

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

5
CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ
HON. JUSTICE G.M. OKELLO, JA
HON. JUSTICE A. TWINOMUJUNI, JA
10 HON. JUSTICE C.N.B. KITUMBA, JA
HON. JUSTICE C.K. BYAMUGISHA, JA

CONSTITUTIONAL PETITION NO.7 OF 2003

15
PEREZ KAKUMU.....PETITIONER

V E R S U S

20 1. THE ATTORNEY GENERAL }
2. THE NATIONAL FOREST AUTHORITY }.....RESPONDENTS

RULING OF THE COURT:

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On the 15th December 2003, the petitioner filed a petition in which he made the following averrements:-

30 "1. THAT your Petitioner, a District Forest officer, is a male Adult Citizen of Uganda of sound mind having interest in and affected by the following matters being inconsistent with the Constitution of the Republic of Uganda 1995 whereby your petitioner is aggrieved:-

35 (a) (i) THAT sections 5-12, 16-20, 26, 28, 29(3), 46-50, 54, 60-79, 80-83, 88 and 95 of the National Forestry and Tree Planting Act, 2003 and gazetted and commenced on 8th August, 2003

August, 2003 are inconsistent with the provisions of articles 176(2)(b) and (e), 180(1) and 189(1), (3) and (4), 190, 191(1) and (2) and 192 of the Constitution in that they disregard the constitutional provisions that the Local Government is the highest Political Organ in its area of jurisdiction with Legislative and Executive Powers in matters of the management of all forests in Uganda, including Central Forests Reserves, as a function and service, preparation of development plans, levying, charging, collecting and appropriation of fees and taxes, under the Minister responsible for Local Governments and the Government is limited to the function and service responsibility of Forests Reserve Policy only in forestry matters.

(ii) THAT further, the whole of parts VIII and IX, sections 52-90, of the National Forestry and Tree Planting Act are inconsistent with the provisions of articles 176(2), (a), (b) and (e), 180(1), 189(1), (3) and (4) of the Constitution in so far as they create National Forestry Authority, the staff and functions thereof, finances and offences thereunder which are all forests management oriented under the Minister responsible for forestry and these violate the provisions of the Constitution that vest all forest management responsibilities to District and lower Government Councils under the Minister responsible for Local Government.

(iii) THAT your petitioner states that sections 24 and 37 of the National Forestry and Tree Planting Act are inconsistent with the provisions of article 27(2) of the Constitution in that

they interfere with the privacy of the person's property by providing that the District Land Board maintains a register of private forests and the Minister responsible for forests keeps an inventory of all forests in Uganda, private forests inclusive.

- (iv) ALSO your petitioner states that sections 26, 30, 31 and 32 of the National Forestry and Tree Planting Act are inconsistent with the provisions of article 26 and 189(1) of the Constitution in that a person is compulsorily deprived of his property and or interest in or right thereof and private forests are outside the scope of responsibility by the Government.
- (v) THAT in violation of articles 173(b), 180(1), 200, 268, 273 and 278 of the Constitution, section 48 of the National Forestry and Tree Planting Act provides for appointment of District Forest Officer and other officers thereof as the government may determine and yet the said office, District Forest Officer and other staff thereof already exist under the Constitution and Act 1 of 1997 and the office has neither been abolished nor the officers thereof removed from office under the law.
- (vi) THAT on 24.10.2003, the Minister responsible for National Forestry Authority under National Forestry Authority and Tree Planting Act 8 of 2003 inaugurated the Board of Directors and Timber Monitoring Team to start operations in the discharge of functions of National Forestry Authority

which are inconsistent with article 189(1) and (3) of the Constitution in that the said Board and Timber Monitoring Team and their operations in the management of forests and in particular Central Forest Reserves is a responsibility for District Councils under the Constitution.

b) THAT Uganda Forestry Policy 2001 is inconsistent with the provisions of articles 27(2), 189(1) and (3), 190, 191(1) and (2) and 192 of the Constitution in so far as it provides for the Government.

