THE REPUBLIC OF UGANDA

THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke, Madrama, Mugenyi & Gashirabake, JJCC)

CONSTITUTIONAL PETITION NO. 11 OF 2019

BETWEEN

1. CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION (CADER)
2. JIMMY MUYANJA ..... PETITIONERS

AND

THE ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT OF MONICA K. MUGENYI, JCC

A. Introduction

1. This Petition was lodged by the Centre for Arbitration and Dispute Resolution (CADER), a statutory authority established under the Arbitration and Conciliation Act, Cap. 4 to perform the functions under sections 11, 12, 13, 14, 15 and 51 of the Act; and Mr. Jimmy Muyanja, the Executive Director of CADER, and an arbitration law practitioner and Fellow of the Chartered Institute of Arbitrators ('the Petitioners'). It is brought under Articles 50 and 137 of the Constitution, and the Constitutional Court (Petition and References) Rules, SI No. 91 of 2005.

2. The Petition challenges the failure to recognize CADER ('the First Petitioner') as a constitutionally established subordinate court, the decisions of which are not subject to appeal; its relegation as an administrative body, the decisions of which are subject to judicial review, and the Respondent's failure to lay the Judicature (Judicial Review) Rules, 2009 before Parliament or advise Parliament and the office of the Chief Justice to enact enabling laws for subordinate courts. It is supported by an affidavit deposed by Mr. Muyanja ('the Second Petitioner') that was lodged in this Court on 8th May 2019, in which the deponent attests to the High Court having been misdirected into the erroneous belief that the First Petitioner is an administrative body that is subject to judicial review proceedings.

3. The Petition is opposed by the office of the Attorney General ('the Respondent'), which contends that the Petition does not raise any question for constitutional interpretation, and denies any constitutional infringement or that CADER is a subordinate court established by the Constitution. The Answer to the Petition is supported by the affidavit of Mr. Allan Mukama, a State Attorney at the Respondent Office, who denies that the First Petitioner is a subordinate court and attests to some of the said entity's functions being administrative in nature and thus amenable to judicial review but not appeal.

4. At the hearing, the Petitioners were represented by Mr. Enoth Mugabi; while Mr. Jeffrey Atwine – Ag. Commissioner Civil Litigation at the Attorney General's Chambers appeared for the Respondent.

B. **Petitioners' Case**

5. It is the Petitioners' contention that registrars and judges of the High Court have been wrongfully exercising judicial review powers over them yet they are not administrative bodies. In their view, the First Petitioner is a subordinate court established under Articles 5, 6 and 11 of the UNICTRAL Model Law on International Commercial Arbitration ('the UNCITRAL Model Law'); sections 9, 11 and 68(a) of the Arbitration and Conciliation Act, and Article 129(1)(d) of the Constitution. It is further proposed that Articles 5, 6 and 11 of the Model Law, sections 9 and 11 of the Arbitration and Conciliation Act and Article 139(2) of the Constitution forestall appeals against the First Petitioner's decisions; neither by virtue of Article 128(4) of the Constitution can the Petitioners be enjoined in proceedings that seek to challenge decisions rendered by them under sections 11, 12, 13, 14, 15 and 51 of the Arbitration and Conciliation Act.

6. It is averred that the Rules Committee acted ultra vires of Parliament's powers under Articles 129(3) and 139(2) of the Constitution when it subjugated the First Petitioner (a subordinate court) to judicial review proceedings pursuant to sections 41 and 42 of the Judicature Act, Cap. 13 and the Judicature (Judicial Review) Rules, *S.I No. 11 of 2009*. The Rules Committee is faulted for neither laying the Judicature (Judicial Review) Rules before Parliament in accordance with section 41(5) of the Judicature Act nor advising the House to enact enabling legislation for the jurisdiction and operation of subordinate courts, such as the First Petitioner. It is thus proposed that any pending applications and decisions of the High Court seeking to quash the Petitioners' decisions on the premise that they are administrative decisions that are amenable to judicial review are inconsistent with Articles 5, 6 and 11 of the UNICTRAL Model Law, sections 9 and 11 of the Arbitration and Conciliation Act and Articles 129(3) and 139(2) of the Constitution.

7. In his affidavit in support of the Petition, the Second Petitioner largely re-echoes the averments in the Petition as summed up above. In addition, he attests to the UNCRITRAL Model Law having been embraced by Uganda and adapted into the Arbitration and Conciliation Act, and the Parliamentary Hansard Reports depict the First Petitioner as having been deliberately established as a court to preside over applications brought under sections 11, 12, 13, 14, 15 and 51 of the Arbitration and

Conciliation Act. The First Petitioner's decisions under section 11 of that Act are opined to be the result of an *inter partes* adverse claim hearing process that cannot be classified as administrative decisions but, rather, would only be subject to appeal within the precincts of Article 139(2) of the Constitution.

8. In the event, the Petitioners seek the following reliefs (reproduced verbatim):

    (a) *A declaration that CADER whilst performing section **68(a) ACA** (Arbitration and Conciliation Act) functions, to wit **sections 11, 12, 13, 14, 15** and **51 ACA** is a **subordinate court** established pursuant to **Articles 129(1)(d), 129(3)** and **139(2) Constitution**.*

    (b) *A declaration that no appeals are allowed against decisions rendered by CADER section 11 ACA pursuant to **Articles 129(1)(d)** and **139(2) Constitution**.*

    (c) *A declaration that **Articles 5, 6** and **11 MAL** (UNICTRAL Model Law on International Commercial Arbitration) and **sections 9** and **11** and **First Schedule ACA** are inconsistent with **Articles 129(1)(d)** and **139(2) Constitution**.*

    (d) *A declaration that the Chief Registrar, Deputy Registrars and Assistant Registrars have no powers to preside over any matters arising from the **Arbitration and Conciliation Act**.*

    (e) *A declaration declaring null and void all decisions emanating from judicial review proceedings against the Petitioners.*

    (f) *An order directing the Respondent and Chief Justice to carry out a census of the Laws of the Republic of Uganda and enact relevant legislation accompanied by the requisite orders and directions listing the subordinate courts present within the Republic of Uganda pursuant to **Articles 133(1)** and **150(1) Constitution**.*

    (g) *An order directing the* Rules Committee *to lay before Parliament all Rules which have been enacted pursuant to section 42 Judicature Act, Cap. 13 which impact upon subordinate courts.*

    (h) *A declaration that the **Judicature (Judicial Review) Rules S. I No. 11/2009**, in as far as it purports to cast CADER and other **subordinate courts** as **administrative bodies** subject to **judicial review** is inconsistent with **Articles 42** and **139(1) Constitution**.*

    (i) *A declaration order directing Registrars from registering proceedings against **section 11 ACA** decisions delivered by the Petitioners before the Courts of the Republic of Uganda or enforcing any decisions arising from the said Courts.*

    (j) *A permanent injunction order restraining the institution, prosecution of and enforcement* judicial review *proceedings against **section 11 ACA** decisions delivered by the Petitioners before the Courts of the Republic of Uganda or enforcing any decisions arising from the said Courts.*

(k) *An order that the Respondent be liable for costs of this Petition as determined by the Court.*

C. **Respondent's Case**

9. Conversely, the Respondent denies any violation of Article 129 of the Constitution, contending that the First Petitioner is neither a subordinate court as envisaged under that constitutional provision nor are appeals from arbitral awards rendered by the said Petitioner permitted under sections 11, 12, 13, 14, 15 and 51 of the Arbitration and Conciliation Act, and Articles 5, 6 and 11 of the UNCITRAL Model Law. It is further averred that in enacting the Judicature (Judicial Review) Rules, 2009, the Rules Committee neither usurped the powers of the legislature nor contravened Articles 129(3) and 139(2) of the Constitution.

10. The Committee's categorization of the First Petitioner as an administrative body is opined to be consistent with Article 139(2) of the Constitution; while its enactment of the Judicature (Judicial Review) Rules was in accordance with sections 40, 41 and 42 of the Judicature Act. Consequently, it is averred, judicial officers have been legally exercising the powers of judicial review over the Petitioners. The same averments are more or less repeated in the affidavit evidence in support of the Answer to the Petition.

