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THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Kenneth Kakuru, Hellen Obura, Stephen Musota, Christopher Madrama, Remmy Kasule, JJCC)

10 CONSTITUTIONAL PETITION NO. 46 OF 2012

1. NATHAN NANDALA MAFABI

2. ENOKA MUSUNDI PETITIONERS

15 3. SAM MAGONA

4. HAJJI HUSSEIN MUMEYA

VERSUS

ATTORNEY GENERAL:..... RESPONDENT

20 JUDGMENT OF HELLEN OBURA, JCC

Introduction

25 This Constitutional Petition was brought under Article 137 of the Constitution of the Republic of Uganda challenging certain provisions of the Cooperative Societies Act (hereinafter referred to as the Act) and the act of the Registrar of Cooperative Societies (hereinafter called the Union) in suspending the Board of Directors of Bugisu Cooperatives Union Ltd (hereinafter called the Union).

30 **The background to the petition**

The facts as ascertained from the court record are that the petitioners are persons with interest in the Union which was formed in 1954. In December 2010, the Registrar exercising his powers under section 52 of the Act suspended the entire Board of Directors of the Union.

5 Following the suspension, the Resident District Commissioner (RDC) Mbale in the company of police Officers sealed off the Union offices, evicted the Chief Executive Officer (CEO) and took over the offices. Later the Permanent Secretary of the Ministry of Trade, Industry and Cooperatives (hereinafter called the Ministry) turned up at Mbale with a one Batala Cyprian an employee of the Ministry and installed him as caretaker manager. He took over
10 management of the Union and became the principal signatory to all union bank accounts. Two years later on 12/09/2012, the 277 primary societies petitioned the Registrar to convene a general meeting but he refused to do so. On 12/09/2012, the owners of the Union convened a special general meeting that was attended by 195 primary societies. They resolved to repossess their Union from the caretaker manager and reinstate the suspended board with a
15 mandate to convene an Annual General Meeting (AGM). The resolutions were communicated to the Registrar who responded that the meeting was illegal and their resolution null and void.

On 15/10/2012, the petitioners lodged a petition in this Court against the respondent seeking for the following declarations and redresses;

- 20 1. *A declaration that sections 6 (3), 22 (1), 24 (2) and (3), 43 (1), 44, 47 (4), 52, 56 and 77 of the Cooperative Societies Act are inconsistent with and contravene Article 40 (2) of the Constitution.*
2. *A declaration that sections 8, 9 (6) and (7), 15, 17, 25(1), 57(1) (c) & (d) and 58 of the Cooperative Societies Act are inconsistent with and contravene Article 29 (b) and (e) of the Constitution.*
- 25 3. *A declaration that sections 13 (3), 22 (7) and 52 of the Cooperative Societies Act are inconsistent with and contravene Article 28 (1) of the Constitution.*
4. *A declaration that sections 23(1) and 52 of the Cooperative Societies Act are inconsistent with and contravene Article 21 of the Constitution.*
5. *A declaration that sections 43 (1), 46, 49 (3), 58 and 77 (1) & (2) of the Cooperative Societies Act are inconsistent with and contravene Article 27 (2) of the Constitution.*
- 30 6. *A declaration that sections 4(2), 29 (b), 49 (3), 73(5) and (6), 73 (17), 77 (1) & (2) of the Cooperative Societies Act are inconsistent with and contravene Articles 27 (2), 29 and 40 (2) of the Constitution.*

- 5 7. A declaration that all sections hereinabove mentioned are inconsistent with and contravene second and third generation rights not specifically provided in the Constitution but saved by Article 45 of the Constitution.
8. A declaration that the Registrar of Cooperative Societies henceforth ceases exercising functions and duties by sections hereinabove challenged.
- 10 9. A permanent injunction does issue restraining the Registrar from exercising the functions.
10. Members of the Board of Bugisu Cooperative Union duly elected by the societies and suspended by the Registrar immediately assume office and organise elections as stipulated by the byelaws.
11. Make an order for compensation to all the 277 cooperative societies and Bugisu Cooperative Union.
12. Costs of this petition be provided for.

15 The averments in the petition, among others, are that;

- (a) Cooperative Societies are formed with the object of promoting the economic and social interests of their members and Bugisu Cooperative Union is no exception.
- 20 (b) Since colonial times central governments have sought to control the activities of Cooperative Societies and unions which are purely private enterprises so as to have political and financial access to their resources.
- (c) This is the reason for the collapse of almost all cooperative unions which existed at independence and the resultant poverty of peasant farmers who came together to form unions to escape poverty.
- 25 (d) With liberalisation of the economy in the 1990's the surviving Unions and societies faced stiff competition from large multinational corporations. Bugisu cooperative union faced competitors such as Kyagalanyi Coffee limited owned by Volcafe of Switzerland and Kawacom owned by a Congolomate of Asian companies.
- 30 (e) The multinational corporations are essentially middlemen competing with the producers' own business entity but without the same government control exercised in respect of cooperative unions and societies.
- (f) The said Commissioner has no power or authority whatsoever over the activities of Kyagalanyi Coffee limited or kawacom because the Cooperative Societies Act does not apply to them.

5 (g) As a result of the Commissioner's actions the owners of the business have someone managing their business without their consent and cannot even convene a general meeting to discuss their affairs.

10 (h) The suspension of the board by the commissioner acting in the course and with the scope of his employment has caused financial loss to the union and the individual cooperative societies and so far lost profits amounting to shillings 96.6 billion for which they hold the respondent responsible. The applicants shall adduce evidence of accountants and agro economists to prove this loss and such further loss as shall accrue.

The petition is supported by the affidavits of the four petitioners. The gist of the affidavit of
15 Hon. Nathan Nandala Mafabi is that;

(a) He was the Chairman of the Union duly elected by the societies comprising the union and he was also a member of Busamaga Growers Cooperative Society.

(b) On 12th December 2010 while in Mbale he received a letter asking him to attend a meeting in the office of the Registrar the next day.

20 (c) When he went for the meeting, he found members of the board of the Union, top management and some former members of the Union present in the meeting.

(d) The Registrar and three other officials of the Ministry constituted themselves into a tribunal to hear a complaint raised by former members of the board.

25 (e) A petition detailing complaint against his board was circulated to him and the members of the board and top management.

(f) He was called upon to respond to the complaint and he did so to the best of his ability after complaining of insufficient notice.

(g) A ruling was made that the respondent would appoint an audit or carry out forensic audit and details would be communicated.

30 (h) Two days later, he received a letter suspending him from the office of chairman of the board of the union and the entire board.

(i) From the time he assumed office as chairman of the board, the Union had moved from indebtedness into profit. It had made 1.3 billion and 1.7 billion profits in 2008 and 2009 respectively. It had projected to make 2.0 billion in profit in 2012.

35 (j) The Union had also cleared all debts incurred by the complainants when they held office.

- 5 (k) At the time of suspension, the Union was giving bursaries to University students and was paying to the farmers shillings 12,000 per kilogram of coffee which the caretaker manager reduced to shillings 3,000 per kilogramme.
- (l) While he was in office, the Union was purchasing 5 million kilogrammes per year which translates into a loss of shillings 45 billion per year making a total of shillings 90 billion which the farmer had lost due to government interference.
- 10

The key highlights of the affidavit of Mr. Enock Musundi are that;

- (a) He was one of the founders of the Union and was elected its Chairman in 1966 and re-elected every two years to the same post until 1982.
- 15 (b) During his chairmanship, the union made a number of capital development, purchased land and made some developments, established a bursary and educated many students, and contributed money for construction of Teso College Aloet, Kachonga College, Masaba Senior Secondary School and Bubulo Girls Secondary School.
- (c) In 1970 government ordered the union to sell its coffee to Coffee Marketing Board (CMB) and that is when it began making losses. CMB replaced the Asians and decided how much to pay the Union.
- 20 (d) From 1970 to 1982 when he retired, there was no capital development carried out by the Union as government now controlled the Union through Co-operative Officers.

The highlights of the affidavit of Mr. Sam Magona are that;

- 25 (a) He was a delegate of his society to the union and in 1982 he was elected Chairman of the Union and re-elected every two years thereby serving until 1996.
- (b) The cooperative department plays a supervisory role over the Union and the Commissioner of Cooperatives has extensive powers under the law in the operations of the Union.
- (c) Because of the extensive powers, it was necessary for him to seek approval of the Commissioner of Cooperatives on fundamental business interests of the Union and this greatly affected the profitability of the Union.
- 30 (d) It was during his time as Chairman that CMB was scrapped and the economy liberalised.
- (e) As a result of liberalisation several limited liability companies entered the market and the union had to compete with them.

5 (f) *The Union was unable to favourably compete with these middlemen because of restrictions imposed by the law on it as to financing and management.*

(g) *These middlemen were able to offer higher prices because the necessary approvals to the Union from the government were not forthcoming.*

10 The 4th affidavit was deposed by the 4th petitioner, Hajji Hussein Mumeya who averred, among others, that;

(a) *He is a delegate of his society to the Union and he had served as a board member of the Union.*

15 (b) *After the 3rd petitioner retired as board chairman of the Union in 1996 and a new board came in, it continuously made losses up to 2007. The new board embarked on selling property of the union such as land.*

(c) *On 2nd May 2008 the Union elected a new board with the 1st petitioner as its Chairman.*

(d) *Within two years, the new board turned the Union from red to even declaring dividends at the general meeting.*

20 (e) *Members of the old board then started accusing the 1st petitioner of being anti-government and lodged a complaint against the new board.*

Representations

At the hearing of this petition, Mr. Wandera Ogalo together with Mr. James Jaabi represented the petitioners while Mr. Richard Adrole Principal State Attorney appeared with Ms. Clare
25 Kokunda a State Attorney for the respondent.

Petitioners' submissions

During the hearing of this petition, counsel for the petitioners sought leave from court to file supplementary submissions and it was granted. Court also granted him leave to regularise
30 the additional affidavit in support of the answer that had been filed late.

In their written submissions, the petitioners raised 4 issues for determination by this Court, namely:

1. *Whether sections 6(3), 22(1), 24 (2) and (3), 43 (1), 45, 52 and 56 of the Cooperative Societies Act are inconsistent with and contravene Article 40 (2) of the Constitution.*
2. *Whether section 23 (1) of the Cooperative Societies Act is inconsistent with and contravenes Article 21 of the Constitution.*
3. *Whether sections 8, 9 (6) & (7), 15 and 17 are inconsistent with and/or contravene Articles 29 and 40 (2) of the Constitution.*
4. *Whether sections 4 (2), 29 (b), 43 (2) and 49 (3) & (4) of the Cooperative Societies Act are inconsistent with and contravene Articles 29 and 40 (2) of the Constitution.*

On the first issue, counsel submitted that section 52, which empowers a stranger to a private business concern to lock out the owners of the business and manage it himself, is a grave encroachment to the right of those owners to carry on their trade or business. They added that section 6(3) which empowers the Registrar without assigning any reason whatsoever to bring a business to an end due to poor performance is a clog on the right to do business. Counsel also submitted that section 45 (b) and (e) which restricts a society's freedom to invest interferes with the right to do business vested in the society by Article 40 (2) of the Constitution.

Regarding section 43 (1), counsel submitted that the provision subjects the right of societies to borrow from persons who are not members of the society to the authorisation of the Registrar and as such, it is inconsistent with the Constitution. They also contended that section 22 (1) which requires the Registrar to approve the auditor appointed by the AGM of the Union is an interference with the right to do business. In regard to section 24 (2) and (3), counsel submitted that this provision allows the Registrar who is a non-member of the society to influence its budget by giving an opinion on the budget estimates. He argued that this interferes with the society's right to do business.

The 2nd issue was abandoned by counsel for the petitioners.

As regards the 3rd issue, counsel submitted that section 9 (6) and (7) which empowers the Registrar to direct the society to amend its bye laws if it appears to the Registrar that the amendment is desirable or necessary contravenes the freedom of thought guaranteed by Article 29 (1) (b) of the Constitution. Counsel also submitted that section 15 violates the freedom of association guaranteed under Articles 29 (1) (e) and 40 (2) in so far as it requires the Registrar to give written permission to a company wishing to become a member of a society. Counsel did not submit on section 8 and in his supplementary submission and he also abandoned his submission on section 17 of the Act.

The 4th and last issue is whether sections 4 (2), 29 (b), 43 (2) and 49 (3) & (4) of the Act are inconsistent with and contravene Articles 29 and 40 (2) of the Constitution. Counsel for the petitioners submitted that section 4 (2) creates a body out of nowhere and makes it the apex body for all registered societies. Further, that section 29 (2) mandates the body to make recommendations to government on registered societies and there is no reason whatsoever why recommendations are made to Government on how the societies and unions are running their business.

They also submitted that under section 52, the Registrar is mandated to make inquiries into the constitution, working and financial condition of any registered society in consultation with Uganda Cooperative Alliance (UCA) Ltd which has been forced on them thus making it have a say in their management. They contended that it amounts to interference with the right of societies to do business and contravenes Article 40 (2).

Counsel argued that societies and unions are corporate bodies created to do business but they are forced into association with a company created by an Act of Parliament. Further, that they cannot opt out as they are conscripted into a mandatory association of all societies in

5 Uganda under this company. He pointed out that the right to associate include the right not to associate. They then contended that since the societies have no choice on whether to associate with and under this company; their right to associate under article 29 is contravened.

10 On section 46 (2), counsel submitted that section 79 of the Act empowers the Minister in consultation with UCA to make Regulations and section 46 (2) provides for the fixing of a ceiling of dividend to be paid to members in the Regulations. Counsel then argued that societies make profits but the Minister and UCA determine how much of those profits can be paid to members. They contended that it amounts to interference with the right to do business as the Minister and UCA by fixing a ceiling of profit determine the levels of investment.

15 In their supplementary written submissions, counsel abandoned his earlier submissions on sections 49 (3) and (4) for reason that the Cooperative Societies (Amendment) Act 2019 gives justification and accountability for education fund and in that regard the provision is justifiable.

20 Counsel also provided some background in the supplementary submission in which they showed that the government has played a central role in societies since colonial times. They referred to the Cooperative Societies Ordinance of 1950, Chapter 210 (hereinafter called Cap. 210) , and singled out sections which gave government control over societies by requiring Registrar's approval on many decisions of societies and those that gave supervisory powers over societies to government. Counsel also referred to sections of Cap. 210 that gave powers
25 to the Registrar to cancel registration of a society, appoint a liquidator under his direct control and settle disputes.

Counsel argued that the control government had over the societies under Cap 210 was justifiable because then government had enacted another law, the Uganda Credit and Savings Bank Ordinance, Chapter 211 (hereinafter called Cap. 211). He pointed out that the

5 long title of Cap. 211 indicated that it was an ordinance to provide for the establishment and management of Credit and Saving Bank for purposes of facilitating loans to Africans in furtherance of agricultural, commercial, building and cooperative societies.

10 Counsel submitted that section 11 of Cap 211 provided that; *"the funds of the bank shall consist of such sums as may, from time to time be placed at the disposal of the bank by resolution of the legislative council"* and as such the societies were then supported by taxpayers money. Counsel concluded that it was therefore understandable that there was necessity for government involvement to safeguard taxpayers' money. To that end, under section 24 (2) of Cap 211, all monies loaned was a charge on crops, produce dead stock and
15 livestock among others. The charge would then have priority on such crops and produce when harvested.

Counsel submitted that the same arrangement continued under the Cooperative Societies Act No. 93 of 1963 (hereinafter called Act No. 93 of 1963), which was preceded by the Uganda
20 Credit and Savings Bank Act, No.90 (hereinafter called Act No. 90). The role of government in using taxpayer's money to support societies continued under that Act.

Counsel further submitted that the government played a central role in assisting societies in Bugisu under the Bugisu Coffee Act (Cap 232) which set up a Board of Trustees consisting
25 of 5 persons appointed by the minister with the Treasury Officer of Accounts being the secretary to the board. It was required to invest trust funds in the best interests of coffee, ensure money was available for price assistance and improvement of the cultivation, processing and quality of coffee.

30 Counsel pointed out that the Coffee Marketing Board Act of 1969 was perhaps one legislation, which showed an extensive role of government in societies in terms of assistance in farming,

5 processing and selling produce. He argued that, that role government played at that time justified the power granted to the Registrar but now all the support government gave to societies is no more.

10 As relates to the remedies sought in this petition, counsel argued that if the contested provisions are to be modified so as to allow continual involvement, then government must actively begin supporting societies. Counsel then submitted that this Court could make this possible by making appropriate orders. He argued that in fact it would be easier to do so because section 19 of the Cooperative Societies Amendment Act 2019 establishes a Cooperative Bank. What remains is for the court to grant redress by prescribing what should
15 be included in an Act of Parliament setting up the bank.

Consequently, counsel prayed that this Court makes the following orders;

1. Government within 3 months implements section 19 of the Cooperative Societies Amendment Act, 2019
 - (a) By way of introducing a comprehensive Bill in Parliament.
 - 20 (b) The bill charges the Consolidated Fund with Capital of the bank
 - (c) Provides for loans to societies at 0% interest.
2. Government provides farm inputs to societies/ Unions at its cost; the rationale being that when coffee, cotton and tea are sold abroad, government earns foreign exchange.
- 25 3. Establish a fund similar to the Coffee Assistance Fund established by the Coffee Ordinance 1959 but applicable to all other crops and livestock societies.
4. Guarantee minimum process so as to cushion farmers from the vagaries of international markets.

- 5 5. Provide technical knowledge to agricultural and livestock Cooperative Societies at government cost.

Counsel submitted that in giving the redress, the court will not be venturing in the area of the Legislative and Executive (political question) but giving such redress that will reconfigure the Cooperative Movement and bring it in line with the Constitution.

Respondent's submissions.

Regarding the 1st issue, counsel submitted that the Registrar having received a petition from a cross section of members of the Union regarding persistent allegations of mismanagement and poor administration of the Union's affairs acted within the ambit of section 52 and intervened to ensure that the member's common interests and rights are protected. He added that the Registrar's intervention is acceptable and demonstrably justifiable in a free and democratic society.

Regarding section 6 (3), counsel submitted that the Registrar can decide to bring a society's business to an end if they do not comply with the conditions precedent set out in section 3 of the Act. Counsel also submitted that section 45 does not give the Registrar power to determine the entity in which a society can invest. He argued that, instead it gives the societies a wide range of institutions or companies that it may invest its funds in and the approval given by the Registrar under this provision is to ensure compliance with section 3 of the Act.

Regarding section 43 (1), counsel submitted that the restrictions under the provision is to ensure that the interests and rights of both the secondary and primary societies are protected. He added that the petitioners did not lay any material before the court that the Registrar abused these powers and that therefore their allegations are merely speculative. Counsel also submitted on section 22 (1), that societies unlike other ordinary business entities need

5 an oversight function over their performance to ensure compliance with cooperative principles.

In response to the submissions on section 24(2) and (3), he contended that the Registrar's oversight function over the estimates by a society is acceptable and demonstrably justifiable
10 in a free and democratic society.

On the 3rd issue, counsel submitted that the petitioners' submission are without merit since the Registrar's powers under section 9 (6) and (7) are to ensure compliance with the principal Act and the interests of the society which powers cannot be exercised arbitrarily. He added
15 that the actions of the Registrar under section 15 are acceptable and demonstrably justifiable in a free and democratic society under Article 43 of the Constitution.

On the 4th issue, counsel submitted that the creation of UCA does not contravene Articles 29 1(b) and (e) and 40 of the Constitution since this is acceptable and demonstrably justifiable
20 in a free and democratic society. He further submitted that the maximum rate prescribed by the Regulations under the Act does not contravene the Constitution because societies registered under the Act are distinct from entities registered under the Companies Act 2012. Further that the maximum rate is prescribed to ensure survival and continuity of societies which is acceptable and demonstrably justifiable in a free and democratic society.

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In conclusion, counsel contended that the impugned sections of the Act do not contravene any of the cited Articles of the Constitution. He therefore invited this Court to dismiss this petition with costs to the respondent.

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5 **Resolution of the Issues**

This Court has a duty as a Constitutional Court under Article 137 of the Constitution of Uganda to determine Constitutional Petitions and give redress. Article 137 (3) and (4) provide as follows;

 “(3) A person who alleges that—

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 (a) an Act of Parliament or any other law or anything in or done under the authority of any law; or

 (b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.

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 (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.”

20

In **Attorney General vs Major General David Tinyefuza; Constitutional Petition No. 1 of 1997** Wambuzi CJ (as he then was) stated as follows at page 24 of his Judgment.

25

“In my view, jurisdiction of the Constitutional Court is limited in Article 137(1) of the Constitution to interpretation of the Constitution. Put in a different way no other jurisdiction apart from interpretation of the Constitution is given. In these circumstances I would hold that unless the question before the Constitutional Court depends for its determination on the interpretation or construction of a provision of the Constitution, the Constitutional Court has no jurisdiction.”

30

This Court sitting as a Constitutional Court adjudicates matters requiring interpretation of the Constitution, and not necessarily enforcement of the Constitution except where upon determination of the issue of interpretation of the Constitution, the court considers, on its own, that there is need to grant additional redress. In order for this Court to interpret the Constitution in a petition before it, there must be a Constitutional question to be determined.

5 In *Ismail Serugo vs Kampala City Council and The Attorney General, Constitutional Appeal No.2 of 1998 (SC)* Wambuzi CJ (as he then was) expounded on Article 137 of the Constitution as follows:-

10 *"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. The applicant must go further to show prima facie, the violation alleged and its effect before a question could be referred to the constitutional court."*

15 I have duly perused the court record together with the petition and I have also carefully considered the written submissions of both counsel. It is the petitioners' submission that certain provisions of the Act contravene certain Articles of the Constitution. In his submissions, counsel for the petitioners pointed out to this Court the violations of the rights and freedoms of societies in the impugned sections of the Act and their inconsistency with the Constitution. It is therefore, my finding that the petition establishes on the face of it questions for Constitutional interpretation.

20 For ease of reference, I have set out in extenso the relevant text of the impugned provisions of the Act below;

"Section 4 Conditions of registration.