- (i) to actively protect, maintain and manage Central Government Forest Reserves,
- (ii) to provide management of private forests,
- (iii) to support and regulate the private in developing and managing commercial forest plantation and collect dues therefrom,
- (iv) to facilitate and regulate the private sector in developing and managing the forests products, processing industries and collect dues therefrom,
- (v) to interfere in community participation in forest management or central Government Forest Reserves and private forest lands,
- (vi) interfere and participate in farm forestry,
- (vii) to interfere and participate in forest conservation of forest biodiversity on forest reserves and private forests,
- (viii) to interfere in the rehabilitation and conservation of private forests,
- (ix) to interfere in the Urban Forest management by private and non-Governmental sectors,

(x) to participate in implementation of educational programmes on the role of the development and supply of high quality tree seeds and improved planting stock to private sector, when the Constitution vests in Government the function and service of forest reserve policy only and the rest of forestry responsibilities are developed to District and lower Government Councils and interference on the privacy of a person's property is prohibited.

10 c) THAT the Uganda National Forest Plan 2002 is inconsistent with the provisions of articles 26, 27(2), 180(1), 189(1) and (3), 190, 191(1) and (2) and 192 of the Constitution in so far as it over stretches the Government's mandate of Forest Reserve Policy by setting out goals and strategies that turn the Forestry Policy 2001 into action and thereby interferes in the constitutional responsibilities of District and lower Government's management of the function and service of forests, levy, charge, collection and appropriation of fees and taxes thereof and further the National Forestry Plan 2002 interferes in the private sector forest activities and collection of fees and dues therefrom.

20 d) THAT your petitioner says that section 175(2) and (3) of the Local Governments Act cap.246 is inconsistent with the provisions of article 189(1) and (3) and schedule 6 thereof, 260 of the Constitution in so far as it empowers the Minister to make a Statutory Instrument to amend, replace, alter or revoke any of the schedules under the Act including schedule 2 part 1 which specifies functions and services for which Government is responsible and is similar to schedule 6 in the Constitution and the

amendment of such schedule by a Minister would tantamount to amending the Constitution in contravention of constitutional provisions of amendment thereof.

5 e) THAT section 176(2) of Local Government Act cap 246 is inconsistent with the provisions of articles 176(2)(a) and (f), 189(1) and (3), 200(1) and (2), 268(1), 273 and 278 of the Constitution:-

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(i) in so far as it left room for the Government to retain Statutory Instrument No.52 of 1995 that in effect amended the Constitution on article 189(1) and (3) and schedule 6 which is the same as schedule 2 part I of the Act.

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(iii) in that Statutory Instrument No.52 of 1995 was the basis upon which the Government drew Forestry Policy 2001 and National Forestry Plan 2002 by falsely believing that forests had been re-centralised after Local Governments (Resistance Councils) Statute (repealed by Act 1 of 1997) was enacted in 1993 decentralising forests to District Councils,

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and all these are inconsistent with the Constitution. (sic)

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f) THAT on 10.10.2003, the Permanent Secretary in the Ministry of Water; Lands and Environment wrote to your Petitioner/Applicant, recognising the lifting of his interdiction by Court and was welcomed back to Bushenyi District by the responsible Chief Administrative Officer but immediately after on 29.10.2003 and 06.11.2003 the Commissioner and Permanent Secretary respectively instructed the petitioner to report to the

Ministry for deployment and this is inconsistent with articles 176, 189(1) and (3), 200 and 268 of the Constitution in that a District Forestry Officer constitutionally falls under the jurisdiction of the District Service Commission for removal from the office of the district.

g) THAT the office and management responsibility in the Ministry of Water, Lands and Environment on forests and staff thereon is inconsistent with the constitution, articles 176(1), (2)(a), (b) and (f), 189(1) and (3), 200 and 268 in that the responsibility for the function and service of forests was developed and transferred from the Government to District Councils under the Ministry of Local Governments and this has not specifically been amended in the Constitution.

