

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT AT KAMPALA

*{Coram: Buteera, DCJ, Bamugemereire, Mutangula Kibeedi, Mulyagonja
& Kihika, JJCC}*

CONSTITUTIONAL PETITION NO. 009 of 2020

PRINCE KALEMERA H. KIMERA :::::::::::::::::::::::::::PETITIONER

VERSUS

1. ATTORNEY GENERAL

2. THE KABAKA OF BUGANDA :::::::::::::::::::::::::::RESPONDENTS

JUDGMENT OF IRENE MULYAGONJA, JCC

The petitioner brought this petition under Articles 137 (3), 50 and 2 (2) of the Constitution of the Republic of Uganda, and rule 3 of the Constitution (Petitions & References) Rules, 2005. The petitioner alleges that certain provisions of the Traditional Rulers (Restitution of Assets and Properties) Act are inconsistent with or in contravention of certain provisions of the Constitution of the Republic of Uganda in as far as they deprive him of his right to inherit property.

Background

The petitioner states that he is a lineal descendant to His Highness (H.H) Sir Daudi Chwa II, whose estate has not yet been wholly administered.

The petitioner is also the son of Prince Harold Kagoro Kimera, a biological son of H.H Daudi Chwa II, and the Administrator of his father's estate. He therefore asserts that he is a beneficiary to the estate of his grandfather, Sir Daudi Chwa II.



He further contends that by the enactment of the Traditional Rulers (Restitution of Assets and Properties) Act (hereinafter also referred to as "*the TRRAP Act*") the Government of Uganda denied him of his benefit to the assets of his grandfather. He thus contends that the Act is
5 inconsistent with provisions of the Constitution of Uganda, as follows:

- a) The Traditional Rulers (Restitution of Assets and Properties) Act is inconsistent with or in contravention of Article 26 of the Constitution in as much as it deprives the petitioner of his property;
- 10 b) Section 2 (4), (5), (6), (7) and (8) of the Traditional Rulers (Restitution of Assets and Properties) Act is inconsistent with Article 26 (2) and 21 of the Constitution in as much as it discriminates against the petitioner by birth and social standing from claiming his beneficial interest in the estate of his father and
15 grandfather, respectively;
- c) Item 8 of the Schedule to the Traditional Rulers (Restitution of Assets and Properties) Act confers Kabaka's Lake to the traditional ruler of Buganda (the Kabaka) in total disregard of FC 13555, and is in contravention of Article 26 of the Constitution of Uganda
20 which guarantees the right to own property and protection from compulsory deprivation of property or any interests in or right over property;
- d) Section 2 (1) to (8) of the Traditional Rulers (Restitution of Assets and Properties) Act was not construed by the respondents with
25 such modifications as may be necessary to bring it into conformity with the 1995 Constitution, thereby leading to the deprivation of property without adequate compensation to the petitioner and the rest of the beneficiaries of the estate of H.H Sir Daudi Chwa II, contrary to Articles 26 and 274 of the Constitution;

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- e) The act of the respondent vesting properly held in the personal capacity of H. H Sir Daudi Chwa II by enacting the Traditional Rulers (Restitution of Assets and Properties) Act wherein all property was transferred to the traditional ruler (2nd respondent) without any further assurance, the statute was unconstitutional to the extent that it contravenes Article 2, 21, 246 (3) (a) of the Constitution of Uganda, 1995;
- f) The respondent legitimised an act of fraud by expressly providing for the omission of payment of any tax, duty or fee and by alteration or cancellation of any relevant certificate of title; the issue of a fresh certificate of title or otherwise is to that extent unconstitutional.

The petitioner then prayed that this court makes the following declarations and orders:

- i) A declaration that Sections 2 and 3 of the Traditional Rulers (Restitution of Assets and Properties) Act are inconsistent with Articles 2, 21, 26, 246 (3) (a) and (b) of the Constitution, and are to that extent void.
- ii) That this court refers the matter to the High Court to investigate the proprietorship of any such property envisaged by or dealt with by the respondent under the Traditional Rulers (Restitution of Assets and Properties) Act to ensure proper restitution to the beneficiaries of the estates of the registered proprietors prior to the commencement of the impugned statute and assessment of general damages.
- iii) **In the alternative**, that this court orders the respondents to pay adequate compensation for the properties deprived to the petitioner and other beneficiaries, amounting to approximately



USD 60,000,000,000 (United States Dollars Sixty Billion); and
that the costs of the petition be provided for.

The petition was supported by the affidavit of the petitioner dated
24th of June 2020, but when the petition was called on for hearing
5 on 3rd March 2023 the petitioner applied for leave to file a
supplementary affidavit and leave was granted. The petitioner thus
deposed a supplementary affidavit in which he presented evidence
said to be proof of the proprietorship of the assets in dispute. It was
dated 13th March 2023.

10 The 1st respondent filed an answer to oppose the petition supported
by the affidavit of Frankline Uwizera, a State Attorney. It was stated
in the answer that the petition does not disclose a cause of action
against the 1st respondent, is misconceived, prolix and an abuse of
court process for it does not raise any issues or questions for
15 interpretation of the Constitution. The 1st respondent further stated
that the petition is in abuse of court process in so far as the petitioner
already filed suits that are pending before the High Court, as Civil
Suit No. 535 of 2017 in the Land Division and Miscellaneous Cause
No 76 of 2018 in the Family Division, for recovery of the property
20 comprised in the estate of Sir Daudi Chwa II.

The 1st respondent responded to the substantive matters raised in
the petition as well. He denied the contents of paragraphs 6, 7, 8, 9,
10, 11 and 12 of the petition and asserted that the petitioner is not
entitled to any of the remedies claimed. The 1st respondent
25 emphasised that the contents of the said paragraphs did not disclose
any question for constitutional interpretation and there is no
evidence on the record to prove the petitioner's rights to the property
that he claims. That the petitioner seeks to enforce rights or freedoms
guaranteed by the Constitution for redress and such actions should

be dealt with by another competent court. That the answer to the question before court, as to whether the vesting of the property that he claims in the institution of the traditional ruler of Buganda violated his rights under Article 26 of the Constitution, does not
5 depend on the interpretation of the Constitution. Rather, it depends on proof of his proprietary interest and thus falls outside the jurisdiction of the Constitutional Court.

