

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 0043 OF 2017

(Coram: Owiny-Dollo, DCJ, Kenneth Kakuru, Egonda-Ntende, Cheborion Barishaki & Christopher Madrama, JJA/JJCC)

10 **1. ABID ALAM**

2. MITYANA FARM GROUP ENTERPRISES LTD ::::: PETITIONERS

VERSUS

ATTORNEY GENERAL..... RESPONDENT

JUDGMENT OF CHEBORION BARISHAKI, JA/JCC

15 This petition concerns the constitutionality of certain actions of the Commission of Inquiry into Effectiveness of Law, Policies and Processes of Land Acquisition, Land Administration, Land Management and Land Registration in Uganda. For brevity's sake, I shall hereinafter refer to the said Commission as the "Land Commission of Inquiry" or just the "Commission".

20 Background

The 1st petitioner is a male adult Ugandan industrialist, entrepreneur and managing director of the 2nd petitioner, a private limited liability company which engages in the business of commercial farming. The 2nd petitioner is the registered proprietor of approximately 10000 acres of land in Mubende District comprised in four separate certificates of title attached to the 1st petitioner's affidavit.

5 According to the 1st petitioner, the said land was acquired between 2001 and 2004, and is fully developed with suitable infrastructure for large scale commercial farming. The 2nd petitioner has been utilizing the land, and save for High Court Civil Suit No. 0136 of 2009; Deus Kakiga Taremwa & Others vs. Mityana Farm Enterprises Ltd & Others instituted by families of ex-world
10 war service men claiming interests in the 2nd petitioner's land, there have been no adverse claims to the said land. The aforementioned suit was determined in favour of the 2nd petitioner. According to the 1st petitioner, despite the Court victory, some of the claimants in the suit referred to above were allowed to stay on part of the 2nd petitioner's land as a good will gesture from the
15 petitioners.

By Legal Notice No. 2 of 2017 issued on the 8th day of December, 2016, a Commission of Inquiry into land matters was set up by the President. From the 11th to 14th September, 2017, the Commission conducted a public hearing on the 2nd petitioner's land during which it considered complaints from some
20 families of ex-world war service men who claimed that they had lawful interest in the 2nd petitioner's land, and that petitioners had been violently evicting some of them from the said land.

The Commission of Inquiry gave a directive for preservation of the status quo in regard to the 2nd petitioner's land as it conducted a mediation between the
25 warring parties. According to the 1st petitioner, the directive encouraged trespassers onto the 2nd petitioner's land, who constructed houses thereon. The 1st petitioner reported the developments to the Commission of Inquiry, but no action was taken.

5 According to the 1st petitioner, the trespassers, who now occupied the 2nd petitioner's land began to sabotage its business. There were incidents between the 1st to 5th November, 2017 where the trespassers violently attacked and injured workers who had gone to clear land in preparation for sugar cane growing. The acts were reported to Mubende Police Station.

10 On 7th, November, 2017, the Commission of Inquiry issued a warrant of arrest of the 1st petitioner. By the warrant of arrest, the 1st petitioner was to be apprehended and brought before the Commission to answer charges of obstructing the work of; and disregarding the directives of the Commission.

When the 1st petitioner appeared before the Commission, he was arrested and
15 detained at Wandegaya Police Station on the orders of the Commission. He was kept there from 11.00 am to 11:00 pm when he was released upon his undertaking not to interfere with the status quo on the 2nd petitioner's land.

On 13th November, 2017, the 1st petitioner wrote to the Director of Public Prosecutions explaining his side of the story and requesting the DPP to
20 intervene in the conduct of the Commission of unfairly applying the criminal process to him. He never received a reply from the DPP.

The Petitioners allege that the Commission treated them in a manner that was unconstitutional. As a result of the unfair treatment, the 1st petitioner was subjected to physical inconvenience, mental agony and damage to his
25 reputation. The 2nd petitioner has suffered a loss of income caused by the Commission's interference with the ownership and use of its land.

Due to the above impugned acts, the petitioners now petition this Court alleging that:

5 “(i) the act of the Commission of inquiry of issuing an arrest warrant
on the 7th November, 2017 against the First Petitioner resulting in
his arrest by the Police on the 8th November, 2017 on the alleged
charge of obstructing the work of, and disregarding the directives
issued by the commission of inquiry was an arbitrary act done in
10 the abuse of process and was/is ultravires the mandate of the
Commission under Legal Notice No. 2 of 2017, the Commissions of
Inquiry Act, Cap 166 and is inconsistent with Articles 2, 20, 23,
43, 126 and 251 of the Constitution.

 (ii) the act of the Commission of inquiry of issuing an arrest warrant
15 on the 7th November, 2017 and a detention instruction on 8th
November, 2017 all against the First Petitioner resulting in his
arrest and detention by the Police on alleged charges of obstructing
the work of and disregarding the directives issued by the
Commission of Inquiry was done in denial of his right to just and
20 fair treatment expected from an administrative body and is
inconsistent with Articles 2, 20, 23, 28, 43, 44, 126 and 251 of the
Constitution.

 (iii) the act of the Commission of inquiry of issuing an arrest warrant
on the 7th November, 2017 and a detention instruction on 8th
25 November, 2017 all against the First Petitioner founded on an
alleged charge of obstructing the work of, and disregarding the
directives issued by the Commission of Inquiry which does not

5 constitute a criminal offence contravenes and is inconsistent with
Articles 2, 20, 23, 28, 43, 44, 126 and 251 of the Constitution.

10 (iv) the act of the Commission of Inquiry of investigating land disputes
between the Second Petitioner and third parties on its land
comprised in LHR Vol. 947 Fol. 19, Plot 14 Singo Block 437, LHR
Vol. 1193 Fol. 10 Plot 26 Singo Block 272 land at Bukoba Mubende
and LHR Vol. 1702 Fol. 25 Plot 7 Singo Block 291 and LHR Vol.
15 953 Fol. 6, Plot Numbers 6, 4, 11 Singo Block 291 land at Kibisi
Estate between 11th-14th September, 2017 and adjudicating upon
the said dispute by issuing orders to maintain the status quo is
ultravires the mandate of the Commission under Legal Notice No.
2 of 2017, the Commission of Inquiry Act Cap. 166, amounts to a
usurpation of the judicial powers of the Courts of law and is
unlawful deprivation of property contrary to Articles 2, 20, 26, 126,
128, 237 and 251 of the Constitution.

20 (v) the act of the Commission of inquiry of issuing an arrest warrant
on the 7th November, 2017 and a detention instruction on the 8th
November, 2017 without laying a formal charge against the
arrestee, the First Petitioner before a competent Court of law as
required by law is inconsistent with and contravened (sic) Articles
25 2, 20, 28, 43, 44, 126, 128 and 251 of the Constitution.

(vi) the act of the Commission of inquiry of issuing an arrest warrant
on the 7th November, 2017 and a detention instruction on the 8th
November, 2017 which acts by themselves amounted to penalties

5 and sanctions without the authority and direction of the Director of
Public Prosecutions as required by S.11 of the Commissions of
Inquiry Act Cap 166, contravenes and is consistent (sic) with
Articles 2, 20, 43, 120, 126 and 251 of the Constitution.

10 (vii) the act of inciting, aiding and abetting the invasion and/or
occupation of the Second Petitioners land Comprised in LHR Vol.
947 Fol. 19, Plot 14 Singo Block 437, LHR Vol. 1193 Fol. 10 Plot 26
Singo Block 272 land at Bukoba Mubende and LHR Vol. 1702 Fol.
25 Plot 7 Singo Block 291 and LHR Vol. 953 Fol. 6, Plot Numbers
6, 4, 11 Singo Block 291 land at Kibisi Estate through issuance of
15 a status quo order and enforcing it by arresting and detaining the
First Petitioner, are acts not protected by immunity as they are
ultravires the mandate of the Commission and they are
inconsistent with Articles 2, 20, 24, 26, 27, 43 and 251 of the
Constitution.”

20 The petitioners seek declarations to the effect that the acts referred to in
paragraphs (i) to (iv) contravene the Constitution. They also seek the following
redress from this Court set out in paragraphs 4 (viii) to (xiii) of the Petition:

25 “(viii) a permanent injunction issues against the Respondent, the
Commission of Inquiry, the Uganda Police and or any other
Government organ, their officers, agents or servants
restraining them from committing the acts or omissions
complained of herein.

- 5 (ix) an order of redress granting damages to the First Petitioner
for the physical inconvenience, mental agony, severe harm to
his reputation and self-esteem.
- (x) a declaration that the Commissioners of the Commission of
Inquiry namely;
- 10 (xi) a declaration that the Commissioners of Inquiry namely;
Hon. Lady Justice Catherine
Bamugemereire - Chairperson.
Owekitibwa Robert Sebunya - Member
Mrs. Mary Oduka Ochan - Member
15 Mrs. Joyce Habaasa - Member
Dr. Rose Nakayi -Member
Hon. Fredrick Ruhindi - Member
Mr. George Bagonza Tinkamanyire- Member
are all personally liable for the acts and/or omissions
20 complained of herein.
- (xii) Costs of the Petition.
- (xiii) any other or further orders as the Court may deem fit.”

At the hearing, the prayer for redress in paragraph xi above was abandoned by counsel for the petitioners. The Petition was brought against the respondent in his capacity as the Government's legal representative for the acts and omissions of the Land Commission of Inquiry. The Commission is

5 composed of a Chairperson, Hon. Justice Catherine Bamugemereire and six members, as well as other support staff that assist the members.

