

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

**CORAM: HON. LADY JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ**

**HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA**

**HON. MR. JUSTICE A. TWINOMUJUNI, JA**

**HON. LADY JUSTICE C.N.B. KITUMBA, JA**

**HON. MR. JUSTICE S.B.K. KAVUMA, JA**

**CONSTITUTIONAL PETITION NO.6 OF 2005**

**BRIGADIER HENRY TUMUKUNDE :::::::::::PETITIONER**

**VERSUS**

- 1. ATTORNEY GENERAL**
- 2. THE ELECTORAL COMMISSION ::::::::::RESPONDENTS**

**JOINT JUDGEMENT OF:**

- 1. HON. L.E.M. MUKASA KIKONYOGO, DCJ**
- 2. HON. C.N.B. KITUMBA, JA**

This petition is filed by Brigadier Henry Tumukunde, hereinafter to be referred to as the petitioner. It is brought under articles 137, 20, 21, 29, 80, 83 and 84 of the Constitution and Legal Notice No. 4 of 1996. The grounds of the petition are contained in the petition itself and in the affidavit in support thereof deposed to by the petitioner on 40 7/06/05. The petitioner alleges as follows

- 1.** That your petitioner is an adult male citizen of Uganda of sound mind being aggrieved by actions infringing my rights under the Constitution and also having interest in the defence of the Constitution and affected by the following matters being inconsistent with the Constitution of the Republic of Uganda, 1995, whereby your petitioner is also aggrieved.

That the act of the Commander- in- Chief and some senior officers of the UPDF directing your petitioner to resign from his position as Army Representative in Parliament of Uganda is inconsistent with and contravenes articles 80, 83(1) and 84 of the Constitution.

That the act of the Speaker of Parliament in accepting and declaring your petitioner's seat in Parliament vacant on the basis of a letter implementing a directive to resign is inconsistent and contravenes articles 80, 83(1) and 84 of the Constitution when the petitioner has not done any act in conflict with article 80 of the Constitution.

That the act of Uganda Peoples Defence Forces of restraining your petitioner as a member of Parliament from expressing himself on all political matters irrespective of the Constituency that your petitioner represents while exempting others from the same restriction is contrary to Articles 20, 21 and 29 of the Constitution.

- 5.** The Electoral Commission is in the process of declaring the petitioner's seat vacant and is about to commence the electoral process to replace the petitioner as a member of Parliament contrary to article 83(1) and 84 of the Constitution whereas the petitioner is still willing and able to serve as a member of Parliament.
- 6.** That this petition is accompanied by the affidavit deponed by your petitioner." (sic)

The petitioner is praying this court for the following reliefs

“ (a) A declaration that the act of the Commander-in- Chief and Army Command in

**directing our petitioner to resign his position as Army representative in Parliament of Uganda is inconsistent with and contravenes articles 80, 83 and 84 of the Constitution.**

**(b) A declaration that the action of the Speaker of Parliament of Uganda in accepting and declaring your petitioner's seat in Parliament vacant on the basis of a letter implementing a directive to resign is inconsistent and contravenes articles 83 (1), 80 and 84 of the Constitution.**

**(c) A declaration that the act of Uganda Peoples Defence Forces in restraining your petitioner as a member of 10 Parliament from expressing himself on all political matters irrespective of the Constituencies that your petitioner represents while allowing others to do so with impunity contravenes articles 20, 21 and 29 of the Constitution.**

**(d) Orders of redress in terms of damages to your petitioner for violation of inherent rights and freedoms for;**

**(i) Freedom of speech (ii) Freedom of Movement and**

**assembly.**

**(e) Grant an Order of Redress by restraining the respondents and all their officials and agents from taking any further steps towards the conduct of the elections for army representative in place of your petitioner.**

**(f) A declaration that your petitioner is still the legally elected representative of the Uganda Peoples Defence Forces in the Parliament of Uganda and an Order forbidding, prohibiting and/or restraining the 2<sup>nd</sup> respondent from declaring the petitioner's seat vacant or conducting elections to replace the petitioner.**

**(g) An order that the respondents pay the costs of this petition to the petitioner, (sic)"**

The petitioner was represented by Hon. Emmanuel Twarebiraho and Mr. Oscar

Kambona. The Solicitor General Mr. L. Tibaruha assisted by Mr. Joseph Matsiko, Ag. Director of Civil Litigation and Mr. Okello Oryema SSA appeared for the Attorney General, hereafter to be referred to as the 1<sup>st</sup> respondent and the Electoral Commission also to be referred to as the 2<sup>nd</sup> respondent.

In their answer to the petition, the respondents denied all the 20 allegations contained in the petition. The answer reads as follows

**“ 1. Save what is herein expressly admitted, the respondents deny all allegations contained in the petition as if the same were set forth and traversed seriatim.**

**In reply to paragraph 2 of the petition the respondents deny any contravention of articles 80, 83(1) and 84 of the Constitution and aver that the petitioner was never forced to resign from his position as Army Representative in Parliament, and that his resignation is effective and not unconstitutional.**

- 3.. The respondents further aver that in any event the alleged actions of the President/Commander-in-Chief are not challengeable in Court.**
- 4.. In reply to paragraph 3 of the petition, the respondents aver that in accepting the petitioner's letter of resignation, the Speaker did not breach articles 80, 83, or 84 (1) of the Constitution.**
- 5. In reply to paragraph 4 of the petition, the respondents aver that the petitioner is barred by the Constitution and the Uganda People's Defence Forces Act from engaging in partisan politics and from making statements or engaging in conduct that is partisan or prejudicial to good order and discipline of the Army, and contravention of articles 20, 21 and 29 of the Constitution is denied.**
- 6. In reply to paragraph 5 of the petition, The respondents aver that the petitioner's seat in Parliament fell vacant and the 2<sup>nd</sup> respondent has not breached articles 83 (1) and 84 of the Constitution as alleged or at all.**
- 7. The respondents aver that this petition is incompetent, misconceived and shall contend at the hearing that it is not supported by admissible evidence or at all, and that the petitioner is not entitled to any reliefs".**

WHEREFORE it was prayed for the respondents that this Court dismisses the petition with costs.

The answer was supported by two affidavits. One was deponed to on 14/06/05 by Angella Kiryabwire Kanyima, a Principal State Attorney in the 1<sup>st</sup> respondent's chambers. The second one dated 22/06/05 was sworn by Major General Joshua Masaba, the Chief of Staff of the Uganda Peoples Defence Forces (UPDF) and a member of UPDF Forces Council, (sic)

Following the scheduling conference the parties agreed to the five following issues.

