THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

CONSTITUTIONAL PETITION NO. 5 OF 1999.

CORAM: HON. MR. JUSTICE S.T. MANYINDO, DCJ.
HON. MR. JUSTICE G.M. OKELLO, JA.
HON. MR. JUSTICE J.P. BERKO, JA.
HON. MR. JUSTICE S.G. ENGWAU, JA.
HON. MR. JUSTICE A. TWINOMUJUNI, JA.

1. DR. JAMES RWANYARARE
2. HAJI BADRU KENDO WEGULO.....PETITIONERS

VERSUS

ATTORNEY GENERAL.....RESPONDENT

RULING OF HON. J.P. BERKO, JA.:

The two petitioners, namely Dr. James Rwanyarare and Haji Badru Kendo Wegulo, originally filed this petition ex-parte, seeking for certain declarations set out in the petition. The petition did not name any respondent but the Attorney General was served with the petition in accordance with rule 5(2) of Legal Notice No. 4 of 1996 and he filed an answer to the petition.

When the matter came up for hearing on the 5th of October 1999 Mr. Peter Walubiri, learned counsel for the petitioners, objected to the participation of the Attorney General as the Attorney General was not a party to the petition and so had no right to be heard. In our ruling of 12/10/99 we upheld the preliminary objection, but in the exercise of our discretion, we joined the Attorney General as a party to the petition under Order 1 rule 10(2) of the Civil Procedure Rules. Our said order has since been upheld by the Supreme Court.

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Following our said order the petitioners filed an amended petition on 7/3/2000 in which the Attorney General has been cited as a respondent. The Attorney General's answer to the petition was filed on 4/4/2000.

At the hearing of the petition on 5/4/2000, Mr. Walubiri invited us to disregard the answer of the Attorney General and proceed to hear the petition ex-parte on the ground that the Attorney General's answer to the petition was filed out of time. His reasons were that rule 6(3) of the Rules of this Court requires a respondent, who wishes to oppose a petition, to file his or her answer within seven days after the service of the petition on him or her. According to Mr. Walubiri the amended petition was served on the Attorney General on 10/3/2000. The Attorney General should have filed an answer, latest by 17/3/2000. Therefore the answer filed on 4/4/20000 without leave was out of time and should be disregarded. He relied on an affidavit of service filed in this court on 24/3/2000 to show that the Attorney general was served on 10/3/2000. In that affidavit the amended petition was served on one Mpaulo Patrick who is said to be a clerk in the Attorney General's Civil Registry.

Mr. Deus Byamugisha, learned counsel for the Attorney General, has submitted firstly, that the Attorney General has never been served with the amended petition by the petitioners' advocates; secondly, that the said Mpaulo Patrick was not qualified to accept service of documents on behalf of the Attorney General as he is a mere messenger employed in the Attorney General's Civil Registry. He cited and relied on rule 5(1) of the Civil Procedure (Government Procedures) Rules, Statutory Instrument 69 – 1 as authority for what he says; thirdly, that the amended petition was served on the Attorney General on 29/3/2000 by the Registrar of this Court together with a letter from the Registry of this Court changing the hearing date from 4/4/2000 to 5/4/2000. Consequently an answer filed on 4/4/2000 was within time.

We rejected the preliminary objection and reserved our reasons which we now proceed to give.

Rule 5(1) of the Rules of this Court requires the petitioner immediately upon presentation of the petition to serve the respondent with a copy of the petition. If the respondent wishes to oppose the petition, then he is required by rule 6(3) to file an

answer within seven days after the service of the petition on him. The mode of service of petitions is not provided for under Legal Notice No. 4. However, this court is permitted by rule 13(1) of the Legal Notice 4 to apply the High Court Civil Procedure Rules contained in the Civil Procedure Act and the Rules made under that Act with necessary modifications in such cases. How to effect service of civil processes on the Attorney General as the principal legal adviser of the Government is not provided for by the Civil Procedure Act and the Rules made under it. There are, however, specific laws relating to civil proceedings by and against the government in the High Court. These laws can be found in the Government Proceedings Act, cap. 69, and the rules made under it. The relevant rules are contained in the Civil Procedure (Government Proceedings) Rules, Statutory Instrument 69 – 1.

Rule 5(1) provides:

"5(1) Service of a document on the Attorney General for the purpose of or in connection with civil proceedings by or against the Government should be effected by delivering or sending the document to be served and a duplicate or copy thereof to the office of the Attorney General, and shall be deemed not complete until the Attorney General or another officer of the Government entitled to practise as an advocate in connection with the duties of his office has endorsed an acknowledgement of service on the document to be served."

It is clear from the above rule that a document for service on the Attorney General can be delivered to and received by a clerk or any other staff in the Attorney General's office, but the service will not be complete until the Attorney General or a State Attorney has endorsed an acknowledgement of service on the document. The requirement of such acknowledgement is obviously to ensure that the document has been seen by a responsible officer who is qualified to take action on the matter.

We do not agree with the argument of Mr. Walubiri that constitutional petitions are not civil proceedings. They are, except that they take precedent over all matters.

In the instant case the amended petition, according to the affidavit of service of Isaac Mudasi, a law clerk of the petitioners

firm of advocates, was served on Mpaulo who is said to be a clerk in the Attorney General's civil Registry. It has not been shown that it was acknowledged by either the Attorney General himself or a State Attorney working in his chambers. In our view the purported service on 10/3/2000 was not a proper service.

The Attorney General has contended that he first became aware of the amended petition when he found it attached to the Hearing Notice served on him on 29/3/2000 by the Registry of this court. Accordingly, the answer filed on the 4/4/2000 was within time.

It was for these reasons that I agreed to the rejection of Mr. Walubiri's objection.

I now wish to deal with the preliminary objections raised by Mr. Deus Byamugisha to the petition. But before going into the merits of the objections, I wish first to dispose of a point of law raised by Mr. Walubiri to the effect that we should not entertain the objections as Mr. Byamugisha did not cite the law under which the objections were made.

According to Mr. Walubiri the provisions of the Civil Procedure Rules under which a preliminary objection may be made to strike out or dismiss a suit can be grouped into two categories. In one category are Order 6 rules 27 and 28 and Order 13 rule 2, which empower the court, in given circumstances, to decide suits on points of law only. Under this category only the pleadings have to be taken into account. The facts to which the points of law relate must also be agreed upon or be not in dispute. In the instant petition, so says counsel, the facts to which the points of law relate have not been agreed upon.

The other category are Order 6 rule 29 and Order 7 rule 11. These are concerned with defective pleadings. The procedure for making preliminary objection under either rule is either by a Motion on Notice or Chamber Summons. In the instant petition none of the above procedure was followed. Besides, a distinction has to be drawn between an application to strike out a plaint for inherent defect in the plaint, under Order 6 rule 27 and the one for determination of a suit on a point of law under Order 7 rule 11.