The Terms of Reference (TOR) for the Commission are set out in Paragraph 5 of Legal Notice No. 2 of 2017 as being;

- 10 (a) *to investigate and inquire into the law, processes and procedures by which land is administered and registered in Uganda;*
- (b) *to investigate and inquire into the role and effectiveness of the Uganda Land Commission in administering public land and the Land Fund;*
- 15 (c) *to investigate, inquire into and review the effectiveness of the relevant bodies in the preservation of wetlands, forests and game reserves and examine ways in which the challenge of human habitation in those areas can be resolved;*
- (d) *to investigate, inquire and solicit views on the role of traditional, cultural and religious institutions who own large tracts of land with*
20 *occupants in a bid to enhance better landlord/ tenant relationships;*
- (e) *to assess the legal and policy framework on Government land acquisition;*
- 25 (f) *to identify, investigate and inquire into the effectiveness of the dispute resolution mechanisms available to persons involved in land disputes;*

5 (g) to inquire into any other matter connected with or incidental to the matters aforesaid and make recommendations-

 (i) for improving the efficiency and effectiveness of the law, policies and processes of land acquisition, land administration, land management and land registration in
10 Uganda and proposing necessary reforms; and

 (ii) pertaining to civil, administrative and criminal sanctions against persons found culpable for wrong doing.”

Paragraph 4 of Legal Notice 2 of 2017 gives the Commission the following powers:

15 “(1) ...the right to employ resource persons and support staff as may be deemed necessary.

 (2) ...the power to apply a multi-disciplinary investigative approach.

 (3) The Chairperson shall constitute an investigative team for the Commission.”

20 Paragraph 6 of the same Legal Notice 2 of 2017 provides that the Commission shall have all the Powers and duties conferred on a Commission of Inquiry under the Commissions of Inquiry Act, Cap. 166.

Principles of Constitutional Interpretation

In Constitutional Petitions, this Court shall apply well known principles of
25 Constitutional interpretation, which have been recently discussed by Arach-Amoko, JSC in **Male. H Mafirizi Kiwanuka & 2 Others vs Attorney**

5 **General, Consolidated Supreme Court Constitutional Appeal Nos. 02, 03
and 04 of 2018.** Those relevant to this Petition are these:

10 1. The Constitution is the Supreme law of the land and forms the
standard upon which all laws are judged. Any law that is inconsistent
with or in contravention of the Constitution is null and void to the
extent of the inconsistency.

15 2. The entire Constitution has to be read together as an integrated
whole with no particular provision destroying the other but rather each
sustaining the other. No one provision of the Constitution is to be
considered alone but that all the provisions bearing upon a particular
subject are brought into view and to be interpreted so as effectuate the
greater purpose of the instrument.

20 3. In determining the constitutionality of legislation, its purpose and
effect must be taken into consideration. Both purpose and effect are
relevant in determining constitutionality, either of the unconstitutional
purpose, or unconstitutional effect animated by the object the
legislation intends to achieve.

25 4. Judicial power is derived from the people and shall be exercised by
the courts established under the Constitution in the name of the people
and in conformity with the law and with the values, norms and
aspirations of the people and the courts shall administer substantive
justice without undue regard to 5 technicalities.

**See: P.K Ssemwogere vs. AG Constitutional Appeal No. 1 of 2002 (SC);
Attorney General vs. David Tinyefunza, Constitutional Appeal No.1 of**

5 ***1997(SC); Attorney vs. Salvatori Abuki, Constitutional Appeal No.1 of
1998, 10 Attorney General vs Uganda Law Society, Constitutional
Appeal No.1 of 2006 (SC); Livingstone Okello Okello vs. Attorney
General; Constitutional Petition No. 4 of 2005 (CC) and Article 126 (1)
and (2) (e) of the 1995 Constitution.***

10 **Representation**

Learned Counsel Fred Muwema represented the Petitioners and Ms. Arinaitwe Gorreti, learned Senior State Attorney from the Attorney General's Chambers represented the respondent. I am thankful to them for their able submissions. I need not repeat those submissions in their entirety in this judgment as they
15 were somewhat lengthy but I have distilled therefrom the main points which will be referred to whenever necessary.

At the hearing, the following issues were agreed to for determination by court:

(1) *Whether the act of the Commission of inquiry of issuing an arrest
warrant on the 7th November, 2017 against the First Petitioner
20 resulting in his arrest by the Police on the 8th November, 2017 on
the alleged charge of obstructing the work of, and disregarding the
directives issued by the commission of inquiry was an arbitrary
act done in the abuse of process and was/is ultravires the
mandate of the Commission under Legal Notice No. 2 of 2017, the
25 Commissions of Inquiry Act, Cap 166 and is inconsistent with
Articles 2, 20, 23, 43, 126 and 251 of the Constitution.*

(2) *Whether the act of the Commission of inquiry of issuing an arrest
warrant on the 7th November, 2017 and a detention instruction on*

5 8th November, 2017 all against the First Petitioner resulting in his
arrest and detention by the Police on alleged charges of obstructing
the work of and disregarding the directives issued by the
Commission of Inquiry was done in denial of his right to just and
fair treatment expected from an administrative body and is
10 inconsistent with Articles 2, 20, 23, 28, 43, 44, 126 and 251 of the
Constitution.

(3) Whether the act of the Commission of inquiry of issuing an arrest
warrant on the 7th November, 2017 and a detention instruction on
8th November, 2017 all against the First Petitioner founded on an
15 alleged charge of obstructing the work of, and disregarding the
directives issued by the Commission of Inquiry which does not
constitute a criminal offence contravenes and is inconsistent with
Articles 2, 20, 23, 28, 43, 44, 126 and 251 of the Constitution.

(4) Whether the act of the Commission of Inquiry of investigating land
20 disputes between the Second Petitioner and third parties on its
land comprised in LHR Vol. 947 Fol. 19, Plot 14 Singo Block 437,
LHR Vol. 1193 Fol. 10 Plot 26 Singo Block 272 land at Bukoba
Mubende and LHR Vol. 1702 Fol. 25 Plot 7 Singo Block 291 and
LHR Vol. 953 Fol. 6, Plot Numbers 6, 4, 11 Singo Block 291 land at
25 Kibisi Estate between 11th-14th September, 2017 and adjudicating
upon the said dispute by issuing orders to maintain the status quo
is ultravires the mandate of the Commission under Legal Notice No.
2 of 2017, the Commission of Inquiry Act Cap. 166, amounts to a

5 *usurpation of the judicial powers of the Courts of law and is unlawful deprivation of property contrary to Articles 2, 20, 26, 126, 128, 237 and 251 of the Constitution.*

10 (5) *Whether the act of the Commission of inquiry of issuing an arrest warrant on the 7th November, 2017 and a detention instruction on the 8th November, 2017 without laying a formal charge against the arrestee, the First Petitioner before a competent Court of law as required by law is inconsistent with and contravened (sic) Articles 2, 20, 28, 43, 44, 126, 128 and 251 of the Constitution.*

15 (6) *Whether the act of the Commission of inquiry of issuing an arrest warrant on the 7th November, 2017 and a detention instruction on the 8th November, 2017 which acts by themselves amounted to penalties and sanctions without the authority and direction of the Director of Public Prosecutions as required by S.11 of the Commissions of Inquiry Act Cap 166, contravenes and is consistent (sic) with Articles 2, 20, 43, 120, 126 and 251 of the Constitution.*

20

25 (7) *Whether the act of inciting, aiding and abetting the invasion and/or occupation of the Second Petitioners land Comprised in LHR Vol. 947 Fol. 19, Plot 14 Singo Block 437, LHR Vol. 1193 Fol. 10 Plot 26 Singo Block 272 land at Bukoba Mubende and LHR Vol. 1702 Fol. 25 Plot 7 Singo Block 291 and LHR Vol. 953 Fol. 6, Plot Numbers 6, 4, 11 Singo Block 291 land at Kibisi Estate through issuance of a status quo order and enforcing it by arresting and detaining the First Petitioner, are acts not protected by immunity as they are*

5 *ultravires the mandate of the Commission and they are*
inconsistent with Articles 2, 20, 24, 26, 27, 43 and 251 of the
Constitution.”

10 (8) *Whether this Court should issue a permanent injunction*
against the Respondent, the Commission of Inquiry, the
Uganda Police and or any other Government organ, their
officers, agents or servants restraining them from committing
the acts or omissions complained of herein.

15 (9) *Whether the First petitioner should be granted an order of*
redress of damages for the physical inconvenience, mental
agony, severe harm to his reputation and self-esteem.

 (10) *Whether the Second petitioner should be granted an order of*
redress of damages for having been denied the use of its
land; as well as loss and damage to its business.

20 (11) *Whether the Commissioners of Inquiry should be held*
personally liable for the acts and/or omissions complained
of in the Petition.

 (12) *Whether the petitioners should be awarded the costs of the*
Petition.

25 (13) *Whether there are any other orders the Court may award to*
the petitioners.

The respondent raised a preliminary objection to the Petition on the ground that it disclosed no issues for Constitutional interpretation and should for

5 that reason be dismissed. Counsel for the respondent submitted that the
allegations that the Commission acted ultravires its mandate in issuing arrest
warrants and detention instructions against the first petitioner; and when it
adjudicated on matters affecting the petitioners, were matters which did not
call for constitutional interpretation and should have been addressed by an
10 action in the High Court through Judicial Review. For that reason, she prayed
that the petition be dismissed with costs.