(2) The Uganda Cooperative Alliance Ltd. shall be the apex body for all registered cooperative societies

25 ***Section 6(3) Registration of a probationary society.***

(3) If at the expiration of twenty-four months the registrar is not satisfied with the performance of the society, he or she may either cancel the registration or extend the probationary period by a period not exceeding twelve months; and if after the extension he or she is still not satisfied with the performance of the society, he or she shall cancel the registration of the society.

5 **Section 8 Cancellation of registration.**

(1) At any time during the period of registration of a society under section 6(1), the registrar may, by notice in writing to the person responsible for the running of the society, cancel the probationary registration of the society stating reasons for the cancellation; and the society shall, from the date of service of the notice, cease to be a registered society.

10 (2) The cancellation referred to in subsection (1) shall be gazetted and published in at least one of the English newspapers in Uganda.

(3) If a society registered under section 6(1) contravenes or fails to comply with section 7, that society and any officer or person who purports to act on its behalf commits an offence and is liable on conviction to a fine not exceeding ten thousand shillings and in the case of a continuing offence to a further fine not exceeding one thousand shillings for each day on which the offence is continued after conviction of the offence.

15

Section 9 (6) and (7) Amendment of the byelaws of a registered society.

(6) If it appears to the registrar that an amendment of the byelaws of a society is necessary or desirable in the interest of the society, he or she may call upon the society, subject to any regulations made under this Act, to make the amendment within the time as he or she may specify.

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(7) If the society fails to make the amendment within the time specified, the registrar may, after giving the society an opportunity of being heard, himself or herself make and register the amendment and issue to the society a copy of that amendment, certified by him or her.

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Section 15 Restriction on membership.

No company incorporated or registered under the Companies Act and no unincorporated body of persons shall be entitled to become a member of a registered society, except with the written permission of the registrar.

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Section 22 (1) Audit, annual returns and accounts.

(1) Every registered society shall cause its accounts to be audited at least once in every year by an auditor appointed by the annual general meeting and approved by the registrar, and the cost of the audit shall be borne by the society; except that—

- 5 (a) no auditor chosen by a registered society to audit its books shall perform that function for more than three annual audits in succession unless authorised by the registrar;
- (b) where the registered society is unable to appoint its own auditors, the registrar may appoint the auditors.

10 **Section 24 (2) and (3) Estimates and expenditure.**

(2) A copy of those estimates shall be sent to the registrar for an opinion before they are submitted to the general meeting.

(3) Supplementary estimates may be prepared by a society during the financial year and submitted to the registrar for an opinion before they are submitted to the annual general meeting.

15 **Section 29 Board of Directors of the Uganda Cooperative Alliance Ltd.**

The Board of Directors of the Uganda Cooperative Alliance Ltd. shall, subject to the byelaws and any directions issued by the general meeting of the alliance—

20 (b) make representations to the Government as it may think fit in relation to any matter affecting registered cooperative societies in general or any particular registered society which those societies generally or any such society may request the board to bring to the notice of the Government;

Section 43 (1) Restrictions on borrowing.

25 (1) A registered society shall receive deposits and loans from persons who are not members only to such extent and under such conditions as the registrar may, from time to time, in writing, authorise.

Section 45 (b) & (e) Investment of funds.

A registered society may invest or deposit its funds only—

30 (a)

(b) in any registered society, company or statutory corporation approved in writing by the registrar;

(c)

(d)

(e) in such other mode as specified by the byelaws of the society and approved by the registrar.

5

Section 49 Contribution to education fund.

(3) In case of a secondary society, or a primary society not affiliated to any secondary society, 50 percent of the education fund set aside under subsection (1) shall be sent to the Uganda Cooperative Alliance Ltd., while the remaining 50 percent of the fund shall be used by the secondary society or primary society to carry out its own educational programmes.

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(4) The Uganda Cooperative Alliance Ltd. shall make quarterly returns to the registrar accounting for collections and utilization of the education fund.

Section 52 Ad hoc committee of inquiry.

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(1) The registrar in consultation with the board may hold an inquiry or direct a person authorised by him or her by order in writing in that behalf to hold an inquiry into the constitution, working and financial condition of a registered society.

(2) On receipt of a resolution demanding an inquiry passed by not less than two-thirds of the members present at a general meeting of the society which has been duly advertised, the registrar in consultation with the board shall cause such an inquiry.

20

(3) During the period of inquiry referred to in subsections (1) and (2), the chief executive and other officers or employees may be suspended from duty by the registrar as he or she may deem necessary to facilitate the smooth holding of the inquiry.

(4) Where the chief executive has been suspended in accordance with subsection (3), a caretaker manager shall be appointed by the registrar in consultation with the board.

25

(5) The caretaker manager shall remain in office until either the former chief executive is reinstated or a new one is appointed; except that he or she shall not stay in that office for more than three months after the report of the committee of inquiry has been submitted.

(6) If during the course of inquiry cause arises to dissolve the committee of the society, the registrar, in consultation with the board, shall dissolve the committee and convene within thirty days a special general meeting to replace the committee.

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(7) All officers and members of the society shall produce such cash, accounts, books, documents and securities of the society and furnish any information in regard to the affairs of the inspected society as the registrar or such person authorised by the registrar may require.

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5 **Section 56 Cancellation of registration after inquiry or inspection.**

(1) If the registrar, after holding an inquiry under section 52 or after making an inspection under section 53, or on receipt of an application made by two-thirds of the members of a registered society, is of the opinion that the society ought to be dissolved, he or she may make an order for the cancellation of registration of the society.

10 (2) Any member of a registered society may, within two months from the date of an order made under subsection (1), appeal from the order to the board.

(3) Where no appeal is presented within two months from the making of an order under subsection (1) cancelling the registration of a society, the order shall take effect on the expiry of that period; where an appeal is presented within two months, the order shall not take effect until it is confirmed by the board.

15 (4) No registered society shall be wound up, except by an order of the registrar.

I shall also reproduce the relevant Constitutional provisions said to be contravened. They are:

Article 29 (1) (b) & (e) Protection of freedom of conscience and association.

20 (1) Every person shall have the right to—

(a).....

(b) freedom of thought, conscience and belief which shall include academic freedom in institutions of learning;

(c).....

25 (d).....

(e) freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organisations.

Article 40 Economic rights.

30 (2) Every person in Uganda has the right to practise his or her profession and to carry on any lawful occupation, trade or business.

The general principles governing Constitutional interpretation were ably laid out by this Court in **Major General David Tinyefuza vs Attorney General (supra)** as follows:-

1. Principles of Interpretation applicable to Statutory Construction also apply to the construction of Constitutional instruments.
2. Words must be given their natural and ordinary meaning where they are not ambiguous.
3. The instrument being considered must be treated as a whole and all provisions having a bearing on the subject matter in dispute must be considered together as an integrated whole.
4. Provisions relating to the fundamental human rights and freedoms should be given purposive and generous interpretation in such a way as to secure maximum enjoyment of the rights and freedoms guaranteed.
5. Where the state or any person or authority seeks to do an act or pass any law which derogates on the enjoyment of the fundamental rights and freedoms guaranteed under chapter four of the Constitution, the burden is on that person or authority seeking the derogation to show that the act or law is acceptable within the derogations permitted under Article 43 of the Constitution.

Also see: **Zachary Olum and Another vs Attorney General, Constitutional Petition No. 6 of 1999 (unreported)** and **Dr. James Rwanyarare and Another vs Attorney General, Constitutional Petition No. 5 of 1999 (unreported)**.

In **Twinobusingye Severino vs Attorney General, Constitutional Petition No. 47 of 2011** this Court stated that;

"Where several provisions of the Constitution have a bearing on the same subject, they should be read and considered together so as to bring out the full meaning and effect of their intent. None should be ignored or preferred over the other. Similarly, the Constitution should be looked at as a whole with no provision destroying another but supporting each other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the Constitution." **See also: Attorney General vs Susan Kigula and ors, Constitutional Appeal No. 03 of 2006 (SC).**

I will be guided by the above principles as I consider the 4 issues agreed upon by counsel for the parties. However, before I delve into the issues, I find it pertinent to first look at what societies are, the principles that underpin them and the historical background of cooperative

5 movement in Uganda. To that end, I have referred to some manual, policy paper, research report/dissertation and paper presentation on societies in Uganda.

Charles Kabuga in a Manual titled “Cooperative Governance and Best Practices in Uganda”, September 2010 gives the internationally accepted definition of a cooperative as follows;

10 *“A cooperative is an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise.”*

Charles Kabuga (Supra) explains that the essential nature of a society is that it is an ‘association of persons’ who come together to achieve a common objective through a jointly owned and democratically controlled enterprise. Since a cooperative is based on people
15 rather than capital, its structures ought to respond to people’s needs. The 7 core principles that underpin societies include; (1) voluntary and open membership (2) democratic member control (3) member economic participation (4) autonomy and independence (5) education, training and information (6) co-operation among co-operatives and; (7) concern for the community.

20 As regards the historical background of societies in Uganda, I found very informative a dissertation by Nuwagira Naboth Mwejune submitted in partial fulfilment of the Degree of Masters of Arts (DS) University of Dar-es-Salaam, 1993 on the topic: “Problems of the Cooperative Movement in Uganda, A Case Study of Banyankore Kweterana Cooperative Union Limited”. I also relied on a paper presentation by Fred Ahimbisibwe, a Senior
25 Cooperative Officer in the Ministry of Trade, Industry and Cooperatives on the topic: “An overview of Cooperatives in Uganda” accessed on www.mtic.go.ug/wp-content/uploads/2019/09/Overview of Cooperatives-in- Uganda.pdf. Another very useful resource material was a Policy Paper for Presidential Economic Council (PEC) dated 1st

5 March 2018 prepared by the National Planning Authority, titled; 'Strengthening of Cooperatives for Social Economic Transformation in Uganda'.

I have elaborately set out the historical background of societies in Uganda based on those resource materials. The dissertation, the paper presentation and the Policy Paper state that the history of societies in Uganda can be traced to present day Mubende District where in
10 1913, four farmers decided to market their crops collectively. According to Ahimbisibwe (supra), they came to be known as "the Kinakulya Growers."

Ahimbisibwe (supra) states that the societies came about as a response to the unfavorable terms of trade imposed on the peasants by the Asian traders through organized local middlemen. In 1920, five groups of farmers in Mengo met in Kampala to form the "Buganda
15 Growers Association" whose supreme goal was to control the domestic and export marketing of members' produce. Counterparts in other parts of the country shared this vision and acted accordingly. A cooperative movement was therefore born to fight the exploitative forces of the colonial administrators and alien commercial interests which sought to monopolise domestic and export marketing.

20 Nuwagira Naboth Mwejune (supra) states that the colonial government considered the formation of cooperatives as a premature and a subversive development. Consequently, any proposed legislation for them was always restrictive. It was an offense for any financial institution to lend money to any African farmer (Kabuga 1991:53; Brett 1973). It was not until 1945 that Britain allowed colonies to organise cooperatives. The 1945 Ordinance was
25 enacted to enable the colonial administration to control the unions and cooperative groups that had come to existence.

Both Ahimbisibwe (supra) and Nuwagira Naboth Mwejune (supra) state that because of these restrictions, societies operated underground until 1946 when the Cooperative Ordinance was

5 enacted to legalize their operations. Peasant farmers saw the 1946 Ordinance as a means of increasing government control in their business and many groups refused to register under it. Those who registered were considered as stooge organisations.

Ahimbisibwe (supra) states that in 1952, Sir Andrew Cohen came to Uganda as governor, he appointed a commission of inquiry headed by Mr. R. Dreschfield to inquire into the progress
10 of the societies. The commission submitted its report on June 11, 1952 which stipulated that; it was not the function of government to guide private enterprise as doing so, would arouse suspicion; the cooperative movement would be stronger if it was independent of government; it was a legitimate and reasonable aspirations of societies to be free of government control.

In light of the above pointers, government amended Cooperative Societies Ordinance 1946
15 and this gave rise to the Cooperative Societies Act 1952, which was more accommodative and provided the framework for rapid economic development. It provided enough autonomy to make registration acceptable to the cooperative groups that had defied the 1946 ordinance. It also provided for both the elimination of discriminatory prices policies and offered private African access to coffee processing. Between 1952 and 1962 cooperative membership
20 increased 8 fold and the tonnage of crops increased 6 fold. The Cooperative District Unions acquired considerable importance. By 1962, there were 14 ginneries and 7 coffee curing works in the hands of Cooperative Unions. Many people were employed and Cooperative Unions became the most conspicuous institutions in the districts.

By the time of Uganda's political independence in 1962, participation in society activities had
25 given a number of leaders national visibility. Their departure created leadership vacuum in the Cooperative movement. Other aspiring politicians began to see societies as useful launching pads into politics. Hence by involving people who had motives other than commitment to serving societies paved way for mismanagement, nepotism and corruption in societies. This caused discontent in various rural areas and the setting up of various

5 commissions of inquiry. It thus resulted into repealing of Cooperative Societies Ordinance of 1952 and replacing it with the Cooperative Societies Act 1963 which restored control of societies by Registrar. In 1970, the 1963 Act was repealed and the 1970 Cooperative Societies Act was put in place. This Act finally, took away all the autonomy and gave the minister direct control over the affairs of registered Societies. Hence members lost control of
10 their societies to managers, politicians and government officers.

In 1986 when National Resistance Movement (NRM) took over the administration of this country, the National Resistance Council (NRC) enacted Cooperative Societies Statute in 1991 that was later transformed into an Act Cap 112 in the laws of Uganda. This legislation is the subject of this petition.

15 As part of the history of societies in Uganda, I must also point out that article 18 (1) of the 1967 Constitution of Uganda on protection of freedom of assembly and association allowed enactment of laws that restrict the right of Trade Unions and societies to assemble and associate, provided the law made provision for their proper management. It provided thus;

Article 18: Protection of Freedom of Assembly and Association

20 *"(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.*

*(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with
25 or in contravention of this article to the extent that the law in question makes provision;*

- a).....
- b).....
- c).....
- d).....
- 30 e).....

The Act was enacted in 1991 under the 1967 constitutional dispensation. It is pertinent to note that there is no similar provision under article 29 of the Constitution of the Republic of Uganda, 1995 that provides for protection of freedom of conscience, expression, movement, religion, assembly and association.

10 I have also found it necessary to point out the role societies can play in boosting the economic status of its members and the national economy. In this regard, the Policy Paper (supra) at page 4 states thus;

15 *"There is apparent consensus of opinions by the key stakeholders, that strengthening of cooperatives is a gateway to resuscitation of the agriculture sector and the economy in general from this present dismal performance (Action Aid, 2013)"*

From the literature on societies I have reviewed, I am convinced that there is need for regulation of societies if they are to perform well.

Charles Kabuga (supra) points out three major challenges that societies in Uganda face that calls for their proper regulation. They are; cooperative leadership, un-empowered membership and laypersons versus technocrats. Under the first challenge of cooperative leadership he says;

25 *"Cooperatives in Uganda are, by and large, local and rural institutions addressing local needs, employing local talent and largely led by leaders with low levels of education. At the AGMs, laypersons continue to elect laypersons, with little or no experience in running business organisations, to serve on the committees/board of cooperative business organisations. In addition to this problem, many times, those elected to the boards usually have different interests and motives. As Edgar Parnell points out, some of those elected may be nest 'featherers', ego builders, recognition seekers, political ladder climbers, hijackers etc. A cooperative leadership that can establish and*

adhere to sound systems of internal control to safeguard shareholders' interests is the challenge faced by many cooperatives."

Under the second challenge of un-empowered membership Charles Kabuga (*supra*) says;

10

"Cooperatives, probably more than other forms of organisations, are focussed on self-help, self-administration and democratic control. These cherished cooperative values call for shareholders that understand their rights, responsibilities and obligations. Without that understanding, the shareholders most likely lack the courage to hold the leadership of their cooperative organisations accountable. Ordinarily, the shareholders tend to be apathetic and do whatever the Board of Directors tell them to do. Good corporate governance calls for shareholders that are active and prudent in the use of their rights. The challenge of member empowerment must be adequately addressed in order to enable them hold their board members to account. Unless that is done, cooperatives could continue to benefit managers and board members more than the members who own the business."

15

Under the third challenge of laypersons versus technocrats, he says;

20

"As pointed out earlier, cooperative members elect laypersons, from amongst themselves, to become board members. Those elected may, therefore, not necessarily possess relevant knowledge and skills to exercise, inter alia, the supervisory and oversight functions expected of them. Besides, because board members are part-time, they usually appoint technocrats (managers and other personnel) to run the cooperative business on a full-time basis. Cooperatives with lay boards and skilled technocrats are, more often than not, management-driven instead of being driven by the owner-members. In the process, such cooperatives often lose their direction and cease to serve the real needs of their members. Ensuring that cooperatives serve the interests of their members more than those of the technocrats is a big cooperative governance challenge."

25

I must however observe that regulation should provide oversight for purposes of promoting good governance and enhancing the carrying on of trade and business of societies. Regulation should not have the net effect of stifling or controlling societies and derogating their constitutionally guaranteed right to carry on trade and business. I have found very instructive a statement in the Policy Paper (*supra*) at page 6 that;

30

5 *"An **appropriate policy, legal and regulatory framework provides an enabling environment for cooperatives to operate and thrive. This should be witnessed in favorable cooperative laws;** favorable economic policies; favorable social policies; favorable market interventions; tax laws and competition laws among others. Relatedly, a country's political environment is critical in the success of a country's cooperative system. **A cooperative system will be vibrant if aspects of political control of cooperative are handled well.** Additionally, the economy must be peaceful and safe for these cooperative activities."* (Emphasis added).

10

Further at page 16, that; *"state intervention should be limited to ensuring a strict adherence to the accountability framework as a safeguard from risks of abuse of cooperative autonomy."*

Bearing in mind the above historical background of societies in Uganda, the cooperative principles, the key role societies can play in an economy and the need for appropriate regulation, I will now determine the issues raised for Constitutional interpretation in this petition.

15

Regarding the first issue, counsel for the petitioners submitted that sections 6(3), 22(1), 24 (2) and 3, 43 (1), 45, 52 and 56 of the Act are inconsistent with and contravene Article 40 (2) of the Constitution which gives the right to every person in Uganda to practice his or her profession and to carry on any lawful occupation, trade or business. The impugned provisions of the Act give the Registrar powers to, *inter-alia*;

20

1. *Cancel registration of a society if he or she is not satisfied with the performance of the society.*
 2. *Approve an auditor appointed by the annual general meeting of a society, give an opinion regarding the estimates of a society before they are submitted to the general meeting.*
 3. *Restrict the borrowing of a society from non-members; approve any other modes of investment not specified under the Act; hold an inquiry into the constitution, working and financial condition of a registered society.*
 4. *To hold or cause an inquiry to held into the working or financial condition of a society and while the inquiry is being held, to suspend the chief executive and other officers or employees of the society.*
 5. *Cancel the registration of a society if in his or her opinion the society ought to be dissolved.*
- 25
- 30

5 Counsel for the petitioners explained in detail how the Registrar's powers in the impugned provisions interferes with the right of societies to freely trade or do business as guaranteed under Article 40 (2) of the Constitution. I have here below analysed each of the impugned provisions under the first issue.

10 Section 6 (3) gives wide discretion to the Registrar without any parameters upon which the performance can be measured. This, in my view, makes the wide discretion prone to abuse as it is subject to the opinion of the Registrar, which may interfere with a society's right to carry on trade or business.

15 As regards section 22 (1), it gives the Registrar power to approve an auditor appointed by the AGM to audit books of accounts of a society. The power to approve impliedly also gives the registrar discretion not to approve without giving any reasons. This section, in my view, gives the Registrar power to, in a way, micro manage societies. I am of the view that if the purpose of section 22 (1) is to help societies get the right auditors, the most ideal way of doing it would be for the Registrar to prequalify or approve a list of auditors to audit societies so that each of them can choose from that list. That is the position in Kenya as provided under section 25
20 (4) of the Cooperative Societies Act (Amended), 2004 (herein after called the Act of Kenya)

I must point out the practical challenge of implementing section 22 (1). The Policy Paper (supra) indicates that by the time of compiling that report in 2018 there were already 16,408 registered societies in Uganda. I suppose many more societies have since been registered. One therefore wonders how practical it would be for the Registrar to approve annually,
25 auditors chosen by the AGM of each of these societies. It may not be farfetched to say that this provision can have the effect of delaying decision on the choice of auditors and bringing uncertainty that can affect the carrying on of trade and business of a society.

5 As for section 24 (2), it requires estimates of the societies income and expenditure for both revenue and capital for the coming 12 months prepared by the committee to be sent to the registrar for an opinion before they are submitted to the general meeting.

Similarly section 24 (3) requires supplementary estimates prepared by the society during the financial year to be submitted to the Registrar for an opinion before they are submitted to the
10 AGM.

Practically it would be impossible for the Registrar to give an opinion on the estimates of each of the many registered societies' income and expenditure of both revenue and capital as well as their supplementary estimates during a financial year without causing unnecessary delay. It also gives room for an outsider, who does not know what is obtaining within the society, to
15 give an opinion on the estimates of its income and expenditure for both revenue and capital and the supplementary estimates. That, in my view, is an unjustified interference with the carrying on of trade and business by a society. I therefore agree with the appellants' submission that in effect it would fetter the right of societies to carry on trade or business.

Section 43 (1) allows societies to receive deposits and loans from persons who are not
20 members only to such extent and under such conditions as the Registrar may, from time to time, in writing, authorise. To my mind, this provision interferes with the right of societies to choose persons they can borrow from and ultimately contravenes their right to carry on trade or business.

I am also of a similar view concerning section 45 (b) which gives the Registrar power to
25 approve, in writing, the society, company or statutory corporation where a society may invest or deposit its funds.