D. **Issues for Determination**

11. Failure by the parties to agree beforehand to the issues for determination in this matter yielded two different sets of issues. There is convergence between the parties on the following issues:

I. *Whether the Petition raises any questions for constitutional interpretation.*

II. *Whether the Center for Arbitration and Dispute Resolution (CADER), whilst performing section 68(a) ACA functions, is a subordinate court established pursuant to Article*(s) *126, 129(1)(d), 139(2), 150(1), 257(1)(p), 257(1)(cc) of the Constitution or an administrative body under Article 42 of the Constitution.*

III. *Whether the Second Petitioner whilst performing section 68(a) ACA functions as a judicial officer of the subordinate court is not liable to action or suit pursuant to Article 128(4) of the Constitution.*

IV. *Whether the Chief Justice or the Rules Committee* (in) *enacting S. I. No. 11/2009 and S. I. No. 32/2019 subjecting the subordinate court CADER to judicial review proceedings violates Articles 79(2), 128(2), 129(d), (3), 133(1), 139(2), 150(1), 257(1)(p) and 257(1)(cc) of the Constitution.*

V. *Whether the Petitioners are entitled to the orders and declarations sought.*

12. In addition, the Petitioners separately propose the following issue:

> *Whether the Registrars presiding as judicial officers over Arbitration and Conciliation Act proceedings contravene Articles 128(5), 128(6), 133, 134(1), 138(1), 142, 144(7), 147(1)(d) and 150 of the Constitution.*

13. Similarly, the Respondent proposes an additional issue as to '*whether the Petition raises any issues/ questions for constitutional interpretation*', and raises a preliminary objection as to whether the Petitioners have *locus standi* to before the Court.

14. Having carefully considered the Petition, I find that the Petitioners' grievances are very well articulated in paragraphs 6 – 13, and can be summed up as follows:

I. The failure to recognize the First Petitioner as a subordinate court established under Article 129(1)(d) of the Constitution;

II. The failure to recognize that no appeal lies against decisions of the First Petitioner.

III. The usurpation of Parliament's legislative function under Articles 129(3) and 139(2) of the Constitution by the enactment of *S. I. No. 11 of 2009* by the Rules Committee, and the failure to lay that statutory instrument before Parliament.

IV. The relegation in that statutory instrument of the First Petitioner and other subordinate courts to administrative bodies.

V. The wrongful application of judicial review to the Petitioners by Registrars and Judges of the High Court.

VI. The failure by the Respondent office to advise Parliament and the Chief Justice to enact enabling laws for subordinate courts pursuant to Articles 129(3) and 133(1) of the Constitution respectively.

15. As can be deduced from the foregoing summation of the Petition, the only reference to the office of Registrars is in relation to their subjection of the Petitioners to judicial review proceedings. That issue would collapse into *Issue No. 4* above. It is, however, a far cry from what I understand to be the import of the additional issue proposed by the Petitioners, which raises contestation over the registrars presiding over proceedings under the Arbitration and Conciliation Act. Such proceedings would be entirely different from the judicial review proceedings presided over by the High Court. It is, in any case, a matter that was only raised by way of relief sought without any foundational basis therefor in the pleadings.

16. In **Interfreight Forwarders (U) Ltd v EADB, Civil Appeal No. 33 of 1992**, the nexus between pleadings and framed issues was espoused as follows (per Oder, JSC):

> The system of pleadings is necessary in litigation. It operates to define and deliver with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. .... **Thus issues are formed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein**. A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. **He will not be allowed** to succeed on a case not so set up by him and be allowed **at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings**. *(my emphasis)*

17. That position was endorsed in the more recent case of **Fangmin v Belex Tours & Travel, Civil Appeal No. 6 of 2013** (Supreme Court), where pleadings were held to '**define and deliver clarity and precision of the real matters in controversy between the parties, upon which they can prepare and deliver their respective cases and upon which the court will be called upon to adjudicate between them**.' Similarly, in **Hon. Dr. Margaret Zziwa v The Secretary of the**

East African Community, EACJ Appeal No. 2 of 2017, the duty upon courts to determine cases within the ambit of the pleadings was articulated as follows:

> It is trite law that parties are bound by their pleadings, that no relief will be granted by a court unless it is founded on the pleadings, and that it is not open to the Court to base a decision on an un-pleaded issue.

18. Abiding the foregoing decisions, I am respectfully unable to entertain an issue that is clearly premised on a case that was never set up by the Petitioners and which therefore the Respondent was never in a position to respond to. I would disallow the Petitioners' additional issue.

19. On the other hand, the Respondent raises the additional issue of the Court's jurisdiction to entertain a matter that discloses no question for constitutional interpretation. This issue is pleaded in paragraph 3 to the Answer to the Petition as follows: '***the Respondent contends and avers that the contents of paragraph(s) (5), (6), (7), (8), (9), (10), (11), (12), (13) and (14) of the Petition do not raise any questions or issues for constitutional interpretation, or contravention of any constitutional provision***.' I would therefore entertain that matter as an issue for determination.

20. Consequently, the issues for determination in this Petition are as follows:

    I. *Whether the Petition raises any questions for constitutional interpretation.*

    II. *Whether the Center for Arbitration and Dispute Resolution (CADER), whilst performing section 68(a) ACA functions, is a subordinate court established pursuant to Article*(s) *126, 129(1)(d), 139(2), 150(1), 257(1)(p), 257(1)(cc) of the Constitution or an administrative body under Article 42 of the Constitution.*

    III. *Whether the Second Petitioner whilst performing section 68(a) ACA functions as a judicial officer of the subordinate court is not liable to action or suit pursuant to Article 128(4) of the Constitution.*

    IV. *Whether the Chief Justice or the Rules Committee* (in) *enacting S. I. No. 11/2009 and S. I. No. 32/2019 subjecting the subordinate court CADER to judicial review proceedings violates Articles 79(2), 128(2), 129(d), (3), 133(1), 139(2), 150(1), 257(1)(p) and 257(1)(cc) of the Constitution.*

    V. *Whether the Petitioners are entitled to the orders and declarations sought.*

E. **Determination**

21. I propose to address *Issue No. 1* on preliminary basis alongside the preliminary objection on the Petitioners' *locus standi* to lodge this Petition. In any case, both matters speak to the question of jurisdiction.

Points of Law: *Whether the Petition raises any questions for constitutional interpretation & Whether the Petitioners have* locus standi *to lodge this Petition.*

22. It is the Petitioners' contention that Article 79(2) of the Constitution designates Parliament as the body responsible for the legislative function in Uganda. Section 42(1)(b) of the Judicature Act, on the other hand, restricts the Chief Justice to making Rules that prescribe the procedures and fees payable towards orders of mandamus, prohibition and certiorari; there being no provision in that Act for either the Rules Committee or the Chief Justice to enact a statutory instrument that prescribes the supervisory jurisdiction of the High Court over subordinate courts.

23. The Petitioners thus portend that the enactment of *S.I. No. 11 of 2009* and *S.I. No. 32 of 2019* by the Rules Committee and Chief Justice offends Articles 129(1)(d) and 139(2) of the Constitution. They further express a violation of National Objective XXIX(g) and Articles 20(2), 133(1) and 141(1) of the Constitution insofar as the Chief Justice has purportedly omitted to perform the functions designated under those constitutional provisions, emphasis being laid on the alleged omission to pass any legal instrument that confirms the existing subordinate courts as supposedly required of that office under Article 133(1) of the Constitution.

24. For present purposes, therefore, it is opined that this Court's interpretative jurisdiction is invoked by the allegations of constitutional violation through the enactment of the Judicature (Judicial Review) Rules, 2009 and Judicature (Judicial Review) (Amendment) Rules, 2019, as well as the unconstitutional judicial review proceedings that the Petitioners have been subjected to thereunder. Additionally, the Petitioners contend that their *locus standi* in this matter is derived from Article 137(3)(b) of the Constitution, emphatically proposing that '***ANY PERSON who alleges that ... any other law ... is INCONSISTENT WITH or IN CONTRAVENTION of this Constitution ...***' may lodge a constitutional petition before this Court. Citing numerous decided cases from this Court and the Supreme

Court, it is argued that the Respondent raises no legal standard that divests the Petitioners of *locus standi* vested in them by Article 137(3)(b) of the Constitution. The Court is urged to disregard the case of **Dima Dominic Poro v Inyani Godfrey, Civil Appeal No. 17 of 2016**[1] (as cited by the Respondent) given that it does not address *locus standi* under Article 137(3)(b) of the Constitution.