Counsel for the appellant disagreed and submitted that where a person
alleges that any provision of the 1995 Constitution had been contravened by
any act of another, like the petitioners did, those allegations must be listened
15 to and considered by this court. He therefore maintained that the Petition was
properly before this Court.

The jurisdiction of the Constitutional Court is established by Article 137 (1)
of the 1995 Constitution stipulates that the questions which the
Constitutional Court may take cognizance of are only questions involving
20 interpretation of the Constitution. Further Article 137 (3) provides that:

“ 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,

25 *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.”*

5 Article 137 was discussed in ***Ismail Serugo vs. Kampala City Council and Attorney General, Constitutional Appeal No. 0002 of 1998***. The current position of the law was articulated therein, albeit differently in the majority opinions of Justices Wambuzi, Kanyeihamba, Karokora and Kikonyogo. Justice Karokora observed that:

10 ***“Needless to say, the Constitutional Court was created by the framers of the Constitution solely for interpretation of the Constitution vis-à-vis any Act of Parliament or any other law... as spelt out by Article 137 (3) of the Constitution***

Justice Karokora JSC established a distinction between actions for
15 enforcement of human rights and those for interpretation of the Constitution. He had this to say:

20 ***“I must observe that the appellant in the instant case was claiming that his fundamental human rights guaranteed under the Constitution were violated when he was arrested, charged with a non-existent offence, convicted and sentenced to a term of imprisonment. Needless to say that the controversy in the instant case did not revolve around the interpretation of the Constitution vis-à-vis any Act of Parliament or any other law etc. but rather the enforcement of appellant’s fundamental rights and freedoms***
25 ***guaranteed under the Constitution which can be by way of tortious action filed in any of the Courts of competent jurisdiction, seeking general damages for breach of those rights and freedoms.”***

5 In his judgment, Justice Kanyeihamba JSC referred to the earlier decision of the Supreme Court in ***Attorney General vs. Tinyefuza, Constitutional Appeal No. 001 of 1997*** and observed that:

10 *“Nevertheless, when it comes to that Court’s view of the jurisdiction of the Court of Appeal as a Constitutional Court, its decision in that case is that the Constitutional Court had no original jurisdiction merely to enforce rights and freedoms enshrined in the Constitution in isolation to interpreting the Constitution and resolving any dispute as to the meaning of its provisions. The judgment of the majority in that case, (Wambuzi, C.J., Tsekooko, JSC, Karokora, JSC and Kanyeihamba, JSC), is that to be clothed with jurisdiction at all, the Constitutional Court must be petitioned to determine the meaning of any part of the Constitution in addition to whatever remedies are sought from it in the same petition.”*

20 In ***Centre for Health, Human Rights and Development (CEHURD) & 3 Others Vs. Attorney General Constitutional Appeal No 1 of 2013***,

Katureebe CJ. went further when held that that where a person petitions the constitutional court under Article 137(3)(b) for a declaration, the constitutional court is not only authorized to hear such a petition but is
25 equally obliged to resolve issues therein.

In my view, some of the averments by the petitioners require this Court to enforce their rights. The first petitioner is seeking to enforce his right to fair and just treatment before an administrative body. He alleges this was denied

5 by the Land Commission in several instances. Further, he is seeking to enforce his rights to a fair hearing guaranteed under Articles 28 and 44 and right to liberty under Article 23 and the second petitioner seeks to enforce its property rights under Article 26 of the constitution.

The Petitioners allege that the Commission acted *ultravires* its powers when
10 it issued an arrest warrant for the 1st respondent on 7th November, 2017, and a detention instruction on 8th November, 2017. By those allegations, the Petitioners request this Court to review the actions of the Commission as a public body.

Mr. Muwema submitted that the Petitioners were entitled to lodge the present
15 Petition in order to get the pronouncement of Court on the constitutionality of the acts and omissions of the Land Commission of Inquiry. He further submitted that the Commission had in the past disobeyed decisions of the High Court which influenced them to seek reliefs from this court. That in view of how the commission had conducted its business there was need for an
20 authoritative decision from a panel of five Justices of the Constitutional Court to guide on the issues raised in the Petition.

Disobedience of decisions of the High Court, is not per se, a reason to conclude that this Petition should be considered by the Constitutional Court. There must be some act or omission which is alleged to be inconsistent with
25 and/or in contravention of the Constitution for this Court to investigate.

In my view, issues 1 to 11 as framed above, do not call for interpretation of the Constitution, they call for enforcement of rights and judicial review of the

5 acts of the Land Commission of Inquiry. Issues 12 to 13 are remedies arising directly out of issues 1 to 11.

However, the following broad questions underlying this Petition call for Constitutional interpretation:

- 10 (i) Did the Land Commission of Inquiry exercise judicial powers concerning the Petitioners?
- (ii) If so, can a Commission of Inquiry exercise such judicial powers under the 1995 Constitution?
- (iii) Did the Commission of Inquiry exercise prosecutorial powers?
- 15 (iv) If so, can a Commission of Inquiry exercise such prosecutorial powers under the 1995 Constitution?

In order to meet the ends of justice it is prudent to resolve these questions. I therefore find that the Petition is properly before this Court.

Petitioners' submissions.

Mr. Muwema submitted that the Land Commission of Inquiry's acts of
20 adjudicating matters between the petitioners and third parties in regard to the 2nd petitioner's land, was an exercise of judicial power, and was inconsistent with and in contravention of the Constitution because only the Courts of Judicature could exercise judicial power in regard to the 2nd petitioner's land. That Legal Notice No. 2 of 2017 which establishes the Land
25 Commission of Inquiry did not give the Commission powers to make adjudications in land matters, neither was there a Term of Reference under

5 the relevant Legal Notice for the Commission to make adjudications in land matters.

That when the Commission conducted a mediation between the petitioners and third parties, and also made an order akin to an injunction staying the status quo in regard to the 2nd petitioner's land, it was exercising adjudication
10 powers which it did not have. According to counsel, the Commission exercised adjudicative powers without observing the tenets of natural justice which was unconstitutional.

Counsel further submitted that the Land Commission of Inquiry's acts of issuing a warrant of arrest of the 1st petitioner, and thereafter sanctioning the
15 charge of obstructing the work of, and disregarding the directives issued by the Commission, and imposing punishment of detention on the 1st respondent, done without the authorization of the Director of Public Prosecutions (DPP) amounted to an exercise of prosecutorial powers in contravention of Article 120 of the 1995 Constitution. Imposition of the
20 punishment referred to was done in violation of Section 16 of the Commissions of Inquiry Act, Capp. 166 which provides that no proceedings shall be commenced for any penalty by a Commission of Inquiry except by the direction of the Director of Public Prosecutions.

Regarding remedies, Counsel prayed this Court issue a declaration that the
25 Land Commission of Inquiry contravened the constitution when it exercised judicial powers and that a permanent injunction do issue against the Commission restraining it from interfering with the Petitioners' quiet possession of the 2nd petitioner's land. He also asked Court to make a

5 declaration that the Chairperson and the other six members of the
Commission to be held personally liable for the impugned acts against the
Petitioners but later abandoned this prayer.

Respondent's submissions

Ms. Gorreti Arinaitwe, Senior State Attorney, submitted that the Petition
10 disclosed no questions for Constitutional Interpretation and should for that
reason be dismissed. In reply to the contention that the Land Commission of
Inquiry exercised judicial powers or adjudication powers, counsel for the
respondent submitted that there was no such exercise of judicial powers. She
contended that the mediation conducted between the petitioners and the third
15 parties laying claim to the 2nd petitioner's land, at the insistence of the
Commission was a mere administrative measure and was not an exercise of
adjudication powers at all. Counsel contended that the Commission could
carry out activities which are incidental to its Terms of Reference in order to
ensure that it effectively carried out its work. Such incidental activities
20 include carrying out mediations. In reply to the contentions that the Land
Commission of inquiry exercised prosecutorial powers by charging the 1st
respondent without the involvement of the Director of Public Prosecutions,
counsel for the respondent submitted that the 1st petitioner was never
charged at all and there was no need to involve the DPP.

25 She concluded with a prayer that the Court dismisses the Petition with costs
to the respondent, and in the alternative, if the Court finds that the Petition
involves questions for Constitutional interpretation, to find that the
petitioners are not entitled to damages, as prayed for.

5 **Resolution**

I have carefully considered the Petition and all annextures thereto, the Answer to the Petition and all annextures thereto, the submissions for either side, the law and authorities cited as well as those not cited which are relevant in the determination of the present petition.

10 Commissions of Inquiry into various issues covering a wide range of matters have been set up in many countries. In Uganda, the main pieces of legislation touching on Commissions of Inquiry are the 1995 Constitution and the Commissions of Inquiries Act, Cap. 166 (COIA). The COIA stipulates that a Commission of Inquiry may be appointed, inter alia, to inquire into any matter
15 in which an inquiry would be necessary for the public welfare. (See Section 1 (1)).

Each Commission of Inquiry has its specific Terms of Reference. The Terms of Reference of the Land Commission of Inquiry have already been enumerated earlier as laid out in Legal Notice No. 2 of 2017, but of specific
20 relevance to this Petition are the following:

- (a) *to investigate and inquire into the law, processes and procedures by which land is administered and registered in Uganda;*
- (f) *to identify, investigate and inquire into the effectiveness of the dispute resolution mechanisms available to persons involved in*
25 *land disputes;*
- (g) *to inquire into any other matter connected with or incidental to the matters aforesaid and make recommendations-*

- 5 (i) *for improving the efficiency and effectiveness of the law,
policies and processes of land acquisition, land
administration, land management and land registration in
Uganda and proposing necessary reforms; and*
- 10 (ii) *pertaining to civil, administrative and criminal sanctions
against persons found culpable for wrong doing.*

It is apparent that the Terms of Reference of the Land Commission of Inquiry require the Commission to carryout investigations or inquiries into various themes in regard to land ownership, registration, administration and dispute resolution in land ownership.