2. THAT your petitioner states that;

a) Sections 5-12, 16-20, 26, 28, 29(3), 46-50, 54, 60-79, 80-83, 88 and 95 of the National Forestry and Tree Planting Act, 2003 are inconsistent with the provisions of articles 26, 27(2), 176(2)(b) and (e), 180(1), 189(1)(3) and (4), 190, 191(1) and (2) and 192 of the Constitution.

b) THAT operations of the National Forestry Authority are inconsistent with articles 176(1), (2)(a), (b) and (f), 189(1) and (3), 190, 191(1) and (2) and 192 of the Constitution in that the management of forests in Uganda is a responsibility of District Councils of which National Forestry Authority is not.

c) THAT Uganda Forestry Policy 2001 is inconsistent with the provisions of articles 26, 27(2), 180(1), 189(1) and (3), 190, 191(1) and (2) and 192 of the Constitution.

5 d) THAT Uganda National Forest Plan, 2002 is inconsistent with the provisions of articles 26, 27(2) 180 (1) and (3), 190, 191(1) and (2) and 192 of the Constitution.

10 e) (i) THAT section 175(2) and (3) of the Local Government Act cap.243 is inconsistent with the provisions of articles 189(1) and (3) and schedule 6 thereof and 258 of the Constitution.

(ii) THAT section 176(2) of Local Governments Act Cap.243 is inconsistent with the provisions of articles 189(1) and (3), 200 (1) and (2), 268(1), 273 and 278 of the Constitution.

15 f) THAT the office of the Permanent Secretary in the Ministry of Water, Lands and Environment and their powers over forests and District Forestry Officers are inconsistent with articles 176(1), (2) (a), (b) and (f), 189(1) and (3), 200 and 268 of the Constitution in that that office is deemed abolished in as far as management of forests and staff thereof is concerned since Forests Management is no longer a responsibility for Government which is vested with the responsibility of forest Reserves Policy only as provided under schedule 6 of the Constitution and forests as a function and service is a responsibility for District Councils and this has been enabled by Local Governments Act 1 of 1997, section 31(1)(b) and schedule 2 parts 1 and 2 thereof."

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The petitioner then asked this court to make the following declarations:

"a)(i) Sections 5-12, 16-20, 26, 28, 29(3), 46-50, 54, 60-79, 80-83, 88 and 95 of the National Forestry and Tree Planting Act, 2003 are inconsistent with the Constitution.

5 (ii) THAT the creation of National Forestry Authority, the Board of Directors, Executive Directors, its staff, functions thereof, their operations, finances and offences thereunder are inconsistent with the Constitution.

10 (iv) That the District Forestry Officer and other officers thereof that were in place immediately before the coming into force of the 1995 Constitution remained in force under District Councils and those offices can only be abolished and staff thereof, the petitioner inclusive, removed under the provisions of the Constitution and Local Governments Act Cap.243. (sic)

15 b) THAT Uganda Forestry Policy 2001 is inconsistent with the provisions of the Constitution.

c) That the Uganda Forestry Plan, 2002, is inconsistent with the provisions of the Constitution.

20 d) (i) THAT section 175(2) and (3) of the Local Government Act cap. 243 is inconsistent with the Constitution.

25 (ii) THAT section 176(2) of Local Government Act Cap.243 is inconsistent with the Constitution.

e) THAT the office in the Ministry of Water, Lands and Environment for the management of forests and staff thereof is inconsistent with the Constitution and abolished thereof.

2 The Respondents pay costs of this petition."

The petition was supported by the affidavit of the petitioner deposed to on 11th November 2003 in which he substantiated the grounds on which the petition was based.

The respondents filed replies to the petition in which they denied every averment in the petitioner's petition. The replies were also supported by affidavits sworn by potential witnesses of the respondents.