In his answer, the 2nd respondent joined issue with the 1st respondent. He stated that the petition raises no questions for
10 interpretation by this court but is the subject of suits in the High Court, as stated above, for determination of the petitioner's rights. He also denied the allegations of fraud attributed to the 2nd respondent. He asserted that the assets which the petitioner claims were vested in the 2nd respondent by law. Further, that no personal
15 property of Sir Daudi Chwa II was vested in the 2nd respondent. The answer was supported by the affidavit of Bashir Juma Kizito, duly appointed agent of the 2nd respondent.

The petitioner filed rejoinders to both answers with affidavits in which he asserted that there are serious questions raised in the
20 petition for the interpretation of the Constitution and remedies to which he is entitled. He reiterated his prayers.

Representation

When the petition was called for hearing on 14th November 2023, Messrs Jonathan Abaine and Dennis Mbasa represented the petitioner. Mr
25 Wanyama Kodoli was holding the brief for Mr George Kallemera, representing the 1st respondent. The 2nd respondent was represented by Mr Usaama Sebuufu.



Counsel for the 1st respondent filed written submissions on 15th March 2023. Counsel for the petitioner and the 2nd respondent prayed that they be allowed to adopt the conferencing notes filed on 11th August 2020 and 15th September 2020, respectively, as their final submissions
5 in the matter. The petitioner, with leave of court filed a rejoinder to the 1st respondent's submissions. The prayers that the court considers the written arguments filed by counsel were all granted and this judgement was prepared on that basis.

Analysis and Determination

10 The respondents both raised preliminary objections to challenge the propriety of the petition. The 1st respondent raised 2 objections; first, that the petition discloses no cause of action against the 1st respondent and secondly that it raises no questions as to the interpretation of the Constitution. The 2nd respondent raised the same objection and
15 asserted that the petition is a narrative turning this court into a court to determine factual and evidential disputes.

Order 6 rule 28 of the Civil Procedure Rules, which is brought into operation by rule 23 of the Constitutional Court (Petitions and References) Rules, provides that:

20 **“Any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the**
25 **hearing.”**

In **Attorney General v. David Tinyefuza, Supreme Court Constitutional Appeal No. 1 of 1997**, the Court considered the import of then Order 6 rule 27 of the CPR, which is now rule 28 of Order 6 CPR. One of the preliminary points of law that was raised there was whether



the petition disclosed a cause of action. Oder, JSC at page 10 of his opinion, had this to say:

5 *"In my view, the effect of the rules under order 6 referred to appears to be this: the defendant in a suit or the respondent in the petition may raise a preliminary objection before or at the commencement of the hearing of the suit or petition that the plaint or petition discloses no reasonable cause of action. After hearing the arguments (if any) from both parties the court may make a ruling at that stage, upholding or rejecting the preliminary objection. The court may also defer its ruling on the objection until after the hearing of the suit or petition. Such a deferment may be made where it is necessary to hear some or the entire evidence to enable the court to decide whether a cause of action is disclosed or not. I think that it is a matter of discretion of the court as regards when to make a ruling on the objection. No hard and fast rule can and should be laid to*
10 *fetter the court's discretion. The exercise of the discretion must, in my*
15 *view, depend on the facts and the circumstances of each case."*

The rest of the members of the court agreed on this point and the opinion of Mulenga, JSC is instructive where he ruled, at page 4 thereof, that:

20 *"The usefulness of decisively disposing of the suit on a legal point, where appropriate, without going through a lengthy trial, cannot be gainsaid. And where such a point is raised it is of course desirable that the court makes a decision on it before embarking on the trial even if the case continues. In my opinion however, that remains in the realm of the court's*
25 *discretion, as is evident from the provisions of the law governing the procedure."*

In this case, the 1st respondent adverted to the petition not raising a cause of action against him, but also asserted that the court has no jurisdiction to entertain the petition which in his view does not raise
30 any questions as to the interpretation of the Constitution. Jurisdiction is an important aspect of any proceedings before a court of law because it is what empowers the court to consider the matter before it. The rules about the jurisdiction of this court to entertain constitutional petitions have been long settled. Since all the parties filed submissions to address



this issue, I will dispose of it first and I do so because if the preliminary objection is upheld, it will dispose of the whole petition.

Whether the petition discloses any question as to the interpretation of the Constitution.

5 ***The submissions of counsel***

Counsel for the 1st respondent framed his 1st issue as: Whether the petition discloses a cause of action. He then submitted that whereas the petitioner claims that the TRAAP Act is inconsistent with the Constitution, he did not identify any provision of the Constitution that
10 required interpretation in order for the petition to be considered by the Court. He relied on **Uganda Network of Toxic Free Malaria Control Ltd v. Attorney General, Constitutional Petition No. 14 of 2009**, for the proposition that this court has no jurisdiction merely to enforce rights and freedoms enshrined in the Constitution in isolation of
15 interpreting it and resolving any dispute as to the meaning of its provisions.

Counsel then asserted that the present petition has no dispute whatsoever about the meaning of all the provisions of the Constitution referred to in the petition. And that in such cases, this court has no
20 jurisdiction to consider the petition. He further opined that the petition is purely about the enforcement of the right to property and other matters connected to it, which can be dealt with by another competent court. He relied on the decision in **James Rwanyarare & Another v. Attorney General, Constitutional Petition No. 11 of 1997**, where it
25 was held that the jurisdiction of the Constitutional Court to entertain matters that fall under Article 50 of the Constitution will only be invoked when there is a reference made to it under Article 137 (5) of the Constitution.