1. **Whether the actions of the Commander- in- Chief can be challenged in a Court of Law.**
2. **Whether the petitioner's letter dated 28<sup>th</sup> May 2005 amounted to a resignation of his seat in Parliament.**
3. **Whether the notification of the Electoral Commission that the petitioner's seat had fallen vacant contravened articles 80, 83(1) and 84 of the Constitution.**
4. **Whether UPDF in pressing charges against the petitioner contravened articles 20, 21, and 29 of the Constitution.**
5. **What reliefs are available to the parties?**

#### **Issue No. 1**

On Issue No. 1, it was Mr. Oscar Kambona's contention that the acts of the President of Uganda and Commander- in- Chief were challengeable in a competent court of law. He gave two reasons for taking that position. Firstly **article 2 of the Constitution of Uganda** proclaims the supremacy of the Constitution.

Article 2 states that:

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

It follows, therefore, that its observance and protection is mandatory on all persons including the Commander- in- Chief of the Uganda People's Defence Forces, hereafter to be referred to as UPDF. The petition is not on the person of the President but the issue is observance of fundamental human rights and freedoms. Secondly, the Constitutional Court is seized with jurisdiction under **article 137 of the Constitution** to entertain a petition

for observance of human rights and freedoms. Its purpose is to determine whether the acts of both the President and the UPDF Officers were inconsistent with and contravened the Constitution. Counsel invited the Court to answer this issue in the affirmative.

For the respondents it was argued by the learned Solicitor General that the issue was basically a matter of the law which goes to the root of the petition. Relying on article **98 clauses 1 and 4 of the Constitution** it was the learned Solicitor General's contention that actions of the President cannot be challenged in a court of law with the exception of **article 104(8)** of the Constitution.

**Clause (1) of Article 98 reads as follows:**

**“There shall be a President of Uganda who shall be the Head of State, Head of Government and Commander-in-Chief of the Uganda Peoples' Defence Forces and the Fountain of Honour”.**

**Clause (4)** reads that:

**“While holding office, the President shall not be liable to proceedings in any court”.**

**Clause (5) of Article 98 reads as follows:-**

**“Civil or criminal proceedings may be instituted against a person after ceasing to be President, in respect of anything done or omitted to be done in his or her personal capacity before or during**

**the term of office of that person; and any period of limitation in respect of any such proceedings shall not be taken to run during the period while that person was President”.**

Counsel further argued that the importance of clause 1 of article 98 is that each of the four attributes mentioned in that clause namely, Head of State, Head of Government, Commander-in-Chief of UPDF and Fountain of Honour constitute the person of the President. Whilst holding that office, the President cannot be liable to any proceedings in any court in his official or private capacity. With the exception of the Presidential Election Petitions under article 104(8) of the Constitution, by challenging the act or acts of the President in court, the petitioner is subjecting him to judicial proceedings.

Further, the Solicitor General submitted that as for the directive to resign, it is argued for the respondents that it was not inconsistent with and did not contravene the Constitution. It is not disputed that as the Commander-in-Chief, the President could advise the petitioner as an army representative in Parliament without contravening the Constitution. Counsel pointed out that the directive to resign can never be a subject of challenge in any proceedings in any court of law. He, therefore, prayed court to answer Issue No. 1 in the negative. Further, as far as the Solicitor General was concerned his submissions on this issue are sufficient to dispose of the petition because he contended it was incompetent and misconceived. However, he decided to proceed to address the court on the remaining issues, presumably should he be overruled.

We accept that as submitted by the learned Solicitor General that the President of Uganda with the four attributes stated in article 98(1) (supra) is at all times entrusted with the complete control of the affairs of the state. He occupies a unique office with powers and responsibilities so vast and so important that public interest demands that he devotes his undivided time and attention to his public duties.

Historically, the President/King has been over and above all other persons. See: Constitutional and Administrative Law by Stanley De Smith and Rodney Brazier 7<sup>th</sup> Edition pages 153-154. He enjoyed sovereign immunity. In the case of Nighell vs Sultan of Jahore (1894) QB 149, the



defendant successfully pleaded sovereign immunity from the jurisdiction of the Court. The plaintiffs action was discontinued.

The rationale behind that is not hard to find. Clearly each of the three arms of the Government namely; the Executive, the Legislature and the Judiciary is independent. There is need for each arm to respect the duties of the others. Unless the President is immune from legal proceedings while holding office, there exists a threat of judicial interference with the executive branch through orders, and other court decisions which would violate the separation of power principle.

In the case of **Baker vs Cart 369 U.S. 1962** it was held by the USA Supreme Court that, when the President is exercising his constitutional executive powers, he is exempted from judicial scrutiny. However, the aforesaid notwithstanding, the courts can review the Head of State powers if the President acts in bad faith or misconstrued his powers. It is an accepted fact when executing his duties, he must do so legally and constitutionally. He has to exercise his powers in a non- arbitrary manner.

As long as the President acts in good faith and if the political decisions are objectively rational, the court will not interfere with the decision because it disagrees with it.

On the other hand, in the more recent case of William Jefferson Clinton, petitioner vs Paula Corbin Jones, 520 U.S. 681 (1997) when the doctrine of Presidential Immunity was extensively considered, the courts in U.S.A decided that, the doctrine with respect to actions taken in his **“public character”** that is official acts, the President may be disciplined principally by impeachment, but not by private law suits for damages. But he is, otherwise, subject to the laws for his purely private acts.

In Uganda we are alive to the provisions of **articles 98 (1),** and

**4, and article 104(8) of The Constitution (supra) which are**

relevant to the issue before court. Article 104 (8) reads as

follows

**“For the purposes of this article, clause (4) of article 98 of this Constitution shall not apply”.**

10 In Uganda, on a proper interpretation of the Constitution and other relevant laws, our considered view is that there is nothing to stop this Court from entertaining a complaint challenging the President’s act or acts. Article 137 is clear and needs no further explanation.

However, challenging the act or acts of the President is one thing and prosecuting him and bringing him before a court of law is another. We agree that under clause 4 of article 98 (supra) the President cannot be prosecuted for a criminal offence or sued in a civil action in any court. The sole exception is the Presidential Election Petition. An aggrieved party in any other civil or criminal matter will have to wait until the end of his term of office.

**Clause (5) of article 98 reads:**

**“ Civil or criminal proceedings may be instituted against a person after ceasing to be President, in respect of anything done or omitted to be done in his 30 or her personal capacity before or during the term of office or that person; and any period of limitation in respect of any such proceedings shall not be taken to run during the period while that person was President”.**

With regard to the parties to the action for complaints against an act or acts of the President, the proper respondent or person to sue is the Attorney General. In the premises we accept Mr. Oscar Kambona's submission that the act or acts of the President of Uganda in appropriate cases can be challenged in courts of law. However, while holding office, the President shall not be liable to proceedings in any court. The answer to Issue No. 1 is in the affirmative.