25. Conversely, the Respondent contends that the Petition is a disguised appeal of the High Court's decision in **International Development Consultants Limited v Jimmy Muyanja, CADER & Another, Miscellaneous Cause No. 133 of 2018**. It is considered to offend Rule 3 of the Constitutional Court (Petitions and References) Rules, 2005 insofar as it does not show which Act of Parliament or act of the Respondent contravenes the Constitution; and is non-compliant with the format proposed in those Rules to set out concisely (without narrative) the issue for constitutional interpretation. Reference is made to the case of **Ismail Serugo v Kampala City Council & Another, Constitutional Appeal No. 2 of 1998** (Supreme Court) where, citing **Attorney General v Maj. Gen. David Tinyefunza, Constitutional Appeal No. 1 of 1997**, it was observed that '**to be clothed with jurisdiction at all, the Constitutional Court must be petitioned to determine the meaning of any part of the Constitution in addition to whatever remedies are sought**.' In learned State Counsel's view, this was not done in the present case.

26. On the question of *locus standi*, the Respondent would appear to contend that section 69 of the Arbitration and Conciliation Act provides for a Governing Council to provide leadership to the First Petitioner, as well as appoint its Executive Director and, therefore, in the absence of a resolution from the Council, the Petition was lodged without requisite authority. To that extent, it is opined, the First Petitioner has no *locus standi* before the Court.

27. Article 137(1) and (3) of the Constitution do articulate the jurisdiction of this Court, clause (1) delineating the jurisdiction *ratione materiae* or subject matter jurisdiction and clause (3), the jurisdiction *ratione personae* or parties' *locus standi* before the Court. *See* ***Centre for Health, Human Rights and Development & 3 Others v***

[1] Also reported as UGHCCD (Uganda High Court Commercial Division) 154 (30th November 2017).

Attorney General & Another, Constitutional Petition No. 22 of 2015. Those constitutional provisions read as follows:

> **(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.**
>
> **(2) .....**
>
> **(3) A person who alleges that –**
>
> **(a) An Act of Parliament or any other law or anything in or done under the authority of any law; or**
>
> **(b) Any act or omission by any person or authority,**
>
> **is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.**

28. The contestation in this Petition is about both the Court's interpretative jurisdiction as outlined in Article 137(1) and the First Petitioner' *locus standi* to lodge the Petition. I am constrained to echo the concern expressed by this Court in **Francis Tumwesige Ateenyi v Attorney General, Constitutional Petition No. 36 of 2018** about the creeping (mal)practice by the office of the Attorney General to contest the interpretative jurisdiction of this Court as a matter of course, whatever the nature of the petition before it. A petition should not be opined to raise no question for constitutional interpretation simply because the question so raised is, from the respondent's perspective, either mundane or lacking in merit.

29. In the instant case, it is quite clear on the face of the pleadings that the Petition does raise questions for constitutional interpretation, not least being what would amount to a subordinate court under the Constitution and whether the impugned statutory instruments, to which a supposedly subordinate court has been subjected, were constitutionally enacted. As quite aptly stated by learned Counsel for the Petitioners, the Court's jurisdiction is invoked on account of '***allegations of violation of the Constitution through enactment of the impugned Judicature (Judicial Review) Rules S.I. 11/2009 and Judicature (Judicial Review) (Amendment) Rules S.I. No. 32/2019 ... and consequent unconstitutional review proceedings the Petitioners have been subjected to***.'

30. The invoked constitutional provisions are clearly spelt out in the Petition and need not be repeated here. The fact that provisions from other legal instruments have also been invoked would not negate that. Rather, it is a matter that goes to the merits of the Petition. I am satisfied, therefore, that the Petition does raise a question for constitutional interpretation and is, to that extent, properly before this Court. I would resolve *Issue No. 1* in the affirmative.

31. On the question of *locus standi*, the Petitioners are faulted for filing the Petition without proof of corporate authority, the First Petitioner being a statutory body with a Governing Council that provides leadership oversight in accordance with section 69 of the Arbitration and Conciliation Act. Learned State Counsel does concede, nonetheless, that the Second Petitioner can maintain the action in his individual right. In response, the Petitioners contend that they derive *locus standi* from Article 137(3)(b) of the Constitution, which stipulates as follows:

> **A person who alleges that 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**

32. As a non-corporate person, the Second Petitioner is undoubtedly competent to appear as a party before the Court. Aside from his designation as the Executive Director of the First Petitioner, in his personal capacity as an arbitration law practitioner and Fellow of the Chartered Institute of Arbitrators, the Second Petitioner does have *locus standi* to institute proceedings before this Court under Article 137(3) of the Constitution.

33. In relation to the First Petitioner, I find that Article 137(3)(b) alludes to legal personality as opposed to the notion of corporate authority as invoked by the Respondent. So that, a juridical entity or 'non-human' person would only have *locus standi* to lodge a matter with the Court if it has legal personality. Hence, in **George William Alenyo v The Chief Registrar, Courts of Judicature & 2 Others, Constitutional Petition No. 32 of 2014**, it was observed that '**"legal personality" or "corporate legal entity" is a creature of statute. It is only after non-biological person(s) or bodies have been conferred with legal personality**

that they become competent to be joined as respondents in Constitutional Petitions commenced in this court.'

34. The First Petitioner is conferred with such legal personality under section 67 of the Arbitration and Conciliation Act, which stipulates as follows:

> **(1) There is established a body to be called the Centre for Arbitration and Dispute Resolution.**
>
> **(2) The centre shall be a body corporate with perpetual succession and a common seal and shall be capable of suing or being sued in its corporate name and may borrow money, acquire and dispose of property and do all such other things as a body corporate may lawfully do.** *(my emphasis)*

35. Consequently, I am satisfied that the First Petitioner has *locus standi* before this Court and would accordingly over-rule the preliminary objection raised by the Respondent.

36. Turning to the substantive issues, I propose to address *Issues 2, 3* and *4* together and conclude with the separate consideration of *Issue No. 5*.

Issues 2, 3 & 4: *Whether the Center for Arbitration and Dispute Resolution (CADER), whilst performing section 68(a) ACA functions, is a subordinate court established pursuant to Article*(s) *126, 129(1)(d), 139(2), 150(1), 257(1)(p), 257(1)(cc) of the Constitution or an administrative body under Article 42 of the Constitution; Whether the Second Petitioner whilst performing section 68(a) ACA functions as a judicial officer of the subordinate court is not liable to action or suit pursuant to Article 128(4) of the Constitution, & Whether the Chief Justice or the Rules Committee* (in) *enacting S.I. No. 11/2009 and S.I. No. 32/2019 subjecting the subordinate court CADER to judicial review proceedings violates Articles 79(2), 128(2), 129(1)(d), (3), 133(1), 139(2), 150(1), 257(1)(p) and 257(1)(cc) of the Constitution.*

37. The Petitioners advance the following 'four-way test' for determination of the question posed under *Issues 2* and *3*, namely, whether the First Petitioner is a subordinate court and the Second Petitioner as a judicial officer thereof enjoys immunity from legal action.

> (1) Whether a subordinate court was established by Parliament pursuant to Article 129(1)(d) of the Constitution.

(2) Whether the subordinate court that was established by Parliament pursuant to Articles 126(1), 128(1), 129(1)(d) and 257(1)(p) of the Constitution is vested with 'judicial power' exercised to dispense justice.

(3) Whether Parliament made provision for the subordinate court's jurisdiction and procedure pursuant to Article 129(3) of the Constitution.

(4) Whether Parliament rendered the subordinate court's decisions appealable pursuant to Article 139(2) of the Constitution.

38. Addressing the First and Second Tests, it is the Petitioners' contention that Article 6 of the UNCITRAL Model Law left the determination of the body responsible for the appointment of arbitrators to the contracting UN states parties and, in section 68(a) of the Arbitration and Conciliation Act, the Ugandan Parliament rightly designated CADER as a subordinate court for that purpose in accordance with Article 129(1)(d) and (3) of the Constitution. This was purportedly done by substituting reference to '*court*' under clause 11 of the Arbitration and Conciliation Bill, 1999 with CADER in section 11 of the resultant Act. The Petitioners rely on the Hansard Extract on the Second Reading of the Arbitration and Conciliation Bill where, at p. 97 of Annex 4, Hon. Wandera Ogalo moved a motion that all reference to '*court*' in clause 12(3) – (6) be substituted with '*the appointing authority*'.

