the primary objection (sic) or objective** of the Petition. To hold otherwise might lead to injustice and in some situation manifest absurdity...”*

(Emphasis ours). The learned Justice made it clear that it could not have been the intention of the framers of our Constitution to have all infringements of the Constitution to have direct access this busy court. He went on to hold:

“...this Court must give guidelines on those matters by construing the constitution, so as to avoid these absurdities and direct such suits and claims to lower tribunals, Magistrates Courts and, where appropriate to the High Court...”

In the **Jude Mbabali** Petition (Supra; COA) the Constitutional Court found that there was nothing in it that required constitutional interpretation because it had been alleged that the Respondent in that petition violated provision of the Leadership Code and Parliamentary Elections Act 2008. In that matter Justice Kenneth Kakuru in the lead Judgement held:

“All laws in this country emanate from the Constitution. Violation of any law by an act or omission directly or by implication is also a violation of the Constitution. The violation of any law must be addressed to and settled by an appropriate court or tribunal and not by this court, unless there is an issue for constitutional

interpretation. This Court may however, having resolved the issue requiring constitutional interpretation, grant any appropriate remedy...”

In this Petition, I find a lot of similarities with the **Jude Mbabali** Petition (Supra, COA). Without going to each and every violation, it is clear that there is a pattern
5 alleged violations with regard to the contractual arrangements for the city markets and square. The most striking pattern is as follows. Not obtaining the approval of the Attorney General for the said contractual arrangements contrary to Article 119 (5) of the Constitution. Not complying with the Land Act (Cap 227), the Public Finance and Accountability Act 2003, the Local Government Act (Cap 243) and its
10 Regulations, and the Leadership Code Act 1992. It has been argued by Counsel for the Petitioner that by reason of this statutory violations there were also Constitutional violations that made the concluding of the said contractual arrangements and the compensation given thereafter consequent upon their termination null and void. Indeed the remedies prayed for include the annulment
15 or cancellation of all the contractual arrangements for the city markets and square; the annulment or cancellation of the subsequent compensation given to some of the Respondents; the refund of such monies with interest to the Uganda Consolidated Account; damages; a permanent injunction against any further compensation payments being made and barring of public officers involved from
20 holding public office. In all this I do not see questions for constitutional interpretation. There is no doubt that these allegations of violations, serious as they may sound, if proved directly or by implication amount to violations of the Constitution; but in my view what falls short in the claims is the need for constitutional interpretation. The onus to show that the claims raise a question for
25 constitutional interpretation lies with the Petitioner. There is indeed a case to be

made that this Petition as it was filed is problematic as several counsel for the Respondents have argued. There are parts of this Petition which are argumentative, prolix, lacking in detail in ways that offend the rules of this court.

The above notwithstanding these type of contradictions within a Petition were addressed by the Supreme Court in the appeal of **Centre for Health, Human Rights and Development (CEHURD) and 3 others Vs Attorney General Constitutional Appeal No 01 of 2013**. In that constitutional appeal Justice Bert Katureebe (CJ) held “... the petition was clumsily drafted and a mixed bag of all sorts of allegations...”

Justice Katureebe observed that some of these allegations could have been litigated in the High Court. He however cautioned as follows:-

“...the Constitutional Court would be right to reject that type of allegation. But the court has to take care not to throw out the baby with the bath water as the saying goes...”

In the same constitutional appeal Lady Justice C.N.B. Kitumba (JSC) emphatically held:

“...whatever is done in Uganda by anybody or authority if it does not conform to the provisions of the Constitution it can be challenged in the Constitutional Court...”

It would therefore appear to me from the above authorities that even in a badly drafted Petition, as long as the said petition does at some point raise a question for constitutional interpretation then that specific question should be answered by the Court and not “... thrown out with the bath water”. In any event care should be taken to avoid a very technical stance in Constitutional matters as this Court has

previously held *that* a liberal and broader interpretation should be given to a constitutional petition than would be given to a plaint in a normal civil suit when determining whether a cause of action has been established (see **Davis Wesley Tusingwire** *supra*). I shall therefore apply that caution to this Petition.

5 To my mind a careful shift through this Petition shows that it does raise an immediate question as to whether any and all lease and management agreements or other contract-like documents by whatever name called purportedly concluded, extended or executed by, between or among the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and/or 20th Respondents in respect of the ownership, management,
10 control and maintenance of or other interests in or rights over Nakasero Market, Nakivubo Shauriyako Market, St. Balikuddembe Market (formerly Owino Market), Nakawa Market and Constitution Square (formerly City Square) in Kampala City between 1st January 2000 and 31st December 2011 were illegal, unconstitutional, null and void *ab initio* for having been concluded without obtaining legal advice and
15 approval from the 9th Respondent in contravention of Article 119 (5) of the Constitution.

This constitutional question goes to the root of the entire transaction and must be answered. First, because Article 119 (5) of the Constitution provides that no agreement, contract, treaty, convention or document however called where the
20 Government is a party or in respect of which the Government has an interest shall be concluded without the legal advice from the Attorney General except in cases and subject to such conditions as the Parliament by law may provide. Secondly, the ninth respondent (Attorney General) has conceded that such legal advice and approval from the Attorney General was not obtained and yet the said transactions

continued to be implemented. Thirdly, even though counsel for the 1st – 6th respondents has argued that the Attorney General should be estopped from conceding this point because the office of the Attorney General went on to recommend payments to the 1st – 6th Respondents under the same agreements, this argument is totally misconceived. It is not possible in my view to estop a provision of the Constitution. Equity follows the law. This argument was also raised without success in the matter of **Anold Brooklyn & Company Vs Kampala City Council and Attorney General** Constitutional Petition No. 23 of 2013.

I accordingly on this question alone over rule the preliminary objection and proceed to answer that particular question.

Whether any and all lease and management agreements or other contract-like documents by whatever name called purportedly concluded, extended or executed by, between or among the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and/or 20th Respondents in respect of the ownership, management, control and maintenance of or other interests in or rights over Nakasero Market, Nakivubo Shauriyako Market, St. Balikuddembe Market (formerly Owino Market), Nakawa Market and Constitution Square (formerly City Square) in Kampala City between 1st January 2000 and 31st December 2011 were illegal, unconstitutional, null and void *ab initio* for having been concluded without obtaining legal advice and approval from the 9th Respondent in contravention of Article 119(5) of the Constitution.

It is necessary to reproduce the provisions of the Constitution that are alleged to have been violated in order to properly answer the above question.

Article 119 (5) of the Constitution provides that:

“... (5) Subject to the provisions of this Constitution, no agreement, contract, treaty, convention or document by whatever name called, to which the Government is a party or in respect of which the Government has an interest, shall be concluded without legal advice from the Attorney General, except in such cases and subject to such conditions as Parliament may by law prescribe...”

The only exception and exemption to the above Constitutional provision is where parliament may in certain cases provide an exception to the Attorney General giving the said advice. In which case Article 119 (6) of the same Constitution goes on to provide that:

“... (6) Until Parliament makes the law referred to in clause (5) of this article, the Attorney General may, by statutory instrument, exempt any particular category of agreement or contract none of the parties to which is a foreign government or its agency or an international organisation from the application of that clause...”

To my mind these provisions are clear and unambiguous. The legal advice of the Attorney General is necessary in contracts involving the Government unless an exemption is given by Parliament through a statutory instrument signed by the Attorney General.

This Court in 2007 in the matter of **Nsimbe Estates V The Attorney General and The Inspector General of Government** Constitutional Petition No. 2 of 2006 discussed the consequences of non-compliance with Article 119 (5) of the Constitution and held that:

“...With respect to the learned Attorney General, we are of the view that he failed to appreciate the consequences of a constitutional violation. He ought to have known that under article 2 of the Constitution, any law or act that contravenes the Constitution is void to the extent of the contravention. In our judgment, the merger agreement was in contravention of articles 164(3) and 119(5) of the Constitution. The agreement was null and void. The consequence of this holding is that the agreements leading to the formation of Nsimbe Holdings Limited were unconstitutional and therefore the company does not exist in law. It is a non-entity which cannot sue or be sued...”

Indeed the **Nsimbe Estates Petition** (Supra) was followed and applied in May 2014 by Hon. Mr. Justice Christopher Madrama Izama (as he then was) in the case of **Equator Touring Services Ltd V Kampala City Council** HCCS 738 and 278 of 2010 when he held:

“...the Defendant authority (i.e. KCC addition mine) is bound by article 119 (5) of the Constitution is conceded in the submissions of the Plaintiff’s Counsel. Any contract affecting or binding a procuring and disposal entity has to be cleared by the Attorney General under article 119 of the Constitution of the Republic of Uganda. Article 119 (5) of the Constitution of the Republic of Uganda provides that no agreement, contract, treaty or convention or document by whatever name called to which the government is a party or in respect of which the government has an interest, shall be concluded without the legal advice from the Attorney General. This article was considered by the Constitutional Court of Uganda in the case of **Nsimbe Holdings Limited versus Attorney General and Inspector General of Government in Constitutional Petition Number 2 of 2006** when the court considered whether a

contract executed without the input of the Attorney General was a nullity (where the government is a party). The Constitutional Court held that it was unconstitutional for NSSF to enter into a merger agreement without submitting such an agreement to the Attorney General for legal advice. They further held that
5 by virtue of article 2 of the Constitution, any law or act that contravenes the Constitution is void to the extent of the inconsistency and the merger agreement was in contravention of the Constitution and was null and void...”.

The effect of non-compliance with Article 119 (5) of the Constitution was also subject of a reference to this Court in the matter of **Anold Brooklyn & Company Vs
10 Kampala Capital City Authority and the Attorney General Constitutional Petition (it should have read reference) No 23 of 2013**. The unanimous Judgment of the Constitutional Court in April 2014 that:

“...it follows therefore that, since it is admitted in the reference question that there was non-compliance with Article 119 (5) of the Constitution, the contract made in
15 contravention of the Constitution was void under Article 2 (2) of the Constitution...”

That decision is in my view on all fours with the factual situation in this Petition and actually again involves the Kampala City Council Authority and the Attorney General. Again like in this Petition, in the **Anold Brooklyn Reference** (Supra) there was an admission that the contract under which the goods were supplied to
20 Kampala City was not subjected to the advice of the Attorney General as was required by Article 119 (5) of the Constitution.

In my view, there is no side stepping the earlier decisions of this Court in **Nsimbe Estates** (Supra) and **Anold Brooklyn** (Supra) on the legal effect of the non-

compliance with Article 119 (5) of the Constitution. Having found as such, it is necessary to address some questions from the trial courts as to the full interpretation of the **Anold Brooklyn Reference** (Supra) when it comes to its effect on Kampala City Council Authority. In the case of **Engineer Investments Ltd vs Attorney General and Kampala Capital City Authority** Hon. Mr. Justice Christopher Madrama Izama (as he then was) in December 2015, referring to and applying the decision of the **Anold Brooklyn Reference** (Supra) in his ruling on a point of law appeared to depart from his earlier decision in **Equator Trading Services** (Supra) when he held as follows:

"...The reference was not meant to determine what a "government entity" is and therefore the decision is distinguishable. The Constitutional Court was never addressed on the issue of whether Kampala Capital City Authority is "Government" as defined by Article 257 which definition clearly applies to Article 119 (5) of the Constitution of the Republic of Uganda. The word "government entity" does not appear in Article 119 (5) of the Constitution. What appears is the word "Government" and also "where (in the contract) Government has an interest.

There is no appellate decision or a decision of the Constitutional Court as to whether a local government as provided for under Article 176 and 180 of the Constitution of the Republic of Uganda is a "Government" within the meaning of Article 119 (5) of the Constitution of the Republic of Uganda.

In this suit and in my ruling there is no question for reference as far as the clear definition of Article 257 of what is meant by "Government" as compared to local

government is concerned. The word “Government” under Article 119 of the Constitution means the “Government of Uganda” and therefore it means the Central Government as opposed to a local government.

In the premises a local government council has the right to obtain the legal services of a private practitioner or the Attorney General at their sole discretion as Article 119 does not apply to a local government council. In the premises the contract in question in this suit is not null and void by virtue of Article 119 (5) of the Constitution of the Republic of Uganda. Article 119 (5) of the Constitution does not make reference to any agreement, contract, treaty, convention or document by whatever name called, to which a local government is a party or in respect of which a local government has an interest. It only refers to an: “agreement, contract, treaty, convention or document by whatever name called, to which the Government is a party or in respect of which the Government has an interest” (Emphasis added)”.
10

Whereas it is true that in the **Anold Brooklyn Reference** (Supra) the difference between “the Government” and “a local government” was not settled, I think with the greatest of respect, the learned trial Judge got it wrong when he sought to find that Kampala City Council Authority was a local government to which the provisions of Article 119 (5) of The Constitution did not apply. Of course not being the Constitutional Court, the court did not and could not apply the principles of constitutional interpretation as outlined in the decision of **Advocates Coalition for Development** (Supra). In particular I wish to high light two of the said principles of constitutional interpretation.
20

First:

“...No one provision of the Constitution is to be segregated from the others and be considered alone but all provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate a greater purpose of the instrument...”

Second:

“...The entire Constitution has to be read together as an integrated whole and with no one particular provision destroying the other but rather each sustaining the other. This is the rule of harmony, completeness and exhaustiveness, the rule of the paramouncy of the written Constitution...” [See reiteration of principles in the **Anold Brooklyn Reference** above]

If the trial Judge had applied these principles then without a doubt his mind would have been drawn to Article 5 (4) to (6) of the Constitution which provides:

“... (4) Kampala, located in Buganda shall be the capital city for Uganda and shall be administered by the Central Government.

(5) The territorial boundary of Kampala shall be delineated by Act of Parliament.

(6) Parliament shall, by law, make provision for the administration and development of Kampala as the capital city...”

So reading the Constitution as a whole, Kampala City Council Authority is not like other local governments established under Chapter 11 of the Constitution because following the promulgation of the 1995 Constitution, Kampala City is administered by the Central Government. What remained under Article 5 (6) was

for Parliament to enact a law that made provision for the said administration and development of Kampala as the capital city. Until such a time as the new law was enacted, Kampala was to be as administered as a **district** (vide Article 290 of the Constitution) but still distinct from other districts of Uganda (see First Schedule).

- 5 It follows therefore that the Central Government retained its constitutional interest in administering Kampala City Council in the transitional period. In this regard I see no difference in substance in determining what Government interest is between KCCA and NSSF in the decisions discussed above.

Since the **Anold Brooklyn Reference** (Supra) was a decision of this Court in April
10 2014 it will serves no purpose to re analyse the reasoning that led to that decision as it is there for all read and all I have to do for now is to follow it.

Now to the facts of this Petition. They are straight forward. It is alleged that the said contractual arrangements for the city markets and city square were not cleared on the advice of the Attorney General as required under Article 119 (5) of
15 the Constitution. In their reply to the Petition, the Kampala City Council Authority (Respondent No 7) suggests that the sub-lease of the city square to M/s Yudaya International Ltd (5th Respondent) was not subject to Article 119 (5) of the Constitution because it was stopped by extraneous factors. This was also true in respect of the sub-leases of Plot 4B and 7B Nakasero Market; which the City council
20 suggests was not subject to Article 119 (5) of the Constitution. The Kampala City Council Authority however concedes (Para 14 of the Answer to the Petition) that in respect of the management contracts for St Balikuddembe Markets, Nakasero Market and sub-lease of Shuari Yako the advice of the Attorney General was not sought.

Indeed in respect of the Management of Nakasero Market it can also be deduced from the affidavit from the Attorney General in this matter that the Ag. Solicitor General (then Mr. L Tibahura) on the 20th November 2002 had written to the Mayor of Kampala (then H/W John Ssebana Kizito) that they could not say for sure that the third and fourth Respondents (Victoria International Trading Company Ltd and Sheila Investment Ltd) had been duly incorporated at the time and therefore the Solicitor General wrote:

"...I am therefore advising you to stay your action in dealing with the two companies until we conclude our investigations and determine conclusively whether the two companies exist in law and can transact any business with the Council..."

The response from the Lord Mayor the next day on the 29th November 2002 was startling. He stated that the District Tender Board had already awarded the contracts to the third and fourth respondents. He concluded his letter thus:

"...Therefore, having nothing to do but honour the contract, we have allowed the winners to take over the management of the two markets. However, your investigators into the registration of these companies should continue; but, until you find anything to the contrary, it is reasonable to assume that the companies are duly registered..."

In other words the Lord Mayor said the advice from the Attorney General had come too late as they had already awarded the tenders to the third and fourth Respondents without it.

It follows therefore that these particular contracts were not cleared by the office of the Attorney General. The timelines here were interesting as the City Advocate

(then Ms. Karugonjo) had only asked for the advice on the 14th November, 2002 and two replies to that inquiry were made by Asst. Registrar General and the Solicitor General on the 28th and 29th November, 2002. It even appears to me that the inquiries made by the City Advocate were not fully in line with a request for an

5 Article 119 (5) advice from the Attorney General as it should have been. This notwithstanding, clearly in her mind the City Advocate was unsettled about the legal status of the third and fourth Respondents and sought clarity from the Registrar General who then was part of the Attorney Generals Chambers. I am therefore satisfied that on the evidence before this Court that there was non-

10 compliance with the provisions of Article 119 (5) of the Constitution in respect of some of the said contracts; as conceded by the Attorney General and Kampala City Council as a parties to this Petition. As a result of that finding, it would only make sense for me now to give a full interpretation of the implication of this finding as far as Article 119 (5) of the Constitution is concerned. It follows therefore “as night

15 would follow day” that the award of some of the contractual arrangements for the city markets and city square under Article 2 (2) of the Constitution were inconsistent with the Constitution and therefore to the extent of that inconsistency were void and do not exist. In my view, it would have been strange for this court in the face of these admissions to hold that it did not have jurisdiction to find that

20 there was a constitutional breach. What would follow this interpretation would be a matter for enforcement in light of the consequences of the said breach on the transactions that ensued thereafter. In the hearing for enforcement, the parties would then be given an opportunity to be heard and then appropriate remedies given.

I accordingly find that to the extent of the concessions made in the Petition and Answers to the Petition that some contracts were entered into in non-compliance of the provisions of Article 119 (5), I answer this question in the affirmative.

Having answered as I have in the above question which vitiates some of the root
5 contracts and therefore those others (like the banking contracts) made pursuant to them, I do not find it necessary to answer the rest questions as they do not in substance raise questions for interpretation but rather require the resolutions and or determination of disputed facts which in my view are matters for enforcement of the Constitution. The findings I have made in the above constitutional question
10 clearly will impact on all the remaining questions put before us. Those other questions and remedies should be brought before an appropriate forum (like the High Court), for enforcement and not just left to be hanging. Indeed the Constitutional Court has made such suggestions before like the Tinyefuza case (Supra) and **Uganda Network on Toxic Free Malaria Control Ltd V Attorney**
15 **General** Constitutional Petition No 14 of 2009. Such a reference to another tribunal should not be regarded as a lost cause because it is there that the remedies can be properly argued for and against by the parties which issues were not fully canvased in these proceedings.

I cannot leave this matter without saying that I am at a loss why the Attorney
20 General having come to a similar conclusion many years before this Petition did not take corrective action?

Remedies.

The Petitioner prayed for a long list of orders for this Court to Grant. Some of the orders sought were quite unique in that they appeared as would be final orders of a trial court. I shall not reproduce them here as there are already listed earlier in this Judgment. However I need to point out that Counsel for the Petitioner was of the view that this court should not just make declarations but rather provide remedies in his words that:

“... catch those who are corrupt and show them that there are consequences (and that) they cannot hide behind legalise and high powered lawyers...”

I understood Counsel for the Petitioner to be saying that he wanted this Court in addition to making final declarations to actually make orders that would punish the corrupt. He argued that declarations without consequences on the corrupt will not help fight corruption. He therefore recommended that this Court’s Rules should be enhanced to achieve this proposed objective.

What then can this court do after making a finding in a Petition? The answer is in Article 137 (4) which provides:

“...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 prayer for the grant of the orders under the Petition fall under the following broad categories:

1. The annulment or cancellation of the contractual arrangements for the city markets and city square for non-compliance with Art 119 (5) of the Constitution [Para (D) (b) (i) of the Petition].
2. The annulment or Cancellation of the all the financial documents by or between the Respondent Banks and the first to sixth Respondents [Para (D) (b) (ii) of the Petition].
3. The annulment or cancellation of the purported compensation of the first to sixth Respondents [Para (D) (b) (iii) of the Petition].
4. The refund of Ug Shs 994,039,186/= given to the first to sixth Respondents as compensation [Paras (D) (b) (iv)-(vii) of the Petition].
5. The payment of Shs 169,514,359,886/= as general and exemplary damages by all the Respondents jointly and severally [Para (D) (b) (vii) of the Petition]. In this regard, the Attorney General (the 9th Respondent is agreement that a refund of all the monies received by the first to sixth Respondents though no figure is given.
6. Permanent injunctions in respect of the financial credits in this transaction [Paras (D) (b) (viii)-(ix) of the Petition].
7. The removal of some of the Respondents from political or public office and ensuring they never again participate in any public procurement and disposal process in Uganda [Para (D) (b) (x)-(xii) of the Petition].
8. An order that costs be granted to the Petitioner.

As to the prayer for the annulment of the contractual arrangements for the city markets and city square, the declarations I have made in this Petition are to the same effect, having found that where the advice of the Attorney General was required but not obtained, then those said contracts were in violation of the Constitution and to that extent were void.

The rest of the orders prayed for (save for costs in this Petition) would then fall in place after the hearing for remedies. In particular it would be difficult to handle the issue of award of damages at this court as these have to be argued and then assessed by court; which was not possible at this stage.

Final Result.

This petition partly succeeds but in order to obtain the appropriate remedy:

I Order

1) That this Petition be referred to the High Court to investigate and determine the appropriate redress and or liability for each of the parties for the constitutional violations which were conceded; that violated Article 119 (5) of the Constitution in this Petition in relation to:

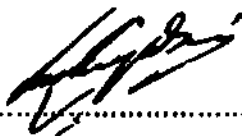
- a) The management contract for St Balikuddembe Market**
- b) The management contract for Nakasero Market and**
- c) The sub-Lease for Shuari Yako Market.**

2) The Attorney General should enforce whatever remedies and or liabilities found against those who violated the powers granted to him under Article 119 (5) of the Constitution.

3) As to Costs, since this Petition raised issues of public interest so I order that each party bear their own costs herein.

5 I SO ORDER.

Dated at Kampala this24.....day of November..... 2020


.....

Hon. Mr. Justice Geoffrey Kiryabwire, JCC

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THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

CONSTITUTIONAL PETITION NO. NO.04 OF 2012

10

LEGAL BRAINS TRUSTPETITIONER

VERSUS

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1. HASSAN BASAJJABALABA
2. HABA GROUP (UGANDA) LIMITED
3. VICTORIA INTERNATIONAL TRADING COMPANY LTD
4. SHEILA INVESTMENTS LIMITED
5. YUDAYA INTERNATIONAL LTD
6. FIRST MERCHANT INTERNATIONAL TRADING COMP
7. KAMPALA CAPITAL CITY AUTHORITY
8. THE BANK OF UGANDA
9. THE ATTORNEY GENERAL OF UGANDA
10. HON. SYDA BBUMBA, MP
11. HON. PROF. KIHIDDU MAKUBUYA, MP
12. PROF. EMMANUEL TUMUSHIME-MUTEBILE
13. UNITED BANK OF AFRICA (UGANDA) LTD
14. ORIENT BANK LTD
15. BANK OF BARODA (UGANDA) LTD
16. TROPICAL BANK (UGANDA) LTD
17. MR. JAMES SSEGANE
18. MRS. RUTH KIJAMBU
19. MR. GORDON MWESIGYE
20. MR. WILLIAM TUMWINE

RESPONDENTS

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA/ JCC
Hon. Mr. Justice Geoffrey Kiryabwire, JA/ JCC
Hon. Lady Justice Elizabeth Musoke, JA/ JCC
Hon. Mr. Justice Cheborion Barishaki, JA/ JCC
Hon. Mr. Justice Stephen Musota, JA/ JCC

JUDGMENT OF JUSTICE KENNETH KAKURU, JA/ ICC

I have had the benefit of reading in draft the Judgment of my able and learned brother His Lordship Hon. Geoffrey Kiryabwire, JA.



5 He has ably set out the introduction and background to his petition. He has set out the issues and grounds the petition requires us to determine, including the declarations and remedies sought. He has also set out the representations of Counsel and the duty of this Court.

10 When this petition was called for hearing Counsel for the respondents objected to the petition contending that, this Court lacks jurisdiction to entertain it, among others. The details of the objections are set out clearly and eloquently in the Judgment of my brother Kiryabwire, JA.

The question we are required to answer in the preliminary objections to this petition is whether the petition, in form, complies with the law sufficiently for us to
15 entertain it.

The second is whether this Court is clothed with jurisdiction under *Article 137* of the Constitution to entertain this petition,

I have carefully read the petition and the replies thereto. It may appear wanting in form. However, the issues stated and raised therein are so important that they
20 override technical requirements of form. See: *Commissioner of Prisons exparte Matovu, Kizza Besigye vs Yoweri Kaguta Museveni & Another, Supreme Court Election Petition No. 1 of 2001*. See also *Article 126 2(e)* of the Constitution. I would dismiss all the objections as to form without hesitation.

The second question is whether the petition raises issues for constitutional
25 interpretation as required under *Article 137 3(b)* of the Constitution which stipulates that:-

"(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



5 (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."

10 In *Attorney General vs Major General David Tinyefunza, Constitutional Appeal No.1 of*
1997. The Supreme Court observed and held that:-

"The Constitutional Court has no original jurisdiction merely to enforce
rights and freedoms enshrined in the Constitution in isolation to
interpreting the Constitution and resolving any disputes as to the
interpretation of its provisions".

15 This decision was followed in *Serugo vs Kampala City Council and Attorney General,*
Constitutional Petition No. 14 of 1997. In which the Supreme Court (per Mulenga JSC)
held that:-

20 'Applications for redress can be made to the Constitutional Court only in
a petition under Article 137 brought principally to interpret the
Constitution. It is the provision in clauses 3 and 4 of Article 137 that
empower the Constitutional Court, when adjudicating on a petition for
interpretation of the Constitution to grant redress where appropriate.'

In *Charles Kabagambe vs U.E.B, Constitutional Petition No. 2 of 1999,* this Court held
that:-

25 'A person who seeks to enforce a right or freedoms guaranteed under the
Constitution, but whose claims does not call for interpretation of the
Constitution has to apply to other competent Court.'

Where a petition has been filed seeking any redress premised on breach of any
provisions of the Constitution but not involving its interpretation, this Court has



5 rightly in my view declined to entertain it. However, if the unconstitutional acts complained of require the Court to first interpret the Constitution before resolving them, then this Court has jurisdiction to hear and determine the matter and may grant any appropriate remedy.

10 In *Ismail Serugo* (Supra) the petitioner was complaining of unconstitutional acts committed against him by employees of the now defunct Kampala City Council (KCC). These acts included arresting, charging, convicting and sentencing the petitioner to imprisonment in respect of facts that did not constitute a criminal offence under any law.

The Supreme Court reversing the decision of this Court held that:-

15 *'Having regard to the pleadings in the instant case, it is obvious that one of the issues would have to be whether an act violating a right guaranteed under the Constitution is inconsistent, with or in contravention of the Constitution if it is committed by a judicial officer in the exercise or purported exercise of a judicial function... the Constitutional Court had jurisdiction over the instant case*
20 *because it involves interpretation of the Constitution, a fact which is also the basis of the earlier holding that the petition discloses reasonable cause of action under Article 137'.*

This is in contrast with *Charles Kabagambe vs UEB* (supra) in which the petitioner was seeking redress from the Constitutional Court following the termination of his
25 employment by the respondent. This Court found that was nothing in the petition requiring the interpretation of the Constitution.

Similarly in *Jude Mbabali vs Edward Kiwanuka Ssekandi, Court of Appeal, Constitutional Petition No. 0028 of 2012* this Court declined to entertain the petition citing lack of jurisdiction. It was the Court's view that the petition was nothing more



5 than a disguised election petition which had earlier been dismissed by the High Court against the petitioner in favour of the respondent.

In Uganda Network on Toxic Free Malaria Control Ltd vs Attorney General Constitutional Petition No. 14 of 2009, this Court found that it lacked jurisdiction to entertain the petition the reason being that, there was no controversy that required
10 interpretation of the provisions of the Constitution. It was an action relating to public health and the right to a clean and a healthy environment that related to the enforcement of the law and the protection of rights without any controversy as the unconstitutionality of the alleged facts or the law.

In Engineer Turyomugyendo and 2 others vs Attorney General and 2 Others Constitution Petition No. 50 of 2011. This Court held that, the petition was an
15 employment dispute that raised no controversy over the provisions of the Constitution and as such it had lacked jurisdiction to entertain it.

In Dr. Maurice Alex Muhwezi & Another vs Busitema University Constitutionalpetition No. 50 of 2011 the petition was similarly dismissed by this Court having found that it
20 raised no issues for Constitutional interpretation. The issues in that petition were found to relate to employment dispute between the parties with no controversy that required the interpretation of the provisions of the Constitution.

In all the above cited petitions in which this Court held that it lacked jurisdiction, the remedies sought by each of the petition could be obtained in other competent
25 Courts. The issues regarding the provisions of the Constitution in those petitions could be resolved by applying the relevant constitutional provisions. The Courts before which those disputes would be presented would interpret and apply the relevant constitutional provisions there being no controversy in that aspect.



5 The question we are required to answer here is whether in this case the petition falls in the category of *Serugo vs Kampala City Council* or that of *Charles Kabagambe vs UEB* and the other similar petition set out above.

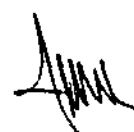
The petitioner is a civil society organization engaged in fostering good governance and observance of constitutionalism. This invaluable includes the role of holding
10 Government organs and agencies accountable to the people of Uganda. Civil Society organizations such as petitioner have sprung up all over the world to champion human rights, good Government and democracy.

The petitioner contends in the petition that the Government failed in its duty to protect public resources, permitting by neglect, omission or willful connivance the
15 loss of millions of United States dollars through a sham compensation scheme to the 1st respondent and his companies.

They contend that, the executive arm of Government acting through Ministers, Local Government officials the Central Bank and various Commercial banks caused financial loss of public funds amounting to millions of United States dollars,
20 through a well-planned, well executed, well-coordinated, illegal, grand corruption scheme for their benefit.

The petitioner describes the conduct of the respondents as arbitrary, high handed, outrageous, disgraceful and heinous. Further that, the respondents jointly and severally acted in a manner detrimental to the public good, public welfare and
25 undermined good governance and the rule of law. The respondents, it was contended violated the right of the people of Uganda to live in a country free from corruption, abuse of power, misuse and plunder of public resources by public officers who wield power and hold public offices.

The petitioner seeks a number of declarations set out in the Judgment of Kiryabwire,
30 JA/JCC. I have found no reason to reproduce them here.



5 I must state from the onset that, having carefully read the petition and the answers thereto, I find that, the petition is neither frivolous nor vexatious. It is not misconceived neither is it an abuse of Court process.

There are a number of objections raised against the petition by almost each of the respondents. They all relate to form and not to substance. They are an attempt to
10 block this Court from hearing the petition on its merits. I reject them as they all have neither merit nor substance.

The citizens of Uganda have a right to inquire into the affairs of Government, firstly, through regular free and fair elections, thereafter, regularly through their elected representatives at all levels up to the National Assembly. Their rights and role does
15 not stop there. For many times their representatives have failed them, we need not to look far. See:- *Consolidated Constitutional Petition No. 49 of 2017, Male Mabirizi and 4 Others versus Attorney General* in which this Court had to annul a constitutional amendment that had been passed by Parliament in total disregard of the Constitution. In that petition Parliament had unconstitutionally extended its
20 term of office and that of local governments from 5 to 7 years. The Supreme Court upheld the decision of this Court in that regard.