Mr. Walubiri submitted that the objections were not properly before this court as it is not clear if the Attorney General wants the petition to be struck off for being defective or dismissed on points of law. He prayed for the rejection of the objections on account of this procedural flaw. He cited and relied particularly on the judgment of Mulenga JSC in Constitutional Appeal No. 2 of 1998. ***Ismail Serugo v Kampala City Council and Attorney General (unreported) Supreme Court.***

On behalf of the Attorney General, Mr. Deus Byamugisha, has contended that under Order 13 rule 2 the court has jurisdiction to determine issues of law first and postpone the settlement of the issues of fact until the issues of law have been determined. The objections in this case were points of law and therefore the objections were properly before the court.

Both Justices Mulenga and Oder, in ***Serugo (Supra),*** criticised this Court for not citing the law under which it considered the preliminary objections or made the order to strike out the petition in that case. The other Justices of the Supreme Court (Kanyeihamba, Tsekooko, Karokora and Mukasa – Kikonyogo) did not comment on the procedure for bringing preliminary objections. Hon. Wambuzi CJ. agrees with Mulenga JSC that different considerations are taken into account depending on what law is applied but he did not see that there was any miscarriage of justice in the procedure adopted by this court as this court considered all the pleadings (i.e. the petition, answer and reply if any) – before arriving at its decision. He said, however, that where the objection finally determines the petition or suit, then the proper order should be a dismissal of the petition or suit and not a striking out of the petition.

It seems to me that the procedural rule Mr. Walubiri is advocating does not appear to be an inflexible rule under which preliminary objections should be made, though it is desirable to cite the relevant law. Mulenga JSC appreciated this in ***Serugo (supra).*** At page 5 of his judgment he said:-

> ***"Like counsel in their submissions, the Constitutional Court did not, in its order or in the reasons for its decision, cite the law under which it considered the preliminary objection or made the order to strike out the***

petition. Although it is not always necessary to cite the law, in matters like the instant case, where alternative provisions involving different principles may apply, it is very useful to do so".

I therefore do not see any merit in Mr. Walubiri's objection.

I now revert to the merits of the preliminary objections raised on behalf of the Attorney General. The first objection is that there is no question for the interpretation of the Constitution as the issues raised in the petition do not call for an interpretation of the Constitution.

For the petitioners, it was contended that all the matters raised in the petition call for interpretation and consequently this court has jurisdiction in the matter.

The jurisdiction of this court is derived from article 137(3) of the Constitution. The relevant provisions are:-

"137(3) A person who alleges that –

(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or

(b) any act or omission by any person or authority,

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

It is clear that for this court to have jurisdiction ***"the petition must show, on the face of it, that interpretation of a provision of the Constitution is required. It is not enough to allege merely that a Constitutional provision has been violated".*** See ***Ismail Serugo (supra).***

I propose to examine the declarations sought and find out if they call for interpretation of a provision or provisions of the

Constitution. The prayer in 20(a) and (b) are for a declaration that the choice of a political system through a referendum or an election under article 69 of the Constitution is inconsistent with and contravenes articles 20, 21, 29(1)(a)(b)(d)(e); 38(2); 70(1) d; 71(f); and 75 of the Constitution. Article 69 provides:-

> ***"69(1) The people of Uganda shall have the right to choose and adopt a political system of their choice through free and fair elections or referenda.***
>
> ***(2) The political system referred to in clause (1) of this article shall include –***
>
> ***(a) the movement political system;***
> ***(b) the multi-party political system; and***
> ***(c) any other democratic or representative political system."***

The article itself has given the right to the people of Uganda to choose and adopt a political system of their choice through elections or referenda. The petition does not say in what way the choice of a political system under article 69 would contravene the articles of the Constitution referred to. In my view the declarations in 20(a) and (b) do not call for an interpretation of any provision of the Constitution.

The prayer in 20(c) calls for a declaration that the active involvement of the judiciary in framing the referendum question under Section 4(2) of the Referendum and Other Provisions Act No. 2 of 1999 is inconsistent with and contravenes articles 28 and 128 of the Constitution. In my view that clearly calls for an interpretation of the Constitution as it alleges that any act of the judiciary under the authority of Section 4(2) of the Referendum and Other Provisions Act would be inconsistent with and contravene articles 28 and 128 of the Constitution.

In my view the declaration in 20(d) is speculative. Since the alleged regulations have not been made, it is impossible to determine whether they would derogate from articles 29(1)(e) and 43 and be inconsistent with and contravene articles 20 and 21 of the Constitution.

The declarations in 20(e) and (f) clearly call for interpretation of the Constitution as they allege that certain sections of the Referendum and Other Provisions Act are inconsistent and contravenes article 69 of the Constitution.

In my humble view I do not think that this court has jurisdiction under article 137(3) of the Constitution to declare that a provision of the Constitution is inconsistent with and contravenes another article of the Constitution. The Constitution is the Supreme law against which other Acts of Parliament or any other laws are to be evaluated. This court is not a super legislature and does not have power to expand the jurisdiction given it under the Constitution. If therefore certain provisions of the Constitution, in the opinion of the petitioners, are inconsistent with and contravene other provisions of the Constitution, then the aggrieved parties should direct their campaign to the proper quarters to have the Constitution amended.

I am therefore of the view that this court has no jurisdiction to make the declarations sought in paragraph 20(g) and (j).

The prayers in paragraph 20(h) does not call for an interpretation of the Constitution. They are speculative.

In the result, I would uphold the objections to the declarations in 20(a), (b), (d), (g), (h) and (I) and declare that they do not call for interpretation of the Constitution and consequently this court has no jurisdiction to entertain them. I hold that this court has jurisdiction in the prayers in paragraphs 20(c), (e) and (f).

The second point of objection is that the petition lacks supporting evidence as required by rule 3(6) of the Rules of this court (Legal Notice 4). Under rule 12(1) all evidence for and against the petition must be by affidavits. In my view how much evidence and what type of evidence to be adduced by the parties to the petition will vary according to the petition presented. For example where it is alleged that one's human rights have been violated, then the evidence must disclose the nature of the violation. If the allegation is simply that a certain law or the act of an individual is inconsistent with a provision of the Constitution, then all that is required is to state in what way the law or the act is inconsistent with a provision of the Constitution.

In the present petition paragraph 9 alleges that a referendum or an election under article 69 of the Constitution would be inconsistent with and would contravene and oust other provisions of the Constitution. It was alleged in paragraph 12 that the involvement of the judiciary in framing the referendum question under S. 4(2) of the Referendum and Other Provisions Act, 1999 is inconsistent with and contravenes articles 29 and 128 of the Constitution and repugnant to the principles of independence of the judiciary and separation of powers. It has also been alleged in paragraphs 13 and 14 that certain sections of the Referendum and Other Provisions Act are inconsistent and contravene certain articles of the Constitution. Each petitioner swore and filed an affidavit in support of the petition. The affidavits are similar in all material respects. Paragraph 14 of the first petitioner's affidavit is the same as paragraph 8 of that of the second petitioner.

