

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. LADY JUSTICE C.N.B. KITUMBA, JA
HON. LADY JUSTICE C.K. BYAMUGISHA, JA

CONSTITUTIONAL PETITION NO. 11 OF 2002

PHILLIP KARUGABA:::::::::::::::::::::::::::::::::::::::::PETITIONER

VERSUS

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

JUDGMENT OF C.N.B. KITUMBA, JA

The Petitioner, Mr. Phillip Karugaba, is a practising advocate. He filed
2002 this petition against the Attorney General under Article 137 of the
Constitution seeking for a declaration that:

"Rule 15 of the Rules of the Constitutional Court (Petition for
Declarations under Article 137 of the Constitution) Directions,
1996 is inconsistent with Article 26 (2) of the Constitution"

The petitioner swore an affidavit in support of the petition. He avers
that he was one of the petitioner's counsel in Constitutional Petition No.
2 of 2001. Joyce Nakacwa Vs Attorney General and 2 Others, in
which the petitioner was seeking for declarations and redress. The
30 petitioner passed away before the determination of her petition. This

court ruled that according to the provisions of rule 15 of the Rules of the Constitutional Court (Petition for Declaration under Article 137 of the Constitution) Directions, 1996 the petition had abated with the death of the sole petitioner.

In answer to the petition the respondent disputed the petitioner's claim in respect of the above mentioned rule 15 and contended that it is not inconsistent with article 26 (2) of the constitution.

10 During the hearing, the petitioner appeared in person and Ms Margaret Apiny, Senior State Attorney, represented the respondent. The petitioner contended that rule 15 of the Rules of the Constitutional Court (Petition for Declarations under Article 137 of the Constitution) Directions, 1996 is unconstitutional because it extinguishes the petitioner's right of action and deprives his or her estate of property without compensation. This is contrary to article 26(2) of the Constitution which provides for protection from deprivation of property without compensation.

20 He submitted that in law property means real property personal property and intangible property like *chose in action*. He argued that according to the late Nakacwa's petition, which is annexure "A" to the affidavit in support of the instant petition, she was a victim of brutal tortious actions by the Police, Kampala City Council and Local Council officials, for which she could get a redress.

He argued that the right to file a petition in the Constitutional Court amounts to "*a chose in action*."

In support of his submission he relied on a **Concise Dictionary of Law** and **Halsbury's Laws of England Fourth Edition Vol. 6 paragraphs 3 & 8**. The petitioner urged this court to follow the authority of **Shah V Attorney General (No. 2) [1970] E.A 523**. He submitted that in that case, Shah had secured a judgment of the court. The government attempted to take away the benefits of that judgment by an act of Parliament. The Constitutional Court was called upon to interpret article 8 of the 1966 Uganda Constitution, which is similar to article 26 of the present Constitution. The court held that a judgement was property and it was unconstitutional to deprive Shah of the same without compensation.

Mr. Karugaba submitted that the issue of death should not make any difference whether the petition continues or not. He argued that in general all actions continue after the death of the plaintiff with the exception of only two namely; action for defamation because there is no property in one's name and an action for a contract for personal service.

In reply, Ms Apiny learned Senior State Attorney, disagreed. She contended that a constitutional petition is not *a chose in action* and Constitutional Petition No. 2 of 2001 was not one. The Petitioner was claiming for a monetary redress but never got it because of her demise before the petition was concluded. As the claims were of a personal nature, they were extinguished by her death. She argued that her petition was, therefore, distinguishable from **Shah V Attorney General (No. 2) (supra)**.

The issue for determination in this petition is whether Rule of 15 the Rules of the Constitutional Court (Petition for Declarations under Article 137 of the Constitution) Directions, 1996 is inconsistent with article 26 (2) of the Constitution.

Rule 15 provides:

"15. (1) A petition shall abate by the death of a sole petitioner or of the survivor of two or more petitioners.

(2).....

(3).....

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and article 26(2) of the Constitution provides:

"26 (2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied-

(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and

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(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for-

(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and

(ii) a right of access to a court of law by any person who has an interest or right over the property."