In any democracy accountability to its citizen is key in every aspect, but more so in respect of public funds. Citizens have a right to challenge unconstitutional actions of the executive and the legislature. This extends to polices and laws. See:- *Thorson vs Attorney General of Canada [1915] 1 SCR 138. Nova Scotia Board of Censors vs Mac*
25 *Neil [1976] 2 SRC 265.*

In *Major General David Tinyefuza vs Attorney General* (Supra), the petitioner was seeking redress for what he considered as violation of his fundamental right to freedom from forced labour among others. But before this Court could determine
30 the remedy sought, it was first required to interpret the constitutional question whether a serving army officer could resign his commission and leave the armed



5 forces without permission from Commander In-Chief. The Court found it had jurisdiction under *Article 137 (3)* to determine that petition.

In *Centre for Health, Human Rights and Development and 3 Others vs Attorney General; Supreme Court, Constitutional Appeal No. 1 of 2013*, this Court declined to entertain a petition by civil society organization seeking to enforce the citizens' right
10 to health. The petitioners were seeking declarations regarding women's right to maternal health. Further, the petition demanded that Government provides its citizens with adequate maternal health care as a fundamental right. This Court found that the petition did not raise any issues for constitutional interpretation.

The petitioners appealed the decision to the Supreme Court. The Supreme Court
15 faulted this Court for having declined to entertain the matter on account of lack of jurisdiction. The Supreme Court held:-

Per. Hon. Dr. Esther Kisaakye, JSC:-

*I now wish to address myself to the Constitutional Court's reasoning that the Petitioners should have gone to the High Court. This, in my view, is a self
20 defeating argument. If indeed the political question doctrine precluded the Constitutional Court from questioning Government's actions or inactions, how then could the High Court exercise its powers under Article 50 or Section 33 of the Judicature Act or under the Government Proceedings Act, without being confronted with the political question issue in a similar
25 manner? As I have already observed, the jurisdiction of the Constitutional Court under Article 137 is not exclusive to just interpretation. (Attorney General v. David Tinyefuza, (supra).*

Other than making a declaration sought under Article 137 (3), the Court may grant an order for redress under Article 137(4), if it considers that



5 there is need to do so or refer the matter to the High court to investigate
and determine the appropriate redress.

A petitioner cannot therefore be faulted for seeking redress under his or
her Petition filed under Article 137 (3). This is especially so, where the
petitioner has in the petition sought for both a declaration and redress.
10 Seeking redress does not make a Petition bad in law.

If the Constitutional Court felt that it could not grant any redress, it should
have dealt with the part of the petition seeking a declaration/interpretation
and referred the matter of redress to the High Court. This is because the
Constitutional Court has a legal and mandatory duty to adjudicate on any
15 matter dealing with the interpretation of the Constitution.

It is not a requirement under the Constitution that in order for a person to
seek redress, the Petitioner must have suffered a personal legal grievance.
The petitioner, in my view, need not show that he or she has experienced or
20 is experiencing or is under the threat of experiencing harm based on the
challenged law, act or omission. The grievance extends beyond a petitioner
directly aggrieved by any act or omission to petition Court. On the other
hand, seeking redress in the High Court presupposes that the petitioner
suffered a grievance

25 I would therefore find that although the political question doctrine has
limited application in Uganda, the Constitutional Court erred in law when it
struck out the appellants' Petition without hearing it on its merits on
grounds that they had no jurisdiction and that the Petition raised political
questions. I would therefore allow ground 1 and 3 of appeal.



5 On his part Hon. G.M Okello JSC held:-

10 *The Petition clearly alleges that certain acts and omissions of the Government and its workers in the health sectors are inconsistent with or in contravention of some named provisions of the Constitution. These allegations raise questions of Constitutions interpretation which fall within the jurisdiction conferred on 1 Constitutional Court by Clause I of Article 137 of the Constitution.*

See:-Ismail Serugo vs KCC & A.G; SCCA NO.2 of 1998.

Hon C.N.B Kitumba Ag. JSC had this to say:-

15 *I agree with her reasoning and conclusion. The petition should be returned to the Constitutional Court for hearing and determination on merit and each party should bear its own costs.*

20 *I would, however, like to add for emphasis that the supremacy of the constitution is clearly provided for in Article 2 of the Constitution and that it has binding force on all authorities and persons throughout Uganda.*

Article 137 of the Constitution gives the Constitutional Court the mandate to deal with all questions of constitutional interpretation.

Sub article 3 there provides:

(3) A person who alleges that-

- 25
- (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.

This article has been interpreted to mean that when the petitioner alleges anything done by anybody or authority or any omission to be inconsistent with or in contravention of the provisions of the Constitution, the Constitutional Court has the jurisdiction to hear and determine the petition. See Ismail Serugo versus Kampala City Council & Attorney General (Supreme Court Constitutional Appeal No 2 of 1998).

In the instant appeal the petitioners alleged certain acts and omission of the Government regarding the provision of maternal health services to be inconsistent with and in contravention of the constitution and quoted the allegedly contravened articles of the constitution. The petition which contained such pleadings was clearly within the jurisdiction of the Constitutional Court. The court had to hear and determine the petition depending on the evidence provided.

The Constitutional Court declined to hear the petition because of the political question doctrine.

I am of the considered view that whatever is done in Uganda by anybody or authority if it does not conform to the provisions of the constitution it can be challenged in the Constitutional Court. Hence the Constitutional Court has rightly looked into the proceedings of Parliament and declared as null and void Acts of Parliament which were passed without the required quorum as required by law. See Paul Semwogerere and Another Vs Attorney General Const Petition No.5 of 1999.

5 *The same is applicable to policy decisions made by the cabinet. In case such decisions are inconsistent with or in contravention of the Constitution they can be challenged in the Constitutional Court.*

Hon. Katureebe CJ, while concurring with Kisaakye JSC stated as follows:-

10 *From the above Article, it is clear that any person who alleges that the Government or any person or authority has done or omitted to do anything that is inconsistent with or in contravention of the, Constitution, may petition the Constitutional Court for declaration to that effect, and for redress where appropriate.*

15 *The Constitutional Court is not only authorized to hear such petitions, it is equally obliged to resolve the issue.*

20 *The above article emphasizes that the Constitutional Courts doors should remain wide open for the people of Uganda to have access to it at all times for interpretation of the Constitution and declarations and redress where appropriate. This position was the decision of the Constitutional Court in the case of Uganda Association of Women Lawyers & 5 others - vs- Attorney General Constitutional Petition No. 2 of 2003 (the judgment of S.G.Engwau , JA) at page 3.*

25 *Therefore, no single article of the Constitution is ring fenced from interpretation by the Constitutional Court. All acts of parliament or other laws and things done under the authority of any law and all acts or omission by any person or authority, (which includes acts and omission of the executive in relation to rights under the constitution) if*
30 *brought before the Constitutional Court for interpretation as to whether*



5 *they are inconsistent with or in contravention of the Constitution become justiciable under Article 137 of the Constitution.*

10 *Now I should turn to the matters alleged in the petition and determine whether they indeed raise a political question which cannot be inquired into by the court. But before doing so, let me address the question of separation of powers under our Constitution as this was the basis upon which the Constitutional Court rejected this petition when it held that the matters contained in the petition raised issues of policy which was a preserve of the Executive and legislative branches, into which the court could not inquire.*

15 *There does not appear to be such a thing as absolute separation of powers between the executive, the legislature and the judiciary in any democratic society. What is required and provided for is a system of checks and balances. As indeed pointed out by the Supreme Court of India in the case of S.P. Gupta -vs-President of India, (1982) 2 S.C.R.365 at 330, coupling separation of powers with a system of checks and balances is the key to a viable democracy. For this reason, the judiciary should be an active participant in the judicial process ready to use law in the service of social justice through a proactive goal oriented approach.*

25 *Similarly, the South African Constitutional Court in the case of Minister of Health vs Treatment Action Campaign, 2002 (5) SA 721 (CC) recognized that while it is sensitive to and respects the separation of powers among the branches of Government, it will not abdicate the primary duty of the courts to the Constitution and law. The court further held that, to the extent that remedying a violation of individual right constitutes an intrusion into the domain of the executive that is an intrusion mandated by the constitution itself. The Court stated thus:-*



"The primary duty of courts is to the Constitution and the law, 'which they must apply impartially and without fear, favour or prejudice. The Constitution requires the state to 'respect, protect, promote, and fulfill the rights in the Bill of Rights'. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it, should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In, so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself."

Under our constitution, the responsibilities and functions are carefully demarcated between the three arms of the state,

Accordingly, Article 79 of the constitution provides, inter alia, that "subject to the provisions of the Constitution, parliament shall have powers to make laws on any matter for the peace, order, development and good governance of Uganda" and "except as provided in the Constitution, no person or body other than Parliament shall have the power to make provisions having the force of law in Uganda without authority conferred by an Act of Parliament". (emphasis added).

This has to be read together with article 137 of the Constitution. Even where Parliament has made law, the Constitutional Court has been vested with powers of review if a person alleges that the law is inconsistent with the Constitution. The political question doctrine and the separation of powers would not arise where the mandate has been given by the Constitution itself. An Act of Parliament will not be inquired into by the Court only if it is consistent with the Constitution. Article 99 of the




5 Constitution provides that ***"the Executive authority of Uganda is vested in the President and shall be exercised in accordance with the Constitution and laws of Uganda."***

10 To me this means that as long as the President or those acting under his authority exercise their powers in accordance with the Constitution, the courts may not interfere with their actions. But the moment a person alleges that those actions or omissions are inconsistent with the Constitution, and then by constitutional command, the Constitutional Court must inquire into the allegation and determine the issue. That
15 would not be interfering with the powers of the executive. It would be part of the system of checks and balances and in fulfillment of the provisions of the Constitution which make the constitution supreme over every person, body or authority. In that type of situation, it is inconceivable that the Government would plead the political question
20 doctrine. The actions or omissions of the Executive are immune from judicial review ONLY in so far as they are made in accordance with the Constitution.

25 In the instant case the petition raises matters touching on the provision of medical services in this country. No one disputes that the Cabinet, under Article III (2) of the Constitution, has the power and mandate ***"to determine, formulate and implement the policies of the Government."*** This includes the policies regarding the provision of medical services. At the same time the Constitution has provided for certain rights to citizens to access medical services.

30 ***Objective No. XIV*** the Constitution states as follows:



5 *"The state shall endeavor to fulfill the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that -*

10 *(c) all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food, security and pension and retirement benefits."*

Further objective XX states as follows:-

15 *"The State shall take all practical measures to ensure the provision of basic medical services to the population" (emphasis added).*

20 *If a citizen alleges that the implementation of that health policy or actions and omissions made under that policy are inconsistent with the provisions of the constitution as given above, then, in my view, the Constitutional Court has a duty to come in, hear the petition and determine whether indeed there is any act that is being implemented which is inconsistent with the Constitution. For example the Court should be able to receive evidence on measures being taken, by Government to satisfy itself that they fall within the stated objective XX.*

25 *The court would have to interpret what amounts to "all practical measures to ensure the provision of basic medical services*

30 *The court should also be guided by Objective I which spell out that "the objectives 'and principles shall guide all organs and agencies of the State, all citizens, organization and other bodies and person in applying or interpreting the Constitution or any other law and in talking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society" (emphasis added).*



5

The court should, in my view, also have to consider Article 8A about the National interest which states that: "Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy"

10

*In paragraph 10 of the petition it is alleged that the acts and omissions stated therein are inconsistent with, inter alia, article 22 of the Constitution with regard to the right to life. In my view the Court would be within its mandate to look into those allegations and make an interpretation of article 22 i.e. what is meant by "**right to life**" in the context of that article, and in relation to the allegation.*

15

*I believe that the court would also have to address the provisions of the Constitution with regard to what constitutes "**fundamental**" and "**other rights**" under chapter 4 of the Constitution. In particular; the court would have to give an interpretation to article 20 (1) which states as follows*

20

(1) "Fundamental rights and freedom of the individual are inherent: and not granted by the State."

25

Where does the right to medical services fall? Is it a fundamental human right that is inherent and not granted by the State?

30

In my view, the court would have to make the necessary interpretations of the above provisions of the Constitution.

To my understanding, the petition raises issues pertaining to what are called social rights. It calls upon the Constitutional court to give the right



5 to health a place in the Constitution. This cannot be done without
interpreting the constitution. What does it mean when the constitution
states that fundamental human rights are inherent and not granted by
the state and yet the petition is about the state failing to provide certain
health services.

10 I do not agree with the Constitutional Court that these are not matters
for Constitutional interpretation. I have already observed that the
petition was clumsily drafted and is a mixed bag of all sorts of
allegations. There are matters such as alleged negligence or rude
15 behavior or incompetence on the part of health staff which can
appropriately be litigated in the High Court. There are known laws that
can handle cases where servants of the Government commit torts and the
Government can be sued under the Government Proceedings Act. It is
inconceivable that any reasonable person would contend that the
20 Government would have a policy of recruiting and deploying negligent or
rude officers. These persons found to be guilty of negligence or
mistreating patients can even be disciplined under the laws of Uganda.
This sort of allegation could not conceivably be one that calls for
interpretation of the Constitution. The Constitutional Court would be
25 right to reject that type of allegation. But the Court has to take care not
to throw out the baby with the bath water, as the saying goes.

30 From the foregoing I am of the view that there is no matter done by the
Executive or by the legislature which may not be a subject of judicial
review if it is, not done in accordance with the provisions of the
Constitution. It would appear to me therefore that the political question
doctrine is of very limited application in Uganda, given the provisions of
our Constitution.



Issue 2

The contention of the Appellants is that even if the Political Question Doctrine is applicable in Uganda, the Constitutional Court improperly interpreted and applied it.

10

They contend that the facts of this case do not fall within the category of cases regarded as nonjusticiable on the basis of the Political Question Doctrine that the Constitutional court adopted an overly broad interpretation of the doctrine ignored the role of judicial review as an integral part of a system of checks and balances within our constitutionally designed Government structure and that the Constitutional Court holding that all health care policy and public, business is solely the discretion of the executive and legislature is found nowhere in the plain text of the constitution.

15

20

The contentions of the Respondents on the other hand are that the constitutional court correctly applied the Political Question Doctrine to the facts of this case because, the petition required the Court to review the general performance of the material health sector and the properly of Government macroeconomic policy of resource allocation to the maternal health sector vis-a- vis other sectors which in their view is the preserve of the legislature and the executive.

25

30

They also contended that the petition the way it is framed does not allow the Court to adjudicate specific acts/omissions, but challenged unspecified incidents involving all health workers and unspecified expectant mothers in all hospitals in Uganda at any given time. That this is abstract and there is no judicially manageable standard to determine such allegations.



5

The Constitutional Court in their decision held that:-

10

'We are in agreement with the Respondent's argument that the petition deals generally with all hospitals, health centers and the entire health sector and broadly cover all expectant mother.'

The Court further held that:-

15

Much as it may be true that, Government has not allocated enough resources to the health sector and in particular the material health care services, this Court is, with the guidance from the

20

above discussion reluctant to determine the discussion to determine the question raised in the petition. The executive has the political and legal responsibility to determine, formulate and implement policies of Government, for inter alia, the good governance of Uganda. This duty is a preserve of the executive and no person or body has power to determine, formulate and implement these policies except in the Executive.

25

This Court has no power to determine or enforce its jurisdiction on matters that require analysis of the health sector Government policies, make a review of some and let on, their implementation. If this court determines the issues raised in the petition, it will be substituting its discretion for that of the executive granted to it by law.

30

The court further held that;

5

"From the foregoing, the issue raised by the petitioners concern the manner in which the Executive and the legislature conduct public business/ issues, affairs which is their discretion and not of this court. This court is bound to leave certain constitutional questions of political nature to the executive and the Legislature to determine"

10

With great respect to the Constitutional Court, I think' they misunderstood what was required of the Court. I do not think the court was required to determine, formulate or implement the health policies of Government! In my view, the court is required to determine whether the Government has provided or taken to the population." In this case, it is maternity services in issue. The allegation by the petitioners is that the Government has failed to do so. If the Court says it has no Constitutional mandate to hear, and determine this allegation within the Constitution, then where does the citizen go.

15

20

In the South African case of Minister of Health and Others vs Treatment Action Campaign, (supra), the Constitutional Court of South Africa, in order to enforce the Government to ensure progressive realization of the rights of pregnant women and their new born children to have access to health services to combat mother -to- child transmission of H.I.V.

25

In the Indian case of Pashim Banga Khet Mazdoor Samity & Ors-vs- State of West Bengal & Anor, (1996) AIR SC 2426 (Supreme Court of India) the Court in order to ensure that in future, proper medical facilities are available for dealing with emergency cases, that Court issued detailed orders that cover policy and resource issues.

30



5 *Finally, in the Tinyefunza case (supra) which was relied upon by Constitutional Court to strike out the petition, Kanyeihamba, JSC himself admitted that the courts will intervene and review legislative measures or administrative decisions when challenged on grounds that the rights or freedoms of individuals are clearly infringed or threatened.*

10 *The above authorities, show that when issues of the State failing its duty to the rights of citizens brought before court for interpretation the courts will not abdicate from determining such issues relying on the political question doctrine.*

15 *It is for the above reasons that I agree that this matter should go back to the Constitutional Court to consider on the merits and in the context of the relevant Constitutional provisions.*

I would also agree that each party bears its own costs as this a matter of great public interest. As the rest of the court agree, the appeal is allowed.

20 *The matter is remitted to the Constitutional Court to determine on the merits. Each party shall bear its own costs in this court and in the court below.*

25 I have had to reproduce in *extenso* the decision of the Supreme Court in the above decision, as it clearly resolves the question of jurisdiction of this Court now before us. I have avoided paraphrasing and having to repeat what Supreme Court has already clearly stated unanimously. I need not say more.

The petition before us is challenging the unconstitutional acts of the executive arm of Government. It faults the legislature for it's inaction, deliberate or unintended.



5 In my humble view it raises very important and novel constitutional issues that require resolution by this Court.

One of the issues raised in the petition is the constitutionality of leasing or otherwise alienating the Constitutional Square. A piece of land reserved as a green area since the city of Kampala was established. It is not disputed that this land was
10 leased to the 1st respondent and or one of his companies the 5th respondent by Kampala City Council, following which compensation was paid apparently because either the contract or lease had been terminated.

The question is whether Kampala City Council or Government had any right to lease this green area in view of the provisions of *Article 237 (b)* which stipulates as
15 follows:-

*'(b) the Government or a local Government as determined by Parliament by law shall hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the
20 common good of all citizens.'*

The question is whether or not green areas in Uganda's cities and towns are "land reserved for ecological" purposes under the Constitution. If this is answered in the affirmative, then next question would be whether an individual who enters into an illegal contract has a right to enforce it and recover damages or compensation. This
25 is one of the many constitutional questions this petition is asking us to determine. I find that, this Court is bound by the decisions of the Supreme Court in *Tinyefunza*



5 (supra) *Serugo*(supra) and *Centre for health* (Supra) and is required to hear and determine the issues raises in this petition.

I find that this Court has jurisdiction to hear this petition and grant orders, declarations and redress it finds appropriate, I would accordingly dismiss the preliminary objections as they all have no merit. I would order that the petition
10 proceeds on it's merits.

I would therefore proceed to resolve the grounds and issues set out in this petition.

The issues for resolution were brought out/agreed to out by the parties as follows:-

1. *Whether the Petition raises any question for constitutional interpretation against all or any of the Responde*

15 2. *Whether the management contracts, subleases and joint venture agreements entered into by the 1st to 6th Respondents and the 17th, 17th, 18th 19th and 20th respondents violated Article 119 (5); 21(1) and (2); 41, 20(1)(2), 32(1), 40(2), 26(1)(2) and 237(8);*

20 3. *Whether the impugned letters of comfort issued by the 8th and 12th Respondents to the 13th, 14th, 15th, and 16th Respondents violated the provisions of Articles 159(2), 159(3), 159(4), 159(5), 159(6), 159(7), 160, 164 and 119(5) of the Constitution, Section 25 of the Public Finance and Accountability Act, Sections 14(1), 29(l)(g), (6) and (7) of the Bank of Uganda Act of the Bank of Uganda Act;*

25 4. *Whether the 1st, 2nd, 3rd, 4th, 5th, 6th, 13th, 14th, 15th and 16th Respondents are/were knowing recipients of unauthorised public funds and thus unjustly enriched.*

30 5. *Whether, in the light of the matters complained of in the Petition, the 1st 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th 11th, 12th, 13th, 14th, 15th 16th, 17th, 18th, 19th and 20th Respondents acted corruptly and in contravention of National Objective XXVI, Articles 8A, 17(l)(i), 20(1),(2), 21, 25(1), 41, 36, 38, 45, 107, 118, 196, 201 and 233 (2) (b) of the Constitution;*



6. *Whether, in the light of the matters complained of in the Petition, the 1st 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th 11th, 12th, 13th, 14th, 15th and 16th, Respondents acted in contravention of Article 162(2) of the Constitution; and lastly.*

10 7. *What remedies are available to the Parties in the circumstances?*

8.

Issue 1

I have already determined this issue in the affirmative.

Issue 2

15 This issue has been substantially answered by the 9th respondent to this petition
The Hon the Attorney General in both his answer to the petition and its
accompanying affidavit. Upon perusal of the Attorney General's answer to this
petition one wonders as to why the petitioner did not upon its receipt withdraw this
petition against him and seek leave to add him as a co-petitioner. The Hon. The
20 Attorney General's answer to the petition is in effect an admission to the issues
raised in this petition. This affirms my decision to dismiss ground one above and to
proceed with the determination of this petition on merits. The Attorney General's
answer to the petition leaves nothing for a trial Court to adjudicate upon under
Article 50. The only issues that remain are issues of constitutional interpretation
25 under Article 137 (3) of the Constitution.

The Hon. The Attorney General sets out his answer to the petition as follows:-

1. *The 9th Respondent concedes that the purported sublease, management and
joint venture agreements and extension letters entered into between the 3rd 6th
Respondents and Kampala City Council were entered into without the prior
30 approval of the Attorney General contrary to Article 119(5) of the Constitution.*



2. The 9th Respondent shall further aver and contend that the transactions leading to the payment of monies to extinguish the indebtedness of the 2nd Respondents in favour of the 13th, 14th, 15th, 16th Respondents contravened the provisions of Article 159(2), 119(5) of the Constitution, S.25 of the Public Finance and Accountability Act and S.29 of the Bank of Uganda Act and the said Respondents were aware of the illegality and they were thus knowing recipients of public money which they should return.
3. The 9th Respondent avers and contends that the 1st, 2nd 3rd 4th, 5th, 6th, 13th, 14th 15th and 16th Respondents were unjustly enriched by the impugned transactions and shall pray that the said Respondents should refund all monies they received with interest at a commercial rate.
4. The 9th Respondent denies in toto the allegations contained in paragraph 30,31,32,34,35,36,37,38,39,40,41,42,43 of the petition in so far as they allege the 9th Respondent launched "a raid on the central bank", the Presidency hatched a plot to make the 8th Respondent "subservient", they acted "corruptly" and shall put the Petitioner to strict proof.
5. The respondent's answer to the petition is supported by the affidavit of Hon. Peter Nyombi the Attorney General of Republic of Uganda.

25 In his affidavit in reply he solemnly answers and state as follows:-

1. That I am the Attorney General of the Republic of Uganda and depone this affidavit in that capacity.
2. That I have carefully read, studied and understood the contents of the Petition and the accompanying affidavit and I respond thereto as here below.



3. *That I know that;*

- 10 a. *On 9th December 2005 Kampala City Council purported to extend a management contract dated 29th November 2002 in respect of Owino Market with the 3rd Respondent. In purporting to enter this contractual arrangement the parties did not obtain the legal advice of the Attorney General's Chambers in accordance with Article 119(5) of the Constitution. A copy of the said extension is attached hereto and marked "Annexure 1" and a copy of the said contract is attached hereto and marked "Annexure 2".*
- 15 b. *On 4th May 2006 Kampala City Council purported to extend a Management Contract dated 29th November 2002 with the 4th Respondent to manage and operate Nakasero Market A copy of the contract and the extension are attached hereto and marked "Annexure 3 and 4" respectively. The legal advice of the Attorney General's Chambers in accordance with Article 119(5) of the Constitution was neither sought nor obtained.*
- 20 c. *On 2nd September 2005 the 4th Respondent and Kampala City Council purported to enter into a Joint venture Agreement for the development of Plot 7B comprised,' in Volume 2802, Folio 22 and Plot 4B comprised in*
- 25 *Volume 2808 Folio 24. The purported joint venture agreement was concluded without having sought or obtained the legal advice of the Attorney General's Chambers in accordance with Article 119(5) of the Constitution. A copy of the joint venture agreement is attached hereto and marked "Annexure 5".*
- 30 d. *Kampala City Council and the 4th Respondent then purported to enter into two sublease contracts in respect of the property described in (c)*



5 *above. A copy of both sublease agreements are attached hereto and marked "Annexure 6 & 7" respectively. The purported sublease agreements were entered without the legal advice of the Attorney General's Chambers in accordance with Article 119(5) of the Constitution.*

10 *e. On 5th July 2006 Kampala City Council purported to enter into a sublease agreement for the development of Shauliyako Market with Nakivubo Shauliyako Market Vendors Association. The purported sublease agreements were entered without the legal advice of the Attorney General's Chambers 'in accordance with Article 119(5) of the*
15 *Constitution. Nakivubo Shauliyako Market Vendors Association then purported to assign its interest in the market to the 6th Respondent through a Memorandum of Understanding. A copy of the Memorandum of Understanding is attached hereto and marked "Annexure 8".*

20 *f. On 6th August 2001 Kampala City Council purported to offer a sublease to the 5th Respondent for the redevelopment of the Constitutional Square. The then Minister of Local Government intervened and stopped the arrangement and ordered a Commission of Inquiry which was established under Legal Notice No. 14 of 2001. The Commission recommended that the Constitutional Square should not be leased out*
25 *hence no contract was entered into between the 6th Respondent and Kampala City Council.*

6. *That I know that after the conclusion of the purported contracts there was popular resistance from market vendors and the public culminating in a breach of peace, riots and demonstrations which caused disruption in the proper*
30 *operation of the markets.*



- 5 7. That I know that His Excellency the President then intervened and cancelled the said contracts, sought legal advice and then subsequently directed that an inter-ministerial evaluation committee be formed to evaluate the 2nd-6th Respondents claims.
- 10 8. That I know the 2nd -6th Respondents then applied to HE the President for compensation.
9. That thereafter a compensation committee was constituted which came up with suggestions as to the 2nd - 6th Respondents claims :
- 15 10. That the 1st and 2nd Respondents presented a number of documents and reports to the evaluation committee including contract documents, extensions and variations in one case signed by 19th Respondent.
11. That I know that after the committee had completed its work, the 19th Respondent wrote to the then Solicitor General pointing out that his signature had been forged.
- 20 12. That I know that notwithstanding the above forgery the 2nd Respondent was not happy with the final report of the evaluation committee recommending that he be paid approximately 54 Billion Shillings.
13. That the 1st and 2nd Respondent subsequently appealed to His Excellency the President who referred the matter back to the Attorney General.
- 25 14. That, thereafter, on 22nd November 2010 the learned Attorney General directed the Ag. Solicitor General to effect payment of UGX 142,697,150,338 to the 2nd Respondent on behalf of Respondents 3,4,5 & 6. This was subject to the following conditions precedent being met; The tax law of Uganda being adhered to; the 2nd-6th Respondents hand over all land titles before any compensation process starts and any pending litigation must be terminated without Government paying any costs. A copy of the Attorney General's directive is attached hereto and marked "Annexure 9."
- 30



- 5 15. That, the Solicitor General on 29th November 2010 then recommended that
Ministry of Finance, Planning and Economic Development prepare a
supplementary budget to ensure payment of the said sum in accordance with
the Attorney General's opinion'. A copy of the Solicitor General's letter is
attached hereto and marked "Annexure 10."
- 10 16. That I know that a supplementary budget requires Parliamentary Approval.
17. That the Permanent Secretary /Secretary to the Treasury having received
the Solicitor General's letter wrote to the Auditor General on 2nd December
2010 asking for a value for money audit of the 2nd Respondents claims. A
copy of the letter is attached hereto and marked "Annexure 11."
- 15 18. That the Auditor General appointed KPMG to conduct a value for money
audit which established that no money was owed to the 2nd -6th Respondents.
19. That I further know, that soon thereafter the 13th 14th 15th and 16th
Respondents on diverse dates received "Letters of Comfort" from the Bank of
Uganda in favour of the 2nd Respondent.
- 20 20. That thereafter the 13th 14th 15th & 16th Respondents had the said letters
honoured and public money was paid to extinguish the
indebtedness of the 2nd Respondent contrary to the provisions of the
Constitution and the law which provisions were known or ought to
have been known by the said Respondents.
- 25 21. That I have read and understood the contents of the KPMG report and in
particular page 38 thereof where the audit firm alleged that the 1st
Respondent personally handed over to them a consent judgment in High
Court Civil Suits 83 of 2007; 590 of 2007; 646 of 2006 and 21 of 2006. A copy
of the purported consent judgment is attached hereto and marked
30 Annexure 12

- 5 22. That I further know the same said consent judgement was presented to URA
in a bid to avoid tax liability. A copy of the letter from URA to the Solicitor
General is attached hereto and marked Annexure 13.
- 10 23. That I know that the Registrar of the High Court His Worship John Eudes
Keitirima wrote to the Solicitor General denying the
existence of the said court judgment.
24. That I further know on the face of it the said consent judgement was a
complete forgery for the benefit of the 1st to, 6th Respondents.
- 15 25. That I know that in order to obtain this compensation the 1st and 6th
Respondents forged documents and letters including a consent judgement of
court, a contract variation letter among others and presented the same to
various officers of Government including the Attorney General, the
Evaluation Committee, the Uganda Revenue Authority and the Auditor
General in an attempt obtain for their own purposes public money.
- 20 26. That I have read and understood the contents of the allegations against the
Presidency by the Petitioner and I note that they are false.
27. That I know that the role played by His Excellency' 'the President in this
matter was that of a pacifier.
28. That when there was a breach of the peace on account of the unlawful
contracts HE the President intervened to recover the market and restore
25 order.
29. That further, working on the assumption that his intervention had caused an
expropriation of property from the 1st Respondent His Excellency sought
legal advice, and then asked for the appointment of an evaluation committee
to ensure that any money invested in the Constitutional Square, Nakasero
30 Market, Owino Market and Shauliyako Market be refunded in the interest of
fairness.



5 30. That I further know that when the compensation figure was made known to the President he directed investigations and instructed me to recover any excess money.

10 31. That it is therefore not true as alleged or at all that His Excellency the President acted with any ulterior motives in this matter but he simply acted as a pacifier and leader with the clearest objective.

15 32. That after the commercial banks awarded the 2nd Respondent credit facilities purportedly secured by "Letters of Comfort" His Excellency the President wrote to me instructing me to recover all the excess money paid to the 1st and 2nd Respondents. A copy of the said letter is attached hereto and marked "Annexure 14"

20 33. That I subsequently complied with the directive of His Excellency the President and wrote to the 2nd Respondent demanding the "excess" be refunded. A copy of my letter is attached hereto and marked "Annexure 14".

25 34. That on further perusal of the file, cognizant of the fact that the original contracts, if at all they existed were entered into in violation of the Constitution and further the subsequent conduct of the 1st -6th Respondents was tainted with fraud, forgery and illegality I became of the opinion that the 1st-6th Respondents were not entitled to any money as alleged or at all.

30 35. That I am cognizant that this court is bestowed with lawful authority to grant redress to the Parties.

36. That I have consequently instructed my officers to pray to this Honourable Court for an order that the 1st, 2nd, 3rd, 4th, 5th, 6th, 13th, 14th, 15th and 16th Respondents refund all money received by them at the commercial rate of interest.