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At the conferencing session of the petition before the Registrar of this Court, the following issues were agreed:

- 15 **"1. Whether the 2nd respondent is a proper respondent to the petition.**
2. **Whether the Uganda Forestry Policy 2001, is inconsistent with the articles 27(2), 189(1) & (3), 191(1) & (2) of the Constitution of the Republic of Uganda, 1995.**
- 20 3. **Whether the National Forest Plan 2002 which sets out goals and strategies that turn the Forestry Policy into action is inconsistent with articles 26, 27(2), 180(1), 189(1) & (3), 190 and 191(1) of the Constitution of the Republic of Uganda, 1995.**
- 25 4. **Whether sections 5-12, 16-20, 24, 30-32, 46-50, 52-90 and 95 of the National Forestry and Tree Planting Act which provide for management of all forests in Uganda are inconsistent with articles 26, 27(2), 173(b), 176(2)(a), (e) and (f), 192, 200, 269, 274 & 279 of the Constitution of the Republic of Uganda 1995.**
5. **Whether the operations of the National Forestry Authority are inconsistent with the provisions of the Constitution of the Republic of Uganda, 1995 article 189.**

6. Whether sections 175 (2) & (3) and 172(2) of the Local Government Act are inconsistent with articles 189(1) & (3) and Schedule 6, articles 176 (2)(a) & (f), 189(1) & (3), 200(1) & (2), 269(1), 274 and 279 of the Constitution of the Republic of Uganda, 1995.

5 7. Whether the claim as relates to the powers of the Permanent Secretary in the management of forests and district forestry officers is *res judicata*.

8. Whether the petitioner is entitled to the reliefs claimed."

10 When the petition came up for hearing, Mr Eric Muhwezi represented the petitioner. Mr. Henry Oluka SSA represented the 1st respondent and Mr. G.S. Lule, Mrs Jogina Musisi, Mr. Muhamed Mbabazi and Mr. Paul Baingana represented the 2nd respondent. Mr. Lule raised a preliminary point of law to the effect that since the issues which were agreed were framed, the Constitution of
15 the Republic of Uganda had been amended which rendered the entire petition no longer sustainable and therefore incompetent. He submitted that whereas formerly the sixth schedule to the Constitution provided that "**Forest and game reserve policy**" was a function of the Central Government, the 2005 constitutional amendment provided that "**Forest and wildlife reserve policy and management**" was a function of the Central Government. In his view,
20 since the cornerstone of the whole petition was that the Central Government of Uganda had no power to manage forest and game reserves under the old provision, then, with amendment, the petition had no further basis. In his view, the petitioner should have withdrawn the petition. His prayer was that the
25 petition was rendered incompetent by the amendment and should be dismissed with costs to the respondents. Mr. Oluka for the 1st respondent associated himself with Mr. Lule's submission. He said that if there were any issues in the petition to determine, that was before the constitutional amendment. Now, the whole petition had been overtaken by events.

In reply, Mr. Eric Muhwezi, learned counsel for the petitioner, did not agree that the petition had been overtaken by the 2005 constitutional amendment. In his view, there were some matters in the petition, which were not affected by the amendment. Though he did not mention those matters, he gave an example of management of private forests as one of them. Mr. Muhwezi conceded that the petition was substantially affected by the amendment but argued that matters which were affected by the amendment could be sorted out during the process of hearing the petition. He invited us to reject the objection and proceed with the petition on its merits.

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We have carefully studied the document on record entitled "**AMENDED PETITION**". It is a very difficult document to comprehend. It does not comply with the requirements of rule 3 of the Constitutional Court (Petitions and References) Rules, 2005 (S.I. NO.91/05) or any other similar law which preceded those rules. We hold the view that even before the amendment of the Constitution, it would have been difficult to sustain the petition in the present form. However, the issues which were distilled from the document and agreed as suitable for determination are clearer than the petition itself.

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20 The basis of this petition, as we understand it, is that under the 1995 Constitution, Forest and game reserve policy was made a preserve of the Central Government. This meant that the management of forestry and game reserves became a responsibility of the Local Governments. The petitioner was irritated to find that the Central Government continued to behave as if it had responsibility to manage forests and game (wildlife) reserves. The matter was made worse for him when the National Forestry and Tree Planting Act was enacted placing the management of the forests and wildlife reserves under the National Forestry Authority contrary to the schedule six of the 1995 Constitution.