- 15 Generally, the COIA, Cap. 166 gives Commissions of Inquiry powers of the High Court to summon witnesses, to call for the production of books, plans and documents and to examine witnesses and parties concerned on oath. (See: Section 9 (1) of the COIA). They may also take evidence, whether oral evidence or evidence in affidavits and interrogatories. (See Section 9 (2)).
- 20 Specifically, under Section 9 (4) of the same Act inquiries by the Commissions are deemed to be Judicial Proceedings for the purposes of Sections 94 and 99 of the Penal Code Act. Therefore, a person who commits perjury, subornation of perjury, or who fabricates evidence while appearing before a Commission of Inquiry commits criminal offences and would attract punishment.
- 25 Furthermore, persons who are summoned to attend a hearing of the Commission, or to produce documents may not fail to do so or they would be liable to pay a fine. (See Section 11 (3) of the COIA).

5 As to whether the Commission of Inquiry exercised judicial power is essentially a question of fact which has to be proved by evidence adduced by the parties. Article 257 (1) of the 1995 Constitution provides that judicial power means the power to dispense justice among persons and between persons and the State under the laws of Uganda. Further still, Black's Law
10 Dictionary, 8th Edition defines judicial power as follows:

“Judicial power. 1. The authority vested in courts and judges to hear and decide cases and to make binding judgments on them; the power to construe and apply the law when controversies arise over what has been done or not done under it.”

15 This Court takes Judicial notice of the acts done by Courts in exercise of judicial power such as hearing of cases of either criminal or civil nature; and thereafter adjudicating on the rights, liabilities and responsibilities of those involved.

The case for the petitioners was that the Land Commission of Inquiry
20 exercised judicial power when it should not have. The petitioners contended that that exercise of judicial powers is a preserve of only the Courts of Judicature as stipulated by Article 126 (1) of the Constitution. The petitioners gave the following instances when the Land Commission of Inquiry exercised judicial powers:

25 Firstly, the Commission initiated mediation processes between the petitioners and third parties in order to resolve conflict which had arisen over the 2nd petitioner's land.

5 Secondly, the commission gave a directive for preservation of the status quo on the 2nd petitioner's land. The status quo being that the third parties on the 2nd petitioner's land, who were trespassers thereon, had to remain there. The petitioners also allege that other unknown people invaded the 2nd petitioner's land acting on the "preservation of status quo order" of the Commission.

10 The respondent answered that the Land Commission of inquiry had not, by any act or omission violated or infringed any part of the Constitution. In the affidavit in support of the Answer to the Petition, Dr. Douglas Singiza, Assistant Secretary to the Land Commission of Inquiry, states as follows:

- 15 "6. That I know that on 20th July, 2017, the Commission received Complaint No LI/640/2017 from a group of five people representing 100 households led by Wilson Mugabi, whose claim was that they were bona fide occupants of land at Bukoba, Kasawo, Nalutuntu, Kasanda county, Mubende district.
- 20 7. That I know that the complainants stated that their land was taken from them improperly or fraudulently by the 1st petitioner, Mr. Alam Abid and or his agents's (sic). They further alleged that Mr. Abid Alam and or his agents on several occasions violently and illegally evicted them whereby some people had lost their lives. (Copy details of the complaint is hereto attached and marked as
- 25 annexure "A")
8. That I know that the aforementioned complaint fell squarely within the terms of reference of the Commission of Inquiry, specifically to investigate and inquire into the law, processes and procedures by

5 *which land is administered and registered in Uganda and the effectiveness of dispute resolution mechanisms available to persons involved in land disputes and so the Commission of inquiry embarked on inquiring into the matter;*

9. *That I know that the Investigators of the Commission of Inquiry*
10 *visited the scene and met with several witnesses who gave various accounts of how the dispute over the ownership of this land has progressed over time.”*

Dr. Singiza’s affidavit then continues by laying out details of the testimonies of several witnesses during the hearing conducted at the scene (2nd
15 respondent’s land). He then proceeds to state as follows:

11. *That I know that as part of information gathering, the Commission of Inquiry did make a visit to the locus in quo in Bukoba on the 11th day of September, 2017 where they interacted with representatives from both sides of the conflict and area leaders.*

20 12. *That I know that while at the locus in quo, the Commission of Inquiry found a group of complainants who showed to the Commissioners what looked like an internally displaced person’s camp in which they have lived since 2015. (Copy of photographs of locus in quo visit are hereto attached and marked as annexure*
25 *“B”).*

13. *That I know that the complainants stated that they were resettled into their land by Government of Uganda.*

- 5 14. *That I further know that the complainants at Bukoba stated that some of them were traditional bibanja holders while others claimed to be descendants/beneficiaries of the Estates of 2nd World War veterans, whose claim of right was on grounds that the veterans had been given land by Crown Government in 1950S (sic).*
- 10 15. *That I know that the Commission of inquiry was shown what appeared to be debris of destroyed settlements from which the complainants were to have been evicted. (sic)*
- 15 16. *That I know that the Commission of Inquiry referred to the office of the DPP reports by the complainants that in the course of a violent eviction a number of persons were murdered but no one had been arraigned before Court, and instead some parties to the complaint had been prosecuted.*
- 20 17. *That I further know that from the 11th to the 14th of September 2017 the Commission of inquiry conducted public hearings in Mubende and a number of witnesses were summoned and appeared and gave their evidence including the 1st Petitioner, Mr. Abid Alarm (sic). (Copies of extract from the transcript evidence of the 1st petitioner is hereto attached and marked as annexure "C")*
- 25 18. *That I know that during the public hearing in Mubende, both parties to the conflict expressed the wish to negotiate and reach an amicable solution to the dispute, a proposal that the Commission was agreeable to.*

- 5 19. *That I know that the process of mediation commenced as shown
by the email communication trail and a draft agreement to mediate.
(Copy of the email and draft agreement is hereto attached and
marked as annexure "D" and "E" respectively).*
- 10 20. *That I know that during the said public hearing, both parties were
directed to keep peace so as to ensure smooth inquiries, a decision
both parties pledge to abide by.*
- 15 21. *That I further know that the Commission of Inquiry received
information on 6th November, 2017 that the 1st Petitioner, Mr. Abid
Alam had breached the peace by allegedly leading further
evictions. (See copy attached and marked as annexure F".*
22. *That following the violation of the mediation agreement by the 1st
Petitioner which had the effect of obstructing the work of the
Commission, the Commission caused the apprehension of the 1st
Petitioner and handed him over to police.*
- 20 23. *That I know that the 1st Petitioner, Mr. Abid Alam was handed over
to the Uganda Police Force/Director of Public Prosecutions for
further management of the allegations against him.*

Paragraphs 6 to 18 of the affidavit in support of the Answer to the Petition indicate that the Commission was carrying out its mandate of inquiring into
25 land registration, administration as well as the dispute resolution mechanisms in land matters. I accept the averments in paragraph 8 of the affidavit in support of the Answer that the acts in those paragraphs fell within the Terms of Reference of the Land Commission of Inquiry.

5 However, the Commission issued an order directing the parties to maintain
the status quo and when the 1st Petitioner failed to abide by the order, the
Commission caused his arrest.

In the affidavit in support of the Petition, the 1st Petitioner avers;

10 18. That in a bizarre turn of events, the commission of inquiry issued
a

Warrant of arrest against me on the 7th November, 2017 requiring
the

Police to apprehend and cause him to appear for an interview at
15 the

Commission in respect of charges of obstructing the work of and
Disregarding directives issued by the commission of inquiry. A copy
The warrant of arrest is attached as annexure L.

19. That on the 8th November 2017, I appeared for the interview at the
20 Commission of Inquiry offices but he was instead arrested and
Detained by the Police at wandegya Police station under a
Detention instruction issued by the commission. A copy of the
Detention instruction is attached as annexure M.

20. That I was held by the Police from 10.00 am until I was released
25 On Police bond at 11.00pm under the direction of the commission

5

A copy of the Police bond form and the undertaking is attached

As group annexture N

21. That while at the Police station, I was compelled to incriminate

Myself for wrong doing by writing an undertaking as a condition

For my release that I would not interfere with the status quo on my

10

Land. A copy of the undertaking is attached hereto as annexture O

In paragraphs 12 and 13 of the Affidavit in support of the Petition the 1st Petitioner avers that the commission initiated a mediation of the dispute between the parties and gave a directive for preservation of the status quo by the parties pending finalization of the commission's investigations. That the status quo directive meant that people who were illegally on the land remained on the land.

15

The issuance of an injunctive order affecting the petitioners' proprietary rights was an exercise of judicial power in contravention of Article 126 of the Constitution which grants such power exclusively to the courts established under the constitution. The Article provides;

20

126. Exercise of Judicial power

(1) Judicial power is derived from the people and shall be exercised by the courts established under this constitution in the name of the People and in conformity with law and with the values, norms and aspirations of the people.

25

5 The courts recognized by the constitution are the supreme court, court
appeal, high court and other subordinate courts but not commissions of
inquiry.

