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THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CORAM: HON. MR. JUSTICE G.M. OKELLO, JA
HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. MR. JUSTICE S.G. ENGWAU, JA
HON. MR. JUSTICE A. TWINOMUJUNI, JA
HON. LADY JUSTICE C.N.B. KITUMBA, JA

CONSTITUTIONAL PETITION NO.2 OF 2003.

1. UGANDA ASSOCIATION OF WOMEN LAWYERS }
2. DORA BYAMUKAMA }
3. JAQUELINE ASIIMWE MWESIGE }
4. PETER DDUNGU MATOVU }.....PETITIONERS
5. JOE OLOKA ONYANGO }
6. PHILLIP KARUGABA }

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT OF TWINOMUJUNI, JA:

This is a petition by the above named six petitioners brought under Article 137 of the Constitution seeking the following declarations:-

"(a) Section 4(1) of Divorce Act (Cap.249) contravenes and is inconsistent with Articles 21(1) & (2), Article 31(1) and Article 33(1) & (6) of the Constitution;

(b) Section 4(2) of the Divorce Act (Cap.249) contravenes and is inconsistent with Articles 21(1) & (2), Article 31(1) and Article 33(1) & (6) of the Constitution;

(c) Section 5 of the Divorce Act (Cap.249) is inconsistent with and contravenes Article 21(1) & (2), Article 31(1) and Article 33(1) & (6) of the Constitution;

(d) Section 21 of the Divorce Act (Cap.249) is inconsistent with and contravenes Article 21(1) & (2), Article 31(1) and Article 33(1) & (6) of the Constitution;

(e) Section 22 of the Divorce Act (Cap.249) is inconsistent with and contravenes Article 21(1) & (2), Article 31(1) and Article 33(1) & (6) of the Constitution;

(f) Sections 23 and 24 of the Divorce Act (Cap.249) is inconsistent with and contravenes Article 21(1) and Article 31(1) of the Constitution;

(g) Section 26 of the Divorce Act (Cap.249) is inconsistent with and contravenes Articles 21(1) & (2), Article 31(1) and Article 33(1) & (6) of the Convention;

(h) No order be made as to costs in any event;

(i) Any other or further declaration that this Honourable Court may deem fit to grant. "

The petition is supported by affidavits of the petitioners and two others sworn by Andrew Lumonya and Norah Matovu Winyi. The respondent filed a reply to the petition, which is also supported by an affidavit sworn by the Ag. Solicitor General Mr. L. Tibaruha.

At the trial of the petition, Mr. Phillip Karugaba, Ms. Lydia Ocheng Obbo and Ms Sarah Lubega represented the petitioners. Ms. Carol Mayanja, a Senior State Attorney and Mr. Henry Oluka, a State Attorney represented the respondent.

At the beginning of the trial, Ms. Carol Mayanja raised three preliminary objections to the petition. Realising that two of them were not sustainable, she abandoned them and opted to pursue only one of them. She submitted that, the petition was time-barred and therefore unsustainable. She relied on the provisions of rule 4(1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992, (Legal Notice No.4 of 1996) which provides that:-

> "4(1) The petition shall be presented by the petitioner by lodging it in person, or, by or through his or her advocate, if any, named at the foot of the petition, at the office of the Registrar and shall be lodged within thirty days after the date of the breach of the Constitution complained of in the petition."

Learned counsel submitted that the Divorce Act whose provisions are being challenged in the petition was enacted in 1904. It was therefore saved by Article 273(1) of the Constitution which provides that:-

> "Subject to the provisions of this article, the operation of existing law after the commencement of this Constitution shall not be affected by the coming into force of this constitution but the existing laws shall be construed with such modifications, adaptation, qualifications and

exceptions as may be necessary to bring it into conformity with this constitution."

According to counsel, this provision brought the Divorce Act into force, in its new form, with effect from the date when the constitution came into force, which was the 8th October 1995. To be able to challenge provisions of that Act, one had to file the petition in the Registry of this court within thirty days from the date the Act came into force, the 8th October 1995. This petition was filed nine years after the Act came into force and therefore it is time barred. Counsel invited us to hold that this petition is incompetent and to dismiss it.

In reply, Mr. Phillip Karugaba submitted that the petition was not time barred. He contended that from the date the Constitution came into force, the provisions of the Divorce Act complained of in this petition breached the Constitution. Every day the provisions remain in force constitutes a continuing breach of the Constitution. In his view, rule 4(1) of Legal Notice No.4 of 1996 cannot apply to Acts or acts which constitute continuing breaches of the constitution. Mr. Karugaba invited this court to follow its earlier decisions on the matter in the case of **Joyce Nakachwa vs. Attorney General and 2 others. Constitutional Petition No.2 of 2001** and **Attorney General vs. Dr. James Rwanvarare and 9 others Miscellaneous Application No.3 of 2002 (C.A) unreported.**

Mr. Karugaba made another argument in reply. He submitted that the 1995 Constitution never placed a limit on the time a Constitutional Petition could be lodged in court. On the contrary, Article 3(4) of the Constitution placed a

duty on all citizens of Uganda to "AT ALL TIMES" defend the Constitution against unlawful suspension, overthrowal, abrogation or amendment. In his view, in order to be able to carry out that duty, the citizen must have access to courts of law, and the Constitutional Court in particular, AT ALL TIMES. He pointed out that the thirty days rule which was introduced in a subsidiary legislation was not in accordance with the spirit of the constitution. He suggested that we declare it unconstitutional or declare it to be only directory and not mandatory. He cited a number of authorities to support his submission that the word "shall" used in rule 4(1) of Legal Notice No.4 of 1996 has been Interpreted to be directory in certain circumstances.

Ms. Carol Mayanja exercising her right of reply opposed any attempts to interpret the word "shall" to be directory and insisted that it was mandatory. She also cited cases in support of her argument that such construction would not be appropriate in the circumstances of Legal Notice No.4 of 1996.

After hearing this preliminary objection, we overruled it, promising to give our reasons with the main judgment of the petition. I propose to give my reasons why I supported the courts decision to overrule the preliminary objection before giving my judgment on the merits of the petition.

The matter of limitation raised by rule 4(1) of Legal Notice No.4 of 1996 has been a subject of many decisions of this court, many of them not consistent admittedly. We admitted that much in the case of Attorney General vs. Dr. James Rwanyarare and 9 others (supra) where this court stated:-

Recently, we have made a number of decisions on this issue which we hoped had put this issue to rest. Apparently we did not succeed. We must now make another attempt in the hope that we shall succeed this time. But first, a short review of the application of Rule 4 of Legal Notice No.4 of 1966 in this court since its inception is called for.

In the infancy days of this court, we decided in a number of cases that a Constitutional Petition filed outside the thirty days of limitation was incompetent. We held that the thirty days began to run the date (in case of an Act of Parliament) when it became law and in case of any other "act" from the date it occurred. This was the holding in the cases of James Rwanyarare (supra). Hajji Sebbagala (supra). Sarapio Rukundo (supra) and Ismail Serugo (supra). Almost all these cases were decided in 1997. However, the Constitutional Court began to realise the problems being caused by the traditional literal interpretation of the thirty days rule especially the hardship it caused in its application to human rights and freedoms cases. A debate began within the court on the following issues:-

(a) Whether the continued dismissal of petitions because of Legal Notice No.4 of 1996 (Rule 4) was not hindering access to the Constitutional Court.

(b) Whether the practice could be sustained in light of the fact that a mere Statutory Instrument was being applied

to deny access to constitutionally guaranteed rights and freedoms.

(c) Whether or not Rule 4 of Legal Notice No.4 of 1996 was not in fact unconstitutional."