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Counsel then submitted that not every alleged breach of the Constitution requires interpretation of the Constitution. He referred to **Ismail Serugo v Kampala City Council & Another, Constitutional Appeal No. 2 of 1998**, and the opinion of Mulenga JSC, where he held
5 that where a person seeks to enforce the rights or freedoms guaranteed under the Constitution by claiming redress for its infringement or threatened infringement, and the claim does not call for interpretation of the Constitution, he or she has to apply to another competent court.

He emphasised that there is nothing to interpret about Articles 2, 21,
10 26, 246 and 274 of the Constitution which are the only provisions which the petitioner cited as provisions with which the impugned statute is inconsistent with or in contravention of. He concluded that because the petition does not depend for its determination on the interpretation of any provision of the Constitution, it does not disclose a cause of action
15 and on that ground alone, it ought to be dismissed with costs to the respondents.

Counsel for the 2nd respondent agreed with the submissions of counsel for the 1st respondent. He explained that the petitioner sought to recover 2 properties or compensation in lieu of the same, which he claims
20 belonged to the estate of his grandfather that was illegally vested in the Kabaka of Buganda by the impugned statute. He named them as the Kabaka's Lake and land comprised in Busiro Block 183 Plot 1 at Bumera and confirmed that this was the background on which the petitioner challenged the constitutionality of the impugned statute.

25 Counsel went on to submit that the petitioners claim for recovery of the properties is misplaced. He asserted that the said claims need first to be established before a competent court and are therefore not matters for constitutional interpretation. He asserted that the petition does not raise matters for constitutional interpretation. Further that the

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petitioner has the burden to prove that the land forming part of the estate of his grandfather was returned to the 2nd respondent under the impugned statute. That this should be done in an ordinary suit as opposed to a constitutional petition.

5 Counsel for the 2nd respondent supported the 1st respondent's submission that not every alleged violation of a right gives rise to Constitutional interpretation. He relied on the decision in **Jude Mbabali v. Ssekandi, Constitutional Petition No. 28 of 2012**, where it was held that the constitutional question that has to be interpreted by the
10 Constitutional Court arises when there is an issue, legal or otherwise, requiring interpretation of the Constitution for the resolution of the cause out of which the issue arises. That the issue may be raised either through lodgement of a constitutional petition in this court or through a reference to the Constitutional Court by the court that is determining
15 the cause from which such an issue requiring interpretation arises; or where a party to the proceedings in that court requests that the court refers the issue to the Constitutional Court for interpretation.

Counsel went on to refer to the decisions in **Ismail Serugo** (supra) and **Attorney General v. David Tinyefuza** (supra) where the jurisdiction of
20 this court was extensively discussed. He emphasised that the decisions in the two cases were that the petition before this court must raise issues that require interpretation of articles of the Constitution as it is stated in Article 137 (3) (a). He further referred to the decisions in **Charles Kabagambe v. Uganda Electricity Board, Constitutional**
25 **Petition No. 2 of 1999**, where the principle was stated that a claim for redress for infringement of a right under the Constitution which does not call for interpretation of the Constitution should be taken before another competent court, not the Constitutional Court.

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Counsel then concluded that the right to recover the land fraudulently registered or illegally registered in the name of another person should be by suit but not a petition to this court for interpretation of the Constitution or enforcement of rights.

5 In his reply to the submissions of the 1st respondent, counsel for the petitioner did not respond to the issue whether this Court has jurisdiction to entertain the petition or whether there is a cause of action raised therein. Instead, he submitted that the assertion that there is no evidence of proof of ownership of the Kabaka's Lake by Sir Daudi Chwa II was incorrect. He further submitted that evidence to prove ownership was provided and is contained in Volume 4 of a report known as 'Godfrey Lule's Report.' The petitioner filed a supplementary affidavit to which he attached gazettes, final certificates and cadastral maps and sheets said to represent the properties that were returned to the 2nd respondent by virtue of the TRRAP Act to the prejudice of the petitioner, and other beneficiaries to the estate of Sir Daudi Chwa II.

Resolution of the Preliminary Objections

It must be emphasised here that the question of jurisdiction and the cause of action are two separate legal points which when they both appear in a dispute must each be considered separately, as it was done in **Attorney General v. David Tinyefuza** (supra). While explaining the expression "*cause of action*," Wambuzi, CJ had recourse to Mulla on the Code of Civil Procedure, Volume 1, 14th Edition at page 206, where the author stated thus:

25 *"A cause of action means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgement of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in*
30 *the absence of such an act no cause of action can possibly accrue. It is*



not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove the facts but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved, would give the defendant a right to an immediate judgement must be part of the cause of action. It is, in other words, the bundle of facts which it is necessary for the plaintiff to prove in order to succeed in the suit. But it has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It is a media upon which the plaintiff asks the court to arrive at a conclusion in his favour. The cause of action must be antecedent to the institution of the suit."

The court in the same case, opinion of Mulenga, JSC at page 11 thereof, explained what amounts to a cause of action under Article 137 of the Constitution, as opposed to a cause of action in an ordinary civil suit as follows:

"A cause of action in simple language is a happening or circumstances which in law, gives rise to a right to sue or take out action in court for redress or remedy. Clause (3) of Article 137 sets out several happenings and circumstances which give rise to a right to petition the Constitutional Court for a declaration. The cause of action under that clause therefore is not constituted by an 'allegation' made by the petitioner as Mr. Lule submitted. Rather, it is constituted by the fact of such happening as for example under (3) (b) the commission of an act which contravenes a provision of the Constitution, or under clause (3) (a) the enactment or existence of an act of Parliament whose provisions are inconsistent with any provision of the Constitution. If the petition to the constitutional court contains an allegation of the existence of any such happening or circumstance, then it discloses a cause of action which should be tried and determined by the court."