39. Article 129(1)(d) and (3) stipulates:

> **(1) The judicial power of Uganda shall be exercised by the courts of judicature which shall consist of –**
>
> **(a) .....**
>
> **(b) .....**
>
> **(c) .....**
>
> **(d) such subordinate courts as Parliament may by law establish, including qadhis courts for marriage, divorce, inheritance and guardianship, as may be prescribed by Parliament.**
>
> **(2) .....**
>
> **(3) Subject to the provisions of this Constitution, Parliament may make provision for the jurisdiction and procedure of the courts.**

40. On the other hand, the cited legal provisions are reproduced below.

UNCITRAL Model Law

Article 6: *Court or other authority for certain functions of arbitration assistance and supervision*

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ..... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

Arbitration and Conciliation Act

Section 11: *Appointment of arbitrators*

(1) No person shall be precluded by reason of that person's nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators and if there is no agreement—

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint the third arbitrator;

(b) in an arbitration with one arbitrator, the parties shall agree on the person to be appointed.

(3) Where —

(a) in the case of three arbitrators, a party fails to appoint the arbitrator within thirty days after receipt of a request to do so from the other party or if the two arbitrators fail to agree on the third arbitrator within thirty days after their appointment; or

(b) in the case of one arbitrator, the parties fail to agree on the arbitrator, the appointment shall be made, upon application of a party, by the appointing authority.

(4) Where, under a procedure agreed upon by the parties for the appointment of an arbitrator or arbitrators –

(a) a party fails to act as required under that procedure;

(b) the parties or two arbitrators fail to reach the agreement expected of them under that procedure; or

(c) a third party, including an institution, fails to perform any function entrusted to it under that procedure,

any party may apply to the appointing authority to take the necessary measures, unless the agreement otherwise provides, for securing compliance with the procedure agreed upon by the parties.

(5) decision of the appointing authority in respect of a matter under subsection (3) or (4) shall be final and not be subject to appeal.

(6) The appointing authority in appointing an arbitrator shall have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.

Section 68(a): *Functions of the centre*

The functions of the Centre shall, in relation to arbitration proceedings under this Act, include the following –

(a) to perform the functions referred to in sections 11, 12, 13, 14, 15 and 51;

41. With regard to the Third Test, the Petitioners propose that Parliament did make provision for the procedure governing the First Petitioner as a subordinate court (as required under Article 129(3) of the Constitution) insofar as Rule 13 of the Arbitration Rules in the First Schedule to the Arbitration and Conciliation Act outline the procedure for applications for the appointment of or challenge to arbitrators. Its jurisdiction, on the other hand, is considered to be articulated in Articles 6 and 11 of the UNCITRAL Model Law and section 11 of the Arbitration and Conciliation Act, and therefore the First Petitioner (like the Industrial Court) is a subordinate court, while the Second Petitioner is a judge of the courts of judicature within the precincts of Article 129(1)(d) of the Constitution. For ease of reference, Rule 13 of the Arbitration Rules and Article 11 of the UNCITRAL Model Law are reproduced below, sections 6 and 11 of the Arbitration and Conciliation Act having been reproduced earlier above.

Rule 13 of the Arbitration Rules, First Schedule to the Arbitration and Conciliation Act

All applications for the appointment of or challenge to arbitrators, and all other applications under the Act, other than those directed by these Rules to be otherwise made, shall be made by way of chamber summons supported by affidavit.

Article 11 of the UNICTRAL Model Law

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provision of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the third arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or any other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

42. Finally, in relation to the Fourth Test, it is argued that Article 11(5) of the UNCITRAL Model Law (as restated in section 11(5) of the Arbitration and Conciliation Act) prohibits appeals against decisions by an appointment authority on the

appointment of arbitrators. Insofar as such decisions are made after hearing both parties to a dispute on the failure to appoint an arbitrator, they are opined to be judicial decisions within the precincts of section 68(a) of the Arbitration and Conciliation Act and Articles 126(1), 128(1) and (2), 129(1)(d) and (3), and 139(2) of the Constitution; as opposed to administrative decisions. It is thus proposed that the sort of decisions that are subject to judicial review are administrative decisions that involve the First Petitioner's decision over a single '*person*' in an administrative capacity as envisaged under Article 42 of the Constitution. In the Petitioners' view, that constitutional provision does not extend to decisions emanating from the determination of competing interests between litigating parties. Hence, the judicial power defined under Article 257(1)(p) of the Constitution and restricted to courts established under the Constitution, is considered to be within the context of adversarial claims '*among persons*' or '*between persons and the State.*'

43. For ease of reference, the cited constitutional provisions are reproduced below.

> Article 42: *Right to just and fair treatment in administrative decisions*
>
> **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.**
>
> Article 126(1): *Exercise of judicial power*
>
> **Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and inconformity with law and with the values, norms and aspirations of the people.**
>
> Article 129: *The courts of judicature*
>
> **(1) The judicial power of Uganda shall be exercised by the courts of judicature which shall consist of:**
>
> **(a) The Supreme Court of Uganda;**
>
> **(b) The Court of Appeal of Uganda;**
>
> **(c) The High Court of Uganda; and**
>
> (d) **Such subordinate courts as Parliament may by law establish, including qadhis courts for marriage, divorce, inheritance of property and guardianship, as may be prescribed by Parliament.**

Article 257(1)(p): *Interpretation*

"Judicial power" means the power to dispense justice among persons and between persons and the State under the laws of Uganda.

44. In the Petitioners' estimation, the clarity of language in the foregoing constitutional provisions draws a clear distinction between administrative and judicial decisions, and does not provide for '*quasi-judicial*' decisions or lend itself to the view in *Ssekaana, Musa & Ssekaana, Salima Namusobya, Civil Procedure and Practice in Uganda, p. 5* that there are tribunals that exist '*outside the normal hierarchy of ordinary courts of law.*' They take issue with the highlighted aspects of that literature as outlined below.

> *In addition to the specified Courts, sometime Parliament makes provision for specifically* ***constituted tribunals or administrative tribunals*** *which are* ***OUTSIDE THE NORMAL HIERARCHY OF ORDINARY COURTS OF LAW*** *which are given jurisdiction in several matters. Mention can be made to:* (Petitioners' emphasis)
>
> *(i) Non-Performing Assets Recovery Tribunal*
> *(ii) Tax Tribunal/ Tax Appeals Tribunal*
> *(iii) Industrial Court*
> *(iv) Land Tribunal*
> *(v) Electricity Regulatory Tribunal*
> *(vi) Communications Tribunal*
> *(vii) Human Rights Tribunal*

45. Under *Issue No. 4*, on the other hand, it is the Petitioners' contention that the role of the Chief Justice in the enactment of subsidiary legislation is under section 42(1)(b) of the Judicature Act restricted to provision for procedures and fees payable in respect of the writs of mandamus, certiorari and prohibition. The office of the Chief Justice is therefore faulted for enacting the Judicature (Judicial Review) Rules, 2009 and the Judicature (Judicial Review) (Amendment) Rules, 2019 ultra vires its mandate.

46. It is argued that the subjection of the First Petitioner (supposedly a subordinate court) to judicial review proceedings before the High Court under Rule 2(1) of *S.I No. 11 of 2009*, and the definition of '*judicial review*' in *S.I. No. 32 of 2009* to confer

the High Court with supervisory jurisdiction over such subordinate courts, amounts to usurping the legislative function of Parliament under Article 79(2) of the Constitution. It is also alleged to contravene Article 128(1) which prohibits the subjection of subordinate courts to the control and direction of anyone; Article 129(3) that restricts the determination of courts' jurisdiction to Parliament, and Article 139(2) which only provides for appeals from the decisions of subordinate courts. To that extent, the enactment of the impugned statutory instruments by the Chief Justice is considered to be a violation of Articles 128(2), 129(1)(d), 133(1), 150(1), and 257(1)(p) and (cc) of the Constitution.

47. It is opined that it is impossible to fit the impugned statutory instruments under Article 42 of the Constitution given that whereas the dispensation of justice ensues under the Judiciary, administrative bodies do not operate thereunder. Furthermore, the supposedly fragmented 'quasi-judicial' concept introduced by the impugned statutory instruments is alien to the notion of un-apportioned justice that is wholly vested in Uganda's courts of judicature.

48. Conversely, the Respondent contends that the First Petitioner is not a court and, in his performance of the functions delineated under section 68(a) of the Arbitration and Conciliation Act, the Second Petitioner is not a judicial officer either. Learned State Counsel argues that the First Petitioner's functions as delineated in sections 11, 12, 13, 14, 15 and 51 of the Arbitration and Conciliation Act are administrative in nature and do not depict any judicial function or power, and therefore the Petitioners exercise quasi-judicial functions that are subject to judicial review. It is the Respondent's contention that it was never the intention of the legislature to equate the First Petitioner to a court for the following reasons.