The constitution gives primacy to the people of Uganda to determine the
manner in which they will be governed. The people have the ultimate power,
10 and a social contract with the Government, in which they give it power and it
in turn agrees to govern them through their will and consent in accordance
with the provisions of the Constitution. Article 1 provides that:

1. Sovereignty of the people.

15 ***(1) All power belongs to the people who shall exercise their
sovereignty in accordance with this Constitution.***

***(2) Without limiting the effect of clause (1) of this article, all
authority in the State emanates from the people of Uganda; and
the people shall be governed through their will and consent.***

20 ***(3) All power and authority of Government and its organs derive
from this Constitution, which in turn derives its authority from
the people who consent to be governed in accordance with this
Constitution.***

25 ***(4) The people shall express their will and consent on who shall
govern them and how they should be governed, through regular,
free and fair elections of their representatives or through
referenda.***

5 Article 2 of the Constitution which reinforces the supremacy of the
Constitution and provides that

2. Supremacy of the Constitution.

***(1) This Constitution is the supreme law of Uganda and shall have
binding force on all authorities and persons throughout Uganda.***

10 ***(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.***

In my view, the people gave their consent solely to the Courts pertaining to
15 exercise of Judicial Power. Article 126 contains no qualifiers and is emphatic
in its meaning. A Commission of Inquiry which exercises Judicial Power acts
way beyond its powers and in blatant usurpation of the powers of the Court
Section 9 of the Commissions of Inquiries Act, Cap. 166 provides that:

Power to summon and examine witnesses.

20 ***(1) Commissioners acting under this Act shall have the powers of
the High Court to summon witnesses, to call for the production of
books, plans and documents and to examine witnesses and
parties concerned on oath.***

25 ***(2) Where the commissioners consider it desirable for the purpose
of avoiding expense or delay or for any other special reason, they
may receive evidence by affidavit or administer interrogatories***

5 ***and require the person to whom the interrogatories are administered to make a full and true reply to the interrogatories.***

(3) Summonses for the attendance of witnesses or other persons or the production of documents may be in the form given in the Second Schedule to this Act, and shall be signed by one of the
10 ***commissioners or by their secretary, and oaths and affirmations may be administered by the secretary.***

(4) An inquiry under this Act shall be deemed to be a judicial proceeding for the purposes of sections 94 and 99 of the Penal Code Act.

15 It was suggested by the respondent in the answer to the petition that a Commission of Inquiry had powers under the above provision to cause attendance of witnesses as well as to summon them. This is true, because it is necessary for witnesses to give evidence to the Commissions of Inquiry for them to gather evidence and conclude their investigations.

20 However, the power to summon witnesses and cause them to attend to the Commissions of Inquiry has to be understood in its proper context. This powers has been referred to as “quasi-judicial”. According to the *Merriam-Webster Dictionary (2019)*, “quasi” is defined as having some resemblance usually by possession of certain attributes. The respondent contends that the
25 Land Commission of Inquiry has judicial powers which have a resemblance with those vested in Courts of Judicature.

5 While I agree that the Land Commission of Inquiry has quasi-judicial powers, these powers cannot be equated to the powers of the courts established by the constitution.

What entails or amounts to quasi-judicial power is neither defined in the Constitution nor the Commissions of Inquiry Act, Cap. 166. Oxford Dictionary
10 of Law at page 402 defines Quasi-Judicial as;

Describing a function that resembles the judicial function in that it involves deciding a dispute and ascertaining the facts and any relevant law, but differs in that it depends ultimately on the exercise of an executive discretion rather than the application of law.

15 The Constitution refers to exercise of judicial powers and as has been concluded earlier, such powers can only be exercised by Courts of Judicature, and not Commissions of Inquiry.

As noted earlier, Section 9 of the COIA, Cap. 166 stipulates that the Commissions of Inquiry shall have the powers of the High Court to summon
20 witnesses, to call for the production of books, plans and documents and to examine witnesses and parties concerned on oath.

In my view the placing of repercussions on a person who fails to comply with witness summons is an exercise of judicial power. Courts have the discretion to issue a warrant for the arrest of a person in such circumstances. An
25 example Order 16 rule 10 of the Civil Procedure Rules, S.I 71-1 which sets an elaborate procedure of how a witness who fails to comply with summons is treated.

5 When the Land Commission of Inquiry issued a warrant of arrest of the 1st
petitioner for obstructing its work and disregarding its directives, it exercised
judicial power. The Constitution stipulates that such powers can only be
exercised by a Court of Judicature.

The Land Commission of Inquiry cannot hide behind the provisions of the
10 COIA, Cap. 166 to justify its exercise of judicial power. This is because the
said Act has to be measured against the Constitution, which is the Supreme
Law of the Land. If any law is inconsistent with any of the provisions of the
Constitution, the Constitution shall prevail, and that other law shall, to the
extent of the inconsistency, be void. (See: Article 2 (2) of the 1995
15 Constitution).

Moreover, the Commissions of Inquiry Act, Cap. 166 is part of the existing
law, having commenced on 15 August, 1914. Under Article 274 (2), existing
law means the written and unwritten law of Uganda or any part of it as existed
immediately before the coming into force of the 1995 Constitution, including
20 any Act of Parliament or Statute or statutory instrument enacted or made
before that date which is to come into force on or after that date. Such existing
law has to be applied with the necessary modifications to bring it into
conformity with the 1995 Constitution. If construed with the necessary
modifications, it would be clear that notwithstanding anything in the
25 Commissions of Inquiry Act, Cap. 166, a Commission of Inquiry may not
exercise Judicial Powers including enforcing the compliance with witness
summons as stated above.

5 Therefore the acts of the Land Commission of Inquiry of exercising judicial power in the manner discussed above is inconsistent with and in contravention of Articles 2 (2) and 126 (1) of the Constitution.

As to whether the Land Commission of Inquiry exercised prosecutorial powers it was alleged by the 1st petitioner, in his affidavit in support of the Petition
10 that the Land Commission Inquiry had exercised prosecutorial powers when it ordered for his detention on allegations of obstructing the work of the Commission. The petitioners contended that the Director of Public Prosecutions had not sanctioned the Commission's moves and that the Commission had acted unconstitutionally.

15 To put it in a simple way, prosecutorial powers are those commonly exercised by the Prosecutor in criminal matters. According to the Black's Law, 8th Edition Prosecutor is defined as:

A legal officer who represents the state or federal government in criminal proceedings.

20 Criminal Proceedings are defined in the same Dictionary as follows:

A proceeding instituted to determine a person's guilt or innocence or to set a convicted person's punishment; a criminal hearing or trial.

In Uganda, the Director of Public Prosecutions bears primary responsibility
25 for exercising prosecutorial powers. The DPP occupies a Constitutional Office with various roles as stipulated under Article 120 of the 1995 which is reproduced below:

5 ***“120. Director of Public Prosecutions***

1. There shall be a Director of Public Prosecutions appointed by the President on the recommendation of the Public Service Commission and with the approval of Parliament.

10 ***2. A person is not qualified to be appointed Director of Public Prosecutions unless he or she is qualified to be appointed a Judge of the High Court.***

3. The functions of the Director of Public Prosecutions are the following

15 ***a. to direct the police to investigate any information of a criminal nature and to report to him or her expeditiously;***

b. to institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial;

20 ***c. to take over and continue any criminal proceedings instituted by any other person or authority;***

d. to discontinue at any stage before judgement is delivered, any criminal proceedings to which this article relates, instituted by himself or herself or any other person or authority; except that

25 ***the Director of Public Prosecutions shall not discontinue any proceedings commenced by another person or authority except with the consent of the court.***

5 **4. The functions conferred on the Director of Public Prosecutions under clause (3) of this article**

a. may, in the case of the functions under paragraphs (a), (b) and (c) of clause (3) of this article, be exercised by him or her in person or by officers authorized by him or her in accordance with general or specified instructions; and

b. shall, in the case of the functions under paragraph (d) of that clause, be exercised by him or her exclusively.

5. **In exercising his or her powers under this article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of legal process.**

6. **In the exercise of the functions conferred on him or her by this article, the Director of Public Prosecutions shall not be subject to the direction or control of any person or authority.**

7. **The Director of Public Prosecutions shall have the same terms and conditions of service as those of a High Court Judge.”**

It may be stated that Prosecutorial powers are those contained in Article 120 (3) above and include directing the police to carry out investigations and make a report, institution, taking over and discontinuance of criminal proceedings in a competent Court. The petitioners alleged that the Land Commission of Inquiry caused the arrest and detention of the first petitioner yet the DPP had not sanctioned the same. Even assuming that were true, it is not evidence of

5 exercise of prosecutorial powers which I referred to earlier. The power to order arrest and detention is vested in the Courts of law and not the DPP. So any infractions in that regard relate to exercise of Judicial rather than Prosecutorial powers.

In my view, the Land Commission of Inquiry did not exercise Prosecutorial
10 powers as alleged by the Petitioners.

Article 137 (3) (b) of the Constitution provides that where the Constitutional Court finds that acts done by any person or authority as alleged in a Petition are inconsistent with or in contravention of any provision of the Constitution, it may issue a declaration to that effect

15 In the result, the Petition partly succeeds with the following declarations and orders;

1. The acts of the Land Commission of inquiry of exercising judicial power by issuing orders preserving the status quo on the 2nd petitioner's land and issuing a warrant of arrest of the 1st petitioner for failing to comply
20 with the Commission's directives and obstructing its work, were in contravention of Articles 2 (2) and 126 (1) of the Constitution.
2. The act of the Land Commission of inquiry in directing and or ordering the arrest of the 1st petitioner on account of his violation of the mediation settlement initiated and endorsed by the Land Commission
25 of inquiry violated the petitioner's right to land, liberty, fair hearing etc.
3. The Land Commission of inquiry did not exercise prosecution powers when they issued a warrant of arrest against the 1st petitioner.