On **issue No. 2** that is concerning the petitioner's letter written on 28<sup>th</sup> May 2005, it was submitted for the petitioner that the said letter was and is not a resignation letter. It reads as follows

**" 28 May 05**

**Hon. BRIG. H. Tumukunde**

***Right Honourable Speaker of Parliament of Uganda  
P.O. Box 7178, Kampala***

***Mr. Speaker Sir,***

***I was summoned to a meeting by the Commander in Chief of the UPDF on the 27<sup>th</sup> of May 2005 to which I comply.***

***During the meeting attended by UPDF Command, I was directed to write to you Mr. Speaker resigning. This directive had a deadline of 12 hours. This explains my writing on a weekend.***

***The purpose of this communication is to draw your attention to the above directive and to accord comply.***

***Please do not hesitate to contact me if you need my further clarifications.***

***Yours faithfully, (sic)***

***Henry Tumukunde***

***BRIGADIER***

***c.c Commander in Chief of the UPDF " c.c. UPDF Forces  
Council***

His counsel argued that it was not disputed by both respondents that the petitioner is currently in detention. In those circumstances, he submitted, that the letter could not have

been written voluntarily to make it a resignation. As far as the petitioner is concerned it was a directive and indeed that is what he communicated to the Hon. Speaker of Parliament and not a resignation. Additionally, counsel argued, that the petitioner was the best person to explain a document of which he is the author. In the instant petition another person, a stranger, cannot come and say that the letter was a resignation. On perusal of **article 83 of the Constitution** it is clear that a directive from a superior is not one of the instances a Member of Parliament may vacate his seat.

On the averment contained in paragraph 4 of Angella Kiryabwire's affidavit to the effect that there was no evidence of force used, counsel argued that there was no need for further evidence. To him, the petitioner's letter speaks for itself. It clearly states it is a directive and that no more 10 evidence of force is required. He also invited this court to disregard paragraphs 8, 9, and 10 of Major General Masaba's affidavit where he attempts to throw some light on the matter which, to him was an attempt by the 1<sup>st</sup> respondent to distort the events that occurred. Advice and a directive are different things. Relying on **sections 92 and 94 of The Evidence Act**, counsel submitted that it was wrong to adduce oral evidence to contradict a written document. Masaba's affidavit clearly stated that they were not happy before the petitioner's letter of 28/05/05, was written which shows it must have been a 20 directive. The petitioner should have been recalled and not given a directive. It was vehemently argued for the petitioner that the Commander-in-Chief of UPDF and the members of the High Command were wrong in directing the petitioner to resign his position as an army representative in the Parliament of Uganda. The directive was inconsistent with and contravened **articles 80, and 84 of the Constitution**.

In reply, the learned Solicitor General submitted that the petitioner's letter of 28/05/2005 was an effective letter of resignation which made his seat in Parliament vacant for a number of reasons.

Firstly, there is no constitutional requirement that to be an effective resignation, it must be accompanied by reasons. To support his submissions, counsel referred the court to **article 83(1) (a) of The Constitution**.

**“ (1) A member of Parliament shall vacate his or her seat in Parliament (a) if he or she resigns his or her office in writing signed by him or her and addressed to the Speaker;”**

Secondly, the letter fulfilled the three requirements provided under article 83(1) (a) of the Constitution and it was, therefore, an effective letter of resignation. Before accepting the resignation, the Speaker does not have to demand to know reasons why a member of Parliament is resigning. It was submitted for the respondents that the directive of the President was not unconstitutional.

We listened to the submissions and arguments advanced by counsel on both sides on this issue and we have considered them carefully. Whether the petitioner was directed or advised by the Commander- in- Chief there is no evidence to show that he was forced to write the letter of resignation to the Speaker. In any case he did not have to write it. He could have refused. He states in his letter that he was given 12 hours in which to write the letter. He wrote it voluntarily on his letterhead and sent it to the Hon. Speaker.

Further, the petitioner who is a soldier, had no choice but to obey orders from the Commander-in-Chief. The fact that he wrote the letter under the directive did not affect the effectiveness of the letter to the Speaker. On the evidence before court we do not accept that the directive contravened **articles 80, 83, and 84 of the Constitution. Article 80** provides for qualifications and disqualifications of the members of Parliament.

Clearly, the Commander-in-Chief did not deny the fact that the petitioner had the necessary qualification for membership of Parliament. He was only displeased with his conduct. On perusal of the provisions of **articles 83(1)**, the petitioner's tenure of office ceased when the Speaker received the letter and accepted it. The letter amounted to a resignation because **article 83(1)** reads as follows:-

**“1. A member of Parliament shall vacate his or her seat in Parliament- (a) If he or she resigns his or her office in writing signed by him or her and addressed to the Speaker.”**

The petitioner wrote a letter resigning his seat in Parliament. He addressed it to the Hon. Speaker of Parliament. He (Speaker) accepted the resignation. It is not a requirement for the Speaker to investigate the reasons for the resignation. All that was required was fulfilled and hence the letter was an effective resignation. In accordance with the Constitution the Hon. Speaker declared the petitioner's seat vacant. With regard to the petitioner's complaint on the President's directive to him to write the letter to vacate his seat, for the reasons already mentioned it was not unconstitutional. The President had powers to give orders to the petitioner, a Brigadier in UPDF and a member of the UPDF Council. Under section **10(4) of UPDF Act** (Cap 307) the Uganda People's Defence Council operates under the general direction of the President. There is no doubt the President, the Commander-in-Chief of the UPDF has the authority to direct or guide any soldier including an army representative in Parliament on any military matter. It is true there is a laid down procedure by Parliament under which a member of Parliament could be recalled from that office on

any of the three grounds mentioned therein and including

**“(a) Misconduct or misbehaviour likely to bring hatred contempt or disrepute to the office”.**

The petitioner’s constituency namely UPDF Council did not have to follow that procedure as submitted by his counsel. For the aforesaid reasons our answer on issue No. 2 is in the affirmative.

**Issue No. 3**

It was the contention of the petitioner that the notification to the Electoral Commission by the Speaker that the petitioner’s

seat had fallen vacant contravened **articles 80 and 83(1)** and **84 of the Constitution**. He relied on his earlier submissions on issue No. 2 that there was no resignation, and that no record was taken. Counsel submitted that the Hon. Speaker wrongly notified the Electoral Commission of the petitioner's seat falling vacant. Counsel emphasized the fact that notification must be made only when there is a vacancy which was not the case.

The Solicitor General did not agree with counsel for the petitioner. He submitted that the Speaker of Parliament was right to accept the resignation. Consequently he did not contravene the Constitution when he notified the Electoral Commission that the petitioner's seat had fallen vacant.