In this matter, the petitioner's complaint is that sections 2 (4), (5), (6), (7) and (8) and 3 of the Traditional Rulers (Restitution of Assets and Properties) Act is inconsistent with Articles 26 (2) and 21 of the Constitution. The petition thus raises a cause of action under Article 137 (3) (a) of the Constitution. The petition raises a further cause of action under clause (3) (b) because the petitioner states that the act of

the 1st respondent vesting the property of Sir Daudi Chwa II held in his personal capacity in the 2nd respondent under the TRRAP Act, without any further assurance than the Act, was unconstitutional to the extent that it contravened Articles 2, 21, 26 and 246 (3) (a) of the Constitution.

5 As a result, it must be determined whether this court has the jurisdiction to entertain this particular petition, given the surrounding circumstances that were stated in the respondents' answers to the petition. I refer to the answers because it has long been settled that the question whether a court has the jurisdiction to entertain a matter is
10 determined on the basis of the pleadings, just as the question whether there is a cause of action is.

In **Tinyefuza's case** (supra) Wambuzi, CJ relied on the definition of the word "*jurisdiction*" in Mulla's Code of Civil Procedure, at page 225 as follows:

15 *"By jurisdiction is meant the authority which the court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limit of this authority is imposed by the statute, charter or commission under which the court is constituted and may be extended or restricted by the like means. If no
20 restriction or limit is imposed the jurisdiction is unlimited."*

The jurisdiction of the Constitutional Court is provided for by Article 137 of the Constitution as follows:

137. Questions as to the interpretation of the Constitution.

25 **(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.**

(2) When sitting as a constitutional court, the Court of Appeal shall consist of a bench of five members of that court.

(3) A person who alleges that—

30 **(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.

5 (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

10 (b) refer the matter to the High Court to investigate and determine the appropriate redress.

(5) ...

In **Ismail Serugo** (supra) the court was divided over the interpretation of the provision above. Kanyeihamba, JSC agreed with Wambuzi, CJ, Karokora and Kikonyogo, JJSC on the interpretation that was rendered
15 in **Attorney General v. David Tinyefuza, Constitutional Appeal No. 001 of 1997**, when he stated that:

20 "... as far as the case of General D. Tinyefunza v. Attorney-General Constitutional, Appeal No.1 of 1997 [Unreported] is concerned. There is a number of facets to the decision of the Supreme Court in that case. Nevertheless, when it comes to that Court's view of the jurisdiction of the Court of Appeal as a Constitutional Court, its decision in that case is that the Constitutional Court has no original jurisdiction merely to enforce rights and freedoms enshrined in the Constitution in isolation to
25 interpreting the Constitution and resolving any dispute as to the meaning of its provisions. The judgment of the majority in that case, [Wambuzi, C.J., Tsekooko J.S.C., Karokora J.S.C., and Kanyeihamba J.S.C], is that to be clothed with jurisdiction at all, the Constitutional Court must be petitioned to determine the meaning of any part of the Constitution in
30 addition to whatever remedies are sought from it in the same petition. It is therefore erroneous for any petition to rely solely on the provisions of Article 50 or any other Article of the Constitution without reference to the provisions of Article 137 which is the sole Article that breathes life in the jurisdiction of the Court of Appeal as a Constitutional Court."



In the same case Wambuzi, CJ succinctly explained the jurisdiction of this court in the following passage, at page 24 of his opinion:

5 *"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 of the Constitution or construction of a provision of the Constitution, the Constitutional Court has no jurisdiction."*

10 The petitioner asserts that because it is alleged that section 2 (4), (5), (6), (7) and (8) of the TRRAP Act is inconsistent with Article 26 and 274 of the Constitution, there is need for interpretation of the two stated provisions of the Constitution.

15 The petitioner does not claim that the property that was vested in the Kabaka under the TRRAP Act belongs to him, which would give him the right to claim that his rights under Article 26 (1) above were violated. Instead he claims that some of it belonged to his grandfather, Sir Daudi Chwa II, as his private estate. He further states in paragraph 7 of the petition that section 2 subsections (4) to (8) of the TRRAP Act are
20 inconsistent with Article 26 (2) and 21 of the Constitution, in as much as they discriminate against him by birth and social standing and prevent him from claiming his beneficial interest in the estate of his father and grandfather, respectively.

25 The petitioner tries to strengthen his case in the affidavit in support of the petition when he explains, in paragraphs 3 thereof, that Item 8 of the Schedule to the impugned Act, the Kabaka's Lake, was the personal property of his grandfather and was never the official property of the 2nd respondent, making the act of vesting it in the latter unconstitutional. He further states in paragraph 4 of the same affidavit that Item 11 of
30 the Schedule to the impugned Act (All Basekabaka's tombs)



encompasses the private property of his late grandfather in Busiro Block 183 Plot 1, Land at Bumera, and it was vested in the 2nd respondent without regard to provisions of the Succession Act and the Registration of Titles Act. That as a result, the vesting of the property in the 2nd respondent was in contravention of Article 274 of the Constitution.

Most importantly, in paragraph 11 of the petition, he states that the respondent legitimised an act of fraud by expressly providing for the omission of payment of any tax, duty or fee and by alteration or cancellation of any relevant certificate of title; and that the issue of a fresh certificate of title or otherwise is to that extent unconstitutional.

The respondents state in both of the affidavits in support of their answers that the petitioner has pending suits in the High Court, in respect of the same property, which raise issues that are related to those in this petition. In paragraph 5 and 6 of his affidavit, Bashir Kizito Juma, the 2nd respondent's agent, states that the petitioner filed **HCCS No. 535 of 2017, Prince Kalemera H. Kimera & Another v. The Kabaka of Buganda & Others**, for the recovery of property comprised in the estate of the late Sir Daudi Chwa II, and the suit is still pending hearing. Further, that there is another pending suit in the Family Division of the High Court, **Miscellaneous Cause No. 76 of 2018, Henry Kalemera Kimera v. Buganda Land Board**, in which the petitioner again seeks to recover property comprised in the estate of Sir Daudi Chwa II from the 2nd respondent. Bashir Kizito further denies that any property of Sir Daudi Chwa II was vested in the 2nd respondent, as alleged or at all.