We then considered relevant decisions of the Supreme Court and indicated that in our view, their Lordships had not finally pronounced themselves on the constitutionality of the thirty days rule because the issue did not call for determination in the case of Ismail Serugo vs. KCC and Anor Constitutional Appeal No.2 of 1997 which they were considering. We however, highlighted comments made by two justices of the court on the rule which we would like to highlight again here:-

Hon. Justice Mulenga, JSC stated:-

"I do appreciate that any constitutional case is very important and once it is filed it must be attended to expeditiously so that a constitutional issue is not left in abeyance for unduly long. The Constitution expressly commands the courts concerned to give that priority to such cases. However, to extend that reasoning to the period prior to the filing of a petition, can lead to unintended difficulties. The most conspicuous difficulty is in respect of petitions alleging that an Act of Parliament or other law, is unconstitutional. Apart from the question of the starting day of computing the thirty days, there is the high probability of the inconsistency of such law being realised long after the expiry of the thirty days after enactment. In

my view, the problem should not be left to be resolved through applications for extension of time, as and when need arises. The appropriate authority should review that rule to make it more workable, and to encourage, rather than appear to constrain, the culture of Constituionalism." [Emphasis supplied]

Hon. Justice Oder, JSC concurred as follows:-

"As regards limitation of time, the complaint in respect of the act of arrest in contravention of the Constitution, the cause of action was not time barred. I also think that the period of limitation of 30 days will have the effect of stifling the constitutional right to go to the Constitutional Court rather than encouraging the enjoyment of that right. It is certainly an irony that a litigant who intends to enforce his right for breach of contract or for bodily injury in a running down case has far more time to bring his action than the one who wants to seek a declaration or redress under Article 137 of the Constitution. What needs to be done by the authorities concerned is obvious." [Emphasis supplied]

This court then concluded:-

"This court has held in Nakachwa case (supra) that each decision must be confined to its own peculiar facts. For example, in respect of a mature mentally normal person, it is fair to hold that the date of perception of a constitutional

breach by an Act of Parliament is the date it comes into force, not the date the petitioner becomes aware of the breach because, he/she is presumed to be aware of it from the date the law came into force. Ignorance of the law is no defence. But what about the infants and the unborn children who may grow up to find that the continuing effect of a constitutional breach by an Act of Parliament contravenes their rights and freedoms or even threatens their very existence, for instance, where the Act authorises activities hazardous to the environment which threaten human existence for the future generations. Are they not protected by the Constitution? Part of the Preamble to the 1995 Constitution states:-

> *'WE THE PEOPLE OF UGANDA.....*
> .....
> .....
> .....*DO HEREBY, in and through this Constituent Assembly Solemnly adopt, enact and give to ourselves and our posterity this Constitution of the Republic of Uganda this 22nd day of September, in the year 1995." [Emphasis supplied]*

It seems to us that a constitution is basic law for the present and the future generations. Even the unborn are entitled to protection from violation of their constitutional rights and freedoms. This cannot be done if the thirty days rule is enforced arbitrarily. In our view, rule 4 of Legal Notice No.4 of 1996 poses difficulties, contradictions and anomalies

the enjoyment of the constitutional rights and freedoms guaranteed in the 1995 Constitution of Uganda. We wish to add our voice to that of the learned Supreme Court Justices, (Mulenga, JSC and Oder, JSC) that this rule should be urgently revisited by the appropriate authorities."

On this occasion, like on several other earlier occassions, we held that the thirty days began to run from the day when the petitioner perceives the breach of the constitution. We stated that the decision was intended, in the words of Mulenga, JSC to "make the rule workable and encourage, rather than constrain, the culture of consitutionalism."

We resisted the temptation to declare the rule to be in conflict with the constitution because, firstly, we hoped that the relevant authorities would urgently act on the concerns of the Supreme Court and those of this court expressed in Attorney General vs. Dr. Rwanyarare (supra) as indicated above. To date, nothing has been done. Secondly, the provisions of Article 3(4) of the Constitution had not yet been brought to our attention.

That article provides in clause 4 as follows:-

"(4) All citizens of Uganda shall have the right and duty at all times -

(a) to defend this Constitution, and in particular, to resist any person or group of persons seeking to overthrow the established Constitutional order, and

(b) to do all in their power to restore this constitution after it has been suspended, overthrown, abrogated or amended contrary to its provisions." [Emphasis supplied]

The issue which we must decide now is whether section 4(1) of Legal Notice No.4 of 1996 has the effect of amending the Constitution of Uganda. If the answer is YES, then we must hold that the citizens of Uganda have a right to come to this court to have it nullified. The Constitution gives the people of Uganda the right under Article 137 to have unimpeded access to this court to seek declaration and redress where:-

(a) An Act of Parliament;

(b) Any other law;

(c) Anything done under the authority of any law;

(d) Any act or omission by any person or authority;

is inconsistent with or in contravention of any provision of the Constitution.

In pursuit of this objective, they have a duty at all times to come to court in resistance to any violation of the Constitution. What then is the role of this thirty days rule? I have examined the practical implication of this rule since this court came into being. Its role has been to restrict access to this court. It has acted as an impediment, a roadblock and a nuisance to those seeking access to constitutional justice. To recast the words of Oder, JSC (supra)

> **"It is certainly an irony that a litigant who intends to enforce his right for breach of contract or for a bodily injury in a run down case has far more time to bring his action than the one who wants to seek a declaration or redress under Article 137 of the Constitution."**

In my view, the framers of the Constitution could not have intended this result. If they had intended such a result, they would have expressly provided so in Article 137.

I am aware that the Attorney General has argued elsewhere that Article 3(4) of the Constitution only applies when the constitution is threatened or has been violated through physical violence. With respect, I do not see any justification in giving the article such a narrow interpretation. The people of Uganda have a right and a duty at all times using all means available, peaceful or violent, constitutional or unconstitutional to resist attempts to unconstitutionally:

"Suspend, overthrow, abrogate or amend the Constitution."

The phrase "amendment of the Constitution" has been considered by the Supreme Court in their recent decision in Paul Ssemogerere and others vs. Attorney General. Constitution Appeal No. 1 of 2002.

In a leading judgment, Kanyeihamba JSC,stated with approval an earlier holding of this court (per TWINOMUJUNI, JA) that:-

> "If an Act of Parliament has the effect of adding to, varying or repealing any provision of the Constitution then the Act is said to have amended the affected article of the Constitution. There is no difference whether the Act is an ordinary Act of Parliament or an Act intended to amend the Constitution. The amendment may be effected expressly, by implication or by infection, as long as the result is to add to, vary or repeal a provision of the Constitution. It is not material whether the amending Act states categorically that the Act is intended to affect a specified provision of the Constitution. It is the effect of the amendment that matters."

Their Lordships in the Supreme Court were here dealing with an Act of Parliament but the holding equally applies to a subsidiary legislation or any other act or omission. To the extent that rule 4(1) of Legal Notice No.4 of 1996 imposes restrictions to the right of access to the Constitutional Court, which the constitution itself does not provide for, it is seeking to add to and or vary the constitution and therefore to amend it without doing so through the amendment provisions of the Constitution. It is clearly against the spirit of the constitution and it is now high time that this court restored, in full, the citizens right to access to the Constitutional Court by declaring that the Rule is in conflict with the Constitution and is therefore null and void. I would so declare.

These are the reasons why I concurred in the decision to overrule the preliminary objection.

THE MERITS OF THE PETITION

(1) INTRODUCTION.

I now turn to the merits of this petition. The petitioners are challenging several provisions of the of the Divorce Act (Cap 249 Laws of Uganda) as being inconsistent with the provisions of the 1995 Constitution. In particular, they contend that the provisions of Sections 4(1), 4(2), 5, 21, 22, 23 and 26 of the Act are inconsistent and in contravention of Articles 21(1) and (2), 31(1) and 33(1) and (6) of the Constitution

(2) SHORT HISTORY OF THE DIVORCE ACT

The Divorce Act which was enacted in Uganda in 1904 has got its origins in the Matrimonial Causes Act of 1857 of England. That Act also had its roots in the Common Law of England whereby a valid marriage could only be terminated by the death of one of the parties to it or by a divorce decree pronounced by a court of competent jurisdiction. The Matrimonial Causes Act 1857 provides that a party to a marriage could obtain a decree of divorce on proving that the spouse had committed a matrimonial offence. The only offence that entitled a husband to obtain the decree was adultery. For a wife, it was not enough for her to prove adultery against her husband. She had to prove that the husband was guilty of aggravated adultery (which meant adultery plus another offence e.g. incest, bigamy, cruelty, desertion etc) or he had changed his faith from Christianity to some other faith and gone through a form of marriage with another woman. This law was brought into force in Uganda by the enactment of Divorce Act on 1st October 1904. Despite the fact that the English have since reformed the Matrimonial Causes Act 1857 by legislation enacted in 1923, 1937, 1969 and 1973, and have abandoned the concept of divorce granted on the basis of proof of matrimonial offences, the 150 years old English Law is still intact and in force in Uganda. As if this is not bad enough, section 3 of the Divorce Act requires that the courts of this country exercise their jurisdiction under the Act "in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England."