In our view, on the record before court, the Hon. Speaker cannot be faulted for notifying the Electoral Commission of the vacant seat. The law is clear and speaks for itself. Having ruled that the petitioner's resignation was effective, the only course open to the Speaker was to comply with the relevant provisions of the law. There was no contravention of the Constitution. We answer Issue No. 3 in the negative.

#### **Issue No. 4**

With regard to issue No. 4 relating to charges preferred against the petitioner, it was submitted for him that they contravened **articles 20, 21 and 29 of the Constitution**. The petitioner was charged before the General Court-Martial with two offences. The gist of the said charges is that on several occasions the petitioner contacted the press and made public statements over the radio which were prejudicial to the good order and discipline in the army. He was also charged with spreading harmful propaganda contrary to **section 38(1) and 2 (c) of the UPDF Act**. It was strongly argued for him that the act of UPDF in restraining him as a member of Parliament from expressing himself on all political matters irrespective of constituencies that he represents while allowing the others to do so with impunity contravenes **articles 20, 21, and 29 of the Constitution**.

To require the petitioner to obtain permission is a violation of his freedom of speech and expression. According **to article 20 of the Constitution**, fundamental rights and freedoms



of an individual are inherent and not granted by the State. **Article 79 of the Constitution** outlines the functions of a member of Parliament. Once a member of Parliament, the petitioner is under an obligation under **article 79(3) of the Constitution** to protect the Constitution and promote the democratic governance of Uganda. There is nothing in the Constitution to restrict a member of Parliament to his or her constituency. He or she can make law for the whole country. To restrain him or her from freely visiting or mixing with Ugandans generally is unconstitutional.

In reply, the learned Solicitor General did not agree with counsel for the petitioner on this issue. As far as he was concerned, the charges preferred against the petitioner did not contravene **articles 20, 21 and 29 of the Constitution**.

Additionally, he explained that they were not entrenched. He pointed out that military law enjoins the petitioner to observe it. He must also comply with the army code of conduct. In accordance with the UPDF Act and standing orders, he is required to obtain permission before communicating any information to an outsider or stranger, and especially to the press.

We heard the submissions and arguments advanced by the learned counsel for both sides and we appreciate the petitioner's concerns. We agree that soldier members of Parliament are full members of Parliament with equal rights and obligations as the civilian members of Parliament. They subscribe to an oath of office to defend, support and uphold the Constitution at all times. It is not disputed that the petitioner is entitled to all the powers and privileges any other member of Parliament has.

The aforesaid notwithstanding, the petitioner as an officer of the UPDF remained a soldier. He must, therefore, obey the army code of conduct and observe the discipline. To defend the Constitution, the petitioner does not have to commit a breach of the law. He is enjoined to employ lawful means to fulfill his obligations. The rights and freedoms provided under **articles 20, 21 and 29 of the Constitution** must be enjoyed within the confines of the law.

Those rights are apparently not

absolute. They are important but are no derogable freedoms under **article 44 of the Constitution.**

Clearly the petitioner knew that participating in radio talk shows and making statements to outsiders without permission from the relevant authority was an offence under the UPDF Act, military standing orders, army code of conduct and other military law enacted in accordance with the Constitution to operationize it. The petitioner should, therefore, not have chosen those methods he used to defend the Constitution and fulfill his obligations as a member of Parliament. He should have employed appropriate ones.

**Rule 20 of the Army Standing Orders (Vol.I) states as follows: -**

**“Military personnel are not allowed to contact the press unless approved by the Army Commander”**

We are mindful that the authority or regulations or rules must be subordinated to the Constitution. However, the petitioner has not proved to the satisfaction of this Court that the army code of conduct, standing orders or any other existing military law or regulations are inconsistent with the Constitution.

As regards the complaint of discrimination of soldier members of Parliament there is no evidence on record to support it. They are not prohibited to speak to the press, to address rallies and to attend local or national functions. All that is required of them is to obtain permission or approval of the Commanding Officer. In our opinion we do not consider that requirement unreasonable. It must have been enacted to enforce observance of discipline and also for security reasons.

Members of Parliament are not above the law. In this we are fortified by the provisions of **article 43 of the Constitution** which under clauses 1 and 2 provide as follows:

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

**“(2) Public interest under this article shall not permit-**

**(a)**

**(b)**

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

To deny the UPDF to enforce military law and especially the army code of conduct against its officers representing it in Parliament would be tantamount to authorizing indiscipline on their part.

For the aforesaid reasons we hold that preferring charges against the petitioner in the circumstances in which it was done, was not inconsistent with and did not contravene **articles 20,**

**21 and 29 of the Constitution.**

The answer to issue No. 4 is in the negative.

#### **Issue No.5 Reliefs**

Lastly what reliefs is the petitioner entitled to if any? Counsel for the petitioner prayed for damages under **article 137 of the Constitution** but, on the record before us there is no evidence of violation of the petitioner's fundamental human rights and freedoms to justify awarding him damages. Although issue No.1 is decided in his favour, it is on a point of law and as such does not entitle him to any damages. We are, therefore, unable to award him any.

The petitioner had also originally prayed for more declarations but he had to abandon several of them because they had been overtaken by events. This Court is, hence, left with the determination of only the five issues framed and agreed upon by the parties at the scheduling conference. Our declarations on the issues framed by the parties are as follows:-

1. **On issue No.1 Actions of the President of Uganda can be challenged in a competent court of law. However, while holding office, the President shall not be liable to proceedings in court.**
2. **On issue No. 2 we are satisfied that the petitioner's letter dated 28<sup>th</sup> May 2005 addressed to the Rt. Hon. Speaker amounted to resignation of the petitioner's seat in Parliament.**
3. **With regard to issue No.3 notification of the Electoral Commission that the**

**petitioner's seat had fallen vacant did not contravene articles 80, 83, and 84 of the Constitution.**

- 4. On issue No.4, the acts of the UPDF Council preferring charges against the petitioner were not inconsistent with and did not contravene articles 20, 21 and 29 of the Constitution.**
- 5. On issue No.5 no damages are awarded to the petitioner.**

In the premises this petition must fail. We would dismiss it and order each party to pay its own costs.

**and did not contravene articles 20, 21 and 29 of the Constitution.**

**(5) Issue No. 5**

**By a unanimous decision of the court the petitioner is not awarded damages.**

In the result by a majority of three to two the petition is dismissed. Each party will bear its own costs.

Dated at Kampala this 25<sup>th</sup> day of August 2005.