4. All disputes relating to ownership and or use and or access to land emanating from the Land Act, the registration of Titles Act or any other law where such a dispute is not resolved amicably or administratively can only be determined by a Court of law established under Article 129 of the Constitution.

5. A permanent injunction do issue restraining the Land Commission of Inquiry from exercising judicial powers.

6. Costs of the Petition are awarded to the Petitioners.

It is so ordered

It is so ordered

Dated at Kampala this 1st day of Sept 2020


Cheborion Barishaki

JUSTICE OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CORAM: OWINY - DOLLO, DCJ; KAKURU, EGONDA-NTENDE, CHEBORION
BARISHAKI, & MADRAMA IZAMA JJA/JJCC.

CONSTITUTIONAL PETITION No. 43 OF 2017

BETWEEN

1. ABID ALAM }

2. MITYANA FARM GROUP ENTERPRISES LTD.} :::::::::::::: PETITIONERS

AND

ATTORNEY GENERAL } RESPONDENT

JUDGMENT OF OWINY - DOLLO; DCJ

I have had the benefit of reading, in draft, the judgment of my learned
20 brother Cheborion Barishaki JA/JCC. I concur with his reasoning and
conclusions that this petition succeeds in part; and have nothing useful
to add. Since Kakuru and Egonda-Ntende JJA/JJCC are also in
agreement, orders are hereby issued in the terms proposed by
Cheborion Barishaki in his judgment.

25 Dated, and signed at Kampala this 10th day of Sept 2020


Alfonse C. Owiny - Dollo

Alfonse C. Owiny - Dollo

Deputy Chief Justice

1

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 043 OF 2017

1. ABID ALAM
2. MITYANA FARM GROUP ENTERPRISES LTD.....PETITIONERS

VERSUS

ATTORNEY GENERAL.....RESPONDENT

CORAM: Hon. Mr. Justice Alfonse C. Owiny-Dollo, DCJ
Hon. Mr. Justice Kenneth Kakuru, JA/ JCC
Hon. Mr. Justice F.M.S Egonda-Ntende, JA/ JCC
Hon. Mr. Justice Cheborion Barishaki, JA/ JCC
Hon. Mr. Justice Christopher Madrama, JA/JCC


JUDGMENT OF JUSTICE KENNETH KAKURU, JA/ JCC

I have had the benefit of reading in draft the Judgment of my learned brother Cheborion Barishaki, JA/ JCC.

I agree with him that this petition ought to succeed for the reasons he has ably set out in his Judgment.

I have nothing useful to add.

Dated at Kampala this 1st **day of** Sept **2020.**


.....

Kenneth Kakuru
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[Coram: Owiny-Dollo, DCJ, Kakuru, Egonda-Ntende, Cheborion & Madrama, JJCC]

CONSTITUTIONAL PETITION NO. 0043 OF 2017

BETWEEN

Abid Alam

Mityana Farm Group Enterprises Ltd

Petitioners


AND

Attorney General=====Respondent

Judgment of Fredrick Egonda-Ntende, JA

I have had the opportunity of reading in draft the Judgment of my brother, Barishaki Cheborion, JCC. I agree with it and have nothing useful to add.

Dated, signed, and delivered at Kampala this ^{1st} day of ^{Sept} 2020


Fredrick Egonda-Ntende
Justice of Appeal

5

THE REPUBLIC OF UGANDA,

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

*(Coram: Owiny- Dollo, DCJ, Kakuru, Egonda-Ntende, Cheborion, Madrama,
JJA / JJCC)*

CONSTITUTIONAL PETITION NO 0043 OF 2017

10

1. ABID ALAM}

2. MITYANA FARM GROUP ENTERPRISES LTD}PETITIONERS

ATTORNEY GENERAL}RESPONDENT

15

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA

I have read in draft the lead judgment of Hon. Justice Cheborion Barishaki, JA/JCC and I agree with his summary of the relevant facts, analysis of the issues disclosed in the petition and answer to the petition.

20 While I agree with the resolutions of the issues in the petition, my judgment is that the matter could only be handled by the High Court as there is no question as to interpretation of the Constitution in terms of Article 137 (1) of the Constitution which arises. I therefore hold that this court has no jurisdiction in the matter and would strike out the petition on the ground of jurisdiction alone for the reasons which follow below.

25 I agree with the facts set out in the lead judgment of Honourable Justice Cheborion Barishaki but for purposes of this Judgment I set out the allegations in the petition as follows:

*Decision of Hon. Mr. Justice Christopher Madrama Izama. Final judgment. 7.3.2020. Security 2020 style XTYPHIC COURT OF APPEAL
Opifoleni*

- 5 1. The act of the Commission of Inquiry of issuing an arrest warrant on 7th
November, 2017 against the 1st petition resulting in his arrest by the
police on 8th November, 2017 on the alleged charge of obstructing the
work of, and disregarding the directives issued by the Commission of
Inquiry was an arbitrary act done in the abuse of process and was/is
10 ultra vires the mandate of the Commission and Legal Notice No. 2 of
2017, the Commission of Inquiry Act, Cap 166 and is inconsistent with
articles 2, 20, 23, 43, 126 and 251 of the Constitution.
- 15 2. The act of the Commission of Inquiry of issuing an arrest warrant on 7th
November, 2017 and a detention instruction on 8th November, 2017 all
against the 1st petitioner resulting in his arrest and detention by the
police on alleged charges of obstructing the work of and disregarding
the directives issued by the Commission of Inquiry was done in denial
of his right to just and fair treatment expected from an administrative
body and is inconsistent with articles 2, 20, 23, 28, 43, 44, 126 and 251
20 of the Constitution.
- 25 3. The act of the Commission of Inquiry of issuing an arrest warrant on 7th
November, 2017 and a detention instruction on 8th November, 2017 all
against the 1st petitioner founded on an alleged charge of obstructing
the work of, and disregarding the directives issued by the Commission
of Inquiry which does not constitute a criminal offence contravenes and
is inconsistent with articles 2, 20, 23, 28, 43, 44, 126 and 251 of the
Constitution.
- 30 4. The act of the Commission of Inquiry of investigating land disputes
between the 2nd petitioner and 3rd parties on its land comprised in LHR
Vol. 947 Folio 19, Plot 14 Singe Block 437... (Describes all the relevant
properties) between 11th – 14th September, 2017 and adjudicating
upon the said dispute by issuing orders to maintain the status quo is
ultra vires the mandate of the Commission and Legal Notice No 2 of

2017, the Commission of Inquiry Act Cap 166, amounts to a usurpation of judicial powers of the courts of law and is unlawful deprivation of property contrary to articles 2, 20, 26, 126, 128, 237 and 251 of the Constitution.

5. The act of the Commission of Inquiry of issuing an arrest warrant on 7th November, 2017 and a detention instruction on 8th November, 2017 without laying a formal charge against the arrestee, the 1st petitioner before a competent court of law as required by law is inconsistent with and contravened (sic) articles 2, 20, 28, 43, 44, 126, 128 and 251 of the Constitution.

6. The act of the Commission of Inquiry of issuing an arrest warrant on 7th November 2017 and a detention instruction on 8th November, 2017, which acts by themselves amounted to penalties and sanctions without authority and direction of the Director of Public Prosecutions as required by section 11 of the Commission of Inquiry Act Cap 166, contravenes and is inconsistent (sic) with articles 2, 20, 43, 120, 126 and 251 of the Constitution.

7. The act of inciting, aiding and abetting the invasion and/or occupation of the 2nd petitioner's land comprised in... (Describes the various properties) through issuance of a status quo order and enforcing it by arresting and detaining the 1st petitioner are acts not protected by immunity as they are ultra-virus the mandate of the Commission as they are inconsistent with articles 2, 20, 24, 26, 27, 43 and 251 of the Constitution.

Noteworthy is the fact that the petitioners also seek consequential orders of a permanent injunction and redress by way of damages and other declarations.

5 It is further noteworthy that the petitioners allege *inter alia* that the acts of
the Commission of Inquiry are *ultra vires* their mandate under the
Commission of Inquiry Act. Obviously, what is *ultra vires* the mandate of the
Commission of Inquiry under the Commission of Inquiry Act is a matter that
falls within the jurisdiction of the High Court since it does not call for
10 interpretation of the Constitution. The acts complained about include the
issuing of an arrest warrant on 7th November, 2017 and the detention
instruction on 8th November, 2017. Those acts complained of cover
paragraphs 1, 2, 3, of the petition. Similarly, the petitioners complain about
the act of the Commission of Inquiry of investigating land disputes between
15 the petitioner and 3rd parties and adjudicating upon the dispute by issuing
orders to maintain the status quo *ultra vires* the mandate of the Commission
under Legal Notice No 2 of 2017 in paragraph 4 of the petition.

In paragraph 5 of the petition the petitioners complain about the
Commission of Inquiry issuing an arrest warrant on 7th of November, 2017
20 and a detention instruction on 8th November, 2017 without laying a formal
charge against the arrestee. In paragraph 6 the petitioners complain about
the same arrest warrant and detention instruction which they claim amounts
to penalties and sanctions without authority and direction of the Director of
Public Prosecutions in terms of section 11 of the Commission of Inquiry Act.
25 Lastly, in paragraph 7 of the petition, the petitioners complain about the act
of inciting, aiding and abetting the invasion or occupation of the 2nd
petitioner's land which is described therein and indicate that the
Commissioners are not immune from due process.