49. First, insofar as section 67 of the Arbitration and Conciliation Act designates the First Petitioner as a body corporate with legal personality, unlike a court, which in any case is defined in section 2(1)(f) of the Act to mean the High Court. Secondly, rather than establish a court, the intention of Parliament was to have arbitration conducted outside the courts system hence the creation of CADER in section 67 as an administrative body. It is proposed that CADER is vested with functions similar to the Nairobi Centre for International Arbitration (NCIA) that is set up under

section 4 of the NCIA Act, 2013 (as Amended), both of which are administrative bodies. *See section 68 of Uganda's Arbitration and Conciliation Act and section 5 of Kenya's NCIA Act.* However, the NCIA Act does also make provision for the separate establishment of an arbitral court while the Arbitration and Conciliation Act does not.

50. It is further argued that, unlike courts the function of which is to adjudicate substantive disputes, the First Petitioner is restricted to administrative functions that can be summed up as the provision of technical and administrative support to arbitration, mediation and other alternative dispute resolution (ADR) processes. By way of illustration, section 11 of the Arbitration and Conciliation Act is opined to only mandate the Petitioners to appoint arbitrators upon the failure by parties to do so, thus underscoring their supervisory/ administrative function.

51. Finally, the prohibition of appeals from decisions made under sections 9, 11 and 34(2)(a) of the Act is considered to be inconsistent with judicial practice, which provides elaborate procedures for appeals, hence the provision in Article 139(2) for appeals from subordinate courts to the High Court. It is the Respondent's contention that the Arbitration and Conciliation Act was enacted with a view to countering delays in court processes and provide for the supervision of ADR, which had become cumbersome. It is argued that there is no provision for appeals from CADER, unlike the Industrial Court, appeals from which are explicitly permitted under section 22 of the Labour Disputes (Arbitration and Settlement) Act, 2006.

52. In the same vein, the Respondent contends that the Second Petitioner is not a judicial officer as defined under Article 151 of the Constitution but, rather, an Executive Director within the confines of section 69(3) of the Arbitration and Conciliation Act. As such, his functions are in section 70(1) and (2) of the Act restricted to the day-to-day administration of CADER. Whereas the Supreme Court did in **Attorney General v Gladys Nakibuule Kisekka, Supreme Court Constitutional Appeal No. 2 of 2016** restrict the concept of judicial immunity to judicial acts that are properly executed, the Second Petitioner does not exercise any judicial functions so as to benefit from the judicial immunity in Article 128(4) of the Constitution. Although he does in the course of his work supervise arbitrations

in some cases, he does not decide any substantive disputes, which role is reserved for the arbitral tribunals.

53. It is argued that in **IDC v Jimmy Muyanja & CADER, High Court Miscellaneous Cause No. 133 of 2018**, the application for judicial review was concerned with the First Petitioner's legality, composition and procedural propriety in the execution of its functions rather than the merits of the decision taken by both Petitioners in the appointment of arbitrators. This would not amount to an appeal from those decisions, which is prohibited under section 11 of the Act.

54. With regard to *Issue No. 4*, the Respondent contends that the Chief Justice does have powers to prescribe the procedure under which judicial review proceedings may ensue, and the definition of administrative bodies under section 3 of the Judicature (Judicial Review) (Amendment) Rules simply clarifies on the appropriate parties to the said proceedings. The Respondent denies any violation of Article 79(2) of the Constitution, arguing that insofar as the Judicature Act was duly passed by Parliament, the legislative mandate conferred upon the Rules Committee and Chief Justice under sections 41 and 42 of the Act are exercised in accordance with the Constitution. The Respondent maintains that the First Petitioner is an administrative body that is subject to judicial review.

55. By way of reply, the Petitioners reiterate their earlier submissions, additionally arguing that the Respondent makes no attempt to prove that applications by Chamber Summons for the appointment of arbitrators are made in pursuit of administrative actions by the Petitioners. It is argued that non-inclusion of the word 'court' to the cited tribunals does not make them any less of subordinate courts.

56. With regard to the Kenyan legislation, it is argued that the law that implements the UNCITRAL Model Law in Kenya is the Arbitration Act, 1995 and not the NCIA Act as invoked by the Respondent. Furthermore, arbitral proceedings not being the subject of contention herein, it is proposed that all reference thereto be disregarded. In addition, the Second Petitioner is opined to be a judicial officer within the meaning of the term as espoused in **Babcon Uganda Limited v Mbale Resort Hotel Ltd (2017) UGSC 10** that '**judicial officer means such other**

person holding any office connected with a court as may be prescribed by law.'

57. This Petition would appear to propose that, as a subordinate court and judicial officer respectively, the Petitioners' subjection to the High Court's supervisory jurisdiction vide judicial review proceedings is unconstitutional; as indeed is the enactment of the subsidiary legislation under which the said proceedings ensue. I am constrained to state from the onset that the UNCITRAL Model Law is not a legally binding legal instrument but, rather, is recommended for adoption by UN States Parties so as to engender the uniformity of global arbitration laws and address the needs of international commercial arbitration. *See Resolutions of the 112th UN General Assembly held on 11th December 1985, as depicted in the Preamble to the Model Law.* Where a Contracting State enacts a domestic arbitration law that is adapted to the Model Law, it is the duly enacted arbitration law that has binding force in that country. In this case, therefore, it is the Arbitration and Conciliation Act that shall be referred to for the legal position on arbitration in Uganda, reference being made to the Model Law for appropriate contextual background only.

58. As quite correctly argued by the Petitioners, Article 6 of the UNCITRAL Model Law leaves to the states parties the decision as to whether either a designated court or a named appointing authority would be responsible for the appointment of arbitrators under their arbitration law. Under the Ugandan Arbitration and Conciliation Act, in recognition of the principle of party autonomy that is so pivotal to arbitration, section 11(2) recognizes the right of parties to an *ad hoc* arbitration to appoint their arbitral tribunal of choice for their dispute. The parties would be at liberty to agree on a procedure for the appointment of the arbitral tribunal or follow the procedure outlined in sub-clauses (a) and (b) but, should they fail to make the appointment, CADER (as the designated appointing authority under section 68(a) of the Act) would pursuant to either party's application therefor make the appointment(s) as mandated to under section 11(3) of the Act.

59. However, Parliament's deference to the First Petitioner as the appointing authority for purposes of the appointment of arbitrators would not necessarily transform that

body into a court. Indeed, the *Hansard of the Sixth Parliament of Uganda dated 7th March 2000, p. 9138* reflects that Parliament considered the First Petitioner as an alternative to courts given the perceived dangers of over-reliance on courts for the appointment of and challenge to arbitrators. It thus recommended that the CADER be set up to '***handle administrative and technical details related to alternative dispute resolution***', the appointment of arbitrators by clear implication being one of them. These functions are captured in section 68(a) and (f) of the Act.

60. Consequently, I am unable to abide the Petitioners' proposition that the designation of CADER as the appointing authority *ipso facto* rendered it a subordinate court as envisaged under Article 129(1)(d) of the Constitution. The Model Law having made provision for *either* a court or an appointing authority to effect the default appointment of arbitrators, the legislature's deference to CADER rather than a court for that purpose is clear indication that CADER is not a court.

61. In any case, the interpretation of Article 129 is instructive as to the nature of subordinate courts envisaged under the Constitution. Article 129(1) and (2) of the Constitution establish the Supreme Court, Court of Appeal and High Court of Uganda as superior courts. Meanwhile, Article 129(1)(d) makes provision for the establishment of subordinate courts by Parliament. Nonetheless, the opening line of Article 129(1) clearly designates all the foregoing courts as courts of judicature that are mandated to exercise judicial power in Uganda. The judicial power exercisable by them is defined in Article 257(1)(p) of the Constitution as '**the power to dispense justice among persons and between persons and the State under the laws of Uganda**.'

62. I would respectfully disagree with the stance adopted by the Petitioners that the emphasis in that definition is on the adversarial nature of a dispute or that any adversarial dispute is *ipso facto* synonymous with judicial power as exercised by the courts of judicature. In my view, the distinction between the exercise of judicial power and the performance of a quasi-judicial function lies in the persons exercising either mandate and the role of formal laws in the determination of the

dispute. I find fortitude in the definition of quasi-judicial functions as highlighted below.