**L.E.M MUKASA-KIKONYOGO, HON DEPUTY CHIEF JUSTICE**

**C.N.B. KITUMBA  
HON. JUSTICE OF APPEAL**

**THE REPUBLIC OF UGANDA**  
**IN THE CONSTITUTIONAL COURT OF UGANDA AT**  
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**CORAM: HON LADY JUSTICE L.E.M. MUKASA KIKONYOGO, DCJ**

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**CONSTITUTIONAL PETITION NO. 06 OF 2005**

**BRIGADIER HENRY TUMUKUNDE:..... " "PETITIONER.**

**VERSUS**

**1. ATTORNEY GENERAL**

**2. ELECTORAL COMMISSION:.....RESPONDENTS.**

**JUDGEMENT OF A.E.N. MPAGI-BAHIGEINE, JA**

This petition was filed by Brigadier Henry Tumukunde, hereinafter referred to as the petitioner. It is under articles 137, 20, 21, 29, 83 and 84 of the Constitution of Uganda 1995 and Rules of the Constitutional Court (Petitions for Declarations under article 137 of the Constitution) Directions, Legal Notice No 4 of 1996 and all other enabling laws.  
The petitioner's grievances are:-

**1. That the act of the Commander-in-Chief and some senior officers of the UPDF directing your**



**petitioner to resign from his position as Army Representative in Parliament of Uganda is inconsistent with and contravenes articles 80, 83 (1) and 84 of the Constitution.**

- 2. That the act of the Speaker of Parliament in accepting and declaring you petitioner's seat in Parliament vacant on the basis of a letter implementing a directive to resign is inconsistent and contravenes Articles 80, 83 (1) and 84 of the Constitution when the petitioner has not done any act in conflict with Article 80 of the Constitution.**
- 3. That the act of Uganda Peoples Defence Forces of restraining your petitioner as a Member of Parliament from expressing himself on all political matters irrespective of the constituency that your petitioner represents while exempting others from the same restriction is contrary to Articles 20, 21 and 29 of the Constitution.**
- 4. That Electoral Commission is in the process of declaring the petitioner's seat vacant and is about to commence the electoral process to replace the petitioner as a Member of Parliament contrary to Articles 83(1) and 84 of the Constitution whereas the**

**petitioner is still willing and able to serve as a Member of Parliament.**

He seeks the following reliefs

- (a) A declaration that the act of the Commander-in-Chief and Army command in directing our petitioner to resign his position as Army Representative in Parliament of Uganda is inconsistent with and contravenes Articles 80, 83 (1) and 84 of the Constitution.**
- (b) A declaration that the action of the Speaker of Parliament of Uganda in accepting and declaring your petitioner's seat in Parliament vacant on the basis of a letter implementing a directive to resign is inconsistent and contravenes articles 83(1), 80 and 84 of the Constitution.**
- (c) A declaration that the act of Uganda Peoples Defence Forces in restraining your petitioner as a Member of Parliament from expressing himself on all political matters irrespective of the constituencies that your petitioner represents while allowing others to do so with impunity contravenes articles 20, 21 and 29 of the Constitution.**
- (d) Orders of redress in terms of damages to your petitioner for violation of inherent rights and freedom for;**
  - (1) Freedom of speech.**
  - (2) Freedom of Movement and Assembly.**
- (e) Grant an Order of Redress by restraining the respondents and all their officials and agents from taking any further steps towards the conduct of the elections for Army Representative in place of your petitioner.**

**(f) That all actions taken by the respondent subsequent to the letter of 28<sup>th</sup> May 2005 seeking to replace the petitioner as Member of Parliament be declared null and void.**

The petition was supported by the petitioner's affidavit sworn on 7<sup>th</sup> June 2005.

The respondent filed an answer to the petition contending that the petitioner was not entitled to any of the reliefs sought as none of the Constitutional provisions alleged were ever breached. In particular, the following paragraphs of the answer state:

**“2. In reply to paragraph 2 of the petition the respondent deny any contravention of articles 80, 83 (1) and 84 of the Constitution and aver that the petitioner was never forced to resign from his position as Army Representative in Parliament, and that his resignation is effective and not unconstitutional.**

**2. The respondent further avers that in any event the alleged actions of the President/Commander-in-Chief are not challengeable in court.**

**4.....the respondents aver that in accepting the petitioner's letter of resignation, the Speaker did not breach articles 80, 83 or 84(1) of the Constitution.**

**5. ....the petitioner is barred by the Constitution and the People's Defence Act from engaging in partisan or making statements or engaging in conduct that is partisan or prejudicial to good order and discipline of the Army, aid contravention of articles 20, 21 and 29 of the Constitution is denied.”**

In the respondent's view the petition is misconceived, incompetent and is not supported by any evidence.

The answer was supported by two affidavits; one deposed by Ms. Angella Kiryabwire Kanyima, Principal State Attorney and dated 4<sup>th</sup> June 2005. The other affidavit dated 22 June 2005 was sworn by

Major General Joshua Masaba, the Chief of Staff of the Uganda People's Defence Forces

(UPDF) and member of the UPDF Council of which the President is the Chairman.

The agreed facts after conferencing are as follows;

1. On 28<sup>th</sup> May 2005 the petitioner wrote to the Speaker of Parliament a letter attached as Annexure “A” to the affidavit in support of the petition.
2. The Speaker subsequently received the said letter,
3. The Clerk to Parliament notified the Electoral Commission in writing that the petitioner’s seat had fallen vacant.
4. The petitioner is currently under detention following charges brought against him before the General Court Martial, on four counts for allegedly making statements that were prejudicial to the good order and discipline of the Army or Government of Uganda and other alleged statements that tantamount to nepotism and sectarianism.

The agreed issues are:-

- 1. Whether the actions of the Commander-in-Chief/President can be challenged in a court of law.**
- 2. Whether the petitioner’s letter dated 28<sup>th</sup> May 2005, amounted to a resignation of his seat in Parliament.**
- 3. Whether the notification to the Electoral Commission that the petitioner’s seat had fallen vacant contravened articles 80, 83(1) and 84 of the Constitution.**
- 4. Whether the UPDF in pressing charges against the petitioner contravened articles 20, 21 and**

## **29 of the Constitution.**

### **5. What reliefs are available to the parties.**

Mr. Emmanuel Twarebiraho with Mr. Oscar Kambona represented the petitioner. The Solicitor General, Mr. Lucien Tibaruha with Mr. Joseph Matsiko Ag Director of Civil Litigation assisted by Mr. Henry Oluka, Senior State Attorney appeared for the respondent Attorney General.

Regarding issue No 1, whether the actions of the Commander-in-Chief can be challenged in a court of law, Mr. Oscar Kambona, learned counsel, argued that such actions are challengeable in court for the following reasons.