In my judgement all the above grounds are matters that fall within the
30 jurisdiction of the High Court and no question for interpretation of the
Constitution is disclosed.



5 What is the jurisdiction of this court under article 137 (1) of the Constitution of the Republic of Uganda?

The petitioners in this petition do not raise any controversy about the meaning of any of the articles of the Constitution which they allege were infringed by issuing of an arrest warrant and detention instructions. Secondly,
10 the act of inciting, aiding and abetting the invasion or occupation of the 2nd petitioner's land by issuing a *status quo* order and enforcing it by arresting and detaining the 1st petitioner is included in the acts which they assert is *ultra vires* the mandate of the Commission under the Commission of Inquiry Act.

15 The jurisdiction of the Constitutional Court shall only be invoked where there is a question as to interpretation of the Constitution in terms of article 137 (1) of the Constitution. Article 137 (1) of the Constitution confers exclusive jurisdiction on the Constitutional Court and in mandatory language. The head note of article 137 reads:

20 Questions as to the interpretation of the Constitution.

Article 137 (1) of the Constitution of the Republic of Uganda stipulates that:

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

Article 137 (1) and (2) of the Constitution not only provide for what the
25 jurisdiction of the Constitutional Court is in terms of the subject matter it is to adjudicate upon, but also defines the quorum of the Court of Appeal for purposes of being constituted into a Constitutional Court.

The key phrase in Article 137 (1) of the Constitution is "*a question as to interpretation*". Where there is no question as to interpretation of the
30 Constitution, the Constitutional Court has no jurisdiction to entertain the petition. It is therefore pivotal to define what is meant by "*question as to*

5 *interpretation of the Constitution".* In my judgment the jurisdiction of the Constitutional Court can only be exercised where there is a petition or a reference in which the issue that arises is a doubt or dispute about the meaning of an Article or Articles i.e. *a question as to interpretation*. Secondly, courts of competent jurisdiction are the primary courts which enforce
10 fundamental rights and freedoms under article 50 (1) of the Constitution. They are also courts which ensure that the executive authority or any other person adheres to the basic principles of natural justice inclusive of administrative law principles such as acting within the jurisdiction conferred by an Act of Parliament. This is administrative law may not necessarily include
15 a matter for enforcement of fundamental rights and freedoms under article 50 of the Constitution of the Republic of Uganda also enforceable by courts of competent jurisdiction.

Thirdly, a cause of action is defined by Article 137 (3) if there is a question as to interpretation involved as stipulated by article 137 (1) of the Constitution
20 of the Republic of Uganda. Article 137 (3) stipulates that a petition shall include a necessary allegation or allegations that an act, omission or law is inconsistent with an Article or Articles of the Constitution. Such an allegation does not necessarily confer jurisdiction on the Constitutional Court because it may not necessarily have any question or questions as to interpretation of
25 the Constitution. For instance, a petitioner may allege that his fundamental rights and freedoms have been infringed contrary to the Bill of Rights which has several articles that are enforced by courts of competent jurisdiction under article 50 of the Constitution.

The Supreme Court in **Ismail Serugo v Attorney General and another Constitutional Appeal No. 2 of 1998** and the judgments of Mulenga JSC, Kanyeihamba JSC and Wambuzi CJ clearly held that it is not sufficient to only
30 allege that a provision of the Constitution has been infringed. The petitioner

5 must show that there is a question as to interpretation of the Constitution which is required to be adjudicated upon.

I emphasize the phrase used under article 137 of the Constitution of "*a question as to interpretation of the Constitution*" and my understanding of the phrase is that the word '*question*' used in Article 137 (1) means
10 "*controversy*" or imports the meaning of an "arguable issue or question" and it means a genuine dispute about interpretation of the Constitution that the Constitutional Court is called upon to interpret. If the word "*question*" under Article 137 (1) should be read as meaning "*controversy*" and the controversy in that context is about interpretation. This logically means that the
15 jurisdiction of the Constitutional Court is restricted to only determine petitions or references on a controversy or controversies about the meaning of a provision of the Constitution.

In any case, the High Court as a court of competent jurisdiction with its unlimited jurisdiction can interpret any provision of the Constitution and
20 enforce it unless or until there is a dispute about the meaning thereof. In that regard, all judicial officers take a judicial oath to uphold the Constitution and the laws of Uganda as established there under and can only do so through interpretation of the laws. The distinction is that they do not handle disputes or questions as to interpretation of the Constitution.

25 I have set out below the whole of Article 137 of the Constitution for ease of reference:

- (1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.
- (2) When sitting as a Constitutional Court, the Court of Appeal shall consist of
30 a bench of five members of that court.
- (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



- 5 (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 (4) Where upon determination of the petition under clause (3) of this Article the Constitutional Court considers that there is need for redress in addition to the declaration sought, the Constitutional Court may—
- (a) grant an order of redress; or
- (b) refer the matter to the High Court to investigate and determine the appropriate redress.
- 15 (5) Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a field court martial, the court—
- (a) may, if it is of the opinion that the question involves a substantial question of law; and
- 20 (b) shall, if any party to the proceedings requests it to do so, refer the question to the Constitutional Court for decision in accordance with clause (1) of this Article.
- (6) Where any question is referred to the Constitutional Court under clause (5) of this Article, the Constitutional Court shall give its decision on the question, and
- 25 the court in which the question arises shall dispose of the case in accordance with that decision.
- (7) Upon a petition being made or a question being referred under this Article, the Court of Appeal shall proceed to hear and determine the petition as soon as possible and may, for that purpose, suspend any other matter pending before it.
- 30 The Constitutional Court and the Supreme Court of Uganda have variously considered the question of what jurisdiction the Constitutional Court has. In **Ismail Serugo v Kampala City Council & Attorney General; Constitutional Appeal No. 2 of 1998** Mulenga JSC dealt with the issue of whether the jurisdiction issue can be raised on the basis of the petition or
- 35 whether evidence should be considered first. He distinguished between cases falling under Order 7 rule 11 of the Civil Procedure Rules and Order 6 rule

5 29. The issue was whether the pleadings are struck out for not disclosing a
cause of action or whether the suit was not maintainable on a point of law.
Mulenga JSC relied on **Nurdin Ali Dewji & others v G.M.M Meghji & Co.
and Others (1953) 20 EACA 132** a case in which there was criticism of the
trial judge in that case for not making a distinction between the rejection of
10 a plaint under Order 7 rule 11 of the Civil Procedure Rules and dismissal of a
suit on an issue of law under order 6 rule 29. Mulenga JSC noted that in
Ismail Serugo (supra) the petition was dismissed not for any defect inherent
in the petition but for not disclosing a cause of action. In line with his decision
a petition discloses a cause of action where it complies with Article 137 (3) of
15 the Constitution. To disclose a cause of action, it is not essential for a
petitioner to be a person aggrieved. It is not essential for the petitioner's
rights to have been violated by the alleged inconsistency or contravention of
the Constitution for there to be a cause of action. Mulenga JSC held that it
was proper for the petition to have been dismissed under Order 6 rule 29 of
20 the Civil Procedure Rules on a point of law rather than having it rejected
under Order 7 rule 11 of the CPR on the basis of pleadings only. Mulenga
JSC considered the issue of jurisdiction separately.

A critical examination of Article 137 (3) of the Constitution is reflected in the
other judgments in **Ismail Serugo v Kampala City Council & Attorney
25 General** (supra) which express the need to show that apart from showing
infringement of a provision of the constitution (i.e. under article 137 (3)) the
Petition must further show that a question for interpretation of the
Constitution arises before the Constitutional Court has jurisdiction.

Article 137 (3) only provides for what shall be alleged in a petition but does
30 not necessarily deal with jurisdiction of the Constitutional Court only
conferred by Article 137 (1) thereof. Article 137 (1) of the Constitution of the
Republic of Uganda is the primary article that confers jurisdiction on the
Constitutional Court. This is further illustrated by the decision of

Kanyeihamba JSC in **Ismail Serugo v Kampala City Council & Attorney General** (supra) in his judgment where he unambiguously held that the question of jurisdiction should be distinguished from that of cause of action in the following words:

However, I am constrained to comment very briefly on some other issues raised by the pleadings in this appeal. In my opinion, the question of cause of action must be distinguished from the matter of jurisdiction. The court may have jurisdiction while the plaintiff lacks a cause or a reasonable cause of action and vice versa.

In other words, a plaintiff may have a perfectly legitimate and reasonable cause but the court before which the plaintiffs filed lacked jurisdiction, just as the court may have jurisdiction but the litigant before it lacked cause of action...

His Lordship further held that *"it was erroneous for any petition to rely solely on the provisions of Article 50 or any other Article of the Constitution without reference to the provisions of Article 137 which is the sole Article that breathes life in the jurisdiction of the Court of Appeal as a Constitutional Court."* The learned justice however did not refer to any particular clause of Article 137 which has numerous other Articles other than the one conferring jurisdiction (Article 137 (1)). Further, in **Ismail Serugo v Kampala City Council & Attorney General** (supra) Wambuzi CJ puts the matter succinctly when he held at page 204 that:

In my view for the Constitutional Court to have jurisdiction the petition must show, on the face of it, that interpretation of a provision of the Constitution is required. It is not enough to allege merely that a Constitutional provision has been violated. If therefore any rights have been violated as claimed, these are enforceable under Article 50 of the Constitution by another competent court.