5 37. That I swear this affidavit in support of the 9th Respondents answer to the Petition.

38. That whatever is stated herein above is true and correct to the best of my knowledge and belief save those paragraphs whose source has been disclosed therein.

10 In his conferencing notes he sets out his legal arguments in respect of each issue raised herein ad follows:-

Brief Facts

15 The facts of this case are briefly that the 1st-6th Respondents entered into a series of contracts, subleases, management agreements and joint ventures with the 7th respondent.

20 The 3rd Respondents management contract in respect of St. Balikudembe Market expired. The 9th Respondent at all material times believed the same to have purportedly been extended. The extension purported to createsa contractual relationship between the 7th Respondent and the 3rd Respondent without having sought or obtained the prior advice of the Attorney General.

25 The 4th Respondents had a series of agreements with respect to Nakasero Market. A joint venture agreement, a sublease, a purported extension the subleases were never executed. All the purported agreements were entered into without the prior advice of the Attorney General.

The 4th Respondent Purported to offer a sublease to the 5th Respondent for the redevelopment of the Constitutional Square. The then Minister of Local Government intervened and stopped the process and appointed a



5 *Commission of Inquiry. No contract was entered into in respect of Constitutional Square.*

10 *The 7th Respondent purported to enter into a sublease agreement with the Nakivubo Shauliyako Market Venders Association who in turn signed a Memorandum of Understanding with the 6th Respondent. The sublease agreement was entered without the prior approval of the Attorney Genet also Chambers.*

The purported contracts caused civil unrest and riots and the Government intervened and ordered that the markets be managed and owned by the vendors themselves and not the 1st -6th Respondents.

15 *As a result, the 1st-6th Respondents appealed to His Excellency the President who referred the matter to the 9th Respondent-the Attorney General.*

20 *An evaluation committee was formed and recommended compensation. The 1st and 2nd Respondents presented a number of documents to the committee some of which, it is now alleged were forged.*

The Committee ultimately recommended a sum in excess of 54 Bn. The 1st 6th Respondents were dissatisfied with this and appealed to His Excellency the President who again referred the matter to the 9th Respondent.

25 *The then learned and Hon. Attorney General on 22nd November 2010 wrote to Ag. Solicitor General proposing payment of UGX 142,697,150,338 to the 1st -6th Respondents subject to certain conditions precedent being met including the payment of all taxes.*

30 *The Ag. Solicitor General then wrote to the Permanent Secretary/Secretary to the Treasury (PS/ST) asking for a supplementary budget. A supplementary budget would require Parliamentary Approval.*



5

The PS/ST asked for a value for money audit from the Auditor General.

The Auditor General appointed KPHG who came to the conclusion that the 1st_6th Petitioners were not entitled to any money as alleged or at all

The 10th Respondent her official capacity as the then Hon. Minister of Finance wrote to the 8th and 12th Respondents and asked that they assist the 2nd Respondent to get paid through the Commercial Banks.

10

The Banks

A series of letters of comfort were written in favour of the 13th-16th Respondents. On the strength of these letters credit facilities were advanced to the 1st_6th Respondents and when these facilities fell due demands were made on the 8th Respondent and honoured. The sum paid by the Bank of Uganda was slightly in excess of UGX 140 Billion.

15

These letters purported to create a contractual relationship. The opinion of the Attorney General was not sought on the contract documents.

20

Neither was the approval of Parliament obtained (in the specific case of the 14th Respondent they were even informed that "Parliament may approve soon") before the issuance of these letters and the settlement of the debts.

25

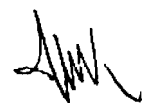
The 1st Respondent also purportedly handed over a consent judgment to the Auditor General and the High Court which consent judgment has been described by the Registrar of the High Court as a forgery.

He proposes the following remedies.

4. Remedies

30

The 9th Respondent shall contend that the 1st, 2nd, 3rd, 4th, 5th, 6th, 13th, 14th, 15th, 16th Respondents were unjustly enriched and will pray that they



5 *refund all the money received by them with interest at the prevailing commercial rates.*

The entire pleadings of The Hon. The Attorney General in this petition can only be classified as total admission of the grounds raised in this petition. Therefore the
10 petitioner would be entitled to a Judgment on admission against the Attorney General.

The Attorney General played a pivotal role in advising Government and all the other respondents in this matter. His evidence is key and cannot be taken lightly at all. The defences raised by all the other respondents jointly and or severally pale in view of
15 this evidence.

I have carefully read the joint answer to this petition filed by 1st, 2nd, 3rd, 4th, 5th and 6 respondents. Their joint answer reveals that they do not contest their description set out in paragraphs 2, 3 and 4 wherein the 1st respondent is described as businessman and politician of some influence in the current Government.

20 At all material times he was the elected Chairman of the Ruling National Resistance Movement Party's Entrepreneur's League and as such a member of both its Central Executive Committee and National Executive Council. At all material times he held out as the Board Chairman of the 2nd respondent company and agent, negotiator and representative of the 3rd, 4th, 5th and 6th respondents.

25 The 2nd, 3rd, 4th and 5th representatives are stated to be sister companies, however, I have not been able to ascertain this.

It is evident that the 1st respondent at all material times held and controlled the 3rd, 4th, 5th and 6th respondents to such an extent that there was no *defacto* difference between them. To put it more bluntly the 2nd, 3rd, 4th, 5th and 6th respondents appear
30 to have been fronts of the 1st respondent. This is not disputed by the 1-6th



5 respondent in their respective pleadings. Their eight page joint answer to the petition is a general denial. It raises no defence or valid answer to the petition and I have found no reason to refer to it beyond that.

The 7th respondent Kampala City Council Authority as successor to Kampala City Council summarised its defence to the petition its conferencing notes filed on 29th
10 August 2012 as follows:-.

1. *The Kampala City Council awarded Victoria International Trading Ltd (the 3rd Respondent) the tender for the management of St. Balikuddembe Market and awarded the management of Nakasero Market to Sheila Investments Ltd (the 4th Respondent) .*

15 2. *The Kampala City Council on the 4th June 2007 approved the sublease of Plots 4B and 7B in respect of Nakasero Market to I Sheila Investments Ltd (the 4th Respondent), however, the lease agreement was never executed.*

20 3. *The Kampala City Council approved a 49 year sublease to Nakivubo ShauriYako Market Vendors Association Ltd to re develop LRV 3559 Folio 24 Plot 39A Nakivubo Road. However, on the 15th August 2006, KCC entered into a sublease for the same property with another company called Nakivubo ShauriYako Market Company Ltd.*

25 4. *First Merchant International Trading Company Ltd (6th Respondent) together with Nakivubo ShauriYako Market Vendors Association Ltd filed a Civil Suit against KCC and Nakivubo ShauriYako Market Company Ltd claiming that all the rights and interests in Plot 39A Nakivubo Road had been transferred to First Merchant International Trading Company Ltd (6th Respondent) by Nakivubo ShauriYako Market Vendors Association Ltd.*



- 5 5. *The High Court in a decree dated 18th August 2006 ordered that all the rights and interests in Plot 39A Nakivubo Road had been transferred to First Merchant International Trading Company Ltd (6th Respondent) by Nakivubo ShauriYako Market Vendors Association Ltd and that the KCC Town Clerk should release the*
- 10 *sublease documents of the said Plot to First Merchant International Company Ltd.*
6. *The KCC granted to Yudaya International Ltd (Fifth Respondent) five year sublease extendable to 49 years over the Constitutional*
- 15 *Square on the 31st July 2001 for the development of the Constitutional Square at a premium of Ushs.635 million and Ground Rent of Ushs.3,175,000. Yudaya International Ltd (Fifth Respondent) paid only Ushs.235 million as premium to the KCC.*
7. *The Commission of Inquiry into the Leasing of the Constitutional Square recommended that the Constitutional Square should not be subleased to a private developer. No further dealings were*
- 20 *pursued with regard to the Constitutional Square.*
8. *The Solicitor General's approval and opinion was never sought by the KCC with regard to transactions involving the management contracts pertaining to St. Balikuddembe Market and Nakasero Market and the sublease of ShauriYako Market.*
- 25 9. *The Solicitor General's clearance, opinion or approval was never sought with regard to Plot 4B and 7B (Nakasero Market) and the Constitutional Square since the transactions were never*
- 30 *substantially concluded to seek the Solicitor General's input.*
- 35



ISSUES**Issue One**

10 Whether the petition raises any issues for constitutional Interpretation against all or any of the Respondents.

15 9. The 7th Respondent agrees that the petition raises issues of constitutional interpretation particularly the question of disposal of public assets in accordance with the Public Procurement and Disposal of Public Assets Act, 2003 and the Regulations thereunder; and the role of the Attorney General in the contract process involving public property and funds.

Issue Two

20 Whether the management contracts, subleases and joint venture agreements entered into by the 1st to 6th Respondents and the 7th 17th, 18th, 19th, and 20th Respondents violated Article 119(5); 21(1) and (2); 41; 20(1), (2), 40(2), 26(1), (2) and 237(8) of the Constitution.

25 The Solicitor General's approval and opinion was never sought by the defunct KCC with regard to transactions involving the management contracts pertaining to St. Balikuddembe Market and Nakasero Market and the sublease of ShauriYako Market. Therefore these transactions were in violation of Article 119(5) of the Constitution.

30 However, the Solicitor General's clearance, opinion or approval was never sought with regard to Plot 4B and 7B (Nakasero Market) and the Constitutional Square since the transactions were never substantially concluded to seek the Solicitor General's input.

35 It is the 7th Respondent's contention that the rest of the purported violations or contraventions are irrelevant.

Issue Three

40 This particular issue does not apply to the 7th Respondent so I shall not address it.



5

Issue Four

This issue does not concern the 1st Respondent so I shall restrain ourselves from addressing it.

10

Issue Five

Whether, in light of the matters complained of in the Petition, all the Respondents acted corruptly and in contravention of National Objective XXVI, Articles 8A, 17(l)(i), 20(1), (2), 21, 25(1), 41, 36, 38, 35, 107, 118, 196, 201 and 233(2)(b) of the Constitution.

15

The 7th Respondent was not in contravention of the Constitutional provisions cited by the Petitioners under Issue Five. It is the submission of the 7th Respondent that the Petitioner's contentions are irrelevant to the crux of the Petition since there is no correlation between the transactions cited and the Constitutional provisions deemed to have been contravened.

20

Issue Six

This particular issue does not pertain to the 1st Respondent so I shall not address it.

25

Issue Seven

What remedies are available to the parties in the circumstances?

A declaration as to the constitutionality of the actions of the Respondents would suffice.

30

From the above excerpt, there is no doubt that the 7th respondent admits to the petition in part and does not contest the rest. Again its answer and written submissions by way of conferencing notes do not in any way contest or address the issues raised in the petition.

35



5 **THE CITY SQUARE.**

I would at this point address one issue that I consider peculiar in this petition.

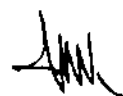
It is common ground that Kampala City Council the 7th respondent granted to Yudaya International the 5th respondent a 5 year sublease extendable to 49 years over Plots 5, 6, and 7 Kampala Road referred to in these proceedings as the
10 Constitutional square/the City square. The lease was extendable to 49 years.

It is contended by the 7th respondent that no lease agreement was signed between the parties in respect of this property. Apparently the 5th respondent had failed to fulfill the lease conditions set by the 7th respondent. The 7th respondent contends that Shs. 235,000,000/= had already been paid by the 5th respondent as part
15 payment of the premium or purchase price. The sub-lease was stopped according to the 7th respondent after a commission of inquiry into the matter had been setup by Government. The 5th respondent according to the 7th respondent's pleadings was entitled to a refund of the money that it had paid Shs. 235,000,000/= as part of purchase price, which was Shs. 635,000,000/= since there was lack of consideration.

20 This property is a green area in the middle of the Kampala City central business District (CBD). I have no doubt that the city planners had left this green area as a public green park. The World Health Organisation (WHO) in its report titled *Health and Sustainable Development* states that:-

25 *'Green spaces such as parks and sports fields as well as woods and natural meadows, wetlands or other ecosystems, represent a fundamental component of any urban ecosystem. Green urban areas facilitate physical activity and relaxation, and form a refuge from noise. Trees produce oxygen, and help filter out harmful air pollution, including airborne particulate matter. Water spots, from lakes to rivers and*
30 *fountains, moderate temperatures.*

Urban parks and gardens play a critical role in cooling cities, and also provide safe routes for walking and cycling for transport purposes as well



5 *as sites for physical activity, social interaction and for recreation. Recent estimates show that physical inactivity, linked to poor walkability and lack of access to recreational areas, accounts for 3.3% of global deaths.*

10 *Green spaces also are important to mental health. Having access to green spaces can reduce health inequalities, improve well-being, and aid in treatment of mental illness. Some analysis suggests that physical activity in a natural environment can help remedy mild depression and reduce physiological stress indicators.'*

See: www.who.int>health-risks

15 There is more literature on this subject. The above will suffice to illustrate the point that urban green areas are key in urban land use, planning, development and management.

Article 237 (2) b of the Constitution stipulates as follows:-

20 *'(b) the Government or a local Government as determined by Parliament by law shall hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens'*

The above article of the Constitution is reproduced in *Section 44 (1)* of the land.

25 The Government or any local or urban authority such as 7th respondent Kampala City Council or its successors and other urban authorities have no power to lease or otherwise alienate green spaces in any urban area. Any interest in land that spans a period of more than 4 (four) years is registrable under the Registration of Titles Act and thus the purported lease of 5 years amounted to alienation. It does not matter, that the contract is termed as a tenancy, temporary permit, licence or any other such description. See *Advocates collation for development and Environment vs Attorney*
30 *General & National Environment Management Authority, High Court Miscellaneous Cause No. 0100 of 2004 per Apio Aweri, J (as he then was).*



5 Such leases of whatever named called are *void abinitio* as they offend the provisions of Article 237 (2) (b) of the Constitution. It is my finding that, this declaration puts on notice the 7th respondent to take immediate action to remedy the current breach of the Constitution in respect of all green areas in Kampala where it has issued such leases and or permits.

10 It is contended by 7th respondent that it had an obligation to refund the monies paid because there was lack of consideration. On the face of it, this argument appears valid. It is in fact the correct position in law and in equity.

This rule against unjust enrichment was expounded upon by Lord Wright in *Fibrosa Spolka Akcyjna vs Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at P. 61as
15 follows:-

“The claim in the action was to recover a prepayment of Pounds 1,000 made on account of the price under a contract which had been frustrated. The claim was for money paid for a consideration which had failed. It is clear that any civilized system of law is bound to provide
20 remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generally different from remedies in contract or in tort, and are now recognized to fall within a
25 third category of the common law which has been called quasi-contract or restitution (emphasis added).

Restitution is an equitable remedy. Courts have long held that actions for money had and received lie “for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied) or extortion or oppression or undue advantage”
30



5 taken of the plaintiff's situation contrary to laws made for the protection
 of persons under those circumstances”.

In *Moses vs Macferhan* [1760] 2 Bur 1005, Lord Mansfield summarised the principle of restitution as follows:-

10 ‘the gist of this kind of action is that the defendant, upon circumstances
 of the case is obliged by rules of natural justice and equity to refund the
 money.’

This principle applies where a contract that was valid and binding at its inception subsequently becomes illegal. In the case *Fibrosa* (supra) a contract had been entered into by the parties on July 12th 1939 before the outbreak of the Second
15 World War. The respondent an English company agreed to sell to the appellant’s polish company machinery worth £4,800 of which one third was to be paid with the order. Delivery was to be within three months CIF Gdynia Poland. On 1st September 1939 war broke out between German and Poland on September 23 Gdynia was occupied by Germans. Britain declared war on Germany. Therefore it was
20 impossible to conclude that the contract and the appellants sought refund of the deposit paid. It was held that they are indeed entitled to it due to failure of consideration.

In this petition before us however, the facts are different. The contract between the 7th respondent Kampala City Council and the 5th respondent Yudaya Investments
25 was *void abnitio*, as it contravened Article 237 (2) b of the Constitution. An illegal contract cannot be frustrated as there is no contract in the first place. The question as whether money paid under an illegal contract is recoverable was answered by the Supreme Court in *Active Automobile Spares Ltd versus Crane Bank and Rajesh Pakesh*, *Supreme Court Civil Appeal No. 21 of 2001* as follows:-



5 *"It is trite law that courts will not condone or enforce an illegality. This well established principle of the law was put this way by Lindley L.J, in Scott vs. Brown Doering –MC No.1 & Co (3) (1892) 2QD, 724 at P.728: " Exturpi causa non oritur action. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is*
10 *not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has*
15 *pleaded the illegality or whether he has not. If the evidence by the plaintiff proves the illegality the court ought not to assist him."*

In the same case, A.I.Smith, L.J said: "If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the court will not assist him."

20 *In the earlier case of Taylor vs. Chester (4) (1869) L.R.4 Q.B. 309, it was said at P.314:*

"The true test for determining whether or not the plaintiff and the defendant were in paridelicto, is by considering whether the plaintiff could make out his case otherwise than through the medium and by aid of the illegal transaction."

25 *In the present case, the appellant and the Bank were in pari delicto in the illegal transaction under consideration. The appellant cannot make out its case for refund of the US dollars 97,000/= without depending on the illegal transaction. In the circumstances the Court cannot order for the return of its money."*

I therefore find that the 5th respondent was not entitled to refund of the money paid
30 under this illegal lease agreement and therefore was not entitled to any compensation resulting there from. See also:-*Sinba (K) Ltd and others versus Uganda Broadcasting corporation Supreme Court Civil Appeal No. 3 of 2014.*

ISSUE NO.2

I now proceed to determine the other aspects of issue 2, the issue states as follows:-



5 2. *Whether the management contracts, subleases and joint venture agreements entered into by the 1st to 6th Respondents and the 17th, 17th, 18th 19th and 20th respondents violated Article 119 (5); 21(1) and (2); 41, 20(1)(2), 32(1), 40(2), 26(1)(2) and 237(8);*

10 I have already found that the lease in respect of Constitutional Square was illegal, and unconstitutional it violated *Article 237* of the Constitution.

The contract to lease the city square having been illegal from its inception could not have been breached by Kampala City Council. Consequently no legal obligation accrued from that transaction. Since there was no legal obligation against Kampala
15 City Council, compensation paid by Government to the 5th respondent was not supported by any consideration. The Government was in the circumstances not obliged to refund the deposit paid by the 5th respondent, with interest and damages.

Nakasero Market and St. Balikuddembe (Owino) Market.

The information regarding management contracts in respect of the two markets
20 above named is contained in the affidavit of Josephine Karugonjo dated 22nd March 2012. She stated that, she was at the time a Senior Principal State Attorney in the Directorate of legal Affairs of Kampala City Council Authority, the successor to the now defunct Kampala City Council the 7th respondent.

She states that the 7th respondent on advice of the World Bank through Uganda First
25 Urban Project and following a new central Government policy on privatization, resolved to privatize the management of markets in Kampala city. Kampala District Tender Board on 18th May 1995 started on the process of expeditiously privatizing Kampala city markets. However, it was not until 3rd May 2002 seven years later that Kampala City Council advertised the markets inviting bids for management
30 contracts, the subject matter of this petition. Ms. Karugonjo in paragraphs 6, 7, 8, 9, 10, 11 and 12 states as follows:-



- 5
6. *On the 3rd May 2002, KCC advertised an invitation for bids for various service contracts whose tenders had expired among which were the contracts to manage St. Balikuddembe (Owino) Market and Nakasero Market.*
- 10
7. *By the closing date and time for submission of tender documents, the Kampala District Tender Board had received five bids for the management of St. Balikuddembe (Owino) Market and eight bids for the management of Nakasero Market.*
- 15
8. *Following an evaluation of the bids, Victoria International Trading Company Ltd (the 3rd Respondent) was awarded the tender for the management of St. Balikuddembe (Owino) Market and Sheila Investments Ltd (the 4th Respondent) was awarded the tender for the management of Nakasero Market. A copy of the report on the evaluation of bids for the management of St. Balikuddembe (Owino) and Nakasero markets is attached and marked "B".*
- 20
9. *On the 14th November 2002, the then City Advocate wrote to the Registrar General's office inquiring about the status of Victoria International Trading Company Ltd (the 3rd Respondent) and Sheila Investments Ltd (the 4th Respondent).*
- 25
10. *On the 29th November 2002, the Assistant Registrar General wrote to the City Advocate and stated that the registration of the said two companies had fatal irregularities and requested for the stay of any action pertaining to the said companies. A copy of the letter is attached and marked "C".*
- 30
11. *On the 28th November 2002, the Solicitor General wrote to His Worship the Mayor of Kampala City and cited a letter from the Assistant Registrar General and advised that since investigations into the incorporation of Victoria International Trading Company Ltd (the 3rd Respondent) and Sheila Investments Ltd (the 4th Respondent) was on-going, a stay of action in dealing with the two companies had to be made. A copy of the letter is attached and marked "D".*
- 35
- 40
12. *On the 29th November 2002, KCC entered into a management contract with Victoria International Trading Company Ltd (the 3rd Respondent) to manage St. Balikuddembe Market for a period of three years.*



It is clear from the above affidavit that the Solicitor General clearly stopped Kampala City Council from entering a contract with both the 3rd and 4th respondents on 28th of November 2002. Both the 3rd and 4th respondent companies had not been incorporated at the time and were therefore non-existent entities at the time. The letter from the Registrar General to the City Advocate, the principal legal officer Kampala City Council the 7th respondent dated 29th November 2002 reads as follows in part:-

'29th November, 2002

*The City Advocates
P.O Box 7010
Kampala.*

*RE: 1. Victoria International Trading Company Limited
2. Sheila Investments Limited*

The above subject refers and your inquiry dated 14th November, 2002 and my reply to your inquiry.

It has transpired that the registration of the above two companies had, fatal irregularities. That, is why they were not easy to locate on our register in the first place and that is why we had earlier on 6th November, 2002 informed the Permanent Secretary of Ministry, of Local Government.

This therefore is to request you to stay any action on those companies till further notice as investigations about them is underway.

*Ben Turyasingura
Assistant Registrar General*

*Cc. Permanent Secretary
Ministry of Local Government*

Cc. The Solicitor General.'



5 It is apparent from this letter that the Registrar General had earlier written to
Kampala City Council and the Solicitor General stating that both the 3rd and 4th
respondent companies were non-existent. This letter is however not on record.

On 28th of November the Solicitor General had written to Mayor of Kampala City as
follows:-

10 *"28th November 2002*

*His Worship the Mayor
Kampala City Council
Kampala.*

15 *M/s. Victoria International Trading Company Limited and Sheila
Investments limited.*

20 *I make reference to the above mentioned "Companies" and' to the two
conflicting letters from Mr. B Turyasingura Assistant Registrar General in this
Ministry.*

25 *This is to advise you that the question whether the two companies were duly
incorporated or not is still under investigation and as of now, we cannot say
for sure, that they are duly incorporated.*

30 *I am therefore advising you to stay your action in dealing with the two
companies until we conclude our investigations and determine conclusively
whether the two companies exist in law and can transact any business with the
Council.*

The matter is receiving our highest and urgent attention.

35



5 *L.Tibaruha*
AG. Solicitor General

c.c *The Permanent Secretary*
 Ministry of Local Government
10 *Kampala.*
 The Town Clerk Kampala City Council
 The Speaker, Kampala city Council
 The Chairman Kampala District Tender board
 The City Advocate Kampala City Council

15 The next day the mayor of Kampala at the time responded to the Solicitor General's letter as follow:-

'May/207/2

20 *29th November 2002*

Solicitor General
Government of Uganda
25 *Kampala.*

Victoria International Trading co. Ltd and Sheila Investments LTD

Thank you for your letter ADM/7/124/01 of the 28th instant concerning the legal status of these companies.

As you know, these companies respectively won tenders to manage St.
30 *Balikuddembe and Nakasero markets. The contracts to do so were effected when, in accordance with the law, the Kampala District Tender Board notified them in writing that they had won tenders for those markets. Immediately after receiving the notification, which in effect was an offer, they paid the required monies, to 'KCC' which constituted an*
35 *acceptance. Hence a contract was made between them and KCC which*



5 *can only be altered by halt consent or unilaterally by KCC at our peril.*
Hence, we could not halt the process; the Minister's directive to nullify the
tenders came too late.

Therefore, having nothing to do but to honour the contract, we have
allowed the winners to take over management of the two markets.
10 *However, your investigators into the registration of these companies*
should continue; but, until you find anything to the contrary, it is
reasonable to assume that the companies are duly registered as per the
documents which were available to Kampala District Tender' Board at
the time of awarding the tenders.

15 *I am sure you will now be dealing with the two companies directly.*

Thank you.

J. Ssebana Kizito
Mayor, Kampala City

20 Clearly there could not have been any contract between Kampala City Council and
the two non-existent companies. There was no award of any tender to the two non-
existent companies. There was a deliberate decision by Kampala City Council at the
highest level, cascading down to the tender committee and management to grant the
two non-existent companies the said contracts.

25 I do not need to be labour this point. There were no valid contracts of management
of St. Balikudembe (Owino) market and Nakasero Market to the 3rd and 4th
respondents.

 It follows therefore that there were no existing contracts between Kampala City
Council and the 4th respondent on 2nd February 2007 when they were purportedly
30 terminated. There was nothing to terminate. The first part of the second issue that



5 relates to the management contracts of St. Balikuddembe (Owino) market and Nakasero market must be answered in the affirmative.

Subleases in respect of St. Balikuddembe (Owino) & Nakasero markets

10 The second part of the second issue relates to the validity of leases or sub-leases entered between the 3rd and 4th respondents and the 7th respondent Kampala City Council. Paragraph 4 of the 7th respondent's answer to the petition states as follows:-

15 *4. The 7th respondent shall aver and contend that on the 4th June 2007, Kampala City Council (hereinafter called "KCC") approved the sub-lease of Plot 4B and 7B in respect of Nakasero Market to Sheila Investments Ltd (the 4th Respondent) however, the sub-lease agreements were never executed because the head-lease was in the possession of the Criminal Investigations Department*

20 Clearly from the above paragraph, there was no lease executed between Kampala City Council 7th respondent and Sheila Investment in respect of Nakasero market. Therefore the 4th respondent could not have been entitled to any compensation resulting therefrom.

In respect of St. Balikuddembe (Owino) market, I have not been able to ascertain the existence of any lease agreement signed between Kampala City Council and Victoria International Trading Company.

25 Shauriyako Market

It is contended by Karugonjo in paragraphs 30, 31 and 32 of her affidavit as follows:-

30 *30. That in 2006, KCC approved a 49 year sub-lease to Nakivubo ShauriYako Market Vendors Association to re-develop Plot 39A Nakivubo Road at a premium of Ushs.10,000,000/= and Ground rent of Ushs.500,000,000/= per annum.*



31. That on the 15th August 2006, KCC entered into a sub-lease agreement for the same property with another company called Nakivubo ShauriYako Market Company Ltd.

10 32. The 7th Respondent shall aver that following the above events, the sub lease of (ShauriYako) Market was the subject of a **Civil Suit HCCS No.646 of 2006** wherein First Merchant International Company Ltd together with Nakivubo (ShauriYako) Market Vendors Association filed a civil suit against KCC Nakivubo ShauriYako Market Company Ltd claiming that all the rights and
15 interests in Plot 39A Nakivubo Road had been transferred to First Merchant International Company Ltd by Nakivubo (ShauriYako) Market Vendors Association.

However, no copies of lease agreements are attached to that affidavit. The order on decree of Court is not attached either. The Auditor General report KPM states as
20 follows in respect of the consent Judgments.

'Consent judgment

We further noted that VITCL and KCC entered into a Consent Court Judgment (Decree) dated 26 February 2008 arising from the High Court Civil Suit No. 21 of 2006 on the matter. It was agreed between the two
25 parties that VITCL is indebted to KCC in arrears of the contract sum in the sum of U shs 2,164,029,816 inclusive of VAT and Ushs 1,225,828,051 after proof of payment of VAT to URA has been provided, after offsetting the construction costs and loss of market dues.

30 Bassajabalaba also provided us with a consent judgment in relation to civil suits no 83 of 2007; 590 of 2007; 646 of 2006 and 21 of 2006 filed by HABA Group (U) Ltd representing SIL, FMITCL, VITCL and YIL versus the Attorney General. We conducted searches at the registry and could not find the files related to the above cases save for civil suit no 21 of 2006.
35 We noted that the only consent judgment filed at the registry was dated 1st February 2008 and was in favour of KCC against VITCL. We also noted that unlike the consent judgment for HABA the consent judgment against



5 VITCL indicated the date when judgment in the terms agreed to by the
parties was entered into. The consent judgment for HABA only shows a
typed year 2011 but not the day or month the judgment was entered into.
It also does not indicate which advocate or person drew and filed the
10 same. Further, we did not find any resolutions at the company registry
giving HABA the right to represent the four claimant companies' only
resolutions granting HABA the authority to receive the proceeds of the
claim. We therefore could not confirm the authenticity of the consent
judgment in the case involving HABA against Attorney General.'

15 Having perused all the pleadings in this matter I can only conclude that there was no
valid consent Judgment. During the course of writing this judgment, I was able to
obtain from the High Court Civil Registry the Court file in respect of *High Court Civil*
Suit No. 646 of 2006. I must state here that Courts take Judicial Notice of their own
records. The record indicates the parties in the suit to be *Global Capital Save (2004)*
20 *LTD vs Hon Steven Biraahwa Mukitale*. That suit was dismissed by Gadenya Paul
Wolimbwa Ag. Assistant Registrar on 7th December, 2006 under Order 5 Rule 1(3)
for failure to serve summons. Even if the companies were duly registered, the
contracts would have been vitiated by other illegalities, namely the forged Consent
Judgment set out above, lack of consent from the Attorney General, failure to follow
25 procedure for acquisition of leases and a host of other fraudulent dealings.

My finding on this is that there was no lease or sub-lease by Kampala City Council in
favour of First Merchant International Trading Company Ltd. There was no valid
Judgment or decree of Court upon which Kampala City Council could have been
required to pay shs. 510,000,000/= for ground rent in respect of LRV 3559 Folio 24
30 plot 39A Nakivubo Road as contended by Ms. Karugonja in paragraphs 38,39 and 40
of her affidavit in support of the 7th respondent's answer to the petition.

There is no evidence on record to support the contention that Nakivubo Shauriyako
Market Vendor's Association ever existed as a legal entity. There is no evidence to



5 show that if it was. It even entered into a joint venture agreement with the First Merchant International Trading Company. For certain, it was never a party to Civil No. 646 at the High Court of Uganda, as outlined above.

My findings on issue 2 are supported by evidence on record. An *ad-hoc* inter-Ministerial Committee was setup by the Attorney General upon instructions of His Excellency the President by letter dated 30th July 2008. It comprised of various
10 officials employed by the Government of Uganda, from the Ministry of Works and Transport, Ministry of Lands, Housing and Urban Development, Ministry of Finance, Planning and Economic Development, Ministry of Local Government and Ministry of Justice and Constitutional Affairs. The committee considered the claims made by the
15 1-6th respondents to Government. The members of the evaluation committee evaluated the claims and made recommendations to The Attorney General on 30th October 2009.

The report at pages 1 and 2 reads as follows:-

20 *'OBJECTIVES OF THE EVALUATION EXERCISE*

The objectives of the evaluation exercise were:-

(1) To determine the legality of the claims by HABA GROUP (U) LTD.

25 *(2) To critically analyse, assess and evaluate the claims for HABA GROUP (U) LTD.*

(3) Make recommendations based on which the Attorney General will form an opinion to advise H.E the President of the Republic of Uganda.

30 ***Background***

Kampala City Council (KCC) entered into Management Contracts and sublease Agreements with companies under Haba Group (U) Limited as follows:-



5 (a) Victoria International Trading Company Limited (VITCL) for the management of ST Balikuddembe (Owino) Market for a period of 3 years on 29th November 2002, which contract was renewed after it is expiry for another term.