It is interesting to note, even at this early stage, that the Constitutio Uganda enjoins the courts to exercise judicial power **"in the name of people and in conformity with the law and with the values, nor and aspirations of the people."** (of Uganda of course)!

(3) THE ISSUES

At the beginning of the trial the following issues were framed and agre upon:-

1) Whether the impugned sections of the Divorce Act are contravention of the Constitution as alleged.

2) Whether the petitioners are entitled to the reliefs prayed

(4) THE EVIDENCE

As I indicated above, the petitioners, most of who are lawyers b profession, swore affidavits in support of this petition. The gist of the evidence contained therein is:-

(a) That the Divorce Act discriminated against women in violation of express provisions of the Constitution.

(b) That the Act perpetuates inequality between sexes.

(c) That the Act is against the dignity, welfare and interest of women and undermines their status.

(d) One male deponent whose marriage broke down in 1996 testified that he had had to live in misery because he cannot divorce his wife due to

his inability to prove adultery against her and to name a co-respondent as required by the Divorce Act.

(e) Another male deponent testified that his marriage broke down shortly after the wedding with his wife due to irreconcilable differences. He is unable to divorce and feels discriminated against in as far the Divorce Act imposes on him different grounds of divorce from those required of his wife. He also finds it cruel, inhuman and degrading to be required to prove adultery of his wife because he is subjected to torture in the process of trying to obtain the necessary evidence.

Though the Ag. Solicitor General Mr. L. Tiberuha swore an affidavit disputing the above averments, both counsel for the parties stated at the trial that they had no disputes arising from the affidavits and that the petition should be resolved on the basis of legal arguments on purely legal interpretation of the Constitution and the Divorce Act.

(5) THE CONSTITUTION

I will now set out the provisions of the constitution, which, it is contended, are being contravened by the various provisions of the Divorce Act.

Article 21 provides as follows:-

"21(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.

(3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.

Article 31 provides:

"31(1) Men and women of the age of eighteen years and above, have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution."

Article 33 provides:-

"33(1) Women shall be accorded full and equal dignity of the person with men."

(6) ARGUMENTS OF COUNSEL

Mr. Phillip Karugaba, learned counsel for the petitioners, attacked the impugned sections of the Divorce Act separately.

(a) Section 4 Divorce Act:

This section provides as follows:-

"4(1) A husband may apply by petition to the court for the dissolution of his marriage on the ground that since the solemnisation of the marriage his wife has been guilty of adultery.

(2) A wife may apply by petition to the court for the dissolution of her marriage on the ground that since the solemnisation of the marriage -

(a) her husband has changed his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman; or

(b) has been guilty of -

(i) incestuous adultery;

(ii) bigamy with adultery;

(iii) marriage with another woman with adultery;

(iv) rape, sodomy or bestiality;

(v) adultery coupled with cruelty; or

(vi) adultery coupled with desertion, without reasonable excuse, for two years or upwards."

Mr. Karugaba submitted that this section violated Articles 21, 31 and 33 because it made prescriptions for divorce on the basis of sex. It

also allows a man to divorce only on proof of one ground whereas women are allowed to prove many grounds. This causes hardship to a man who may have other grounds, other than adultery. It compels the women to have to prove many grounds whereas the man is not required to do the same. He argued that the section was discriminatory since it gave only one ground for divorce to the man while the women had seven grounds of divorce. He cited the following cases in support of this argument:-

1) Sarah Longwe vs. Intercontinental Hotel [1934] 4 LRC 221
2) Mukungu vs. Republic [2002 LLR 2073 CAK]
3) Unity Dow vs. Attorney General of Botswana [1992] LRC (const.) 623.
4) Dalia Parueen vs. Bangladesh Biman Corporation [1996] 3 CHRLD.

(b) Section 5 Divorce Act:

This section provides as follows:-

"S.5 Where the husband is the petitioner, he shall make the alleged adulterer a corespondent to the petition unless he is excused by the court from doing so on one of the following grounds:-

(a) that the respondent is leading the life of a prostitute, and that he knows of no person with whom the adultery has been committed;

(b) that he does not know the name of the alleged adulterer although he has made due efforts to discover it; or

(c) that the alleged adulterer is dead."

Mr. Karugaba argued that this section requires a husband to name a co-respondent in a divorce petition but a wife is not required to do the same. In his view, this section was discriminatory and contravened the equality provisions of the Constitution set out above.

(c) Section 21 Divorce Act:

Section 21(1) provides:-

> "A husband may, by petition claim any damages from any person on grounds of his having committed adultery with the wife of the petitioner."

According to Mr. Karugaba, to the extent that a wife is not permitted to claim compensation from the woman who may have committed adultery with her husband, the law is discriminatory and contravenes the equality provisions of the Constitution.

(d) Sections 22 & 23 Divorce Act:

Section 22 permits the court to order a co-respondent to pay costs of the proceedings if adultery with the wife of the petitioner has been established against him. This provision only applies to the husband but not to a wife.

Section 23 provides for a court to order a husband to pay alimony to a wife during or after divorce proceedings but there is no similar provision in favour of a husband.

Mr. Karugaba argues that these provisions are clearly discriminatory and contravene the Constitution.

(e) Section 26 Divorce Act:

The section provides as follows:-

"When a decree of dissolution of marriage or of judicial separation is pronounced on account of adultery by the wife, and the wife is entitled to any property, the court may, notwithstanding the existence of the disability of coverture, order the whole or any part of the property to be settled for the benefit of the husband, or of the children of the marriage, or both."

The Act does not contain a similar provision in favour of a wife where divorce or judicial separation is a result of a man's adultery. The petitioners contended that this is discriminatory and contravenes the Constitution.

Finally Mr. Karugaba invited us to hold that the impugned sections of the Divorce Act contravened and were inconsistent with the Constitution. He invited us to so hold.

In reply, Ms Carol Mayanja, the learned Senior State Attorney of the respondent made one major all embracing argument. She submitted that the Divorce Act was saved by Article 273 of the Constitution (which was quoted in full earlier in this judgment). In her view, Acts of Parliament which were

saved by that article cannot be ruled to be in contravention or inconsistent with the Constitution. They only have to be:-

> "Construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring (them) into conformity with the Constitution."

She cited the cases of Pyarali Abdul Rasaul Esmail vs. Adrian Sibo Constitutional Petition No.9 of 1997 and Dr. James Rwanyarare vs. Attorney General Constitutional Petition No.11 of 1997 in support of her argument.

She further submitted that most authorities relied upon by the petition are of a foreign origin from countries in which their constitution do not have the equivalent of our Article 273 of the Constitution. She invited us to follow our previous decisions to the effect that when interpreting provisions of the Constitution, it is necessary to look at the Constitution as a whole. She invited us to look at Article 273 in that light and to hold that the Divorce Act is not discriminatory and to dismiss the petition.

Mr. Karugaba in further reply, submitted that Article 273 must be read together with Article 274 states:-

> "Article: 274. The first President elected under this Constitution may, within twelve months after assuming office as President, by statutory instrument, make such provision as may appear necessary for repealing, modifying, adding to or adapting any law for bringing it into conformity with this Constitution or otherwise for giving effect to this Constitution."

He pointed out that the President has never issued any guidelines in accordance with this article. In his view, this has caused difficulties in the lower courts in their attempt to comply with Article 273 because there are situations in which attempts to apply it have resulted into a multiplicity of interpretations which could cause confusion. He submitted that the instant case was such example. He invited us to give one binding interpretation for guidance of all the courts below the Constitutional Court.

(7) RESOLUTION OF ISSUE NO.1

There are three sub-issues in this issue to resolve:-

(a) Does the impugned provisions of the Divorce Act derogate (inconsistent/contravene) the Articles of the Constitution cited above?