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Rule 15, which is in issue, applies to petitions, which come to the Constitutional Court under article 137 of the Constitution. It is necessary to internalise the jurisdiction of this court under article 137 of

the Constitution in order to decide whether Rule 15 is unconstitutional as alleged.

The Supreme Court and this Court have held that the jurisdiction of this Court under article 137 of the Constitution is to interpret the Constitution and not to grant redress. See Ismael Serugo Vs Kampala City Council and Another Constitutional Appeal No. 2 of 1998 and The Attorney General of Uganda Vs David Tinyefuza Constitutional Appeal No. 1 of 1998. Charles Kabagambe V Uganda Electricity Board Constitutional Petition No. 2 of 1999.

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In its ruling on the preliminary objection on its jurisdiction in Constitutional Petition No. 2 of 2001 Joyce Nakachawa Vs The Attorney General and Two Others this court dwelt at length on the subject. Quoting from the decisions of the Supreme Court and its own decision, this Court reaffirmed that its jurisdiction under article 137 is to interpret the Constitution. This court stated thus:

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"First we deal with the issue of jurisdiction. This court has recently pronounced itself on this matter in the case of Alenyo Vs The Attorney General and 2 others (supra) in which we followed the Supreme Court decisions in Serugo (supra) and David Tinyefuza (supra). We stated:-

"Article 137 (1) provides:

Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.'

The Constitution does not define the word "Interpretation." However article 137(3) gives a clear indication of what the word means. It states:

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'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.'

10 We hold the view that the allegations made to the Constitutional Court, if they are in conformity with article 137(3), give rise to the interpretation of the Constitution and the Court has the jurisdiction to entertain them.

In the instant petition, the petitioner alleges that the Law Council is guilty of commissions and omissions, which are inconsistent with or in contravention of the Constitution. He has petitioned this court for a declaration to that effect. In our judgment these are the type of actions envisaged by article 137 (3)(b). He is not stating as a fact that he has a definite right that should be enforced. He is alleging that the conduct of the Law Council has violated his rights guaranteed by specified provisions of the constitution and this court should so declare. In order to do that the Court must determine the meaning of the specified provisions of the Constitution allegedly violated and whether the conduct complained of has actually violated those provisions. The carrying out of the exercise by the court is an interpretation of the Constitution. It is not an enforcement of rights and freedoms. The court is being called upon to interpret the Constitution. It can make a declaration and stop there or it can grant redress if appropriate. Whether the alleged acts and omissions of the Law Council contravene or are inconsistent with the Constitution is not relevant to the issue of jurisdiction. It is what the court is called upon to investigate and determine after it has assumed jurisdiction. It is not relevant either, that there is a remedy available to the petition somewhere else. That alone cannot deprive the Court of the jurisdiction specifically conferred on it by article 137." (underlining mine).

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This court held that it deals with matters of redress under article 50 only when this is done in the process of constitutional interpretation.

I respectfully agree with the decision in Shah V Attorney General (No.2) supra that a judgment of the Court is property. I also note the definition of "choses in action" in Halsbury's Laws of England (supra) is as follows:

10 **"The meaning of the expression "choses in action" has varied from time, but is now used to describe all personal rights of property which can only be claimed or enforced by action and not by taking physical possession"**

To me the above definition connotes a suit where some redress is sought.

20 However, it is my considered view that a right to file a constitutional petition is not property in terms of article 26 (2) of the Constitution. A Constitutional Petition under article 137 is a legal action of special nature. One may file a Constitutional Petition in which this court may make a declaration and stop there without granting a redress. There have been a number of Constitutional Petitions before this court in which if the petitioners had passed away before conclusion, their estates would have had no interest.

The petitioner was counsel in Constitutional Petition No. 2 of 2001 in which the deceased petitioner had sought for interpretation of the Constitution and redress. I think that this influenced the petitioner in his pleadings and submission before court which, with due respect, I do not agree with.

This court has specific jurisdiction as stated above. In a case where the estate of the deceased petitioner seeks redress, the action can be instituted in a court of competent jurisdiction and if a question of constitutional interpretation arises, the same can be referred to this court under article 137 (5) of the Constitution.