The paragraph reads:-

> ***"That on the 16th day of August 1999 I obtained a copy of the Referendum and Other Provisions Act, No. 2 of 1999 and closely studied its contents alongside the provisions of the Constitution, the Movement Act No. 7 of 1997, the Electoral Commission Act, No. 3 of 1997, the Parliamentary Elections (Interim Provisions) Statute No. 4 of 1996".***

Paragraph 15 of the first petitioner's affidavit is the same as paragraph 9 of that of the second petitioner. The paragraph reads:

> ***"That in the following two days I and my co-petitioner had discussed with our lawyers Messrs Kwesigabo, Bamwine and Walubiri Advocates over the Constitutionality of holding a referendum to choose and adopt a political system under the Referendum and Other Provisions Act No. 2 of 1999.***

Paragraph 16 of the first petitioner's affidavit is the same as paragraph 10 of the second petitioner's affidavit. The paragraph states:-

> ***"That we were advised by our said lawyers and I verily believe their advise (sic) to be correct that holding of the said referendum is inconsistent with and contravenes the provisions of articles 20, 21, 28, 29(1) (a), (b), (d), (e); 38(2), 43; 70(1)(b); 71(f); 75 and 128 of the Constitution of the Referendum of Uganda, 1995 and that these inconsistencies and contraventions are continuing up to this day.***

The other paragraph of the affidavit of the first petitioner worth referring to is paragraph 19.

The paragraph states:

> ***"That I honestly believe and fear that the Minister responsible for public elections will soon refer the issue of the referendum question to the Chief Justice and that the Chief Justice will soon constitute a panel of Judges to frame the referendum question as provided for in the Referendum and Other Provisions Act, No. 2 of 1999".***

Paragraphs 13 and 14 of the second petitioner's affidavit deal with the same matter.

The paragraphs I have reproduced contained evidence in support of the specific allegations made. I do not see what more the petitioners would and should have said by way of evidence. It was sufficient for them to state that certain sections of the Referendum and Other Provisions Act are inconsistent with and contravene certain provisions of the Constitution and also that the act of the Minister in requesting the Chief Justice to choose a panel of Judges to frame the Referendum question under S. 4(2) the Referendum and Other Provisions Act is inconsistent with provisions of the Constitution. It then rested on their lawyers to argue the points of law in court. Whether the averments in the affidavits would be sufficient to sustain the allegations in the petition go to the merit. Lack of evidence is different from sufficiency of evidence. The argument of Mr Byamugisha clearly

shows that he does not appreciate this distinction. Accordingly I would overrule the second objection.

The third and last point of objection is that the petition is time barred. It was submitted by the counsel for the Attorney General that rule 4(1) of the Rules of this Court (Legal Notice No. 4) requires a petition to be lodged in a competent court within thirty days of the date of the alleged breach. The petition challenges certain provisions of the Constitution as being inconsistent with certain provisions of the Constitution which came into force on 8th October 1995. It was that date that the breach occurred. The breach here is the continuance in force of provisions of the Constitution when those provisions are inconsistent with some provisions of the Constitution. He contended that the petition should have been brought by 7th Nov. 1995, that is, within 30 days of the coming into force of the Constitution. This petition was filed on 6/9/99; out of time and without an extension of time by court.

The petition also alleges that the Movement Government has been ruling the country since the Parliamentary Election of 1996. A petition of that nature should have been filed in 1996.

The petition also challenges certain provisions of the Referendum and Other Provisions Act, 1999 as being inconsistent with certain articles of the Constitution. That Act was passed on 2/7/1999. The petition should have been filed on 1/8/1999, but was in fact filed on 6/9/1999, out of time and without an extension of time by court.

I do not agree with that argument. In my view the time begins to run when the petitioners perceived the alleged breach or inconsistencies in the Constitution. In the instant case the petitioners have alleged in their affidavits that they became aware of the grave legal implications of the Constitution after reading the provisions of the Referendum and Other Provisions Act, 1999 on or about 16/8/1999 and sought legal advice on the matters they are challenging. There is no evidence to the contrary. They filed the petition on 6/9/99. Clearly it was filed within the time prescribed by law. I therefore do not see any merit in the last point of objection.

Council for Respondent

In the result I would overrule Mr. Walubiri's objection that the Attorney General's answer is time barred, I would also overrule his

Petition

objection that the preliminary points of objections was not properly before this court. I would overrule grounds two and three of the preliminary objections. I would uphold ground one in part. I would order that the petition proceeds for the determination of the questions in paragraph 20(c), (e) and (f) of the Petition.

Dated at Kampala this ....2nd....day of ....May....2000.

10

J.P. Berko
Justice of Appeal.

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

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VERSUS

ATTORNEY GENERAL ..... RESPONDENT

RULING OF MANYINDO, DCJ

I read the Ruling of Berko, JA in draft and I agree with his conclusions on the preliminary points of objections. In my opinion the Attorney General must be sued in Constitutional cases as he would in civil actions for by their nature, constitutional cases are civil matters. That is why rule 13 of Legal Notice No. 4 of 1996 enjoins this court to apply the Civil Procedure Act and the Rules made under it when hearing constitutional matters.

It follows that service on the Attorney General in constitutional cases must be in accordance with Rule 5(1) of the Civil Procedure (Government Proceedings) Rules, Statutory Instrument 69-1. This was not done here. Therefore Byamugisha's contention that time began to run against the Attorney - General on 29.3.2000 when he was served by this court must be correct. The Attorney - General's answer to the petition which was filed on 4 April 2000 was thus filed in time.

With regard to the procedure pertaining to objections on preliminary points of law, I am of the view that where at the commencement of a hearing an objection is taken on a point of law, the objection should be heard there and then and determined one way or the other. This has been the long time practice of the courts in this country. It is a good practice as it allows for expeditious trials of cases. I do not see why an objection on a clear point of law should be raised formally, by Notice of Motion as Mr. Walubiri would have it. There may be cases where the point ~~or~~ matter is complex and would be best dealt with in a separate trial but the instant case is not such a case.

With regard to the affidavit evidence, this court clearly stated in *Olum and Kafiire v Attorney General Constitutional Petition No. 6 of 1999*, that where a petitioner challenges a legal provision, it is enough to state that the challenged law violates a provision or provisions of the Constitution. As Berko JA has clearly pointed out the jurisdiction of this court springs from Article 137 of the Constitution. Under Article 137(1) any question touching

on the interpretation of the constitution can only be heard by the court of appeal sitting as a constitutional court. The constitutional court can only deal with matters falling under Article 137 (3) in my view. Clearly for the petitioners to have a cause of action, he or she must allege in the petition one or more of the following matters:

(a) *that an Act of Parliament or any other law or anything in or any other law or anything in or done under the authority of any law is inconsistent with or contravenes a given provision of the constitution*

(b) that an act on omission by any person or authority is inconsistent with or contravenes a certain provision of the Constitution.