63. The *Oxford Dictionary of Law, 7th Edition (2009), p. 446* defines quasi-judicial as '**describing a function that resembles the judicial function in that it involves deciding a dispute and ascertaining the facts and any relevant law, but differs in that it depends ultimately on the exercise of an executive discretion rather than the application of the law**.' *Black's Law Dictionary, 8th Edition (2004), pp. 1278, 1279* similarly defines the same term as '**of, relating to, or involving an executive or administrative official's adjudicative acts**.' Meanwhile, the term is more elaborately espoused in *Paton, George Whitecross, 'A Textbook on Jurisprudence', 4th Edition (1972), G. W. Paton & David P. Derham eds., p. 338* as follows:

> Quasi-judicial is a term that is ... not easily definable. In the United States the term often covers **judicial decisions taken by an administrative agency – the test is the nature of the tribunal rather than what it is doing**. In England quasi-judicial belongs to the administrative category and is used to cover situations where the administrator is bound by law to observe certain forms and possibly hold a public hearing but where he is a free agent in reaching the final decision. If the rules are broken, the determination might be set aside. *(my emphasis)*

64. In the instant case, the First Petitioner, the Industrial Court and tribunals such as Non-Performing Assets Recovery Tribunal, Tax Appeals Tribunal, Land Tribunal, Electricity Regulatory Tribunal, Communications Tribunal and Human Rights Tribunal are opined to be subordinate courts within the normal hierarchy of the ordinary courts of judicature rather than entities that perform quasi-judicial functions.

65. The status of the Industrial Court as a subordinate court within the courts of judicature (albeit with concurrent jurisdiction as the High Court) was settled in **Asaph Ntegye Ruhindi & Another v Attorney General, Constitutional Petition No. 33 of 2016** and shall not, therefore, be re-opened here. In addition to the qadhis courts that are specifically designated as subordinate courts in Article 129(1)(d) of the Constitution, magistrates' courts would indeed be subordinate courts that are established under section 3 of the Magistrates Courts Act, Cap. 16,

interpreted with the necessary adaptation as required under Article 274(1) of the Constitution.

66. The First Petitioner, on the other hand, is a body established under section 67(2) of the Arbitration and Conciliation Act to provide technical and administrative support to arbitration practice in Uganda. *See section 68 of the Act.* Its functions under section 68 of the Act are reproduced below.

> **(a) to perform the functions referred to in sections 11, 12, 13, 14, 15 and 51;**
> **(b) to perform the functions specified in the UNCITRAL Arbitration Rules of 1976;**
> **(c) to make appropriate rules, administrative procedure and forms for effective performance of the arbitration, conciliation or alternative dispute resolution process;**
> **(d) to establish and enforce a code of ethics for arbitrators, conciliators, neutrals and experts;**
> **(e) to qualify and accredit arbitrators, conciliators and experts;**
> **(f) to provide administrative services and other technical services in aid of arbitration, conciliation and alternative dispute resolution;**
> **(g) to establish appropriate qualifications for institutions, bodies and persons eligible for appointment;**
> **(h) to establish a comprehensive roster of competent and qualified arbitrators, conciliators and experts;**
> **(i) to facilitate certification, registration and authentication of arbitration awards and conciliation settlements;**
> **(j) to establish and administer a schedule of fees for arbitrators;**
> **(k) to avail skills, training and promote the use of alternative dispute resolution methods for stakeholders;**
> (l) **to do all other acts as are required, necessary or conducive to the proper implementation of the objectives of this Act.** *(my emphasis)*

67. As quite correctly opined by learned State Counsel, the First Petitioner's role in the promotion of arbitration in Uganda is akin to that of the Nairobi Centre for International Arbitration (NCIA) in Kenya that was established under section 4 of the NCIA Act as '**a body corporate with perpetual succession and a common seal and shall in its corporate name be capable of suing and being sued**.' Its functions are delineated in section 5 of the same Act as follows:

(a) promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act;
(b) administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices;
(c) ensure that arbitration is reserved as the dispute resolution process of choice;
(d) develop rules encompassing conciliation and mediation processes;
(e) organize international conferences, seminars and training programs for arbitrators and scholars;
(f) coordinate and facilitate, in collaboration with other lead agencies and non-State actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation;
(g) maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives;
(h) in collaboration with other public and private agencies, facilitate, conduct, promote and coordinate research and dissemination of findings on data on arbitration and serve as repository of such data;
(i) establish a comprehensive library specializing in arbitration and alternative dispute resolution;
(j) provide ad hoc arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties;
(k) provide advice and assistance for the enforcement and translation of arbitral awards;
(l) provide procedural and technical advice to disputants;
(m) provide training and accreditation for mediators and arbitrators;
(n) educate the public on arbitration as well as other alternative dispute resolution mechanisms;
(o) enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to enable the Centre to achieve its objectives;
(p) provide facilities for hearing, transcription and other technological services;
(q) hold, manage and apply the Fund in accordance with the provisions of this Act; and
(r) perform such other functions as may be conferred on it by this Act or
any other written law.

68. Like the First Petitioner, the NCIA is an administrative body that seeks to promote arbitration and other ADR processes, albeit with regional outreach. Hence, the long title to the NCIA Act clarifies that NCIA was set up '**as a regional centre for international commercial arbitration**.' However, as can be deduced from the long title and section 21 of the Act, that statute did additionally and separately from the NCIA set up an arbitral court. The Arbitration and Conciliation Act makes no such provision for the establishment of a court either by the designation of the First Petitioner as such or by setting up a separate court. The distinction between the NCIA as an administrative body and the arbitral court established to facilitate its work would underscore the position that an administrative body that renders support to arbitration and other ADR processes cannot be equated to a court – arbitral, subordinate or otherwise, however formal or legalistic such body's administrative processes are.

69. I take the view, therefore, that the First Petitioner is an administrative body that is mandated to execute quasi-judicial functions as encapsulated in section 68(a) of the Arbitration and Conciliation Act. Its quasi-judicial status is underscored by the nature of the adjudicative functions it is responsible for under that statutory provision. Save for section 11(6) of the Act that enjoins the First Petitioner to have '**due regard to any qualifications required of an arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator**', the rest of the functions outlined in section 68(a) depend for their determination on the exercise of an executive discretion rather than the strict application of any law.

70. In any event, unlike the courts of judicature that are defined in Article 257(1)(d) of the Constitution as having been established by and under the Constitution, the First Petitioner is established under section 67 of the Arbitration and Conciliation Act, not as a court but as a body corporate with legal personality. The courts of judicature as outlined in Article 129(1) of the Constitution do not have legal personality to sue or get sued in their respective names. That too would set the First Petitioner apart from a court of judicature.

71. Turning to *Issue No. 2*, in paragraphs 2 and 3 of the Petition and supporting affidavit respectively, the Second Petitioner is *inter alia* described as the Executive Director of the First Petitioner. Therefore, any decisions taken under section 68(a) of the Arbitration and Conciliation Act by either Petitioner would be taken in the capacity of the administrative body responsible for the promotion of arbitration and the Chief Executive Officer thereof.

72. I am alive to the following definition of the term 'judicial officer' in Article 151 of the Constitution:

> **(a) A judge or any person who presides over a court or tribunal howsoever described;**
> **(b) The Chief Registrar or a registrar of a court;**
> **(c) Such other person holding any office connected with a court as may be prescribed by law.**

73. However, Articles 142, 145 and 148 do also shed light on who would amount to a judicial officer by virtue of appointment. Those constitutional provisions are reproduced below.

> Article 142(1): *Appointment of judicial officers*
>
> **The Chief Justice, the Deputy Chief Justice, the Principal Judge, a justice of the Supreme Court, a justice of the Court of Appeal and a judge of the High Court shall be appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament.**
>
> Article 145(2): *Registrars*
>
> **The Chief Registrar and a registrar shall be appointed by the President on the advice of the Judicial Service Commission.**
>
> Article 148: *Appointment of other judicial officers*
>
> **Subject to the provisions of this Constitution, the Judicial Service Commission may appoint persons to hold or act in any judicial office .... and confirm appointments in and exercise disciplinary control over persons holding or acting in such offices and remove such persons from office.**

74. In **Uganda Law Society v Attorney General, Constitutional Petition No. 52 of 2017**, this Court *inter alia* proposed the following rules of constitutional interpretation, a summation of the propositions of previously decided cases on the subject.