(b) Is the derogation (if any) in public interest and therefore justified within the meaning of Article 43 of the Constitution.

(c) Does the application of Article 273 of the Constitution preclude this court from nullification of an Act which was in existence when the Constitution came into force?

a. Derogation.

The word "**discriminate**" is defined in article 21(3) which has been cited in full above. I have carefully perused all the cases cited by Mr. Karugaba in which the meaning of the word has been considered. I bear in mind the submission of counsel. Though Mr. Karugaba strongly argued that the impugned sections of the Divorce Act are discriminatory, learned counsel for the Attorney General made no

attempts to dispute that. She only sought to rely on the applicability of article 273 as the sole defence of the respondent. I have also studied the History of the Divorce Act, especially, the English concepts of Marriage and Divorce before and after the enactment of the Matrimonial Causes Act of 1857. I have no doubt in my mind that the impugned provisions of our Divorce Act are a result of the Englishman's pre-20th Century perceptions that a man was a superior being to a woman and they could not be treated as equals in marriage. It is, in my view, glaringly impossible to reconcile the impugned provisions of the Divorce Act with our modern concepts of equality and non-discrimination between the sexes enshrined in our 1995 Constitution. I have no doubt in my mind that the impugned sections are a derogation to articles 21, 31 and 33 of the Constitution.

b. Is Derogation Justified?

It is the petitioner's case that the derogation is not justified. The respondent made no attempt to raise the defence of justification. Neither article 43 nor any other article of the Constitution can conceivably be invoked to justify continued existence of the impugned provisions of the Divorce Act.

c. Article 273.

The sole defence of the respondent is that a law which was saved by article 273 cannot be nullified as being in contravention or inconsistent with the Constitution. The case of Pyarali Esmail vs. Adrian Sibo (supra) was cited as authority for that proposition.

This case came to this court under the provisions of article 137(5). It was a reference from the High Court with request to determine the following issue:-

> "Whether the expropriated Properties Act No.9 of 1982, to the extent that it nullified the sale of the suit property to the defendant and accordingly deprives him of proprietory interest therein, contravenes the Constitution of the Republic of Uganda is thereby null and void."

This court (per Mpagi-Bahigeine, JA) made the following order:-

> Since the Act No.9/82 is an existing law within the meaning of Article 273 of the 1995 Constitution, the provisions of the impugned section 11(4) and (b) would be construed qualified and adapted to conform to Article 26(2)(b)(1) of the 1995 Constitution by the trial court. The Act therefore would not be null and void."

The full court concurred in this decision.

It must be noted that this court was dealing with a reference from the High Court under article 137(5). Article 273 enables all courts to construe legislation which existed at the coming into force of the Constitution with such "modifications, adaptations, qualification and exceptions as may be necessary to bring into conformity with the Constitution."

This was intended to empower all courts to modify existing laws without having to refer all such cases to the Constitutional Court. This court, sitting as a Court of Appeal of Uganda can avail itself of the provisions of article 273 where appropriate. However, article 273 does not oust the jurisdiction of this court, the Constitutional Court, when exercising its jurisdiction under article 137(3). Under that provision, this court is only required to declare whether or not an Act, act or omission is inconsistent with or in contravention of any provision of the Constitution and to grant a redress where appropriate. The defence of the respondent is therefore not sustainable and should be rejected.

(8) RESOLUTION OF ISSUE NO.2

The issue here is whether the petitioners are entitled to reliefs prayed for.

The short answer is YES..

This means that all the grounds of divorce mentioned in Section 4(1) and (2) are available to both parties to the marriage and the provisions of the Act relating to naming of the co-respondent, compensation, damages and alimony apply to both women and men who are parties to the marriage.

(9) HUMAN RIGHTS CONVENTIONS

No issue was framed as to whether contravention of an International Human Rights Convention amounts to a contraventions of the Constitution. I make no consideration or holding on the matter.

(10) CONCLUSION

I would allow this petition and make no order to costs as was requested by both parties.

Dated at Kampala this 10th day of March 2004.

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Hon. Justice A. Twinomujuni
JUSTICE OF APPEAL.

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

CORAM: HON MR JUSTICE G.M. OKELLO,JA.
HON LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.
HON MR JUSTICE S.G. ENGWAU, JA.
HON MR JUSTICE A. TWINOMUJUNI, JA.
HON LADY JUSTICE C.N.B KITUMBA, JA.

CONSTITUTIONAL PETITION NO 2 OF 2002

BETWEEN

(1)– Uganda Association of Women Lawyers]
(2) - Dora Byamukama
(3) - Jacqueline Asiimwe Mwesige] PETITIONERS
(4) - Peter Ddungu Matovu
(5) - Joe Oloka Onyango]
(6) - Philips Karugaba

AND

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

JUDGMENT OF G.M. OKELLO, JA.

I have had the chance to read in draft the judgment of my brother Justice Twinomujuni, JA, just delivered and I agree with him that the petition must succeed.

The petitioners brought this petition under article 137(3)(a) of the Constitution and under Modifications To The Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992 Directions, 1996 (Legal Notice No. 4 of 1996). In the petition they challenged certain sections of the Divorce Act (now Cap 249) as being inconsistent with various articles of the Constitution and prayed for the following declarations:-

"(a) Section 4(1) of the Divorce Act Cap. 249) contravenes and is inconsistent with Articles 21(1) & (2), Article 31(1) and Article 33(1) & (6) of the Constitution;

(b) Section 4(2) of the Divorce Act (Cap 249) contravenes and is inconsistent with Articles 21(1) & (2), Article 31(1) and Article 33(1) & 6 of the Constitution;

(c) Section 5 of the Divorce Act (Cap 215) is inconsistent with and contravenes Articles 21(1) & (2); Article 31(1) and Article 33(1) & (6) of the Constitution;

(d) Section 21 of the Divorce Act (Cap 249) is inconsistent with and contravenes Articles 21(1) & (2), Article 31(1) and Article 33(1) & 6 of the Constitution;

(e) Section 22 of the Divorce Act (Cap 249) is inconsistent with and contravenes Article 21(1) & (2); article 31(1) and Article 33(1) & (6) of the Constitution.

(f) Sections 23 and 24 of the Divorce Act (Cap 249) are inconsistent with and contravene Article 21(1) and Article 31(1) of the Constitution.

(g) Section 26 of the Divorce Act (Cap 249) is consistent with and contravenes Article 21(1) & (2), Article 31(1) and Article 33(1) & (6) of the Constitution.

(h) No order be made as to costs in any event;

(i) Any other or further declaration that this Honourable Court may deem fit to grant."

The petition was accompanied by the affidavit of Jacqueline Asiimwe, the coordinator of Uganda Women Network (UWONET) an NGO. The affidavit set out the grievances complained of in the petition. The affidavit evidence in support of the petition was also supplied by all the petitioners. The respondent filed his answer to the petition. It was accompanied by the affidavit of L. Tibaruha, the acting Solicitor General, setting out the facts to support the answer.

At the commencement of the hearing, Ms Caroline Mayanja, a Senior State Attorney, who appeared for the respondent, raised three preliminary points of objection namely:-

(a) That the petition was time barred in as far as it was not filed within the thirty days period prescribed by rule 4(1) of Legal Notice No 4 of 1996;

(b) That this court has no jurisdiction to entertain the petition as it raised no issue of constitutional interpretation and

(c) That the petition was frivolous and vexatious.

Learned Senior State Attorney however later abandoned points (b) and (c). She argued only (a) above. We heard the arguments of counsel from both sides on the objection and we overruled it reserving our reasons to be incorporated in the final judgment on the petition. I now propose to give my reasons here.

The thrust of Ms Mayanja's argument is that the petition was incompetent because it was filed out of the thirty days period prescribed by rule 4(1) of Legal Notice No 4 of 1996. According to her, the rule provides that such a petition must be lodged in court within thirty days after the date of the breach complained of in the petition. She submitted that in Zachary Olum and others vs Attorney General, Constitutional Petition No 6 of 1996, this court laid down a principle that computation of the thirty days starts from the date when the petitioner perceived the breach. Because of the

difficulty in setting a general formular for determining the date of perception in all cases, she pointed out, this court stated so in **James Rwanyarare vs Attorney General. Miscellaneous Application No 3 of 2003.** She further pointed out that in **Joyce Nakachwa vs Attorney General and others. Constitutional Petition No. 2 of 2001,** this Court eventually held that each case must be decided on its peculiar facts. That meant that the date of perception in each case must be decided on the peculiar facts of the case.