10 (b) Sheila Investments (U) Limited (SIL) for the management of Nakasero market, on 29th November 2002, Joint venture on 2nd September 2005 and Sublease on 22nd December 2006/June 2007 to operate and develop Nakasero market.

15 (c) First Merchant International Trading Company Limited (FMITC) for the Sublease (through the assignment) to redevelop Shauriyako market, on 14th July 2006.

(d) Yudaya International Limited (YIL) for a Sublease to redevelop Constitution (City) Square on 6th August 2001

20 The Committee noted that all the four contracts mentioned above which were entered into by KCC with the above Companies, were not cleared by the office of the Solicitor General before signature.

25 The said Management Contracts for the said markets and the Sublease redevelopments met popular resistance from the market vendors and the public which included among others; riots and demonstrations resulting into termination and cancellation of the same.

30 Arising from the foregoing, "Haba Group (U) Limited petitioned HE the President of Uganda to have the former compensated in respect of the said cancelled Management Contracts, Joint venture and the Subleases.

By letter reference PO/173, dated 30th July 2008. H.E the President of Uganda directed the Minister of Justice and Constitutional Affairs/Attorney General to examine the legality of the compensation claims by Haba Group and advise him accordingly. (Emphasis added)

35 What is pertinent here is the observation by the technical committee it reads as follows;-



5 *"all the four contracts mentioned above which were entered into by
Kampala City Council, with the above companies, were not cleared by the
office of the Solicitor General before signature"*

At this point the committee which included officials of Attorney General Chambers
ought to have first dwelt on the legality of the compensation claims. Had they done
10 so they would have arrived at the same conclusion that I have.

From the host of correspondence between the Attorney General, the Solicitor
General, Secretary to the Treasury and Kampala City Council it is clear that the
legality of the contracts was in question. Specifically, the lease in respect of the
Constitutional Square and the developments thereon had been stopped by
15 Government intervention. The Government had determined that the Constitutional
Square could not be legally leased to a private developer or at all, in view of the clear
constitutional provisions already referred to above.

I have no doubt in my mind having read the record before me that at all materials
times the committee was well aware that there was no legal basis upon which
20 the compensation claim could be paid. Unless, perhaps they assumed, had reason to
believe or knew as fact that His Excellency the President intended to authorise an
ex-gratia payment which is well within his powers to do. There is however no
evidence of such, on the record.

The terms of reference on that Committee were very clear. The President directed
25 the Attorney General to "examine the legality of claims by Haba Group and advise
him accordingly."

The Hon. The Attorney General with utmost respect failed and or neglected and or
omitted to do so. Instead the Attorney General dwelt on the quantum of the
compensation claim. That was not his duty. That could have been done by the
30 Auditor General, which he eventually did. His Excellency the President did not direct



5 the Attorney General to compute the exact amount owed. The Attorney General was well aware that:-

1) *The claimants and Kampala City Council had neither sought nor obtained advice from him before entering any of the said contracts.*

10 2) (i) *The claimants Victoria Intentional Trading Company Ltd and Sheila Investments Ltd were non-existent entities at the time the contracts were entered into, or at least their legal existence had not been proved and had been questioned by the Registrar General in writing.*

15 (ii) *Kampala City Council executed contracts in their favour and granted them leases against the express directive of the Solicitor General and the Registrar General.*

3) *The Constitutional Square was not available for lease under the Constitution and the Land Act.*

20 4) *The 1st and 2nd respondent had no legal authority to claim and be paid any compensation resulting from any contracts or leases with Kampala City Council as they were never at anytime party to those leases and or contracts and such any payments to those two, would be irregular.*

Be that as it may, the committee above named recommended compensation to the claimants as follows:-

25 1. Yudaya International Ltd (Constitutional Square)
Shs.22,075,937,056/= up for the original recommended amount of Shs. 2,639,720,000/=.

30 2. Sheila Investments Limited (Nakasero Market)
Shs.24,160,763,956/= up from the original recommended amount of Shs. 11,669,669,550/=.

3. First Merchant International Trading Company (Shauliyako Market)



5 Shs 5,652,231,004/=.

4. Victoria International Trading Company Ltd
Shs. 2,801,585,133/=.

10 Total Shs.54,690,517,149/=

The original recommendation by the evaluation committee appointed by the Attorney General was Shs.22,770,349,673/=.

The original claim by the 1-6th respondents was Shs. 131,734,996,651/=.

15 Although the *ad-hoc* committee revised the claim upwards their award was still less than what the 1-6th respondents had originally claimed.

On 29th November 2010, The Attorney General unilaterally revised the above amount upwards to Shs.142,698,096,388/= well above the original claim of Shs.131,734,996,951/= without any justification whatsoever. Neither the law nor common sense would justify payment of compensation of any nature beyond
20 what is stated in the claim. The claimants were awarded more than they had claimed. It is however not difficult to guess the reason why.

The above amount was subsequently paid as I will show later in this Judgment, through the Ministry of Finance, Bank of Uganda and the four Commercial Banks. Those banks are set out in this petition as respondents, 13th respondent, United
25 Bank Of Africa (Uganda) Ltd, 14th respondent, Orient Bank Ltd, 15th respondent, Bank of Baroda (Uganda) Ltd, 16th respondent, Tropical Bank (Uganda) Ltd.

The Auditor General on 26th July 2011 issued a final report on the verification of claims submitted by Haba Group against Government, in a letter addressed to the Hon. Minister of Finance. I am constrained to reproduce the letter forwarding the
30 report in full. It reads:-

DAP. 151/29/01



26th July 2011

*The Hon. Minister of Finance,
Ministry of Finance, Planning & Economic Development
KAMPALA*

**FINAL REPORT ON THE VERIFICATION OF CLAIMS SUBMITTED BY
HABA GROUP AGAINST GOVERNMENT**

I appointed KPMG Kenya, an international auditing and consulting firm, to undertake on my behalf the verification of the claims totaling to Shs.142,698,096,388/= submitted by Haba Group of Companies against Government. The primary objective was to make an objective assessment of the claim, including additional claims and variations made by First Merchant Trading Company Ltd, Victoria International Trading Company, Sheila Investments Ltd and Yudaya Investments Ltd all generally referred to as the Haba Group in the context of the claim. I am pleased to enclose herewith the final report on the assignment. I am submitting this report to Parliament in accordance with section 20 of the National Audit Act 2008. Please note that your copy has been availed to you in accordance with section 26 of the National Audit Act for your necessary action.

The assessment has determined that Instead of an amount of Shs.142,698,096,288 claimable by the Haba Group, Haba owes Government a net amount of Shs.994,039,186. The main reasons for the amendments to the amounts claimed are;

- general lack of substantive support to the claims raised.*



5

- *lack of legal basis for some of the aspects and areas raised in the claims.*
- *general lack of reasonability for the amounts used in the preparation of the claims*

10

I understand that before this assessment exercise could be concluded, Bank of Uganda (BoU) upon request by the Ministry of Finance, Planning and Economic Development issued guarantees (letters of comfort) to various commercial Banks to enable the Haba Group access credit facilities totaling to US\$6S.3Smillion in anticipation of Government settlement of the claims by Haba. This is in addition to Shs.24.Sbillion paid to BoU and Uganda Development Bank by the Ministry in 2010/11 financial year to settle the indebtedness of Haba Group to the two banks.

15

20

According to BoU, by June 2011, two of the credit facilities offered to Haba by two of the commercial Banks hall fallen due before Government had paid the amounts claimed by Haba and BOU as the guarantor had paid US\$ 34.35 million to the two banks. There is lack of clarity as to why the ministry and BOU entered into this settlement arrangement with the Haba Group before the conclusion of the verification exercise.

25

Based assessment undertaken through this exercise which has determined that the Haba Group instead owes Government a net amount of Shs.994,039,186 there is a potential risk of all the funds already paid to the Haba Group and the associated companies.

30

I strongly recommend that:-



- 5
- *all funds paid (and payable by guarantee) to the Haba Group in relation to the claim through loans, advances and guarantees be determined and immediate and appropriate, arrangements made for the recovery.*
 - *the report be studied with a view of having the recommendations*
- 10 *implemented.*
- *Investigations/inquires be Immediately Instituted to establish those responsible for any loss so far suffered and any contingent loss that is likely to arise and appropriate and necessary action undertaken*

15 This letter sums up everything. It is self explanatory and I need not say more. Suffice to state that from the foregoing I can only answer the second issue in the affirmative.

Issue 3

20 It is imperative for me to set out a brief background to this issue. The chronology of events leading to the payment of the above colossal sum of money to Haba Group of Companies can be discerned from the pleadings before me but more specifically from the affidavit of Ms. Karugonjo referred to earlier in this Judgment.

25 Sometime between 1990 and 1994, Kampala City Council on the advice of the World Bank through the Uganda First Urban project and following the Central Government policy on privatisation resolved to contract out the management of city markets.

30 On 18th May 1995 Kampala City Council, moved to implement the above policy. It appears that immediately thereafter city markets were privatized through public tender and open bidding. They were then run by private companies on short



5 term contracts. Those contracts appear to have expired or were due to expire by mid 2002.

On 3rd May 2002 Kampala City Council advertised an invitation for bids for various service contracts whose tenders had expired among which were Nakasero and St. Balikuddembe (Owino). An undated document annexure 'B' to the affidavit of Karugonjo (supra) indicates that a Technical committee of
10 Kampala City Council evaluated the bids.

It was constituted as follows:-

Kampala City Council Staff

- | | |
|---------------------------|----------------------------|
| 1. James K.N Ssegane | Deputy Town Clerk Chairman |
| 15 2. Ms. J.S.B Karugonjo | City Advocate |
| 3. Mr. William Tumwine | PATC/Central Division |
| 4. Eng A.J Byandala | City Engineer |
| 5. Mr. Basil Bataringanya | Principal Accountant. |

Co-opted Members

- | | |
|---------------------------|---------------------|
| 20 Mr. Ntwatwa Kyagulanyi | Quality surveyor |
| Eng Frank Katusiime | Consulting Engineer |

Facilitator

Ms. Justine Kasule Ag. Secretary, Kampala District Land Board

The above persons then awarded contracts as follows:- Victoria International
25 Trading Company Ltd/ 3rd respondent was to manage St. Balikuddembe (Owino) Market, Sheila Investments won the tender to manage Nakasero Market. As already set out earlier in this Judgment the above companies were at the time neither incorporated nor registered with the Registrar General's office. At least their registration and incorporation had not been ascertained. The above not



5 withstanding Kampala City Council signed agreements with them on 29th November
2002. We now know from what I have already set out earlier that First Merchant
International Company was awarded and granted a lease over Nakivubo Shauriyako
Market in a joint venture with Nakivubo Shauriyako company ltd a company whose
legal status has not been ascertained from the record before me. Sheila Investment
10 granted a lease over Nakasero Market. Yudaya International was offered a lease
over the Constitutional Square.

For the reasons I have already stated above and others that I find no reason to delve
into, all those contracts either expired or were terminated. The reasons for their
termination have already been alluded to and were a subject of investigation by the
15 Auditor General. Suffice to state that each of the parties that is 1st, 2nd, 3rd, 4th, 5th,
6th, 7th and 9th respondents share the blame, in this whole unfortunate state of
affairs.

By the end of 2008, the 3rd, 4th, 5th and 6th respondents were stuck. They had lost the
leases and management contracts. They have lost the City Square and they have lost
20 cases, in Court. Up to this point it appears that at least on paper the 3rd, 4th, 5th, and
6th companies are separate and independent entitles carrying on genuine business,
that they had each successfully been awarded tenders and leases on merit. That they
had each independently invested colossal sums of money in those projects and were
at the verge of losing that money.

25 But that was not so. The Attorney General's letter dated 29th July 2010 to the
Solicitor General reveals that on 31st March 2009 His Excellency The President met
with Mr. Hassan Bassajjabalaba, the 1st respondent, who sought his help to recover
from Government money he had lost following the termination of his company's
contracts and leases with Kampala City Council. Part of the Attorney General's letter
30 referred to above reads as follows:-



5 *"His Excellency The President judged that, agencies for which
Government accepts responsibility erred in inviting M/S Sheila
Investments (Nakasero Market) and Ms. Yudaya Investments
(Constitutional Square) to lease and operate in violation of public
10 interest. His Excellency The President agreed that apparently innocent
private investors be compensated..."*

We know that the directive of His Excellency The President set out above to the Attorney General was to ascertain the legality of the claims only and not the amount purported to have been lost. The extent of financial loss could only be ascertained after confirmation that the claim had a legal basis.

15 His Excellency The President's assessment in my view was that, in principle an investor who, for reasons of poor decision of Government agencies loses his investment, he ought to be compensated. Presumably in order to avoid a long process of litigation, in cases where Government was clearly to blame which may result into further losses.

20 It now becomes apparent that the 1st respondent Hassan Bassajjabalaba, had floated the companies in issue, that is:- respondents 2nd, 3rd, 4th, 5th and 6th. He had not named himself as a director or shareholder in any of those companies for apparent reasons. The companies had submitted bids for tender of management and later for leases of stated markets and the constitutional square as if they were unrelated
25 entities competing for business. Somehow only his companies were successful in almost all the bids. At least all those that, are subject of this petition. The companies afore mentioned were awarded contracts/ leases without the approval of the Attorney General, without having been registered, without any history of having carried out any business, without assets, without bank statements without income
30 tax returns as Americans say "without nothing!" I say so because I have perused all the pleadings and I have found none of those documents. The above can also be



5 inferred from this simple fact that a non-existent entity could not have possessed any of the requirements above named, unless of course another miracle happened.

The Auditor General in his report found in respect of the relationship between the 1st and 2nd respondent on one hand and the 3rd, 4th, 5th, and 6th respondent on the other as follows:-

10 *'A search on the Companies registry indicated that the four claimant companies and Haba do not share similar control or management. We also noted that Basajjabalaba the purported chairman of the HABA Group is neither a shareholder nor a director of any of the four claimant companies or the HABA Group.*

15 *We obtained various board resolutions dated from 10 March 2010 to 15th March 2010 authorising HABA Group to receive proceeds of the claims against KCC and the Government of Uganda in respect of the markets".*

20 In view of the above finding, how then did the 1st and 2nd respondent come to claim compensation on behalf of 3rd, 4th, 5th and 6th respondents. The answer is clear. All along the 1st respondent was in cahoots with officers of Kampala City Council and its tender board. They set out a scheme. They obtained contracts. They frustrated them. They now sought compensation. When the chips where down, and the push came to
25 shove. Mr. Hassan Bassajjabalaba approached His Excellency The President for assistance. The President agreed in principle that, compensation could be paid but only upon verification of the legality of the claim. He requested the Attorney General to verify the legality of the claim. The Attorney General instead of advising His Excellency the President on the legality of the claim proceeded to quantify it. That
30 was not his duty. That was the duty of the Auditor General the similarity of their acronyms notwithstanding. The Adhoc committee set up by the Attorney General instead of verifying the legality of the claim it increased the quantum from Shs.22, 763, 205, 687 to Shs.54,690,517,149/= without any basis.



5 On 28th September 2010 the Solicitor General wrote to the Secretary to the Treasury increasing the claim due to Shs. 96,461,395,376/= no explanation is given in the letter. On 29th November 2010, the Solicitor General on instruction of the Attorney General increased the amount of claim to Shs. 142, 698,096, 388/=-, again without any explanation or justification. Following that increment the Attorney General by
10 letter asked the Secretary to the treasury to raise a supplementary budget to pay it.

The Secretary to the treasury perhaps smelling a rat, declined to pay this astronomical amount of money. Instead he wrote to the Auditor General on 2nd December 2010 attaching the legal advice of the Attorney General and the related documents. The secretary to the Treasury being frugal penned as follows:-

15 *'2nd December 2010*

*The Auditor General
Office the Auditor General*

20 *RE: Compensation claims to Haba Group of companies.*

*Reference is made to the attached communication from the Ag. Solicitor General, Ministry of Justice and Constitutional affairs requesting the
25 approval and release of supplementary funding amounting to U. Shs. 142 698,096,388 (Uganda shillings One hundred Forty Two Billion Hundred Ninety Eighty million shillings One Hundred Forty Two billion six hundred ninety eight million , ninety six thousand three hundred and eighty only) to enable the compensation of the claim by the HABA group
30 of companies .*

Before the effecting of the above request, I would like to kindly request your office to establish the value for money in respect of the claims, so that payment can then be effected. (Emphasis added)
35

I am attaching the Attorney General's Legal Opinion and other documentation for ease of reference.

40 *Keith Muhakanizi
PERMANENT SECRETARY /SECRETARY TO THE TREASURY*



5

Cc. The Hon Minister of Finance, Planning and Economic Development.

10

The Ag.Solicitor General Ministry of Justice and Constitutional Affairs.'

15

The Auditor General could only do what he does best. He decided to have the claim thoroughly investigated. On 28th March 2011 he appointed an audit firm of international repute KPMG as an independent expert to assist the Government in assessing the claim made by Bassajabalaba and the Haba Group.

Once again the conspirators got stuck. They got stuck because no payment in nature of compensation can be made by Government without a clearance of the Auditor General in form of "a letter of no objection". See: *American Procurement vs Attorney General, Civil Appeal No.35 of 2009*.

20

Before the Auditor General could issue his report, Bassajabalaba the 1st respondent again approached the President with a proposal to have 'his claim' paid through Bank of Uganda since he had loans from commercial Banks that required to be serviced urgently. The President then wrote to the Governor Bank of Uganda the 12th respondent on 8th January, 2011 requesting him to find a way of helping Bassajabalaba, to borrow money to pay his loan from commercial Banks. The President wrote in part as follows:-

25

"I therefore advise you to assist the company to access funding without suffering interest. However, it should only be done after offsetting whatever is due and owing to Government" (Emphasis added).

30

At this point the Auditor General was not involved and had not yet set up the forensic audit. The letter was not copied to the Auditor General but to the Minister of Finance. The President, it is apparent had not been advised by the Attorney General on the legality of the claims. He appears to have been under the



5 impression that the claim had passed the legal test since he had received a report from the Attorney General's Inter-Ministerial Committee. The President, apparently was not aware that the matter was before the Auditor General for a value for money audit at the request of the Secretary to the Treasury.

10 The Minister of Finance at the time Hon. Syda Bbumba the 10th respondent appears to have been involved earlier in this move to have Haba Group paid through Bank of Uganda by side stepping the requirement for a letter of no objection from the Auditor General. I say so, because on 23rd March 2011 she wrote to the Governor of Bank of Uganda the 12th respondent referring him to her earlier letter MEP 83/207/02 dated 3rd December 2010 which is not on
15 Court record. By this time His Excellency The President had not written the letter to the Attorney General above mentioned. This Minister's letter of 22nd March 2011 reads in part as follow:-

"March 22, 2011

20 *The Governor
Bank of Uganda
KAMPALA*

COMPENSATION TO HABA GROUP OF COMPANIES

25 *Please refer to my earlier "Ref. MEP 83/207/02" dated 3rd December 2010 and to other correspondences regarding the above subject, echoing H.E. the President's directive.*

30 *Further to my letters, this is to confirm that you can repay the proceeds of the earlier programmes with the Banks. As soon as the budgetary arrangements allow, I, Will authorize repayments to the Haba Group through the Bank of Uganda from which payments you can deduct the extra money to pay to the Banks the extra loans you
35 will have arranged for Haba Group.*

*Syda Bbumba
Minister of Finance, Planning and Economic Development.*



*Cc. The Permanent Secretary/ Secretary to the Treasury
Ministry of Finance"*

10 There was an earlier letter also from Hon. Syda Bbumba the then Minister of
Finance and Planning to the Governor Bank of Uganda dated 24th February 2011
on the same subject. It reads:-

'24th February, 2011

15 *The Governor
Bank of Uganda
KAMPALA*

Dear Sir,

20

RE: COMPENSATION TO HABA GROUP OF COMPANIES

25 *Refer to my earlier letter Ref MEP /83/207 /02 dated December 3rd
2010 and to other correspondences on the subject, echoing H.E. the
President's directives.*

30 *Haba Group has written to state that they were duly assisted with a
small portion of their claim by various financial institutions that
repayment is now due.*

*In accordance with their correspondence this is to request you to sort
out repayment with the said financial institutions.*

35 *Yours faithfully,
Syda N.M Bbumba(MP)
Minister OF Finance, Planning And Economic Development*

Cc. The Permanent Secretary / Secretary to the treasury

40

Cc. The Chairman



10 The two letters are copied neither to the Auditor General nor to the Attorney General. As earlier stated His Excellency The President appears to have been under the impression that Basajjabalaba was seeking assistance to get loans for commercial Banks. However, in the above letter, Hon Syda Bbumba clearly states that the Haba group had already obtained loans from commercial Banks which were due for repayment. She had earlier on 30th September 2010 written to the Governor Bank of Uganda on the same subject, yet at this time there is no indication that the President was aware of this issue, involving Bank of Uganda.

There is nothing on record indicating that the President had directed Bank of Uganda to effect any payment to Haba Group at this stage or later.

20 The push to have the Bank of Uganda involved in the compensation scheme was clearly initiated by Hon. Syda Bbumba, she is the one who pushed and forced the hand of the Governor to comply.

The Governor of Bank of Uganda the 12th respondent must have been aware of the constitutional requirements that Government can only guarantee loans upon an Act of Parliament. Further he must have been aware that in the performance of its function the Bank of Uganda is required to conform with the Constitution but shall not be subject to the direction or control of any person or authority.

25 In this regards, *Article 162(2)* of the Constitution provides:-

(2)In performing its functions, the Bank of Uganda shall conform to this Constitution but shall not be subject to the direction or control of any person or authority.



5 Consequently the Governor was only able to write 'letters of comfort' as opposed to guarantees. The President being alive to the provisions of Article 159 (2) and 162(2) did not in his letter to him dated 8th January 2011 direct him to do anything. He simply advised him on subject matter. The advice of The President is not binding on the Governor of Bank of Uganda See: *Jim Muhwezi & 3 Others*
10 *versus Attorney General & Anor, Constitutional Court Constitutional Petition No.10 of 2008*. That petition discusses the powers of the President in relation to the independent offices under the Constitution. In that case it was the Inspector General of Government. The principle applies equally to the Governor of Bank of Uganda.

15 The 12th respondent therefore had no obligation to guarantee the Haba Group loans by way of "letters of comfort" Government guarantee or otherwise. In fact he is expressly prohibited by the Constitution from doing so.

Be that as it may, Shs. 142,698,096,388/= paid to the 2nd respondent at the instigation of the 1st respondent purportedly on behalf of the 2nd, 3rd, 4th, 5th and
20 6th respondents would never have been paid without the role played by the 13th, 14th, 15th and 16th respondents Banks.

The 13th respondent United Bank of Africa in its amended answer to the petition denied that the acts of issuing letters of comfort by the Bank of Uganda in respect of the loan sought by the 2nd respondent were inconsistency with the
25 Constitution.

Further in paragraph 6 (a) and (b) stated as follows:-

" 6(a) it is denied that the alleged letters of comfort issued by the 8th respondent to the 13th respondent amounted to guarantee or guarantee credit facilities issued by the 13th respondent to the 2nd respondent.



5 ***(b) Alternatively if the letter of comfort amount to guarantee from the 8th respondent to secure the 2nd respondent borrowing , then the said letters were lawfully issued by the 13th respondent to by the 8th respondent."***

I find no difficulty in resolving this question of law relating to the legality of the so called "letters of comfort."

10 Article 159(2) of the Constitution clearly stipulates that:-

(2) Government shall not borrow, guarantee, or raise a loan on behalf of itself or any other public institution, authority or person except as authorised by or under an Act of Parliament.

This is a very clear constitutional provision, which was not contained in 1967
15 Constitution. It was a departure from the past, expressly prohibiting Government from guaranteeing among others personal loans, except as authorised by Parliament or under an Act of Parliament. The question as to whether Bank of Uganda in issuing the aforementioned letter of comfort contravened *Article 159(2)* of the Constitution on whether or not the said letter constituted a guarantee envisaged
20 under *Article 159(2)* can be discerned from the letter itself. It is a common ground that there was no authorization obtained from Parliament. Whether or not the letter of comfort was amounted to guarantee under *Article 159(2)* of the Constitution can be discerned from the letter itself. The 13th respondent argues in alternative, that the 'letter of comfort' as referred to above did not amount to a guarantee.

25 The said "letter of comfort" written by the 8th respondent dated 30th October 2010 as follows:-

"Ref.GOV.122.10U

30th October 2011

30



5 The Managing director
United Bank for Africa (U) Ltd.
P.O. Box 7396,
KAMPALA

10 Dear Madam,

\$(US) 10,000,000 facility to HABA Group Limited

15 Reference is made to the request to you from HABA \$(US) 10,000,000/= (United States Dollars Ten Million Only).

20 I am writing to confirm that HABA Group Limited of P.O. Box 20000, Kampala, Uganda, has receivables from Government of Uganda o the tune of shs. 46 billion which shall be paid to HABA Group within the next three (3) months.

25 The Bank of Uganda hereby states unequivocally that it shall, within three months, deduct from the aforesaid receivables the equivalent of \$(US) 10 million and pay the said equivalent of \$(US) 10 million into HABA Group's account with the United Bank of Africa (U) Limited, Jinja Road, Kampala.

30 We further unequivocally confirm that the said deduction and payment shall be effected within the said three months and further confirm that the payment to HABA Group has been duly approved by the authorized officers and that there are no contingent conditions to the payment now or hereafter that can deter the release of the funds to United Bank for Africa Uganda Limited within the said three months.

35 Please do rely on this undertaking to grant the \$(US) 10 million facility to HABA Group, We are willing to give any further clarification if you so require.

40 E. Tumusiime-Mutebile
GOVERNOR'



5 There is also another letter worded exactly as the above, from the same 8th respondent to the 13th respondent dated 6th April 2011. In otherwise two such letters were issued. Both are annexed to the 13th respondent's amended answer to the petition.

Black's law Dictionary 9th Edition defines a 'guarantee' as: -

10 *'A contract or deed by which one person promises to pay the obligation of another.'*

See: Lord Diplock in Moschi vs Lep Air Services [1973] Ac 331 at 348.

Although the above letter is not strictly written as a deed of guarantee or contract and does not state that it is irrevocable or that the 8th respondent shall indemnify
15 the 13th respondent upon demand in the event of default by the 2nd respondent nonetheless, it satisfies all the tenets of a loan guarantee. More importantly, both parties appear from the pleadings to have intended the letter to be a guarantee and indeed when the 2nd respondent 'failed' to pay the loan, the 13th respondent, on the basis of that letter demanded payment from the 8th respondent who duly paid up.

20 I am required to interpret the contents of the letter of guarantee or comfort. I have done so and concluded that, it cannot be given any other interpretation or construed in any other way other than constituting an irrevocable guarantee by the 8th respondent in favour of the 13th respondent. *See: Stanbic Bank (U) Ltd vs Atyaba Agencies Supreme Court Civil Appeal No.2 of 2005.* The 13th respondent advanced
25 United States Dollars 19,500,000 to the 2nd respondent between December 2010 and May 2011 on the basis of that letter. We know that His Excellency the President had not written to Bank of Uganda about the subject matter in December 2010. The 13th respondent denied that the said payment constituted unjust enrichment or that it obtained unfair pecuniary benefit there under.



5 The said amount was advanced to Haba Group (U) Ltd for purchase of Hospital Equipment, steel, cement Aluminum and other construction materials for Kampala International University and Haba Group (U) Ltd.

Nothing is mentioned of the 3rd, 4th, 5th and 6th respondents who were the beneficiaries of Government compensation. There is of course on record resolutions
10 by those respondent companies authorizing Haba Group to receive money basically an agent of the said respondents. The resolution is not a deed of assignment and as such it did not transfer the ownership of that money to Haba Group (U) Ltd. Haba Group (U) Ltd. It only authorised Haba Group to receive it and nothing beyond that. To that extent the 13th respondent Bank had no authority to advance a loan to Haba
15 Group (U) Ltd based on a promise to receive money due and owing to third parties. In addition the loan from the 13th respondent was applied for by the 1st respondent on behalf of the 2nd respondent who was neither a shareholder nor a Director of that company. There is no evidence provided by the 13th respondent as to the nexus between, the 1st and 2nd respondent and the 2nd respondent and Kampala
20 International University.

The whole purpose of the loan is shrouded in mystery. There was no evidence what so ever that the 2nd respondent and or the 3rd, 4th, 5th and 6th are singly or jointly involved in real estate business, constructing 400 houses then or in the future. The future is now and that housing project is nowhere on paper or on the ground. My
25 finding is that all this was a fraud and the 13th respondent was in the thick of it.

The 13th respondent bank was part of the oil lubricating the wheels of corruption. Its role was to assist the 1st respondent to defraud tax payer's money. The same role was played by the 15th respondent, Bank of Baroda (U) Ltd. The loan from this bank was applied for by the 2nd respondent. The application was signed by the 1st
30 respondent. It is dated 3rd December 2010, it is for one million dollars. The 15th



respondent also obtained a letter of comfort from the Bank of Uganda also dated 3rd December 2010! It states:-

Ref.GOV.122.10B

3rdDecember 2010

*The Managing Director
Bank of Baroda
KAMPALA*

Dear Mr. Gupta

Credit Facility of \$ (US) 1,000,000 to HABA Group (U) Ltd.

Please refer to our telephone conversation this afternoon and the application from HABA Ltd. Facility of \$(US) 1,000,000= (United States Dollars One Million Only) from your bank.

I am writing to confirm that HABA Group Ltd. Of P.O. Box 20000, Kampala, has receivables from the Government of Uganda to the tune of Shs.96 billion, which will be paid to HABA Group within the next 3 months. The Minister of Finance, Planning & Economic Development has confirmed that these funds will be paid to the HABA Group through the Bank of Uganda. The Bank of Uganda, therefore, unequivocally confirms that the payment has been approved by the authorised officers and that there are no contingent conditions to the payment now or hereafter that cart deter the release of the funds.

In the above premises, we hereby with or without demand undertake to remit the monies due and owing to you' from HABA Group (U) Ltd. under the credit facility including interest thereon and other incidental charges within the said period of three months.

Please do rely this undertaking to grant the \$(US) 1,000,000/= facility to the company.

Yours sincerely,



5 *E.Tumusiime- Mutebile*
Governor

On 31st March 2011 the 15th respondent wrote to 1st and 2nd respondent informing them that the loan was due for payment. There is no indication that this letter was
10 ever replied to. There is nothing to suggest that any effort had made by the bank to recover that loan by foreclosure in any civil suit or otherwise by that Bank.

On 8th November 2011 the 15th respondent wrote to Bank of Uganda as follows:-

'HO/BOU/2K11/3193

8th November 2011

15 *The Governor*
Bank of Uganda
Kampala

20 ***Re: loan of Ugx 2300 million to Ms/ Haba Group (U) Ltd.***

We refer to our letter Nos HO/ADVI2K 11/11466 dated 19th April 2011, HOIBOU/2K11/2328 dated 26th July 2011 and HO/BOU12K11/2598 dated 26th August 2011 on the captioned matter and submit to inform you as under:-

25 *As per the letter from your office bearing reference number GOV 122.10B dated 3rd December 2010 it has been confirmed that Haba Group will be receiving payment to the tune of Ugx 96 billion from the Government of Uganda through Bank of Uganda. It has been further been confirmed that Bank of Uganda undertakes to remit the monies due and*
30 *owing to our Bank from Haba Group (U) Ltd under the credit facility including interest thereon and other incidental charges Within period of 3 months.*



5 *Giving consideration to BOU's communication dated 03.12.2010 confirming that BOU undertake to remit the money due to our Bank, we have extended a short term loan of Ugx 2300 million to M/s Haba Group (U) Ltd and the loan was due for repayment on 3rd March 2011.*

10 *We have requested BOU in the past also vide our letters referred above, copies enclosed, but the **payment is yet to be released to us.***

As on date the entire present outstanding along with charges and interest (interest up to 04.11.2011) is overdue for payment. The total amount due is Ugx 2865 million (inclusive of interest and processing charges.