The petitioner filed an affidavit in rejoinder to that of Bashir Kizito in which he stated that the denial in Kizito's affidavit that any of the

property of Daudi Chwa II was vested in the 2nd respondent was a material falsehood. Further that **Annexure A** to the petition was testimony enough that the private properties of Sir Daudi Chwa II were appropriated to the 2nd respondent under the impugned statute.

- 5 **Annexure A** to the affidavit in support of the petition was a letter from the Attorney General of Uganda to the Katikiro of Buganda dated 19th March 2014. In the letter, the Attorney General informed the Katikiro that the family of the late Sir Daudi Chwa II petitioned his office to return property that he owned in his private capacity that was
- 10 confiscated by the Government of Uganda. He referred to a list of the said property which he attached to the letter and requested the Katikiro to verify and confirm to him whether the said property belonged to the late Sir Daudi Chwa II; how the request could be handled in view of the Understanding signed between the Central Government and the
- 15 Kingdom; and whether there was any attempt by the Kingdom and the family of Sir Daudi Chwa II to resolve the matter amicably.

It is pertinent to note that the list referred to in **Annexure A** was not attached to it. It was therefore not part of the evidence in the petition. It is also evident that the dispute over the property still subsists. It is

20 the subject of two suits that are still pending in the High Court, which is not denied by the petitioner.

Interestingly, the petitioner finally admits that the property over which he claims rights under Article 26 of the Constitution has not yet been identified. In his prayers in this petition, he asks the court to make a

25 declaration that sections 2 and 3 of the impugned statute are inconsistent with Articles 2, 21, 26, and 246 (3) (a) and (b) and 274 of the Constitution, and thereafter make the following order:



5 “(b) Refer the matter to the High Court to investigate the proprietorship of any such property envisaged by or dealt with by the respondents under the Traditional Rulers (Restitution of Assets & Properties) Act, Cap 247 to ensure restitution to the beneficiaries of the estates of the registered proprietors prior to the commencement of the impugned statute and assessment of general damages.”

10 In my opinion, the prayer above is an unequivocal admission that the petition now before this Court was premature. In his conferencing notes, which were adopted as the legal arguments in this petition, counsel for the petitioner provided a list of 22 properties said to be “some of the private properties belonging to the estate of HH Sir Daudi Chwa II.” Counsel further submitted that when the petitioner filed **HCCS No. 535 of 2017** in the Land Division, it was in a bid to recover Sir Daudi Chwa’s said property. Further that the 2nd respondent’s
15 defence in the suit was that the property was vested in him by law and therefore such vesting was lawful. Counsel then states that it was for that reason that the petitioner brought this matter to challenge the impugned statute and have its provisions interpreted by this court.

20 The petitioner further alleges that the vesting of Sir Daudi Chwa’s private property in the 2nd respondent resulted in fraudulent transactions that were validated by section 2 (8) of the TRRAP Act, which provides as follows:

25 **(8) Notwithstanding any provision of the Registration of Titles Act, the registrar of titles shall take all necessary steps for giving effect to the transfer of any asset or property effected by this section free from any tax, duty or fee whether by the alteration or cancellation of any relevant certificate of title, the issue of a fresh certificate of title or otherwise.**

30 He thus claims, in paragraph 11 of the petition, that exempting the alteration and cancelation of titles, without the payment of any tax or



fee, and the issue of fresh titles was not only fraudulent but also unconstitutional.

In his submission as well as his rejoinder, counsel for the petitioner extensively submits about fraud which is attributed to the 2nd respondent and alleged to flow from section 2 (8) of the TRRAP Act. Counsel also enumerated the particulars of fraud as they were stated in the plaint in **HCCS No 535 of 2017** in his submissions in rejoinder to those of the 1st respondent. He then comes to the conclusion that because certain actions were taken by the Registrar of Titles in the registration of the 2nd respondent as proprietor of the land in dispute, fraud may be inferred.

From this ground it becomes apparent that though the petition established causes of action under Article 137 of the Constitution, the petitioner's remedy in respect of the alleged fraud was not in this court. Indeed, the petitioner filed **HCCS No 535 of 2017**, in which it is stated in his submission that one of the claims was that the cancellation of titles that resulted from the vesting of the property and assets under the impugned statute in the 2nd respondent was fraudulent. That fact, if proved, would not be premised on the interpretation of any provision of the Constitution but on the Registration of Titles Act, among other laws.

In order to prove fraud, not only must it be pleaded and particularised as is required by Order 6 rule 3 of the Civil Procedure Rules, but cogent evidence must be brought before the court to prove it. In this petition, the petitioner purports to bring lists of certificates of title arranged in tables in his submissions, as well as cadastral maps attached to his supplementary affidavit, and reports issued in Parliamentary proceedings to prove the claim that from the implementation of the

impugned Act, fraud can be imputed to the 2nd respondent. These efforts amounted to bringing another suit in this court to prove facts in another suit that was still pending before the High Court.

I would therefore find that the alleged fraud has no nexus with the interpretation of the Constitution but is related to provisions and processes under the Registration of Titles Act, the Succession Act and revenue statutes. It did not require interpretation of any provision of the Constitution though it may have, by a long shot, amounted to a violation of the rights of the petitioner. In **Attorney General v. Tinyefuza** (supra), Kanyeihamba, JSC in his opinion, at page 26, had this to say about the need to distinguish between and focus on matters that ought to be brought to this court, and other disputes about rights insured by the Constitution:

"In my opinion, it could not have been the intention of the framers of the Uganda Constitution that such matters inconsistent, as they may appear to be, with the provisions of the Constitution would have direct access to the Court of Appeal which happens to be one of the busiest courts in the land, entertaining appeals from other diverse courts and judges. This court must give guidelines on these matters by construing the Constitution so as to avoid these absurdities and so direct such suits and claims to lower tribunal's, Magistrates Courts and, where appropriate to the High Court."