Section 45 (e) which gives the Registrar power to approve such other mode as specified by the byelaws of the society in which a society may invest or deposit its funds. I find this provision rather ambiguous. I do not know its exact import in view of section 5 (3) of the Act

5 which requires 3 copies of a society's byelaws to accompany its application for registration and section 9 which provide for amendment of byelaws. Does it mean that such other mode of investment or deposit of funds as specified by the byelaws of the society would have to be approved by the Registrar separately or does it mean that once the byelaws or amendment thereto which specifies the mode in which a society may invest or deposit its funds, is
10 registered then the approval is automatic?

Besides the ambiguity, I also find that it interferes with the autonomy and independence of societies to make investment decisions and as such a fetter to their right to carry on trade or business.

Section 52 of the Act, also gives the Registrar some powers. Section 52 (1) allows the
15 Registrar, in consultation with the board, to hold an inquiry into the affairs of a society. Under section 52 (3), during the inquiry the Registrar may suspend the CEO and other officers or employees from duty as he or she deems necessary to facilitate the smooth holding of the inquiry. Where the CEO is suspended, the Registrar is clothed with power under section 52 (4) to appoint a caretaker manager in consultation with the board. The effect of this provision
20 is unconstitutional although the purpose may have originally been regulatory.

There is no doubt that when the Registrar suspended the entire Board of Directors of the Union, he was exercising his powers under that section. By his actions, he enforced a statutory limitation to the petitioners' right to carry on any lawful trade and business which is guaranteed under article 40 (2) of the Constitution. For his actions to be justifiable, it must be
25 shown that the Registrar was acting within the limits stipulated under Article 43 of the Constitution, which provides as follows:

43. General limitation on fundamental and other human rights and freedoms.

"(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

30 *(2) Public interest under this article shall not permit—*

5

(a) political persecution;

(b) detention without trial;

(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution”.

10

In the Supreme Court of Canadian in **Regina vs Oakes, 26 DLR (4th) 201** the Supreme Court of Canada at page 225 held thus:-

15

"The onus of proving that a limit on a right or freedom guaranteed by the charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of S.I (Equivalent to our article 43 of the Constitution) that the limit on the rights and freedoms enumerated in the charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking S.I can bring itself within the exception criteria, which justify their being limited. This is further substantiated by the use of the word "demonstrably" which indicate that the onus of justification is on the party seeking to limit."

20

The onus of proving that a law which restricts the rights and freedoms guaranteed under Chapter Four of the Constitution, is justified under Article 43 thereof, falls on the respondent. (See **Onyango Obbo and another vs Attorney General; Supreme Court Constitutional Appeal No. 2 of 2002**). In the instant petition, counsel for the respondent submitted that the Registrar's actions are acceptable and demonstrably justifiable in a free and democratic society.

25

The phrase “beyond what is demonstrably justifiable in a free and democratic society” as stipulated under Article 43 (2) (c) is not defined in the Constitution but Courts have considered it and given some useful guidance. In **Zachary Olum and another vs Attorney General (supra)** Okello, JA in his judgment stated thus:

5 *"The phrase in a "free and democratic society" has been considered by courts in other jurisdictions. In Canada, the Supreme Court in The Queen Oakes [1987] (Const.) 477 at 498 – 9 said: -*

10 *"A second contextual element of interpretation of (section 1) is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the court to the very purpose for which the charter was originally entrenched in the Constitution of Canadian society is free and democratic. The court must be guided by the values and principles essential to a free and democratic society which I believe embody to name but a few, respect for inherent dignity of human rights, commitment to social justice and equality, accommodation of a wide variety of beliefs,*
15 *respect for cultural and group identity and faith in social and political institutions which enhance the participation of individual and groups in society. The underlying value and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect to be reasonable and democratically justified.*

20 *The general features in the definition of the phrase "free and democratic society" are that it is a society where its government is based upon the consent of informed citizenry and there is dedication to the protection of the rights of all. That is a free and democratic society."*

It is the respondent's case that the Registrar acted within the ambit of section 52 and his intervention was to ensure that the member's common interests and rights are protected. I
25 accept that the Registrar was carrying out his statutory duty. However, the issue in contention in this petition is that the Registrar's powers under the impugned provisions which also allow him to suspend an entire board of directors of a society, as is the case in the instant petition, contravene the Constitution.

In a bid to resolve this issue, I have found it necessary to look at the Act of Kenya for purposes
30 of finding out if they have an equivalent of section 52 of the Act. I chose Kenya because, firstly, it is within the region. Secondly, because according to the Policy Paper (supra), it has

5 the most vibrant and strongest societies in Africa, yet they are stated to be the most regulated and that Kenya acts as a role model in African scene.

Section 58 of the Act of Kenya provides for inquiry by the Commissioner who performs the role of a Registrar Cooperatives in Uganda. It states thus;

- 10 (1) *The Commissioner may, of his own accord, and shall on the direction of the Minister, or on the application of not less than one-third of the members present and voting at a meeting of the society which has been duly advertised, hold an inquiry or direct some person authorized by him in writing to hold an inquiry, into the by-laws, working and financial conditions of any co-operative society.*
- 15 (2) *All officers and members of the co-operative society shall produce such cash, accounts, books, documents and securities of the society, and furnish such information in regard to the affairs of the society, as the person holding the inquiry may require.*
- 20 (3) *The commissioner shall report the findings of his inquiry at a general meeting of the society and shall give directions for the implementation of the recommendations of the inquiry report.*
- (4) *Where the commissioner is satisfied, after due inquiry, that the committee of a co-operative society is not performing its duties properly, he may –*
- 25 (a) *dissolve the committee, and*
- (b) *cause to be appointed an interim committee consisting not more than five members from among the members of the society for a period not exceeding ninety days.*
- 30 (5) *A person who contravenes subsection (2) shall be guilty of an offence and shall be liable to a fine not exceeding two thousand shillings for each day during which the offence continues.*

While section 52 (3) of the Act gives the Registrar power to suspend the CEO and other officers or employees from duty as he or she deems necessary during the inquiry, section 58 of the Act of Kenya does not have a similar provision.

35 Under section 52 (5) of the Act, the caretaker manager is to remain in office until either the former chief executive is reinstated or a new one is appointed; except that he or she shall not stay in that office for more than three months after the report of the committee of inquiry has

5 been submitted. It is pertinent to note that the period within which the inquiry is to be completed is not specified under that section and so a caretaker manager could remain in office for as long as the inquiry is not completed and a report not submitted whether it takes years. In the instant petition, paragraph 15 of the additional affidavit in support of the answer to the petition deposed by Joseph William Kitandwe, Commissioner Cooperatives in the
10 Ministry of Trade, Industry & Cooperatives indicate that the investigations were concluded in 2014. This was after a period of about 4 years since according to the affidavit in support of the petition deposed by the 1st petitioner, the entire board of the Union was suspended in December 2010 and a caretaker manager appointed immediately.

Also noteworthy is that under section 52 (6) of the Act, the Registrar has power to dissolve
15 the committee of the society if cause arises to do so during the inquiry and convene, within 30 days, a special general meeting to replace the committee. For the case of Kenya, under section 58 (3) of the Act of Kenya the Commissioner is required to report the findings of his inquiry at a general meeting of the society and give direction for the implementation of the inquiry report. He or she may then dissolve the committee if he is satisfied, after due inquiry,
20 that the committee of a society is not performing its duties properly and cause an interim committee consisting not more than five members from among the members of the society for a period not exceeding 90 days.

While the Kenya position allows members to continue managing the affairs of their society through the interim committee, the Uganda position removes management from the hand of
25 the society and puts it in the hands of a caretaker manager who may be a complete stranger to the society. I have no problem with an inquiry being carried out as mandated by section 52 (1) & (2) of the Act. However, it is my firm view that the power of the registrar under section 52 (3) to unilaterally suspend the CEO and other officers or employees from duty as he or she deems necessary during the inquiry is excessive and ultra vires the Constitution. My
30 view is that the suspension of the CEO and other officers or employees from duty for purposes

5 of facilitating the smooth holding of the inquiry, should be done in consultation with the members of the society who should also be the ones to propose names of persons from among their membership to be appointed as caretaker manager.

Counsel for the petitioner did not make any submission on section 56 of the Act. I take it that by that conduct he abandoned it. Otherwise, section 56 (1) gives the Registrar power to cancel
10 the registration of a society if, after holding an inquiry under section 52 or after making an inspection under section 53, or on receipt of an application made by two-thirds of the members of a registered society, he/she forms an opinion that the society ought to be dissolved. I would only observe that section 56 (2) gives an aggrieved member of a registered society right of appeal against the order for the cancellation of registration of the society. In my view, section
15 56 of the Act does not contravene the Articles of the Constitution cited in this petition.

As regards sections 52 (3), (4), (5) and (6) of the Act, I find that the powers given to the Registrar there under cannot be demonstrably justifiable in a free and democratic society because they derogate a society's right to carry on trade or business. In the instant petition, the respondent provided evidence that indeed the Union suffered some loss due to
20 mismanagement during the time it was under the leadership of the caretaker manager. Paragraphs 16 and 17 of the affidavit of Joseph William Kitandwe acknowledges the loss and said it was compensated. It is not therefore enough for counsel for the respondent to argue that the Registrar's actions are acceptable and demonstrably justifiable in a free and democratic society when exercise of that power may cause a society to incur losses as was
25 the case in this petition.

The onus to show that the restriction imposed by an impugned provision of the law on the fundamental rights and freedoms enshrined in Chapter 4 of the Constitution is demonstrably justifiable in a free and democratic society rests upon the respondent. The respondent has failed to do so and therefore it is my finding that all the impugned sections of the Act under

5 the first issue do not pass the test set out under Article 43 (2) (c) of the Constitution. I am
satisfied that they are a fetter to the right of societies to carry on trade or business as
guaranteed under Article 40 (2) of the Constitution. The implementation of those provisions
would also cause unnecessary delay in decision-making and interfere with the autonomy and
independence of societies, yet these are some of their key principles. For that reason, I
10 answer the first issue in the affirmative by finding that sections 6(3), 22(1), 24 (2) & (3), 43
(1), 45 and 52 (3), (4), (5) & (6) of the Cooperative Societies Act are inconsistent with and
contravene Article 40 (2) of the Constitution. .

On the 3rd issue, the petitioners contend that sections 8, 9 (6) and (7), 15 and 17 of the Act
are inconsistent with Articles 29 and 40 (2) of the Constitution. Counsel for the petitioners
15 submitted that section 9 (6), which empowers the Registrar to direct a society to amend its
bye laws if it appears to the Registrar that the amendment is desirable or necessary, and
section 9 (7), which empowers the Registrar himself or herself to make and register the
amendment, if the society fails to do so within the time specified, contravene the freedom of
thought guaranteed by Article 29 (1) (b) of the Constitution. He also added that section 15
20 violates the freedom of association as guaranteed under Article 29 (1) (e) and 40 (2) in so far
as it requires the Registrar to give written permission to a company wishing to become a
member of a society.

In reply, counsel for the respondent submitted that the petitioners' submission are without
merit since the Registrar's powers under section 9 (6) and (7) are to ensure compliance with
25 the principal act and the interests of the societies which powers cannot be exercised
arbitrarily. Further that, the actions of the Registrar under section 15 are acceptable and
demonstrably justifiable in a free and democratic society under Article 43 of the Constitution.

5 I have perused section 9 of the Act on amendment of byelaws particularly subsections (6) and (7) as well as regulation 7 of the Cooperative Societies Regulations SI 112-1 which specifies what should be provided in the byelaws. They are as follows;

"Regulation 7. Byelaws of the society

(1) *A society shall make byelaws providing for the following matters_*

- 10 (a) *its name;*
- (b) *its registered address;*
- (c) *the objects for which it is established;*
- (d) *the area within which its operations and membership shall be confined;*
- (e) *the qualification for membership, the terms of admission and the mode of election of members;*
- 15 (f) *the withdrawal or expulsion of members and payments, if any, to be made by the members and the time in which the payments shall be made;*
- (g) *the nature and extent of the liability of members;*
- (h) *the transfer of shares or interests of members*
- (i) *the manner of raising funds, including the fixing of the maximum rate of interest on members' deposits, if any;*
- 20 (j) *general meetings, the procedure and quorum at the meetings, the powers of the meetings and representation and voting at the meetings;*
- (k) *the appointment, suspension and removal of members of the committee and officers of the society, and the powers and the duties of the committee and the officers of the society;*
- 25 (l) *mode of payment of calls on shares and the financial year of the society;*
- (m) *the consequences of default by a member in payment of calls on shares;*
- (n) *the authorisation of the officers of the society to sign documents on its behalf; and*
- (o) *the manner in which books of account shall be kept.*

(2) *If the object of the society include the creation of funds to be lent or advanced to its members, the society shall make byelaws providing for the conditions on which loans or advances may be made to members, including_*

- 30 (a) *the rate of interest;*
- (b) *the maximum amount which may be lent to a member;*
- (c) *the extension of the term of the loans or the renewal of loans;*

5 (d) *the purpose of loans; and*

(e) *the security for the payment of loans.*

(3) *If the members of the society are registered societies, the society shall make byelaws providing for the following matters_*

10 (a) *the number of officers of each member society who shall be entitled to exercise the voting power of that society;*

(b) *the terms and conditions of employment for any paid staff; and*

(c) *the authority of the committee in relationship to the employees of the registered society.*

Of these above listed things under regulation 7, I do not see what the Registrar would, on his own motion, as a regulator find necessary to amend without the initiation of the members of the society or its management. As I mentioned earlier in my discussion of the first issue, under section 5 (3) of the Act, an application for registration of a society is to be accompanied by 3 copies of its byelaws. It is expected that a society is only registered when its byelaws comply with the Act. I do not see a scenario where the Registrar would later justifiably think and decide for a society that its byelaws require amendment so as to comply with the law and if it fails to act then the Registrar himself or herself would have to make an amendment on behalf of the society and register it.

Autonomy and independence of Societies is one of the key principles which cannot just be undermined for no justifiable reason or cause. The onus was on counsel for the respondent to point out such scenarios that would justify the enactment of section 9 (6) & (7) of the Act but he failed to do so. If section 9 (6) is to be accommodated, it would have to be amended to elaborate more on scenarios where amendment would be necessary or desirable in the interest of a society to justify trampling on its autonomy and independence in thinking and deciding what is in its best interest.

I am therefore not persuaded by the unsubstantiated argument of counsel for the respondents that the Registrar's powers under section 9 (6) and (7) are to ensure compliance with the

5 principal act. I would instead find that the Registrar's powers under section 9 (6) and (7) of the Act limits freedom of thought of societies as guaranteed under Article 29 (1) (b) of the Constitution. The limitation imposed goes beyond what is demonstrably justifiable in a free and democratic society thus rendering it unconstitutional.

10 As regards section 15 of the Act, I have not found any justification for requiring the Registrar to give written permission to a company whether incorporated or registered under the Companies Act and unincorporated body of persons to become a member of a society. Counsel for the respondent also failed to show to my satisfaction that the power given by that section is acceptable and demonstrably justifiable in a free and democratic society.

15 In interpreting the impugned sections of the Act, the purpose and effect principle of constitutional interpretation considered in **Attorney General vs Salvatori Abuki and anor, Constitutional Appeal No. 1 of 1998**, should be applied since the object of a legislation is achieved only by its practical application or enforcement. I find that, the exercise of the Registrar's powers under the impugned sections defeats the purpose of Articles 29 (1) (b), (e) and 40 (2) of the Constitution and it has the effect of denying societies the enjoyment of
20 their fundamental rights guaranteed under those Constitutional provisions. While the provisions of section 15 might have been justifiable under the 1967 Constitution which was replaced by the Constitution of the Republic of Uganda 1995, it has no place in the current constitutional dispensation. In the premises, I would answer the third issue in the affirmative.

25 On the 4th and last issue, counsel submitted that sections 4 (2) and 29 (b) create UCA, a body mandated to make recommendations to government on registered societies and also advise the Registrar on issues regarding the working and financial conditions of a society. He contended that this interferes with the society's right to do business and contravenes Article 40 (2) of the Constitution. He added that section 46 (2) which empowers the Minister and

5 UCA to determine how much of the society's profits can be paid to members interferes with the society's right to do business guaranteed under Article 40 (2) of the Constitution.

In reply, counsel for the respondent submitted that the creation of UCA is not in contravention of Article 29 and 40 of the Constitution because it acts as a medium where all societies in Uganda can address issues affecting them. He submitted that this is akin to the requirement of lawyers to subscribe to the Uganda Law Society (ULS), which is an association of lawyers charged with ensuring high levels of professionalism. He therefore contended that it is acceptable and demonstrably justifiable in a free and democratic society and that the maximum rate prescribed by the Regulations under the Act is to ensure survival and continuity of societies. He also added that the provisions ensure that the children of members of societies have access to education funds, which is acceptable and demonstrably justifiable in a free and democratic society.

I note that sections 4 (2) and 29 (b) relate to the creation of UCA and the functions of its board of directors. Section 4 (2) of the Act provides that UCA shall be the apex body for all registered societies in Uganda. Section 29 stipulates the functions of its Board of Directors, namely to;

- 20 1. *"Consider and make recommendations to the Government on matters of policy relating to the cooperative movement;*
2. *Make representations to the Government as it may think fit in relation to any matter affecting registered cooperative societies in general or any particular registered society which those societies generally or any such society may request the board to bring to the notice of the Government;*
- 25 3. *Carry out any other duty assigned to it under this Act.* Under section 49 (3) and (4) the body receives 50 percent of the education fund from societies and it also makes quarterly returns to the Registrar accounting for collections and utilization of the education fund."

The purpose of establishing UCA can be gleaned from the functions of its board of directors. In addition, information obtained from its website (<http://uca.co.ug/about-us/>) states that;

5 *"Uganda Cooperative Alliance Ltd is an umbrella organization for all cooperatives in Uganda established in 1961. It serves as the voice of the cooperative movement at both national and international level with a mandate to recommend to government on matters of policy relating to cooperatives arbitration (settlement of disputes) advocate and represent cooperatives interest's capacity building of co-operators in cooperative business practices provide business skills development support, advisory services and mobilize resources for cooperative movement in Uganda."*

Its mandate are;

1. *To advocate and represent the interests of the cooperative movement in Uganda at all levels at both national and international.*
- 15 2. *To carry out arbitration on disputes affecting cooperatives in Uganda as mandated by the cooperative Act.*
3. *To do capacity building in areas of leadership, management, business skills and management and operations of cooperatives, using the recommended cooperative principles as well as cooperative sound practices.*
- 20 4. *To provide advisory services to cooperatives in their business operations.*
5. *To mobilize resources for the cooperative movement in Uganda.*
6. *To do any other cooperative development work*

Internationally, Cooperative Alliance is part of the structure of the cooperative movement. At the international level, the International Cooperative Alliance was established in 1895 as a voice of societies worldwide. Nationally we have UCA as a voice of cooperative movement in Uganda. I have therefore failed to see how the creation of UCA interferes with the right of societies to associate and to carry on trade and business given its mandate. It must be appreciated that a society is not like an ordinary form of business enterprise. It is a unique type of business with unique structures. It would be misleading to equate it to other forms of businesses. In that regard, I would not agree that a provision which makes UCA an apex body in the structure of societies violates the right of association of societies. On the contrary, I am

5 of the view that, if properly managed, it would provide technical support to societies and advocate for their interest.

To that end, I accept counsel for the respondent's submission that the creation of UCA is acceptable and demonstrably justifiable in a free and democratic society.

Counsel for the petitioner did not submit on section 43 (2) which was included on the 4th issue.
10 However, in their supplementary submission, they instead argued based on section 43 (1) which allows a registered society to receive deposits and loans from non-members only to such extent and under such conditions as the Registrar may, from time to time, in writing, authorise. They urged this Court to construe it in line with Article 40 (2) by requiring a society to give notice of its intention to borrow which will allow the Registrar to raise concerns with
15 reasons. Conversely, counsel for the respondent submitted that the restrictions under section 43 (1) is to ensure that the interests and rights of both the secondary and primary societies are protected.

I have considered both submissions and looked at the impugned section and my view is that the petitioner has not shown that the restriction is acceptable and demonstrably justifiable in
20 a free and democratic society within the limits of Article 43 (2) (c) of the Constitution. Counsel for the respondent merely contended that the restriction on such freedom is acceptable and demonstrably justifiable in a free and democratic society without any substantiation. I therefore find that the restriction under section 43 (1) derogates on the societies' rights to carry on trade or business, which among others consists of borrowing.

25 As regards section 46 (2), I agree with counsel for the petitioners that the power of the minister to fix a ceiling of dividends to be paid to members of the society interferes with the right of the society to carry on trade or business. It is not at all justifiable. The 4th issue therefore succeeds as relate to sections 43 (1) and 46 (2) but fails in relation to section 4 (2) and 29 (b).

5 In conclusion, I find that most of the impugned provisions of the Act contravene the provisions of the Constitution insofar as they interfere with the autonomy and independence of societies and their right and freedom to associate, think and to carry on trade or business.

In that regard, Article 2 (2) of the Constitution provides as follows;

10 *"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"*

Based on the above Constitutional provision, I would find as follows:

1. That sections 6(3), 22(1), 24 (2) & (3), 43 (1), 45 and 52 (3), (4), (5) & (6) of the Cooperative Societies Act are inconsistent with and contravene Article 40 (2) of the
15 Constitution.
2. That sections 8, 9 (6) & (7), and 15 of the Cooperative Societies Act are inconsistent with and contravene Articles 29 (1) (b) and 40 (2) of the Constitution.
3. That sections 4 (2) and 29 (b) of the Cooperative Societies Act are neither inconsistent with nor contravene Articles 29 (1) (b) and 40 (2) of the Constitution.
- 20 4. That sections 43 (1) and 46 (2) of the Cooperative Societies Act contravene Articles 29 (1) (b) & (e) and 40 (2) of the Constitution.

In the premises, I would declare the said provisions null and void to the extent of their inconsistency as pointed out in this judgment. Accordingly, I would allow this petition.