15 *We once again request you kind intervention in the matter so that the entire loan amount (inclusive of interest and charges) is remitted to us.*

Thanking you.

20 *With Regards
sd:
PRAMOD K GUPTA
Managing Director.*

25 *Encl A/a*

C.C To the Senior Branch Manager, Bank of Baroda (U) Ltd, Kasanga branch. Advised to arrange to follow up the matter with the company.'

30 *The money was eventually paid by the Bank of Uganda. Again the 15th respondent advanced the money to the 1st respondent as part of a fraudulent scheme. It was not a loan but a conduit provided by the bank to fraudulently channel money from Bank of Uganda to the 1st respondent for the benefit of both parties and others.*

35 *The 14th respondent Orient Bank did the same thing. It appears that as far back as June 2010 Bank of Uganda and Orient Bank were in talks about assisting the 1st*



5 respondent obtain money pending release of money from Government to the 2nd
respondent. There is a letter to that effect from Bank of Uganda to Orient Bank dated
11th June 2010. On 28th October 2010, the Governor of Bank of Uganda wrote to
Managing Director Orient bank as follows:-

10 *Ref. Gov. 122.101*

28th October 2010

15 *The Managing Director
Orient Bank (U)
P.O. Box 3072
KAMPALA*

20 *Dear Sir,*

Proposed facility of \$(US)10,000,000/= to Haba Group Ltd

My letter of 11th June 2010 refers.

25 *I am further advised that HABA Group Ltd. Has submitted a proposal to
your Bank for a short term loan facility of \$(US)10,000,000- (United
States Dollars Ten Million Only) against the company's compensation
claims from the Government of Uganda totaling Shs.96billion.*

30 *The Bank of Uganda hereby promises to pay to the account of Orient Bank
from the above mentioned receivables the equivalent of \$(U)10million
into HABA Group Ltd's account with Orient Bank on or before the 31st of
January 2011 as a repayment of the facilities extended to HABA Group Ltd
by Orient Bank (U) Ltd.*

35 *Please do not hesitate to contact me for any further clarifications you may
require on this matter.*

Yours faithfully,

40 *E. Tumusiime-Mutebile*
GOVERNOR

5 This was long before the 1st respondent on behalf of the 2nd respondent had applied
for the loan. The loan was applied for on 1st April 2011 by letter written by the
1st respondent to Orient bank as follows:-

1st April 2011

10 *The Managing Director
Orient Bank Ltd
P. O. Box 3072
Kampala, Uganda.*

15 *Dear Madam/Sir,*

Re: Application for a Loan of USD 10,000,000

20 *We are a company engaged in Real Estates development and
management with a number of properties in and around Kampala. The
company is expanding its real estate business with construction of 4000
and houses and apartments in its 10 years' development plan.*

25 *We request you to authorize a short term loan of USD 10,000,000 (Usd
Ten Million) for a period of five months from the date of disbursement to
finance our ongoing projects and operations. The Ministry of Finance
shall be releasing the 2nd disbursement of our compensation in the
financial year 2011/2012 through Bank of Uganda, with which the loan
shall be repaid (a copy is herewith attached for your reference).*

30 *The Bank of Uganda comfort shall be the security for the loan and by the
copy of this letter, the Governor is requested to provide the same to your
account requested to provide the same to your Bank.*

35 *Thanking in advance,*

Yours faithfully,

40 *Hassan Basajjabalaba*

*Cc. The Governor
Bank of Uganda*



5 On the same day Orient Bank wrote to Bank of Uganda requesting for a letter of comfort. The letter reads as follows:-

'Ref OBL/Adv- Gen/ Haba

10 *April 1, 2011*

*The Governor Bank of Uganda
P.O. Box 7120
Kampala*

15 *Dear Sir,*

Payment of US\$10,000,000 to HABA GROUP LIMITED

20 *We are in receipt of a letter from Haba Group Ltd requesting for a USD 10 mn short term credit facility from our bank for expansion of its real estate business within Kampala.*

25 *The company has indicated that the Ministry of Finance shall be releasing the 2nd disbursement of their compensation in the Financial Year 2011/2012 through Bank of Uganda.*

30 *We are hereby requesting for a letter of comfort showing the amount, date of disbursement and a promise to pay to the company's account at Orient Bank Ltd.*

Managing Director

35 *Maxwel Ibeanusi'*

On 6th April 2011 the 8th respondent Bank of Uganda wrote a letter of comfort to the 14th respondent . It reads:-

Ref.GOV.122.10L

40 *06 April 2011*



5
The Managing director
Orient Bank (U) Ltd,
P.O. Box 3072
KAMPALA

10
Dear Sir,

Proposed Facility of \$ (US) 10,000,000 TO HABA Group Ltd.

15
Your letter of 1st April 2011 refers. HABA Group Ltd. has submitted a proposal to your Bank for a short term loan facility of \$ (US) 10,000,000 (United States Dollars Ten Million Only) against the company's compensation claims from the Government of Uganda totaling Shs. 67.2billion)

20
The bank of Uganda hereby promises to pay the account of Orient Bank from the above mentioned receivables the equivalent of \$ (US) 10million into HABA Group Ltd's account with Orient Bank before the end of six months as a repayment of the facilities extended to HABA Group Ltd by Orient Bank (U) Ltd.

25
Please do not hesitate to contact me for any further clarifications you may require on this matter

30
Yours faithfully

E.Tumusiime- Mutebile"

I find that this letter constitutes a guarantee envisaged under Article 159 (2) of the
35 Constitution. I say saw because it was acted upon as such by both parties. On 31st October 2011 Orient Bank wrote to Bank of Uganda as follows:-

'OBL / BOU /45/11

31st October 2011

40
The Governor
Bank of Uganda,
P.O Box 7120,
Kampala, Uganda.



5

Dear Sir,

Credit Facility US\$ 10,000,000 to HABA GROUP LTD

10

We refer to your letter Ref Gov.122.10L of 6th April 2011 on the subject in caption.

15

We wish to advise that the facilities equivalent of USD 10 Million Orient Bank Ltd extended to Haba Group Ltd against your irrevocable undertaking has matured for payment. Interest accrued to date amounts to equivalent of USD 988,090 (Nine Hundred eighty eight thousand ninety dollars).

20

As promised by BOU, we look forward to receiving the payment in our account for further credit to Haba Group Ltd's account to avoid further interest.

Yours faithfully,

25

*Managing Director
Maxwel Ibeanusi'*

30

United States Dollars 10 million of tax payers money had been paid to Orient Bank in two installments of 5 million each, by 10th November 2011. No effort had been made whatsoever to ascertain the legality of the transaction, in regard to the parties involved, the 1st respondent, the 2nd respondent and the 3rd, 4th, 5th and 6th respondents. There is no indication that, due diligence had prior to the advancement of that money been carried out by Orient Bank. The letter from the 1st respondent on behalf of the 2nd respondent to Orient Bank was requesting for a loan of USD

35

\$10,000,000/= to develop and manage real estate in Kampala. It was required for the construction of 4000 houses and apartments. But this was just a hoax. The Bank did not request from the 1st respondent any evidence of this. There is no evidence that the applicant had land, approved architectural plans, no feasibility study, no



5 evidence whatsoever that the applicant would ever use the money for the purpose it pretended it required it for.

What was important to the bank was that the Bank of Uganda had guaranteed payment of the loan. The bank was 100 percent assured that the loan would be repaid together with interest and all attendant costs including penalties.

10 The position and roles of the 16th respondent was not different. It was involved in this fraudulent scheme in the same way as the other respondents Banks. Tropical Bank the 16th respondent granted an over draft to the 2nd respondent of Ushs. 11,500,000,000/= payable in a period of 2 years. The 2nd respondent did not even have an account with the 16th respondent Bank until 20th July 2010 when it opened
15 one. In its application Haba Group (U) named 1st respondent Basajjabalaba as its Director. All the documents from the Company Registry attached to 16th respondent's affidavit in answer to the petition show that the 1st respondent was not Director in the respondent company at that time. There is a resolution by Haba Group the 2nd respondent dated 19th July 2011 authorising the company to open an
20 account with the 16th respondent and naming the 1st respondent Basajjabalaba as the sole signatory. There is also on file a company resolution by Haba Group authorising the company to borrow USD\$ 10,000,000 from Tropical Bank and stating that the security for the loan would be a letter of undertaking from Bank of Uganda.

25 Bank of Uganda issued a letter of comfort as a guarantee that it would pay the 2nd respondent's loan amounting to USD\$ 10,000,000 from receivables from Government of Uganda. We know that the Government did not owe Haba Group (U) LTD any money.

That letter reads as follows:-



5 *Ref: Gov.122. 10L*

06 April 2011

10 *The Managing Director
Orient Bank (U) Ltd
P.O Box 3072
Kampala*

15 *Dear Sir,*

Re: Proposed Facility of \$(US)10,000,000 to HABA Group Ltd.

20 *Your letter of 1st April 2011 refers. HABA Group Ltd. has submitted a
proposal to your Bank for a short term loan facility of \$(US) 10,000,000
(United States Dollars Ten Million Only) against the company's
compensation claims from the Government of Uganda totaling
Shs.67.2billion*

25 *The Bank of Uganda hereby promises to pay to the account of Orient
Bank from the above mentioned receivables the equivalent of \$(US) 10
Million into Group Ltd's account with Orient bank be ore the end of six
months as a repayment of the facilities extended to HABA Group Ltd. by
Orient Bank (U) Ltd.*

30 *Please do not hesitate to contact me for any further clarifications you
may require on this matter*

Yours faithfully

35 *E. Tumusiime-Mutebile
GOVERNOR*

40 *The loan application form names the 1st respondent as one of the directors of the 2nd
respondent. There is nothing to indicate that he was a director of that company at
the time or even before. Yet he was the sole signatory to the account and the one
who signed as the applicant. The loan was for real estate development. No details
were provided. There is no due diligence carried out as to the viability of the project.
No security was requested none was provided save for the letter of comfort.*



5 The purpose of the loan was stated to be:-

"Completion of ongoing projects in real estate in Haba Group."

Mode of re-payment was stated to be "From pending Government compensation as per letter attached". This loan was never paid by the borrower. The bank invoked the guarantee and Bank of Uganda paid out of public funds.

10 The acts of the four respondent banks jointly and severally completed the fraudulent scheme that stated with the bogus tenders of Kampala City Council markets and the Constitutional Square. The conspirators are the 1st, 2nd, 3rd, 4th, 5th and 6th respondents and together with various Kampala City Council officials named as the 17th, 18th and 19th and 20th respondents and others who constituted the
15 Kampala City Council Tender Board. The other conspirators are the Attorney General Khiddu Makubuya and the Minister of Finance Syda Bumba at the time these were the master minds behind this fraud. They were obviously the beneficiaries of the fraud and corrupt dealings. Their efforts to get this money through the Ministry of Justice by way of a supplementary Budget were thwarted by
20 Mr. Keith Muhakazi the Secretary to the treasury who on smelling a rat he referred the claim to the Auditor General. No payment could be made through Ministry of Finance/National Budget without a letter of no objection from the Auditor General. Perceiving that no such authorisation could be obtained, the Auditor General having commenced an audit, the results of which were all too obvious to the
25 conspirators, they decided to circumvent the proceed before the release of the Auditor General's report. They did this by requesting Ministry of Finance to ask Bank of Uganda to issue guarantees to Private Commercial banks.

The 1st respondent would obtain fake loans from Commercial banks guaranteed by the Bank of Uganda. Upon failure to pay which was a fact known and envisaged by
30 the Banks, the 1st respondent and Bank of Uganda, the guarantees would be invoked and Bank of Uganda would pay off the loans using tax payer's money. In the first



5 place no such money was ever owed by Government to 1st, 2nd, 3rd, 4th, 5th and 6th
respondent. I am fortified in my findings by the conclusion arrived at by the KPMG
the audit firm tasked to carry out a forensic audit on this scheme. The Auditor
General in his report to the Ministry of Finance dated 26th July 2011, stated that:-

10 *"The assessment has determined that instead of an amount of shs. 142, 698, 096,
288/= claimable by Haba Group, Haba owes Government a net amount of
Shs.994.039,186/="*

He made the following recommendations.

15 *'Based assessment undertaken through this exercise which has
determined that the Haba Group instead owes Government a net amount
of Shs.994,039,186/= there is a potential risk of all the funds already
paid to the Haba Group and the associated companies.*

I strongly recommend that:-

- 20
 - *all funds paid (and payable by guarantee) to the Haba
Group in relation to the claim through loans, advances and
guarantees be determined and immediate and appropriate ,
arrangements made for t e u recovery.*
 - *the report be studied with a view of having the recommendations
25 implemented.*
 - *Investigations/inquires be immediately Instituted to establish
those responsible for any loss so far suffered and any contingent loss
that is likely to arise and appropriate and necessary action
30 undertaken.'*

For the reasons I have endeavored to set out above, I have no hesitation in
answering the third issue in the affirmative. In addition to the above His Excellency
The President wrote a letter to the Attorney General dated 6th October, 2011
summed up the whole Basajjabalaba scheme as follows:-

35 *"6th October, 2011*

Hon. Peter Nyombi



KAMPALA**BASAJJABALABA'S CLAIMS**

10

I am writing to you in connection with Mr. Basajjabalaba's endless adventures involving public interests e.g markets, abattoirs, etc. I stopped his grabbing of people's markets and on account of fairness, I directed that the concerned Government departments compensate him so that either the City Council retains its ownership of the markets or they are operated by the market vendors themselves.

15

That process of compensation kept dragging on for years. Eventually, some thieves, yet to be established in the various Government departments, colluded with Basajjabalaba to pay him the incredible figure of 142 billion shillings. I have seen Basajjabalaba claiming that I "okayed" that figure. This is totally false. In any case, the President or anybody has no powers to okay what is illegal and illegitimate. Moreover, I have proof that that same Basajjabalaba has been trying to infiltrate elements in my office to help him commit fraud or manipulate my decisions.


20

25

I am, therefore, directing you to initiate the process of recovering this money. One can easily, with the right professional, evaluate the value of whatever Basajjabalaba put in markets for the brief period he was there. That should be deducted from whatever has been given to Basajjabalaba so that he repays the rest of the money. He must pay the money that the Government Valuer says was in excess of what was due to him.

30

Moreover, I have also got information that Basajjabalaba has been diverting the money he has been getting from Government for his Ishaka



5 *hospital. I think the story was that if he got support from the Government, he would treat people free of charge.*

By copy of this letter, I am directing my Ag Principal Private Secretary to send my Medical Services Monitoring unit, to find out whether this is happening or not. I, however, got a report that he had diverted this
10 *money to build something in Dodoma, Tanzania. Move on all these issues.*

Yoweri. K Museveni

PRESIDENT

Cc: H.E the Vice President

15 *Cc: Rt. Hon. Prime Minister*

Cc: The Minister in-charge of Presidency

Cc: Hon Minister of Finance, Planning & Economics Development

Cc: Permanent Secretary/Secretary to Treasury, Ministry of Finance, Planning

20 *&Economic Development*

Cc: Ag Principal Private Secretary"

The above letter in my view sums up the whole scheme and points to what the remedies ought to be.

25 Apparently even after the above letter had been received by the Attorney General nothing was done. It was not until the petitioner herein a public interest Non-Governmental organisation brought this petition that the matter was revived. Regrettably this Court has taken 8 years to come with a decision.

 Having answered issues 1, 2 and 3 in the affirmative, it follows that issue 5 and 6
30 have to be answered in the same way. I do hereby answer the 5th and 6th issues in



5 the affirmative. Accordingly this petition substantially succeeds on all grounds. I
would now make the following declarations.

10 **1. THAT** any and all lease and management agreements or other
contract-like documents by whatever name called purportedly
concluded, extended or executed by, between or among the 1st
15 ,2nd 3rd, 4th 5th ,6th , 7th and 8th Respondents in respect of the
ownership, management, control and maintenance of or other
interests in or rights over Nakasero Market, Nakivubo
Shauriyako Market, St. Balikuddembe Market (formerly Owino
Market), Nakawa Market and the Constitution Square
20 (formerly City Square) in Kampala City between 1st January
2000 and 31st December 2011 were illegal, unconstitutional,
null and void abinitio for having been concluded without
obtaining legal advice and approval from the 9th Respondent in
contravention of Article 119(5) of the Constitution;

25 **2. THAT** the 1st , 2nd, 3rd, 4th, 5th , 6th and 7th Respondents jointly
or severally contravened or threatened the right of the people
of Uganda to live free from corruption and abuse or misuse of
power and public resources by politicians and public officers as
30 guaranteed under National Objective XXVI and Articles 8A, 17(
1)(i), 20(1)(2), 21, 25(1), 41, 36, 38, 45, 164, 196, 201 and
233(2)(b) when they purported to conclude, extend or
execute all or any of the lease and management agreements
and other contract – like documents described in (i) above
35 without obtaining the appropriate authorization of KCC, its
Mayor and the relevant division councils as specified by the
relevant laws and regulations relating to local Governments



5 without complying with procurement and disposal laws and regulations then in force, and without obtaining legal advice and approval from the 9th Respondent;

10 3. **THAT** the 1st, 2nd, 3rd, 4th, 5th 6th and 7th Respondents jointly or severally contravened or threatened the fundamental rights of the people of Uganda guaranteed by Article 21 (1) and (2) of the Constitution when they purported to conclude, extend or execute all or any of the lease and management agreements and other contract-like documents described in (i) above
15 without complying with basic principles of public procurement and disposal prescribed by the relevant laws and regulations then in force;

20 4. **THAT** the 1st, 2nd, 3rd, 4th, 5th 6th and 7th Respondents jointly or severally contravened or threatened the fundamental rights of the people of Uganda guaranteed by Article 41 of the Constitution when they purported to conclude, extend or execute all or any of the lease and management agreements and other contract-like documents
25 described in (i) above without complying with basic principles of public procurement and disposal prescribed by the relevant laws and regulations then in force;

30 5. Respondents jointly or severally contravened or threatened the right of the people of Uganda to live free from corruption and abuse or misuse of power and public resources by politicians and public officers as guaranteed under National Objective



5 XXVI and Articles 8A, 17(1)(i), 20(1)(2), 21, 25(1), 41, 36, 38,
45, 164, 196, 201 and 233(2)(b) of the Constitution when they
purported to conclude, extend or execute all or any of the lease
and management agreements and other contract-like
documents described in (i) above without complying with basic
10 principles of public procurement and disposal prescribed by the
relevant laws and regulations then in force;

15 6. **THAT** the 1st, 2nd, 3rd, 4th, 5th 6th and 7th Respondents jointly or
severally contravened Article 237(8) of the Constitution when
they purported to conclude, extend or execute all or any of the
lease and management agreements and other contract-like
documents described in (i) above without obtaining prior
written consent from the existing market vendors or other
tenants/users of the properties complained of or from their
20 families or spouses, and without giving them or their
associations prior notice, sensitization or the first option to
make such acquisition, and without complying with other
procedures prescribed by the Land Act relating to security of
occupancy for lawful or bonafide occupants;

25 7. **THAT** the 1st, 2nd, 3rd, 4th, 5th 6th and 7th
Respondents jointly or severally contravened Articles 20 (1)
(2), 32(1), 40(2), and 26(1)(2) of the Constitution on account
of their failure or refusal to proactively take affirmative action
to empower existing market vendors or other tenants/users of
30 the Impugned Properties to acquire enhanced property and
business rights or interests in or over the said properties, and



5 also on account of their failure to give prompt payment of fair
and adequate compensation to existing market vendors or
other tenants/users of the Impugned Properties prior to the
purported conclusion, extension or execution of all or any of
the lease and management agreements and other contract-like
10 documents described in (i) above;

8. **THAT** any and all lease and management agreements or other
contract-like documents by whatever name called purportedly
concluded, extended or executed by, between or 1st, 2nd, 3rd, 4th,
15 5th 6th, and 7th Respondents in respect of the ownership,
management, control and maintenance of or other interests in
or rights over Nakasero Market, Nakivubo Shauriyako Market,
St. Balikuddembe Market (formerly Owino Market), Nakawa
Market and the Constitution Square (formerly City Square) in
20 Kampala City between 1 January 2000 and 31 December 2011
were illegal, unconstitutional, null and void abinitio on account
of the contraventions of the Constitution and the law specified
in (ii), (iii), (iv), (v), (vi) and (vii) above and Article 237(2) of
the Constitution.

9. **THAT** any and all letters of comfort, guarantee, indemnity,
credit or assurance, promissory notes, cash payment orders,
and other financial instruments, agreements, contracts,
covenants and like documents by whatever name called
30 purportedly concluded or executed by, between or among the
8th, 10th, 12th, 13th, 14th, 15th, and /or 16th respondents in
respect of loans or credit facilities advanced to the 1st, 2nd, 3rd,
4th, 5th, and / or 6th Respondents between 1st January 2000 and

5 31 December 2011 and on the pretext of assisting Government
to expedite compensation of the 1st, 2nd, 3rd, 4th, 5th, and / or
6th, respondents were illegal, unconstitutional, null and void
ab initio for having been concluded without obtaining legal
advice and approval from the 9th Respondent contrary to
10 Article 119 (5) and 159 (2) of the Constitution.

15 **10.** THAT the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th,
14th, 15th and 16th Respondents jointly or severally
contravened Articles 154(3), 160, 163(3)(a)(b) and 164 of the
Constitution when, on the pretext of expediting the
implementation of Government's proposals for compensation
of the 1st, 2nd, 3rd, 4th, 5th, and/or 6th Respondent in respect of
the properties complained of in this Petition, they
contemplated, rationalized, applied for, facilitated and/or
20 authorized the withdrawal of funds from the Consolidated
Fund in a fraudulent manner and without obtaining the
approval of the Auditor General and without complying with
the relevant provisions of the Public Finance and
Accountability Act, 2003.

25 **11.** THAT the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th,
14th, 15th and 16th Respondents jointly or severally contravened
Articles 154(1) (b), 154(2), 156, 159(5), 160 and 164 of the
Constitution when, on the pretext of expediting the
implementation of Government's proposals for compensation
of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents in respect of
30 the properties complained of in this Petition, they fraudulently



5 *contemplated, rationalized, applied for, facilitated and/or*
 authorized the withdrawal of funds from the Consolidated
 Fund or other public funds or public accounts of Uganda other
 than the Consolidated Fund or elsewhere without the issue of
 such monies being authorized by Parliament through an
10 *Appropriation Act, a Supplementary Appropriation Act or*
 solution of Parliament.

12. *THAT the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th,*
 14th, 15th and 16th Respondents jointly or severally contravened
15 *Articles 154(3) 160, 164(3)(a)(b) and 164 of the*
 Constitution when, on the pretext of expediting the
 implementation of Government's proposals compensation of
 the 1st, 2nd, 3rd, 4th, 5th and /or 6th, Respondent in respect of the
 properties complained of in this petition, they contemplated,
20 *rationalized, applied for, facilitated and/or authorized the*
 borrowing, guaranteeing, raising or giving of loans or grants
 that were obtained by the 1st, 2nd, 3rd, 4th, 5th and/or 6th without
 Parliamentary approval and without complying with the
 relevant provisions of the Public Finance and Accountability
25 *Act, 2003 and other laws and procedures intended to control*
 the raising or giving of loans, grants and guarantees by or on
 behalf of Government or its agencies and organs;

13. *THAT the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th,*
 14th, 15th and 16th Respondents jointly or severally contravened
30 *Article 162(2) of the Constitution when, in anticipation of*
 Parliamentary approval and the Auditor General's clearance of



5 Government's proposals for compensation of the 1st, 2nd, 3rd,
4th, 5th and/or 6th Respondents in respect of the properties
complained of in this Petition, they directly or indirectly co-
opted or otherwise contemplated, rationalized, facilitated
and/or authorized the
10 co-opting of the Central Bank in a spurious and
unconstitutional loan-and-guarantee, scheme aimed at
granting them more favourable treatment than is
contemplated by the Constitution and the law;

15 **14.THAT** the 8th and 12th Respondents jointly or severally
contravened Article 162(2) of the Constitution when they
approved and acted in accordance with illicit, gratuitous and
unconstitutional directives, plans or proposals made by the 1st,
2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and
20 16th Respondents with the object of co-opting
the Central Bank in a spurious and unconstitutional loan-and-
guarantee scheme designed purposely to gain access to the
Consolidated Fund and other public funds of Uganda
prematurely or in anticipation of Parliamentary approval and
25 the Auditor General's clearance of Government's proposals.

30 **15.THAT** the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th,
13th, 14th, 15th and 16th Respondents jointly or severally
undermined the rule of law and contravened or threatened the
of be people of Uganda to live free from corruption and abuse
or misuse of power and public resources by politicians and
public officers as guaranteed under National Objective XXVI,



Articles 8A, 17(1)(i), 20(1)(2), 21, 25(1), 41, 36, 38, 45, 107, 118, 164, 196,201 and 233(2)(b) when, on the pretext of expediting the implementation of Government's proposals for compensation of the 1st2nd, 3rd, 4th, 5th and/or 6th Respondents in respect of the properties complained of in this Petition, they failed to conform to the Constitution and scandalously allowed themselves to be used to further the interests of the Presidency and/or the interests of the 1st, 2nd, 3rd, 4th, 5th , 6th 13th, 14th, 16th and/or 16th Respondents or their associates in the public or private sector in a manner detrimental to the interests of the people of Uganda;

16. THAT the purported compensation of the 1st 2nd, 3rd, 4th, 5th and 6th respondents by 7th 8th, 9th, 10th, 11th and 12th respondents in respect of the properties complained of in this Petition was not only illegal, unconstitutional, null and void abinitio, but also amounted to an intolerable abuse or misuse of power and public funds;

17. THA T the 8th, 13th , 14th, 15th and 16th Respondent Banks jointly or severally contravened Articles 119(5), 154(1)(b), 154(2), 154(3), 156, 159(2), 159(3), 159(4), 159(5), 159(6), 159(7), 160, 163(3)(a)(b) and 164 of the Constitution when through fraud they purported to call on, enforce or implement letters of comfort, guarantee, credit or assurance and other contract-like documents that had been unlawfully issued by the 8th and 12th Respondents on the pretext of assisting Government to expedite compensation of the 1st 2nd, 3rd, 4th, 5th and/or 6th Respondents and in respect of monies lent or given to the 1st



5 *2nd, 3rd, 4th, 5th and/or 6th Respondents by the 13th, 14th, 15th and/or 16th
Respondent Banks which had been unlawfully secured by public fund ;*

10 *18. THAT the purported compensation of the 13th, 14th, 15th and/or
16th Respondent Banks by the 8th and 12th Respondents in respect
of the impugned guarantee, indemnity or assurance agreements or
other contract-like documents concluded by, between or among
the 8th, 12th, 13th, 14th, 15th and/or 16th Respondents purportedly to
secure the repayment Respondents by the 13th, 14th, 15th and/or
16th Respondent
Banks was not only illegal, unconstitutional, null and void ab initio,
15 but also amounted to embezzlement , corruption an intolerable
abuse or misuse of power and public funds.*

Other Remedies available

20 I find myself obliged to apportion culpability and to grant specific remedial and
punitive orders. I am alive to the fact that this is not a criminal trial and as such I am
unable to make any findings as to the possible criminal aspects of this matter.

Be that as it may Court has powers to grant redress where appropriate. Redress is
defined in the Oxford Advanced Learner's Dictionary New 8th Edition as:-

"Suitable, acceptable or correct for the particular circumstance"

25 In the circumstances of this petition in which the petitioner has brought before this
Court in public interest, the public deserves redress. The public was robbed of
billions of shillings equivalent to millions of United States Dollars as outlined above.

This money would have been used to procure medicines for health centres, to
educate the young children, to pay teachers and soldiers. It would have built roads,



5 schools and hospitals. Redress in the circumstances of this cannot be less than recovery of this money.

Corporations worldwide have been fined for their wrong doings.

The decade since the 2008 financial crisis has witnessed an explosive leap in the magnitude of fines and penalties handed down to global companies found to have engaged in improper conduct. The \$1.6bn penalty inflicted on engineering giant Siemens that year by US and German authorities for alleged violations of anti-corruption laws is less than half of the charge taken at Odebrecht in 2016 (\$3.5bn).

These amounts, while huge, pale in comparison to the largest multi-billion-dollar fines levied for other major corporate offenses, ranging from financial fraud to violations of international sanctions and environmental crimes.

The biggest corporate fine to date was levied against BP in the wake of the 2010 Deepwater Horizon oil spill in the Gulf of Mexico, the largest in history. BP settled with the U.S.

Several of the largest fines have hit the financial services industry, a direct result of the scrutiny facing banks in the wake of the financial crisis. These include the second-place \$16.65bn fine paid by Bank of America in 2014 for its role in the subprime loan crisis, the \$13 billion paid by JP Morgan to resolve similar charges, and the \$8.9bn paid by BNP Paribas for violations of U.S. sanctions against Sudan, Iran, and Cuba.

Major fines have also been levied on Citigroup, Royal Bank of Scotland, Goldman Sachs, Credit Suisse, Wells Fargo, and HSBC holdings for conduct ranging from money laundering to rate manipulation, retail practices, and tax evasion. As a result, financial services companies have been forced to make significant new investments



- 5 in their compliance, controls and oversight – however, with new cases often in the news, it appears that much effort remains to be done.

The third largest fine was paid by Volkswagen, which, in 2016, faced \$14.7bn in civil and criminal penalties from the United States in the wake of its scandal over emissions cheating.

- 10 Regulators in the US and Europe alike appear to be taking aim at Silicon Valley and with growing concerns about cyber-security, data protection, and online privacy, the technology sector has emerged as the next target of multi-billion-dollar fines. Over the past three years, the EU has levied a series of fines against Google for alleged anti-competitive practices, totaling over €8bn. In 2019, it has been widely reported
15 that another tech giant, Facebook, is expected to face fines of up to \$5bn by the Federal Trade Commission for privacy violations.

The lesson from these giant fines and penalties is clear: the era of tolerance for corporate crime has ended and going back to business-as-usual is not an option.

See: Periodical Report by Jose Hernandez published on 24, May 2019.

- 20 In Hungary Microsoft was fined over USD 8.7 million in bribery case, it was reported by MTI-Econews on Tuesday, July 12 2019 as follows:-

25 *"The Hungarian unit of software giant Microsoft Corporation has agreed to pay more than USD 8.7 million in criminal penalties to resolve a foreign bribery case, the United States Department of Justice (DOJ) said on Monday, state news wire MTI reported.*

Microsoft Hungary executives and employees falsely represented to Microsoft that steep discounts were necessary to conclude deals with resellers who bid for the opportunity to sell Microsoft licenses to Government customers. In reality,



5 *the savings were not passed on to the Government customers, but instead were used for corrupt purposes and were falsely recorded as "discounts" and stored in various tools and databases on Microsoft servers in the United States, the DOJ said."*

The Press release of 29th September, 2016, reported that Hedge fund was fined to
10 pay \$413m for bribery as follows;-

"The fight to hold corporate actors to account for overseas corruption has been given a significant boost after the New York hedge fund Och-Ziff was ordered to pay \$413m by the United States Department of Justice and Securities and Exchange Commission (SEC) for violations of the Foreign Corrupt Practices Act
15 *(FCPA).*

The use of bribes enabled Och-Ziff to profit from mining and oil deals, some of which deprived one of the world's poorest countries of money that could have been used to build schools and fund hospitals. It is only right that they are held to account," said Pete Jones, campaigner at Global Witness. "But this mustn't
20 *just be about issuing fines: the individuals behind these corrupt deals must be held accountable and jailed where appropriate."*

"Anonymously-owned companies played a key role in helping to pull off some of the damaging deals in the Och-Ziff case," said Jones. "We've seen time and again that corrupt corporate actors use anonymous companies to disguise payments
25 *and make off with their profits".*

The colossal sums of money set out in this Judgment would never have been lost without the involvement of the 13th, 14th, 15th and 16th respondent Banks. They are the ones individually and collectively that provided the 1st respondent with the key to the national treasury. They provided him with the password to the safe. Without



5 them this money would never have been lost. They are to blame for the loss of over
shs. 142,698,096,338/= of tax payers money. This money ought to be recovered and
paid back to the treasury.