Therefore the Constitution is the yard stick against which the alleged offending laws or actions must be considered. This has to be so since the constitution is the supreme law of the land. It follows that this court has the jurisdiction to entertain the petition in respect of paragraph 20(c), (e) and (f) which seek:

"

(c) *A declaration that the active involvement of the judiciary in framing the referendum question under section 4(2) of the Referendum and other Provisions Act No. 2 of 1999 is inconsistent with and contravenes articles 28 and 128 of the Constitution.*

(e) *A declaration that Section 21(3) (4) (5) (6) and (7) of the Referendum and other Provisions Act No. 2 of 1999 are inconsistent with and contravenes the provisions of article 69 of the Constitution and are null and void.*

(f) A declaration that Sections 4(1) (d), 10, 13(2) & (3) and 26 of the Referendum and other Provisions Act No. 2 of 1999 is inconsistent with and contravenes the provisions of article 69 of the Constitution and are null and void.

The rest of the declarations sought, namely:

(a) *A declaration that the choice of a "political system" through a referendum or an election under article 69 of the Constitution is inconsistent with and contravenes articles 20, 21, 29(1) (a) (b), (d), (e); 38(2); 70(1) (d), 21(f); 72(1) and 75 of the Constitution.*

(b) A declaration that there is already in the Constitution an elaborate and non-discriminatory political system of governance and accordingly the movement and "Multiparty" are not political systems.

(d) *A declaration that regulations to be made under article 73(1) which derogate from articles 29(1) (e) and 43 would be inconsistent with and contrary to article 20 and 21 of the Constitution and would not be demonstrably justifiable in a free and democratic society.*

(g) *A declaration that Article 269 of the Constitution is inconsistent with and contravenes Articles 20, 21, 29(1) (a), (b), (d), (e); 38 (2) and 75 of the Constitution.*

(h) ***IN THE ALTERNATIVE*** *a declaration that a referendum under articles 271(3) of the Constitution would not be free and fair and would be disciminary and inconsistent with and contravene articles 20, 21 and 69 of the Constitution.*

(i) ***IN THE FURTHER ALTERNATIVE*** *a declaration that no free and fair referendum can be held while article 269 of the Constitution is still in force.*

(j) An order prohibiting the Minister responsible for Public Elections from referring the matter of a referendum question to the Chief Justice.

(k) An order prohibiting the Chief Justice from appointing a panel of three Judges to frame the referendum question

(l) An order prohibiting the panel of Judges from framing the referendum question(s).

(m)An order prohibiting the Treasury Officer of Accounts from disbursing *funds from the consolidated fund or any other source of from in any way the referendum."*

are either speculative or outside the ambit of the jurisdiction of this court. I do not see how this Court can look into the question whether certain articles of the constitution contradict each other as this matter is not covered by article 137(3). Harmonisation of the Constitution as against itself is a matter for Parliament and not for the courts. Even the principle of liberal interpretation of the Constitution would not be invoked where the jurisdiction of the court is plainly restricted. This court must in my view refrain from "judicial activism" which can lead to absurd results.

In the result I would overrule the objections except that one challenging the jurisdiction of this court on matters contained in paragraph 20 (c) (e) and (f) of the petition. The court should proceed to hear the petition to that extent only. As this is the view of the majority of my Lords, it is so ordered.

DATED at KAMPALA this 2nd Day of ~~April~~ May 2000

S.T. MANYINDO

DEPUTY CHIEF JUSTICE

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

CORAM: HON. MR. JUSTICE S.T. MANYINDO, DCJ;
HON. MR. JUSTICE G.M. OKELLO, J.A.
HON. MR. JUSTICE J.P. BERKO, JA.
HON. MR. JUSTICE S.G. ENGWAU, JA.
HON. MR. JUSTICE A. TWINOMUJUNI, JA.

CONSTITUTIONAL PETITION NO. 5 OF 1999

BETWEEN

1. DR. JAMES RWANYARARE }::::::::::::::PETITIONERS
2. HAJI BADRU KENDO WEGULO }

AND

THE ATTORNEY GENERAL::::::::::::::::::::::::RESPONDENT

RULING OF G.M. OKELLO, J.A

I have read in draft the ruling of Berko, JA. He has ably set out the background facts to this petition. I shall not therefore repeat them. I shall embark straight away on considering the objections that constitute the issues before us for the moment.

The first one was the objection by Mr. Peter Walubiri, learned counsel for the petitioners, to the participation of the Attorney General in these proceedings. We unanimously over-ruled that objection and reserved our reasons to be given later. The following are my reasons:

The thrust of Mr. Walubiri's objection was that the Attorney General did not file his answers to the amended petition within the 7 days period

prescribed by rule 6 (3) of The Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992, Legal Notice No. 4 of 1996. He pointed out that the affidavit of service of Isaac Mudasi, a Clerk with the firm of M/S Kwesigabo, Bamwine and Walubiri Advocates revealed that the Attorney General was served with the amended petition on 10/3/2000. The said service was accepted by Mr. Mpaulo Patrick, a clerk in the Civil Registry of the Attorney-General's Chambers. In counsel's view, the Attorney-General having been served on 10/3/2000, if he wished to oppose the amended petition, should have filed his answers latest on 17/3/2000 but he did not. Instead he filed his answers on 4/4/2000, 17 days later than the prescribed period. He argued that those answers filed out of time without an order of the court extending the time within which to file them were of no effect and should be disregarded. He prayed that the hearing of the petition be ordered to proceed exparte.

Mr. Deus Byamugisha, Director of Civil Litigation in the Attorney-General's chamber who appeared for the respondent did not agree with those arguments. He contended that the Attorney-General's answers to the amended petition were filed within the prescribed period. He argued that the purported service by Mr. Isaac Mudasi which was accepted by Mr. Mpaulo Patrick, was ineffective as it did not comply with rule 5 (1) of the Civil Procedure (Government Proceedings) Rules, Statutory Instrument 69-1, which governs service of Attorney-General for purposes of Civil proceedings in which Government is a party. The rules are made under The Government Proceedings Act, Cap. 69. According to Mr. Byamugisha, the Attorney-General effectively learned of the amended petition on 29/3/2000 when an official from the Registry of this Court served

them with a Notice of change of Hearing date from 4/4/2000 to 5/4/2000 attaching to the notice a copy of the amended petition. Upon that service, the Attorney-General's answers were filed on 4/4/2000. In Mr. Byamugisha's view, that was within the prescribed period.

Rule 6 (3) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules (supra) provides in effect that the respondent who wishes to oppose the petition **"shall within seven days after the petition was served on him or her, filed an answer to the petition"**. Under this rule, the respondent has to file his answer within seven days after he was served with the petition if he desires to oppose it.

Service of documents on the Attorney General for purposes of Civil Proceedings in which Government is a party is a governed by the Civil Procedure (Government Proceedings) Rules, (supra). Rule 5 (1) thereof provides in part that service on the Attorney-General **"shall be deemed not complete until the Attorney-General or another officer of the Government entitled to practice as an advocate in connection with the duties of his office has endorsed an acknowledgement of service on the document to be served".** In other words, service on the Attorney-General for purposes of Civil proceedings in which government is a party is regarded as effective only after the entitled officer has endorsed knowledgment of service on the document to be served.

