THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

[CORAM G.M. OKELLO, J.A., A.E.M. BAHIGEINE, J.A., S.G.ENGWAU, J.A., M. KIREJU. J.A. & A. TWINOMUJUNI. J.A.]

CONSTITUTIONAL CASE NO.3/97

B E T W E E N

SERAPIO RUKUNDO :: PETITIONER

A N D

ATTORNEY GENERAL :: RESPONDENT

RULING OF THE COURT:

Serapio Rukundo, the petitioner was the unsuccessful Parliamentary Candidate for the Kabale Municipality Parliamentary seat in the Parliamentary Elections held on 27th June 1996. He brought this petition under Article 137(3) of the Constitution of Uganda 1995 and rule 3(3) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992, alleging that the petitioner is a person affected by the decision of the Court of Appeal in Civil Appeal No.27 of 1996 - Bakunda Darlington vs Dr. Kinyatta Stanley and Anor. (unreported) which he contends is inconsistent with Article 126(2)(e) of the Constitution. He sought inter-alia a declaration that the said decision of the Court of Appeal in the above mentioned case is inconsistent with Article 126(2)(e) of the Constitution. He further asked for order of redress appropriate in the circumstances.

The petition was supported by the affidavit of the petitioner sworn on the 27th day of March 1997. There is also a supplementary affidavit sworn by Livingstone Kawenja, advocate in the Firm of M/s Kayondo & Co. Advocates which represents the petitioner.

The background facts to this petition as discerned from the supporting affidavit are that the petitioner had contested the Kabale Municipality Parliamentary seat in the Parliamentary Elections held on 27/6/96 and lost to Dr. Ruhakana Rugunda. He later filed an Election Petition No. MKA 3 of 1996 in the High Court District Registry of Kabale challenging the election of Dr. Ruhakana Rugunda. At the hearing of that petition, a preliminary objection was raised by Counsel for the respondent that the petition and the accompanying affidavit were defective, having been drawn by an advocate who lacked a valid practising certificate. The trial Judge overruled that objection on 18/11/96.

On 20/11/96, the Court of Appeal delivered its judgment in Civil appeal No.27 of 1996 - Bakunda's case (supra) which arose from Election Petition No. 18 of 1996 at the High Court in Kabale. The Court of Appeal decided in the said case that an affidavit commissioned by an advocate without a valid practising certificate is invalid. That decision was in direct contrast with the ruling of the High Court in the election petition between the petitioner and Dr. Ruhakana Rugunda. It is on the basis of that decision that the petitioner brought this petition.

The respondent filed an answer to the petition in which he denied that the decision of the Court of Appeal in Civil Appeal No.27 of 1996 - Bakunda's case (supra) is inconsistent with Article 126(2)(e) of the Constitution. The answer was supported by an affidavit of M.S. Arach then Commissioner for Litigation in the Ministry of Justice/Attorney General Chambers sworn on 20/6/97.

When the petition was called for hearing, Mr. Nasa Tumwesige, Director of Civil Litigation in the Ministry of Justice, who represented the respondent took a preliminary objection raising the following three salient points:-

1. that the petition is time barred,
2. that the Attorney General is not the right party to this petition and
3. that the petition discloses no cause of action.

OR the question of time limit, Mr. Tumwesige pointed out that Rule 4(1) of the Modifications To The Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 Directions, 1996 Legal Notice No.4 1996 sets a time limit within which a petition shall be lodged. It requires a petition to be lodged within 30 days after the date of the breach of the Constitution

complained of. The learned counsel further pointed out that in the instant case, the decision of the Court of appeal in Bakunda's case (supra) which is alleged to have offended against a provision of the Constitution was delivered on 20/11/96. Yet, this petition was lodged on 1/4/97 about four and a half months after the delivery of the offending judgment. He submitted that the petition was therefore filed outside the time allowed by the rules governing the Constitutional petition proceedings.

On the other hand, Mr. Kayondo SC, counsel for the petitioner contended that in Constitutional matters there is no time limit.

While we agree that in Constitutional matters particularly on questions of human rights, courts should ignore minor irregularities, it is important that rules of procedure should be followed to ensure smooth and predictable conduct of Constitutional petitions. Certainty and predictability are some of the corner stones of justice. Rule 4(1) of the Modifications to the Fundamental Rights and Freedom (Enforcement Procedures) Rules, 1992, Directions, 1996 sets a time limit within which a petition shall be lodged. It reads:

> "4(1) The petition shall be presented by the petitioner by lodging it in person, or by or through his or her advocate, if any, named at the foot of the petition, at the office of the Registrar and shall be lodged within thirty days after the date of the breach of the Constitution complained of in the petition." [emphasis is ours]

The above rule provides that a petition shall be lodged within thirty days after the breach of the Constitution complained of. The purpose of this rule is not hard to find. It takes into account among others the importance of Constitutional cases which must be attended to expeditiously and seeks to cut out stale cases. We do not therefore agree with Mr. Kayondo SC that in Constitutional matters there is no time limit. He did not give us any authority for that proposition. We think that this petition offended against the said Rule 4(1). We therefore uphold the first objection.