In line with the above global trends and keeping in mind that the Judiciary in
Uganda is totally committed to fighting corruption at all levels, I would make the
10 following orders:-

1. *An order for annulment and/or cancellation of all the purported leases, agreements and compensation between the 7th respondent and the 2nd, 3rd, 4th, 5th, and /or 6th respondents in respect of the properties complained of in this petition*
- 15 2. *I would direct the High Court to ascertain the exact amount of public money received under the impugned contracts between the 7th respondent and the 2nd, 3rd, 4th, 5th and 6th respondents. Thereafter apportion it to the 1st, 2nd, 3rd, 4th, 5th, and 6th respondents and issue a decree in respect thereof in favour of the Attorney General who is hereby directed to recover it within 6 months of this judgment.*
- 20 3. *I have not found the 7th, 8th and 9th respondents culpable as Government institutions in anyway and I make no orders against them.*
4. *The registrar of this Court is hereby directed to forward this judgment to both the Inspector General of Government (IGG) and the Director of Public Prosecutions (DPP) for them to ascertain the culpability of the individual*
25 *officers of the 7th, 8th and 9th respondents responsible for the loss of the said money and take appropriate action.*
5. *In respect of the 10th and 11th respondents, I find each of them individually responsible for causing financial loss to Government and also in abuse of*
30 *their respective offices. Since the above are criminal offences I direct the*



- 5 Registrar of this Court to forward this Judgment to the IGG and DPP for them
to take an appropriate and independent action against the 10th and 11th
respondents.
6. I have not found any evidence against the 12th respondent, but I fault him for
failure to properly advise the President in respect of this matter. It is up to
10 the appointing authority to take any appropriate action against him in this
regard.
7. I have not been able to ascertain the exact role played by the 17th, 18th, 19th
and 20th respondent to warrant sanctions against them.
8. I hereby issue an order for annulment and/or cancellation of all the
15 loan/guarantee, indemnity and assurance agreements between the 13th, 14th
15th and 16th respondent Banks and the 8th and 12th respondents in respect of
the credit facilities granted to the 1st, 2nd, 3rd, 4th, 5th and 6th respondents
which have been found to be unconstitutional and therefore null and void ab
initio.
9. I hereby impose penal fine of USD 10 (Ten) million United States Dollars or
20 its equivalent in Uganda shillings against each of the following individual
Banks involved in this corruption scheme, namely the 13th respondent,
UNITED BANK OF AFRICA (UGANDA) LTD, the 14th respondent, ORIENT
BANK LTD, the 15th respondent, BANK OF BARODA (UGANDA) LTD and the
25 16th respondent, TROPICAL BANK (UGANDA) LTD to be paid by each of the
offending Banks to the Bank of Uganda within 30 (Thirty) days of this
Judgment.
10. The Bank of Uganda is hereby directed to recover the above sums by
debiting the accounts of each of the said offending Banks set out in



5 paragraph 9 above with the said amount if the same has not been paid
within 30 (thirty) days from the date of this judgment.

11. This being is a public interest matter I make no order as to costs.

I would so order

Final Conclusion and orders

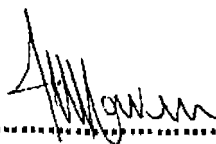
10 The final declarations and orders of this Court by majority decision are as follows:-

1. The preliminary objections as to the competence of this petition and the jurisdiction of this Court have no merit and are hereby dismissed.
2. This petition raises questions for constitutional interpretation and is neither frivolous nor vexatious.
- 15 3. It is hereby declared that all the impugned contracts and leases between the 7th respondent and the 2nd, 3rd, 4th, 5th and 6th respondent were null and void having been executed in contravention of the Constitution as set out in this judgment.
4. No compensation was payable under the impugned leases and contracts
20 referred to in paragraph 3 above which were illegal and therefore null and void *ab initio*.
5. All the money paid as compensation to the 1st, 2nd, 3rd, 4th, 5th and 6th respondents by Government under the impugned contracts and or leases shall be refunded by the said respondents jointly and or severally to the
25 Government through the office of the Attorney General.
6. The exact amount of money to be refunded to Government by the 1st, 2nd, 3rd, 4th, 5th and 6th respondents referred to in paragraph 5 above shall be ascertained and apportioned by High Court. The Registrar of this Court is hereby directed to transmit the whole of this file to the High Court for that
30 purpose.



- 5 7. We hereby declare that, the acts or omissions of the 8th and 12th respondents,
of issuing guarantees and or letters of comfort in favour of the 1st, 2nd, 3rd, 4th,
5th and 6th respondents to the 13th, 14th, 15th and 16th respondent banks to
facilitate payment of the impugned compensation was inconsistent with and
in contravention of Article 159(2) & (7) (a) of the 1995 Constitution.
- 10 8. This being a public interest action we order that each party to this petition
bear its own costs

Dated at Kampala this24.....day ofMarch....., 2020.



15

.....
Kenneth Kakuru
JUSTICE OF APPEAL/ CONSTITUTIONAL COURT

**THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 0004 OF 2012**

**LEGAL BRAINS TRUST (LBT) LTD ::::::::::::::::::::::::::: PETITIONER
VERSUS**

- 1. HASSAN BASAJJABALABA**
 - 2. HABA GROUP (UGANDA) LTD**
 - 3. VICTORIA INTERNATIONAL TRADING COMPANY LTD**
 - 4. SHEILA INVESTMENTS LTD**
 - 5. YUDAYA INTERNATIONAL LTD**
 - 6. FIRST MERCHANT INTERNATIONAL TRADING COMPANY LTD**
 - 7. KAMPALA CAPITAL CITY AUTHORITY**
 - 8. BANK OF UGANDA**
 - 9. ATTORNEY GENERAL**
 - 10. HON. SYDA BBUMBA, MP ::::::::::::::::::::::::::: RESPONDENTS**
 - 11. HON. PROF. KHIDDU MAKUBUYA, MP**
 - 12. PROF. EMMANUEL TUMUSIIME-MUTEBILE**
 - 13. UNITED BANK OF AFRICA (UGANDA) LTD**
 - 14. ORIENT BANK LTD**
 - 15. BANK OF BARODA (UGANDA) LTD**
 - 16. TROPICAL BANK (UGANDA) LTD**
 - 17. MR. JAMES SSEGANE**
 - 18. MS. RUTH KIJJAMBU**
 - 19. MR. GORDON MWESIGYE**
 - 20. MR. WILLIAM TUMWINE**
- (Coram: Kakuru, Kiryabwire, Musoke, Cheborion, Musota, JJA/JJCC)**

JUDGMENT OF ELIZABETH MUSOKE, JA/JCC

I have had the opportunity of reading in draft the judgments of my learned brothers, Kakuru, Kiryabwire and Cheborion, JJA/CC in the present Petition.



The judgment of Kiryabwire, JA/CC gives a thorough exposition of the factual background of the Petition; the allegations against the respondents; and the declarations and orders prayed for by the petitioner. It also sets out in detail the submissions for the parties. I need not repeat that material here. However, I wish to make some comments of my own about the present Petition.

The Petitioner's main allegations were that the Government of Uganda, in the period between 2001 and 2011, had paid Ug. Shs. 142,697,752,244/= (One Hundred Forty Two Billion Six Hundred Ninety Seven Million, Seven Hundred Fifty Two Thousand Two Hundred Forty Four Shillings only) in unmerited compensation to the Haba group, comprised of companies, which are managed by the first respondent.

The said compensation was in respect of contracts for redevelopment of the City Square and management of several city markets, which had been entered into by the 7th respondent and member companies of the Haba group of companies (3rd, 4th, 5th and 6th respondents).

The issue of payment of compensation arose after the contracts were terminated because they met "popular resistance from market vendors and the public." Subsequent to the cancellation of the said contracts, Haba Group (U) Limited petitioned H.E the President for compensation in respect of the contracts which it claimed had been unlawfully terminated.

After receiving the Haba Group Petition, His Excellency the President directed the Attorney General to investigate the matter, consequent upon which, an "inter-ministerial team" was constituted for the purpose. The said team initially recommended the payment of Ug. Shs. 22,770,349,673/= (Twenty Two Billion, Seven Hundred Seventy Million, Three Hundred Forty Nine Thousand, Six Hundred Seventy Three Shillings only). This recommendation was later revised to Ug. Shs. 54,690,517,149/= (Fifty Four Billion, Six Hundred Ninety Million, Five Hundred Seventeen Thousand, One Hundred and Forty Nine Shillings only) by the 11th respondent, then Attorney General; and further to Ug. Shs. 96,461,395,376/= (Ninety Six Billion, Four Hundred Sixty One Million, Three Hundred Ninety Five Thousand, Three Hundred



Seventy Six Shillings only) by then Solicitor General in a letter to the Secretary to the Treasury dated 28th September, 2010; and finally further upwards to Ug. Shs. 142,698,096,388/= (Shillings One Hundred Forty Two Billion, Six Hundred Ninety Eight Million, Ninety Six Thousand, Three Hundred Eighty Eight), per the communication of then Acting Solicitor General H. Lwabi. (annexture F.5 to the Petition). Thereafter then Minister of Finance (10th respondent) requested the Governor Bank of Uganda to sort out the repayment of the loans/obligations incurred by the Haba Group. She wrote:

"Refer to my earlier letter Ref: MEP/83/207/02 dated December 3rd, 2010 and to other correspondences on the subject echoing H.E The President's directives.

Haba Group has written to state that they were duly assisted with a small portion of their claim by various financial institutions, and that repayment is now due.

In accordance with their correspondence this is to request you to sort out repayment with the said financial institutions."

By another letter (Annexture I3 to the Petition), the Minister responsible for finance wrote that:

"Further to my letters, this is to confirm that you can repay the proceeds of the earlier programmes with the Banks. As soon as the budgetary arrangements allow, I will authorize payments to the Haba Group through the Bank of Uganda from which you can deduct the extra money to pay to the Banks the extra loans you will have arranged for Haba Group."

As regards, the mode of payment of compensation, it was alleged by the petitioner that the compensation was paid to Haba Group on the strength of assorted financial instruments including; letters of comfort, letters of guarantee, letters of indemnity, letters of credit, letters of assurance, promissory notes, which were given by the 8th and 12th respondents in favour of the 2nd respondent to obtain credit facilities from the 13th, 14th, 15th and 16th Respondent Banks. The total amount allegedly obtained from the respondent banks was as follows:



- US Dollars 20,000,000 from the 13th respondent about and around 15th January, 2011 to 6th April, 2011.
- US Dollars 34,350,000 from the 14th respondent about and around 28th October, 2010 to 15th January, 2011.
- US Dollars 1,000,000 from the 15th respondent about and around 3rd December, 2010.
- US Dollars 10,000,000/= from the 16th respondent about and around 25th November, 2010.
- **Total: US Dollars 65,350,000.**

However on perusal of the pleadings in this case, the monies paid to the 2nd respondent through credit facility arrangements with the 13th, 14th, 15th and 16th respondent Banks, were as follows:

- Ug. Shs. 11,500,000,000/= (Eleven Billion, Five Hundred Million Shillings only) from the 16th respondent by an agreement dated 15th November, 2010. (See: Annexure E to the affidavit in support of the 16th respondent's answer to the Petition).
- US Dollars 1,000,000 (One Million Dollars only) from the 15th respondent. (See: Annexures to the affidavit in support of the 15th respondent's answer to the Petition).
- US Dollars 9,500,000 (Nine Million, Five Hundred Thousand Dollars only) from the 13th respondent. (See: Annexures to the affidavit in support of the 13th respondent's answer to the Petition).
- US Dollars 10,000,000 (Ten Million Dollars only) from the 14th respondent. (See: Annexures to the affidavit in support of the 14th respondent's answer to the Petition).
- **Total: Ug. Shs. 11,500,000,000/= (Eleven Billion, Five Hundred Million Shillings); and US Dollars 20,500,000 (Twenty Million, Five Hundred Thousand US Dollars).**

According to the letter from then Ag. Solicitor General referred to earlier, the monies which were deemed payable to the 3rd, 4th, 5th and 6th respondents; and which were paid to the 2nd respondent stood at a total of Ug. Shs. 142,698,096,388/= (Shillings One Hundred Forty Two Billion, Six Hundred

Ninety Eight Million, Ninety Six Thousand, Three Hundred Eighty Eight). Those Monies were subsequently disbursed in instalments from the consolidated fund; either to offset the above credit facilities extended by the 13th, 14th, 15th and 16th respondent banks to the 2nd respondent; or were paid directly to the 2nd respondent.

The petitioner further alleges that the 8th and 12th respondents arranged for the payment to Uganda Broadcasting Corporation of Ug. Shs. 10,400,000,000/= (Ten Billion, Four Hundred Million Shillings only), as purchase price for UBC's land which the 2nd respondent was interested in buying.

The petitioner was adamant that the respondents had each played a role in causing or facilitating the impugned payments, and that each of the 20 respondents had jointly or severally undermined the rule of law and unjustly enriched themselves or their associates.

During conferencing, counsel for the petitioner proposed seven issues for the determination of this Court, which were acquiesced to by the various counsel for the respective respondents as follows:

- "1. Whether Kampala City Council or Government had any right to lease the Constitutional Square, a green area in view of the provisions of Article 237 (b).**
- 2. Whether the management contracts, subleases and joint venture agreements entered into by the 1st to 6th respondents and the 7th , 17th , 18th, 19th and 20th respondents violated Article 119 (5); 21(1) and (2); 41, 20(1)(2), 32(1), 40(2), 26(1)(2) and 237(8).**
- 3. Whether the impugned letters of comfort issued by the 8th and 12th respondents to the 13th, 14th, 15th, and 16th" respondents violated the provisions of Articles 159(2), 159(3), 159(4), 159(5), 159(6), 159(7), 160, 164 and 119(5) of the Constitution, Section 25 of the Public Finance and Accountability Act, Sections 14(1), 29(I)(g), (6) and (7) of the Bank of Uganda Act of the Bank of Uganda Act;**
- 4. Whether the 1st, 2nd, 3rd, 4th, 5th, 6th, 13th, 14th, 15th and 16th respondents are/were knowing recipients of unauthorised public funds and thus unjustly enriched.**

5. Whether, in the light of the matters complained of in the Petition , the 1st, 2nd, 3rd, 4th, 5th , 6th , 8th, 9th, 10th, 11th, 12th , 13th, 14th , 15th 16th , 17th , 18th ,19th and 20th respondents acted corruptly and in contravention of National Objective XXVI, Articles 8A, 17(I)(i), 20(1),(2), 21, 25(1), 41, 36, 38, 45, 107, 118, 196, 201 and 233 (2) (b) of the Constitution;
6. Whether, in the light of the matters complained of in the Petition , the 1st, 2nd, 3rd, 4th, 5th , 6th , 8th, 9th, 10th, 11th, 12th , 13th, 14th , 15th and 16th , respondents acted in contravention of Article 162(2) of the Constitution; and lastly.
7. What remedies are available to the Parties in the circumstances?"

Jurisdiction of the Constitutional Court

The Constitutional Court was established under **Article 137** of the **1995 Constitution**, which as far as is relevant provides:

"The Constitutional Court.

137. Questions as to the 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) When sitting as a Constitutional Court, the Court of Appeal shall consist of a bench of five members of that court.

(3) A person who alleges that—

(a) ...

(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.

(4) 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.



- (5)...
- (a)...
- (b)...
- (6)...
- (7)..."

It was contended for the 1st, 2nd, 3rd, 4th, 5th and 6th respondents, during the hearing that the Petition was improperly before this Court because; first it was for the enforcement of rights yet under Article 50 of the Constitution, such actions must be brought before the High Court; secondly that the Petition did not raise any matter for Constitutional interpretation beyond merely alleging violations of the Constitution; and thirdly that the petitioner who had failed to concisely identify in his Petition the issues for Constitutional interpretation was inviting this Court to try this matter and make findings of fact or law, which was best suited for a trial in the High Court.

It must be observed that this Court and the Supreme Court have in various decisions discussed the jurisdiction of this Court. This Court has previously expressed the view that the said jurisdiction is for the interpretation of the Constitution, which has to do with finding the meaning of the provisions of the 1995 Constitution, before applying the same to the acts and omissions in order to determine their constitutionality; and that even where there is violation of any law by any person through any act or omission, a violation which would also result in the violation of the Constitution, the Constitutional Court would not be the proper forum where it is not required to interpret the Constitution. **See: Hon. Justice Kakuru, JA in Mbabali Jude vs. Edward Kiwanuka Sekandi, Constitutional Petition No. 0028 of 2012.**

Kasule, JA in Mbabali Jude (supra) observed that:

"Interpretation of the Constitution is the ascertaining of the meaning of specific constitutional provisions and how they should be applied in a particular context.

Meanings are assigned to words of the Constitution so as to enable legal decisions to be made by the court vested with competent jurisdiction to



interpret the Constitution determine whether or not the matter before it is in compliance and or consistent with the Constitution or not.

Interpretation of the Constitution also embraces the term "construction" that is inferring the meaning of the provision(s) of the Constitution from a broader set of evidence, such as considering the whole structure of the Constitution as well as its legislative history. See; Principles of Constitutional construction: <http://www.constitution.org/cons/princons.htm>, John Roland of the constitution society.

See also: Pepper (Inspector of Texas) V Hart [1993] AC 593."

The learned Kasule, JA further observed that:

"Therefore while a court vested with the jurisdiction to interpret the Constitution must, in the exercise of that jurisdiction, allow and avail itself to be accessed by anyone with a genuine Constitutional cause deserving interpretation of the Constitution, such a Court, given the critical nature of its jurisdiction, must see to it that the exercise of its such jurisdiction, is not abused and misapplied by litigants who may access the Court not genuinely seeking Constitutional interpretation, but rather to pursue their personal causes that they can legitimately pursue elsewhere in other Courts of Law."

In contrast, the learned Kasule, JA in the same decision made the following observations about application of the 1995 Constitution:

"There is however, a difference between the Constitutional Court interpreting a provision of the Constitution as stated above and any other court of law applying a particular provision of the Constitution to a particular set of facts of a case that is being determined by that court.

To apply the Constitution or its provision, in my considered view, is for the court concerned, to operate or effect a particular provision of the Constitution to the facts of a particular case that court is determining. It is the process by which that court makes use of the Constitution. In such a case the dispute before the court is capable of being resolved without the Constitution first being interpreted by the Constitutional Court.

A competent court determining a cause is at liberty to find and pronounce itself as to whether or not, in its finding, a particular set of facts of the case, are contrary to or are in compliance with the Constitution. By doing so, such a court is not interpreting the



Constitution. The said court is just applying the Constitution to the facts of the case before the Court.

Likewise, one seeking enforcement of a right or freedom guaranteed under the Constitution by claiming redress for its infringement may apply to any other competent court for such redress under Article 50 of the Constitution. Such a person does not necessarily apply to the Constitutional court because, in order to get such redress there is no need for the Constitutional Court to first interpret the Constitution. All that is needed is the court adjudicating the matter to apply the Constitution to the proved set of facts and/or law and proceed to grant or not to grant the redress sought."

Justice Kanyeihamba in **Attorney General vs. Tinyefuza, Constitutional Appeal No. 001 of 1997** observed that:

"Nevertheless, when it comes to that Court's view of the jurisdiction of the Court of Appeal as a Constitutional Court, its decision in that case is that the Constitutional Court had no original jurisdiction merely to enforce rights and freedoms enshrined in the Constitution in isolation to interpreting the Constitution and resolving any dispute as to the meaning of its provisions. The judgment of the majority in that case, (Wambuzi, C.J., Tsekooko, JSC, Karokora, JSC and Kanyeihamba, JSC), is that to be clothed with jurisdiction at all, the Constitutional Court must be petitioned to determine the meaning of any part of the Constitution in addition to whatever remedies are sought from it in the same Petition ." (emphasis added)

Indeed, the attitude of the Supreme Court in the years immediately after the Constitutional Court was created, was similar to the view expressed in **Jude Mbabali (Supra)**. For example in **Ismail Serugo vs. Kampala City Council & Another, Constitutional Appeal No. 002 of 1998**, the majority view (**Mulenga, JSC. dissenting**) was that for the Constitutional Court to have jurisdiction, the Petition must show, on the face of it, that interpretation of a provision of the Constitution is required; that it was not enough to allege merely that a Constitutional provision has been violated, and that if therefore any rights have been violated as claimed, these are enforceable under Article 50 of the Constitution by another Competent Court.




In the same case, the Court further held with reference to the views expressed in **Attorney General vs. Tinyefuza, Constitutional Appeal No. 01 of 1997** that the Constitutional Court had no jurisdiction in any matter which did not involve the interpretation of the Constitution.

However, in subsequent decisions, there appears to be a shift in the attitude of the Supreme Court, with some decisions preferring the minority view of **Mulenga, JSC** in **Ismail Serugo (supra)**. For example in **Baku Raphael & another vs. Attorney General, Constitutional Appeal No. 01 of 2003** it was held that in Constitutional Petitions brought under Article 137 (3) of the Constitution, a cause of action is disclosed if the petitioner alleges the act or omission complained of and cites the provisions of the Constitution which have been contravened and prays for a declaration.

Most recently the Supreme Court has held that where it is clear from the Petition that the petitioner has specified the acts and omissions of the respondents which it alleges to be inconsistent with and in contravention of the Constitution; and the petitioner has also cited the particular provisions of the Constitution which the said acts and omissions of the respondents were alleged to have contravened; and the petitioner has prayed in its Petition to the Constitutional Court for specific declarations to the effect that those acts and omissions contravened the Constitution and also sought for redress, the aforementioned averments would give rise to competent questions for the Constitutional Court to hear, interpret and determine, with a view to establishing whether the petitioner's allegations had been proved to warrant the Constitutional Court to issue the declarations sought by the petitioner and to grant the petitioner redress or to refer the matter to the High Court with the appropriate directions, in accordance with the dictates of Article 137 (4). **See: Page 11 of the lead judgment of Dr. Kisakye, JSC in Centre for Health, Human Rights and Development (CEHURD) & 3 Others vs. Attorney General, Constitutional Appeal No. 01 of 2013**

In the same **CEHURD** case, **Katureebe, JSC** while discussing the import of Article 137, expressed the view that:



"...From the above Article, it is clear that any person who alleges that the government or any person or authority has done or omitted to do anything that is inconsistent with or in contravention of the Constitution, may Petition the Constitutional Court for declaration to that effect, and for redress where appropriate.

The Constitutional Court is not only authorized to hear such Petitions, it is equally obliged to resolve the issue.

The above article emphasizes that the Constitutional Courts (sic) doors should remain wide open for interpretation of the Constitution and declarations and redress where appropriate. This position was the decision of the Constitutional Court in the case of Uganda Association of Women Lawyers & 5 others vs Attorney General, Constitutional Petition No. 2 of 2003 (the Judgment of S.G. Engwau, J.A) at page 3."

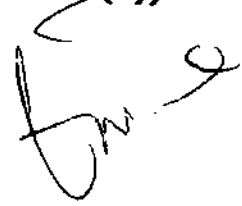
(See: Pages 10-12 of Katureebe, C.J's judgment)

It may be, as was contended by counsel for the 1st to 6th respondents that the Petition was sloppily drafted and was lacking in precision as to the issues being brought for the determination of this Court, but that as of itself cannot be relied on to defeat it. In my view, this Court in its overall requirement to exercise its delicate jurisdiction in such a matter of public interest ought to try as far as possible to sever the good parts of the Petition and save them from the bad ones.

Indeed I have strenuously perused the Petition and I have found within it several allegations that certain acts and/or omissions on the part of the various respondents were inconsistent with and/or in contravention of the Constitution. I have further found that the petitioner cited the various articles of the Constitution which those acts or omissions were allegedly inconsistent with and/or which those acts contravened. Those allegations must be investigated by this Court.

In my view, the alleged unconstitutional acts may be classified as follows:

- "1. Allegations against the 7th respondent, that its acts in awarding the relevant impugned contracts to the 2nd, 3rd, 4th, 5th and 6th respondents without obtaining legal advice and approval from the Attorney General was inconsistent with or in contravention of Article 119 (5) of the Constitution. (See: Para 14 (a))**

A handwritten signature in black ink, appearing to be 'Engwau', is written over the page number.

2. **Allegations against the 7th, 17th, 18th, 19th and 20th respondents that their acts or omissions which led to the acquisition of the ownership, management, control and maintenance of or other interests in rights over Nakasero Market, Nakivubo Shauriyako Market, St. Balikuddembe Market (formerly Owino Market), Nakawa Market and the Constitutional Square (formerly City Square) in Kampala City (hereinafter collectively referred to as "the impugned properties") by the Haba Group between 1 January 2000 and 31 December 2011 without complying with basic principles of public procurement and disposal prescribed by the relevant laws and were in contravention of the 1995 Constitution; particularly Objective XXVI of the National Objectives and Directive Principles of State Policy; and Article 8A of the Constitution. (See: Para 14 (c) (iii)); that the same respondents had caused the acquisition of the impugned properties without empowering the existing market vendors or giving them prompt, fair and adequate compensation in contravention of Articles 20 (1) & (2), 32 (1), 40 (2) and 26 (1) & (2) of the Constitution. (See: Para 14 (e)).**
3. **Allegations against the 8th, 10th and 12th respondents that their acts or omissions in using their authority to arbitrarily procure the 13th, 14th, 15th and 16th respondents to provide funds to the 2nd respondent, on the strength of financial documents approved by them without obtaining legal advice and approval of the Attorney General were inconsistent with or in contravention of Articles 119 (5) of the 1995 Constitution; further that the acts or omissions of the 8th, 10th and 12th respondents in concert with the 9th and 11th respondents in authorizing the impugned compensation without the involvement of the Auditor General without complying with the relevant provisions of the Public Finance and Accountability Act, 2003 were inconsistent with or in contravention of Articles 154 (3), 160, 163 (3) (a) & (b) and 164 of the Constitution.; further that the acts of the 8th, 9th, 10th, 11th and 12th respondents in using their authority to authorize the payment of the impugned compensation to the 2nd respondent without the involvement of parliament was inconsistent with or in contravention of Articles 154 (1) (b), 154 (2), 156, 159 (5), 160 and 164 of the Constitution.**



4. **Allegations against the 13th, 14th, 15th and 16th respondents, that jointly with the 8th, 9th, 10th and 11th respondents, they had by their acts or omissions in causing the borrowing, guaranteeing or raising of loans or grants on behalf of the Government without obtaining the approval of parliament contravened Articles 159 (2), (3), (4), (5), (6) & (7); 160 and 164 of the Constitution.**
5. **Allegations that the acts or omissions of the 8th and 12th respondents in allowing themselves to be used to further the interests of the presidency, Haba group and its bankers without carrying out the necessary due diligence was inconsistent with and/or in contravention of Article 162 (2) of the 1995 Constitution.**
6. **Allegations that the high-handed, outrageous, infamous, disgraceful and heinous acts or omissions of the 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th and 20th respondents by which they were used to further the interests of the presidency and/or Haba Group in a manner prejudicial to the public good, public welfare and good governance undermined the rule of law, contravened or threatened the right of the people of Uganda to live free from corruption and abuse or misuse of power and public resources by politicians as guaranteed under Objective XXVI of the National Objectives and Directive Principles of State Policy; and Articles 8A, 17 (1) (i), 20 (1) (2), 21, 25 (1), 41, 36, 38, 45, 107, 118, 164, 196, 201 and 233 (2) (b) of the Constitution."**

The above averments in the Petition, which specify the acts or omissions of the respective respondents, as well as the provisions of the Constitution they are alleged to have violated give rise to questions for this Court to hear, interpret and determine, with a view to establishing whether the petitioner's allegations have some merit. In other words, those averment raise questions for constitutional interpretation.

Therefore, the Petition, although not properly drafted raises several questions for Constitutional interpretation as stipulated above. I will therefore dismiss the preliminary objection that the Petition is improperly before this Court. I would therefore hold that the present Petition is properly before this Court.



I will now proceed to address the questions this Petition raises for Constitutional interpretation. I will do so while bearing in mind the principles of Constitutional interpretation which are set out at length in the judgment of my learned brother Kiryabwire, JA, in the order below.

The first allegation above is that the 7th respondent's acts and omissions of failing to obtain the input of the Attorney General prior to awarding the impugned contracts to the 3rd, 4th, 5th and 6th respondents were in contravention of the 1995 Constitution.

Article 119 (5) of the Constitution is to the effect that no agreement or contract, to which the Government is a party or in respect of which the Government has an interest, shall be concluded without legal advice from the Attorney General, except in such cases and subject to such conditions as Parliament may by law prescribe. In my view, the Government had interest in contracts concluded by the Kampala City Council, because under Article 5 (4) of the 1995 Constitution (before the 2005 amendment), which was in force at the time of conclusion of the impugned contracts, Kampala was the capital city of the country. Its unique position as a capital city rendered it of sufficient national importance in nature and the central Government was interested in the contracts it concluded.

The 9th respondent conceded both to the fact that the impugned contractual arrangements were entered into without seeking the Attorney General's advice, and also conceded that the conclusion of the said contracts without seeking the said advice was unconstitutional. However, I must note here that a concession on the part of any party to a Constitutional Petition cannot prevent this Court from pronouncing itself on the alleged unconstitutional acts in relation to which the concession was made. This was the position articulated by **Kisaakye, JSC** in the lead Judgment in **Foundation For Human Rights Initiatives Vs Attorney General Constitutional Appeal No. 03 Of 2009**. In that case, the respondent had made a concession to the effect that certain provisions of the impugned Act were unconstitutional. However, the Constitutional Court proceeded to consider the constitutionality of the impugned Act, and found contrary to the



concession that the impugned Act was not inconsistent with the Constitution. On appeal, it was contended that the Constitutional Court had erred not to determine the Petition in favour of the Petitioner by virtue of the relevant Concession. Kisaakye, JSC observed as follows:

"The Petition, from which this appeal arose, originated under Article 137 of the Constitution. Under this Article, the Constitutional Court is vested with power to interpret and declare whether an Act of Parliament is inconsistent with or contravenes the Constitution. The Constitutional Court therefore had a duty to consider and resolve all the claims made in the Petition presented before it and to determine whether the impugned legal provisions were unconstitutional or not. The Constitutional Court cannot therefore be faulted for disregarding a party's concession.

Agreeing with FHRI's submissions would have the effect of usurping the power of the Constitutional Court to interpret the Constitution. This is because the Constitutional Court would be turned into a Court that endorses what the parties had agreed to, without going into the merits of the case."

I must add that the practical importance of Kampala City to the Central Government has been manifested now, where, following the cancellation of the relevant contracts by the Central Government, tax payers' money under the control of the Central Government has been used to pay compensation to the relevant respondents.

Therefore, I find that the impugned contractual arrangements were concluded without the Attorney General's legal advice having been sought when it should have. This was inconsistent with and in contravention of Article 119 (5) of the 1995 Constitution.

In the second allegation, the petitioner alleged that the 7th, 17th, 18th, 19th and 20th respondents had approved the acquisition of the ownership, management, control and maintenance of or other interests in rights over Nakasero Market, Nakivubo Shauriyako Market, St. Balikuddembe Market (formerly Owino Market), Nakawa Market and the Constitutional Square (formerly City Square) by the Haba Group without complying with the



procurement laws; and without empowering the existing market vendors or giving them prompt, fair and adequate compensation in contravention of **Articles 20 (1) & (2), 32 (1), 40 (2) and 26 (1) & (2)** of the 1995 Constitution.

However there was no evidence in support of these allegations beyond the averments in the Petition. The 7th respondent in its answer to the Petition avers that the contracts were awarded following a "due procurement process." Therefore in my view, the petitioner failed to adduce evidence to satisfy this Court to the requisite standard that the 7th respondent did not follow the right procedure in awarding the impugned contracts or to specify the role of the 17th, 18th, 19th and 20th respondents in the said non-compliance with procurement law. I would therefore decline to apportion any blame in that regard.