1. Article 2 proclaims the supremacy of the Constitution. It follows thus that observance of the Constitution and its protection is mandatory on all persons including the Commander-in-Chief without exception. Mr. Kambona pointed out that the petition was not about the person of the President. It only sought orders aimed at observance of the Constitution, the fundamental human rights of the petitioner.
2. The petition is against the Attorney General and not the Commander-in-Chief/the President. He pointed out that under article 137 (1) this court can enquire into the Constitutionality of any act or omission by any person or authority and this time it follows that the acts of the Commander-in-Chief and President are challengeable in this court.  
Fie prayed court to resolve this issue in the affirmative.

In reply the learned Solicitor General opposing the petition argued that the actions of the President

could not be challenged in a court of law. Referring to article 98 (1) and (4) he submitted that in the presidency are infused four attributes of Head of State, Head of Government and Commander-in-Chief of the UPDF and Fountain of Honour. These attributes are inseparable. Clause 4 makes it clear that while in office the President cannot be sued or made liable in court neither in his official nor in his personal capacity, the only exception being article 104 (8) when the President can be dragged to court to defend a presidential election petition.

The learned Solicitor General further contended that the Attorney General who is being sued is not the Government but a representative of the Government and that it is the President as Head of State, Head of Government and Commander-in-Chief of the UPDF who advised the petitioner to resign his position which advice the petitioner accepted though he states he obliged since as senior officer he was duty bound to obey the Commander-in-Chief. He pointed out that the act of the President in asking the petitioner to resign could not be challenged in court. The petition is thus wholly incompetent and the court should find it

**Under article 137 (3)-**

**“(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 the constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.”**

It is clear that this provision empowers this Court to inquire into any act or omission by any person or authority without exception.

The President is primarily the executive branch of government. He is vested with executive power being the Head of State, Head of Government and the Commander-in-Chief of the Armed Forces and the Fountain of Honour. He superintends the administration of the country through various ministries/departments. He effectuates all laws passed by Parliament. If his acts/omissions were to be exonerated from court’s jurisdiction the administration of justice would grind to a halt as my lord



Twinomujuni, JA put it.

As the Fountain of Honour, the person of the President while still in office is protected against court proceedings by article 98 (4). In all these various capacities under article 119 the Attorney General, who is the Principal Legal Adviser of the Government, represents and defends the Government including the President's official actions and or omissions, in court. That is why this petition is filed against the Attorney General and not the President. Regarding anything done by the President in his personal capacity, criminal or civil proceedings may be taken against the President after he leaves office - article 98 (5). I would therefore answer issue No 1 in the affirmative.

Regarding issue No 2 whether the petitioner's letter dated 28<sup>th</sup> May 2005 amounted to a resignation of his seat in Parliament, this letter annexure "A" to the petition reads:-

**"Mr. Speaker Sir,**

**I was summoned to a meeting by the Commander-in-Chief of the UPDF on the 27<sup>th</sup> of May 2005 to which I complied.**

**During the meeting attended by UPDF Commander, I was directed to write to you Mr.**

**Speaker resigning. This directive had a deadline of 12 hours. This explains my writing on a weekend.**

**The purpose of this communication is to draw your attention to the above directive and to accordingly comply.**

**Please do not hesitate to contact me if you need any further clarifications.**

**Yours faithfully Sgd: Henry Tumukunde.**

**c.c. Commander-in-Chief of the UPDF**

**c.c. UPDF Forces Council"**

Mr. Kambona, learned counsel, argued that this was not a letter of resignation. The petitioner was

just directed to resign. This explains his writing it on a weekend. Immediately thereafter, he was arrested and is currently in detention pending trial before General Court Martial. He submitted that the surrounding circumstances cannot make the letter a resignation but a directive, though it was contended by the respondent that it was advice. It was argued that the respondent's admission that the petitioner was required to be a listening post in Parliament, which he declined, proves that the letter was not a resignation but a directive. A directive is not a recall as prescribed under article 84, counsel submitted.

In reply the learned Solicitor General argued that the letter in question was an effective letter of resignation for the following reasons;

- a) There is no requirement that the resignation to be effective must be accompanied by reasons or that the Speaker must demand an explanation. The letter fulfilled the requirement of article 83.
- b) The directive of the President was not unconstitutional.

In support of his arguments he referred to the following provision;

- Section 11 (3) (b) of the Parliamentary Elections Act 2001 providing for the electoral procedure of special interest groups and regulations thereunder under section 99 of the Act, pointing out that under regulation No 3, representatives of the army are elected by the UPDF Council in the manner and procedure laid down by the Council.
- He submitted that the UPDF Council is established under section 10 20 (1) of the UPDF Act

and it operates under the general direction of the President. Amongst the powers conferred on the President is the power to direct any army representative in Parliament concerning the military in accordance with the army code of conduct. The Chief of Staff,

Major General Joshua Masaba, in his affidavit indicated that the petitioner had on several occasions contacted the press without approval by the authority as provided for under the Regulations and had made statements prejudicial to good order and conduct of the army. The President had expressed displeasure and accordingly advised him to resign. Advising or directing the petitioner to resign was lawful.

The letter was an effective letter of resignation. The petitioner did not prove otherwise, he asserted.

With respect, the learned Solicitor General shifted the burden of proof. It is clear through the averments of the affidavit of the Chief of Staff, Major General Joshua Masaba that it was because of the

petitioner's conduct both in and outside Parliament that he Commander-in-Chief summoned him to a meeting with other officers. This meeting coupled with the tone of the ensuing letter, Annexure "A", his subsequent arrest soon thereafter and his being charged before the General Court Martial all leave no doubt that he was directed to resign. It was a directive but the Hon Speaker being aware of the usual discretionary nature of the powers of the Commander-in-Chief of the army, could not do otherwise than to accept the petitioner's letter as an effective resignation.

Therefore the resignation from that view point was as effective as any under article 84 (3), (4) and 5.

**appeal, it will not be moot before the decision is rendered, the claim is clearly based on a constitutional provision, the courts will dismiss it because they are the wrong place to take the grievance.”**

I am of the considered opinion that, though from a foreign jurisdiction, the above concept is relevant to the Uganda situation regarding the issue now under consideration. The Constitution puts the question of how to promptly handle the liability to court proceedings by an incumbent President or immediately subjecting his/her acts or omissions to judicial review, beyond the courts competence. It leaves it to the people who, through the exercise of their sovereignty, either directly or through their representatives in Parliament, may bring an end to the incumbent’s presidency thereby opening the door for legal action to be taken against him or her. I so find.

**The words of My Lord Justice Kanyeihamba, JSC in *The Attorney General vs. Major General David Tinyefuza, Constitutional Appeal No. 1 of 1997*, are also pertinent here. His Lordship said - “The rule appears to be that courts have no jurisdiction over matters which are within the constitutional and legal powers of the legislature or the executive. Even in cases, where courts feel obliged to intervene and review legislative measures of the Legislature or administrative decisions of the executive when challenged on the grounds that the bar him/her from freely consulting constituents at large. They are thus unconstitutional and contravene articles 20 and 29.**

In reply the learned Solicitor General argued that the charges against the petitioner do not contravene articles 20 and 29. The petitioner is a military officer operating under military law and is subject to the army code of conduct and military standing orders. He prayed court to dismiss this issue.