25 As for the orders sought in this petition, it is clear that some of them have been overtaken by events because this petition was filed 8 years ago. I have also considered the orders counsel prayed for in their supplementary submissions, which are completely different from the ones in the petition. While I agree that previously government provided financial support to societies, which justified the giving of excessive powers to the Registrar to supervise them, I

5 would be reluctant to make those orders for reasons that they may have far-reaching financial implications for the government. I would advise the petitioners to use other avenues to make a case for government to finance societies in Uganda in the manner proposed.

On the whole, I would make the following declarations and order;

1. That sections 6(3), 22(1), 24 (2) & (3), 43 (1), 45 and 52 (3), (4), (5) & (6) of the Cooperative Societies Act are inconsistent with and contravene Article 40 (2) of the Constitution and they are accordingly declared null and void to the extent of their inconsistency.
2. That sections 8, 9 (6) & (7), and 15 of the Cooperative Societies Act are inconsistent with and contravene Articles 29 (1) (b) and 40 (2) of the Constitution and they are accordingly declared null and void to the extent of their inconsistency.
3. That sections 4 (2) and 29 (b) of the Cooperative Societies Act are neither inconsistent with nor contravene Articles 29 (1) (b) and 40 (2) of the Constitution.
4. That sections 43 (1) and 46 (2) of the Cooperative Societies Act contravene Articles 29 (1) (b) & (e) and 40 (2) of the Constitution and they are accordingly declared null and void to the extent of their inconsistency.
5. The respondent bears the costs of this petition.

Dated at Kampala this 15th day of April 2021.



Hellen Obura

JUSTICE OF THE CONSTITUTIONAL COURT/ COURT OF APPEAL

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

CONSTITUTIONAL PETITION NO 46 OF 2012

1. NATHAN NANDALA MAFABI}

2. ENOCK MUSUNDI}

10 **3. SAM MAGONA}**

4. HAJJ HUSSEIN MUMENYA}PETITIONERS

VERSUS

ATTORNEY GENERAL} RESPONDENT

JUDGMENT OF MADRAMA CHRISTOPHER, JCC/JA

15 I have had the benefit of reading in draft the judgment of my learned sister
Hon. Lady Justice Hellen Obura, JCC and I agree with the facts and issues she
has set out in her judgment as well as the detailed background material
therein.

I have considered the resolution of the 3 issues in the lead judgment of my
20 learned sister namely:

1. Whether sections 6 (3), 22 (1), 24 (2) and (3), 43 (1), 45, 52 and 56 of
the Cooperative Societies Act (Cap 112) are inconsistent with and
contravene Article 40 (2) of the Constitution.

25 2. Whether sections ... (issue 2 was abandoned)

3. Whether sections 8, 9, (6) & (7), 15 and 17 are inconsistent with
and/or contravene Articles 29 and 40 (2) of the Constitution.



5 4. Whether sections 4 (2), 29 (b), 43 (2) and 49 (3) & (4) of the Cooperative Societies Act are inconsistent with and contravene Articles 29 and 40 (2) of the Constitution.

Issues number 1 and 3 were answered in the affirmative while issue number 4 was answered in the negative.

10 I agree with the resolution of issue number 4. I have set out the 3 issues and issue number 2 which was abandoned is whether section 23 (1) of the Cooperative Societies Act is inconsistent with and contravenes Article 21 of the Constitution, and I do not have to deal with it.

15 With regard to the resolution of issue number 4, I concur with the judgment of Obura, JCC that sections 4 (2), 29 (b), 43 (2) and 49 (3) & (4) of the Cooperative Societies Act are not inconsistent with or in contravention of Articles 29 and 40 (2) of the Constitution and I have nothing to add.

20 I would write a separate judgment on issues numbers 1 and 3 and my judgment is that the petition should be disallowed for the reasons I give herein below. I further set out the submissions of Counsel of both parties on issues 1 and 3 for ease of reference.

Submissions of Counsel:

Issue 1:

25 **Whether section 6 (3), 22 (1), 24 (2) and (3), 43 (1), 45, 52 and 56 of the Cooperative Societies Act are inconsistent with and contravened Article 40 (2) of the Constitution.**

Submissions of the petitioner's counsel on issue 1:

30 The petitioner's counsel submitted that Article 40 (2) of the Constitution vests every person in Uganda [including Cooperative Unions and Societies which are bodies corporate] with the right to carry on any lawful trade or business.



5 He submitted that a cooperative society is a business concern with a right under article 40 (2) to carry on any lawful trade or business.

In relation to section 52 of the Cooperative Societies Act, the petitioner's counsel submitted that it empowers the Registrar to suspend the chief executive and other officers or employees of a society and appoint a
10 caretaker manager. Pursuant to that power, the registrar suspended the chairman and chief executive officer and the entire board of directors of Bugisu Cooperative Union. He further relied on the evidence of the petitioners that in December 2010, the registrar exercising powers under section 52 of the Cooperative Societies Act suspended an entire board of
15 directors. He submitted that these directors had been elected by the shareholders comprising of 277 primary societies to carry on and manage their coffee business on their behalf. Almost two years later from the time of filing the petition, the entire board was still suspended. Following the suspension, the Resident District Commissioner of Mbale district, together
20 with an employee of the Ministry of Cooperatives installed a person as a caretaker manager for management of the union and the person became the principal signatory of all union bank accounts. Two years later on 12th September, 2012, the 277 primary societies petitioned the registrar to convene a general meeting but he refused to do so. On 12th September, 2012,
25 the owners of the union convened a special general meeting which was attended by 195 primary societies wherein they resolved to repossess their union from the caretaker manager and reinstate the suspended board with a mandate to convene an annual general meeting. The resolutions were communicated to the registrar who responded and stated that the meeting
30 was illegal and their resolution was null and void.

Thereafter, the members of the union condemned the government interference in the operation of the union. They resolved that the Bugisu Cooperative Union farmers would like the cooperative laws to be amended



5 to conform to the liberalisation policy. Upon the filing of the petition, the owners of the union remained in the dark about their business. The annual accountability required in the annual general meeting were no more. The accountability includes consideration of the audit report and the passing of the annual budget.

10 The petitioner's counsel submitted that section 52 which empowers a stranger to a private concern to lockout the owners of the business concern and manage it derogates from and is an encroachment on the right of the owners to carry out any trade or business.

Further section 3 of the Cooperative Societies Act states that the object for
15 setting up a cooperative society is to promote the economic and social interests of its members. Counsel submitted that a provision that allows a stranger to the society to lock out the owners of the business from managing their business for a period of more than 2 years infringes the rights to do business. It bars the members from examining their accounts or planning
20 how and where to invest by passing a budget and thereby negates promotion of economic and social interests. The evidence of the registrar shows the justification for taking over the union was a complaint about mismanagement and the registrar wanted to establish the authenticity of the complaint. He submitted that there was no justification for taking over the
25 union as may be permitted by article 43 of the Constitution as a derogation from rights.

Section 6 (3)

The petitioner's counsel submitted that section 6 of the Act empowers the Registrar to register a Cooperative Society on probation. If after two years of
30 operation the registrar is not satisfied with the performance of the society, he or she may cancel the registration or extend the probation period. The section empowers the registrar, without assigning any reason whatsoever, to



5 bring a trade/business to an end. He contended that the right to carry on the
trade or business of a cooperative society is subject to the whims of the
registrar. He submitted that the registrar did not need to give any reasons
and this breached the constitutional right to trade or to do business. Further,
10 trade is not satisfactory for him or her to cancel its registration as a
cooperative society.

The petitioner's counsel further submitted that the right to do businesses
encompasses the possibility of making losses, poor decisions et cetera.
Business involves speculation. Poor performance by a business is normal. It
15 is possible to make losses especially in the first and second years of a
business. Poor performance is in fact most likely due to challenges of a
beginner, be it financial or administrative. However, this did not mean that
performance cannot improve. A provision that seeks to curtail a business due
to poor performance is a clog on a right to do business. He submitted that
20 on such cancellation, the registrar appoints a liquidator and all property of
the society vests in the liquidator with powers to sell assets.

Section 45 (b) and (e) of the Cooperative Societies Act.

The petitioner's counsel submitted that a registered society can only receive
loans from persons who are not members only to such extent and under
25 conditions as the registrar may authorise. If a society seeks a loan of shillings
50,000,000 from a bank, the registrar can reduce it and authorise only
shillings 10,000,000. The registrar can then set conditions on the loan. The
registrar may for example vary the period of repayment. For instance, where
the society agrees with the bank to repay the loan within 5 years, the registrar
30 can set a condition to the effect that it shall be repaid within 3 years.

The petitioner's counsel submitted that a right to carry on business
presupposes that a businessman/entity is best suited to determine what is in



5 the best interest of the business. The society studies the market, understands
the weather patterns, knows the risks and makes a decision to borrow from
a bank taking into account all those factors. However, the decision is subject
to (a) approval and (b) conditions set by a bureaucrat in Kampala. He
contended that the power given by the section seeks to treat cooperative
10 societies like children who cannot manage businesses without supervision by
an elder. He submitted that the right to carry on any business or trade
includes a component of borrowing and is subject to some authority which
can override that right. Therefore, it is inconsistent with article 40 (2) of the
Constitution.

15 **Section 23 (1)**

The petitioner's counsel submitted that the above section requires the
accounts of the society to be audited by an auditor appointed by the annual
general meeting. He submitted that this is normal practice for business
entities carrying on businesses. That it is a component of the right to carry
20 on business envisaged by article 40 (2) of the Constitution. However, the
section goes further and clogs the right of the society to freely manage its
affairs. The petitioner's counsel submitted that the auditor appointed in the
annual general meeting cannot carry out the audit unless he or she is
approved by the registrar. He contended that this is interference with the
25 right to carry on business. Further he submitted that the registrar has a final
say as to who will audit the books of accounts and not the owners and
therefore it is a clog on that right.

Section 24 (2) and (3) of the Cooperative Societies Act.

The petitioners counsel submitted that section 24 (1) requires a society to
30 prepare estimates of income and expenditure for the next financial year.
Those are submitted to the annual general meeting to debate and for
approval. In such estimates, the society lays out its business plans for the next

5 financial year. Counsel submitted that section 24 (2) requires that those estimates will not be submitted to the annual general meeting unless the registrar has given his or her opinion on the estimate. Under subsection 5, failure to submit the same for the opinion of the registrar allows the same registrar to arbitrarily impose a fine on the society or officer. He contended
10 that the fact that there is a penalty for failure to submit means that it is mandatory. Carrying on business/trade may be defined as activity engaging in any transaction for purposes of financial gain. Therefore, he contended that it is irrational that a business concern has to submit its budget to an outsider for an opinion. A budget is essentially a means of raising revenue and appropriating that revenue. Members of the society know what is best
15 in their economic and social interests and therefore the provision purports to allow in a non-member to influence the budget which is the very essence of the business. Counsel submitted that it is an interference with the right to do business. Further the petitioner's counsel submitted that the registrar of companies under the Companies Act does not have such powers and yet
20 both companies and cooperative societies are business entities in a liberalised economy. Where a budget has to be submitted to a third party to render an opinion on it, the business entity does not have the control necessary to carry out transactions because that right is fettered by the
25 opinion of the registrar.

Submissions of the respondent's counsel in reply on issue 1.

In reply, the respondent's counsel submitted that the petitioner's contention is that section 52 of the Cooperative Societies Act empowers the registrar to suspend the chief executive and other officers or employees from duty to
30 facilitate the smooth holding of an inquiry and the appointment of a caretaker manager contravenes Article 40 (2) of the Constitution. However, the respondent's case is that the purpose of enacting the Cooperative Societies Act in 1991 was to consolidate the law relating to the constitution



5 and regulation of cooperative societies and for other related matters
connected therewith. Pursuant to section 4 of the Act, the Act gives
legitimacy to cooperative societies through their registration. He submitted
that the regulation of cooperative societies, safeguards the assets of
cooperative societies and the rights of its members and ensures compliance
10 with the law. Further, it is to ensure that cooperative societies serve the
interests of their members within the legal framework.

The respondent's counsel further submitted that although the rights to carry
on business under Article 40 (2) of the Constitution are guaranteed rights,
article 43 of the Constitution permits derogation from fundamental and
15 other human rights and freedoms prescribed in the Constitution to the extent
that is acceptable and demonstrably justifiable in a free and Democratic
society or what is provided for in the Constitution.

He contended that the question was whether the impugned sections of the
Cooperative Societies Act are justifiable in a free and Democratic society.

20 The respondent's counsel submitted that section 52 of the Cooperative
Societies Act permits the registrar to hold an inquiry into the operations of
cooperative societies only if certain conditions exist namely the Constitution,
working and financial condition of a registered society. He submitted that
the evidence before the court is that the registrar of cooperative societies
25 received a petition from a cross-section of members of the Bugisu
Cooperatives Union following persistent allegations of mismanagement and
poor administration of the Union affairs. The intervention by the registrar was
therefore acceptable and demonstrably justifiable in a free and Democratic
society and he invited the court to find that section 52 of the Act is not
30 inconsistent with or in contravention of article 40 (2) of the Constitution.

With regard to section 6 (3), the respondent's counsel submitted that it
empowers the registrar to register a cooperative society on probation and

5 the registrar can bring the business to an end without assigning a reason. He
contended that section 6 (3) of the Cooperative Societies Act should be read
together with section 3 of the Cooperative Societies Act which sets out the
conditions precedent for the registration of the cooperative society whose
object is the promotion of the economic and social interests of its members
10 in accordance with cooperatives principles. He submitted that the only
reason the registrar may decide to bring a cooperative society's business to
an end it is if they do not comply with the provisions set out in section 3 of
the Act.

With regard to the contention of the petitioner's counsel that the freedom
15 of the society to invest in the course of doing its business is restricted under
section 45 (b) of the Cooperative Societies Act, the respondents counsel
submitted that section 45 of the Act does not give the registrar powers to
determine the entity which the cooperative society can invest in. On the
contrary, the section gives the cooperative societies a wide range of
20 institutions or companies that they may invest or deposit funds in. In
addition, it is the respondent's submission that the approval granted by the
registrar in section 45, ensures compliance with section 3 of the Act which
deals with the promotion of economic, social interests of the members in
accordance with cooperative principles.

25 With regard to the allegation that section 43 (1) of the Act is inconsistent
with the Constitution, the respondent's counsel submitted that the
restrictions on borrowing under the provision was intended to ensure that
the interest and rights of both the secondary and primary cooperative
societies are protected. It is further the respondent's submission that the
30 petitioner has not laid out any material before the court that the registrar
had abused those powers. The allegations are merely speculative and ought
not to be entertained by this court.

A handwritten signature in black ink, appearing to be 'R. M. K.', is located at the bottom right of the page.

5 With regard to section 22 (1) of the Cooperative Societies Act and with regard
to the appointment of an auditor by the annual general meeting as approved
by the registrar, the respondents counsel submitted that the registrar is
mandated to approve the appointment of the auditor appointed by the
annual general meeting to safeguard the rights and interests of cooperative
10 societies. The respondent further submitted that the cooperative societies,
are unlike other ordinary business entities such as companies and therefore
need an oversight function into the performance of the societies to ensure
compliance with cooperative principles.

With regard to section 24 (2) and (3) of the Cooperative Societies Act, the
15 respondent's counsel submitted that the impugned section allows the
registrar to carry out an oversight function into the estimates by a
cooperative society and this is acceptable and demonstrably justifiable in a
free and Democratic society under article 43 of the Constitution.

Issue 3

20 **Whether section 8, 9 (6) and (7), 15 and 17 are inconsistent with and/or
contravene Article 29 (b) and (e) of the Constitution.**

Submissions of the petitioner's counsel:

With regard to sections 9 (6) and (7) of the Cooperative Societies Act, the
petitioner's counsel submitted that one of the conditions for registration of
25 a cooperative society is the submission of copies of the proposed byelaws in
terms of section 5 (3) of the Act. He submitted that if the registrar is satisfied
that the proposed byelaws are not contrary to the provisions of the Act, he
or she registers the society. After the said registration and when the society
is operational, the registrar may direct the society to amend the byelaws
30 within such time as he or she may specify. The amendment is not originated
by the society but if "it appears to the registrar that an amendment is



5 desirable or necessary". It was contended that this contravenes the freedom of thought guaranteed by article 29 (1) (b) of the Constitution.

Section 15 of the Cooperative Societies Act.

The petitioner's counsel submitted that a company registered under the Companies Act, cannot become a member of a cooperative society unless
10 the registrar gives it written permission. In other words, the freedom to associate is subject to the permission of the registrar. The petitioners counsel submitted that the Constitution in Article 29 (1) (e) and 40 (2) specifically provides for freedom to join associations. If members of a registered society wish to associate with the company which is itself ready to become a member
15 of the society, the Constitution gives both a right to associate and it is not upon the registrar to tell the society with whom it may associate.

Section 17 of the Cooperative Societies Act.

The petitioner's counsel submitted that, in order to be a member of more than one cooperative society, a person needs the written consent of the
20 registrar. If the registrar withholds his or her consent, that person cannot associate with members of the society he or she may crave to join. It does not matter that the person had been invited to join that society. It follows that this was inconsistent with the freedom to associate under article 29 (1) (c) of the Constitution.

25 Reply of the respondent's counsel submissions issue 3

In reply to submissions on sections 9 (6) and (7) of the Cooperative Societies Act, the respondent's counsel submitted that the impugned section of the Act on amendment of byelaws of a registered society are not in contravention of Articles 29 (1) (b) and (e) of the Constitution. The
30 respondents counsel further submitted that the powers given to the registrar under the impugned provisions of the law are made to ensure compliance with the Principal Act and the interest of the society which powers cannot be



5 exercised arbitrarily. Therefore, the petitioner's submission that the impugned sections contravene article 29 (1) (b) of the Constitution does not have merit.

10 With regard to the provisions of section 15 of the Cooperative Societies Act, the respondent's counsel submitted that the impugned section which deals with restrictions on membership of a cooperative society is to ensure the promotion of economic and social interests of the members of the society in accordance with cooperative principles. He submitted that the actions of the registrar are acceptable and demonstrably justifiable in free and Democratic society under article 43 of the Constitution.

15 The petitioner's counsel further submitted that section 17 of the Cooperative Societies Act was repealed by the Cooperative Societies (Amendment) Act of 2020 and the petition with regard to that section has been overtaken by events.

Resolution of Petition

20 I have carefully considered the submissions of counsel, the impugned provisions in respect of the issue of consistency or inconsistency with Articles 29 and 40 (2) of the Constitution. I have also had the benefit of reading in draft the judgment of my learned sister Obura, JCC and I agree that there may be some undue interference with the running of cooperative societies and particularly with regard to the affairs of Bugisu Cooperative Union and in the manner of intervention into the affairs of that Union. In that regard I have considered whether such interference could give rise to an application for judicial review or in some circumstances be appealable under the Act rather than be dealt with as a question as to interpretation of Articles 29 and 30 40 (2) of the Constitution.



5 I also agree with the principles for interpretation of constitutions set out by my learned sister Obura JCC in the draft judgment and the elaborate background material and facts set out in the judgment.

10 Generally, in the interpretation of any statute, the entire scheme of the statute, and in this case, the **Cooperative Societies Act Cap 112** should be brought in to perspective with due regard to the intention of Parliament and the doctrine of separation of powers. The impugned sections of the Cooperative Societies Act should be read in the context of the entire enactment before reaching a conclusion on whether it contravenes articles 29 and 40 (2) of the Constitution.

15 I further note that in issues 1, 3 and 4 set out for resolution of the petition, only two articles of the Constitution are stated to have been contravened; namely; two paragraphs of Article 29 and Article 40 (2) of the Constitution.

20 The mandate of this court under article 137 (1) of the Constitution is to determine questions as to the interpretation of the Constitution. A question as to interpretation of the Constitution by necessary implication is an issue or controversy between the parties that requires court to determine the meaning, scope, application or purview of an article of the Constitution in relation to any law, act or omission that is stated to be in contravention of the Constitution. For that reason, it becomes imperative that the article
25 stated to have been infringed in the petition should be explored to determine any question as to interpretation disclosed in the petition and answer to the petition. Where there is no question as to interpretation and what is being presented is merely inconsistency with a provision of the Constitution, the cause of action, if any, can be lodged for enforcement before a court of
30 competent jurisdiction.

A controversy as to interpretation may arise where the parties are in doubt as to whether a constitutional provision has been infringed or not. The



5 question whether there is any question or controversy as to interpretation of
the Constitution implies an additional question as to whether the
constitutional court has jurisdiction in the matter. All courts of judicature are
empowered to uphold the Constitution by applying or complying with its
provisions and in that application or compliance with any provision of the
10 Constitution, the courts have to construe any article or articles to ascertain
the meaning, scope or applicability before enforcement. Provided, no
controversy or question as to interpretation arises, and if it does, the court is
obliged to refer such a question to the Constitutional Court for determination
under Article 137 (5) of the Constitution. Article 137 (5), (6) and (7) of the
15 Constitution provides that:

(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 the
court in which the question arises shall dispose of the case in accordance with that
25 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 It is clear from article 137 (6) that where the Constitutional Court has
determined a question as to interpretation of the Constitution pursuant to
the reference, the trial court shall enforce the constitutional provision in
accordance with the determination of any question as to interpretation.



5 In the circumstances of this petition, there are challenges to several provisions of the Cooperative Societies Act as being inconsistent variously with Article 29 (1) (b) and (e) and Article 40 (2) of the Constitution. Similarly, the sections of the Cooperative Societies Act which are alleged to be inconsistent with a provision of the Constitution have been set out. These are
10 sections 6 (3), 22 (1), 24 (2) and (3), 43 (1), 45, 52 and 56 of the Cooperative Societies Act for alleged inconsistency or contravention of Article 40 (2) of the Constitution.

Secondly, it is alleged that sections 8, 9 (6) & (7), 15 and 17 are inconsistent and/or contravene Article 29 and 40 (2) of the Constitution.

15 In the judgment of my learned sister Obura, JCC, it is the finding that sections 4 (2), 29 (b), 43 (2) and 49 (3) & (4) of the Cooperative Societies Act are not inconsistent with or in contravention of Article 29 and 40 (2) of the Constitution and I do not need to consider those provisions of the Cooperative Societies Act, the subject matter of issue No. 4.