In the instant case, the affidavit of service sworn by Mr. Isaac Mudasi on which Mr. Walubiri relied revealed that the purported service of the amended petition on the Attorney-General on 10/3/2000 was effected on Mr. Mpaulo Patrick who is said to be a clerk in the Civil Registry

of the Attorney-General's chambers. No endorsement of acknowledgement of service by either the Attorney-General himself or by a State Attorney was shown on the amended petition as required by rule 5 (1) of the Civil Procedure (Government proceedings) Rules above. Clearly, the absence of the endorsement rendered that service ineffective for non-compliance with the rule. The time within which to file his answers under rule 6 (3) of Legal Notice 4 of 1996 above, therefore could not have started to run against the Attorney-General after that ineffective service.

I agree with Mr. Deus Byamugisha, when he said that they learned of the amended petition on 29/3/2000 when an official from the Registry of this Court served them with a Notice of change of hearing date to which the amended petition was attached. In my view, that date was the effective date of service on the Attorney-General with a copy of the amended petition. Therefore, the time within which to file his answers, if he wished to oppose the amended petition, started to run against the Attorney-General after this date. Consequently, his answers filed on 4/4/2000 were within the seven days stipulated by rule 6 (3) above.

Mr. Walubiri argued that the Civil Procedure (Government proceedings) Rules, (supra) do not apply to constitutional petitions but only to ordinary Civil proceedings.

I am not persuaded by this argument. Constitutional petition proceedings are in effect civil proceedings though Clause 7 of article 137 of the Constitution makes them take precedence over all other proceedings. The Clause reads:-

> **"Upon a petition being made or a question being referred under this article, the Court of Appeal shall proceed to hear and determine the petition as soon as possible and may, for that purpose, suspend any other matter pending before it."**

Under rule 13 (1) of Legal Notice No. 4 of 1996, the practice and procedure in Constitutional Petition proceedings are to be regulated as nearly as may be possible in accordance with the Civil Procedure Act and the rules made under that Act governing the trial of a suit in the High Court only with modifications as the court considers necessary in the interest of justice and expedition of the proceedings.

Mr. Walubiri further questioned what would happen if the entitled officer refuses to endorse acknowledgment of service on the document to be served as required by rule 5 (1)(supra). My answer to this question is that in such a case, it seems to me that apart from filing an affidavit of service stating how it was effected and leave to the court to decide on the effectiveness or otherwise of the service, the party seeking service may apply to court for direction as to the appropriate alternative mode of service.

The next objection which Mr. Walubiri raised was that the preliminary objections raised by counsel for the respondent were not properly before the court since the law under which they were raised was not stated. In his view, failure to state the law under which the objections were raised made it difficult to determine which procedure to follow as different law prescribe different procedure. He contended that a proper procedure would be to identify the law under which such

objection is raised and then follow the procedure prescribed by that law. He relied on ***Serugo Vs Kampala City Council and Anor, Constitutional Appeal No. 2 of 1998, Supreme Court (unreported)*** for authority.

Mr. Byamugisha's response was that under 07 r 11 (d) and 013 r2 of the Civil Procedure Rules, the court has power to postpone the issue of facts and determine the issues of law first and that as these were points of law, court had power to handle them first.

It is the law that questions of law may be raised at any time of the proceedings. (See ***Makula International Ltd. Vs His Eminence Cardinal Nsubuga and Anor [1982] HCB 11).*** The views expressed by Oder JSC, Mulenga, JSC and supported by the Chief Justice for the desirability to cite the law under which an objection is brought, was not the decision of the Court as it was not supported by the majority justices of the Court. The Chief Justice infact held that no miscarriage of justice was occasioned by the procedure followed by this court.

The same procedure was adopted in the instant case. In my view the failure to cite the law under which the objections were brought did not occasion any miscarriage of justice. I hold that the respondent's objections were properly before this court.

It is for these reasons that I joined my colleagues in overruling Mr. Walubiri's objections.

The next batch of objections were raised by counsel for the respondent challenging on several grounds the competence of the amended

petition. The first of those grounds was that apart from prayers (e) and (f) of paragraph 20 of the amended petition, the petition raises no questions of Constitutional Interpretation and therefore this court has no jurisdiction in the matter. Mr. Byamugisha pointed out that the rest of the allegations challenge articles of the Constitution as being inconsistent with others. In his view, this court has no jurisdiction to interpret articles of the Constitution against the other. He submitted that this was clear from article 137 (3) of the Constitution.

According to Mr. Walubiri, all the allegations in the petition call for Constitutional interpretation. He argued that this court was empowered to look at any provision of the Constitution and to interpret the Constitution as a whole. If in the process of interpretation of an article of the Constitution, there is another article on the same subject, the court should look at it too. Where there is conflict within the Constitution itself, the court has power to harmonise them.

The pertinent question that arises from the above arguments is whether the court has power to construe the different articles of the Constitution on the same subject in such away as to harmonise them where they conflict with each other.

The contention of Counsel for the respondent that this court has no jurisdiction to interpret different articles of the Constitution on the same subject matter so as to harmonise them is untenable.

This court derives its power to interpret the Constitution under article 137 of the Constitution which as far as is relevant to this point reads:-

"(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 the Court.

(3). A person who alleges that:

(a) an Act of Parliament, or any other law or thing 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.

(4).....

(5).....

(6).....

(7)....."

The view of Berko, JA is that:-

"This Court is not a super legislature and does not have power to expand the jurisdiction given it under

the Constitution. If therefore certain provisions of the Constitution, in the opinion of the petitioners, are inconsistent, then they should direct their campaign to the proper quarters to have the Constitution amended."

With the utmost respect, I do not agree with that reasoning. Court should not simply shy away from its responsibility.

The Constitution has allocated responsibilities to the various organs of the state; for example the Executive, Legislature and the Judiciary. Under article 137 (1) **"Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court."**

That marks the allocation of the duty to interpret the Constitution to this Court.

Under article 2, it is the Constitution and not Parliament or even the Presidency that is supreme. Parliament therefore is not even a super legislature. This may be so in other countries like Britain without written Constitution.

In my view, article 137 (3) (a) above is broad enough to empower the Court to interpret different articles of the Constitution in order to harmonise them. The phrase **"anything in"** in that article could mean anything in any law **"including the Constitution"** which is the Supreme 'law' of this Country. If one of its provisions is alleged to be

inconsistent with or in contravention of another or other provisions on the same subject, it would call for harmonisation.

I must emphasise, that harmonisation of the Constitution is not a preserve of the politicians or of the legislatures. Harmonisation of the provisions of the Constitution on an issue falls within the ambit of Judicial power. The Constitutional construction principle by which the judiciary carries out that task is well known, not only to the jurists and Constitutional lawyers but also to the whole legal fraternity. As my brother, my Lord Justice Manyindo, DCJ stated in ***Major General Tinyefunza Vs The Attorney General, Constitutional Petition No. 1 of 1996, Constitutional Court of Uganda (unreported)***.