Section 13 of the Law Reform Miscellaneous Provisions Act (cap. 74) provides for survival of action after the death of the deceased as follows:-

10 **"13.(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of his estate:**

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims under section 22 of the Divorce Act for damages on the ground of adultery."

20 The late Nakachwa was seeking for "compensation/redress for unlawful imprisonment, pain and suffering, embarrassment, humiliation and loss of her child."

A civil action can be instituted in a competent court for the benefit of her estate in respect of that. This would be merely for compensation/redress but not for constitutional interpretation.

In the result I find that rule 15 of the Rules of Constitutional Court (Petition for Declarations under article 137 of the Constitution) Directions, 1996 is not inconsistent with article 26 (2) of the constitution.

I would accordingly dismiss the petition for lack of merit with no orders as to costs.

Dated at Kampala this.....¹⁵.....day of^{April}.....2003.

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C.N.B. Kitumba
C.N.B. KITUMBA,
JUSTICE OF APPEAL

**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. LADY JUSTICE C.N.B. KITUMBA, JA.
HON. LADY JUSTICE C.K. BYAMUGISHA, JA.**

CONSTITUTIONAL PETITION NO.11 OF 2002

Between

PHILIP KARUGABA PETITIONER

AND

THE ATTORNEY GENERAL RESPONDENT

JUDGMENT OF G.M. OKELLO, JA.

I have had the chance to read in draft the leading judgment prepared by My Lord Justice Kitumba. JA. I do agree with her conclusion that the petition must fail. I, however, have a few observations of my own to make on the matter.

The Petition is brought under article 137(3) of the Constitution of the Republic of Uganda and under Modifications To The Fundamental Rights and Freedom (Enforcement Procedure) Rules 1992. Directions. 1996 (Legal Notice No.4 of 1996). The petition is brief and reads:-

1. Your Petitioner is a person having an interest in the following matters being inconsistent with the Constitution whereby your Petitioner is aggrieved;

(a) Rule 15 of The Rules of the Constitutional Court (Petition for Declarations under Article 137 of the Constitution) Directions 1996 is inconsistent with Article 26(2) of the Constitution;

(2) Your Petitioner states that the said Rule 15 of The Rules of the Constitutional Court (Petition for Declarations under Article 137 of the Constitution) Directions 1996 as inconsistent with Article 26(2) of the Constitution in so far as it deprives the estate of a deceased sole petitioner of a chose in action being property, without compensation;

(3) Therefore your Petitioner prays that the court may;

(a) grant a declaration that

(i) Rule 15 of the Rules of the Constitutional Court (Petition for Declaration under Article 137 of the Constitution) Directions, Legal Notice No.4 of 1996 is inconsistent with Article 26(2) of the Constitution;

(b) make no order as to costs."

The Petition was supported by an affidavit of the Petitioner to which he attached as annexure 'A' a photocopy of Constitutional Petition No.2 of

2001. Joyce Nakacwa vs The Attorney General and 2 others.

Annexure 'B' to that affidavit is a copy of the proceedings in this court in respect of that Constitutional Petition No.2 of 2001.

The respondent filed an answer in which he contended that the Petition was misconceived. He denied that rule 15 of Legal Notice No.4 of 1996 is either inconsistent with Article 26(2) of the Constitution or deprive the estate of a deceased sole petitioner of a chose in action without compensation. He contended that a chose in action is not property within the meaning of Article 26(2) of the Constitution.

The answer was supported by an affidavit of Joseph Matsiko, Principle State Attorney, in the Directorate of Civil Litigation in the Attorney General's Chambers. The affidavit was sworn on the 11th of December 2002.

It is clear from the pleadings that this petition is based on Nakacwa's constitutional Petition (supra). In that petition, upon proof of Nakacwa, the sole petitioner's death, this court ordered that the petition was abated in terms of rule 15 of Legal Notice No.4 of 1996 which provides:

- “ (1) A petition shall be abated by the death of a sole petitioner or of the survivor of the two or more petitioners.**
- (2)**
- (3)”**

Mr. Karugaba the petitioner, contended that the above rule is inconsistent with article 26(2) of the Constitution which guarantees the right against taking away one's property without payment of adequate compensation. He argued that by abating the petition on the death of the sole petitioner, the rule deprives the estate of the deceased of the deceased's chose in action, which is property, without payment of adequate compensation. This, he argued, is inconsistent with article 26(2) of the Constitution. He cited and relied on **Shah v Attorney General (NO.2) (1970) EA 523**.