As to whether the Attorney General is the right party to this petition, Mr. Tumwesige submitted that the Attorney General is not the right party. His argument was that the functions

of the Attorney General are set out in Article 119 of the Constitution. The function of the Attorney General relating to Court matters is covered under Clause 4(c) of Article 119 which enjoins him/her to represent Government in Courts or in any other legal proceedings to which Government is a party. Mr. Tumwesige further pointed out that, under section 4(5) of the Government Proceedings Act (Cap. 69), Government cannot be liable for anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him/her or any responsibilities which he/she has in connection with the execution of a judicial process. He cited Attorney General vs Oluoch (1972) E.A 392 in support of that view. He contended that the act complained of in this petition is the decision of the Court of Appeal in Civil Appeal No.27 of 1996 which was the act of the Justices of Appeal in the discharge of their judicial responsibilities vested in them by law. He submitted that Government cannot be held liable for such act and that therefore the Attorney General cannot be a party.

Mr. Kayondo SC, on his part submitted that as the Attorney General is the head of the Uganda Bar and the Chief Legal Adviser to Government, he/she must be a party to the petition otherwise who else can?

The functions of the Attorney General are indeed set out in Article 119 of the Constitution. These functions include representing Government in Courts or any other legal proceedings to which the Government is a party. This particular function is contained in Clause 4(c) of Article 119 of the Constitution. The law governing the Civil Liabilities and Rights of Government and to Civil Proceedings by and against the Government is to be found in the Government Proceedings Act.

We agree with Mr. Tumwesige that Section 4(5) of this Act prohibits the bringing of any action against Government in respect of an act or omission done by any person in the discharge or purported discharge of a judicial function vested in him/her. That is the law.

The relevant sub-section reads:-

> "No proceedings shall be brought against the Government by virtue of this section in respect of anything done or omitted to be done by any person while

> discharging or purporting to discharge any responsibilities of a judicial nature vested in him or any responsibilities which he has in connection with the execution of judicial process."

This is in conformity with Article 128(4) of the Constitution which provides immunity to judicial officers in the exercise of their judicial functions.

The decision of the Court of Appeal in Civil Appeal No.27 of 1996 - Bakunda's case (supra) which is the complaint in this petition is an act done in the discharge of a judicial function. It cannot found an action against the Government as indeed the former court of Appeal for Eastern Africa observed in Attorney - General vs Oluoch (supra) that no action lies against the Attorney General in respect of acts done in the discharge or purported discharge of a judicial function. As no action lies against the Government in respect of act done in the discharge of a judicial function, the Attorney General was therefore wrongly ade a party in this petition.

We should perhaps, point out that under Rule 5(2) of the Modifications To The Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992, Directions 1996, the Registrar is required to serve a copy of the petition on the Attorney General where the latter is not a party. Had the petition been properly before this court, the Attorney General would have been served in accordance with the above rule.

On the question of cause of action, Mr. Tumwesige submitted:-

1. that neither the Attorney General nor the petitioner was a party to the Bakunda case (supra). He contended that if the purpose of the petition was to overrule the decision in Bakunda's case, then the parties to that case should be parties to this petition to afford them opportunity to be heard as to leave them out would be unjust to them.

2. that since the complaint in the petition is against the decision in Bakunda's case, it cannot be challenged under Article 137 of the Constitution.

3. that in view of the independence of the judiciary guaranteed under Article 128 of the Constitution, no one can interfere with the decision in Bakunda's case except by way of an appeal if the law allows.

concluded that on these grounds, the petition lacks a cause of action.

Mr. Kayondo SC contended on this point that the petition discloses a cause of action as the petitioner's right to justice under Article 126(2)(e) of the Constitution was threatened. He argued that if the petitioner's Election Petition No. MKA 3 of 1996 now pending in the High Court in Kabale was to be heard, it would be dismissed in view of the decision of the Court of Appeal in Bakunda's case. He further submitted that in this petition, the petitioner represents a large section of the population in this country.

In deciding whether a suit discloses a cause of action, one looks ordinarily only at the plaint (Jeraj Shariff & Co vs Chotai Fancy Store (1960) EA 394 and assumes that the facts alleged in it are true. By analogy therefore, to decide whether the instant petition discloses a cause of action, one must look only at the petition and the affidavit accompanying it and assume that the facts alleged therein are true. We did that. It is clear to us from the petition and the supporting affidavit that the complaint in the petition is against the decision of the Court of Appeal in Civil

appeal No.27 of 1996. In the instant case, the petitioner alleges that the act of the Court of Appeal in Bakunda's case (supra) contravenes Article 126(2)(e)of the Constitution.