She further submitted that applying that principle to the instant case, the date when the petitioners perceived the breach must be the date when the Divorcee Act came into force. She pointed out that this was the principle which this court had set in **Pyrali A.R. Esmail vs Andrian Sibo. Constitutiional Petition No 9 of 1997.** In that case, the court held that the date of enforcement of a statute was the date of perception of its breach of the Constitution. According to her, this principle was repeated by the court in **Dr. James Rwanyarare vs Attorney General, Constitutional Petition No 11 of 1997.**

She argued that the Divorce Act having been enacted on 1/10/1904 is one of those legislations which were in existence when the Uganda Constitution of 1995 was promulgated on 8/10/1995. It is one of those legislations that have been saved by article 273 of the Constitution as existing laws. Therefore, she argued, the enforcement date of the Divorce Act is 8/10/1995 when the Constitution was promulgated.

She stated that since the enforcement date of Divorce Act was as stated, computation of the thirty days period started on 9/10/1995. That meant that the petitioners had up to 8/11/1995 to file their petition. Learned counsel submitted that since the petitioners did not file their petition until 7/3/2003, without obtaining an extension of time, their petition was filed out of time. It was time barred and should therefore be dismissed for being incompetent.

In reply, Mr. Karugaba, learned counsel for the petitioners did not agree. He submitted that his client's petition was competently before the court as it was filed within time. He conceded that this court had earlier adjudicated on this rule 4(1).

He mentioned AG vs Rwanyarare (supra)and Joyce Nakachwa (supra). He pointed out that in those cases this court attempted to mitigate the harsh effect of application of that rule so as to encourage rather than discourage citizens' access to the Constitutional Court. In doing so, he pointed out, this court had been deciding each case on its own facts. In all those cases this court had been considering rule 4(1) in the context of new laws: ie laws made after the 1995 Constitution was promulgated until in the case of AG. Vs Rwanyarare (supra) when it talked about a continuing breach of the Constitution by legislation.

In counsel's view, that opened the gate for consideration of the rule in the context of the laws that were in existence when the Constitution was promulgated. He submitted that continuing breach renders time limit set by rule 4(1) irrelevant.

He submitted that rule 4(1) is in fact inconsistent with article 3(4) of the Constitution and should be declared so. He explained that while that article bestows on the citizens of Uganda the right and duty at all times to defend this Constitution against its unconstitutional suspension, or overthrow, abrogation or amendment, rule 4(1), a subsidiary legislation, sets a time limit of 30 days within which a citizen can file his or her petition in the Constitutional Court.

It was retorted for the respondent that article 3(4) applies only to a situation where there is a violent attempt to unconstitutionally overthrow the established constitutional order.

I must admit from the outset that rule 4(1), is problematic. This court realised this fact soon after its inception. In its infancy, this court had adopted a literal interpretation approach to interpreting the rule. This approach produced a negative impact on the citizen's right to access to the Constitutional Court. It was stifling rather than encouraging access to the Constitutional Court. To mitigate that harmful effect, this court adopted another interpretive approach, to interpreting the rule.

In Zachary Olum and others (supra), this court adopted a perception principle which is a more liberal approach. That meant that computation of the thirty days period starts from the date when the petitioner perceives the breach.

Even this approach did not provide absolute solution to the problem of the rule because it still remained difficult to fix a general formular for

determining the date of perception in every case. The court, therefore, adopted a safety-valve system approach to overcome the problem. That is that each case must be decided on its peculiar facts. That meant that the perception date in each case must be determined on the peculiar facts of each case.

In the meantime, appeal was made by some Justices of the Supreme Court in **Ismail Serugo vs KCC and Anor, Constitutional Petition appeal No 2 of 1997** and by this court in **Joyce Nakachwa** (supra) to the appropriate authorities to do something about this rule. Unfortunately, to date, no steps have yet been taken by the authorities to remedy the situation.

No challenge had earlier been made before us about the constitutionality of the rule until today. Article 3(4) which the rule is alleged to be inconsistent with provides thus:-

> " All citizens of Uganda shall have the right and duty at all times:-
>
> (a) to defend this Constitution and in particular to resist any person or group of persons seeking to overthrow the established constitutional order; and
>
> (b) to do all in their power to restore this Constitution after it has been suspended, overthrown, abrogated or amended contrary to its provisions."

It was argued for the respondent that the above article applies only to a violent attempt at or actual violent suspension, overthrow, abrogation or amendment of the constitution. I fully agree with my brother Justice Twinomujuni, JA, that the makers of this Constitution could not have intended such a narrow interpretation to be placed on that article which creates a right and duty to the citizens. Courts as the protectors of the rights of the citizens must give such an interpretation that will promote rather than destroy the rights. The narrow interpretation advocated by counsel for the respondent does not promote the right created by that article. It is, therefore, not a proper approach. The proper interpretation is that the article gives to the citizens wide powers at all times to defend the Constitution. They can use whatever means at their disposal necessary to counter the situation to defend the Constitution. This certainly includes filing petitions in the Constitutional Court as a mean of defending the Constitution.

The impugned rule 4(1) provides thus:-

> "The petition shall be presented by the petitioner by lodging it in person, or, by or, through his or her advocate, if any, named at the foot of the petition, at the office of the Registrar and shall be lodged within thirty days after the date of the breach of the Constitution complained of in the petition." (emphasis added.)

That rule clearly conflicts with article 3(4)(a) which sets no time limit. Ms Mayanja submitted that the scope and purpose of this rule is to ensure that constitutional cases are attended to expeditiously. I agree that Constitutional cases are very important and that they must be given priority to dispose of them expeditiously. In fact even article 137(7) supports that view when it provides that:-

> " ... 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."

This provision shows however, that the urgency starts when a petition is filed not before it is filed. To extend the reasoning of expeditious dealing with Constitutional cases to the period before filing the petition exceeds what the makers of the Constitution had intended. Such a move leads to stifling the citizens' right to access to the Constitutional Court. That is not what the makers of the Constitution intended.

Mulenga JSC observed in Ismail Serugo (supra) thus:-

> "I do appreciate that any constitutional case is very important and once it is filed it must be attended to expeditiously so that a constitutional issue is not left in abeyance for unduly long. The Constitution expressly commands the Court concerned to give the

priority to such cases. However, to extend that reasoning to the period prior to the filing of a petition, can lead to unintended difficulties."

Oder JSC saw irony in the rule and said,

"It is certainly an irony that a litigant who intends to enforce this right for breach of contract or for bodily injury in a running down case has far more time to bring his action than the one who wants to seek a declaration or redress under article 137 of the Constitution."

It is clear from article 3(4)(a) that the right and duty created therein are exercisable under specified situations. The imposing question then is, whether the facts of this case bring it within any of those situations stated in the article? I think so. The provision by rule 4(1) of the time limit within which a citizen must file his/her petition when article 3(4)(a) does not set such a time limit amounts to a variation of what the article provides. The word "amend" is defined in Section 2 of the Interpretation Decree No. 18 of 1976 to:-

"include repeal, revoke, rescind, cancel, replace, add or to vary and the doing of any two or more of such things simultaneously or in the same written law."

This fits within the definition of the word "amendment" as given by Kanyeihamba, JSC in Paul Ssemogerere and others vs the Attorney General. Constitutional Petition Appeal No 1 of 2002. That amendment is not in accordance with the provisions of the Constitution. In such a situation, the petitioners were entitled under article 3(4) to take steps to defend the Constitution.

In The Queen vs Big Drug Mart Ltd (other intervening) (1996) LRC (Const) 332, the Supreme Court of Canada held that both purpose and effect are relevant to determine constitutionality of a legislation. This case was cited with approval by the Supreme Court of Uganda in **Attorney General vs Salvatori Abuki. Constitutional appeal No 1 of 1998.**

In the instant case, the effect of application of rule 4(1) of Modifications To The Fundamental Rights And Freedoms (Enforcement Procedure) Rules 1992, Directions,1996 (Legal Notice No 4 of 1996) is clearly inconsistent with article 3(4)(a) of the Constitution. It sets time limit within which a citizen must file a petition when article 3(4)(a) does not set such a limitation. The rule is, therefore, unconstitutional. I intended to so declare. That was the reason which prompted me to agree with my colleagues to overrule the preliminary objection.