Ms Apiny, learned Senior State Attorney for the respondent, did not agree. She contended that rule 15 is not inconsistent with article 26(2) of the Constitution because it (rule 15) applies only to Constitutional Petitions. In her view, article 26(2) applies to ascertained property. She argued that Shah's case (*supra*) was distinguishable from Nakacwa's case. In the former, judgment had been obtained and therefore, the property was ascertained. In the latter case however, judgment was not obtained as the petition was not concluded. The property was thus not ascertained.

The sole issue in this petition is whether rule 15 of Legal Notice No.4 of 1996 is inconsistent with article 26(2) of the Constitution. The task of this court is therefore to determine the constitutionality of the impugned rule 15. In a petition of this type, the principle applicable is the purpose and effect of the impugned law. It must be taken into consideration. If its purpose is inconsistent with the article of the Constitution, then it shall be declared unconstitutional. Similarly, if its purpose is innocuous but the effect of its implementation is inconsistent with the article of the Constitution, then the impugned provision shall still be declared

unconstitutional. Again where both the purpose and the effect of implementation of the impugned provision are inconsistent with the article of the Constitution, the provision shall also still be declared unconstitutional. This principle was stated in the Canadian case of The Queen vs Big Drug Mart Ltd. (others Intervening) 1996 LRC (Const.) 332B and was approved by the Supreme Court of Uganda in Attorney General vs Abuki Salvatori, Constitutional Petition Appeal No.1 of 1998.

In the instant case, the complaint of the petitioner is against the effect of the implementation of the impugned rule 15. To determine whether the effect of implementing that rule is inconsistent with article 26(2) of the Constitution, it is important to know what a chose in action means. The meaning of chose in action as can be discerned from the Hulsbary's laws of England 4th Edition Vol 6 paragraphs 1 – 8, may be stated to be:-

“ a right of proceedings in a court of law to procure the payment of a sum of money or to recover pecuniary damages for infliction of a wrong or non-performance of a contract”.

Clearly the right of action in a court of law must be:-

- (a) to procure the payment of a sum of money or
- (b) to recover pecuniary damages for infliction of wrong or non-performance of a contract.

A right of proceeding seeking an interpretation of a provision of the Constitution under article 137 (3) of the Constitution would not fall under the above definition. Such a petition does not seek to procure the payment of a sum of money or to recover pecuniary damages for infliction of a wrong or non performance of a contract. It primarily seeks an interpretation of a provision of the Constitution.

Ms Apiny submitted that rule 15 applies only to constitution petitions. I agree. A claim for redress which is included in a constitutional petition is incidental to the petition and therefore severable from the petition. The right of action in a court of law to recover pecuniary damages for a tortious act or non-performance of a contract is not affected by an abatement of the petition under rule 15. It could be pursued in a competent court if the constitutional petition to which it is incidental is abated.

Nakacwa's claim for redress in Constitutional Petition No.2 of 2001 was for personal injuries. That could meet an obstacle even in a competent court because it is trite at common law that a right of action in a court of law to recover pecuniary damages for personal injuries is neither assignable nor does it survive on the death of the injured. Claim for such personal injuries, for the benefit of the estate of the injured who died from the injuries, was made possible by the passing of the law Reform (Miscellaneous Provisions) Act (Cap) 74. Section 13 thereof in brief provides:

“Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested

in him shall survive against or as the case may be for the benefit of his estate.

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims under section 22 of the Divorce Act for damages on ground of adultery..”

That is why such a claim for personal injuries is brought by the estate of the deceased under that specific law.

In my view, the right of proceeding in a court of law by Nakacwa to recover pecuniary damages for the tortious wrongs inflicted on her, could be pursued by her estate for the benefit of her dependants in a competent court. But this would have to be done under the law Reforms (Miscellaneous Provisions) Act (Cap) 74. That right of action did not abate when constitutional petition No.2 abated under rule 15. What was abated was the right of action to petition the Constitutional Court seeking the interpretation of a provision of an article of the Constitution. Rule 15 of Legal Notice No.4 of 1996 is therefore, not inconsistent with article 26(2) of the Constitution.

