

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

CONSTITUTIONAL APPLICATION NO.14 OF 2013

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[Arising from Constitutional Petition No.16 of 2013]

1. HON. LT. (RTD) SALEH M.W. KAMBA } :::::::::::APPLICANTS/
2. MS. AGASHA MARYM. } PETITIONERS

VS

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1.THE ATTORNEY GENERAL
2.HON. THEODORE SSEKIKUBO } :::::::::::RESPONDENTS
3.HON. WILFRED NIWAGABA
4.HON. MOHAMMED NSEREKO
5.HON. BARNABAS TINKASIMIRE }

AND

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CONSTITUTIONAL APPLICATION NO.23 OF 2013

[Arising from Constitutional Petition No.21 of 2013]

NATIONAL RESISTANCE MOVEMENT ::::::APPLICANT/PETITIONER

VS

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1. THE ATTORNEY GENERAL }
2. HON. THEODORE SSEKIKUBO }
3. HON. WILFRED NIWAGABA }

- 4. HON. MOHAMMED NSEREKO
- 5. HON. BARNABAS TINKASIMIRE

}RESPONDENTS

CORAM: HON. JUSTICE S.B.K. KAVUMA, AG.DCJ/CC

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HON. JUSTICE A.S. NSHIMYE, JA/CC

HON. JUSTICE REMMY KASULE, JA/CC

HON. LADY JUSTICE FAITH MWONDAH, JA/CC

HON. JUSTICE RICHARD BUTEERA, JA/CC

**RULING BY JUSTICE REMMY KASULE, JUSTICE
CONSTITUTIONAL COURT (DISSENTING)**

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This Constitutional Court has, as of now, handled to completion, pending final judgement, the hearing of consolidated **Constitutional Petitions Numbers 16, 19, 21 and 25 of 2013.**

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At the commencement of hearing the Court also ordered that **Constitutional Applications Numbers 14 and 23 of 2013,** amongst others, be heard and disposed of together with the stated consolidated constitutional petitions. In making the order Court of course reserved upon itself the power to revert back to the issue of a grant of the temporary injunction, if circumstances warranted so.

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Court made this order, after coming to the conclusion that too much time was being spent by the parties on the said applications at the expense of the expeditious disposal of the consolidated Constitutional Petitions and yet the issues of the temporary injunction applications were similar to those of **Constitutional**

5 **Petitions Numbers 16 and 21 of 2013.** In the course of hearing that took about eleven days continuously, no circumstances arose necessitating the Court to revert back to the issue of whether or not a temporary injunction should be granted pending completion of the hearing. So the hearing proceeded to conclusion.

50 The main essence of the prayers in **Constitutional Applications 14 and 23 of 2013** is that this Court should grant to the applicants a temporary injunction to restrain the implementation of the Rt. Hon. Speaker of Parliament's ruling by restraining the 2nd, 3rd, 4th and 5th respondents to **Constitutional Petitions numbers 16 and**
55 **21 of 2013** from entering, sitting, participating in any proceedings of the Parliament of Uganda until the disposal of the said Constitutional Petitions.

The above prayers for a temporary injunction also constitute, in the main, the reliefs being sought by the petitioners in
60 **Constitutional Petitions Numbers 16 and 21 of 2013**, namely that on being expelled from the National Resistance Movement political party, the party on whose ticket each one of the said 2nd to 5th respondents stood and won the Parliamentary election in their respective constituencies in 2011, each one of them ceased to be a
65 Member of Parliament and therefore ought to have vacated his seat in Parliament. Accordingly it was unconstitutional of the Honourable Speaker of Parliament to retain them as Members of Parliament. Thus this Constitutional Court is prayed to declare and order that each of the stated respondent's stay in Parliament, after

0 his expulsion from the National Resistance Movement political party, is unconstitutional and as such each one ought to vacate Parliament.

75 In the course of the hearing up to completion, of the stated Constitutional Petitions and applications this Court obtained all the available evidence, submissions and legal authorities from all the parties, both petitioners/applicants and respondents. All that this Court remains to do now is to deliver its final judgement on the basis of the evidence, the submissions of respective counsel and the legal authorities availed to Court for and on behalf of all the parties.

80 It has however transpired after conclusion of the hearing, but before delivery of the final judgement by this Court, that this Court should pronounce itself on the issue of the temporary injunction pending delivery of its final judgement. In other words if this Court comes to the conclusion that the applicants have made out a case
85 for the interlocutory temporary injunction, then this Court should grant the same by ordering the barring of the 2nd to 5th respondents from Parliament pending delivery of the final Judgement of this Court in the Constitutional Petitions.

90 With the greatest respect, I am in disagreement with the approach being adopted by the Court. My reasons for disagreeing are the following:

The fact that the temporary injunction applications seek prayers that are the same as the main reliefs sought in **Constitutional**

Petitions Numbers 16 and 21 of 2013, the ends of justice dictate
95 that this Court, which is now in possession of all evidence,
submissions and legal authorities necessary to make a final
decision, does proceed to give that final decision other than
resorting to granting interlocutory temporary reliefs in the nature of
a temporary injunction. Otherwise this Court will be using
100 interlocutory reliefs to pre-determine conclusively the substantive
issues in the stated **Constitutional Petitions**.