20 It is a cardinal rule of interpretation of statutes that the first effort in interpretation should be to ascertain the natural or ordinary meaning of a word or phrase that may be in issue. This principle is set out by Sir Rupert Cross in **Statutory Interpretation; London Butterworth's 1976** at page 29 from several decisions of the House of Lords. In **Pinner v Everett [1969] 3 All ER 257 at 258 – 259**, Lord Reid stated that:
25

In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that
30 it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute.



5 Further rules of construction are aids and not "masters" and the court should apply its own judgment after considering the relevant circumstances. In **Maunsell v Olins and another [1975] 1 All ER 16**, Lord Reid stated at page 18 that:

10 Then rules of construction are relied on. They are not rules in the ordinary sense of having some binding force. They are our servants not our masters. They are aids to construction, presumptions or pointers. Not infrequently one 'rule' points in one direction, another in a different direction. In each case we must look at all relevant circumstances and decide as a matter of judgment what weight to attach to any particular 'rule'.

15 In proceeding with interpretation of a statute, every word should be given its ordinary meaning unless there is sufficient reason to give it, in the particular case, a secondary or limited meaning.

A Constitution is a special instrument which call for rules of interpretation of its own that may be peculiar to its context and should first be construed on the basis of its own language. Lord Wilberforce in **Minister of Home Affairs and another v Fisher and another [1979] 2 All E.R. 21** at 26 stated that:

20 ... The second would be ... to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.

This principle is also found in the words of the South African Constitutional Court per Chaskalson P in **State v Makwanyane and Another [1995] 1 LRC 269** that:

30 We are concerned with the interpretation of the Constitution, and not the interpretation of ordinary legislation. A constitution is no ordinary statute. It is the source of legislative and executive authority. It determines how the country is to be governed and how legislation is to be enacted. It defines the powers of the different organs of state, including Parliament, the Executive, and the Courts as well



5 as the Fundamental Rights of every person which must be respected in exercising such powers.

Last but not least, constitutional provisions are construed or interpreted in harmony *inter se* and not in conflict as stated by Justice White of the Supreme Court of the United States in **South Dakota v North Carolina 192 U.S. 286 (24 S. Ct. 269, 48 L. Ed. 448 (1940))** at page 465 that:

15 I take it to be an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all the others, and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. If, in following this rule, it be found that an asserted construction of any one provision of the Constitution would, if adopted, neutralize a positive prohibition of another provision of that instrument, then it results that such asserted construction is erroneous, since its enforcement would mean, not to give effect to the Constitution, but to destroy a portion thereof.

20 This principle was applied with approval of **South Dakota v North Carolina** (supra) in **National Council for Higher Education v Anifa Kawooya Bangirana Constitutional Appeal No 4 of 2011** by the Supreme Court of Uganda in the judgment of Odoki CJ at page 49 that:

25 each provision is an integral part of the Constitution and must be given meaning or effect in relation to others. Failure to do so will lead to an apparent conflict within the Constitution

30 It is incumbent on this court before striking out any provision of a statute to consider the greater purposes of the Constitution such as the right of Parliament to make laws for legitimate purposes. I further wish to state that it is further incumbent upon the court to consider the provisions of the Cooperative Societies Act in context to ascertain the meaning, purpose and intention of legislature in enacting the impugned sections before ascertaining, in the effort of determining the issues set out, whether it is inconsistent with any article of the Constitution. Similarly, where the registrar



5 of the Cooperative Societies Act, acts ultra vires, unreasonably, capriciously,
maliciously or where there are any grounds which may be valid grounds for
judicial review under article 42 of the Constitution, the question is whether
the statute itself does not provide a remedy to any aggrieved party to seek
redress in a court of competent jurisdiction. Further, the issue is whether the
10 action taken was permitted by the statute or a derogation from the purpose
and principles of law set out in the statute.

In the context of the Cooperative Societies Act, there are provisions for
appeals to the board as well as to a court of competent jurisdiction from
decisions of the registrar. I particularly note that the impugned sections deal
15 with the exercise of powers of the registrar under provisions of the law. I
would consider the intention of Parliament while considering the impugned
sections of the Cooperative Societies Act against Articles 29 and 40 (2) of the
Constitution for any inconsistency in the appropriate context.

The headnote of Article 40 of the Constitution reads: "Economic Rights" and
20 demonstrates that it is about economic rights. It provides in article 40 (2)
thereof that:

"(2) Every person in Uganda has the right to practice his or her profession and to
carry on any lawful occupation, trade or business."

Article 40 (2) in its ordinary meaning confers a right on every person in
25 Uganda to practice his or her profession. Secondly, it confers a right to every
person in Uganda to carry on any lawful occupation, trade or business. For
there to be an infringement of article 40 (2) of the Constitution, it should be
shown that the right to practice his or her profession or the right to carry on
any lawful occupation, trade or business of any person in Uganda has been
30 infringed. The word "lawful" has to be emphasized. The right does not stretch
to business, occupation, trade or profession that is forbidden by statute or
regulated. The purpose for the regulation or forbiddance must be
determined before measuring it against the Constitution.

- 5 In interpretation of articles 40 (2) and 29 of the Constitution, it should be shown that the infringement or inconsistency is in the law, act or omission or anything done under the authority of any law. As in this petition, it must be shown that the law violates any related rights to practice profession or to carry out any lawful occupation, trade or business.
- 10 I further note that articles 40 (2) and article 29 (1) (e) of the Constitution have been cited together. Article 29 (1) (e) of the Constitution *inter alia* enshrines the freedom of association. Secondly article 29 (1) (b) enshrines freedom of thought, conscience and belief which shall include academic freedoms in institutions of learning. For instance, is the law inconsistent with the freedom
- 15 of thought, conscience and belief which shall include academic freedoms in institutions of learning?

Resolution of issue 1

Whether section 6 (3), 22 (1), 24 (2) and (3), 43 (1), 45, 52 and 56 of the Cooperative Societies Act are inconsistent with and contravened Article

20 **40 (2) of the Constitution.**

I will start with the allegation of inconsistency with article 40 (2) of the Constitution.

The Cooperative Societies Act, regulates, membership of the society, and the conditions it must fulfil under the law. It provides for the conditions for

25 registration under section 4 thereof which *inter alia* stipulates that one of the conditions is that the minimum number of persons of a primary society shall be 30 persons. In the case of a secondary society, it shall consist of at least 2 registered primary societies among its registered members. In the case of a tertiary society, shall consist of at least 2 registered secondary societies

30 among its registered members. In the case of an apex society, it consists of 2 or more secondary societies. There are qualifications introduced by statute on the freedom of association in relation to the formation of a cooperative



5 society. Secondly upon the registration of a probationary society under
section 6 (5) it is stipulated that the society shall become a body corporate
by the name under which it is registered in the probationary period and
would have perpetual succession and a common seal with power to hold
10 to enter into contracts, to institute and defend suits and other legal
proceedings and to do all things necessary for the purposes of its
Constitution. Section 3 of the Cooperative Societies Act further restricts the
kind of societies to be registered when it provides that:

3. Societies which may be registered.

15 Subject to this Act, a society which has for its object the promotion of the economic
and social interests of its members in accordance with cooperative principles and
which, in the opinion of the registrar, is capable of promoting those interests may
be registered under this Act with or without limited liability; except that a
cooperative union or any Society shall be registered with limited liability.

20 It is clear from the section that persons who wish to be registered as a society
must in the first place have the object of the promotion of economic and
social interests of its members in accordance with cooperative principles and
law and they should be capable of promoting those interests. Some of these
principles which are considered by the registrar before registration of the
25 society as a cooperative society is the proposed byelaws of the society by
which it chooses to be registered. The byelaws are binding on the society's
members. Further, section 13 of the Cooperative Societies Act has express
restrictions to membership of a cooperative society in that a person who
wants to be a member of the society must be a resident within or in
30 occupation of land within the society's area of operation as prescribed by the
relevant by law. There are also restrictions on shareholding in the share
capital of a cooperative society under section 14. Last but not least section
28 of the Cooperative Societies Act provides that societies shall be bodies
corporate:



5 28. A society on registration shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and property of every description, to enter into contracts, to Institute and defend suits and other legal proceedings and to do all things necessary for the purpose of its constitution.

10 I proceed to consider the various impugned sections of the Cooperative Societies Act in issue No. 1 and particularly the discretionary powers of the Registrar. The Petitioners counsel submitted that section 52 of the Cooperative Societies Act empowers a stranger to a private concern to lockout the owners of the concern and manage its affairs in derogation of
15 the owners right to carry out any trade or business. Particularly he made reference to the taking over of the management of Bugisu Cooperative Union which comprises of about 277 primary societies which had elected a management of the Union and the fact that a caretaker management has been managing the affairs since December 2010 when the registrar
20 suspended the entire board of the Union and a caretaker was appointed. About two years after the filing of the Petition on 12th September, 2012 the members of the Union convened a special general meeting to get a team to take over from the caretakers but the registrar stated that that resolutions to that effect were null and void for illegality. The Bugisu Cooperative Union is
25 aggrieved and concerned about interference with the Union affairs by Government for a long period of time hence the challenge *inter alia* to section 52 of the Act.

The caretaker management was appointed pursuant to the exercise of the powers of the registrar to cause an inquiry into the affairs of Bugisu
30 Cooperative Union and the appointment of a caretaker management pursuant to suspension of the Chief Executive and other officers of the Union under section 52 of the Cooperative Societies Act.

Section 52 of the Cooperative Societies Act stipulates that:



5 52. Ad hoc committee of inquiry.

(1) The registrar in consultation with the board may hold an inquiry or direct a person authorised by him or her by order in writing in that behalf to hold an inquiry into the constitution, working and financial condition of a registered society.

10 (2) On receipt of a resolution demanding an inquiry passed by not less than two-thirds of the members present at a general meeting of the society which has been duly advertised, the registrar in consultation with the board shall cause such an inquiry.

15 (3) During the period of inquiry referred to in subsections (1) and (2), the chief executive and other officers or employees may be suspended from duty by the registrar as he or she may deem necessary to facilitate the smooth holding of the inquiry.

(4) Where the chief executive has been suspended in accordance with subsection (3), a caretaker manager shall be appointed by the registrar in consultation with the board.

20 (5) The caretaker manager shall remain in office until either the former chief executive is reinstated or a new one is appointed; except that he or she shall not stay in that office for more than three months after the report of the committee of inquiry has been submitted.

25 (6) If during the course of inquiry cause arises to dissolve the committee of the society, the registrar, in consultation with the board, shall dissolve the committee and convene within thirty days a special general meeting to replace the committee.

30 (7) All officers and members of the society shall produce such cash, accounts, books, documents and securities of the society and furnish any information in regard to the affairs of the inspected society as the registrar or such person authorised by the registrar may require.

Section 52 allows the Registrar to appoint an ad hoc committee of inquiry and to suspend the board. There are two case scenarios envisaged where this may happen. These are that the registrar acts in consultation with the board to hold an inquiry into the constitution, working and financial condition of a



5 registered society. The board therein has been defined by the impugned statute to mean the board of directors of the Uganda Cooperative Alliance Ltd, the overall society which represents all the other societies and has several powers which include the power to hear appeals from decisions of the registrar with a further right to appeal to a court from their decisions.

10 Secondly, the registrar may hold or cause an inquiry to be made upon the receipt of a resolution demanding an inquiry passed by not less than two thirds of the members present at a general meeting of the society which has been duly advertised. Even then, the registrar acts in consultation with the board to cause such an inquiry. It is further provided that during the
15 pendency of the inquiry, the chief executive officer and other officers or employees of the society may be suspended by the registrar as he or she may deem necessary to facilitate the smooth holding of the inquiry.

It should be noted that any suspension is only to facilitate the smooth holding of the inquiry. Thirdly, upon such suspension of the executive, the
20 caretaker manager shall be appointed by the registrar in consultation with the board. It is further provided that the caretaker manager shall remain in office until either the former chief executive is reinstated or a new one is appointed except that the caretaker manager shall not stay in office for more than 3 months after the report of the committee of inquiry has been
25 submitted. If during the course of inquiry cause arises to dissolve the committee of the society, the registrar upon consultation with the board shall dissolve the committee and convene within 30 days, a special general meeting, to replace the committee.

It is quite clear from the foregoing that the registrar cannot act arbitrarily and
30 in case the inquiry takes more than 3 months or a prolonged period of time, the members of the society are not precluded from holding the registrar liable to account. Furthermore, the inquiry ought to be carried out within a reasonable period that does not interfere with the carrying out of the



5 business of the society as envisaged in the Cooperative Societies Act. As a
matter of law, the Act envisages that a caretaker manager shall run the affairs
of the Society for a short period of time namely a period of 3 months after
the report of the committee of inquiry has been submitted to pave way for
the resumption of duties of the suspended executives or officials or the
10 appointment of new executives and officials as the case may be.

The report of the committee of inquiry ought to be submitted within a
reasonable period of time because management cycles should be evaluated
in terms of financial years and the holding of the mandatory annual general
meetings to consider, *inter alia*, the requisite annual reports. It would be
15 unreasonable to interfere with the management of the affairs of the society
through delay.

It should further be noted that the registrar may hold the inquiry himself or
herself or cause an inquiry to be made. Further, the suspension of the chief
executive officer or other officers, is expressly stated to be, only to facilitate
20 the smooth holding of the inquiry. The suspension of the management of
the Union cannot be for any other purpose other than that envisaged and
expressly stipulated in section 52 of the Act. To further facilitate the holding
of an inquiry, all of the members of the society are required to produce such
cash, accounts, books, documents and securities of the society and to furnish
25 any information in regard to the affairs of the inspected society as the
registrar or such person authorised by the registrar to hold the inquiry may
require. The power of the registrar to cause an inquiry subject to the
requirements to do so, should be narrowly construed as a power to cause an
inquiry within a reasonable time with the full cooperation of the Union
30 officials. What is a reasonable time will be considered from the facts and
circumstances of the case by a court of competent jurisdiction or the board
as I shall demonstrate herein below.



5 Failure for the inquiry to be conducted and a report submitted within a reasonable period of time and in this case a delay of over a year is not envisaged by the Cooperative Societies Act and is ultra vires the enabling provisions of the Act to cause an inquiry into the affairs of a registered society as well as to suspend management and appoint a caretaker management to
10 facilitate the holding of an inquiry.

Before concluding the issue concerning the impugned section 52 of the Cooperative Societies Act, I have further considered the provisions of section 6 (3) of the Cooperative Societies Act. The Petitioners counsel submitted that section 6 (3) of the Act empowers the registrar upon registering a society on
15 probation, to bring its business to an end without assigning any reason and this may be at the whim of the registrar. The petitioner's counsel argued that this power breached the constitutional right to trade or do business as it was sufficient for the registrar to think that the business or trade of the society registered on probation was not satisfactory and to cancel its registration. He
20 argued that to cancel registration for poor performance in business was unreasonable as a new society may initially make losses before the first two years or so before it starts making profit.

For ease of reference, section 6 of the Cooperative Societies Act is quoted in its entirety for context though the petition alleges only the inconsistency of
25 section 6 (3) of the Act with article 40 (2) of the Constitution. Section 6 of the Act provides that:

6. Registration of a probationary society.

(1) If the registrar is satisfied that a society has complied with this Act and regulations made under it and that its proposed byelaws are not contrary to the
30 provisions of this Act, he or she shall register the society and its byelaws on probation for a period not exceeding twenty-four months.

(2) If at the expiration of twenty-four months the registrar is satisfied with the performance of the society, he or she shall register the society permanently.



- 5 (3) If at the expiration of twenty-four months the registrar is not satisfied with the performance of the society, he or she may either cancel the registration or extend the probationary period by a period not exceeding twelve months; and if after the extension he or she is still not satisfied with the performance of the society, he or she shall cancel the registration of the society.
- 10 (4) If the registrar cancels the registration of a society under subsection (3), then the provisions of sections 62 and 63 concerning the appointment of a liquidator and his or her powers shall apply.
- 15 (5) Any society registered under subsection (1) shall become a body corporate by the name under which it is registered probationary, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purpose of its constitution; and any reference in any written law to a registered society shall include a society which is registered under this section.
- 20 Section 6 (1) gives the requirement for the registrar to consider in terms of whether a society is fit to be registered. A Society fit to be registered must have complied with the Act and regulations made under it and must have proposed byelaws which are not contrary to the provisions of the Act whereupon the registrar shall register the society and its byelaws on
- 25 probation for a period not exceeding two years. During this period, the registrar is required to monitor the performance of the society and if he or she is satisfied with it, may register the society permanently.

Against that background, section 6 (3) of the Cooperative Societies provides that; if at the expiration of twenty-four months the registrar is not satisfied

30 with the performance of the society, he or she may either cancel the registration or extend the probationary period by a period not exceeding 12 months; and if after the extension he or she is still not satisfied with the performance of the society, he or she shall cancel the registration of the society. Section 8 of the Cooperative Societies Act further gives grounds for

5 the cancellation of registration of a society registered on probation. It provides that:

8. Cancellation of registration.

10 (1) At any time during the period of registration of a society under section 6(1), the registrar may, by notice in writing to the person responsible for the running of the society, cancel the probationary registration of the society stating reasons for the cancellation; and the society shall, from the date of service of the notice, cease to be a registered society.

(2) The cancellation referred to in subsection (1) shall be gazetted and published in at least one of the English newspapers in Uganda.

15 (3) If a society registered under section 6(1) contravenes or fails to comply with section 7, that society and any officer or person who purports to act on its behalf commits an offence and is liable on conviction to a fine not exceeding ten thousand shillings and in the case of a continuing offence to a further fine not exceeding one
20 thousand shillings for each day on which the offence is continued after conviction of the offence.

It is mandatory for the registrar to cancel registration in the circumstances stated and this revolves on the "satisfaction" of the registrar about the performance of the society in the probationary period. The grievance of the petitioners can be confined to the power of the registrar to be satisfied.

25 It should be noted that under section 6 (5) any society which is registered for a probationary period is still a body corporate and therefore has to be liquidated if its registration is cancelled. What should further be considered are the matters the registrar should address his mind on in the probationary period before concluding that the performance of a society on probation is
30 not satisfactory.

I agree with the Respondent's counsel that the intention of Parliament for the creation of cooperative societies is to *inter alia*, take care of the economic and social welfare of ordinary farmers and any other categories of farmers



5 who wish to cooperate and enjoy the benefits of the cooperative societies as set out in the law. Further, the requirements for the existence of a cooperative society are different from that of private or public limited liability companies.

The reason for assessment by the registrar of the performance of a probationary society should be construed in light of the purpose of the Act of promotion of the economic and social interests of the members and whether the probationary society is capable of advancing the object of registration as stipulated by section 3 of the Cooperative Societies Act which provides that:

3. Societies which may be registered.

15 Subject to this Act, a society which has for its object the promotion of the economic and social interests of its members in accordance with cooperative principles and which, in the opinion of the registrar, is capable of promoting those interests may be registered under this Act with or without limited liability; except that a cooperative union or any apex society shall be registered with limited liability.

20 The registrar ought to consider whether the society is capable of fulfilling the object of the promotion of the economic and social interests of its members in accordance with cooperative principles. Further section 4 of the Cooperative Societies Act stipulates the conditions for registration of societies.

25 It is apparent that the role of registrar is to promote the object of Parliament and that of its target beneficiaries namely the members of a society registered under the Act. The powers of the registrar can only be used to implement or promote the object of the Cooperative Societies Act.

Article 42 of the Constitution provides that:

30 42. Right to just and fair treatment in administrative decisions.



5 Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.

A fair and just treatment has to be in accordance with the purpose of the statute. A literal reading of article 42 of the Constitution seems to apply to a person appearing before any administrative official or body. However, the principle also applies to any issue set before an administrative official or body without the physical appearance of a person before that official or body for decision. Such persons have a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her. What is crucial is that there should be pending any administrative decision to be taken either for or against or in respect of a person or entity that may lead to a grievance. Article 42 imports the common law doctrine of reasonableness, fairness and rationality as well as legality in making decisions affecting persons by any administrative official or body. The common law principles of fair hearing, fairness, reasonableness and rationality as well as legality in the exercise of administrative powers over the subject are implied in article 42 of the Constitution.

According to **H. W. R WADE**, in "**Administrative Law**" 5th edition at pages 355 and 356, also pages 356 - 357, there is no unfettered discretion in public law.

"The common theme of all the passages quoted is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers an unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose, everything depends upon the true intent and meaning of the empowering Act."...



5 It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law.

For the same reasons it makes no sense to ask whether there may be unreviewable administrative action. Unreviewable administrative action is just as much a contradiction in terms as is unfettered discretion, at any rate in the case of statutory powers. The question which has to be asked is what is the scope of judicial review. But that there are legal limits to every power is axiomatic.

10 The above passage reflects the law as embodied in Article 42 of the Constitution of Uganda. The powers of the registrar can only be exercised in the interests of the members of a registered cooperative society and to promote the object or objects of the Cooperative Societies Act. Any discretionary powers conferred on the registrar can only be used for the public good and is subject to scrutiny by courts which have jurisdiction to deal with ultra vires acts, unreasonable acts and any arbitrary, malicious or capricious acts. For instance, decisions driven by improper motives such as political bias may be nullified.

20 There are innumerable authorities which reflect the common law that has been and is still part of the laws of Uganda on administrative and constitutional law. The general statement of law is that a statutory body exercising powers derived from statute will be seen as performing a public function and is therefore amenable to judicial review. In **Leech v Parkhurst Prison Deputy Governor Prevot v Long Larton Prison Deputy Governor [1988] 1 All ER 485** Lord Bridge stated at 496 that:

30 The principle is now as well established as any principle can be in the developing field of public law that where any person or body exercises a power conferred by statute which affects the rights or legitimate expectations of citizens and is of a kind which the law requires to be exercised in accordance with the rules of natural justice, the court has jurisdiction to review the exercise of that power. The governor of a prison holds an office created by the 1952 Act and exercises certain powers under rr 47 to 55 of the 1964 rules which are conferred on him and him alone. The



5 exercise of those powers may well affect the rights and certainly affects the legitimate expectations of prisoners.