The articles alleged to have been contravened read:

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

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

Article 21 prescribes equality and freedom from discrimination before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. A person is not to be discriminated on grounds of, amongst others, his/her *political opinion*.

Article 29 (1) protects an individual's freedom of conscience, expression, assembly and association.

The charges being pressed against the petitioner are contained in, annexures "C" and "D" to the petition. They allege conduct prejudicial to good order and discipline in that he appeared in a talk show and made public speeches/statements prejudicial to good order and discipline of the Army. This involved spreading harmful propaganda in breach of the UPDF Act.

It is noteworthy that the petitioner was elected to Parliament as a serving officer to represent the Army under article 78 (1) (c). According to article 84 (1), his constituency remained his interest group, which is the Army. However, as pointed out by learned counsel Mr. Oscar Kambona the is petitioner took the oath of member of Parliament to give faithful service to Parliament and to support and uphold the Constitution. I agree with learned counsel that the oath imposed on the petitioner a wider mandate than his limited interest group did, to legislate

for the entire country and defend the Constitution in every conceivable way, not to defend it in part in respect of his constituency alone. It is my view, therefore, that the instructions, as deponed by the Chief of Staff, Major General Masaba, to the army representatives to be a listening post for the UPDF and to provide guidance to Parliament in military matters, which role can be fulfilled by the Minister of Defence, are quite irreconcilable with the wider import of the oath of member of Parliament.

The restrictions/limitations would not be assailable when applied to a non-Parliamentarian officer or soldier. They would then perhaps pass the test under article 43 (2) (c) as being in public interest. However, once an army representative, who is so vulnerable, is allowed to subscribe to the oath of member of Parliament, he/she is put in a situation where he or she is faced with two masters to serve, the army code of conduct or the oath of member of Parliament. Who is the supreme master? The oath of member of Parliament.

The petitioner becomes a legislator just like any other civilian member of Parliament having descended into that arena. Consequently the is instructions to be a listening post and pressing charges against him would conflict with and violate articles 20, 21 and 29 of the Constitution. The oath to uphold the Constitution has an overriding effect over any thing else.

I would finally declare that:

- (a) The actions of the President/Commander -n-Chief are challengeable in court.**
- (b) The petitioner resigned his seat in Parliament.**

**(c) The actions of the Electoral Commission were lawful**

**(d) Pressing charges against the petitioner violates and contravenes articles 20, 21, and 29 of the Constitution.**

The petition therefore succeeds in part.

I would order each party to bear its own costs.

Dated at Kampala this 25<sup>th</sup> day of August 2005

A.E.N. MPAGI-BAHIGEINE

JUSTICE OF APPEAL



**THE REPUBLIC OF UGANDA**

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

**CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ V HON.  
JUSTICE A.E.N. MPAGI-BAHIGEINE, JA HON. JUSTICE A.  
TWINOMUJUNI, JA HON. JUSTICE C.N.B. KITUMBA, JA HON.  
JUSTICE S.B.K. KAVUMA, JA**

**CONSTITUTIONAL PETITION NO.6 OF 2005**

**BRIGADIER HENRY TUMUKUNDE.....PETITIONER**

**V E R S U S**

- 1. ATTORNEY GENERAL }**
- 2. THE ELECTORAL COMMISSION }.....RESPONDENTS**

**JUDGMENT OF TWINOMUJUNI, JA**

This petition is brought under article 137 of the Constitution and Legal Notice No.4 of 1996. The petitioner made the following averments:-

- "1. That your petitioner is an adult male citizen of Uganda of sound mind being aggrieved by actions infringing my rights under the Constitution and also having interest in the defence of the Constitution and affected by the following matters being inconsistent with the Constitution of the Republic of Uganda, 1995, whereby your petitioner is also aggrieved.**
- 2. That the act of the Commander-in-Chief and some senior officers of the UPDF directing your petitioner to resign from his position as Army Representative in Parliament of Uganda is inconsistent with and contravenes articles 80, 83(1) and**

**84 of the Constitution.**

- 3. That the act of the Speaker of Parliament in accepting and declaring your petitioner's seat in Parliament vacant on the basis of a letter implementing a directive to resign is inconsistent with and contravenes articles 80, 83(1) and 84 of the Constitution when the petitioner has not done any act in conflict with article 80 of the Constitution.**
- 4. That the act of Uganda People's Defence Forces of restraining your petitioner as a member of Parliament from expressing himself on all Political matters irrespective of the Constituency that your petitioner represents while exempting others from the same restriction is contrary to articles 20, 21 and 29 of the Constitution.**
- 5. The Electoral Commission is in the process of declaring the petitioner's seat vacant and is about to commence the electoral process to replace the petitioner as a member of Parliament contrary to article 83(1) and 84 of the Constitution whereas the petitioner is still willing and able to serve as a member of Parliament."(sic)**

The petition seeks for the following declarations and remedies:-

- "(a) A declaration that the act of the Commander-in-Chief and Army Commander in directing your petitioner to resign his position as Army Representative in Parliament of Uganda is inconsistent with and contravenes articles 80, 83 and 84 of the Constitution.**
- (b) A declaration that the action of the Speaker of Parliament of Uganda in accepting and declaring your petitioner's seat in Parliament vacant on the basis of a letter implementing a directive to resign is inconsistent with and contravenes articles 83(1), 80 and 84 of the Constitution.**
- (c) A declaration that the act of Uganda People's Defence Forces in restraining your**

**petitioner as a member of Parliament from expressing himself on all political matters irrespective of the Constituencies that your petitioner represents while allowing others to do so with impunity contravenes articles 20, and 29 of the Constitution.**

**(d) Orders of redress in terms of damages to your petitioner for violation of inherent rights and freedoms for;**

**(i) Freedom of Speech.**

**(ii) Freedom of Movement and Assembly.**

**(e) Grant and Order of Redress by restraining the respondents and all their officials and agents from taking any further steps towards the conduct of the elections for army representative in place of your petitioner.**

**(f) A declaration that your petitioner is still the legally elected representative of the Uganda People's Defence Forces in the Parliament of Uganda and an Order forbidding, prohibiting and/or restraining the 2<sup>nd</sup> respondent from declaring the petitioner's seat vacant or conducting elections to replace the petitioner.**

**(g) An order that the respondents pay the costs of this petition to the petitioner."(sic)**

**The purpose of this communication is to draw your attention to the above directive to accordingly comply.**

**Please do not hesitate to contact me if you need further clarification.**

**Yours faithfully Henry Tumukunde**

**Hc/Je BRI**

**cc Commander-in-Chief of the UPDF.**

**cc UPDF Forces Council."**

Shortly after this, the petitioner was arrested and charged with various offences in the General Court Martial and is still detained awaiting trial. Meanwhile, the process to replace him as

army representative in Parliament began and at the time of hearing of this petition, replacement had already been elected and sworn in.