The approach being adopted by the Court has the danger of
undermining the Court's judicial duty to resolve all the issues
before it impartially, that is without being, or appearing to be
105 favouring or prejudging the issues in favour of or to the prejudice of
any of the parties to the causes, before the Court gives its final
Judgement.

This is likely to be so because in order to be able to decide one
way or the other as regards the grant or refusal of a temporary
110 injunction, this Court has to resolve, as between the
petitioners/applicants and the respondents, whether a prima facie
case has been made out or not, whether there is or there is not any
irreparable injury being suffered and in whose favour is the balance
of convenience. See: **SCCA No.19 of 1990: Robert Kavuma Vs**
115 **Hotel International and Giella V Cassman Brown & Co. Ltd**
[1973] EA 358.

In the **Court of Appeal Constitutional Application No.29 of**
2011: Nasser Kiingi and Another Vs The Attorney General And

20 **2 Others**, unreported, this Court (**Kavuma, S.B.K, JA**, as he then was) in my view correctly stated the law on the point when he stated that:

125 **“It is, however, no part of the Court’s function at this stage of litigation to try to resolve conflicts of evidence on affidavit as to facts or on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations. These are matters to be dealt with at the trial of the main petition.”** [Emphasis is mine].

130 The learned **Justice S.B.K. Kavuma** was referring to the state when an application for a temporary injunction is considered by Court before that Court has considered fully the merits of the subject matter giving rise to the application for a temporary injunction. It follows from the above quotation that where the Court has, in the course of the trial, as is the case now, received all
135 the evidence from all the parties on all matters, been availed all the facts on which the claims of either party will ultimately depend, been addressed on all questions of constitutional and other laws relevant to the case and where issues are the same for the temporary injunction and also for the main subject matter from
140 which the application for a temporary injunction arises, as is the case herein, then by this Court holding at this final stage, when only final judgement is pending, that a case for the grant of a mandatory injunction has been made out by the applicants against

the respondents, amounts to pre-judging the main issues in the
145 **Constitutional Petitions, particularly numbers 16 and 21 of
2013** in favour of those who are granted the injunction to the
prejudice of those targetted by the injunction.

This is so because there are no new matters by way of evidence,
submissions and law that are not in possession of the Court now
150 which the Court has not considered at this final stage before
reaching the decision on the temporary injunction. In effect the
Court is pronouncing itself in advance to those parties who are the
target of the temporary injunction that though the final judgement
of the Court is still pending, each one of them has not made out a
155 case to the **Constitutional Petitions Numbers 16 and 21 of 2013.**

With the greatest respect, I find the approach being adopted by
my most Honourable brothers and sister justices of this Court, to
be prejudicial, pre-judgemental and contrary to the duty imposed
upon this Court, not only to act, but also to appear to be acting
160 impartially. The duty of the Court to act impartially is such that a
court of law must conduct and handle the matters before it in such
a manner that a reasonable person is not made to conclude, taking
into account all relevant circumstances, that the decision-making
process of the Court is fundamentally unfair. This duty is imposed
165 upon this Court by **Article 28 (1) of the Constitution:**

“28. Right to a fair hearing.

170 (1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.”

[Emphasis is mine].

175 The effect and import of **Article 28 (1)**, which is non-derogable under **Article 44 of the Constitution**, as to the essentiality of impartiality of a court of law, is further manifested in the language of the **Judicial Oath** that every Judicial officer subscribes to before exercising judicial functions:

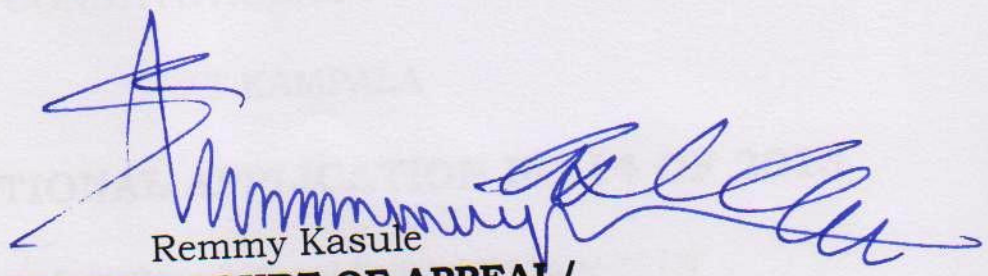
180 “.....will do right to all manner of people in accordance with the Constitution of the Republic of Uganda as by law established and in accordance with the laws and usage of the Republic of Uganda without fear or favour, affection or ill will. **So help me God.**” [Emphasis is mine].

185 For the above reasons I decline to entertain the issue of granting or not granting a temporary injunction at this stage of the proceedings, when only what remains to conclusively resolve all the issues before Court is the preparation and delivery of the final judgement of this Court. It is in that final judgement that I shall deal with the said issue of a temporary injunction which also
190 happens to be a substantive issue in **Constitutional Petitions Numbers 16 and 21 of 2013.**

As to costs, these too shall be addressed in my final Judgement.

Dated at Kampala this^{6th}.....day of September, 2013.

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Remmy Kasule
**JUSTICE COURT OF APPEAL/
CONSTITUTIONAL COURT**