Turning now to considering the merits of the petition itself, two issues were framed as follows for determination of the court:-

(1) Whether the impugned sections of the Divorce Act are

inconsistent with the stated articles of the Constitution as alleged;

(2) Whether the petitioners are entitled to the reliefs sought.

I have stated earlier in this judgment that I agree with my Lord Justice Twinomujuni, JA that the petition must succeed. I have only one or two observations to make for emphasis only.

(1) **Evidence:**

The affidavit evidence in support of the petition shows that sections 4(1) + (2); 5, 21, 22, 23, 24 and 26 of the Divorce Act discriminate on the basis of sex. Peter Ddungu Matovu and Andrew Lomonya deponed to what they personally experienced when they sought legal advice to institute divorce proceedings to terminate their respective marriages with their wives. Norah Matovu Winyi, the chairperson of the first petitioner, deponed to her practical experience with her clients seeking divorce. Dora Byamukama and Professor Oloka-Onyango deponed to their knowledge as lawyers on the interpretation of the impugned sections of the Divorce Act vis a vis the stated articles of the Constitution. According to them these sections discriminate on the basis of sex and therefore inconsistent with stated article of the Constitution.

There is in my view, no serious dispute in the evidence before us. Mr. L. Tibaruha, the acting Solicitor General deponed an affidavit in support of the

respondent's answer to the petition. His affidavit is to the effect that the impugned sections of the Divorce Act are not inconsistent with the stated articles of the Constitution because article 273(1) of the Constitution empowers courts among others to repeal, modify, add or adapt such laws to bring them into conformity with this Constitution or otherwise for giving effect to the Constitution.

Presenting his argument, Ms Mayanja contended that the divorce Act is or the impugned sections thereof are not inconsistent with the Constitution because of article 273(1). According to her, under this article, courts are enjoined to construe the existing law with the necessary modifications, adaptations, qualifications and exceptions as may be necessary to bring them or any of them within the Constitution.

Mr. Karugaba responded that article 273 must be read together with article 274. The latter article provides for the making by the first President of law for Modification of existing law. Mr. Karugaba submitted that failure to comply with article 274 has produced practical difficulties in the application of article 273(1).

(2) The above arguments raise the question how courts should apply article 273(1)?

Other jurisdictions with similar provisions in their Constitutions like our article 273(1) have considered their provisions. Their consideration may offer guidance to us.

In Tanzania, their Constitution of 1984 contains section 4(1) of Act 16 of 1984 which provides in alia:-

> **"... The court will construe the excating law , including customary law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the provisions of the Fifth Constitutional Amendment Act 1984 ie Bill of Right."**

In **Ephrahim vs Pastory and Another,** Civil Appeal No 70 of 1989 (1970) LRC (Const) 757, the Tanzanian court was confronted with a case where customary law was alleged to be inconsistent with a provision of the Bill of Rights. A woman in one of the clans in Tanzania had validly inherited a piece of land from her father by will. She later sold the land to a non clan member. Their customary law does not allow a female member of the clan to sell clan's land. The position was different for a male member of the clan. Her nephew sued the buyer to recover the land claiming that the sale was void as under their customary law a female member, like his aunt, could not sell clan's land. The trial Magistrate ruled that the female member of the clan had the right under the Constitution to sell the clan land and that a male member had the right to redeem it only on refunding the purchase price.

On appeal, the Tanzanian Court of Appeal upheld that decision stating that the customary law, as an existing law was construed as modified to be void

for being inconsistent with the provision of the Bill of Rights that provides against discrimination on the basis of sex.

In Zimbabwe, their Constitution which came into force in 1980, has section 4(1) which is in parimateria with our article 273(1). In the case of Bull vs Minister of Home Affairs (1987) LRC (Const) 547 a certain provision in their Criminal Procedure and Evidence Act Cap 59 restricted the right to bail. This was alleged to be in conflict with the right to liberty in the Bill of Rights. Court agreed that if indeed that provision in the Criminal Procedure Act was inconsistent with the right to liberty prescribed in the Bill of Rights **then it would be taken as modified such that it did not exist but void.** However, the learned judge found as a fact that the section in question was not inconsistent with any provision in the Bill of Rights. The Supreme Court of Zimbabwe agreed with the reasoning of the trial judge.

The above cases provide persuasive guide as to how article 273(1) should be applied. The general principle of statutory interpretation is the purposive one. That meant that the purpose of the statute must be determined. In the instant case, what is the purpose of the article and what did the makers intend to achieve by it. What mischief did they intend to remedy.

Article 273(1) provides:

> "Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution **but the existing law shall be**

construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution."
(Emphasis added).

I think that the message which the makers of the Constitution intended to send out in that article is loud and clear. They enjoined courts to clear away existing laws that they find to be inconsistent with any provision of the Constitution. They are to do that by modifying them such that they do not exist but void. That does not prevent the Constitutional Court from declaring such a law unconstitutional.

In the instant case, the evidence available reveals that sections 4(1) & (2), 5, 21, 22, 23, 24 and 26 of the Divorce Act discriminate on the basis of sex. This brings them into conflict with articles 21(1) (2), 31(1) and 33(1) & (6) all of which provide against discrimination on the basis of sex. This is a ground for modifying or declaring them void for being inconsistent with these provisions of the Constitution. To the extent that these sections of the Divorce Act discriminate on the basis of sexes, contrary to articles 21(1) & (2). 31(1) & 33(1) & (6) of the Constitution, they are null and void. This means that the grounds for divorce stated in section 4(1) & (2) are now available to both sexes. Similarly, the damages or compensation for adultery (S.21), costs against a co-respondent (S. 22), alimony (S. 23 and 24) and settlement under section 26 are now applicable to both sexes.

Application of this order is likely to meet some difficulties. It is, therefore, necessary that the relevant authorities should take appropriate remedial steps as soon as possible.

In the result, I would allow the petition. I would declare that all the above impugned sections of the Divorce Act are inconsistent with the above stated articles of the Constitution. They are, therefore, unconstitutional and void. As all the other Justices on the panel agree, the petition is hereby allowed. All the impugned sections of the Divorce Act are declared unconstitutional and void for being inconsistent with the stated articles of the Constitution. No order is made as to costs since the petitioners prayed so.

Dated at Kampala, this ....10th.... **day of** ....March.... **2004.**

G.M. OKELLO.
JUSTICE OF APPEAL

REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA

CORAM: HON JUSTICE G.M. OKELLO,JA
HON JUSTICE A.E.N.MPAGI-BAHIGEINE,JA
HON JUSTICE S.G. ENGWAU,JA
HON JUSTICE A. TWINOMUJUNI,JA
HON JUSTICE C.N.B. KITUMBA,JA

CONSTITUTIONAL PETITION NO.2 OF 2003

1. UGANDA ASSOCIATION OF WOMEN LAWYERS]
2. DORA BYAMUKAMA]
3. JAQUUELINE ASIIMWE MWESIGE } PETITIONERS
4. PETER DDUNGU MATOVU]
5. JOE OLOKA ONYANGO]
6. PHILLIP KARUGABA]

VERSUS

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

JUDGMENT OF A.E.N MPAGI-BAHIGEINE.JA

I agree with Twinomujuni JA that this petition should succeed.

I only wish to make a few comments just for emphasis, on the applicability of Article 273 of the Constitution and the concept of equality, generally.