The Supreme Court gave guidance in the same case when it held, at page 26 of the opinion of Kanyeihamba, JSC, with which the other members of the court agreed, that:

"I do believe that the jurisdiction of the Constitutional Court derived from Article 137 (3) is concurrent with the jurisdiction of those other courts which may apply and enforce the articles enumerated above, but there is an important distinction that I see, and that is that for the Constitutional Court to claim and exercise the concurrent jurisdiction, the validity of that claim and the exercise of the jurisdiction must be derived from either the petition or reference to have the Constitution or one of its provisions interpreted or construed by the Constitutional Court. In other words, the

concurrent original jurisdiction of the Court of Appeal sitting as the Constitutional Court can only arise and be exercised if the petition also raises questions as to the interpretation or construction of the Constitution as the primary objective or objectives of the petition. To hold otherwise might lead to injustice and, in some situations, manifest absurdity.”

Therefore, with regard to situations akin to that presented in this petition, Article 137 (5) to (7) of the Constitution provide as follows:

(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

(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 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.

We do not know whether the petitioner and counsel informed the High Court that this petition was filed in this court. The petition not having been filed under the correct provisions has also not been disposed of as expeditiously as it would have been, had it been brought before us as a reference by the judge in **HCCS No 535 of 2017**. This, without a doubt, caused a considerable amount of delay in disposing of the suit in the High Court, as well as this petition.

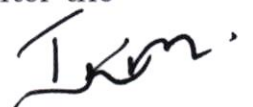
It is apparent that the petitioner is engaged in shopping for the most expeditious forum to enforce his rights because he has three suits in



the courts over the same matter. For that reason, I would accept the submissions of counsel for the 1st respondent that bringing this petition to this court was an abuse of court process. Pursuant to rule 2 (2) (b) of the Rules of this Court, I would dismiss it without much further ado.

5 However, for completeness, it is important to comprehensively and conclusively dispose of the question whether the petition raises any question as to the interpretation of the Constitution. For that purpose, it will be recalled that the main question that the petitioner meant for this court to determine is whether sections 2 and 3 of the Traditional
10 Rulers (Restitution of Assets and Properties) Act is inconsistent with and/or in contravention of Articles 2, 21, 26, 246 (3) (a) and (b) of the Constitution. Article 2 establishes the Constitution as the supreme law of the land and states that any law that is inconsistent with the Constitution is null and void to the extent of the inconsistency. Article
15 21 prohibits discrimination against any person on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability. The petitioner did not plead any clear facts to prove that he has been discriminated against in any way.

20 Article 246 of the Constitution provides for the reinstatement of the institution of traditional leader that had been abolished by the 1967 Constitution. The petitioner takes issue with this provision because it provides in clause (3) (a) and (b) that a traditional leader shall be a corporation sole with perpetual succession and with the capacity to sue
25 and be sued and hold property. However, it does not seem logical to me for the petitioner to seek a declaration from this court that sections 2 and 3 of the impugned Act are inconsistent with Article 246 (3) (a) and (b) of the Constitution. I say so because Article 246 ensured the continued operation of the provisions of the impugned statute after the



promulgation of the 1995 Constitution. It therefore cannot be said that the any provision of the impugned Act is inconsistent with and/or in contravention of Article 246 (3) (a) and (b) of the Constitution.

5 It then becomes clear to me that the main provision that the petitioner sought to have this court interrogate or interpret was Article 26 of the Constitution, in as far as it relates to sections 2 of the impugned Act, which he believes deprived him of his right to inherit the property alleged to belong to his father and grandfather.

Article 26 of the Constitution provides in part as follows:

10 **26. Protection from deprivation of property**

(1) Every person has a right to own property either individually or in association with others.

15 **(2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied—**

(a) ...

It will be recalled that counsel for the petitioner did not directly address the question whether the petition raises any question as to the interpretation of the Constitution. However, in his submissions about
20 the first issue, whether section 2 (1), (4) and (5) of the impugned Act contravene Articles 26 and 246 (b) of the Constitution, he submitted that the stated provisions are in contravention of the Constitution because an Act of Parliament cannot take away the petitioner's inalienable rights guaranteed by it.

25 In his submissions in rejoinder to the 1st respondent's submissions, at page 44, counsel referred court to the principles that were affirmed by the Supreme Court in **Uganda National Roads Authority v Asuman Iumba & Peter Magelah, Constitutional Appeal No 2 of 2014**. In



that case, section 7 (1) of the Land Acquisition Act was nullified to the extent of its inconsistency with Article 26 (2) of the Constitution.

Counsel then drew an inference from this decision to the provisions of section 2 (7) of the TRRAP Act, which was enacted 2 years before the coming into force of the Constitution in 1995, and submitted that the said provision of the impugned Act provided for “the confiscation of people’s property that was supposed to be returned by the same law and vested it in the traditional leader of Buganda.” He asserted that this amounted to unjust enrichment on the part of the 2nd respondent, contrary to the principle that was established or affirmed in **Uganda National Roads Authority v. Asumani Irumba & Another** (supra).

The argument here was that because the impugned Act came into force before the 1995 Constitution of the Republic of Uganda, it ought to be construed so as to bring it into conformity with the Constitution as it is required by Article 274 of the Constitution, which provides as follows:

274. Existing law.

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 law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.

(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 that date which is to come into force on or after that date.