> **"...the entire constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution."**

Oder JSC, while also talking about principles of constitutional interpretation remarked on appeal in the same case that:

> **"Another important principle governing interpretation of the Constitution is that all provisions of the Constitution concerning an issue should be considered all together. The Constitution must be looked at as a whole.**

In *South Dakota Vs North Carolina 192, US 268 (1940) L.ED 448, the US Supreme Court said at page 465:*

> **'Elementary rule of constitutional construction is that no one provision of the Constitution is to be segregated from all others and considered alone. All provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the instrument'.**
>
> **In my judgment the principles of interpretation of the constitution to which I have referred above should be applied to the interpretation of our Constitution."**

I respectfully agree with those views. Different articles of the constitution on the same subject must be looked at and construed so as to harmonise them. To construe article 137 (3) (a) narrowly so as to deny this court this role of harmonisation would lead to absurdity. The argument that the Constitution is the yardstick upon which other legislations are to be measured is the more reason for harmonsation so that the yardstick is the same on an issue. To have two or more yardsticks of different lengths to measure the same subject would produce absurd results. Where the words in different clauses or articles of the Constitution on the same subject conflict with each other as to lead to inconsistency, it is the duty of the court to harmonise them.

For those reasons, I would hold that this court has jurisdiction to interpret different articles of the constitution on the same subject. Consequently I would hold that besides prayers in paragraph 20 (e)

and (f) which the respondent conceded to, para (a) (c) (g) and (h) of the same paragraph 20 of the petition also raise questions of constitutional interpretation.

The second objection in the batch was that there was no affidavit to support the petition. Mr. Byamugisha pointed out correctly in my view, that rule 3 (6) of Legal Notice No. 4 of 1996 requires that petition **shall be accompanied by supporting affidavit**. He further pointed out correctly that rule 12 (1) of the same Legal Notice requires that evidence in support of the petition **shall be by affidavit**. He submitted however, that his perusal of the petition revealed that there was no affidavit evidence to support the allegations in the petition.

I do not agree. There are two affidavits sworn on 7th March 2000 in support of the amended petition. One was sworn by Dr. James Rwanyarare and the other by Haji Badru Kendo Wegulo. Both affidavits were filed on 7/3/2000. In those circumstances, I find no merit in this objection. I would overrule it.

Finally, Mr. Kamugisha-Byamugisha Senior State Attorney who appeared with Mr. Deus Byamugisha, put up a spirited argument on the third objection that the petition was time barred. He pointed out that certain paragraphs of the petition complain against certain articles of the Constitution as being inconsistent with other articles of the same Constitution, while other paragraphs complain against certain sections of the **Referendum and Other Provisions Act** as being inconsistent with certain articles of the Constitution. He further pointed out correctly in my view, that rule 4 (1) of Legal Notice No. 4 of 1996 requires that the petition **must be filed within thirty (30)**

days after the breach complained of. He argued that for those paragraphs of the petition that complain against the provisions of the constitution as being inconsistent with other articles, the petition should have been filed within 30 days after the promulgation of the Constitution on 8/10/95. In his view, the petition should have been filed by the 7/11/95.

He contended that as for the complaint against certain sections of the Referendum and Other Provisions Act which came into force on 7/7/99, the petition challenging the constitutionality of those sections should have been filed by 6/8/99. Learned Senior State Attorney dismissed the claim by the respondent that they perceived the breach on 16/8/99 as a plea of ignorance of the law which is not helpful to them. The time started to run against them after the date of breach but not after the date of perception of the breach.

The question of time limit under rule 4 (1) of Legal Notice No. 4 of 1996 was considered by this Court in ***Zachary Olum and Another Vs The Attorney General, Constitutional Petition No. 6 of 1999*** where it held that time begins to run after the petitioner perceived the breach.

In the instant case paragraphs 16 and 8 of Dr. Rwanyarare and Haji Wegulo's affidavits respectively show that the petitioners perceived the breaches complained of on 16/8/99. The petition having been filed on 6/9/99 was clearly filed within the time prescribed by law. I therefore find no merit in this objection and would overrule it.

In the result, I would overrule grounds 2 and 3 of the objections in whole and ground 1 in part. I would hold that the hearing of the petition proceeds on the prayers in paragraph 20 a, c, e, f, g and h.

Dated at Kampala this.....2nd.....day of .....May.....2000.

G.M. OKELLO,

JUSTICE OF APPEAL.

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

CORAM: HON. MR. JUSTICE S.T. MANYINDO, DCJ.
HON. MR. JUSTICE G.M. OKELLO, JA.
HON. MR. JUSTICE J.P. BERKO, JA.
HON. MR. JUSTICE S.G. ENGWAU, JA.
HON. MR. JUSTICE A. TWINOMUJUNI, JA.

CONSTITUTIONAL PETITION NO.5 OF 1999

1. DR. JAMES RWANYARARE)
) :::::::::::::::::: PETITIONERS
2. HAJI BADRU WEGULO)

VERSUS

ATTORNEY GENERAL :::::::::::::::::::::::::::::::: RESPONDENT

RULING OF TWINOMUJUNI J.A.

I have had the benefit of reading the ruling in draft of my Lord, Justice Berko, JA. I respectfully agree with all, BUT ONE, of the holdings on the preliminary points of objection raised by both parties at the trial, and as far as those are concerned, I have nothing useful to add. However, I do not agree that the Constitutional Court of Uganda has no jurisdiction to entertain a petition in which it is averred that one Article or Clause of the 1995 Constitution contradicts or is in conflict with another Article or Clause of the same constitution.

The background facts leading to the petition and indeed to the preliminary objections raised at the beginning of the trial have been ably narrated in the ruling of Berko, JA. It is therefore not necessary to repeat them here.

It is now trite that the jurisdiction of this court is solely derived from Article 137 of the Constitution. In my understanding of the Article, there are three main clauses which confer jurisdiction to this court.

Art.137(1) states:-

> "Any question as to the interpretation of this constitution shall be determined by the Court of Appeal sitting as the Constitutional Court."

This Clause gives to this court wide powers to interpret or to give meaning to, the constitution as a whole. In my view, this jurisdiction is wider than that one conferred by Clause (3) and (5) of the same Article which are more specific but which do not affect the generality of the jurisdiction conferred by Clause (1).

Article 137(3) states:-

> "Any person who alleges that -
>
> (a) any Act of Parliament or any other law or anything in or done under the authority of any law or **(Emphasis mine)**
>
> (b) any act or omission by any person or authority, is inconsistent with or in contravention of any provision of this Constitution may petition the Constitutional Court for a declaration to that
>
> effect and for redress where appropriate." **(Emphasis mine)**

The expression "law" in the above Clause is not defined in the Constitution but in my view it includes the Constitution.

Article 2 of the Constitution provides:-

> "This Constitution is the Supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda." **[Emphasis mine]**

What should be noted here is that the Constitution is one of the laws (although Supreme) of Uganda. Therefore expressions "any other law" and "anything in ..... any law" in Article 137(3) includes the Constitution and anything in the Constitution respectively. It therefore follows that if a person alleges that there is anything in the Constitution that "is inconsistent with or in contravention of a provision of this Constitution," then in my judgment, this court has jurisdiction under Article 137(3) of the Constitution.

Article 137(5) only arises when an issue over which this court has jurisdiction under Article 137(1) and (3) is raised during trial in another competent court, in which case that court can refer the issue to this court for disposal first by way of interpretation.