> (1) .....
> (2) The entire Constitution has to be read together as an integral whole with no particular provision destroying the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the Constitution.
> (3) .....
> (4) All provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument.
> (5) .....
> (6) Where the language of the constitution or statute sought to be interpreted is imprecise or ambiguous a liberal, general or purposeful interpretation should be given to it.

75. Given the imprecise and inconclusive nature of the definition of a judicial officer in Article 151(a) and (c) of the Constitution, I would revert to a liberal and purposive interpretation of that term to give effect to the intention of the framers of the Constitution. I draw such purpose and intent from the provisions of Articles 142(1), 145(2) or 148 of the Constitution insofar as they clarify who would amount to a judicial officer by their mode of appointment. Thus, judges of the superior courts appointed under Article 142(1) and registrars appointed under Article 145(2) of the Constitution are, under the sub-title '*Appointments, qualifications and tenure of office of judicial officers*', designated as judicial officers. Reference is similarly made to the appointment of other judicial officers under Article 148 of the Constitution. It is reasonable to conclude that those are the categories of judicial officers envisaged under Article 151 of the Constitution, namely, persons appointed to judicial office by the President on the advice of the Judicial Service Commission (JSC) and with approval of Parliament; by the President on the advice of the JSC, or solely by the JSC.

76. I find no evidence whatsoever on record that the Second Petitioner's appointment as the Executive Director of CADER subscribes to any one of the foregoing categories of judicial appointments. Accordingly, the decisions taken by him under

section 68(a) of the Arbitration and Conciliation Act would be taken in the capacity of Chief Executive Officer of CADER and not as a judicial officer within the meaning ascribed to that term under the Constitution.

77. Consequently, I find that CADER, whether or not performing the functions under section 68(a) of the Arbitration and Conciliation Act, is not a subordinate court established pursuant to Articles 126, 129(1)(d), 139(2), 150(1), and 257(1)(p) and (cc) of the Constitution, but rather an administrative body within the precincts of Article 42 of the Constitution. Furthermore, having found that the Second Petitioner is not a judicial officer as envisaged in the Constitution, it follows that in performance of the functions enlisted under section 68(a) of the Arbitration and Conciliation Act he would not benefit from the immunity accorded to judicial officers under Article 128(4) of the Constitution. Accordingly, I respectfully find no merit in *Issues 2* and *3* of the Petition.

78. With regard to *Issue No. 4*, the Petitioners challenge the subjection of the First Petitioner to judicial review proceedings under Rule 2(1) of *S.I No. 11 of 2009*, as well as the definition of '*judicial review*' in *S.I. No. 32 of 2009* to confer the High Court with supervisory jurisdiction over it, as a supposedly subordinate court. My finding under *Issue No. 1* that the First Petitioner is an administrative body would render it subject to the provisions of Article 42 of the Constitution that do lay ground for the practice of judicial review. In any case, even if perchance it were considered to be a subordinate court, it would be legally subject to the supervisory powers of the High Court for the reasons I espouse below.

79. Article 42 of the Constitution guarantees the right to just and fair treatment in administrative decisions, failure of which a complainant may apply to a court of law for redress. On the other hand, Articles 79 and 150 do confer Parliament with its legislative function with specific regard to legislation in respect of the Judiciary. That function, however, is subject to the recognition in Article 79(2) that another '**person or body other than Parliament**' may, by the Constitution itself or under an Act of Parliament, have power to enact provisions that have the force of law. Articles 79(1) and (2), and 150 of the Constitution are reproduced below.

Article 79: *Functions of Parliament*

(1) Subject to the provisions of this Constitution, Parliament shall have the power to make laws on any matter for the peace, order, development and good governance of Uganda.

(2) Except as provided in this Constitution, no person or body other than Parliament shall have the power to make provisions having the force of law in Uganda except under authority conferred by an Act of Parliament.

Article 150: *Power to make laws relating to the Judiciary*

(1) Subject to the provisions of this Constitution, Parliament may make laws providing for the structures, procedures and functions of the judiciary.

(2) Without prejudice to clause (1) of this article, Parliament may make laws for regulating and facilitating the discharge by the President and the Judicial Service Commission of their functions under this Chapter. *(my emphasis)*

80. Meanwhile, Article 139(1) of the Constitution *inter alia* confers upon the High Court such '**other jurisdiction as may be conferred on it by this Constitution or any other law**.'

81. The Judicature Act is an Act of Parliament, the purpose of which is '**to take account of the provisions of the Constitution relating to the Judiciary**.' *See the long title thereof.* It is within that context that section 17(1) of the Act delineates the supervisory powers of the High Court over subordinate courts, while section 36 grants the High Court the powers of judicial review. To the extent that Articles 79(2) and 139(1) of the Constitution recognize that courts' jurisdiction may be conferred by an Act of Parliament, and Article 150 succinctly mandates Parliament to make laws for the functions of the Judiciary; the supervisory jurisdiction of the High Court as derived from section 17 of the Judicature Act would not be unconstitutional. This should dispel the notion that had the First Petitioner been a subordinate court, its subjection to the High Court's supervisory jurisdiction would be inconsistent with Articles 128(2) or 129(3) of the Constitution.

82. The enactment of the impugned statutory instruments is not inconsistent with Articles 79(2) or 139(2) either for the following reasons. The Judicature Act was enacted by Parliament within the confines of its mandate under Articles 79(2) and

150(1) of the Constitution, and does in sections 41 and 42 confer upon the Rules Committee and Chief Justice the authority to enact provisions that have the force of law in Uganda. Sections 41(1) and 42(1) provide as follows:

> Section 41: *Functions of the Rules Committee*
>
> **(1) The Rules Committee may, by statutory instrument, make rules for regulating the practice and procedure of the Supreme Court, the Court of Appeal and the High Court of Uganda and for all other courts in Uganda subordinate to the High Court.**
>
> **(2) .....**
>
> **(3) .....**
>
> **(4) An instrument made under this section shall be laid before Parliament and be subject to annulment by Parliament and shall cease to have effect when so annulled but without prejudice to anything done under it or the making of a further instrument.**
>
> Section 42: *Chief Justice to make rules of court relating to prerogative orders*
>
> **(1) The Chief Justice may by statutory instrument make rules of court –**
>
> **(a) .....**
>
> **(b) prescribing the procedures and fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought;**
>
> **(c) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any order referred to in paragraph (b);**
>
> **(d) requiring that where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.** *(my emphasis)*

83. Whereas section 36 of the Judicature Act provides the broad legal framework for judicial review, sections 41(1) and 42(1) of the Act mandate the Rules Committee and Chief Justice to formulate by statutory instrument the rules of procedure that would apply to judicial review proceedings. The office of the Chief Justice is faulted for exceeding its mandate by providing such definitions of the terms '*court*', '*lower court*' and '*judicial review*' as amount, in the Petitioners' estimation, to the

'***imposition, creation and invention of the High Court jurisdiction***.' With respect, I am unable to abide that view.

84. As propounded earlier in this judgment, the High Court's jurisdiction over judicial review is a creature of statute as stipulated in section 36 of the Judicature Act. Therefore, the definition of '*judicial review*' in *S.I. No. 32 of 2019* simply re-echoes that statutory provision. In relation to the perceived extension of that jurisdiction to subordinate courts and the Industrial Court, on the one hand, as well as tribunals and other bodies or persons who carry out quasi-judicial functions or public acts and duties; Article 42 of the Constitution and section 17 of the Judicature Act are instructive.

85. Article 42 authorizes judicial scrutiny over the right to just and fair treatment in administrative decisions. Section 36 provides the option of judicial review for the enforcement of that right, while the definition of judicial review in the impugned statutory instruments provides clarity as to the scope of that remedial procedure to include '**tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties**.' I find no inconsistency with that definition and Article 42 of the Constitution.

86. The extension of judicial review to subordinate courts, on the other hand, would appear to be grounded in the supervisory jurisdiction of the High Court over those courts as stipulated in section 17 of the Judicature Act. The Rules Committee exercised its mandate under section 41(1) of the Judicature Act to '**make rules for regulating the *practice* and procedure of ... the High Court of Uganda**.' As to whether this is inconsistent with the right of appeal enshrined in Article 139(2) of the Constitution, it becomes necessary to consider the distinction between judicial and appellate review.