We find some of the grounds advanced by Mr. Tumwesige for saying that the petition discloses no cause of action unmeritious. His argument that the petitioner or the Attorney General needed to be parties to the Bakunda's case or that parties to the Bakunda's case should be parties to this petition to found a cause of action is untenable in view of the clear provision of Article 137 (3) of the Constitution. Clause 3 of the Article provides that:

> "A person who alleges that:
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> (a) an Act of Parliament or any other law or anything in or done under the authority of any law or
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> (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."

To us, the question of locus standi is made very clear by the above provision of the article. One only needs to allege any of the above and he or she will be entitled to petition the Constitutional Court. He or she does not have to show any personal interest.

In IRC vs National Federation of Self-employed and Small Business Ltd (1981) 2 ALL.E.R. 93. Lord Dipick said, at page 107,

> "It would in my view be a grave lacuna in our system of public law if a pressure group, like the federation or even a simple spirited tax-payer, were prevented by out-dated technical rule of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

In that case there was a long standing practice in Fleet Street London for casual employees on National News-paper to evade tax. In order to prevent the tax evasion by the casual employee, the Inland Revenue made special arrangement with the casual workers' employers, employees and the workers' union whereby the employees were required to register with the

Revenue and submit tax return for the previous two years in return for an undertaking by the Revenue not to investigate tax evaded prior to the previous two years.

A federation of self employed persons and small business Ltd which claimed to represent a body of tax-payers applied for judicial review under the rule of the court seeking:-

(i) a declaration that the Revenue had acted unlawfully in making the arrangement and

(ii) an order of mandamus directing the Revenue to assess and collect tax on the News-paper employees as required by law.

The Revenue opposed the application on the ground that the applicant did not have "a sufficient interest in the matter" relating to the application as required by Order.53 r. 3-(5) RSC for the court to grant it the necessary leave to apply for judicial review.

One of the questions raised therein was whether if a government department or a public authority is transgressing or about to transgress the law in a way which offends or injures a large portion of the population, can a group of citizen or even a single public spirited citizen bring the matter to court to vindicate the law and get the unlawful conduct stopped? This and other questions went to House of Lord on appeal.

There, Lord Dipick who gave the above quoted observations had cited with approval the following remarks made earlier by Lord Denning while considering a similar question in R vs Greater London Council Ex-parte Blackburn (1976) 3 ALL ER 184 at 192 or (1976) 1 WILR 550 at 559 thus.

> "I regard it as a matter of high constitutional principle that if there is a good ground for supposing that a government department or a public authority is transgressing the law or is about to transgress it in a way which offends or injures thousands of Her Majesty's subject, then anyone of those offended or injured can draw it to the attention of the court of law and seek to have the law enforced and the courts in their discretion can grant whatever remedy is appropriate"

The House of Lord allowed the appeal on another ground that the Federation failed to show any conduct of the Revenue that was ultravires or unlawful. The above cases are not binding on us, but have persuasive value.

In our view, Article 137(3) of the Constitution *1995* provides for who can petition the Constitutional court for declaration.

However, his second and third grounds which may be summarised as,

> "the act complained of being a decision of court can not be challenged under Article 137 of the Constitution except by way of the appeal if the law allows it"

have some merits. We agree that a decision of a court can only be challenged by way of appeal. Where there is no right of appeal like in the Bakunda's case, if the decision is alleged to be contrary to a provision of the Constitution, it can not be challenged under Article 137 of the Constitution because the power to interpret statutes is vested in the courts. A decision of a final court has no remedy in the Constitutional Court as the latter court is not an appellate court. To do so would only undermine the principle of finality and circumvent the law which prohibits appeal from such a decision. We think that the remedy in such a case lies with Parliament which has power to amend the relevant law.

Section 96(3) of the Parliamentary Elections (Interim Provisions) Statute No.4 of 1996 provides that:

> "the decision of the Court of Appeal in an appeal under this section is final"

That means that no appeal lies from the decision of the Court of Appeal in election petitions. Such a decision if alleged to be contrary to a provision of the Constitution can not be challenged in the Constitutional Court under Article 137 of the Constitution as that would be circumventing what Section 96(3) of the Statute No.4 of 1996 prohibits. It would amount

to allowing appeal from the decision of the Court of Appeal in election petition through the back door. That would be contrary to the clear intention of the legislature.

We have perused the judgment of the Court of Appeal in Bakunda's case (supra) and also the ruling of the Supreme Court in Kabogere Coffee Factory vs Haji Twahibu Kigongo S.C.U.