Thirdly, the petitioner alleged that the 8th, 10th and 12th respondents by their acts or omissions in using their authority to arbitrarily procure the 13th, 14th, 15th and 16th respondents to provide funds to the 2nd respondent, on the strength of financial documents approved by them without obtaining legal advice and approval of the Attorney General were inconsistent with or in contravention of Articles 119 (5) of the 1995 Constitution; further that the acts or omissions of the 8th, 10th and 12th respondents in concert with the 9th and 11th respondents in authorizing the impugned compensation without the involvement of the Auditor General and without complying with the relevant provisions of the Public Finance and Accountability Act, 2003 were inconsistent with or in contravention of Articles **154 (3), 160, 163 (3) (a) & (b) and 164** of the Constitution.; further that the acts of the 8th, 9th, 10th, 11th and 12th respondents in using their authority to authorize the payment of the impugned compensation to the 2nd respondent without the involvement of parliament was inconsistent with or in contravention of **Articles 154 (1) (b), 154 (2), 156, 159 (5), 160 and 164** of the 1995 Constitution.



The petitioner cited various provisions of the Constitution, but in my view the most relevant is **Article 159** of the Constitution which I have reproduced below:

"159. Power of Government to borrow or lend.

(1) Subject to the provisions of this Constitution, Government may borrow from any source.

(2) Government shall not borrow, guarantee, or raise a loan on behalf of itself or any other public institution, authority or person except as authorised by or under an Act of Parliament.

(3) An Act of Parliament made under clause (2) of this article shall provide—

(a) that the terms and conditions of the loan shall be laid before Parliament and shall not come into operation unless they have been approved by a resolution of Parliament; and

(b) that any monies received in respect of that loan shall be paid into the Consolidated Fund and form part of that fund or into some other public fund which is existing or is created for the purpose of the loan.

(4) The President shall, at such times as Parliament may determine, cause to be presented to Parliament such information concerning any loan as is necessary to show—

(a) the extent of the total indebtedness by way of principal and accumulated interest;

(b) the provision made for servicing or repayment of the loan; and

(c) the utilisation and performance of the loan.

(5) Parliament may, by resolution, authorise the Government to enter into an agreement for the giving of a loan or a grant out of any public fund or public account.

(6) An agreement entered into under clause (5) of this article shall be laid before Parliament and shall not come into operation unless it has been approved by Parliament by resolution.

(7) For the purposes of this article, the expression "loan" includes any money lent or given to or by the Government on condition of return or



repayment and any other form of borrowing or lending in respect of which—

(a) monies from the Consolidated Fund or any other public fund may be used for payment or repayment; or

(b) monies from any fund by whatever name called, established for the purposes of payment or repayment whether in whole or in part and whether directly or indirectly, may be used for payment or repayment.

(8) Parliament may by law exempt any categories of loans from the provisions of clauses (2) and (3) of this article, subject to such conditions as Parliament may prescribe.”

The payment of compensation to the 2nd respondent were in the form of a loan to the Government. In the terms of **Article 159 (7) (a)** a loan includes any form of borrowing or lending in respect of which monies from the Consolidated Fund or any other public fund may be used for payment or repayment. It was established that the compensation monies were paid by way of a credit facility from the 13th, 14th, 15th and 16th respondent Banks to the 2nd respondent on the basis of letters of comfort from Bank of Uganda. It was further not in dispute that the credit facilities were settled using money from the Consolidated Fund.

In my view, tax payers' money in the Consolidated Fund may only be withdrawn with the approval of Parliament. The said approval will be manifested by an Act of Parliament assented to by the President. In the present case, parliament's involvement was circumvented by the acts or omissions of the 8th, 10th and 12th respondents. I would therefore make a declaration that the acts or omissions of the Government, through the 8th, 10th and 12th respondents, of securing monies from the 13th, 14th, 15th and 16th respondent banks to effect payment of the impugned compensation to the 2nd respondent was inconsistent with and in contravention of **Article 159 (2) & (7) (a) of the 1995 Constitution**.

It was further alleged by the petitioner that the high-handed, outrageous, infamous, disgraceful and heinous acts or omissions of the 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th and 20th respondents by which they were used to further the interests of the



Presidency and/or Haba Group in a manner prejudicial to the public good, public welfare and good governance undermined the rule of law, contravened or threatened the right of the people of Uganda to live free from corruption and abuse or misuse of power and public resources by politicians as guaranteed under **Objective XXVI** of the **National Objectives and Directive Principles of State Policy**; and **Articles 8A, 17 (1) (i), 20 (1) (2), 21, 25 (1), 41, 36, 38, 45, 107, 118, 164, 196, 201 and 233 (2) (b)** of the 1995 Constitution.

I find that these allegations were not fully substantiated and I cannot make a decisive conclusion about them. This is because no evidence, beyond merely the petitioner's averments in the Petition was adduced about the so called "interests of the Presidency," which the respondents had furthered. The only interest of the President which is brought out in evidence was his desire to have the claims by Haba Group investigated. The course which his delegates, the Ministers took cannot on the available evidence be attributed to him. It is my finding, therefore, that the foregoing allegations were not established by the petitioner.

I would therefore dispose of this Petition in the terms proposed in the above analysis, and I would make the following declarations:

- a) All the impugned contracts concluded between the 7th respondent on one hand, and the 2nd, 3rd, 4th, 5th and 6th respondents, variously on the other hand were null and void because they were so concluded without legal advice of the Attorney General in contravention of **Article 119 (5) of the Constitution**. No compensation was payable in respect of the said contracts which were illegal.
- b) The acts or omissions of the Government, through the 8th and 12th respondents, of securing a loan from the 13th, 14th, 15th and 16th respondent banks to effect payment of the impugned compensation to the 2nd respondent was inconsistent with and in contravention of **Article 159 (2) & (7) (a)** of the **1995 Constitution**.

Having made the above declarations, I have to proceed to determine the appropriate redress in the circumstances.



Article 137 (4) of the **1995 Constitution** provides that where upon the determination of a Petition under Article 137 (3), 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 determine the appropriate redress.

Having perused the Petition and all the supporting annextures, I am of the opinion that it is appropriate to refer this matter to the High Court, for it to determine the appropriate redress in the circumstances. This is because from the Petition and its annextures alone, the exact amount of money to be refunded by the respondents has not been sufficiently proven. Given that the money paid in the disputed compensation is tax payers' money, the need to have the High Court determine the matter becomes very important.

The High Court would also be the right forum to determine whether the petitioner is entitled to other prayers sought in the Petition namely, orders for: payment of Ug. Shs. 169,514,359,886/= as general and exemplary damages to the Uganda Consolidated Fund for the loss caused by the acts of some of the respondents, permanent injunction against some of the respondents, among others.

Therefore, I would order that the matter be referred to the High Court under **Article 137 (4) (b)** of the **1995 Constitution** for the appropriate redress to be determined.

In view of the above analysis I would make the following declarations and orders:

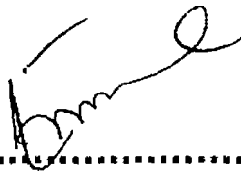
- a) Although the instant Petition is not properly drafted, it raises several questions for Constitutional interpretation.
- b) I would make a declaration that for the reasons set out in this Judgment, all the impugned contracts concluded between the 7th respondent on one hand, and the 2nd, 3rd, 4th, 5th and 6th respondents, variously on the other hand were null and void and any compensation paid in respect thereof shall be refunded.



- c) I would also make a declaration that the acts or omissions of the Government, through the 8th and 12th respondents, of securing a loan from the 13th, 14th, 15th and 16th respondent banks to effect payment of the impugned compensation to the 2nd respondent was inconsistent with and in contravention of Article 159 (2) & (7) (a) of the 1995 Constitution.
- d) The exact amount of money to be refunded under order (a) shall be determined by the High Court, and this matter is hereby referred to the High Court for that purpose.
- e) I would order that each party to this Petition bears its own costs given that the Petition was brought in the public interest.

I would so order.

Dated at Kampala this^{24th}..... day of^{March}..... 2020



.....
Elizabeth Musoke

Justice of Appeal/Constitutional Court

- 5 14. Orient Bank Ltd
15. Bank of Baroda (Uganda) Ltd
16. Tropical Bank (Uganda) Ltd
17. Mr. James Ssegane
18. Mr. Gordon Mwesigye
- 10 19. Mr. William Tumwine

JUDGMENT OF HON. JUSTICE CHEBORION BARISHAKI JA/JCC.

Introduction.

The Petitioner brought this Petition under Articles 2, 50(1), (50(2) and 137 (3) of the Constitution. The Petition is essentially premised on alleged violation of
15 various fundamental rights and freedoms of the People of Uganda, guaranteed under the various provisions of the Constitution and Acts of Parliament. The Petitioner seeks various declarations and orders from this Court against the various Respondents.

The brief background to this petition is that between 1st January 2000 and 31st
20 December 2011, the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents entered into a series of contractual arrangements with KCC, the 7th Respondent for management of Nakasero Market, Nakivubo Shauriyako Market, St Balikuddembe Market (formerly Owino), Nakawa Market and Constitutional Square (formerly City Square). During this period some of the said contractual arrangements were
25 extended upon expiry.

5 According to the Petitioner and the 9th Respondent; the Attorney General, these contractual arrangements did not obtain the legal advice or approval of the Attorney General of Uganda, contrary to Article 119 (5) of the Constitution and authorisation of KCC contrary to Section 67 (4) of the Local Government Act and Regulation 29 (2) of the Local Government and of the of the Central Division of
10 Kampala City contrary to Section 86 (1B) of the LGA. The said contractual arrangements were not subjected to established procurement procedures in force at the time and contravened section 13 (3) of the Leadership Code Act.

The Petitioner further stated that Sheila Investment Ltd the 4th Respondent defaulted on its agreements for Nakasero Market which led to termination of the
15 agreements by KCC. In 2001, because of public outcry, the Minister of Local Government stopped the arrangement for the development of City Square and instituted a Commission of Inquiry (under Legal Notice No. 14 of 2001) into the matter, whose recommendation stopped the whole process. The Government terminated the contracts which prompted the 1st to 6th Respondents (Haba
20 Group) to seek for compensation.

The Government set up an inter-ministerial technical committee to investigate the claims which recommended compensation of Ug Shs 54,690,517,149/=. The claimants rejected this amount and made an appeal to H.E the President, who directed the Attorney General to handle the matter. The Attorney General
25 authorised that a sum of Ug Shs 142, 697,752,244/= be paid to the Haba Group as compensation. The Attorney General's award of compensation led to the

5 Auditor General of Uganda to call for a value for money audit of the said compensation.

Funds were drawn from the consolidated account and paid by Bank of Uganda and other through four commercial banks namely; United Bank of Africa, the 13th Respondent, Orient Bank Limited, the 14th Respondent, Bank of Baroda (U) 10 Limited, the 15th Respondent and Tropical Bank (U) Limited, the 16th Respondent through execution of various legal documents.

The Petitioner claims that the payments by Government were fraudulent and illegal. It further claims that there was preferential treatment of Haba Group and illegitimate concealment of information, because it was awarded contracts 15 without following proper procurement procedure, and that the existing market vendors who were lawful or bonafide occupants were removed contrary to Article 237(8) of the constitution. The Petitioner further alleges that there was failure to give adequate compensation to vendors contrary to Article 26(1) & (2) of the Constitution and that by providing funding without getting the Attorney 20 General's approval, the commercial banks acted contrary to Article 119(5) of the Constitution.

It is also alleged that the Attorney General, Hon. Prof Khiddu Makubuya, Minister of Finance, Hon. Syda Bumba, the Governor of Bank of Uganda, Prof. Emmanuel Tumusiime Mutebile, the 12th Respondent approved payment 25 without authorisation of Parliament contrary to Articles 154, 156, 159, 160 and 164 of the constitution. That the same officials furthered interests of the

5 Presidency without subjecting them to due diligence, which was detrimental to public good and threatened the right of the people of Uganda to live in a corrupt free country in contravention of the Constitution.

 The Petitioner further contended that the contracts and leases were unconstitutional because they did not obtain clearance of the Attorney General.

10 That the respondents were corrupt and some unjustly enriched themselves and all the above acts breached Articles 8A, 17 (1) (i), 20 (1) (2), 21 (1) ,25 (1), 26(1) (2), 32(1), 41, 36, 38, 45,118, 119 (5) 164, 196, 201 and 233 (2) (b) ,237 (8) 154 (1) (b), 154 (2), 156, 159 (5), 154 (3), 160, 163(2) ,163 (3) (a) (b) and 164 160 and 164 ,196 ,201, 233(2)(b) and National Objective XXVI of the Constitution.

15 The Petitioner seeks for the following declarations and remedies;

 (i) *THAT any and all lease and management agreements or other contract-like documents by whatever name called purportedly concluded, extended or executed by, between or among the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and/or 20th Respondents in respect of the ownership,*
20 *management, control and maintenance of or other interests in or rights over Nakasero Market, Nakivubo Shauriyako Market, St. Balikuddembe Market (formerly Owino Market), Nakawa Market and Constitution Square (formerly City Square) in Kampala City between 1st January 2000 and 31st December 2011 were illegal, unconstitutional, null and void ab*
25 *initio for having been concluded without obtaining legal advice and*

5 *approval from the 9th Respondent in contravention of Article 119(5) of the Constitution;*

10 (ii) *THAT the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and 20th Respondents jointly or severally contravened or threatened the right of the people of Uganda to live free from corruption and abuse or misuse of power and public resources by politicians and public officers as guaranteed under National Objective XXVI and Articles 8A, 17(1)(i), 20(1)(2), 21, 25(1), 41, 36, 38, 45, 164, 196, 201 and 233 (2)(b) when they purported to conclude, extend or execute all or any of the lease and management agreements and other contract-like documents described in*

15 *(i) above without obtaining the appropriate authorization of KCC, its Mayor and the relevant division councils as specified by the relevant laws and regulations relating to local governments, without complying with procurement and disposal laws and regulations then in force, and without obtaining legal advice and approval from the 9th Respondent;*

20 (iii) *THAT the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and 20th Respondents jointly or severally contravened or threatened the fundamental rights of the people of Uganda guaranteed by Article 21(1) and (2) of the Constitution when they purported to conclude, extend or execute all or any of the lease and management agreements and other*

25 *contract-like documents described in (i) above without complying with*

5 *basic principles of public procurement and disposal prescribed by the relevant laws and regulations then in force;*

(iv) *THAT the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and 20th Respondents jointly or severally contravened or threatened the fundamental rights of the people of Uganda guaranteed by Article 41 of the Constitution when they purported to conclude, extend or execute all or any of the lease and management agreements and other contract-like documents described in (i) above without complying with basic principles of public procurement and disposal prescribed by the relevant laws and regulations then in force;*

10

15 (v) *THAT the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and 20th Respondents jointly or severally contravened or threatened the right of the people of Uganda to live free from corruption and abuse or misuse of power and public resources by politicians and public officers as guaranteed under National Objective XXVI and Articles 8A, 17(1)(i), 20(1)(2), 21, 25(1), 41, 36, 38, 45, 164, 196, 201 and 233(2)(b) of the Constitution when they purported to conclude, extend or execute all or any of the lease and management agreements and other contract-like documents described in (i) above without complying with basic principles of public procurement and disposal prescribed by the relevant laws and regulations then in force;*

20

25

5 (vi) *THAT the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and 20th*
Respondents jointly or severally contravened Article 237(8) of the
Constitution when they purported to conclude, extend or execute all or
any of the lease and management agreements and other contract-like
documents described in (i) above without obtaining prior written consent
10 *from the existing market vendors or other tenants/users of the properties*
complained of or from their families or spouses, and without giving them
or their associations prior notice, sensitization or the first option to make
such acquisition, and without complying with other procedures
prescribed by the Land Act relating to security of occupancy for lawful or
15 *bonafide occupants;*

(vii) *THAT the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and 20th*
Respondents jointly or severally contravened Articles 20(1)(2), 32(1),
40(2) and 26(1)(2) of the Constitution on account of their failure or refusal
to proactively take affirmative action to empower existing market vendors
20 *or other tenants/users of the Impugned Properties to acquire enhanced*
property and business rights or interests in or over the said properties,
and also on account of their failure to give prompt payment of fair and
adequate compensation to existing market vendors or other
tenants/users of the Impugned Properties prior to the purported
25 *conclusion, extension or execution of all or any of the lease and*
management agreements and other contract-like documents described in
(i) above;

5 (viii) THAT any and all lease and management agreements or other contact-
like documents by whatever name called purportedly concluded,
extended or executed by, between or among the 1st, 2nd, 3rd, 4th, 5th, 6th,
7th, 17th, 18th, 19th and 20th Respondents in respect of the ownership,
management, control and maintenance of or other interests in or rights
10 over Nakasero Market, Nakivubo Shauriyako Market, St. Balikuddembe
Market (formerly Owino Market), Nakawa Market and Constitution
Square (formerly City Square) in Kampala City between 1st January 2000
and 31st December 2011 were illegal, unconstitutional, null and void ab
initio on account of the contraventions of the Constitution and the law
15 specified in (ii), (iii), (iv), (v), (vi) and (vii) above;

(ix) THAT any and all letters of comfort, guarantee, indemnity, credit or
assurance, promissory notes, cash payment orders, and other financial
instruments, agreements, contracts, covenants and like documents by
whatever name called purportedly concluded or executed by, between or
20 among the 8th, 10th, 12th, 13th, 15th und/or 16th Respondents in respect
of loans or credit facilities advanced by the 13th, 14th, 15th and /or 16th
Respondents to the 1st, 2nd, 3rd, 4th, 5th and/Or 6th Respondents between
1st January 2000 and 31st December 2011 and on the pretext of assisting
Government to expedite compensation of the 1st, 2nd, 3rd, 4th, 5th and/or
25 6th Respondents were illegal, unconstitutional, null and void ab initio for
having been concluded without obtaining legal advice and approval from
the 9th Respondent contrary to Article 119(5) of the Constitution;

- 5 (x) *THAT the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th Respondents jointly or severally contravened Articles 154(3), 160, 163(3)(a)(b) and 164 of the Constitution when, on the pretext of expediting the implementation of Government's proposals for compensation of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents in*
10 *respect of the properties complained of in this Petition, they contemplated, rationalized, applied for, facilitated and/or authorized the withdrawal of funds from the Consolidated Fund without obtaining the approval of the Auditor General and without complying with the relevant provisions of the Public Finance and Accountability Act, 2003;*
- 15 (xi) *THAT the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th Respondents jointly or severally contravened Articles 154(1)(b), 154(2), 156, 159(5), 160 and 164 of the Constitution when, on the pretext of expediting the implementation of Government's proposals for compensation of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents in*
20 *respect of the properties complained of in this Petition, they contemplated, rationalized, applied for, facilitated and/or authorized the withdrawal of funds from the Consolidated Fund or other public funds or public accounts of Uganda other than the Consolidated Fund or elsewhere without the issue of such monies being authorized by*
25 *Parliament through an Appropriation Act, a supplementary Appropriation Act or a resolution of Parliament;*

5 (xii) *THAT the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th
and 16th Respondents jointly or severally contravened Articles 159(2),
159(3), 159(4), 159(5), 159(6), 160 and 164 of the Constitution when, on
the pretext of expediting the implementation of Government's proposals
for compensation of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents in
10 respect of the properties complained of in this Petition, they
contemplated, rationalized, applied for, facilitated and/or authorized the
borrowing, guaranteeing raising or giving of loans or grants that were
obtained by the 1st, 2nd, 3rd, 4th, 5th and/or 6th without Parliamentary
approval and without complying with the relevant provisions of the Public
15 Finance and Accountability Act, 2003 and other laws and procedures
intended to control the raising or giving of loans, grants and guarantees
by or on behalf of Government or its agencies and organs;*

(xiii) *THAT the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th
and 16th Respondents jointly or severally contravened Articles 162(2) of
20 the Constitution when, in anticipation of Parliamentary approval and the
Auditor General's clearance of Government's proposals for compensation
of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents in respect of properties
complained of in this Petition, they directly or indirectly co-opted or
otherwise contemplated, rationalized, facilitated and/or authorized the
25 co-opting of the Central Bank in a spurious and unconstitutional loan-
and-guarantee scheme aimed at granting them more favourable
treatment than is contemplated by the Constitution and the law;*

5 (xiv) THAT the 8th and 12th Respondents jointly or severally contravened
Article 162(2) of the Constitution when they approved and acted in
accordance with illicit, gratuitous and unconstitutional directives, plans
or proposals made by the 1st, 2nd, 3rd, 4th, 5th, 6th, 9th, 10th, 11th, 13th, 14th,
15th and/or 16th Respondents with the object of co-opting the Central
10 Bank in a spurious and unconstitutional loan-and-guarantee scheme
designed purposely to gain access to the Consolidated Fund and other
public funds of Uganda prematurely or in anticipation of Parliamentary
approval and the Auditor General's clearance of Government's proposals
for compensation of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents;

15 (xv) THAT the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th
and 16th Respondents jointly or severally undermined the rule of law and
contravened or threatened the right of people of Uganda to live free from
corruption and abuse or misuse of power and public resources by
politicians and public officers as guaranteed under National Objective
20 XXVI and Articles 8A, 17(1)(i), 20(1)(2), 21, 25(1), 41, 36, 38, 45, 164,
196, 201 and 233(2)(b) when, on the pretext of expediting the
implementation of Government's proposals for compensation of the 1st,
2nd, 3rd, 4th and/or 6th Respondents in respect of the properties
complained of in this Petition, they failed to conform to the Constitution
25 and scandalously allowed themselves to be used to further the interests
of the Presidency and/or the interests of the 1st, 2nd, 3rd, 4th, 5th, 6th, 13th,
14th, 15th and/or 16th Respondents or their associates in the public or

5 *private sector in a manner detrimental to the interests of the people of Uganda;*

(xvi) *THAT the purported compensation of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents by the 7th, 8th, 9th, 10th, 11th and/or 12th Respondents in respect of the properties complained of in this Petition was not only*
10 *illegally, unconstitutional, null and void ab initio, but also amounted to an intolerable abuse or misuse of power and public funds;*

(xvii) *THAT the 8th, 13th, 14th, 15th and 16th Respondent Banks jointly or severally contravened Articles 119(5), 154(1)(b), 154(2), 154(3), 156, 159(2), 159(3), 159(4), 159(5), 159(6), 159(7), 160, 163(3)(a)(b) and 164 of*
15 *the Constitution when they purported to call on, enforce or implement letters of comfort, guarantee, credit or assurance and other contract-like documents that had been unlawfully issued by the 8th and 12th Respondents on the pretext of assisting Government to expedite compensation of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents and in*
20 *respect of monies lent or given to the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents by the 13th, 14th, 15th and/or 16th Respondent Banks which had been unlawfully secured by public funds;*

(xviii) *THAT the purported compensation of the 13th, 14th, 15th and/or 16th Respondent Banks by the 8th and the 12th Respondents in respect of the*
25 *impugned guarantee, indemnity or assurance agreements or other contact-like documents concluded by, between or among the 8th, 12th,*

5 13th, 14th, 15th and/or 16th Respondents purportedly to secure the repayment of monies lent or given to the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents by the 13th, 14th, 15th and/or 16th Respondent Banks was not only illegal, unconstitutional, null and void ab initio, but also amounted to an intolerable abuse or misuse of power and public funds;

10 (xix) THAT the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th and 20th Respondents jointly or severally unjustly enriched themselves or their associates in the public or private sector at the expense of the people of Uganda;

15 (xx) THAT the 1st, 10th, 11th, 12th, 17th, 18th, 19th and 20th Respondents jointly or severally contravened Article 164(2) of the Constitution and Section 15(7) of the Leadership Code Act, 2002 when they directed or concurred in the use of public funds contrary to laid down procedures described in this Petition and, as a result of such contravention, each of the 1st, 10th, 11th, 12th, 17th, 18th, 19th and 20th Respondents is personally liable to
20 make good any and all losses arising from his or her conduct complained of in this Petition;

25 (xxi) THAT the impugned conduct of the 1st, 10th, 11th, 12th, 17th, 18th, 19th and 20th Respondents contravened the Oath of Allegiance and/or the oaths of their respective offices which require them to uphold, defend and conform to the Constitution, and are therefore liable to be dismissed from their respective political or public offices;

- 5 (xxii) *THAT the impugned conduct of the 1st, 10th, 11th, 12th, 17th, 18th, 19th and 20th Respondents contravened Articles 17(1)(d), 17(1)(e) and 17(1)(i) of the Constitution and Sections 13 of the Leadership Code Act, 2002 which require each of them to protect and preserve public property entrusted to his or her respective office, and are therefore liable to be dismissed from*
- 10 *their respective office;*
- (xxiii) *THAT the 1st, 10th, 11th, 12th, 17th, 18th, 19th and 20th Respondents are not fit to hold any political or public office in Uganda from a period of 5 (five) years from the date of Judgments;*
- (xxiv) *THAT the 1st, 2nd, 3rd, 4th, 5th, 6th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th,*
- 15 *18th, 19th and 20th Respondents are not fit and proper persons to participate in public procurement and disposal processes or like businesses with or on behalf of Government or any of its organs and agencies, including the Central Bank, for a period of 5 (five) years from the date of Judgment*
- 20 (i) *An order for annulment or cancellation of any and all lease and management agreements or other contract-like documents by whatever name called purportedly concluded, extended or executed by, between or among the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 17th, 18th, 19th and/or 20th Respondents in respect of the ownership, management, control and maintenance of or other interests*
- 25 *in or rights over Nakasero Market, Nakivubo Shauriyako Market, St. Balikuddembe Market (formerly Owino Market), Nakawa Market and the*

- 5 *Constitution Square (formerly City Square) in Kampala City between 1st January 2000 and 31st December 2011;*
- (ii) *An order for annulment or cancellation of any and all letters of comfort, guarantee, indemnity, credit or assurance, promissory notes, cash payment orders, and other financial instruments, agreements, contracts, covenants*
10 *and like documents by whatever name called purportedly concluded or executed by, between or among the 8th, 10th, 12th, 13th, 14th, 15th and/or 16th Respondents in respect of loans or credit facilities advanced by the 13th, 14th, 15th and/or 16th Respondents to the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents between 1st January 2000 and 31st December 2011 and on the*
15 *pretext of assisting Government to expedite compensation of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents;*
- (iii) *An order for annulment or cancellation of purported compensation of the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents by the 7th, 8th, 9th, 10th, 11th and/or 12th Respondents in respect of the properties complained of in this Petition;*
- 20 (iv) *An order for annulment or cancellation of purported compensation of the 13th, 14th, 15th and/or 16th Respondents by the 8th and 12th Respondents in respect of the guarantee, indemnity or assurance agreements or other contact-like documents complained of in this Petition.*
- 25 (v) *An order for refund or payment of all monies previously given to the 1st, 2nd, 3rd, 4th, 5th and/or 6th Respondents by or under the authority of the 7th, 8th,*

- 5 *9th, 10th, 11th and/or 12th Respondents on the pretext of compensation in respect of the properties complained of in this Petition, together with interest thereon at 30% p.a., to the Uganda Consolidated Fund Account no later than 6 (six) months from the date of Judgment;*
- 10 (vi) *An order for refund or payment of all monies previously given to the 13th, 14th, 15th and/or 16th Respondents by the 8th and 12th Respondents in respect of the guarantee, indemnity or assurance agreements or other contract-like documents complained of in this Petition, together with interest thereon at 30% p.a., to the Uganda Consolidated Fund Account no later than 6 (six) months from the date of Judgment;*
- 15 (vii) *An order directing the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents jointly or severally to pay an additional sum of UGX 994,039,186/= (Uganda Shillings Nine Hundred Ninety Four Million Thirty Nine Thousand One Hundred Eighty Six Only) together with interest thereon at 30% p.a., to the Uganda Consolidated Fund Account no later than 6 (six) months from the date of*
- 20 *Judgment pursuant to the findings and recommendations of the Auditor General;*
- 25 (viii) *An order directing the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th and 20th Respondents jointly or severally to pay UGX 169, 514, 359, 886/= (Uganda Shillings One Hundred Sixty Nine Billion Five Hundred Fourteen Million Three Hundred Fifty Nine Thousand Eight Hundred Eighty Six Only) as general and exemplary damages to the*

5 *Uganda Consolidated Fund Account for the loss caused to the people of
Uganda by their impugned conduct;*

(ix) *A permanent injunction to restrain Government or any of its organs, agencies
and functionaries, including the 7th and 8th Respondents or their officers,
servants, agents or any of them or otherwise howsoever, from giving or
10 authorizing the giving of any monies, loans, grants or guarantees to all or
any of the 1st, 2nd, 3rd, 4th, 5th, 6th, 13th, 14th, 15th and 16th Respondents or
their directors, officers, servants, agents, bankers, lenders, assignees,
associates, successors-in-title or any of them or otherwise howsoever on the
pretext of compensation in respect of the properties complained of in this
15 Petition without obtaining the approval of both the Auditor General and the
Legislature in accordance with the Constitution and the law;*

(x) *A permanent injunction to restrain the 8th, 13th, 14th, 15th and 16th
Respondent Banks, whether by themselves or their officers, servants, agents
or any of them or otherwise howsoever called, from soliciting, negotiating,
20 entering into, concluding, executing, calling on or otherwise enforcing any
letters of comfort, indemnity, guarantee, credit or assurance or other
agreements, instruments and documents of like nature in respect of the
Uganda Consolidated Fund Account or other public accounts or public funds
of Uganda or authorizing any of the acts aforesaid without obtaining legal
25 advice and approval from the 9th Respondent and without obtaining approval*

- 5 *from the Auditor General and the Legislature in accordance with the Constitution and the law;*
- (xi) *An order directing that the 1st, 10th, 11th, 12th, 17th, 18th, 19th and 20th Respondents be dismissed or removed from any and all political or public offices which they presently hold;*
- 10 (xii) *An order directing that the 1st, 10th, 11th, 12th, 17th, 18th, 19th and 20th Respondents be barred or prohibited from holding any political or public office in Uganda for a period of 5 (five) years from the date of Judgment;*
- (xiii) *An order directing that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th and 20th Respondents be barred or*
- 15 *prohibited from participating in public procurement and disposal processes, functions or like businesses with or on behalf of Government or any of its organs and agencies, including the Central Bank, for a period of 5 (five) years from the date of Judgment;*
- (xiv) *An order granting the costs of this Petition to the petitioner.*
- 20 The respondents opposed the petition. The gravamen of their opposition is that the petition is incompetently before this Court, the claims therein are for enforcement of rights under Article 50(1) of the Constitution rather than ones meriting constitutional interpretation, and that such matters ought to be dealt with by way of trial in the High Court.

5 Learned Counsel for the Respondents contended that, it was apparent from the issues framed at conferencing that the entire petition was seeking an application of the provisions of the Constitution and Acts of Parliament to ascertain if there was non-compliance therewith by the Respondents. The respondents further contended that the petition flouts the rules governing presentation of petitions
10 before this Court. To support their objections, the Petitioners relied on a number of authorities including; ***Constitutional Petition No.10/2012, Kikonda Butema Farm Limited V Attorney General; Constitutional Petition No. 25/2009, Eng. Edward Turyomurugendo & Others V Attorney General & Others, Constitutional Petition No. 0028/2012, Mbabali Jude V Edward***
15 ***Kiwanuka Sekandi, Constitutional Petition No. 7 of 2003, Perez Kakumu V The Attorney General & NFA and Attorney General V Osotraco Limited, Court of Appeal Civil Appeal No. 32 of 2002.***

At the hearing of the petition, Learned Counsel Isaac Ssemakadde appeared for the Petitioner while learned counsel David F. K. Mpanga represented the 16th
20 Respondent; Mr. Caleb Alaka and Joseph Kyazze represented the 1st to 6th Respondents; Mr. Dennis Byaruhanga represented the 7th Respondent; Mr. Albert Byamugisha represented the 8th and 12th Respondents; Principal State Attorneys Philip Mwaka and Patricia Mutesi represented the 9th Respondent; Mr. Dennis Wamala represented the 13th and 15th Respondents; Mr. Nicholas
25 Mwasame represented the 14th Respondent and Ms. Farida Ikyimaana represented the 20th Respondent. The 10th; 17th 18th 19th and 20th Respondents were neither present nor represented.