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We agree that at the time this petition was filed, the petitioner had genuine grounds to believe that the 1995 Constitution was being violated. However, all that changed with the constitutional amendment to schedule six which was introduced by the Constitutional (Amendment) Act No.5 of 2005. In that amendment, the **policy** and **management** of all forests and wildlife reserves is placed squarely under the Central Government through its agent, The National Forestry Authority. With that amendment, the basis of this petition was effectively destroyed. We are unable to see any other matter in the petition that survives the impact of the amendment. If such a matter exists, it would only be discernible if the pleadings were radically overhauled in such away as to leave only such a matter outstanding in the petition. In our view, that cannot be done within the present petition. The petitioner would need to file another one if necessary. For now, we hold that the constitutional amendment to schedule six effectively destroyed the basis of this petition. It would be an exercise in academic gymnastics for this court to entertain this petition at this point in time. We do uphold the preliminary objection of the respondents.

There is yet another reason why this petition is not sustainable. Article 137(3) of the Constitution and rule 3 of the Constitutional Court (Petitions and References) Rules, 2005 provide that a constitutional petition shall allege:-

- "(a) that an Act of Parliament or any other law or anything in or done under the authority of any law is inconsistent with or in contravention of a provision of the Constitution,**
- (b) that any act or omission by any person or authority is inconsistent with or in contravention of a provision of the Constitution."**

Now, a closer look at the 2nd and 3rd agreed issues will show that this court is being asked to interpret certain Government Forestry Policy and Plans of 2001 and 2002 against the provisions of the Constitution. The Uganda Forestry Policy 2001 which is annexed to the amended petition is a document of 29 pages. We do not think that a document is an **"Act of Parliament or any other law or anything done under the authority of any law."** We do not think that the policy is an **"act or omission by any person or authority"**. The same applies to The National Forestry Plan of 2002 which is a 160 page long document. The petition does not state which part or parts of these documents violates the Constitution or are inconsistent with it. We do not agree that the plans and policies of government are justiciable in the Constitutional Court under article 137(3) of the Constitution. We hold that those two so-called issues do not merit consideration by this court.

Regarding matters raised in agreed issues No.4 and 6 of the Conferencing Notes, we hold that this type of pleading is defective as it does not comply with Rule 3(2) and (3) of the Constitutional Court (Petitions and References) Rules, 2005 which require that the petition should allege:

"3 (2)(a) that the Act of Parliament or any other law or anything in or done under the authority of any law is inconsistent with or in contravention of a provision of the Constitution; or
(b) that any act or omission by any person or authority is inconsistent with or in contravention of a provision of the Constitution."

And that:

(3) The petition shall be divided into paragraphs numbered consecutively, each of which shall be confined, as nearly as

may be, to a distinct inconsistency or contravention
complained of [Emphasis mine]

A close look at issue No.4 will serve to illustrate what we mean. The issue
5 alleges that sections 5-12 [8 sections], 16-20 [5 sections], 24, 30-32 [4 sections],
46-50 [5 sections], 50-90 [41 sections] and section 95 of the National Forestry
and Planting Act is inconsistent with articles 26, 27(2), 173(b), 176(2)(a)(b), (e)
and (f), 192, 200, 269, 274 and 279 of the Constitution of Uganda. In other
words, the allegation is that a total of 65 sections of the National Forests and
10 Tree Planting Act are inconsistent with 9 articles of the Constitution. The issue
does not specify the extent of the inconsistency. A close look at the articles
cited also reveals that they deal with matters that have nothing to do with
management of forests or wildlife reserves. For example, article 26 provides for
protection from deprivation of property. Article 27 provides the right to privacy
15 of person, home and property. Article 173 (2) deals with appointment of
persons to the personal staff of the President. Article 173(b) deals with
protection of public officers. Article 176 deals with the Local Government
System. Article 190 deals with planning by District Councils. Article 192 deals
with collection of Taxes by Local Government. Article 200 deals with the
20 functions of the District Service Commission. Article 269 deals with regulation
of Political Parties. Article 274 deals with modification of existing law by the
1st elected president. Articles 279 deals with pending matters before courts and
other authorities. Now, one wonders how all these diverse provisions of the
constitution are contravened by 64 sections of the National Forestry and Tree
25 Planting Act, which provides for the management of National Forests and
Wildlife Reserves! In our view, this is the worst kind of pleading and grossly
contravenes all rules of civil pleadings, including specifically rule 3(3) of the
Constitutional Court (Petitions and References) Rules, 2005. The contents of
issue No.6 also fall in the same category. The pleadings which give rise to these