Ms Apiny sought to distinguish Shah v Attorney General (supra) from Nakacwa's case (supra) on the ground that in the latter, judgment was not yet obtained and therefore, no property of Nakacwa had yet been ascertained. I do not agree. A chose in action is defined to be a right of action in a court of law to recover a sum of money or a pecuniary damages

for tortious wrong or non-performance of a contract. That has been held to be property. It is not necessary that the right of action must first be translated into a judgment to be property. However, in Nakacwa's case, the injured was dead and the incidental claim was for damages for personal injuries..

In the result, I agree with my learned sister Kitumba, JA. That there is no merit in the petition and would dismiss it. As all the other justices agree, the petition be and is hereby dismissed. We make no order as to costs as this is a matter of public interest.

Dated at Kampala, this 4th day of April 2003.


G.M. Okello
JUSTICE OF APPEAL

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

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

CONSTITUTIONAL PETITION NO.11 OF 2002.

PHILLIP KARUGABA :::::::::::::::::::::::::::::: PETITIONER

VERSUS

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

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

I agree with Hon. Lady Justice Kitumba that this petition lacks merit and should be dismissed. This was a matter for enforcement under Article 50 before a court of competent jurisdiction and not for interpretation, before this court, under Article 137(3) of the Constitution.

I have nothing useful to add.

Dated at Kampala this^{4th}..... day of ...^{April}..... 2003.


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

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA
HOLDEN 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. JUSTICE C.N.B. KITUMBA, JA.
HON. JUSTICE C.K. BYAMUGISHA, JA.

CONSTITUTIONAL PETITION NO. 11 OF 2002.

PHILLIP KARUGABA ===== PETITIONER
VERSUS
THE ATTORNEY GENERAL =====RESPONDENT

JUDGMENT OF S.G. ENGWAU, JA

I had the benefit of reading in draft the lead judgment of Kitumba,JA and I agree with her reasons and conclusion that this petition lacks merit. I have, however, some few observations to mention on the matter for emphasis only as hereunder:

The petitioner has brought this petition under article 137 (3) of the 1995 Constitution of Uganda and under Modifications To the Fundamental Rights and Freedom (Enforcement Procedure) Rules 1992, Directions, 1996 - Legal Notice No. 4 of 1996. He is seeking for a declaration that rule 15 of the Rules of the Constitutional Court (Petition for Declarations under Article 137 of the Constitution) Directions, 1996 is inconsistent with Article 26 (2) of the Constitution in so far as it deprives an action of a deceased sole petitioner of a chose in action being property, without compensation. He also prays that no order as to costs be made because this is a matter of public interest.

The petitioner swore an affidavit in support of his petition. He avers that in Constitutional Petition No. 2 of 2001, Joyce Nakacwa Vs. Attorney General and 2 Others, this court upon proof of the death of Nakacwa, ruled that her petition had abated in accordance with the provisions of rule 15 of Legal Notice No. 4 of 1996. In

that petition, Joyce Nakacwa who was the sole petitioner was seeking for constitutional interpretation/declarations and redress. Unfortunately she died before the determination of her petition.

The respondent in his answer to the Petition, contended that rule 15 of Legal Notice No. 4 of 1996, is neither inconsistent with Article 26 (2) of the Constitution nor does it deprive an estate of a deceased sole petitioner of a chose in action without compensation. It was his contention that a chose of action is not property within the meaning of Article 26 (2) of the Constitution. In his view, this Petition is, therefore, misconceived. The Attorney General's answer was supported by the affidavit of Mr. Joseph Matsiko, Principal State Attorney, dated 11th December, 2002.

The rule 15 of Legal Notice No. 4 of 1996, under challenge, provides:

"15 (1) A petition shall be abated by the death of a sole petitioner or of the survivor of the two or more petitioners.

(2)

(3)"

and article 26 (2) of the Constitution provides:

" 26 (2) NO person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied -

(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and

(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for -

(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and

(ii) a right of access to a court of law by any person who has an interest or right over the property."