The grounds for the petition are as follows:

a) Section 4(1) of the Divorce Act (Cap.249) is inconsistent with and contravenes Article 21(1) & (2), Article 31(1) and Article 33 (1) & (6) of the Constitution in so far as it permits a husband to petition for dissolution of marriage solely on the grounds of adultery and does not afford a wife the opportunity;

b) Section 4(2) of the Divorce Act (Cap.249) is inconsistent with and contravenes Article 21(1) & (2), Article 31(1) and Article 33(1) & (6) of the Constitution in so far as it requires a wife seeking a divorce to rely on the multiple grounds of apostasy; or incestuous adultery; or bigamy with adultery; or rape, sodomy, or bestiality; or adultery coupled with cruelty; or adultery coupled with desertion without reasonable excuse for two years;

c) Section 5 of the Divorce Act (Cap.249) is inconsistent with and contravenes Article 21(1) & (2), Article 31(1) and Article 33(1) & (6) of the Constitution in so far as it obligates only a husband to name the alleged adulterer as co-respondent and does not require the same of a wife petitioning for divorce;

d) Section 21 of the Divorce Act (Cap.249) is inconsistent with and contravenes Article 21(1) & (2), Article 31(1) and Article 33(1) & (6) of the Constitution is so far as it permits only a husband petitioning for divorce to collect damages from the alleged adulterer and does not allow a wife petitioning for the same from the adulteress;

e) Section 22 of the Divorce Act (Cap.249) is inconsistent with and contravenes Article 21(1) & (2), Article 31(1) and Article 33(1) & (6) of the Constitution in so far as it permits only a husband petitioning for divorce to collect costs from a co-respondent and does not afford a wife petitioning for divorce the same opportunity;

f) Section 23 and 24 of the Divorce Act (Cap.249) is inconsistent with and contravenes Article 21, Article 31(1) of the

Constitution in so far as it permits only a wife to obtain alimony and does not afford a husband the same opportunity;

g) Section 26 of the Divorce Act (Cap.249) is inconsistent with and contravenes Article 21(1) & (2), Article 31(1) and Article 33(1) & (6) of the Constitution in so far as it permits a successful husband petitioner to claim property of his wife and does no afford the same opportunity to a successful wife petitioner.

The petitioners prayed court to declare those sections of the Act inconsistent with the aforementioned provisions of the Constitution and therefore null and void.

We entertained this petition under Article 137 of the Constitution and [The Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992] Directions, 1996.

Ms Carol Mayanja, learned Senior State Attorney, strenuously argued that the challenged sections of the Divorce Act were not null and void as the Divorce Act was saved by Article 273 of the Constitution. In support of this statement she specially relied on Pvarali Abdul Rasaul Esmail vs Adrian Sibo, Constitutional Petition No. 9 of 1997 in which this court held that the challenged Section 11(4) and (b), of the Expropriated Properties Act No.9 of 1982, prescribing unfair and inadequate compensation for compulsorily acquired property was an existing law prior to the 1995 Constitution and that therefore under Article 273 of the Constitution, the section would be construed, qualified and adapted so as to conform to Article 26(2) (b)(1) of the Constitution which provides for prompt payment of fair and adequate compensation for the property.

Ms Mayanja thought we could adopt the same procedure and save the challenged sections of the Divorce Act.

Mr Phillip Karugaba, learned counsel for the petitioners, on the same point lamented that the question of pre-existing law has never been considered in the context of Article 273 and that therefore each day the Divorce Act continues in existence in its present form, it leads to new violations of women's constitutional rights. He prayed this court to strike down the impugned sections.

Article 273 reads:

> "273(1) Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may bring it into conformity with this Constitution."

As pointed out in the lead judgement, the Pyarali case (supra) was referred to us under Article 137(5). We referred it back to the trial court with directions to construe and adapt section 11(4) and (b) of the Act so as to conform to Article 26(2) (b) (1) and assess fair and adequate compensation as prescribed by Article 273. The gist of the matter in that case was that compensation had to be paid and promptly too, as under the Constitution. However section 11 offered a lower scale and the time of payment was not made of essence. Hence we referred the matter back to the trial court with directions to comply with the Constitutional requirements as required by Article 273 after hearing the rest of the evidence

part of which it had already listened to. Compensation was not the only issue in that case.

What we were saying in essence was that the trial court should have handled the matter on its own motion by applying the Constitutional provisions on that one issue and proceeded with the hearing.

It is clear from the express words of Article 273 that the Constituent Assembly (C.A.) intended to do away with all the unjust existing laws which are inconsistent with the Constitution in the new era after the Constitution or let them be treated as modified so that they are in line with the new Constitution. This is in line with Article 2 which enshrines the sovereignty and supremacy of the Constitution. Clause (2) thereof states:

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

The unfortunate situation of continuing violations by some sections of the Divorce Act as lamented by Mr Karugaba should therefore not arise because although Article 50(4) obligates Parliament to make laws including amendments for the enforcement of the rights and freedoms, this requirement has not received the urgent attention it warrants. Hence Article 273 saves the situation and fills in the lacunae by empowering all courts of Judicature proceeding under Article 50(1) in their ordinary jurisdictions not to apply oppressive provisions of the law nor wait for petitions to be filed in this court.

Article 273 does not save oppressive provisions of the law. It is for emergency, as it were, pending petitions to this court. Its purpose is to enable all courts to remedy all the unjust existing laws which must be subjected, as the occasion arises, to rigorous tests and meticulous scrutiny to make sure that they are in consonance with the Constitution. In this way the courts are able to grant redress as conveniently and as speedily as possible.

We are, however, not entertaining this petition on reference but in our interpretative capacity under Article 137(3) to declare whether the impugned sections are null and void and to grant redress should we consider it necessary.

I turn briefly to the aspect of equality.

It is clear that the challenged sections of the Divorce Act to wit 4(1) and (2); 5, 21, 22, 23, 24 and 26 violate a woman's constitutional right to equality on ground of her sex while Articles 21(1) and (2); 31(1); 33(1) and (6) guarantee that very right.

Article 21 spells out:

> "21 (1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.
>
> (2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, ..."

These sections have the effect of negating the concept that equality is a core value of the Constitution. The preamble to the Constitution makes it clear that the framers intended to build a popular and desirable Constitution based on the

principles of unity, peace, equality, democracy, freedom, social justice and progress.

It is beyond dispute that no area of law impacts on more women with greater force than the Domestic Law. The Divorce Act (Cap.249) is, however, archaic in content as pointed out by Twinomujuni J.A. It is in substance a colonial relic whereby the traditional patriarchal family elevated the husband as the head of the family and relegated the woman to a subservient role, of being a mere appendage of the husband, without a separate legal existence. This concept of the family has been drastically altered in recent decades. Marriage is now viewed as an equal partnership between husband and wife. Still, the old ideas and patterns persist, as do their psychological and economic ramifications. That notwithstanding, women are entitled to full equality in respect of the right to form a family, their position within the functioning family, and upon dissolution of the family, so proclaims Article 31(1): Men and women of the age of eighteen years and above, have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.

It is well to remember that the rights of women are inalienable, interdependent human rights which are essential in the development of any country and that the paramount purpose of human rights and fundamental freedoms is their enjoyment by all without discrimination which discrimination is manifest in The Divorce Act. The concept of equality in the 1995 Constitution is founded on the idea that it is generally wrong and unacceptable to discriminate against people on the basis of personal characteristics such as their race or gender. Legal rules, however, continue to be made gender neutral so much so that there are no more

husbands or wives, only spouses. This step is in the right direction. It is further important to note and appreciate that the 1995 Constitution is the most liberal document in the area of women's rights than any other Constitution South of the Sahara. This was noted at the Judicial Colloquium on the Application of International Human Rights Law at the Domestic Level, held on 9-11 September 2003 in Arusha-Tanzania. It is fully in consonance with the International and Regional Instruments relating to gender issues, (The Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) which is the women's Bill of Rights and the Maputo Protocol on the Rights of Women in Africa [2003]). Be that as it may, its implementation has not matched its spirit. There is urgent need for Parliament to enact the operational laws and scrape all the inconsistent laws so that the right to equality ceases to be an illusion but translates into real substantive equality based on the reality of a woman's life, but where Parliament procrastinates, the courts of law being the bulwark of equity would not hesitate to fill the void when called upon to do so or whenever the occasion arises.

In sum, I agree that the impugned sections of the Divorce Act clearly violate and are inconsistent with the stated Articles of the 1995 Constitution and are thus null and void.

I would therefore grant the declarations sought.