5 **Principles of Constitutional Interpretation**

Before delving into the merits of the petition, I find it appropriate at this juncture to re-state some of the time tested principles of constitutional interpretation, which are considered to be pertinent in the determination of constitutional petitions by the Constitutional Court. These have been expounded in numerous decisions of this court and the Supreme Court. They inter alia include; the constitution is the supreme law of the land and forms the standard upon which other laws are judged, any law that is inconsistent with, or in contravention of the constitution is null and void to the extent of the inconsistency, the entire constitution has to be read together as an integral whole with no particular provision destroying the other but each sustaining the other, where words and phrases are clear and unambiguous they must be given their plain ordinary meaning. ***See Constitutional Petition No. 16/2013 Hon. (RTD) Sale M.W Kamba & Anor versus Attorney General and Others***

20 **Objections to the Competence of the Petition and the Jurisdiction of the Court**

At the commencement of the hearing of the petition, learned counsel for some of the respondents raised preliminary points of law objecting to the petition and prayed that it should be dismissed. The gravamen of their opposition was that the petition is incompetently before this Court, the claims therein are for enforcement of rights under Article 50(1) of the Constitution rather than ones

5 meriting constitutional interpretation, and that such matters ought to be dealt with by way of trial in the High Court.

Learned counsel for the 1st to the 6th respondents contended that the Petition offends the Rules of this Court governing presentation of petitions on account of being argumentative and citation of non-existent Articles of the Constitution.

10 They further argued that the Petition was misconceived as it sought remedies which can be sought in ordinary suits by way of plaint. That the Petition was also brought for the enforcement of rights as opposed to interpretation of a constitutional question because the complaints raised in it related to enforcement of rights arising out of commercial contracts. Counsel alluded to
15 the fact that the Petition seeks to recover Ug. shs 142 billion on the allegations of fraud and relies on a draft report of the Auditor General, which merited an ordinary trial in the High Court. They contended that the Attorney General is estopped from conceding to the Petition when he approved the impugned payments.

20 Counsel further submitted that the Petitioner seeks to enforce the rights of Ugandans to live in a corruption free environment, equal treatment and none discrimination; the right to information; the rights of market vendors, tenants and other users of the impugned properties; and property interests in markets. According to counsel, it is not the mandate of this Court to handle Petitions
25 where the parties do not seek interpretation of the Constitution. In this Petition, Counsel argued that Court is nowhere being invited to interpret any article of the Constitution.

5 It was further submitted for the Respondents that, it is apparent from the issues framed at conferencing that the entire petition seeks application of provisions of the Constitution and Acts of Parliament and to ascertain if there was non-compliance therewith by the Respondents. He gave examples of whether there was misuse of Government resources; whether there was violation of Acts of
10 Parliament in the process of awarding the 1st – 6th Respondents compensation and whether there was illegitimate concealment and insider trading in the award of contracts for the city markets and the square. These issues in his view again were for investigation for purposes of enforcement and not interpretation. He argued that instead of constitutional interpretation, the Petitioner has invited
15 this Court to make various findings of fact. Counsel submitted that there is a clear distinction between interpretation of the constitution on the one hand and enforcement of constitutional rights and that the latter falls outside the mandate of this Court

To support their objections, the respondents relied on a number of authorities
20 including; ***Constitutional Petition No. 10/2012 Kikonda Butema Farm Limited versus Attorney General; Constitutional Petition No. 25/2009 Eng. Edward Turyomurugyendo & Others versus Attorney General & Others, Constitutional Petition No. 7 of 2003 Perez Kakumu versus the Attorney General & NFA and Attorney General Versus Osotraco Limited Court of***
25 ***Appeal Civil Appeal No. 32/2002.***

It was also brought to the attention of Court that there had been litigation on some aspects of this Petition between the 3rd respondent and KCC. For the 8th

5 and 12th respondents it was argued that the two issued letters of contract as agents Government hence no personal liability accrued against them.

It was submitted for the respondents that the Petition raised allegations of conspiracy and fraud whose particulars were not detailed as required by law and whose standard of proof was higher than a balance of probabilities.

10 The Attorney General conceded that the contracts and leases were entered into without proof of the Attorney General and were for that reason null and void and the monies paid out should be refunded with interest at commercial rates.

Resolution of the preliminary objections.

15 I have considered the petition, supporting affidavit, the answers to the petition filed by the Respondents together with the affidavits in support thereof, the submissions of learned counsel for parties and have equally reviewed the authorities cited by counsel.

What needs to be answered here is whether the matters raised in the petition
20 warrant interpretation by the constitutional court of any provision of the constitution for it is taken that other courts are free to apply and enforce provisions of the Constitution. In my view, three pertinent questions arise in the context of the facts and reliefs sought in this petition and their resolution would dispose of the petition either way. These relate to; what is the scope of the
25 jurisdiction of the Constitutional Court, what is the meaning and distinction between interpretation of the constitution by this Court and application of the Constitution and other Acts of Parliament by any other competent court and

5 lastly, whether this Court is the proper and competent court to grant the remedies sought in the peculiar circumstances of the Petition.

The answers to the questions are not difficult to find, as this court and the Supreme Court have previously dealt with related questions in a number of authorities and ably pronounced themselves on the law. I will deal with each of
10 them in the context of the Petition.

The jurisdiction of the Constitutional court is now well settled. Article 137 (1) of the constitution, which confers jurisdiction upon the Constitutional Court sets out in precise terms, what the Petitioner must plead before the jurisdiction of this court can be invoked. The Article provides that:

15 *Questions as to the 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.

It is apparent that such jurisdiction must be exercised correctly, appropriately and within the limits of its scope. In terms of scope and extent of the exercise of
20 such jurisdiction, I find the decision of Hon. Justice **Remmy Kasule JCC in Constitutional Petition No. 0028/2012 Mbabali Jude Versus Edward Kiwanuka Sekandi** very instructive. His Lordship held that;

*"It follows therefore that the jurisdiction to interpret the constitution is of critical
25 importance the world over, Uganda inclusive, and as such, the same must be exercised correctly and appropriately, as the consequences of its exercise are*

5 of a fundamental nature in the governance of society. Therefore while a court
vested with the jurisdiction to interpret the constitution must, in the exercise of
that jurisdiction, allow and avail itself to be accessed by anyone with a genuine
constitutional cause deserving interpretation of the Constitution, such a Court,
given the critical nature of its jurisdiction, must see to it that the exercise of its
10 such jurisdiction, is not abused and misapplied by litigants who may access
the Court not genuinely seeking constitutional interpretation, but rather to
pursue their personal causes that they can legitimately pursue elsewhere in
other Courts of Law.

The issue that calls for interpretation of the Constitution by the Constitutional
15 Court must involve and show that there is an apparent conflict with the
constitution by an Act of Parliament or some other law, or an act or omission
done or failed to be done by some person or authority. Further, the dispute
where the apparent conflict exists must be such that its resolution must be only
when and after the Constitutional Court has interpreted the Constitution. The
20 constitutionality of statute or same law, or the act or omission of a person or
authority must be brought forth for determination. See: **Hassan Ali Joho and
Another V Suleiman Shahbal and 2 others (2013) eKLR (Court of Appeal,
Kenya).**

Interpretation of the Constitution also arises if a given aspect of a case that is
25 the subject of litigation in a court of law or quasi tribunal or body is not explicitly
provided for in the law and its constitutionality has not been determined...”.

5 Interpretation of the constitution is the ascertaining of the meaning of a specific constitutional provision and how it should be applied in a particular context.

It is therefore incumbent on the Petitioner in its petition to specifically plead the acts and or omissions and the issues, without narrative that require constitutional interpretation. The Petition must specify the law or act in each
10 case that contravenes the constitution in such a way as to require constitutional interpretation under Article 137 or is otherwise unconstitutional. Any omission by the petitioner to plead in the petition, the act requiring constitutional interpretation as required by law cannot be cured through framing of issues or recasting of issues as contended by Petitioner's counsel neither can it be done
15 by way of submissions. Submissions are by their nature not pleadings.

In other words, the Petition must be drafted in a manner that enables the Respondents to know precisely which issues require constitutional interpretation. It is not enough for the Petition to merely indicate that the acts of the Respondents complained of were inconsistent with or in violation of the
20 various provisions of the Constitution set out therein and Acts of Parliament and to pray for declarations and orders. See: ***Constitutional Petition No. 25/2009 Eng. Edward Turyomurugyendo & Others versus Attorney General & Others***

Secondly, there is apparent confusion amongst litigants before this Court caused
25 by continued failure to appreciate that there is a difference between the Constitutional Court interpreting a provision of the Constitution and any other court of law applying a particular provision of the Constitution to a particular

5 set of facts of a case that is being determined by that court. As a result, disputes that ought to be preferred before the High Court end up in this court.

It is wrong to consider every act or omission deemed to be in violation of the constitution as one requiring constitutional interpretation and therefore merits a petition before this Court. Some of those disputes actually require application
10 of the constitution and or any Act of Parliament by a competent court. In my view, to apply the Constitution or its provision is for the court concerned, to operate or effect a particular provision of the Constitution to the facts of a particular case that court is determining. It is the process by which that court makes use of the constitution. In such a case, the dispute before the court is
15 capable of being resolved without the Constitution first being interpreted by the Constitutional Court. The constitutional court must therefore guard against abuse by litigants who may ingenuously seek constitutional interpretation but with a main interest of pursuing causes other than interpretation of the constitution.

20 This Petition is unique in its content and prayers for remedies. It is awash with violation after violation of the Constitution and other statutory laws with regard to the contractual arrangements for the city markets and square. We must however keep sight of the role of this Court which is interpretation of the Constitution as provided for under Article 137 of the Constitution. I reiterate
25 that not every violation of the constitution or breach of any legislation calls for

5 constitutional interpretation. In **Jude Mbabali (supra)** Hon. Justice Kakuru JCC had this to say regarding the jurisdiction of this court;

“All laws in this country emanate from the constitution. Violation of any law by any act or omission directly or by implication is also a violation of the constitution. The violation of any law must be addressed to and settled by an appropriate court or tribunal and not by this court unless there is an issue for interpretation. This court may however, having resolved the issue requiring constitutional interpretation, grant any appropriate remedy”

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It would follow therefore that a competent court, determining a matter before it is at liberty to find and pronounce itself as to whether or not, in its finding, a particular set of facts of the case, are contrary to or are in compliance with the Constitution. By doing so, such a court is not interpreting the Constitution. The said court is just applying and or enforcing a provision of the Constitution to the facts of the case before the Court. The decision of the **Hon. Justice Kiryabwire J(as he then was) in Kikungwe Issa & 4 Others versus Standard Chartered Bank Investments Limited HCMA No. 394 & 294/2004** is quite instructive on the matter. The duty of the competent court is to apply and enforce the provisions of the Statute and the Constitution, allegedly violated by the Respondents.

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It would follow from the foregoing analysis that a person seeking enforcement of a right or freedom guaranteed under the Constitution by claiming redress for its infringement may apply to any other competent court for such redress under **Article 50 (1)** of the Constitution. Such a person does not necessarily apply to

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5 the Constitutional Court because, in order to get such redress there is no need
for the Constitutional Court to first interpret the Constitution. That is the import
of Article 137(4) of the Constitution. In the circumstances, all that is needed is
the court adjudicating the matter to apply the Constitution to the proved set of
facts and/or law and proceed to grant or not to grant the redress sought. I am
10 fortified in my opinion by the decision of this Court in ***Constitutional Petition
No. 0028/2012 Mbabali Jude Versus Edward Kiwanuka Sekandi, and
Constitutional Petition No. 10/2012 Kikonda Butema Farm Limited versus
Attorney General and Attorney General Versus Osotraco Limited Court of
Appeal Civil Appeal No. 32/2002.***

15 Regarding the last question of whether this Court is the proper and competent
court to grant the remedies sought in the peculiar circumstances of the Petition,
I must state without any fear of contradiction that this is not a trial court of fact.
The mandate of this court is to interpret the constitution in the manner already
alluded to herein before. It is not a trial court of fact and law required to conduct
20 an ordinary trial and make such findings of fact and law, upon which to grant
the orders sought. This position has since been settled in ***Constitutional
Petition No. 0028/2012 Mbabali Jude Versus Edward Kiwanuka Sekandi
(Mwangushya JCC and Kakuru JCC)***. In accepting any invitation to grant
declarations and orders sought in a petition in a matter where the allegations
25 made by the petitioner require proof through a trial, this court will have
abdicated from its constitutional mandate.

5 In determining whether the objections raised by the Respondents to the competence of the petition in the instant matter are meritorious, I will be guided by the aforementioned legal principles. In my view, the competence of a petition can only be determined upon a thorough preparation of the pleadings by the petitioner, the supporting affidavits and any annextures thereto. I have therefore
10 reviewed the Petition and supporting affidavit as well as the annextures thereto, in their entirety and I now proceed to determine the competence of the petition before this court.

Upon perusal of the Petition, it is evident from paragraph 14 at page 5 thereof that the Petition is brought under Article 50 (1), 50(2) and 137 (3) of the
15 Constitution and Rule 3 of the Constitutional Petitions and References Rules. It is now settled law that actions under Article 50 of the constitution for enforcement of rights guaranteed under the constitution must be preferred in a competent court which is the High Court and not the Constitutional Court.

Constitutional Petition No. 10/2012 Kikonda Butema Farm Limited versus
20 **Attorney General.** To the extent to which the Petitioner in the instant petition seeks to enforce rights guaranteed under the constitution in exercise of the right under Article 50(1) & 50(2) of the constitution, the petition before this court would in my view be incompetent. I have particularly looked at the averments in paragraphs 14-44 of the petition. They, in essence relate to alleged violations of
25 various provisions of the Acts of Parliament and the Constitution. They seek application and enforcement of such provisions.

5 It is apparent from the petition that there is no controversy regarding the meaning of any of the articles of the constitution or provisions of the various statutes, which the petitioner alleges were contravened by execution of the contracts or leases and the payments which followed. That clearly falls outside the mandate of this court. It is now trite law that the Petitioner must in the
10 petition concisely set out the specific matters for constitutional interpretation. Interpretation of the Constitution has been defined by this court to mean; the process of determining what a particular provision means, ascertainment of the meaning to be given to a particular constitutional provision. **See Constitutional Petition No. 0028/2012; Mbabali Jude Versus Edward Kiwanuka Sekandi.**
15 The jurisdiction of the constitutional court should only be invoked where there is 'a question as to the interpretation of the constitution' as provided in Article 137 (1) of the constitution.

I am aware that, in appropriate circumstances, especially where the petition is specifically brought under Article 137 (4) (a) & (b) of the Constitution, this court
20 may grant appropriate redress. This is only applicable, where in the dispute, there is an apparent conflict which exists and this must be such that its resolution must be only when and after the Constitutional Court has interpreted the Constitution. The court would be required to first interpret the provision allegedly contravened before resolving the dispute and granting appropriate
25 reliefs. In that context, the Petitioner must have brought the petition specifically under Articles 137 (1) and (4) (a) and (b) of the Constitution. That is the position

5 taken by this court in ***Constitutional Petition No. 0028/2012 Mbabali Jude Versus Edward Kiwanuka Sekandi***.

The Petitioner did not move under Article 137(4) of the Constitution. In my view, it is not open to this court to deem it necessary on its own motion to invoke the mandate of the Court under Article 137 (4) of the Constitution, where the
10 Petitioner opted not to claim relief thereunder. Rule 3 (2) and (3) of the Constitutional Petitions and References Rules SI 91/2005, under which the instant petition was brought, requires the Petitioner to specifically plead the basis of the petition and reliefs sought. ***See; Constitutional Petition No.07/2003 Perez Kakumu versus the Attorney General and Constitutional***
15 ***Petition No. 25/2009 Eng. Edward Turyomurugyendo & Others versus Attorney General & Others.***

In any case, upon careful scrutiny of the petition, no where is this court being invited to interpret a particular provision of the constitution or a particular provision of an Act of Parliament alleged to be inconsistent with the constitution,
20 with the view of resolving any of the disputed facts raised by the petitioner. All this court is being invited to do is to apply and enforce provisions of the constitution and the Acts of Parliaments alluded to in the petition.

I re-iterate the position of the law that the mandate of the constitutional court only arises when there is a question as to the interpretation of the constitution.
25 The question arises where there is a doubt or precisely a dispute as to the meaning of an article or articles of the constitution. ***See Hon. Justice Madrama***

5 ***in Foundation For Human Rights Initiative Vs. Attorney General Const. Petition NO. 1 of 2016,***

In ***Ismail Serugo vs Kampala City Council & Attorney General Constitutional Appeal No2 of 1998 unreported Wambuzi CJ*** at page 204 had this to say on jurisdiction of the constitutional court;

10 *“In my view for the constitutional court to have jurisdiction the person must show, on the face of it, that the interpretation of a provision of the constitution is required. It is not enough to allege merely that a constitutional provision has been violated”.*

What is apparent from the petition is that the petitioner is inviting this Court to
15 apply provisions of the Constitution and various Acts of Parliament and make findings as to whether the various acts and or omissions of the Respondents violated those provisions. I have particularly looked at paragraphs 14 15-17, 18-34, 35- 40 and 41- 44 of the Petition.

In summary, the averments in the said paragraphs relate to alleged misuse of
20 Government resources in contravention of several Acts of Parliament and provisions of the Constitution, alleged violation of Various Acts of Parliament in the process of the compensation, alleged illegitimate concealment and insider trading of information in the acquisition of the leased properties, alleged unlawful acquisition of the leases/ sub leases in the various properties by the
25 1st -6th Respondents, alleged failure to consult and obtain consent from the Attorney General to whether the tenants/ vendors and other stakeholders in the

5 markets who ought to have been consulted or their consent ought to have been
obtained, alleged failure to compensate vendors/ tenants or other stakeholders
who were lawful or bonafide occupants under the Land Act, and who ought to
have been compensated in accordance with Article 26 (1) & (2) of the
Constitution, alleged non-compliance with the statutory requirements preceding
10 compensation alleged illegality and as to whether the transactions the subject of
the petition were valid or illegal under the relevant laws.

In essence, what this court would be doing is to ascertain whether the
Respondents in executing whatsoever acts alleged against them acted contrary
to the Constitution or the Acts of Parliament including the Land Act, Public
15 Finance and Accountability Act 2003, the Appropriation Act, the Supplementary
Appropriation Act and a resolution of Parliament, the Local Government Act, and
LGC Regulations, the Leadership Code Act. Evidently, this requires application
of the Constitution and statutory provisions as opposed to interpretation of the
constitution, which is not the mandate of this court. **Constitutional Petition**
20 **No. 10/2012 Kikonda Butema Farm Limited versus Attorney General**

Additionally, the court would also have to pronounce itself on matters of alleged
unethical conduct, immorality, unjust enrichment, corruption and abuse of
office, misuse of power and influence. These are not questions for constitutional
interpretation and would therefore not be justiciable before this court. **See;**
25 **Constitutional Petition No.07/2003 Perez Kakumu versus the Attorney**
General. These in my view, would call for an ordinary trial, where-after, such

5 court would be required to make findings of fact and law and thereafter grant the reliefs sought. After making findings on the facts and the law, the Court would be required to make findings on remedies including a refund of compensation sums and general damages. That is not the mandate of this court.

See Constitutional Petition No. 0028/2012; Mbabali Jude Versus Edward

10 ***Kiwanuka Sekandi.***

It would be absurd for this court to accept an invitation to constitute itself into a trial court of fact and law to conduct an ordinary trial and make such findings of fact and law, upon which to grant the orders sought. It is evident that the declarations and orders cannot be granted unless and until the issues of fact
15 complained of which are denied by the Respondents have been proved. Proof of such allegations requires an ordinary trial, which would possibly call for cross examination of witness and critical evaluation of the documentary evidence so presented.

I have also particularly considered the invitation by the Petitioner to this court
20 to consider Article 119 (5) of the Constitution and make a finding as to whether it was breached by the various acts of the Respondents.

I am aware that the meaning and scope of Article 119(5) of the constitution has already been the subject of interpretation by this Court and the Supreme Court in; ***Constitutional Petition No. 02/2006 Nsimbe Holdings Ltd versus***
25 ***Attorney General and IGG, Anold Brooklyn & Company Vs. Kampala City Authority and Attorney General Constitutional Petition No. 23 of 2013 ,***

5 ***Bank of Uganda Vs. Banco Arabe Espanol SCCA No. of 2001*** and in ***Hon. Theodore Ssekikubo & others Vs. Attorney General & Others Constitutional Appeal No. 1 of 2015.***

These decisions show that Article 119(5) of the constitution has been interpreted and there is no controversy or ambiguity as to its application. In that context, it
10 cannot therefore be said that that particular aspect of the petition, that is the subject of litigation is not explicitly provided for in the law and its constitutionality has not been determined. The resolution of the issues raised in the instant petition does not require the interpretation of any provision of the constitution.

15 It would follow that there is nothing new for this court to interpret in so far as Article 119 (5) of the Constitution is concerned. It would only be open to the Petitioner, relying on the interpretation already made by this court and the Supreme Court to seek appropriate remedies in a competent court. Any invitation to this court to re-interrogate and re-interpret Article 119 (5) of the
20 Constitution would amount to an academic endeavour. All that is needed is for the competent court to apply and enforce the impugned articles referred to by the petitioner and subject to proof of the petitioner's allegations, grant appropriate relief.

I further note that the Petitioner seeks several orders from this court the main
25 of which are annulment of all leases and management agreements executed and refund or payment of all monies paid out plus 30% interest per annum to the consolidated fund. He also seeks for an order of injunction on the 13th, 14th,

5 15th and 16th respondents who are commercial banks stopping them from
soliciting, negotiating or executing letters of comfort, indemnity, guarantee,
credit assurance or other agreements, instruments and documents with the 9th
respondent without obtaining advice of the attorney general, an order for the 1st,
10th, 11th, 12th, 17th 18th 19th and 20th respondents to be dismissed or removed
10 from public office they hold.

Clearly, the entire petition seeks to enforce rights based on alleged breach of
Article 119(5) and other provisions of the various Acts of Parliament. The
constitutional court adjudicates matters requiring interpretation of the
constitution and not necessarily application and enforcement of provisions of the
15 constitution. Such reliefs as those sought in the petition would only be grantable
pursuant to a petition brought under Article 137(4) of the constitution. In such
a case the constitutional court may grant other redress in addition to having
interpreted the constitution or it may refer the matter to the High Court to
investigate and determine the appropriate redress. **See: Mbabali Jude Vs.**
20 **Edward Kiwanuka Sekandi Constitutional Petition NO. 28 of 2012**

It is now settled law that a person who seeks to enforce a right or freedoms
guaranteed under the constitution but whose claim does not call for
interpretation of the constitution has to apply to other competent court. **See**
Charles Kabagambe Vs. UEB Constitutional Petition No. 2 of 1999. Article
25 50(2) above allows any person or organisation such as the petitioner to bring an
action against another person or groups. Indeed the Petitioner moved under

5 Article 50(1) of the constitution to enforce its and other people's rights but should have preferred his action before the High Court, not this court, as there is nothing calling for interpretation of the constitution. The article provides:

50 Enforcement of rights and freedoms by courts

1) *Any person who claims that a fundamental or other right or freedom*
10 *guaranteed under this constitution has been infringed or threatened is entitled to apply to a competent court for redress which may include compensation.*

2) *Any person or organisation may bring an action against the violation of*
15 *another person's or groups human rights.*

If in course of such hearing a matter arises which calls for interpretation of the constitution then it can be referred to the constitutional court under Article 137(5) of the constitution which provides:

(5) *Where any question as to the interpretation of this constitution arises in*
20 *any proceedings in a court of law other than a field court martial, the court-*

(a) May if it is of the opinion that the question involves a substantial question of law and

(b) Shall, if any party to the proceedings requests it to do so, refer the question to the constitutional court for its decision accordance with clause (1) of this article.

5 In this Petition, I find similarities with the **Jude Mbabali** Petition (Supra, COA). It is clear that there is a pattern alleged violations with regard to the contractual arrangements for the city markets and square. The most striking pattern is as follows; not obtaining the approval of the Attorney General for the said contractual arrangements contrary to Article 119 (5) of the Constitution, not
10 complying with the Land Act (Cap 227), the Public Finance and Accountability Act 2003, the Local Government Act (Cap 243) and its Regulations, and the Leadership Code Act 1992. It has been argued by Counsel for the Petitioner that by reason of this statutory violations there were also constitutional violations that made the concluding of the said contractual arrangements and the
15 compensation given thereafter consequent upon their termination null and void. Indeed the remedies prayed for include the annulment or cancellation of all the contractual arrangements for the city markets and square; the annulment or cancellation of the subsequent compensation given to some of the Respondents; the refund of such monies with interest to the Uganda Consolidated Account;
20 damages; a permanent injunction against any further compensation payments being made and barring of public officers involved from holding public office. In all this I do not see questions for constitutional interpretation. There is no doubt that these allegations of violations, serious as they may sound, if proved directly or by implication amount to violations of the Constitution; but in my view what
25 falls short in the claims is the need for constitutional interpretation. The onus to show that the claims raise a question for constitutional interpretation lies with the Petitioner and in this matter they have not discharged it. I see no controversy

5 involving the interpretation of the Constitution and no matter how liberal and broad an interpretation, I give to this issue I find none in this matter. This finding in itself is sufficient for me to dispose of this Petition

Learned counsel for the respondents also raised a pertinent issue regarding the competence of the Petitioner's pleadings, the petition and supporting affidavit

10 which they contended offended the rules governing petitions before this court, as they were argumentative, prolix and a mere narrative. I have carefully considered the grounds in the petition and the supporting affidavit together with the annexures thereto. I agree with respondent's counsel that the grounds are not only narrative but also argumentative. The pleadings are very wordy,

15 argumentative and repetitive. The Petition does not specifically set out the Act of Parliament or other law or act that requires constitutional interpretation. It only sets out a long narrative of allegations of violations of various statutes and provisions of the constitution without concisely setting out which one requires constructional interpretation. This court has guided before that the Respondents in a petition are entitled to know precisely the issues raised under Article 137 that require constitutional interpretation. See: **Constitutional Petition No.**

25/2009 Eng. Edward Turyomurugyendo & Others versus Attorney General & Others

What is apparent from the petition is a long narrative of about 40 paragraphs of facts which do not point to the issues meriting constitutional interpretation. The petition falls short of setting out, without narrative or argument the issues requiring constitutional interpretation and does not specify any law or act that

5 contravenes the constitution in such a way as to require constitutional
interpretation. I therefore find that the petition offends rule 66 of the Court of
Appeal Rules and Rule 3 of the Constitutional Petitions and References Rules.
Non-compliance with the requirements of the said provisions is not a matter of
form but substance, since the jurisdiction of this court is limited to interpretation
10 of the constitution. See: **Constitutional Petition No. 25/2009 Eng. Edward
Turyomurugyendo & Others versus Attorney General & Others**

I further agree with respondent's counsel that the affidavit in support of the
petition is argumentative, narrative and contains matters of hearsay, which
15 offends the provisions of Order 19 Rule 3 of the Civil Procedure Rules. The
affidavit in support is unnecessarily too length with 74 long paragraphs. Whereas
the length of the paragraphs by themselves would not be an issue per se, I find
that the contents are very argumentative and prolix. The said paragraphs fall
short of meeting the required standard. They argue the case instead of laying
20 down the evidence to be relied on deciding the petition. In the case of **Male
Mabirizi Kiwanuka versus the Attorney General Constitutional Appeal No.
2/2018**, the Supreme Court held that affidavits which are argumentative,
narrative and contain hearsay offend the provisions of Order 19 rule 3 of the
Civil Procedure Rules.

25 In the instant case, both the petition and supporting affidavit constitute a blatant
violation of the rules and practice of the court.

On that ground, the petition is incompetent and liable to be dismissed.

Having analyzed the law as to the issue of the interpretation of the constitution as contrasted with applying the Constitution, and also having considered in detail the petitioner's petition, the submissions of counsel for the petitioner and
10 those for the respondent, I note that what the petitioner seeks from this court is not interpretation of any provision of the Constitution, but rather a number of redresses premised on alleged violations of provisions of the Constitution and the various Acts of Parliament. This is a matter for enforcement of rights under Article 50(1) of the Constitution. The Complaints in the petition are essentially
15 on violation of various provisions of the Constitution and Acts of Parliament and not necessarily constitutional interpretation. The violation of the laws does not necessarily call for Constitutional interpretation and must be addressed to and settled by an appropriate court or tribunal not by this Court. The petition and supporting also offend the rules and practice of this court and are incompetent.

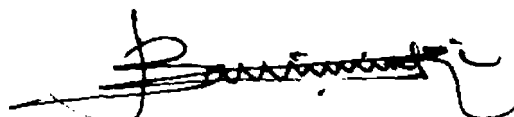
20 Having found as above, the petition is not only incompetent but this Court has no jurisdiction to hear it and grant the reliefs sought.

I accordingly dismiss it.

5 As to costs, since the Petition was brought in the public interest, I further Order that each party bear their own costs.

I so order.

Dated at Kampala this²⁴.....day of^{March}..... 2020


CHEBORION BARISHAKI

JUSTICE OF APPEAL/ CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
CONSTITUTIONAL PETITION NO. 0004 OF 2012

LEGAL BRAIN TRUST(LBT) LTD:..... PETITIONER

VERSUS

HASSAN BASSAJJABALABA AND 18 OTHERS:..... RESPONDENT

CORAM:

HON. MR. JUSTICE KENNETH KAKURU, JA/JCC

HON. JUSTICE GEOFFREY KIRYABWIRE, JA/JCC

HON. MR. JUSTICE ELIZABETH MUSOKE, JA/JCC

HON. JUSTICE CHEBORION BARISHAKI, 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 of my learned brother Hon. Mr. Justice Cheborion Barishaki, JA/JCC. I agree with his analysis, findings and the orders he has proposed.

Most of the issues raised by the petitioners were for investigation, not interpretation of the constitution. Clearly there is a difference between enforcement of constitutional rights and their interpretation. There is no doubt that some of the allegations of violations, serious as they may sound if proved directly or by implication amount to violations of the constitution, but as suggested by the learned brother, all fall short of the need for constitutional interpretation.

The petitioner had the onus to show that the questions raised are questions for constitutional interpretation. In this case they have not discharged it no matter how liberal and broad an interpretation one can give. Matters for constitutional interpretation must specifically
5 be pleaded in the petition. Omission by the petitioner to plead in the petition the act requiring constitutional interpretation as required by law cannot be cured by framing issues, or recasting of issues as contended by the petitioner's counsel, neither can it be cured by way of submissions. Submissions are not pleadings.

10 While exercising jurisdiction to interpret the constitution, the constitutional court must see to it that the exercise of that jurisdiction is not abused or misapplied by litigants who may approach the court not genuinely seeking interpretation but rather to pursue their personal causes that they can legitimately pursue
15 elsewhere in other courts of law.

I therefore agree that the complaints in this petition are essentially on violation of various provisions of the constitution and Acts of Parliament and not for constitutional interpretation. Violation of laws does not necessarily call for constitutional interpretation. These
20 ought to have been addressed to an appropriate court or tribunal.

This petition should accordingly be dismissed. Each party should bear their own costs because the petition was brought in public interest.

I so order.

25 Dated at Kampala this.....24.....day ofMarch.....2020


Stephen Musota

JUSTICE OF APPEAL/CONSTITUTIONAL COURT