The above conclusions in the interpretation of Article 137 of the Constitution are consistent and justified by principles of Constitutional Interpretation which have over the years been pronounced by eminent common law jurists on the subject. The same was expounded by his Lordship, Justice Manyindo, DCJ in Major General Tinyefuza -vs- Attorney General Constitutional Petition No.1 of 1996 (CA) where he stated:-

> "But perhaps I should first and briefly address my mind to the principles that

> govern the interpretation of the Constitution. I think that it is now well established that the principles which govern the construction of statutes also apply to the construction of Constitutional provisions. And so the widest construction possible in its context should be given according to the ordinary meaning of the words used, and each general word should be held to extend to all ancilliary and subsidiary matters. See Republic -vs- El Maun [1969] EA 357 and Uganda -vs- Kabaka's Government [1965] EA 393. As was rightly pointed out by Mwendwa, CJ (as he then was) in El Maun (supra), in certain contexts a liberal interpretation of Constitutional provisions may be called for. In my opinion Constitutional provisions should be given liberal construction, unfettered with technicalities because while the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed may give rise to new and fuller import to its meaning." **[Emphasis mine]**

It is pertinent here to ask whether this literal construction of Article 137 permits this court to harmonise the constitution when it is called upon to do so as in the instant case. The view of Hon. Berko, JA. is:-

> "I do not think that this court has jurisdiction under Article 137(3) of the Constitution to declare that a provision of the Constitution is inconsistent with and contravenes another article of the Constitution. The Constitution is the supreme law against which other Acts of Parliament or any other laws are to be evaluated. This court is not a super legislature and does not have the power to expand the jurisdiction given it under the Constitution. If therefore certain provisions of the Constitution, in the

> opinion of the petitioners, are inconsistent with and contravenes (sic) other provisions of the Constitution, then they should direct their campaign to the proper quarters to have the Constitution amended." **[Emphasis mine]**

With great respect, this view cannot be applied to the Constitution of the Republic of Uganda or any written Constitution anywhere else. They apply to a non written Constitution which does not have entrenched provisions for altering the Constitution. It applies where like in Britain, Parliament or the legislature is supreme and where it can amend the Constitution at will. In Uganda there is no supreme legislature. In fact, the Uganda Constitution was not enacted by Parliament and Parliament alone cannot amend most provisions of the Constitution. In their wisdom, the framers of the Constitution gave the role of harmonisation of the Constitution to the Constitutional Court. This role was recognised by Manyindo, DCJ in Major General tinyefuza (supra) when he stated:-

> "The second principle (of Constitutional Interpretation) is that the entire Constitution has to be read as an Integral whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhausiveness and the rule of paramountancy of the written Constitution."

As I have already noted above a written constitution is for posterity. It is not intended to be amended every time there is

a dispute on the meaning of its provisions and a glance at its amendment provisions will bear me out. It is the Constitutional duty of this court to give meaning to the Constitution and not to abdicate its responsibility in the vain hope that other authorities or persons will do it.

The principles of harmonisation are very well known in the American legal system where they have operated one of the oldest written Constitution in the common law legal system.
In the United States Supreme Court in South Dakota -vs- North Carolino 192 US 268 [1940] L.Ed. 448 at page 465 the court stated the principles of harmonisation as follows:-

> "(It is) an elementary rule of Constitutional construction that no one provision of the Constitution be segregated from all others, and to be considered alone but that all provisions bearing upon a particular subject be brought into view and to be interpreted as to effectuate the greater purpose of the instrument."

The above position is also very well known at common law. In CHATALEY page 716 (quoted in the Tanzanian High Court case of Rev. Christopher Mtikira -vs- the Attorney General Civil Case No.5 of 1993 at page 43) the position was stated as follows:-

> "..... It must be remembered that the operation of any fundamental right may be excluded by any other Article of the Constitution or may be subject to an exception laid down in some other Article. In such a case it is the duty of the court

to construe the different Articles in the Constitution in such a way as to harmonise them and try to give effect to all the articles as far as possible and it is only if such reconciliation is not possible, one of the conflicting Articles will have to yield to the other."

In the case of Major General Tinyefuza (supra) this court actually had the opportunity to harmonise the provisions of Articles 41 and 44 of the Constitution. The court was considering whether section 121 of the Evidence Act was consistent with Articles 28, 41 and 44 of the Constitution. The court was asked by the Attorney General to read Article 44 together with Article 41 which restricts release of information on grounds of security or sovereignty of the state or interference with the right to the privacy of any person. This court stated:-

"Under Article 44 no derogation is permitted from the enjoyment of the rights set out therein and under Article 44(c) is the right to fair hearing. Mr. Kabatsi submitted that Article 44 must be read with Article 41. We do not agree. To accept this argument would be to do violence to the clear language of Article 44. It states:-

"Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms:-

(a)

(b)

(c) The right to fair hearing." **[Emphasis mine]**

> The language is clear. It admits of no other construction. It prohibits any derogation from the enjoyment of the rights set out therein regardless of anything else in the Constitution. It is a complete and full protection of the right to fair hearing."

In my judgment, the effect of this decision is that where the right to fair hearing guaranteed by Article 28 of the Constitution is in issue, Article 41 cannot operate at all as it has been overriden by Article 44. This interpretation was not questioned by the Supreme Court on appeal and is the earliest example where this court has, in my opinion, rightly assumed jurisdiction under Article 137 to harmonise two Articles of our Constitution.

In the Tinyefuza case (supra), like in this case, the issues to be resolved related to fundamental rights and freedom of a citizen. Like in this case, the state raised a number of preliminary objections including one that this court had no jurisdiction over the petition. His Lordship Manyindo, DCJ. made the following observation with which I respectfully agree:-

> "The case before us relates to the fundamental rights and freedom of the individual like the petitioner, which are enshrined in and protected by the Constitution. In my opinion, it would be highly improper to deny him a hearing on technical or procedural grounds. I would even go further and say that even where the respondent objects to the petition as in

this case, the matter should proceed to trial on the merits unless it does not disclose a cause of action at all. This court should readily apply the provisions of Article 126(2)(e) of the Constitution in a case like this and administer substantive justice without undue regard to technicalities. It is for the above reasons that I cannot uphold Mr. Kabatsi's objections."

This opinion was cited with approval by Mulenga ~~S.C.J.~~ J.S.C. in the Supreme Court and it was not questioned by the other justice of the Supreme Court. I find it very instructive.

In the instant case the petitioners allege that the fundamental human rights guaranteed to them under Articles 20, 21, 29, 38, 70, 71, 72 and 75 of the Constitution are contravened by the provisions of Article 69 of the same Constitution. They further aver that Article 269 is inconsistent and contravenes the provisions of Articles 20, 21, 29, 38 and 75 of the same Constitution. It is implied in the ruling ~~of the majority~~ of Berko J.A (quoted above) that we should fold our arms and tell the petitioners to go to Parliament to seek amendments to the Constitution because the Constitutional Court has no powers to do anything about it.