By holding that it is not sufficient to only allege that a Constitutional provision has been violated, Wambuzi CJ makes it necessary for the petition to be maintainable under Article 137 (1) of the Constitution of the Republic of Uganda to have in disclosed in it a question as to interpretation of the Constitution and not only an allegation of inconsistency of a Law, act or omission with a provision of the Constitution under article 137 (3) of the

5 Constitution. An allegation of inconsistency with an article of the Constitution
can fulfil the requirements of Article 137 (3) of the Constitution but it is not
sufficient on the face of the petition to only allege breach of or inconsistency
with an Article or Articles of the Constitution by any act, omission or law. For
the Constitutional Court to have jurisdiction the allegation must have in it a
10 controversy as to interpretation of the Constitution. It follows that the
question before court should involve a controversy about interpretation
before the Constitutional Court assumes jurisdiction in the matter. As I have
noted above, a question for interpretation must be an arguable question
about interpretation and this occurs where there is some doubt about the
15 meaning which the person having the doubt needs cleared or their point of
view adopted by the court while the adverse party has a contrary view about
the meaning and scope of an article of the Constitution. In other words, it
must be a doubt which makes the meaning of an article controversial and
which controversy should be determined by the Constitutional Court.

20

The Role of Courts of Competent Jurisdiction under article 50 (1) of the Constitution

It is axiomatic to say that all courts and authorities should uphold the
Constitution. Nobody can uphold any article of the Constitution without
25 understanding it. Nobody can understand a provision or provisions of the
Constitution unless he or she ascertains the meaning thereof. The meaning
can only be ascertained through interpretation. Every Judicial Officer takes a
judicial oath to do right to all manner of people in accordance with the
Constitution. Part of the oath reads:

30 ... I will well and truly exercise the judicial functions entrusted to me and will do
right to all manner of people in accordance with the Constitution of the Republic
of Uganda as by law established...

5 The power of competent courts to interpret the Constitution is also envisaged by Article 274 (1) of the Constitution which provides that:

274 (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
10 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 Constitutions.

No one can construe a law with the necessary modifications, adaptations and qualifications to bring it into conformity with the Constitution without having
15 understood and ascertained the meaning of the constitutional provision through interpretation. The word "construe" under article 274 (1) can be considered in its own light. The term 'Construction' is derived from 'construe' as used in Article 274 and is defined in the **8th Edition of Black's Law Dictionary** as:

20 The act or process of interpreting or explaining the sense or intention of a writing; the ascertainment of a document's meaning in accordance with judicial standards...

"Construction, as applied to written law, is the art or process of discovering and expounding the meaning and intention of the authors of the law with respect to
25 its application to a given case, where that intention is rendered doubtful either by reason of the fact that the given case is not explicitly provided for in the law."

Henry Campbell Black, Handbook on the Construction and Interpretation of the Laws 1 (1896)

"Some authors have attempted to introduce a distinction between 'interpretation' and 'construction.' Etymologically there is, perhaps, such a distinction; but it has
30 not been accepted by the profession. For practical purposes, any such distinction may be ignored, in view of the real object of both interpretation and construction, which is merely to ascertain the meaning and will of the lawmaking body, in order that it may be enforced." William M Life et al Brief Making and the Use of Law
35 Books 337 (3d ed. 1914)

5 ...” There is no explanation of the distinction between interpretation and
construction [in Blackstone's], nor can it be inferred from the matters dealt away
under each head. The distinction is drawn in some modern works, but it is not taken
in this book because it lacks an agreed basis. Some writers treat interpretation as
something which is only called for when there is a dispute about the meaning of
10 statutory words, while speaking of construction as a process to which all statutes,
like all other writings, are necessarily subject when read by anyone. Others treat
interpretation as something which is mainly concerned with the meaning of
statutory words, while regarding construction as a process which mainly relates to
the ascertainment of the intention of legislature.” Rupert Cross, Statutory
15 Interpretation 18 (1976).

It is my judgment that the last meaning in the immediately preceding
passage quoted above is the meaning of interpretation adopted by the
Constitutional Court and Supreme Court. This holding is that interpretation
is only called for when there is a dispute about the meaning of statutory
20 words. This in my judgment captures precisely the purpose of Article 137 (1)
of the Constitution which confers jurisdiction on the Constitutional Court to
determine any dispute as to the meaning of a provision of the Constitution.
It is clearly the plain and unambiguous meaning of Article 137 (1) (supra) to
refer questions as to interpretation to the Constitutional Court which has the
25 exclusive mandate to resolve any such doubt or dispute as to the meaning
of an Article of the Constitution. For instance, a court of law before which a
question as to interpretation of the Constitution arises refers the matter to
the Constitutional Court to get directions about the meaning. On the other
hand, the High Court ascertains the meaning of any provision of the
30 Constitution inclusive of those dealing with fundamental rights and freedoms
before applying the relevant law where there is no dispute about the
meaning of a provision.

Finally, in terms of accessibility of court, the High Court is the more accessible
courts with a single judge able to apply and enforce any provision of the

5 Constitution in line with the principle of the **Rule of Law** which allows court to inquire into the violations of the law or legality of any act of omission in judicial review of administrative. In **Attorney General v Kabourou [1995] 2 LRC 757** the Court of Appeal of Tanzania held that; -

10 One of the fundamental principles of any democratic Constitution, including ours, is the rule of law. The principle is so obvious and elementary in a democracy that it does not have to be expressly stated in a democratic Constitution...The Constitution cannot be interpreted so as to protect unconstitutional or illegal acts or deeds of the ...by the courts of law...It follows therefore that any act or deed made contrary to the Constitution or the relevant law is subject to review or inquiry
15 by the appropriate courts of law... Under this principle, nobody is above the law of the land and similarly nobody is authorized to act unconstitutionally or illegally.

The decision of the Tanzania Court of Appeal echoes the foundation of Constitutional and Administrative Law, which confers unlimited jurisdiction
20 to the High Court and specific jurisdiction on other courts of competent jurisdiction to ensure that authorities act within powers granted to them by law. The principles of rationality and legality permit courts to primarily enforce all articles or any article of the Constitution. Powers are granted by the Constitution and other legislation. If the court cannot read it, interpret it
25 for meaning and apply it, then it has lost that fundamental power of upholding the Constitution, other laws and hence the rule of law. Further, under the *ultra vires* doctrine, anybody can file an action for Judicial Review on grounds that someone or authority acted *ultra vires* his or her powers conferred by the Constitution provided there is no dispute as to the meaning
30 of the relevant article of the Constitution sought to be enforced. That is the situation in the current petitioner's petition under consideration. The Petitioners allege that their fundamental rights were infringed. Secondly, they allege that the Commission of Inquiry acted *ultra vires* their powers

5 under the Commission of Inquiry Act. No dispute as to interpretation of the Constitution was alleged or disclosed.

Proceedings for enforcement of rights and freedoms under **Article 50 of the Constitution** also involve interpretation of Articles on fundamental rights and freedoms and the principles for interpretation of fundamental rights and freedoms in the main, are well trodden and do not need to be restated here.

15 Reading the entire petition and supporting affidavit evidence there is no doubt in my mind that there is no dispute about the meaning of any provisions of the Constitution disclosed in the petition.

The fact that a competent court acting under the constitutional powers to enforce fundamental rights and freedoms have special jurisdiction to interpret the Constitution is emphasized in **Minister of Home Affairs and another v Fisher and another [1979] 3 All ER 21** where it was held by the Privy Council a purposive interpretation should be given to bill of rights to afford the subjects the maximum protection thereof. Lord Wilberforce at pages 25 – 26 stated that:

25 *These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to. (3) Section 11 of the Constitution forms part of Chapter I. It is thus to 'have effect for the purpose of affording protection to the aforesaid rights and freedoms' subject only to such limitations contained in it 'being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice ... the public interest'. (Emphasis added).*

This was restated in **The Queen v Big M Drug Mart [1986] LRC 332** at 364 when the Supreme Court of Canada held that in interpreting the charter on rights the courts should adopt a generous rather than a legalistic approach

5 aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charters protection.

In the premises, it would be strange to restrict the jurisdiction of the High Court to guarantee the full benefit of chapter 4 of the Constitution which declares, promotes and enforces fundamental rights and other freedoms.
10 Neither would it be proper to restrict access to the High Court by allowing other provisions of the Constitution to only be interpreted by the Constitutional Court. A generous and purposive approach to protection and promotion of fundamental and other human rights and freedoms would allow the High Court to be actively involved in interpreting the Constitution
15 unless and until there is a controversy or dispute about the meaning of a provision as to call for interpretation by the Constitutional Court. A restrictive approach to jurisdiction where exclusive jurisdiction is conferred on the Constitution court on all matters involving application of a provision of the Constitution does not secure for individuals the full benefit of the
20 Constitution which protects their rights. The same statement applies to powers conferred on authorities by the Constitution. The High Court has jurisdiction to nullify any ultra vires acts of inter alia, any statutory authorities, local government authorities and Central Government acting contrary to any noncontroversial provision of the Constitution.

25 Whenever there is controversy or any question arising about the meaning of an Article which raises a substantial question for interpretation, it is referred to the exclusive interpretation of the Constitutional Court.

As noted above, I agree with the judgment of my learned brother Justice
30 Cheborion Barishaki, JA/JCC but only disagree on the issue of jurisdiction. It



5 follows that being a public interest litigation, I would not award costs against the petitioners.

In the result, I would strike out the Petitioners petition for having been lodged in a court without jurisdiction with no order as to costs.

10 Dated at Kampala the 1st day of Sept 2020



Christopher Madrama Izama

Justice of the Constitutional Court/ Court of Appeal