The petitioner, Mr. Phillip Karugaba, appeared in person. He contended that rule 15 of Legal Notice No. 4 of 1996 is inconsistent with Article 26 (2) of the

Constitution which guarantees a right of a person from deprivation of his or her property without payment of adequate compensation. His argument was that by abating the petition upon the death of Joyce Nakacwa, the above rule extinguished her estate of a right of a chose in action, which is property, without paying adequate compensation. **Shah vs. Attorney General (No. 2) [1970] EA 523** was cited as authority.

10 Ms. Margaret Apiny, Senior State Attorney, holds contrary view. She distinguished Shah 's case (supra) from Nakacwa's case in that in the former, judgment had been obtained and the property was, therefore, ascertained. In the latter case, Nakacwa died before her petition was heard and concluded. According to Ms. Apiny, property was therefore not ascertained as envisaged under Article 26 (2) of the Constitution. She argued that rule 15 of Legal Notice No. 4 of 1996 deals only with Constitutional Petitions. Nakacwa's claim for redress in her petition was based on personal injuries. In her view, learned Senior State Attorney submitted that Nakacwa's claim for redress could be pursued in a competent court despite the fact that her petition had abated under rule 15 of Legal Notice No. 4. of 1996.

20 I do agree with learned Senior State Attorney in view of the clear provisions of section 13 of the Law Reform (Miscellaneous Provisions) Act (Cap 74) which state thus:

" 13 Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against or as the case may be for the benefit of his estate.

30 **Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims under section 22 of the Divorce Act for damages on ground of adultery."**

40 Clearly, from the above section, Nakacwa's claim for redress survived after her death for the benefit of her estate or beneficiaries to be pursued in a competent court. Her claim was based on a tortious action arising from personal injuries. Section 13 of the Law Reform (Miscellaneous Provisions) Act provides protection of that right from deprivation of property without adequate compensation. In my view, that right of action did not abate under rule 15 of Legal Notice No. 4 of 1996. It was her right of action to petition the Constitutional court in which she was seeking for a constitutional interpretation under Article 137 (3) of the Constitution which abated

under that rule. I would, therefore, agree with the respondent's submissions that the provision of rule 15 of Legal Notice No. 4 of 1996 is neither inconsistent with Article 26 (2) of the Constitution nor does it deprive an estate of a deceased sole petitioner of a chose in action without compensation.

In the result, I would dismiss the petition with no order as to costs on ground of public interest.

Dated at Kampala this 4th day of April 2003.

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S.G. Engwau
Justice of Appeal.

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

CONSTITUTIONAL PETITION NO.11 OF 2002

5

BETWEEN

PHILIP KARUGABA:::::::::::::PETITIONER

AND

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

10

CORAM: HON.JUSTICE G.M.OKELLO,JA.
HON. JUSTICE A.E.N.MPAGI-BAHIGAIN,JA.
HON. JUSTICE S.G.ENGWAWU,JA ✓
HON. JUSTICE C.N.B.KITUMBA,JA
15 HON. JUSTICE C.K.BYAMUGISHA,JA.

JUDGMENT OF BYAMUGISHA,JA

The petitioner filed this matter under **Article 137** of the Constitution
20 claiming that he has an interest in that **Rule 15** of the **Constitutional**
Court(Petition forDeclarations under Article 137 of the Constitution)
Directions 1996 is inconsistent with **Article 26(2)** of the Constitution. The
basis of this claim is that the said rule deprives the estate of a deceased sole
petitioner of a chose in action being property without payment of
25 compensation. It was his prayer that this court grants a declaration to the

effect that the said rule was inconsistent with the mentioned article. There was a prayer for an order for costs.

An affidavit was sworn in support of the petition by the petitioner himself.