Dated at Kampala this ....16th..... day of ..March..... 2004

A.E.N. Mpagi-Bahigeine
Justice of Appeal

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

CORAM: HON. JUSTICE G.M. OKELLO, JA.
HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.
HON. JUSTICE S.G. ENGWAU, JA.
HON. JUSTICE A. TWINOMUJUNI, JA.
HON. JUSTCIE C.N.B. KITUMBA, JA.

CONSTITUTIONAL PETITION NO. 2 OF 2003.

BETWEEN

1. UGANDA ASSOCIATION OF WOMEN LAWYERS
2. DORA BYAMUKAMA
3. JACQUELINE ASHIMWE MWESIGE
4. PETER DDUNGU MATOVU
5. JOE OLOKA ONYAGO
6. PHILIP KARUGABA ==========PETITIONERS

AND

THE ATTORNEY GENERAL ========== RESPONDENT

JUDGMENT OF HON. JUSTICE S.G. ENGWAU, JA.

I had the benefit of reading in draft the judgment of A. Twinomujuni, J.A. and I entirely agree with him that this petition be allowed with no order as to costs. I do not intend to repeat the facts arising from the petition because Twinomujuni, J.A, has ably stated them. He also ably stated the declarations being sought by the petitioners. At the commencement of the hearing of the petition, Ms. Carol Mayanja, learned Senior State Attorney, raised one main preliminary objection to the petition. Her contention was

that the petition was time-bared. She argued that under rule 4 (1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992 - (Legal Notice No. 4 of 1996), this petition should have been lodged in court within 30 days after the date of the breach of the Constitution complained of in the petition. According to counsel, although the Divorce Act whose provisions are being challenged in the petition was saved by Article 273 (1) of the Constitution, the petition was filed out of the prescribed 30 days as stipulated by rule 4(1) of Legal Notice No. 4 of 1996. In the premises. The petition, in her view, is incompetent and should be dismissed.

Mr. Phillip Karugaba, learned counsel for the petitioners, does not agree for two reasons. Firstly, that the provisions of the Act complained of constitute continuing breach of the relevant articles of the Constitution mentioned in the petition.

Secondly, that article 3 (4) of the Constitution does not place a time limit when a Constitutional Petition could be lodged in court. In his view, Article 3 (4) places a duty on all citizens of Uganda to "AT ALL TIMES" defend the Constitution by all means against any violation.

I am in agreement with Mr. Karugaba that the provisions of the Divorce Act complained of constitute continuing breach of the Constitution. In that regard the petition is not time-barred. Further, the provisions of Article 3 (4) of the Constitution places a duty on all citizens of Uganda to AT ALL TIMES defend the Constitution by all means, either peacefully or violently

to resist any attempts to unconstitutionally suspend, overthrow, abrogate or amend the Constitution. In the premises, the door to the Constitutional Court should remain wide open for people of Uganda to have access to it at all times for a declaration and redress under article 137 of the Constitution in the event of any violation. I do not think that the framers of the Constitution had intended to amend the Constitution by using the provisions of rule 4 (1) of the Legal Notice No. 4 of 1996. The rule is a subsidiary legislation which cannot prevail over the Constitution. The Constitution prevails over it. In the premises, the 30 days rule has no legal effect as it is inconsistent with and contravenes Article 3 (4) of the Constitution.

Having given the reasons for overruling the preliminary objection, I wish now to consider briefly the merits and demerits of the petition by way of emphasis only. It is the contention of the petitioners that sections 4 (1) & (2),5,21,22,23 and 26 of the Divorce Act (CAP 215) are inconsistent and in contravention of Articles 21 (1) and (2), 31 (1) and 33 (1) and (6) of the Constitution. In his judgment, Twinomujuni, J.A, has written down in detail the provisions of the impugned sections of the Divorce Act and the articles of the Constitution which they allegedly contravene. I do not, therefore, intend to repeat the same here.

Under Article 21 of the Constitution, all persons are equal before and under the law and a person shall not be discriminated against on the ground of sex etc. Article 31 provides for men and women to have equal rights in

marriage, during marriage and its dissolution. Article 33 provides for women to have full and equal dignity with men.

Mr. Karugaba then brought into question the impugned sections of the Divorce Act, herein after to be referred to as the Act. Under section 4 (1) of the Act, a husband may petition for dissolution of a marriage on the sole ground of adultery. Section 4 (2) of the Act provides a wife with several grounds for divorce. In counsel's view, section 4 of the Act offends Articles 21, 31 and 33 of the Constitution because it makes prescriptions for divorce on the basis of sex.

In section 5 of the Act, a husband is required to name a co-respondent to his petition but there is no similar provision for a wife who seeks a divorce. In counsel's view, that section is discriminatory and inconsistent with and contravenes Articles 21 (1) & (2), 31 (1) and 33 (1) and (6) of the Constitution.

Learned counsel submitted that section 22 of the Act permits only a husband petitioning for divorce to collect costs from a co-respondent and does not afford a wife petitioning for a divorce the same opportunity. In that context counsel argued that the section is discriminatory, inconsistent with and contravenes Articles 21 (1) & (2), 31 (1) and 33 (1) & (6) of the Constitution.

In section 23 of the Act, only a wife is permitted to obtain alimony but a husband does not have the same opportunity. Mr. Karugaba contended that

the sections are discriminatory on the basis of sex and they contravene the provisions for equality before the law and equal rights in a marriage and that these provisions presuppose a parasitic relationship.

Finally, Mr. Karugaba vehemently attacked the provisions of section 26 of the Act. He said that the section permits only a successful husband petitioner to claim property of his wife and does not afford the same opportunity to a successful wife petitioner. Consequently, Mr. Karugaba prayed for the petition to be allowed with no order as to costs.

Ms. Mayanja, learned Senior State Attorney for the respondent however submitted to the contrary. She said that the impugned sections of the Divorce Act do not contravene the said Articles of the Constitution and the said International Conventions. She based her argument on our previous decisions to the effect that when interpreting provisions of the Constitution, it is worth looking at the Constitution as a whole. Ms. Mayanja submitted that the Divorce Act which was saved by Article 273 of the Constitution should not be said to be inconsistent with or in contravention of the Constitution but rather to be construed with such modifications, adaptations and qualifications that are necessary to bring it into conformity with the Constitution.

After considering the submissions of counsel for both parties, it is my considered view that the impugned sections of the Divorce Act are inconsistent with and contravene Articles 21, 31 and 33 of the Constitution. In the result I would allow this petition with no order as to costs.

Dated at Kampala this 16th day of March 2004.

Hon. Justice S.G.Engwau
Justice of Appeal.

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CORAM: *HON. JUSTICE G.M. OKELLO, JA*
HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. JUSTICE S.G. ENGWAU, JA
HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE C.N.B. KITUMBA, JA

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VERSUS

THE ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT OF C.N.B. KITUMBA, JA

I have had the benefit of reading in draft the judgment of Twinomujuni, JA. I agree with him that the petition should succeed with no orders as to costs.

The petition and the declarations sought are contained in the lead judgment and so are the arguments of counsel for both parties. I will not, therefore, repeat them here. However, I would like to make some comment.

I will begin with the preliminary objection that the petition is time barred because of the provisions of **Rule 4(1), The Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992 (Legal Notice No. 4 of 1996.)**

This objection was dismissed by court. My reason for supporting the dismissal is that the framers of the Constitution did not impose a time limit when a constitutional petition is to be filed. If, one takes such limitation to be time of perception, or when the act of Parliament is enacted this would lead to absurd situation whereby all citizens of Uganda would be obliged to read all statutes and find out whether any section thereof is inconsistent with any article of the Constitution. I agree with my learned brother that **Rule 4(1) of The Fundamental Rights Freedoms (Enforcement Procedure) Rules, 1992** is a subsidiary legislation that is hindering people's access to the Constitutional Court and has the effect of amending the Constitution.

People's defence of the Constitution which is a duty to be observed all times as provided by **article 3(4) of the Constitution**, in my view means, *inter alia,* filing a constitutional petition to challenge any law which a citizen thinks violates the Constitution.

Regarding the impugned provisions of the Divorce Act, I entirely agree that they are inconsistent with the provisions of the Constitution as alleged in the petition.

In the result I would allow this petition with no order as to costs.

Dated at Kampala this ....10th.... day of ....March.... 2004.

C.N.B. KITUMBA
JUSTICE OF APPEAL