In **Irumba Asumani & Peter Magelah v. Attorney General & Uganda National Roads Authority, Constitutional Petition No 40 of 2013**, this court considered the question whether section 7 (1) of the Land Acquisition Act was inconsistent with Article 26 of the Constitution. The

court traced the history of Article 26 of the Constitution from the Constitution of 1962 through to 1967, up to the provision as it stands in the 1995 Constitution. Section 7 (1) of the Land Acquisition Act provided for taking possession of land by Government as follows:

5 **7. Taking possession.**

10 **(1) Where a declaration has been published in respect of any land, the assessment officer shall take possession of the land as soon as he or she has made his or her award under section 6; except that he or she may take possession at any time after the publication of the declaration if the Minister certifies that it is in the public interest for him or her to do so.**

The court observed that the Land Acquisition Act commenced on 2nd July 1965, 35 years before the coming into force of the 1995 Constitution, and then found that it fell within the ambit of Article 274
15 of the Constitution. The court further observed that the provisions of Article 22 of the 1962 Constitution did not provide for “the prompt and adequate compensation, prior to the taking of possession of the property” as Article 26 (2) of the 1995 Constitution does. It was then held that:

20 *“Clearly the 1995 Constitution departs from the earlier Constitutions in respect of the right to property and specifically on the powers of government to acquire land compulsorily. The 1995 Constitution is very restrictive in this regard, it specifically provides for prior payment of compensation before taking possession or acquisition.”*

On that basis, the court nullified section 7 (1) of the Land Acquisition
25 Act, to the extent of its inconsistency with Article 26 (2) of the Constitution. It was accordingly ordered that the acts of the 2nd respondent, UNRA, of taking possession of the petitioner’s property prior to payment of compensation contravened the right to property as enshrined in Article 26 (2) of the 1995 Constitution. The Supreme Court
30 upheld the decision of this court in **UNRA v. Asumani Irumba & Another** (supra).

The petitioner here filed his petition with the aim of getting a similar interpretation of Article 26 of the Constitution with regard to sections 2 and 3 of the TRRAP Act so that this court holds them null and void to the extent of their inconsistency. I observed that the impugned Act was enacted to bring into effect the provisions of Article 118A of the Constitution (Amendment) Statute of 1993, which provided as follows:

118A. The Legislature may make provision for the return to Traditional Rulers of any assets or properties previously owned by them or connected with or attached to their office and which were confiscated to the state under or by virtue of Article 118 of this Constitution as it existed immediately before the coming into force of this article.

Parliament then enacted the impugned Act vesting 14 properties listed in a Schedule thereto as the assets of the Traditional ruler of Buganda.

However, the petitioner now claims that 22 properties that are listed in his advocates submissions, which appear to me to be different from those that are listed in the Schedule to the impugned Act, were also given to the 2nd respondent thereunder. He desires that this court maintains the interpretation of Article 26 (2) of the Constitution that was given by this court and upheld by the Supreme Court in **UNRA v Irumba Asumani** (supra). This would, in his expectation, result in the 22 assets listed in his submissions being declared part of his grandfather's estate.

The decision in **Irumba Asumani's case** is about compulsory acquisition of property by Government. It is not clear to me that the vesting/return of the assets that were confiscated from the traditional ruler of Buganda under Article 188 of the 1966 Constitution amounted to compulsory acquisition of those assets by the Government of Uganda. I also do not think that it amounted to compulsory acquisition by the Kabaka of Buganda. However, I observed that in his submissions,

counsel for the petitioner claims that the vesting of the assets in dispute in the Kabaka of Buganda amounted to illicit enrichment. It has already been established that the facts relating to that claim still need to be proved.

5 Nonetheless, the constitutional principle that was unwaveringly stated by this court in **Irumba Asumani & Peter Magelah v UNRA** (supra) and affirmed by the Supreme Court in **UNRA v Asumani Irumba & Peter Magelah** (supra) implies that an Act of Parliament cannot override the right to property that are enshrined in Article 26 of the Constitution
10 without ensuring that it meets the imperatives stated in Article 26 (2) of the Constitution, which provides as follows:

(2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied—

- 15 **(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and**
- (b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for —**
- 20 **(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property;**

It is my view that the question in this petition is substantially the same as that which was explored in **Irumba's case** (supra) the interpretation of Article 26 (2) of the Constitution in as far as it applies to an Act passed
25 by Parliament. It would therefore, in my opinion, be *res judicata* under section 7 of the Civil Procedure Act, for purposes of Article 137 of the Constitution.

In **Fox Odoi Oywelowo v. Attorney General, Constitutional Petition No 54 of 2013**, this court extensively, and in my view, comprehensively
30 dealt with the principle of *res judicata* in as far as it applies to constitutional petitions. While considering the interpretation of Articles

28 (1), 42, 44 (c) of the Constitution and several others related to them, Madrama, JA, as he then was, had this to say:

5 *"In the context of Article 137 (1) of the Constitution in which the Constitutional Court determines any question as to interpretation of the Constitution, I have considered the mandate of the Constitutional Court which is an exclusive mandate to determine any question as to interpretation of the Constitution and once determined, the determination is binding on anybody to whom the Article applies or who wants to apply the Article. The keyword to be considered is "any question" and not any*
10 *"Article" of the Constitution.*

...

Therefore, the question of whether the matter is res judicata should be determined on the basis of whether the same question has been raised in the subsequent petition."

15 At page 28 and 29 of his opinion, Madrama, JA went on to emphasise that:

"In my determination, res judicata under section 7 of the Ugandan CPA is only applicable in the context of Article 137 of the Constitution where the same issue or question as to interpretation of the Constitution has been raised and determined before.

20 ...

Further, a question which is directly in issue does not only have to be between the same parties or parties claiming interest and litigating under the same title in the subsequent suit. I have therefore confined the determination of whether the matter raised in this petition is res judicata
25 *by considering the questions as to interpretation of the Articles of the Constitution raised in Hon Joseph Murangira v Attorney General (supra) and compared it with the questions as to interpretation of the Articles of the Constitution raised in this petition. For emphasis the questions (or) issues raised have to be questions as to interpretation of the Constitution*
30 *and not questions for enforcement of any Article of the Constitution."*

Musota, JA (as he then was) agreed and stated the same principles thus:

35 *"This finding is fortified by the decision in **Uganda Vs Onegi Obel Constitutional Reference No. 0024 of 2011** in which the Constitutional Court held that the interpretation of the court of any legal provision vis-à-vis the Constitution and its legal effects is not limited to the parties concerned in the case in which the interpretation is made. It*

constitutes a binding pronouncement of the law subject to the right of appeal to the Supreme Court. The court cannot therefore hear and determine the same substantial legal issues more than once.