87. Judicial review is defined in the *Oxford Dictionary of Law, 7th Edition (2009), p. 306* as '**the principal means by which the High Court exercises supervision over public authorities in accordance with the doctrine of *ultra vires***.' *Ultra Vires* is explained in the same *Dictionary*[2] as '**describing an act by a public authority,**

[2] At p. 564.

company, or other body that goes beyond the limits of the powers conferred on it.' Indeed, the import of what would amount to judicial review can be deduced from the remedies available thereunder. In Uganda, these include the writs of certiorari and prohibition, which are orders to *quash* or *forbid* decisions made ultra vires legal authority; or the writ of mandamus, which is an order to compel performance by public officers of their statutory duties. *See section 2(1) of S.I. No. 11 of 2009 (as amended).* This is distinguishable from the thrust of appellate review that, according to *Black's Law Dictionary, 8th Edition (2004), p. 1345*, is restricted to an examination of the merits of a lower court's decision by a higher court, which can '**affirm, reverse or modify**' the decision.

88. Thus, the effect of the supervisory jurisdiction of the High Court under the impugned statutory instruments is to avail an additional remedy for breaches or threats of breach to procedural or substantive rights, without necessarily negating the right of appeal that is available under Article 139(2) of the Constitution. In fact, although section 11(5) of the Arbitration and Conciliation Act prohibits appeals against decisions by an appointment authority on the appointment of arbitrators, redress that engenders the right to just and fair treatment in administrative or quasi-judicial decisions under Article 42 of the Constitution may be sought by way of judicial review. I would therefore find no contravention of Article 139(2) of the Constitution.

89. In the result, I do not deduce any violation of Articles 79(2), 128(2), 129(1)(d), (3), 133(1), 139(2), 150(1), 257(1)(p) and 257(1)(cc) of the Constitution by the enactment by the Rules Committee and Chief Justice of *S.I. No. 11 of 2009* or *S.I. No. 32 of 2019*. I would therefore resolve *Issue No. 4* in the negative.

Issue No. 5: *Whether the Petitioners are entitled to the reliefs sought.*

90. Having resolved all the preceding *Issues* in the negative, I would decline to grant any of the declarations and orders sought by the Petitioners. With specific regard to the order '*directing the Rules Committee to lay before Parliament all Rules which have been enacted pursuant to section 42 (of) the Judicature Act, Cap. 13 which impact upon subordinate courts*', that issue was not canvassed in submissions and is therefore presumed to have been abandoned. In any event, the duty to lay

statutory instruments before Parliament only arises in respect of instruments made pursuant to section 41(5) of the Judicature Act. I find no corresponding duty in respect of statutory instruments enacted under section 42 of that Act.

91. On the question of costs, I would exercise my discretion to order each party to bear its own costs given the important constitutional questions clarified by this Petition.

F. **Conclusion**

92. The upshot of my consideration hereof is that I would dismiss the Petition and order each party to bear its own costs.

93. I would so order.

Dated and delivered at Kampala this ..... day of ....., 2023.

Monica K. Mugenyi

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(*Coram: Egonda-Ntende, Musoke, Madrama, Mugenyi & Gashirabake, JJCC*)

Constitutional Petition No. 11 of 2019

BETWEEN

Centre for Arbitration and Dispute Resolution (CADER)=======Petitioner No. 1

Jimmy Muyanja==========Petitioner No.2

AND

Attorney General==========Respondent

Judgment of Fredrick Egonda-Ntende, JCC

[1] I have had the opportunity to read in draft the judgment of my sister, Mugenyi, JCC. I agree that this petition must fail.

[2] As Musoke, Madrama and Gashirabake, JJCC, agree, this petition is dismissed with each party bearing its costs.

Dated, signed and delivered at Kampala this 2nd day of May 2023

Fredrick Egonda-Ntende

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 11 OF 2019

1. CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION (CADER)
2. JIMMY MUYANJA::PETITIONERS

VERSUS

ATTORNEY GENERAL::RESPONDENT

CORAM: HON. MR. JUSTICE FREDRICK EGONDA-NTENDE, JCC
HON. LADY JUSTICE ELIZABETH MUSOKE, JCC
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JCC
HON. LADY JUSTICE MONICA K. MUGENYI, JCC
HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JCC

JUDGMENT OF ELIZABETH MUSOKE, JCC

I have had the advantage of reading in draft the judgment of my learned sister Mugenyi, JCC. For the reasons she has given therein I agree with her that this Petition should be dismissed with no order as to costs.

Dated at Kampala this .....2nd.....day of .....March..... 2023.

.....

Elizabeth Musoke

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA,

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(CORAM; EGONDA NTENDE, MUSOKE, MADRAMA, MUGENYI, GASHIRABAKE, JJCC/JJCA)

CONSTITUTIONAL PETITION NO. 011 OF 2019

1. CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION CADER)
2. JIMMY MUYANJA} ..... PETITIONERS

VERSUS

ATTORNEY GENERAL} ..... RESPONDENT

JUDGMENT OF JUSTICE CHRISTOPHER MADRAMA IZAMA, JCC

I have read in draft the Judgment of my learned sister Hon. Lady Justice Monica K. Mugenyi, JCC.

I concur with the Judgment and the orders proposed and I wish to add one point on the question of whether The Judicature Judicial Review Rules, S.I. No. 11 of 2009 is inconsistent with provisions of the Constitution.

I concur with my learned sister that the rules were made under the Judicature Act and provide *inter alia* for applications for orders of mandamus, prohibition, certiorari or an injunction. The rules also provide for an application for declaration or injunction and the award of damages where appropriate. In my judgment, the Judicature (Judicial Review) Rules is complementary to any rules for the enforcement of fundamental rights and freedoms. The High Court has always exercised supervisory control over administrative bodies exercising administrative/executive powers. With the promulgation of Constitution of the Republic of Uganda 1995 and

> "application" mean an application to a competent court under article 50 of the Constitution for redress in relation to fundamental rights and freedoms guaranteed under articles 20 to 45 of the Constitution.

In other words, article 42 of the Constitution is enforceable by an application for the enforcement of fundamental rights and freedoms under article 50 of the Constitution. Nonetheless, before Parliament enacted the law, the court could be approached by any procedure which was appropriate for the enforcement of fundamental rights and freedoms and this is reflected in the precedents.

In **Attorney General vs. Ali & Others (1989) LRC 474** at p 525 – 526 Harper JA held that:

> "In my view citizen whose constitutional rights are allegedly being trampled upon must not be turned away by procedural hiccups. Once his complaint is arguable, a way must be found to accommodate him so that other citizens become knowledgeable of their rights..."

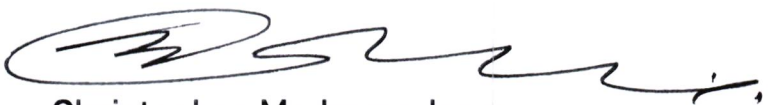
Article 42 declares a fundamental right and the court can be approached by way of an application for Judicial Review under the **Judicature (Judicial Review) Rules, 2009**. The right of individuals alleging violation of a fundamental right to gain access to court irrespective of whether Parliament has enacted the envisaged procedural law or not was also considered in **Juandoo vs. Attorney General of Guyana (1971) AC 972** at pages 982 – 983. In that matter no rules of procedure had been prescribed by Parliament for enforcement of fundamental rights and freedom though the Constitution provided that the rules shall be prescribed. The controversy related to an application for enforcement of a fundamental right to property by Juandoo and the court considered the issue of the propriety of the procedure she had used to commence proceedings and stated that:

> "...the clear intention of the constitution that a person who alleges that his fundamental rights are threatened should have unhindered access to the High Court is not to be defeated by failure of parliament or the rule making authority to make specific provisions as to how that access should be gained.

In the premises, I concur with the decision of my learned sister that the **Judicature (Judicial Review) Rules, 2009** is not unconstitutional and do not violate any provisions of the Constitution but rather seek to have them enforced.

I further agree with the orders proposed by my learned sister and have nothing useful to add.

Dated at Kampala the 2nd day of March 2023



Christopher Madrama Izama

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Musoke, Madrama, Mugenyi & Gashirabake, JJCC]

CONSTITUTIONAL PETITION NO. 11 OF 2019

CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION (CADER) & ANOTHER ::::::::::::::::::::::PETITIONER

VERSUS

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

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA/JCC

I have had the benefit of reading in draft the judgment prepared by my learned Sister, Hon. Lady Justice Monica K. Mugenyi, JA/JCC. I concur with the judgment and have nothing useful to add.

Dated at Kampala this ..... Day of .....2023.

.....

Christopher Gashirabake

JUSTICE OF THE CONSTITUTIONAL COURT