two issues do not contain paragraphs "each of which [shall be] is confined, as nearly may be, to a distinction in consistency or contravention complained of." They do not give rise to any matter deserving determination under article 137(3) of the Constitution.

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We also wish to quickly mention that issue No.5 which, alleges that the operations of the National Forestry Authority are inconsistent with article 189, was overtaken by events with the passing of the 2005 Constitutional Amendment which put management of all forests and wildlife reserves in the hands of the Central Government and its agency, The National Forestry Authority. Issues No.7 of the agreed issues, which alleges that the claims relating to the powers of the Permanent Secretary in the management of forests and District Forest Officers is res judicata, does not raise any matter for constitutional interpretation under article 137(3) of the Constitution. Besides, it is not indicated how the issue of res judicata arises in this petition.

Finally, the agreed framed issue No.1 alleged that this court determines whether the 2nd Respondent (i.e. The National Forestry authority) is a proper respondent to the petition. The whole of this petition was a challenge to the powers of the Central Government of Uganda through the National Forestry Act to manage national forests and wildlife reserves. It would have been strange if the authority which under section 52 of the National Forestry and Tree Planting Act, is a body corporate with the right to sue and to be sued was left out of this constitutional petition. The simple answer to that issue is that, it is a non-issue. The law speaks for itself.

For all the reasons we have endeavoured to give above, we find that this petition is grossly defective and incompetent. The petition as drawn failed to comply

with rule 3 of The Constitutional Court (Petitions and References) Rules, 2005.

Under rule 3(4) of the same rules:-

5 **"No costs shall be allowed for the drawing or copying of any
petition not substantially in compliance with this rule, unless the
court otherwise orders."**

10 The fault for this miserable state of affairs cannot be pinned on the petitioner. It
falls squarely on learned counsel for the petitioner who drew up the petition. If
the petition is dismissed or struck out on that count, it is counsel who is liable to
personally pay any costs incurred by other parties to the petition.

15 Besides, this petition was overtaken by events in November 2005 when the
Constitution was amended to give the Central Government of Uganda power
over policy and management of forests and wildlife reserves. Learned counsel
had more than ample opportunity to advise his client to withdraw the petition or
to amend it. Up to the time the petition came up for hearing recently, counsel
still, contrary to overwhelming evidence, believed that the petition in its original
form was still competent. We find this conduct amazing, grossly negligent and
boarders on abuse of court process. He is therefore, liable to pay the costs of the
20 suit personally. The petition is therefore struck out with costs to the respondent.

Dated at Kampala this.....^{4th}.....day of.....^{October}.....2006.

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.....^{L.E.M.}.....
Hon. Justice L.E.M. Mukasa-Kikonyogo
DEPUTY CHIEF JUSTICE

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G.M. Okello

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Hon. Justice G.M. Okello
JUSTICE OF APPEAL

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A. Twinomujuni

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Hon. Justice A. Twinomujuni
JUSTICE OF APPEAL

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C.N.B. Kitumba

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Hon. Justice C.N.B. Kitumba
JUSTICE OF APPEAL

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C.K. Byamugisha

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Hon. Justice C.K. Byamugisha
JUSTICE OF APPEAL

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