...

5 *In this petition, the petitioner's counsel listed Articles in the Constitution, which he contended were dealt with and are res judicata. It should be made clear that the Constitutional Court deals with "questions" as to interpretation of the Constitution, but not Articles of the Constitution. In conclusion, I agree that the current petition raises no further question as to interpretation of the Constitution.*

10

Since Obura, JJA and Kasule, Ag JA agreed that there was no further question as to the interpretation of the Constitution for the court to consider, the petition was dismissed with no order as to costs.

The petitioner now before us unequivocally admits that the relevant part
15 of Article 26 of the Constitution which he seeks to have this court interpret was already interpreted by this court. The decision binds this court in subsequent petitions that require interpretation of the same provision, unless there is a good reason to depart from it. As a result, this court is left with nothing to interpret.

20 With regard to the alleged violation of his rights by the impugned provisions of the law, the petitioner must return to the High Court to complete the suits that are now pending determination under the impugned Act. This would facilitate the application of the meaning that was given to Article 26 (2) of the Constitution in **Irumba's case**, if the
25 judges in the two suits on evaluating the evidence before them find that such interpretation is applicable to the petitioner's cases.

In conclusion therefore, the petition does not raise any questions for interpretation by this court and it ought to be dismissed.

With regard to the petitioner's prayer for costs, it is clear that the
30 petition was filed contrary to the procedure that is provided for in Article

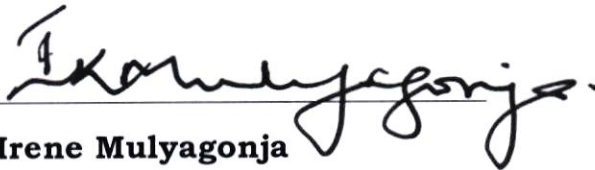


137 (5) to (7) of the Constitution. It was therefore an abuse of the process of this court and the High Court and a waste of the valuable time and limited resources of this court. For that reason, the petitioner shall pay the costs of the petition to the respondents, in any event.

5 I would therefore order that:

- a) This petition stands dismissed and the petitioner is not entitled to any of the declarations and orders claimed.
- b) The petitioner shall pay the costs of the petition to the respondents.

10 Dated at Kampala this 14TH day of FEB 2024.



Irene Mulyagonja

JUSTICE OF THE CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 009 OF 2020

Coram: [Buteera-DCJ, Bamugemereire, Kibeedi, Mulyagonja, Kihika] [JJCC]

PRINCE KALEMERA H. KIMERA ===== PETITIONER

VERSUS

1. ATTORNEY GENERAL

2. THE KABAKA OF BUGANDA ===== RESPONDENTS

JUDGMENT OF RICHARD BUTEERA, DCJ

I have had the benefit of reading in draft the Judgment prepared by My Learned Sister Justice Irene Mulyagonja, JCC.

I agree that this Petition be dismissed with costs to the Respondents and the Petitioner is not entitled to any declarations and orders claimed.

As all the members of the Court agree with the proposed orders of Lady Irene Mulyagonja in her lead Judgment, the Petition stands dismissed in the terms proposed by her.

Dated this^{14TH}..... day of^{FEB}..... 2024.


.....

Richard Buteera
DEPUTY CHIEF JUSTICE

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT AT KAMPALA

Coram:

[Buteera, DCJ, Bamugemereire, Kibeedi, Mulyagonja & Kihika, JJCC]

CONSTITUTIONAL PETITION NO. 009 of 2020

PRINCE KALEMERA H. KIMERA :::::::::::::::::::::::::::::::::::PETITIONER

VERSUS

1. ATTORNEY GENERAL

2. THE KABAKA OF BUGANDA :::::::::::::::::::::::::::::::::::RESPONDENTS

JUDGMENT OF CATHERINE BAMUGEMEREIRE, JCC

I have had the opportunity to read, in draft the Judgment of my learned sister, Mulyagonja, JA. I agree with her reasoning and orders.

Signed and Dated^{14TH} day of^{FEB}.....2024



Catherine Bamugemereire
Justice of the Constitutional Court

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT AT KAMPALA

(Coram: Buteera, DCJ, Bamugemereire, Mutangula Kibeedi, Mulyagonja &
Kihika, JJCC)

CONSTITUTIONAL PETITION NO. 009 of 2020

PRINCE KALEMERA H. KIMERA :::::::::::::::::::::::::::::::::::PETITIONER

VERSUS

ATTORNEY GENERAL
THE KABAKA OF BUGANDA :::::::::::::::::::::::::::::::::::RESPONDENTS

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JCC

I have had the advantage of reading in draft the Judgment prepared by my sister, Hon. Lady Justice Irene Mulyagonja, JCC. I agree with the analysis and the Orders she has proposed. I have nothing useful to add.

Delivered and dated at Kampala this 14TH day of FEB 2024.



Muzamiru Mutangula Kibeedi
JUSTICE OF THE CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT AT KAMPALA

*{Coram: Buteera, DC}, Bamugemereire, Mutangula Kibeedi, Mulyagonja &
Kihika, JJCC}*

CONSTITUTIONAL PETITION NO. 009 of 2020

PRINCE KALEMERA H. KIMERA :::::::::::::::::::::::::::::::::::PETITIONER

VERSUS

- 1. ATTORNEY GENERAL**
- 2. THE KABAKA OF BUGANDA :::::::::::::::::::::::::::::::::::RESPONDENTS**

JUDGMENT OF OSCAR JOHN KIHICA, JCC

I have had the benefit of reading, in draft, the Judgment of Hon. Lady Justice Irene Mulyagonja. I agree with the reasoning, conclusions and the orders proposed.

Dated at Kampala this^{14TH}.....day of^{FEB}.....2024


OSCAR JOHN KIHICA
JUSTICE OF THE CONSTITUTIONAL COURT