In my judgment, it is the duty of this court to assume its rightful jurisdiction clearly spelled out in Article 137 of the Constitution and harmonise those provisions of the Constitution, if they are found to be in conflict or inconsistent with other Articles of the same Constitution. The citizens whose rights are affected have a right to expect this from this court and it is

our duty ~~as sitting members~~ of this court to do the needful.

In the result I would have dismissed all the preliminary objections and hear the petition on its merits in respect of paragraph 20,(a), (c), (e), (f), (g), (h) and (i).

Dated at Kampala this 2nd **day of** May **2000.**

A. TWINOMUJUNI
JUSTICE OF APPEAL.

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

CORAM: HON. MR. JUSTICE S.T. MANYINDO, DCJ.
HON. MR. JUSTICE G.M. OKELLO, JA.
HON. JUSTICE J.P. BERKO, JA.
HON. MR. JUSTICE S.G. ENGWAU, JA..
HON. MR. JUSTICE A. TWINOMUJUNII, JA.

CONSTITUTIONAL PETITION NO. 5 OF 1999

1. DR. JAMES RWANYARARE}::::::::::::::::::::::::::PETITIONERS
2. HAJI BADRU WEGULA }

VERSUS

ATTORRNEY GENERAL::::::::::::::::::::::::::::::::::::::RESPONDENT

RULING OF ENGWAU, JA.

I have read in draft the ruling of Berko, JA and I entirely agree with it. He has ably narrated the facts leading to the petition and also to the preliminary objections. It is therefore not necessary for me to repeat them here.

At the hearing of the petition, Mr. Walubiri, learned Counsel for the petitioners, raised a preliminary objection to the effect that we should hear the petition ex-patre on the ground that the Attorney General had filed his answer to the petition out of time. We indeed unanimously over- ruled that objection and reserved our reasons to be given later. I now proceed to give my reasons:

Mr. Walubiri's objection was that the Attorney General did not file his answer to the amended petition within 7 days as required by rule 6 (3) of The Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992, Legal Notice No. 4 of 1996. According to Counsel, the Attorney General was duly served with the amended petition on 10/3/2000. In the event of opposition to the petition, the Attorney General should have filed his answer latest by 17/3/2000. Mr. Walubiri pointed out that the answer filed by the Attorney General on 4/4/2000 was filed out of time and no extension of time was sought. The learned Counsel therefore urged this Court to proceed with the hearing of the petition ex-patre.

Mr. Deus Byamugisha representing the Attorney General did not agree with Walubiri's line of argument. He said that the lawyers representing the petitioners had not served the Attorney General to date with any copy of the amended petition but instead their Chambers were served by the Registry of this Court on 29/3/2000. According to Counsel time started to run against the respondent from that date. The respondent filed his answer on 4/4/2000 which was within the time of 7 days as by law required

I find that service on the attorney General in constitutional or civil cases must comply with Rule 5 (1) of The Civil Procedure (Government Proceedings) Rules, Statutory Instrument 69 – 1. This was not done here. Accordingly time started running against the Attorney General when he was served on 29/3/2000. His answer to the petition which was filed on 4/4/2000 was within time.

The second preliminary objection raised by Mr. Walubiri relates to the procedure pertaining to objections on preliminary points of law. He argued that the preliminary objections raised by the Attorney General were not brought under any law. It was his contention that each objection should have been raised under a particular law and then follow the procedure prescribed by that law. For this proposition, Mr. Walubiri relied on the authority of ***Serugo Vs Kampala City Council and Anor, Constitutional Appeal No. 2 of 1998, Supreme Court (unreported).***

Mr. Byamugisha submitted rightly, in my view, that the objections raised here involve points of law which must be decided first before issues of facts. I am inclined to agree with him on this point as the practice expedites trials of cases. There is therefore no need for the objections on point of law raised by the respondent here to be brought by either Notice of Motion or Chamber Summons as suggested by Mr. Walubiri.

As regards the jurisdiction of this Court, Berko, JA has rightly pointed out that this Court derives its jurisdiction from Article 137 (1). Any issue involving the interpretation of the constitution can be heard by the Court of Appeal sitting as a Constitutional Court. The Constitutional Court deals with allegations falling under Article 137 (3). For a petitioner to have a cause of action, he or she must allege in the petition (a) that an Act of Parliament or any other law or anything in or done under the authority of any law is inconsistent with or contravenes a particular provision of the Constitution; (b) that an act or omission by any person or authority is inconsistent with or contravenes any provision of the Constitution.

According to Counsel for the petitioners, all the allegations in the petition call for interpretation of the constitution. On the other hand Counsel for the respondent was of a different view. He said that all the issues raised in the petition do not call for an interpretation of the Constitution, except the declarations being sought in paragraph 20 (e) and (f) only. Clearly, this Court has jurisdiction to entertain the allegations in the petition in respect of paragraph 20 (c) (e) and (f) respectively which call for:

> "(c) A declaration that the active involvement of the judiciary in framing the referendum question under section 4 (2) of the Referendum and Other Provisions Act No. 2 of 1999 is inconsistent with and contravenes articles 28 and 128 of the Constitution.
>
> (e) A declaration that section 21 (3) (4) (5) (6) and (7) of the Referendum and other Provisions Act No. 2 of 1999 is inconsistent with and contravene article 29 (1) (a) of the Constitution.
>
> (f) A declaration that sections 4 (1) (d), 10, 13 (2) and (3) and 26 of the Referendum and other Provisions Act No. 2 of 1999 are inconsistent with and contravene the provisions of article 69 of the Constitution."

In my view, the declarations being sought in paragraph 20 (a), (b), (d), (g), (h), (i), (j) (k), (l) and (m) do not call for an interpretation of the Constitution

because they are either speculative or fall outside the jurisdiction of this Court.

As regards certain provisions of the Constitution which appear to have conflict with other provisions, it is my considered view that such provisions cannot be harmonised by this Court. I think that it is the legislature which can do that by way of an amendment of the Constitution. The jurisdiction of this Court sitting as a Constitutional Court is restricted only to the interpretation of the Constitution as envisaged in Article 137 (3) thereof.

Finally, it was argued by the respondent that under rule 4 (1) of Legal Notice No. 4 of 1996, any breach complained of regarding the Constitution must be filed within 30 days since the promulgation of the Constitution on 8/10/1995. Accordingly the petition in that respect should have been filed latest by 7/11/95. As for complaints regarding certain sections of the Referendum and Other Provisions Act No. 2 of 1999 which came into force on 7/7/99, the petition challenging the provisions of the Constitution should have been filed latest by 6/8/99.

In ***Zachary Olum and Anor. Vs The Attorney General, Constitutional Petition No. 16 of 1999,*** this court held inter alia that time begins to run against a petitioner after the perception of the breach being complained about. According to their affidavits in paragraphs 9 and 16 which are similar in all respects, the petitioners perceived the alleged breaches on 16/8/99. The petition was filed on 6/9/99. Clearly, this was within the time prescribed by law.

In the result, I would overrule the objections except those contained in paragraph 20 ©, (e) and (f) of the petition which the court should proceed to hear.

Dated at Kampala this 2nd day of May 2000.

S.G. ENGWAU

JUSTICE OF APPEAL