Further, in **Inland Revenue Comrs v National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93** at pages 97 – 98 Lord Wilberforce stated that:

10 In the present case we are in the area of mandamus, an alleged failure to perform a duty. It was submitted by the Lord Advocate that in such cases we should be guided by the definition of the duty, in this case statutory, and inquire whether expressly, or by implication, this definition indicates, or the contrary, that the complaining applicant is within the scope or ambit of the duty. I think that this is
15 at least a good working rule though perhaps not an exhaustive one.

The Commissioners of Inland Revenue are a statutory body. Their duties are, ... defined in the Inland Revenue Regulation Act 1890 and the Taxes Management Act 1970. ...

20 From this summary analysis it is clear that the Commissioners of Inland Revenue are not immune from the process of judicial review. They are an administrative body with statutory duties, which the courts, in principle, can supervise.

According to **Blackstone Chambers General Editor Beverley Lang Q.C in Administrative Court: Practice and Procedure, Sweet and Maxwell, 2006** at pages 21 - 22

25 The grounds on which judicial review may be granted were classified by Lord Diplock in Council of Civil Service Unions versus Minister for the Civil Service [1985] 374, at 410D:

30 "Judicial review I think developed to the stage today when... one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.... By 'illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it... By 'irrationality' I mean
35 what can now be succinctly referred to as "Wednesbury



5 unreasonableness'... It applies to a decision which is so outrageous in its
defiance of logic or of accepted moral standards that no sensible person
who had applied his mind to the question to be decided could have arrived
at it... I have described in the third head as 'procedural impropriety' rather
10 than failure to observe basic rules of natural justice or failure to act with
procedural fairness towards the person who will be affected by the
decision."

Statutory powers which tend to give the authority power to act as they deem
fit has been the subject of scrutiny by courts. In **Commissioners of Customs
and Excise v Cure & Deeley Ltd [1961] 3 All ER 641** Sachs J at pages 657
15 – 568 stated that:

I reject the view that the phrase "appear to them to be necessary" when used in a
statute conferring powers on a competent authority, necessarily makes that
authority the sole judge of what are its powers as well as the sole judge of the way
in which it can exercise such powers as it may have. It is axiomatic that, to follow
20 the words used by Lord Radcliffe in *A-G for Canada v Hallet & Carey Ltd ([1952] AC
at p 449)* "the paramount rule remains that every statute is to be expounded
according to its manifest or expressed intention". It is no less axiomatic that the
application of that rule may result in identic phrases receiving quite different
interpretations according to the tenor of the legislation under consideration. As an
25 apt illustration of such a result it is not necessary to go further than *Liversidge v
Anderson* and *Nakkuda Ali v MF de S Jayaratne*, in which cases the words
"reasonable cause to believe" and "reasonable grounds to believe" received quite
different interpretations. To my mind a court is bound before reaching a decision
on the question whether a regulation is intra vires to examine the nature, objects,
30 and scheme of the piece of legislation as a whole, and in the light of that
examination to consider exactly what is the area over which powers are given by
the section under which the competent authority is purporting to act.

For more illustrations, Lord Denning: **The Discipline of Law, London,
Butterworths, 1979** at pages 99 - 101 considered the words in a statute: "If
35 the Minister is satisfied" and citing from his judgment in *Education Secretary
v Tameside BC in the [1977] AC 1014*:



5 "So far as "satisfied" is concerned, it is suggested – and was suggested by the chief
officers of the local authority on June 21, 1976 – that once the Secretary of State
said that he was "satisfied" his decision could not be challenged in the courts unless
it was shown to have been made in bad faith. We were referred by Mr. Bingham to
10 **Liversidge v Anderson [1942] AC 206**, where Lord Atkin drew attention to the
cases where the Defence Regulations required the Secretary of State to be
"satisfied" of something or other. Lord Atkin said at page 233:

"In all these cases it is plain that unlimited discretion is given to the Secretary
of State, assuming as everyone does that he acts in good faith"...

15 Those statements were made, however, in relation to regulations in wartime or
immediately after the war when the decisions of the executive had to be
implemented speedily and without question. Those statements do not apply today.
Much depends on the matter about which the Secretary of State has to be satisfied.
If he is to be satisfied on the matter of opinion, that is one thing. But if he has to
be satisfied that someone has been guilty of some discreditable or unworthy or
20 unreasonable conduct, that is another. To my mind, if the statute gives a minister
power to take drastic action if he is "satisfied" that a local authority has acted or is
proposing to act improperly or unreasonably, then the Minister should obey all the
elementary rules of fairness before he finds that the local authority is guilty or
before he takes drastic action overruling them. He should give the party affected
25 notice of the charge or impropriety or unreasonableness and a fair opportunity of
dealing with it. I am glad to see that the Secretary of State did so in this case. He
had before him the written proposals of the new council and he met their leaders.
In addition, however, the Minister must direct himself properly in law. He must call
his own attention to the matters he is bound to consider. He must exclude from
30 his consideration matters which are irrelevant to that which he has to consider and
the decision to which he comes must be one which is reasonable in this sense: that
it is, or can be, supported with good reasons or at any rate is a decision which a
reasonable person might reasonably reach. Such is, I think, plain from **Padfield v
Minister of Agriculture, Fisheries and Food [1968] AC 997** which is a landmark
35 in our Administrative Law and which we had in mind in **Secretary of State for
Employment v ASLEF (No 2) [1972] 2 QB 455**, 493, 510. So much for the
requirements of the Minister is to be "satisfied".



- 5 **Blackstone Chambers** (supra) sets out the principles for judicial review and interpretation of statutory powers at Paragraph 2 – 44 page 22

10 In administrative law, the term "ultra vires" means a body that acts beyond its powers. There is an academic debate as to whether "ultra vires" is the conceptual basis of all grounds for judicial review. But the conventional use of the term is narrower in scope. It arises where a decision maker has acted outside the scope of the statute, directive or regulation that authorises his exercise of power.

Further on the principle of legality in paragraph 2 – 44 **Blackstone Chambers** (supra) states that:

15 in the absence of express words to the contrary, the courts would presume that Parliament intended to legislate in accordance with the basic fundamental rights. This has been described as "the principle of legality" in the leading cases of R v Secretary of State for the Home Department ex parte Pierson [1988] AC 539 and R v Secretary of State for the Home Department ex parte Simms [2000] 2 AC 1 and 5. In the Simms, the House of Lords held that if prison standing orders were
20 construed as permitting a ban on prisoners interviews with journalists, it would be ultra vires the enabling statute, which was presumed to have been enacted subject to fundamental rights. The standing orders were therefore to be construed narrowly in accordance with the principle of legality.

25 It is a presumption of law that the Cooperative Societies Act and specifically the powers of the registrar under sections 52 and 6 (3) thereof were enacted subject to the fundamental rights and freedoms and not in derogation thereof.

With regard to use of statutory power for political ends **Blackstone Chambers** (supra) paragraph 2 – 53 states that:

30 In Wheeler versus Leicester City Council [1985] AC 1054, the Council banned the club from using its property because three of its players took part in a controversial tour of South Africa during the apartheid regime. The House of Lords held that the council had exercised illegitimate pressure to punish the club, and misused its powers.



5 Statutory powers are exercised to fulfil or achieve legislative purpose and not to frustrate it. According to Blackstone Chambers (supra) paragraph 2 – 54:

Public bodies are under a duty to promote the purpose of the statute under which they are acting. In *Padfield versus Minister of agriculture, Fisheries and Food* [1968] AC 997 the Minister refused to exercise his statutory power to refer a complaint
10 about differential milk pricing to a committee of investigation, avoid the political consequences of the complaint being upheld. The House of Lords quashed his decision, on the ground that he was under a duty not to act so as to frustrate the policy and objects of the statute.

Further in paragraph 2 – 57 Blackstone Chambers (supra) sets out the
15 principle that statutory authorities are required to reach reasonable decisions:

Wednesbury unreasonableness: In *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, it was confirmed that the court could intervene if the decision-maker had come to a conclusion so unreasonable that no
20 reasonable decision-maker could ever have come to it. This test has been narrowly interpreted by the courts. In *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410, Lord Diplock said, "It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived
25 at it."

In the circumstances of this petition, it is the registrar to be satisfied after the period stipulated that the society may continue to be registered as a cooperative society, if he is not satisfied, then he may cancel the registration. However, he or she ought not to cancel any registration without giving the
30 society a hearing and a chance to rectify that with which he is not satisfied. In any case, the grounds upon which to cancel must be in accord with the statutory requirements for the incorporation and carrying on of the business of a cooperative society under the Cooperative Societies Act. It follows that, the requirement to have the registrar satisfied does not mean that the
35 registrar can cancel registration of a probationary society on any grounds



5 that he or she deems fit but only on reasonable grounds that are in accord
with the intention of Parliament as reflected in the Cooperative Societies Act.
Because the decision of the registrar can be the subject matter of an appeal
or an application for judicial review, no question as to interpretation of the
Constitution arises. The acts of the registrar can be held to be ultra vires the
10 Cooperative Societies Act. It may also be found to be unreasonable, arbitrary,
illegal etc. and the decision may, in any case, be a basis for judicial review in
a court of competent jurisdiction.

Similarly, exercise of the powers of the registrar under section 52 of the
Cooperative Societies Act was in the circumstances of this case not in accord
15 with the Act and the acts may be the subject of review under Article 42 of
the Constitution in a court of competent jurisdiction. No question or
controversy as to interpretation of the Constitution arises.

I find that the allegation that sections 52 and 6 (3) of the Cooperative
Societies Act are inconsistent with or in contravention of the Constitution has
20 not merit and I would dismiss those grounds.

I would therefore find that section 6 (3) of the Cooperative Societies Act does
not infringe the right to carry on any business or trade and is not inconsistent
with article 40 (2) of the Constitution.

With regard to section 22 (1) it deals with the audit and annual returns of
25 accounts. It requires the accounts of every society to be audited once a year
just like a public company. It restricts an auditor chosen by the registered
society to audit its book for three annual audits in succession unless such
successive audits by the same auditor is authorised by the registrar. In the
event that the society is unable to appoint its own auditors, the registrar may
30 appoint the auditors. I have in mind the fact that that a society must have a
minimum of 30 persons (as a primary society) before it can be registered.
Secondary societies and Tertiary societies are superimposed on primary

- 5 societies and therefore affect a greater number of persons. Further we have to consider the safeguards under section 22 (2) of the Act which requires audits to be conducted in accordance with generally accepted professional audit standards. In addition, there has to be an audit of management efficiency.
- 10 The right to practice his or her profession and to carry on any lawful occupation, trade or business enshrined in article 40 (2) does not imply any right to do so without regulation or restrictions. Such restrictions are common with the legal profession, the medical profession and even the auditor's profession. The scheme of the statute setting up such professions
- 15 is to ensure professionalism, ethics and high standards. Legislature can make it hard to invest funds of the association or its members in risky ventures or mismanage the business of the farmers generally. Notwithstanding the application of Article 40 (2) of the Constitution, that right does not override the right of government to regulate certain trades or even business
- 20 associations, because the business has to be a lawful business and it is Parliament which prescribes the law to regulate it.

I have considered section 24 which deals with estimates and expenditure that have to be submitted to the registrar for an opinion before they are further submitted to the general meeting. First of all, it is the general meeting which

25 is the ultimate authority on the estimates. Secondly, the registrar only gives an opinion and does not change the estimates. In relation to the likely time to be taken in considering the estimates and any delay, the question of inadequacy of staff should first of all be considered from the definition of "registrar". Section 1 (r) defines the "register" to mean the registrar of

30 cooperative societies and includes deputy registrars of cooperative societies. Further section 2 of the Act sets out several levels of registrars. I would not conclude that the staffing or statutory scheme for the office of registrar is not adequate. It includes the chief registrar, 3 deputy registrars, all officers of

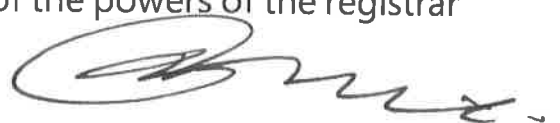


5 the rank of assistant corporate officer and above are assistant registrars of
cooperative societies and the Minister has powers to confer or impose on
any assistant registrar of the cooperative society all or any of the powers and
duties conferred on the registrar under the statute. If the staffing is
inadequate, it is a matter for government provision or legislative reform.
10 Inadequacy of staff is not sufficient to make section 24 of the Cooperative
Societies Act inconsistent with article 40 (2) of the Constitution.

With regard to section 43 which restricts borrowing, my judgment is that
legislature intended it to be a safeguard to be applied in the interest of the
primary societies and members of the cooperative movement. It therefore
15 allows the registrar from time to time in writing to authorise deposits and
loans from persons who are not members only to the extent which he
considers proper.

With regard to section 45 which deals with investment of funds, there are
many restrictions for instance, in the investment of public funds, for the
20 safety of the funds and therefore the interest of the beneficiaries. Under the
Public Trustees Act, only certain investments are approved. The Public
Trustee may invest funds in government securities and bonds and shares
which are guaranteed by the East African countries. Such provisions are
meant to ensure the safety of investment in assets and not to risk the funds
25 of the society in risky or high risk investments. There are policy issues
involved in which investments are made within the country and that is in the
wisdom of legislature which is not subject to judicial interference. I would not
declare sections 45 or 43 of the Act to be unconstitutional or as contravening
the right to practice any trade or profession contrary to article 40 (2) of the
30 Constitution.

Generally speaking, Article 42 of the Constitution allows a person who has
been treated unfairly in any administrative decision to apply to the court for
redress which may include compensation. If any of the powers of the registrar



5 are abused, it may become the subject of an application for judicial review
under article 42 of the Constitution and the High Court can deal with it. This
is balanced with the right of governments to restrict or regulate certain
business associations. If there is any delay in the submission of an opinion by
the registrar, it would be in breach of the statute because they are supposed
10 to be annual returns and therefore any delay by more than one year is a
violation of the rights of the societies and statute and subject to judicial
review allowing the High Court to issue any order of mandamus or injunction
to remedy the breach.

Issue No 3

15 **Whether sections 8, 9, (6) & (7), 15 and 17 of the Cooperative Societies
Act are inconsistent with and/or contravene Articles 29 (b) and (e) of
the Constitution.**

The Petitioners counsel submitted on sections 9 (6) and (7), 15 and 17 of the
Cooperative Societies Act and is deemed to have abandoned the petition in
20 respect of section 8 of the Act.

Freedom of Thought

With regard, to section 9 (6) and (7) of the Cooperative Societies Act, the
petitioners counsel submitted that one of the conditions for registration of a
cooperative society is the submission of the proposed byelaws and if the
25 registrar is satisfied that the byelaws are not contrary to the provisions of the
Act, he or she registers the society. However, when the society is operational,
the registrar may direct the society to amend the byelaws within such time
as he or she may set specify and the amendment is not originated by the
society. It therefore contravenes the freedom of thought guaranteed by
30 Article 29 (1) (b) of the Constitution.

In respect of section 15 of the Cooperative Societies Act, the petitioner's
counsel submitted that a company registered under the Companies Act



5 cannot become a member of a cooperative society unless the registrar gives written permission thereof thereby contravening the freedom to associate enshrined in the Constitution.

With regard to section 17 of the Cooperative Societies Act, the petitioner's counsel submitted that in order to be a member of more than one
10 cooperative society, one needs the written consent of the registrar who may withhold his or her consent thereby contravening the freedom to associate under article 29 (1) (c) of the Constitution.

I have carefully considered the submissions of the petitioner's counsel and the submissions of the respondent's counsel. I have further considered the
15 provisions of article 29 of the Constitution and some judicial precedents.

Article 29 of the Constitution provides that:

29. Protection of freedom of conscience, expression, movement, religion, assembly and association.

(1) Every person shall have the right to—

20 (a) freedom of speech and expression which shall include freedom of the press and other media;

(b) freedom of thought, conscience and belief which shall include academic freedom in institutions of learning;

25 (c) freedom to practice any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with this Constitution;

(d) freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition; and

30 (e) freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organisations.



5 (2) Every Ugandan shall have the right—

(a) to move freely throughout Uganda and to reside and settle in any part of Uganda;

(b) to enter, leave and return to, Uganda; and

(c) to a passport or other travel document.

10 Article 29 (1) (b) of the Constitution enshrines the freedom of thought, conscience and belief which shall include academic freedom in institutions of learning. I have failed to perceive how a freedom of thought is infringed by the powers of the registrar conferred by section 9 (6) and (7) of the Cooperative Societies Act. Section 9 and the headnote thereto shows that it
15 deals with “Amendment of the byelaws of a registered society”.

Section 30 of the Cooperative Societies Act Cap 112 provides that:

30. Byelaws to bind members.

(1) The byelaws of a registered society shall, when registered, bind the society and its members to the same extent as if they were signed by each member, and
20 contain obligations on the part of each member, his or her heirs, executors, administrators and assignees, to observe all the provisions of the byelaws.

(2) It shall not be competent for a member of a registered society to contest any suit, claim, action or proceedings between that member and the society or any other member of the society on the ground that any byelaw of the society
25 constitutes a contract in restraint of trade.

There are obligations on the part of members to comply with the terms of the byelaws which are binding between members and their successors.

A cooperative society is created by statute and enjoys the fiction of legal personality by incorporation after fulfilling the statutory scheme or
30 requirements for registration and upon being registered. There are other alternative business associations such as limited liability private or public companies, unincorporated associations, partnerships, sole proprietorships



5 etc. Because cooperative societies are creatures of statute just like companies
are creatures of statute, any members of the public who fulfil the
requirements of the statute for incorporation of a company or for registration
as cooperative society under the Cooperative Societies Act may choose to be
10 registered thereunder. Such a choice is voluntary in terms of joining one form
of business association or another and the joining should be preceded by
informed understanding of the advantages and disadvantages of such a
business association.

The counsel of the parties did not address the court on any practical
circumstance where the registrar directed that byelaws of a society be
15 amended when such an amendment was opposed by a cooperative society.
As noted above, a byelaw can be amended to fulfil the purpose of the
enactment or the law. The fact that such a situation is hard to conceive of
does not per se make it unconstitutional and it cannot violate freedom of
thought since there are many regulations that are peculiar to the formation
20 and operation of a cooperative society.

Section 82 (2) of the Cooperative Societies Act allows the Act to be construed
in such a way that where it conflicts with any other laws governing or
regulating business activities of cooperative societies, the Cooperatives
Societies Act shall be construed with such modifications, adaptations and
25 qualifications as are necessary to enable the society to conform to the laws
governing or regulating its business activities. Further, the Cooperative
Societies Act came into force or commenced on 15th November 1991 before
the enactment of the 1995 Constitution and was an existing law by the time
of promulgation of the Constitution. Article 274 of Constitution provides that:

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

- 5 (2) For the purposes of this article, the expression "existing law" means the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or Statute or statutory instrument enacted or made before the date which is to come into force on or after that date.
- 10 It is clear that section 9 (6) can only be invoked by the registrar where the amendment is necessary in the interest of the society whereupon he or she shall call upon the society to make the amendment. Secondly, under section 9 (7) of the Cooperative Societies Act, where the society fails to make the amendment, then the registrar may make it after giving the society an
- 15 opportunity to be heard and a hearing. The powers of the registrar should be construed narrowly as only meant to serve the interest of the society and nothing else. In any case, the exercise of the powers is subject to scrutiny by courts.

Section 82 (2) of the Cooperatives Societies Act should be considered

20 together with article 274 of the Constitution and this is particularly in light of the fact that the law was enacted before the promulgation of the Constitution. In an application for judicial review, a competent court can be addressed on any of the concerns of the parties and where any question arises as to interpretation of the Constitution, such question may be referred

25 to the constitutional court. A question as to interpretation of the Constitution must necessarily be a dispute, or substantial question in which the court will be engaged in determining or resolving a doubt or dispute as to the meaning or application of an article of the Constitution so as to give directions to a competent court about how to apply the law. Such a question as to

30 interpretation of the Constitution does not arise with regard to sections 9 of the Act.

Freedom of Association.



- 5 In the circumstances, the petitioners are not alleging that the freedom to be members of a primary cooperative society has been infringed. There is therefore no basis for the petition in terms of article 29 (1) (e) of the Constitution as the freedom to join any Society is not the case of the petitioners.
- 10 As I noted above, a cooperative society is a creature of statute and is therefore regulated. The regulation stretches from the requirements for registration, the minimum number of persons who may become a cooperative society, and the nature of the interests or objects of the society. Once it has been registered, its activities are the activities of a body corporate
- 15 which is separate from its members. It cannot in the circumstances by any stretch of imagination, be contended that the acts of the cooperative society which is registered or its rights, infringed the right to form a cooperative society. The freedom of association by extension of the right to form an association to be registered as a cooperative society, only extends to the
- 20 right to join or to form the Association by the requirements for registration to enjoy the benefits of the Cooperative Societies Act, which, as noted above, is subject to statutory regulation.

In respect of section 15 of the Cooperative Societies Act, the petitioner's counsel submitted that a company registered under the Companies Act

25 cannot become a member of a cooperative society unless the registrar gives it written permission and this infringed the freedom to associate as it is subject to the permission of the registrar.

In respect to section 17 of the Cooperative Societies Act, the petitioner's counsel submitted that in order to be a member of more than one

30 cooperative society, an intending person requires the written consent of the registrar. If the registrar withholds his or her consent, the intending person cannot associate with the members of the society they crave to join



5 irrespective of whether he or she was invited to join and therefore this contravened the freedom to associate.

I have carefully considered the provisions of section 15 of the Cooperative Societies Act which clearly indicates in its headnote that the section is about restriction to membership of a society. It provides that no company
10 incorporated or registered under the Companies Act and no an incorporated body of persons shall be entitled to become a member of a registered society, except with the written permission of the registrar. It is clear that the purpose of section 15 of the Act should be construed in light of the objects for the formation of a cooperative society to the extent that the company
15 which seeks to be a member of the cooperative society should likewise have as its objective the purposes of the Cooperative Societies Act. In any case, the section gives the registrar powers to censor companies whose objects may not be consistent with the purpose of the Cooperative Societies Act or its beneficiaries.