5 He deponed that he was one of the advocates who represented the late Joyce Nakacwa in **Constitutional Petition No.2/2001**(a copy of the petition was attached to the instant petition as annexure A) .It is deponed that the late Nakacwa passed away on the 23rd October,2002 before this court determined the petition. On the 4th November,2002 when the petition came up for
10 hearing the court was informed of the demise of the petitioner and an order was made to the effect that the petition would abate in accordance with **rule 15**(supra). In paragraph 9 of the affidavit, the petitioner deponed that in a petition such as the one Nakacwa had filed seeking *inter alia*, orders for redress constitutes a chose in action and as such, it is personal property of
15 the petitioner. In paragraph 10 he deponed that **Article 26(1) of the Constitution** recognises every person's right to own property and **sub-article 2** recognises the right of every person not to be deprived of property without adequate compensation. It was contended in paragraph 12 of the affidavit that the operation of rule 15 deprived the estate of the late Nakacwa
20 of property contrary to **Article 26(2)**(supra). He reiterated his earlier prayer

specifically enacted to compulsorily deprive him of the fruits of his judgment that he was trying to enforce against the Government of the day. The legislation made no provision for payment of compensation. Thus prompting the constitutional reference.

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In the matter now before us, the petitioner has not shown by his pleadings how the abating of Nakacwa's petition under the rule deprived him of any property. The claim was partly for redress. The tortious acts she complained of were personal to her. If they survived her, then her estate can go to a competent court under the provisions of **Cap74**. In my view the rule was not specifically enacted to deprive either Nakacwa, her former advocate or her legal representative of any property. It has been in existence since 1996. I do not think it was aimed at anyone's property. The petitioner had the burden to show that the rule is clearly inconsistent and incompatible with the principles laid down in the Constitution. He did not. The rule in my view is not inconsistent with **Article 26** of the Constitution. The petition has no merit. It will be dismissed with each party bearing its own costs.

Dated this...th...day of...~~April~~...2003.

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that the impugned rule be declared as being inconsistent with the stated provisions of the Constitution.

In his answer to the petition, the respondent through Mr Matsiko, a Principal
5 State Attorney deposed an affidavit. He stated that the petition has no merit.
He stated in paragraph 5 thereof that Nakacwa's constitutional petition did
not constitute property as alleged in the instant petition. He averred in
paragraphs 6 and 7 of the affidavit that rule 15 is in no way inconsistent
with the provision of the article being relied upon and it did not deprive the
10 estate of a deceased sole petitioner of property contrary to Article 26(supra).

When the matter came before us for disposal, the petitioner appeared in
person. The respondent was represented by Ms Apiny, Senior State
Attorney. In his submission, the petitioner rehearsed the history of
15 Nakacwa's case. He contended that when Nakacwa passed away, the
administrator of the estate was not allowed to take over the conduct of the
petition. He submitted that by extinguishing late Nakacwa's right of action,
rule 15 deprived the estate of property without compensation contrary to
article 26(2)(supra)

He contended that a right of action is a form of personal property which is protected under the article. He referred to the definition of the word property contained in **Concise Law Dictionary** which is that property is anything that can be owned. These include according to him, real, personal and intangible property or choses in action. He also referred to the definition of choses in action contained in **Halsbury's Laws of England 4th Edition** and contended that a right of action arising of tort is a chose in action and therefore personal property. The petitioner cited the case of **Shah v Attorney-General (No.2)[1970]EA 523** where a judgment obtained by Mr Shah was taken away by an Act of Parliament. It was held in that case that the Constitution protects all forms of property including intangible intangible ones. He contended that the principle laid out in Shah's case applies to this case. He further submitted that there are only two instances where death would defeat a cause of action. The first instance is the case of defamation as there is no property in the name and the second instance is a contract for personal services. He contended that in all other claims, the action survives. He concluded his submissions by stating that a right of action is property and any rule that attempts to take it away must be declared unconstitutional. He prayed that a declaration be made as prayed with no order as to costs. He claimed that this was a matter of public interest.

In reply, the learned State Attorney submitted that the late Nakacwa's right is not property. She relied on the definition of the word property contained in **Oxford Companion to Law** paragraph 8 at page 212 which defines

5 personal rights to property that can be claimed or enforced. She submitted that the late Nakacwa was claiming monetary redress but she never got. She contended that the claim was of a personal nature and it was extinguished by death and therefore no property accrued to her estate. She submitted that the question of property goes hand in hand with ownership and that property
10 must be definite in order to be claimed. She stated the obvious that Nakacwa's petition was not finalised and no awards were made.