Civil Application No.10 of 1993 (unreported) on which the Court of Appeal relied in its decision in Bakunda's case. We are in full agreement with their arguments and interpretation of section 2 of the Commissioner for Oaths (Advocates) Act (Cap 53) in conjunction with Section 14 of the Advocates Act 22 of 1970. In our view, if the public feels that the application of the law as interpreted by the courts causes injustice or that it runs contrary to a provision of the Constitution, the remedy does not lie in petitioning the Constitutional Court for a declaration. The remedy lies with Parliament which has the power to amend the relevant law as we have already stated above.

Paragraph 8 of the petitioner's affidavit states that the petitioner's Election Petition No. MKA 3 of 1996 is still pending in the High Court District Registry in Kabale and he fears that if it is heard, it would be dismissed in view of the decision in Bakunda's case.

The procedure to be followed when an issue of Constitutional interpretation arises during a trial was dealt with by the Supreme Court of Uganda in the leading Judgment of Wambuzi - C.J., in Civil Appeal No.7 of 1992 - Attorney General vs Milton Obote Foundation and Another. He said, at page 30 of his judgment thus.

> "I would direct that the original suit between parties be set down for hearing and if at the hearing the parties wish to take any preliminary points for decision, then the trial court shall frame the issue to be determined and shall also record the evidence necessary to substantiate any claims made. If the trial court is satisfied that the question raised involve a substantial question of law or if the court is so requested by any of the parties it shall then make a reference of the issue to a Constitutional Court provided that it is of the opinion that the issues are sufficiently important to the proceedings to require such a reference"

It is clear from the above quotation, that when there is a case pending and there arises an issue of Constitutional interpretation in it, one does not have to stop the proceeding in that case and file a petition in the Constitutional court seeking to resolve that Constitutional issue. The proper course is to proceed with the case as stated above and raise the issue in the course of the hearing then a reference of the issue would be made after evidence sufficient to substantiate the claim is recorded.

In Constitutional Petition No.4 of 1997 John Arutu vs Attorney General, (unreported) the Magistrate Court made a reference to this court without following the above procedure. This

Court remitted that reference to the trial court for it to proceed with the trial of the case and to make a reference if necessary, in accordance with the above procedure.

In the instant case, the trial Judge should have proceeded to hear the election petition. And if in the course of the hearing an issue requiring constitutional interpretation arose, the trial Judge should have after recording the evidence sufficient to substantiate the claim, framed the issue and referred it to this court for determination.

Learned Senior Counsel for the petitioner further submitted that the preliminary objection should be brushed aside and the hearing of the petition continued. He cited Tinyefuza vs The Attorney General Constitutional Petition No.1 of 1996 in support of his view. We think that Tinyefuza's case as it stands now (it is on appeal) is distinguishable from the present petition in that the objection therein was mainly on irregularities pertaining to the supporting affidavit and the petition was in respect of violation of a fundamental right of an individual. In the instant petition, the objections touched on fundamental points of law which go to the root of the case. For example limitation of time, propriety of parties and question of cause of action. These questions, cannot simply be brushed aside. In the words of Roman LJ in Evertt vs Ribband and Another (1952) 2 OB 198 at 206-207.

> "I think where you have a point of law which if decided in one way is going to be decisive of litigation, then advantage ought to be taken of the
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> facilities by the Rules of court to have it disposed of at the close of pleadings or very shortly after the close of pleadings".

We are alive to the provision of Rule 18 of the Legal Notice No. 4 of 1996 which we think does not apply to this case. The rule is to the effect that-

> "no proceeding upon the petition shall be defeated by any formal objection or by the miscarriage of any notice or any document sent by the Registrar to any party to the petition".

The preliminary objections in this petition, if upheld could be decisive to the case. No useful purpose would therefore be served to go through the whole length of trial which would involve unnecessary costs. We therefore resolved to deal with the preliminary objections at once. As it is, we think with respect that the petition is misconceived and incompetent.

Before we take leave of this matter, we wish to observe that advocates have a duty to advise their clients on legal matters. Cases such as this one, indicate want of such advice. We think that an advocate who brings to court such a case which with due diligence would not be brought should in future be ordered to personally pay costs. With those remarks and for reasons given we uphold the objections that the petition is time barred, discloses no cause of action and that the Attorney General is not the right party to this petition.

It is accordingly struck out with cost to the Respondent. So be it.

Dated at kampala this 14th day of December 1997.

G.M. OKELLO,
JUSTICE OF APPEAL.

A.E. MPAGI-BAHIGEINE,
JUSTICE OF APPEAL.

S.G. ENGWAU,
JUSTICE OF COURT OF APPEAL.

M. KIREJU,
JUSTICE OF APPEAL.

A TWINOMUJUNI

JUSTICE OF APPEAL.