20 Further unincorporated associations are not entities with legal personality and may have objects that are at cross purposes with that of a cooperative societies Act. Similarly, section 17 of the Cooperative Societies Act provides for the restriction on membership in more than one society. It clearly provides that no person shall be a member of more than one registered
25 society with unlimited liability except with the written consent of the registrar. It provides that no person shall be a member of more than one registered society having the same or similar objects. There is no need to belabour the purpose of section 17 as in the first category it deals with being a member of more than one unlimited liability society. It does not restrict a
30 person of being a member of more than one registered society with limited liability. Why would the registrar forbid a member to be a member of more than one society registered with unlimited liability? It obviously has something to do with unlimited liability and the interest of the members of



5 the society to be joined or formed. Secondly, being registered as a member of more than one society having the same or similar objects, may possibly be unnecessary since the objective of the member can be fulfilled in one society and there would be no unhealthy competition or rivalry.

10 Last but not least, the restrictions under sections 15 and 17 of the Cooperative Societies Act, are not absolute and are subject to the discretionary power of the registrar after taking into account relevant factors. Further, all the decisions of the registrar may be subject to judicial review.

Freedom of Association under Article 29 (1) (e) of the Constitution.

15 (e) freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organisations.

Article 29 (1) (e) of the Constitution gives every person a right or freedom of association with other persons which right includes the freedom to form and join association or unions, including trade unions and political and other civic
20 organisations. A literal reading of the article suggests that it is about the right to join and therefore there should be no restrictions to the freedom to join associations or to form and join associations, unions, political and other civic organisations. The emphasis is on the right to join or form associations and not on the objects of the associations, unions, political and other civic
25 organisations. The protection afforded by article 29 (1) (e) extends only to the freedom of association but not necessarily to the objects for which any association may be joined or formed. It should be borne in mind that the freedom to associate in terms of a cooperative society leads to the registration of a society which becomes a body corporate separate from its
30 members capable of holding property and enjoying the fiction of legal personality. The concept of freedoms has been distinguished from the concept of rights. In **Re Public Service Employee Relations Act [1987] 1 S.C.R. 313** the Supreme Court of Canada per Dickson C.J. observed that



5 section 2 of the Canadian Charter which is the equivalent of the Uganda
article 29 protects freedoms as opposed to rights:

At page 361:

10 "Although these two terms are sometimes it used interchangeably, a conceptual
distinction between the two is often drawn. "Rights" are said to impose a
corresponding duty or obligation on another party to ensure the protection of the
right in question whereas the "freedoms" are said to involve simply an absence of
interference or constraint. This conceptual approach to the nature of "freedoms"
may be too narrow since it fails to acknowledge situations where the absence of
government intervention may in effect substantially impede the enjoyment of
15 fundamental freedoms..."

At page 365:

20 "in my view, the "fundamental" nature of freedom of association relates to the
central importance to the individual of his or her interaction with fellow human
beings. The purpose of the constitutional guarantee of freedom of association is, I
believe, to recognise the profoundly social nature of human endeavours and to
protect the individual from state centred isolation in the pursuit of his or her
ends....

25 "Freedom of association is most essential in those circumstances where the
individual is liable to be prejudiced by the actions of some larger and more
powerful entity, like the government or an employer."

At page 366:

30 "What freedom of association seeks to protect is not associational activities *qua*
particular activities, but the freedom of individuals to interact, with support, and be
supported by, their fellow humans in the varied activities in which they choose to
engage. But this is not an unlimited constitutional licence for all group activity. The
mere fact that an activity is capable of being carried out by several people together,
as well as individually, does not mean that the activity acquires constitutional
protection from legislative prohibition or regulation."



5 The Supreme Court of Canada recognized that freedom of association may be regulated by legislation. It cannot for instance be a freedom to join or form a cooperative society without qualifications which are stated by Parliament in the statute.

10 There are several judicial precedents which advance that position that a freedom to associate should not always be extended to the purpose of the association. In the petitioner's petition, the purpose of a cooperative society is statutory and freedom to associate as a cooperative society, unlike freedom to be part of a worker's union is subject to certain statutory requirements. Moreover, cooperative societies also enjoy certain statutory
15 benefits as well as restrictions. In **Collymore and Another v Attorney General of Trinidad and Tobago [1969] 2 All ER 1207**, the Privy Council considered the concept of freedom of association guaranteed under the Constitution of Trinidad and Tobago in a challenge to the Industrial Stabilisation Act, 1965 as to whether it was null and void for violation of the
20 freedom of association.

It was argued for the appellants that "Freedom of Association" must be construed in such a way that it is not merely a right to associate but protects the purpose or object of the association. In relation to trade unions, that freedom must also protect the purpose for the formation of trade unions
25 such as collective bargaining on behalf of their members and the right to strike. It was argued that to take away the right to strike is an abridgement of the right of freedom of association. On the other hand, it was argued for the respondent that freedom of association enshrined in Constitution means that persons are free to associate but the freedom to associate does not
30 cover the objects of the association. The trial Court and the Court of Appeal of Trinidad and Tobago held that freedom of association is a separate right of association which does not cover the freedom to pursue to objects for which the association is formed.



5 Lord Donovan quoted the holding of the lower court with which the Privy Council agreed that:

Sir Hugh Wooding CJ put the matter thus:

10 "In my judgment, then, freedom of association means no more than freedom to enter into consensual arrangements to promote the common interest objects of the association group. The objects may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the
15 peace, order and good government of the country."

... It therefore seems to their Lordships inaccurate to contend that the abridgment of the right to free collective bargaining and of the freedom to strike leaves the assurance of "freedom of association" empty of worth-while content.

20 In **Canadian Egg Marketing Agency versus Pineview Poultry Products Ltd, and Frank Richardson operating as Northern Poultry [1990] 3 S.C.R 157** the Supreme Court of Canada in the judgment of Iacobucci and Bastarache JJ held that the purpose of article 2 (d) of the Canadian Charter is to protect the associational aspect and not the purpose of the association. At page 228 they held that:

25 "However, underlying the cases on section 2 (d) is the proposition that freedom of association protects only the associational aspect of activities, not the activity itself. If the activity is to be protected by the Constitution, that protection must be found elsewhere than in section 2 (d)."

30 Finally, at page 231 they stated that:

"Although the various judgments in the *Alberta Reference* are not at one on the precise scope of freedom of association, they all agree that



5 it remains essential to distinguish between associational aspect of the activity and the activity itself."

Freedom to associate is a freedom exercised within the law. For instance, there is not absolute freedom to join any association which may have its own regulations and qualifications of membership. As a business association a
10 cooperative society is regulated for the objects set by parliament and prior to joining or forming a society under the Act of Parliament, it must meet the criteria set in the Cooperative Societies Act. Last but not least regulation of business forms is not a derogation of the freedom to associate but gives those exercising their freedom a wide variety of business forms ranging from
15 partnerships, private and public companies, unincorporated associations, unlimited companies, companies limited by guarantee and cooperative societies etc. these forms of business associations a regulated by different laws.

20 In the premises, I find that sections 8, 9 (6) & (7), 15 and 17 of the Cooperative Societies Act are not inconsistent with article 29 (1) (b) & (e) and 40 (2) of the Constitution.

I would state that the matters the petitioner is aggrieved about are all enforceable by the High Court and I would dismiss this petition. This being a petition brought in the public interest, I would dismiss it with no order as to
25 costs.

Dated at Kampala the 1st day of April 2021



Christopher Madrama

Justice of Court of Appeal/Constitutional Court

5

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

[Kenneth Kakuru, Hellen Obura, Stephen Musota, Christopher
Madrama, JJCC & Remmy Kasule, Ag, JCC)

10

CONSTITUTIONAL PETITION NO. 46 OF 2012

1. NATHAN NANDALA MAFABI

2. ENOKA MUSUNDI

3. SAM MAGONA

4. HAJJI HUSSEIN MUMEYA



.....

PETITIONERS

15

VERSUS

ATTORNEY GENERAL

.....

RESPONDENT

JUDGMENT OF THE HON. JUSTICE REMMY KASULE (Ag. JCC)

20 This is a petition in which the Petitioners moving under Article 137
of the Constitution of the Republic of Uganda sought this Court for
declarations that;

1. **Sections 6(3), 22(1), 24(2) and (3), 43(1), 44, 45, 47(4), 52, 56 and 77 of the Cooperative Societies Act**, are inconsistent with and contravene **Article 40(2)** of the Constitution.

25 2. **Sections 8, 9(6) and (7), 15, 17, 25(1), 57(1)(c) and (d) and 58 of the Cooperative Societies Act** are inconsistent with and contravene **Article 29(b) and (e) of the Constitution.**

30 3. **Sections 13(3), 22(7) and 52 of the Cooperative Societies Act** are inconsistent with and contravene **Article 28(1) of the Constitution.**

4. **Sections 23(1) and 52 of the Cooperative Societies Act** are inconsistent with and contravene **Article 21 of the Constitution.**

35 5. **Sections 43(1), 46, 49(3), 58 and 77(1) and (2) of the Cooperative Societies Act** are inconsistent with and contravene **Article 27(2) of the Constitution.**

6. **Sections 4(2), 29(b), 49(3), 73(5) and (6), 73(17), 77(1) and (2) of the Cooperative Societies Act** are inconsistent with and contravene **Articles 27(2), 29 and 40(2) of the Constitution.**

40 Since the filing of this Constitutional Petition in this Court on 15th October, 2012, the Co-operative Societies Act Cap.112 Volume 5 Laws of Uganda has undergone a number of amendments which rendered some of the Sections of the Act to be deleted or amended thus necessitating a re-addressing of the originally sought
45 declarations. The substantive amendments are now by the Co-operative Societies (Amendment) Act, No. 5 of 2020 assented to on 16th February, 2020 and commenced on 20th March, 2020. It has as such become necessary to reframe the issues. The re-framed issues are:

50 **Issue 1:**

Whether **Sections 6(3), 22(1), 24(2) and (3), 43(1), 45, 52 and 56 of the Co-operative Societies Act** are inconsistent with and contravene Article 40(2) of the Constitution.

Issue 2:

55 Whether **Section 23(1) of the Co-operative Societies Act** is inconsistent with and contravenes **Article 21 of the Constitution**.

Issue 3:

Whether **Sections 8, 9(6) and (7), 15 and 17** are inconsistent with and/or contravene **Articles 29 and 40(2) of the Constitution**.

60 **Issue 4:**

Whether **Sections 4(2), 29(b), 43(2) and 49(3) and (4) of the Co-operative Societies Act** are inconsistent with and contravene **Articles 29 and 40(2) of the Constitution**.

Background:

65 The background of this Petition is briefly that Bugisu Cooperative Union was formed in 1954 with a major objective of helping over eighty two co-operative societies to market and sell their coffee without going through middlemen who were Asian traders at that time. The Union would eventually sell the coffee in Mombasa directly
70 without going through the Asians. The first, second and third petitioners are all former chairmen for this union, having served in that capacity at different times, with the first Petitioner having been the Chairman duly elected by the Societies that comprise the Union

when this petition was lodged. The fourth petitioner is a former board
75 member of the Union.

The facts that led to this petition are contained in the affidavit of Hon.
Nathan Nandala Mafabi, the first petitioner. On the 12th day of
December, 2010, Hon. Nandala Mafabi together with the members of
the Union board, the top management of the Union, and some of the
80 union's former members held a meeting with the Registrar of Co-
operative Societies (herein referred to as "the Registrar"). The
Registrar and some officials of the Ministry of Tourism, Trade and
Industry had constituted a tribunal that was hearing and
determining complaints raised by some of the former members of the
85 Union's board. The petition that contained the complaints was duly
circulated to Hon. Nandala Mafabi and the members of his board and
top management to which they were asked to answer, and they did.

The Registrar then made a ruling that he would appoint an audit
team to audit the Union and that he would communicate the details
90 later. Two days later, Hon. Nandala Mafabi and his board received
letters suspending them from the Union's board. Hon. Nandala
Mafabi then filed **Miscellaneous Application No. 223 of 2010 in
the High Court** against the Registrar seeking an order of certiorari
to quash the Registrar's decision which order the High Court granted.
95 The Registrar however immediately thereafter issued another order
suspending the board and instituting a board of inquiry into the
Union's affairs.

At the time when this petition was lodged, the suspended Union board had not yet resumed its duties and the Union had deteriorated in terms of its profits that had enormously increased prior to the board's suspension. The petitioners attribute the Union's poor performance to its mismanagement at the watch of the respondent and the caretaker managers appointed by him. The petitioners contend that a private venture that the Union is, should not be run by the Respondent's agents who lack the Union's financial and developmental interests at heart. It is upon that background that the petitioners contend that the provisions of the Cooperative Societies Act under which the respondent's agents acted are inconsistent with the Constitution.

The respondent, both in his answer to the Petition and the affidavit of Mr. Mugagga-Muwanguzi Robert, the learned State Attorney in the Attorney General's chambers, denied the contentions by the petitioners, namely that the actions of the Registrar were unlawful and that the provisions of the Cooperative Societies Act under which he acted are inconsistent with the Constitution.

Legal representation:

At the hearing of this petition, learned Counsel Wandera Ogalo and James Jaabi represented the petitioners, while the learned Principal Senior State Attorney, Richard Adrole together with Ms. Clare Kokunda, a State Attorney, represented the respondent.

Submissions by the Parties:

I extend appreciation towards both Counsel for the Petitioners and
125 the respondent for their detailed submissions towards the
determination of this petition. It is to be appreciated that the
petitioners' case in the Constitutional petition is to question the
constitutionality of the Co-operative Societies Act. The current
operative Co-operative Societies Act is Cap 112 Laws of Uganda that
130 replaced the Co-operative Societies Act No. 30 of 1970 which is now
repealed.

Petitioners' Submissions:

The petitioners' Counsel addressed this Court on the issues covering
the declarations sought. Counsel abandoned issue No. 2 as due to
135 the amendment of the Act, it became unnecessary to resolve the said
issue.

Issue 1:

Whether **Sections 6(3), 22(1), 24(2) and (3), 43(1), 45, 52 and 56**
of the Cooperative Societies Act, are inconsistent with and
140 contravene **Article 40(2)** of the Constitution.

Under this issue, the petitioners averred that **Article 40(2)** of the
Constitution vests in every Ugandan including co-operative unions
and societies with the right to carry out any lawful trade or business.
The petitioners therefore prayed that this Court finds that **Section**
145 **52 of the Co-operative Societies Act** which empowers the Registrar
of cooperative societies to suspend the chief executive and other
officers of a co-operative society, which is a private business,

encroaches on the right of the owners of a cooperative society to carry out their business or trade. The petitioners averred that **Section 52** of the Act allows a stranger to lock out the owners of a business from managing their business and therefore negates them from promoting their economic and social interests.

In any case, the petitioners submitted that the mere raising of a complaint by former members in regard to mismanagement, without establishing the authenticity of the complaints, was not enough for the Registrar to act by suspending the board and officials of Bugisu Cooperative Union. It was averred that the Registrar ought to have been sure that the board and the chief executive of the Union had prejudiced the human rights and freedoms of other people or that it was in public interest to suspend the board.

It was further averred for the petitioners that **Section 6** of the **Act** empowers the Registrar without assigning any reason whatsoever to bring a co-operative society to an end and that therefore the cooperative societies' right to carry on trade is subject to the whims of the Registrar. This Section, in the petitioners' view, is inconsistent with **Article 40(2)** of the Constitution. The petitioners submitted that the right to do business encompasses the possibility of making losses and poor decisions and therefore the poor performance by a cooperative society should not be a reason for the Registrar to deregister a cooperative society.

It was the case of the petitioners that **Section 45(b)** and **(e)** of the Act empowers the Registrar to determine the companies that a

cooperative society may invest in. All investments by a co-operative society have to made and done upon approval by the Registrar. In
175 similar fashion, **Section 43(1)** of the **Act** prohibits a co-operative society from receiving loans from its members. Loans have to be received by a co-operative society to such an extent and in such conditions as the Registrar may authorize. In the petitioners' opinion, these provisions allow for interference with the co-operative societies' right to do business vested into them by the Constitution.

Section 22(1) of the **Act** requires that accounts of any cooperative society be audited by an auditor appointed by the society's annual general meeting, but this auditor cannot carry out the audit unless he or she is approved by the Registrar. It was averred for the
185 petitioners that the fact that the Registrar has the final say on who audits the books of accounts of co-operative societies clogs the right of a society to freely manage its affairs. Similarly, under **Section 24(2)** of the **Act**, a society cannot submit to its annual general meeting its estimates of income and expenditure for the next financial
190 year unless the Registrar gives his or her opinion on those estimates. The petitioners averred that it is irrational and therefore an infringement on the right to trade for a business to have to submit its budget to an outsider for an opinion.

It was prayed that this Court gives the due declaration as framed in
195 issue 1.

Issue 2:

This issue was abandoned by the petitioner due to amendment of the
200 Co-operative Societies Act since the filing in Court of this petition,
thus rendering the determination of the issue unnecessary.

Issue 3:

Whether **Sections 8, 9(6) and (7), 15 and 17** of the Co-operative
Societies Act are inconsistent with and or contravene **Articles 29 and**
205 **40(2) of the Constitution.**

It is to be noted that **Section 17 of the Principal Act** has been
repealed by the **Co-operative Societies Act No. 5 of 2020.**

Counsel for the petitioners contended that the requirement for
permission to be sought from the Registrar under the impugned
210 sections violate the right of the members of co-operative societies to
associate thus violating **Article 29(b) and (e) and 40(2) of the**
Constitution. Petitioners' Counsel prayed this Court to so declare,
as being the correct interpretation of the Constitution.

Issue 4:

215 This is whether **sections 4 (2), 29 (b), 43 (2), 49 (3) and (4)** of the
Co-operative societies Act are inconsistent with and or contravene
Articles 29 and 40 (2) of the Constitution. The petitioners' Counsel
contended that creating an apex body for all registered co-operative
societies without first consulting the co-operative societies which are
220 corporate body entities amounts to forcing them into association with
the said apex body.

The petitioners relied upon **Centre for Health, Human Rights and Development (CEHURD) & 3 Others Vs. Attorney General, Supreme Court Constitutional Appeal No. 1 of 2013** and
225 **Rubaramira Ruranga Vs. Electoral Commission & The Attorney General, Constitutional Petition No. 21 of 2006**, and prayed that this Court so interprets the Constitution and makes a declaration to that effect. The Court was finally prayed to allow this Constitutional Petition.

230 **Respondent's Submissions:**

Issue 1:

The respondent's Counsel replied to Issue 1 by submitting that the right to practice one's profession and to carry on a lawful occupation, trade or business under **Article 40(2)** of the Constitution is not
235 absolute. It is one of those rights subject to the Constitutional limitations under **Article 43** of the Constitution. The respondent's Counsel submitted that the impugned sections of the Act are justifiable in a free and democratic society. Counsel prayed this Court to disallow this issue.

240 **Issue 2:**

The respondent's Counsel consented to the abandonment of this issue.

Issue 3:

In response to Issue 3, it was the submissions of Counsel for the
245 Respondent that the powers given to the Registrar under the

impugned provisions are meant to further the interests of the co-operative societies and that the powers cannot be exercised arbitrarily. The respondent's Counsel argued that **Section 15** of the **Act** which restricts membership of co-operative societies is meant to ensure the promotion of economic and social interests of the members of the societies. Accordingly the issue had to be disallowed.

Issue 4:

In response to Issue 4, the Respondent's Counsel submitted that the impugned Sections of the Co-operative Societies Act are acceptable and demonstrably justifiable in a free and democratic society. **Section 49(3) and (4)** of the **Act**, that allow co-operative societies to contribute to the education of children in this country could not be unconstitutional. Counsel prayed Court to answer this issue in the negative.

Counsel for the respondent prayed this Court to disallow the whole petition.

Resolution of the Issues:

This Court's jurisdiction to interpret the Constitution is by virtue of **Article 137(3) and (4) of the Constitution**. One who alleges that an Act of Parliament, or any other law or anything done or omitted to be done under the authority of any law, is inconsistent with or in contravention of the Constitution has a right to petition the Constitutional Court for a declaration to that effect.

The Constitutional Court must then interpret the Constitution to resolve the issue before the Court. The resolution of the issue must

depend for its determination on the interpretation and/or Construction of a provision of the Constitution. This is the jurisdiction vested in the Constitutional Court. See: **Attorney General vs Major General David Tinyefuza: Constitutional**
275 **Petition Appeal No. 1 of 1997.**

It is not enough to merely allege that a provision of the Constitution has been violated. The petitioner must, prima facie, show that the violation alleged and its effect require, in order to resolve the issues involved, interpretation of a provision of the Constitution. See:
280 **Ismail Serugo vs Kampala City Council and the Attorney General: Constitutional Appeal No. 2 of 1998 (SC).**

Having addressed myself to the above issue of jurisdiction of the Constitutional Court and having carefully considered the petition, the replies to the petition as well as the submissions of the parties to
285 the petition, I too agree with my sister, the Honourable Lady Justice Hellen Obura, JA, in her Judgment in this petition, that the petitioner's petition prima facie, shows and establishes a cause of action for constitutional interpretation. I will therefor proceed to so resolve the issues.

290 **Issue 1:**

Whether Sections 6(3), 22(1), 24(2) and (3), 43(1), 45, 52 and 56 and of the Cooperative Societies Act are inconsistent with and contravene Article 40(2) of the Constitution.

Article 2 of the Constitution, makes the Constitution the supreme
295 law of the land, and any other law inconsistent with it, is null and

void to the extent of that inconsistency. It is important to recognize that what has been asked of this court is the declaration of the constitutionality of certain provisions of an Act of Parliament as opposed to actions of a certain authority.