On **Article 26(2)**, counsel contended that the property under that article must be ascertained and its acquisition invites fair and adequate compensation. If this is not done, it would amount to a breach of the constitution.

15 Commenting on **Shah's** case learned State Attorney submitted that the Local Government Act was enacted specifically to defeat the judgment that was property and ascertainable. She concluded her submissions by stating that the petition failed to show the inconsistency with the article and it should be dismissed with costs.

Before I deal with the substantive issue that was raised in this petition I wish to refer to the record of this court in Nkacwa's petition. On the 4th November the petitioner herein, who was counsel for the late, informed^{us} that his client had passed away. He made an application for an adjournment of the petition
5 pending the appointment of a personal representative to take over the conduct of the petition. The application for an adjournment was opposed by Mr Bireije and Mr Mutyaba who were representing the first and second respondents respectively. The basis of their opposition was rule 15(supra). In reply, the petitioner stated that rules of court were handmaidens of justice
10 and should not be used to defeat it. He went further to state that the petition raised matters of constitutional importance touching on the rights of women in this country and therefore it should be heard and this court applies its constitutional mandate to do justice. In a unanimous ruling we rejected the application for an adjournment and confirmed that rule 15 was mandatory in
15 that a petition abates by the death of a sole petitioner and there was no rider at all. There was no appeal against this ruling to a higher court by Mr Karugaba. In my view he should have appealed against our ruling if he thought that our interpretation of the rule was wrong. Instead he brought the instant petition claiming that he is a person having an interest in the

matter. He did not disclose the said interest but that is not a matter of great moment at this time.

Turning to the merits of the petition, the complaint here is that the rule took away Nakacwa's property in the petition contrary to Article 26 of the

5 Constitution. The article provides that:-

1) "Every person has a right to own property either individually or in association with others.

2) No person shall be compulsorily deprived of property or any interest
10 in or right over property of any description except where the following conditions are satisfied -

(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and

15 (b) the compulsory taking of possession or acquisition of property is made is made under a law which makes provision for-

(I) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and

(ii) a right of access to court of law by any person who has an interest
20 or right over the property.

None of the advocates who appeared before us cited any authority in which the provisions of the article have been judicially considered. But the usual rules of interpretation would be invoked and applied. The word property is not defined in the article. The word means something capable of being
5 owned and ascertained. I agree with the definition of property that the petitioner referred ^{to} in his submissions. I think the petitioner has the burden to prove that he is a person who had an interest or right over the property either individually or in association with the late Nakacwa. He has also to show that he was deprived of his property compulsorily by **rule 15**(supra),
10 and that there was no provision made for prompt payment of fair and adequate compensation. This is how I understand the scope of **Article 26**(supra). In other words the petitioner has to bring himself within the ambit of the article if he has to succeed.

I have perused the affidavit filed by the petitioner and failed to find any
15 statement which states that he owned any property with the late Nakacwa. The right that Nakacwa had to bring a constitutional petition was in my view personal to her and could not be assigned. I also do not think that it was property that was capable of being compulsorily acquired and taken possession of by anybody. The decision of **Shah** is distinguishable from this
20 petition. Mr Shah had a judgment debt-intangible property. A law was

specifically enacted to compulsorily deprive him of the fruits of his judgment that he was trying to enforce against the Government of the day. The legislation made no provision for payment of compensation. Thus prompting the constitutional reference.

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In the matter now before us, the petitioner has not shown by his pleadings how the abating of Nakacwa's petition under the rule deprived him of any property. The claim was partly for redress. The tortious acts she complained of were personal to her. If they survived her, then her estate can go to a competent court under the provisions of **Cap74**. In my view the rule was not specifically enacted to deprive either Nakacwa, her former advocate or her legal representative of any property. It has been in existence since 1996. I do not think it was aimed at anyone's property. The petitioner had the burden to show that the rule is clearly inconsistent and incompatible with the principles laid down in the Constitution. He did not. The rule in my view is not inconsistent with Article 26 of the Constitution. The petition has no merit. It will be dismissed with each party bearing its own costs.

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Dated this...⁴...day of...^{April}...2003.

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C.K. Byamugisha
Justice of the Constitutional Court.

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