300 The Supreme Court in **Attorney General Vs. Salvatori Abuki, Constitutional Appeal No. 1 of 1998** put forward a very important rule of constitutional interpretation when it comes to ascertaining the constitutionality of legislations. The Supreme Court stated that when considering the constitutionality of any legislation, the court has to
305 consider the legislation's purpose and effect. Should the purpose of the legislation be inconsistent with a provision of the Constitution, the legislation or a section of that legislation should be declared unconstitutional. Similarly, should the effect of implementing any provision of the legislation be inconsistent with a provision of the
310 Constitution, the provision of the legislation should be declared unconstitutional as well.

I will now deal with the interpretation of the impugned provisions.

Article 40(2) of the Constitution provides that;

315 **"Every person in Uganda has the right to practise his or her profession and to carry on any lawful occupation, trade or business".**

Section 6(3) of the Co-operative Societies Act provides for the probationary registration of co-operative societies. Thereunder, upon the expiration of twenty-four months after registration, the Registrar,
320 if not satisfied with the performance of a society, may either cancel

the registration or extend the probationary period by a period not exceeding twelve months; and if after the extension, the Registrar is still not satisfied with the performance of the society, may cancel the registration of the society. It was the submission of the petitioners' Counsel that the ability of the Registrar to cancel the registration of a society because he or she is not satisfied with its performance violates the right of the society and its members to practice their profession and to carry out their business.

It is necessary to consider **Article 20** of the **Constitution**; it provides:

"20. Fundamental and other human rights and freedoms:

(1) Fundamental rights and freedoms of the individual are inherent and not granted by the State.

(2) The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons."

I thoroughly examined the affidavit of Mr. Enoka Musundi, the 2nd petitioner, which ably brought out the reasons why co-operative societies are formed. They are formed by people that intend to obtain economic and sometimes social benefits from them. The founders of these societies always have objectives which in no way could be said to be the same for every society. **Article 20(2) of the Constitution** guarantees freedoms of groups which in my understanding include freedoms of co-operative societies. These freedoms are inherent and

not granted by the State as was held in the persuasive authority of:
Rev. Christopher Mtikila Vs. Attorney General of Tanzania & Others, Civil Case No. 5 of 1993 High Court of Tanzania.

350 **Article 40(2)** of the Constitution which provides for the right for anyone to carry out a lawful trade or business already contains the restrictions that the Constituent Assembly while framing the 1995 constitution felt were justifiable in a free and democratic society. The Assembly felt that any trade or business that anyone chooses to carry out should be lawful. Therefore, for as long as the trade is lawful, any
355 other restraint on a person's trade would be unjustifiable. The test should be two fold. The first test should be whether there is any law that prohibits the trade or business in the absence of which the trade or business should be lawful. The second test should be whether the business complies with all the requirements of the law associated
360 with that line of business. For example, is the situation whether or not the business pays all the taxes imposed by the tax regime. If the answer to that is affirmative, then the business is good to go on and is therefore lawful within the meaning of **Article 40(2)**. If taxes are not being paid, then the authorities may put restrictions on the
365 business.

The performance of the business should only be the concern of the people that ventured into the business. Each business should be judged against its objectives and by the framers of the objectives who in a free and democratic society should be the people who own the
370 business themselves, not some form of Registrar or other Government official imposed on the business by Government.

The above of course does not mean that regulation of business by the Government is unlawful. The regulation by Government is very necessary but this should only be aimed at ascertaining whether in
375 the realisation of the objectives of the business, it is infringing on the rights of other citizens and/or the business is doing so using unlawful means. In no way should the regulation of businesses by the State be aimed at enforcing the realisation of the economic objectives of that business. Only when the failure to realise its
380 objectives is detrimental to the rights of other persons should the State halt a private business venture on account of poor performance.

I therefore agree with the petitioners that the cancellation by the Registrar of the registration of a society on account of the general
385 ground of not being satisfied with its performance violates the society's trade and business freedom guaranteed under **Article 40(2)** of the Constitution. **Section 6(3)** of the Cooperative Societies Act is therefore unconstitutional to that extent.

Section 22(1) of the Act obliges every registered society to cause its
390 accounts to be audited at least once in every year by an auditor appointed by its annual general meeting and approved by the Registrar. The Section empowers the Registrar, where the registered society is unable to appoint its own auditors, to appoint the required auditors.

395 It was the petitioners' averment that co-operative societies are private in nature and they should be able to perform their audits without

that much approval by the Registrar or the Government for that matter.

Under **Section 24** of the Co-operative Societies Act, committees of
400 registered societies are obliged to submit to their annual general
meetings, estimates of the societies' income and expenditure for the
coming twelve months, at least three months before the end of its
financial year. There is no dispute of the constitutionality of that
provision in its general form. The petitioners however contended that
405 **Sections 24(2) and (3)** of the Act that require a copy of the prepared
estimates to be sent to the Registrar for an opinion before they are
submitted to the general meeting are unconstitutional.

Section 43(1) of the Act restricts co-operative societies from
borrowing from non-members except with the prior permission of the
410 Registrar. Registered societies can only receive loans and any form of
deposits from non-members only to such an extent and under such
conditions as the Registrar may in writing authorise. The petitioners
urged this court to find that the need for the Registrar to authorise
the loans and deposits they take from people to be contrary to the
415 right for anyone to carry on business.

Section 45 of the Act obliges a registered society to invest or deposit
its funds only in a registered cooperative bank; any registered society,
company or statutory corporation approved in writing by the
Registrar; any bank or financial institution incorporated in Uganda;
420 securities as are by law allowed for the investment of trust funds; or
in such other mode as specified by the byelaws of the society and

approved by the Registrar. This, the petitioners contend is a violation of the societies' right to trade under **Article 40** of the Constitution.

Section 52 of the Act empowers the Registrar in consultation with
425 the board to hold an inquiry or direct a person to hold an inquiry into the Constitution, the working and the financial condition of a registered society. During the period of inquiry, the chief executive and other officers or employees of the co-operative society which is the subject of the inquiry, may be suspended from duty by the
430 Registrar to facilitate the smooth holding of the inquiry. Where the chief executive is suspended, a caretaker manager may be appointed by the Registrar in consultation with the board. The facts constituting this petition steamed from the Registrar exercising his power under this section of the Act.

435 After holding an inquiry or on receipt of an application made by two-thirds of the members of a registered society, if the Registrar is of the opinion that the society ought to be dissolved, he or she may make an order for the cancellation of registration of the society under **Section 56**. This order may be appealed against by any member of
440 the society to the board.

Article 40(2) of the Constitution is not to be interpreted to mean that the State cannot regulate trade and business. I find that it is acceptable and justifiable for the Registrar as representative of Government to approve of auditors for a cooperative society, to
445 regulate the estimates of the societies as well as to track their borrowing, surplus funds and deposits and to inquire into the

dealings of any co-operative society under **Sections 22(1), 24, 43(1), 45, 52 and 56** of the Cooperative Societies Act.

450 In regulating trade and business by carrying out the above stated functions the Registrar of Co-operative Societies must do so in compliance with **Articles 28, 42, 43(2)(c) and 44(c) of the Constitution**. The Co-operative Societies Act, unfortunately, does not require the Registrar to so comply and this is where the none compliance with the Constitution happens.

455 **Article 28** provides for the right to a fair hearing in that in the determination of civil rights and obligations the one involved is entitled to a fair, speedy and public hearing before an independent and impartial Court or tribunal established by law. The right to a fair hearing is non derogable under **Article 44(c)** of the Constitution.

460 Further, under **Article 42** of the Constitution, one appearing before any administrative official, of whom the Registrar co-operative societies is, has a right to be treated justly and fairly and has a right to apply to a Court of law in respect of any administrative decision taken against him or her.

465 Any limitation on the enjoyment of any right that is non-derogable under the Constitution must be in compliance of what is acceptable and demonstrably justifiable in a free and democratic society or what is provided in the Constitution according to **Article 43(2)(c) of the Constitution**.

470 In exercising the powers that are vested in the Registrar of co-operative societies by **Sections 6(3), 22(1), 24(2) and (3), 43(1), 45,**

52 and 56 of the Co-operative Societies Act, the Registrar of co-operatives, is not required by those provisions, or any other provision under the Co-operative Societies Act to act in compliance with the
475 right to a fair hearing and the right to treat others justly and fairly.

The manifestation of all the above on the part of the Registrar is when on 15th December, 2010 the Registrar suspended the Board of Directors of Bugisu Co-operative Union Ltd from duty and a caretaker manager was appointed in their stead. By 12th September,
480 2012, the said Board was still under suspension, and when it tried to re-assume office, the very same Registrar of co-operative societies called in Police to stop the resumption of office by the Board members.

Such a conduct of the Registrar, was contrary to **Article 40(2)** of the
485 Constitution to the prejudice of the members of Bugisu Co-operative Union whose right to practice and carry on lawful occupation, trade and business of growing, processing and exporting coffee was being violated.

The limitation that the Registrar's action put on the enjoyment of that
490 right went beyond what is acceptable and demonstrably justifiable in a free and democratic society. That is a society where governance is based upon the consent of the citizenry and there is dedication to the protection of the rights of all: See: **Zachary Olum and Another vs the Attorney General: Constitutional Petition No. 6 of 1999.**
495 (Okello, JA).

The powers that the Registrar of Co-operatives is vested with under **Sections 6(3), 22(1), 24(2) and (3), 43(1), 45 52 and 56 of the Co-operative Societies Act** derogate and are a fetter upon a co-operative society's right to carry on its trade or business guaranteed under **Article 40(2) of the Constitution**, since the Registrar of co-operative societies has powers to dictate otherwise and even to stop the carrying on of the business, whether the owners of the co-operative society agree or do not agree. The Registrar's powers are absolute in as much as the same are exercisable regardless of whether the society members are consulted or not and/or whether they agree or do not agree with the Registrar's decision.

Accordingly I hold that the operation of **Sections 6(3), 22(1), 24(2) and (3), 43(1), 45, 52 and 56 of the Co-operative Societies Act** is incompatible with the right of co-operative societies to carry on their lawful occupations, trade or business, since they vest in the Registrar of co-operative societies unfettered powers to interfere, interrupt and even stop, without first having afforded any hearing to the members, the management and running of the business and or trade, of the co-operative societies. I accordingly answer issue 1 in the affirmative.

Issue 2:

This issue stands abandoned by the petitioners with the consent of the respondents.

Issue 3:

Whether Sections 8, 9(6) and (7) and 15 of the Cooperative Societies Act are inconsistent with and contravene Articles 29 and 40(2) of the Constitution.

525 **Article 29** of the Constitution protects every Ugandan's freedom of conscience, expression, movement, religion, assembly and association. Thereunder, **Clauses 1(b) and 1(e)** protect the freedom of conscience and association respectively. These clauses provide as follows;

530 **“(1) Every person shall have the right to—**

(b) freedom of thought, conscience and belief which shall include academic freedom in institutions of learning;

(e) freedom of association which shall include the freedom to form and join associations or unions, including trade unions and
535 **political and other civic organisations.”**

In *Charles Onyango Obbo & another v Attorney, Supreme Court Constitutional Appeal No. 2/02*, although that was a matter concerning the freedom of speech under **Article 29(1) (a)**, Justice Mulenga's (JSC) (RIP) reasoning cuts across the entire **Article 29**. All
540 the freedoms guaranteed under **Article 29** are not absolute but their limitation must be justifiable in a free and democratic society and the test for the limitations that are justifiable is what Justice Mulenga set out as follows;

"Under Article 43(2) democratic values and principles are the criteria on which any limitation on the enjoyment of rights and freedoms guaranteed by the Constitution has to be justified. The court must be guided by the values and principles essential to a free and democratic society. In Mark Gova & Another v Minister of Home Affairs & Another;

[S.C.36/200:Civil Application No.156/99] the Supreme Court of Zimbabwe formulated the following summary criteria, with which I agree for justification of law imposing limitation on guaranteed rights-

The legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right;

The measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations.

The means used to impair the right of freedom must be more than necessary to accomplish the objective"

See also: South Africa appeal case of **Diamond Producers Organization vs Minister of Minerals and Energy and Others, CCT No. 234/6** that held that the test as to what measures are justifiable in an open and democratic society is that: "there must be a rational connection between means and ends. Otherwise the measure is arbitrary and arbitrariness is incompatible with such society".

The Sections under the Co-operative Societies Act said to be inconsistent with **Article 29** of the Constitution are **Sections 8, 9(6) and (7) and 15**.

570 **Section 8** provides for the cancellation of registration of any co-operative society by the Registrar. **Section 9** deals with the amendment of the byelaws of a registered society and **Subsections (6) and (7)** give the Registrar the power to require any society to
575 amend its byelaws or the Registrar on his/her own to amend them.

Section of the Act place restrictions on the membership of co-operative societies. Under **Section 15**, no company incorporated or registered under the Companies Act or an unincorporated body of persons is entitled to become a member of a registered society, except
580 with the written permission of the Registrar.

According to the wording of **Article 29(1) (e)**, of the Constitution, the freedom of association includes the right to form and join associations or unions. Any limitation to this right must be sufficiently important so as to warrant the overriding of this right. A
585 cooperative society is formed by persons with certain objectives that are normally economic or social in nature. How they fulfil these objectives should be the concern of the society's members.

It would follow therefore that, unless a co-operative society is formed with the objective of compromising national security, health and
590 safety of its members, there is no reason as to why the formation of such a society by members who wish to form it, should be denied to do so. The Registrar's concern should be the objectives of the society

at the stage when it is seeking to be registered. Once it has been registered, the affairs of the society should be the concern of its members as long as the said co-operative society does not abandon its objectives and byelaws. To allow the Registrar to determine the progress, set goals and amend byelaws for co-operative societies is to restrict the members of the societies from forming and running the society in the first place for it is them who know why they formed it.

For the reasons stated above, I come to the conclusion that issue 3 of this petition must succeed. **Sections 8, 9(6) and (7) and 15 of the Co-operative Societies Act** are held to be inconsistent with and in contravention of **Articles 29(1) (b) and (e) and 40(2) of the Constitution.**

Issue 4:

Whether Sections 4(2), 29(b), 43(2), 49(3) and (4) of the Cooperative Societies Act are inconsistent with and contravene Articles 29 and 40(2) of the Constitution.

Section 4(2) of the Co-operative Societies Act provides that the Uganda Co-operative Alliance Ltd. is the apex body for all registered cooperative societies. **Section 29(b)** empowers the Uganda Co-operative Alliance Ltd, to make representations to the Government as it may think fit in relation to any matter affecting registered cooperative societies.

As to whether **Sections 4(2) and 29(b)** of the Co-operative Societies Act are inconsistent with **Articles 29 and 40(2) of the Constitution**, **Section 4(2)** of the Act provides;

“(2) The Uganda Co-operative Alliance Ltd. shall be the apex body for all registered co-operative societies.”

620 **Section 29(b)** of the Act stipulates that;

“29. The Board of Directors of the Uganda Cooperative Alliance Ltd. shall, subject to the byelaws and any directions issued by the general meeting of the alliance—

625 **(b) make representations to the Government as it may think fit in relation to any matter affecting registered cooperative societies in general or any particular registered society which those societies generally or any such society may request the board to bring to the notice of the Government;”**

630 The petitioners have not in any way established how the above sections of the Act contravene the right for anyone to practice lawful trade or business and anyone’s freedom of conscience, expression, movement, religion, assembly and association. As a result, I hold that **Sections 4(2) and 29(b)** of the Cooperative Societies Act are not inconsistent and are not in contravention of **Articles 29 and 40(2)** of the Constitution.

635

As to **Sections 43(2) and 49(3) and (4) of the Co-operative Societies Act**, the principal **Sections 43 and 49** provide for restrictions on borrowing (S.43) and contribution to education fund (S.49). A registered co-operative society shall receive deposits and

640 loans from non members to such an extent and under such conditions as the registrar shall authorize in writing from time to time. **Section 43(2)** provides that for the purpose of **Section 43(1)**

credit on current account for more than 90 days and money deposits under hire purchase agreements are deemed to be loans within the
645 meaning of the Section.

It is to be noted that the Registrar is vested with absolute powers, without being required to consult the members of the society or to give them an explanation, or to give them any hearing, when determining, imposing, implementing and authorizing the extent and
650 the conditions under which the co-operative society is to receive deposits and loans from those who are not co-operative society members.

The powers vested in the Registrar are a violation of **Article 40(2) of the Constitution** as they interfere with the society's members
655 enjoyment of the rights to practice and carry on any lawful occupation, trade or business. It is a limitation that is beyond what is acceptable and justifiable in a free and democratic society and thus contrary to **Article 43(2)(c) of the Constitution**.

As to **Section 49(3) and (4) of the Co-operative Societies Act**, a
660 national Co-operative Education Fund is contributed to by every registered society remitting 1% per year of its turnover. 50% of the society's contribution to the education fund is sent to the secondary society to which the contributing society is affiliated, while the remaining 50% is retained by the contributing society to carry out its
665 own educational programmes. In case of a secondary society or a society that is not affiliated to a secondary society, 50% of the education fund set aside is to be sent to the Uganda Co-operative

Alliance Ltd, while the remaining 50% is to be used by the secondary society or primary society to carry out its educational programmes.

670 The Uganda Co-operative Alliance Ltd has to make quarterly returns to the Registrar accounting for the collections and utilization of the education fund.

It is contended by the petitioner that **Section 49(3) and (4)** violate the right to privacy of the co-operative societies and their members
675 thus contravening **Article 27(2) of the Constitution**.

Co-operative Societies are meant to advance the needs of their members, including the needs of education for themselves and that of their children and relatives. It is a fact that not all members of a co-operative society are involved in the day to day running of the
680 affairs of the co-operative society or appreciate the necessity of some needs.

It is therefore proper to have in the Co-operative Societies Act sections like **Section 49** that make for compulsory contribution by every society to a particular vital need, like that of education, and to
685 have the Co-operative Alliance Ltd making quarterly returns to the Registrar, as the Government officer, for purposes of accountability and proper management. I find that **Section 49(3) and (4) of the Co-operative Societies Act** does not in any way contravene Articles 27(2), 29 and 40(2) of the Constitution.

690 Issue 4 is therefore resolved by holding that **Sections 4(2), 29(b) and 49(3) and (4)** are not inconsistent with the Constitution. However



Section 43(2) of the Act is inconsistent with **Articles 40(2) and 43(2)(c) of the Constitution.**

In conclusion this petition is allowed.

695 **Sections 6(3), 8, 9(6) and (7), 15, 22(1), 24(2) and (3) 43(1) and (2), 45, 52 and 56 of the Co-operative Societies Act** are inconsistent and in contravention of the Constitution, the particulars of the contravention and inconsistency being as set out in resolving issues 1,3 and 4 of the petition.

700 The stated Sections of the Co-operative Societies Act are therefore declared null and void to the extent of the inconsistency and/or being in contravention with the Constitution.

As to the other orders sought in the petition, the Registrar of Co-operatives is under obligation to act in compliance with the law that
705 is consistent and in compliance with the Constitution as declared by this Court or any other Court of competent jurisdiction.

As for an order for compensation to 277 co-operative societies and Bugisu Co-operative Union, no evidence was received by this Court to support this prayer. At any rate, this is a relief that can be pursued
710 by the petitioners and those others affected who claim to have a cause of action for this relief, through any other Court of competent jurisdiction under **Article 50 of the Constitution.** No. compensation is accordingly awarded.

The other orders sought in the petition have been overtaken by other
715 events that have happened since this petition was filed in this Court more than 8 years ago on 15th October, 2012.

As to the prayers 1,2,3,4 and 5 made on page 12 of the petitioners' supplementary submissions filed in this Court on 12th August, 2020, the same were not pleaded as part of the original petition and as such cannot be entertained by this Court. They have been introduced to this Court as submissions and not as pleadings of a cause of action in a constitutional petition to interpret the Constitution. The said prayers are accordingly rejected.

As to costs, the petitioners have been on the whole successful on issues involving interpretation of the Constitution. I accordingly award them the costs of the petition.

Dated at Kampala this 15 day of April 2021.



Remmy Kasule
Ag, Justice Court of Appeal/Constitutional Court

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 46 OF 2012

1. NATHAN NANDALA MAFABI
2. ENOKA MUSUNDI
3. SAM MAGONA
4. HAJJI HUSSEIN MUMEYAPETITIONERS

VERSUS

ATTORNEY GENERAL RESPONDENT

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA/JCC
 Hon. Lady Justice Hellen Obura, JA/ JCC
 Hon. Mr. Justice Stephen Musota, JA/JCC
 Hon. Mr. Justice Christopher Madrama Izama, JA/JCC
 Hon. Mr. Justice Remmy Kasule, Ag. JA/JCC

JUDGMENT OF JUSTICE KENNETH KAKURU, JA/ JCC

I have had the opportunity of reading in draft the Judgment of my learned sister Hon. Hellen Obura, JA/JCC.

I agree with her that, this petition ought to succeed to the extent and for the reasons she has set out in her judgment.

I also agree with the orders she has proposed.

By majority decision, this petition succeeds with declarations and orders as set out in the judgment of Justice Obura, JA/JCC.

It is so ordered.

Dated at Kampala this 15th day of April 2021.



.....
Kenneth Kakuru
JUSTICE OF APPEAL/CONSTITUTIONAL COURT

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VERSUS

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

*(Coram: Kenneth Kakuru, Hellen Obura, Stephen Musota,
Christopher Madrama JJA/JJCC, & Remmy Kasule, AG.
JA/JJCC)*

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA/ JCC.

I have had the benefit of reading in draft, the judgment of my sister Justice Hellen Obura, JA/JCC.

I agree with her analysis, reasoning and finding that the impugned sections 6(3), 9(6) & (7), 15, 17, 22(1), 23(1), 24(2), & (3), 43(1) & (2), 45, 52 and 56 of the Cooperatives Societies Act, contravene and are inconsistent with Articles 29(1) (b) & (e) and 40(2) of the Constitution. They are accordingly declared null and void to the extent of their inconsistency.

In the result, this petition is allowed with costs.

Dated this 1st day of April 2020



Stephen Musota, JA/JCC