The following issues were agreed upon by the parties

- i) Whether the actions of the Commander-in-Chief/President can be challenged in a Court of law.
- ii) Whether the petitioner's letter dated 28<sup>th</sup> May 2005, amounted to a resignation of his seat in Parliament, iii) Whether the notification to the Electoral Commission that the petitioner's seat had fallen vacant contravened articles 80, 83(1) and 84 of the Consitution.
- iv) Whether the UPDF in pressing charges against the petititoner contravened articles 20, 21 and 29 of the Constitution, v) What reliefs are available to the parties.

At the trial Hon. Emmanuel Twarebireho and Mr. Oscar Kambona represented the petitioner. The respondent was represented by Mr. Lucian Tibaruha, the learned Solicitor General and Mr. Joseph Matsiko the Ag. Director for Civil Litigation. In a pre-trial scheduling conference before the Registrar of this Court, counsel agreed on the above issues. There was also agreement on the facts of this case except that whereas the petitioner states that he was forced to resign, the respondent states that he was advised to resign, hence issue No.2 above which is the central issue in the petition. I now tum to the consideration and resolution of the issues in the petition.

#### ISSUE NO.1

**This is whether the actions of the Commander-in-Chief/President can be challenged in a court of Law.**

Arguing this issue, the learned Solicitor General cited and placed heavy reliance on article 98(1) and (4) of the Constitution which provide:-

**98. (1) There shall be a President of Uganda who shall be the head of State, Head of Government and Commander-in Chief of the Uganda Peoples' Defence Forces and the Fountain of Honour.**

**(2) .....**

**(3).....**

**(4) While holding office, the President shall not be liable to proceedings in any court."**

Mr Tibaruha contended that these provisions mean that the President, who is also the Commander-in-Chief of UPDF, the Head of State, Head of Executive and Fountain of Honour, cannot be sued in court for acts done by him/her in his/her official or private capacity until he leaves office. In challenging his actions, the petitioner is subjecting the President to proceedings in court in contravention of article 98(4) of the Constitution.

In reply, Mr. Oscar Kambona contended that actions of the President who is also the Commander-in-Chief of the UPDF are challengeable in court because of the following reasons:-

- (a) Article 2(1) of the Constitution proclaims the Supremacy of the Constitution of Uganda over all persons and authorities in Uganda. Observance of the Constitution is mandatory for every person and authority without exception. This petition is not aimed at the person of the President. It seeks to enforce observance of fundamental human rights and freedoms of the petitioner. This court has the power and jurisdiction under article 137 of the Constitution to entertain the petition where the actions of the President have violated the rights and freedoms of a citizen of this country.
- (b) The President is not being subjected to court proceedings, as he is neither a party nor a witness to the petition. It is the Attorney General and the Electoral Commission who are parties to this petition. Article 98(4) protects only the person of the President from court proceedings while he holds the office of President. He is not above the law or the Constitution. His actions, therefore, are challengeable in courts of law.

With the greatest respect to the learned Solicitor General, I think he misconstrued the meaning of article 98(1) and (4) of the Constitution. But before I discuss the article, I will first revert to the jurisdiction of this court under article 137(3) of the Constitution which provides:-

**"(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."**

[Emphasis supplied]

Clearly, any act or omission by any person or authority which contravenes the Constitution or is in any way inconsistent with it is justiciable under the laws of Uganda. There is no exception whatsoever. The President of Uganda, no matter in what capacity, is not excepted. As can be seen from the roles of the President in article 98(1) of the Constitution, the President is the supreme executive and legislative authority in this country. It is only article 128 of the Constitution that prevents the President from exercising judicial power. If this Court were to interpret article 98 to exempt the actions of the President from challenge in court, then there would be no need for the Constitutional Court because the President does virtually everything. Fortunately, such an interpretation is not justifiable and is not called for.

I have said that the Solicitor General misconstrued article 98 of the Constitution. I agree with Mr. Kambona that the article only protects the person of the President from being dragged in courts of law either as a party or a witness for actions performed when holding the office of the President. Article 98(4) means that and no more. I would so hold and decide this issue in the affirmative.

## ISSUE NO.2

**The issue is whether the petitioner's letter dated 28<sup>th</sup> May 2005, amounted to a resignation of his seat in Parliament.**

The parties do agree that the letter dated 28<sup>th</sup> May 2005 (supra) was indeed written and signed by Brigadier Henry Tumukunde. However, Mr. Kambona contended that the letter did not amount to a resignation of his seat in Parliament because it was not voluntarily written. It was written under the directive of the Commander-in-Chief of the UPDF. Shortly after he wrote the letter, the petitioner was arrested and at the time of trial he was still in detention. In

Mr. Kambona's view, a letter written under those circumstances cannot be a valid letter of resignation. The Speaker of Parliament should not have accepted it because on the face of it, the letter states that it was written under the directive of the Commander-in-Chief. He invited us to hold that the letter did not amount to a resignation of his seat in Parliament.



Mr Tibaruha did not agree with Mr. Kambona's reasoning. He advanced several reasons why he believed that the petitioner's letter of resignation was effective and amounted to a resignation of his seat in Parliament:-

(a) Article 83(l)(a) of the Constitution requires that for a member of Parliament to effectively resign the seat, the resignation must be:-

- In writing.
- Signed by the person resigning.
- Addressed to the Hon Speaker of Parliament.

Mr. Tibaruha submitted that there was no requirement that the person resigning should give reasons for his decision. In his view, the petitioner's letter of resignation fulfilled the requirements of article 83 of the Constitution and the Speaker of Parliament was right to accept it as an effective resignation.

(b) Even if the President had directed the petitioner to resign, the directive was not unconstitutional. The petitioner was elected to Parliament by the Army Council which operates under the general control of the Commander-in-Chief. If the member of Parliament's performance falls below expectation, the president has the duty and power to require such a member to resign his seat.

(c) The letter of resignation required the Speaker to comply with the petitioner's request to resign his seat from Parliament. The Speaker obliged.

(d) The petitioner was never forced to resign. He was summoned before the President on 27-5-2005 and the letter of resignation was written on 28-5-2005. He was given enough time to reflect over the matter and he freely chose to resign.

I have carefully studied the affidavit evidence of the petitioner and that of Major General Joshua Masaba, the Army Chief of Staff of UPDF. I take into account the contents of the resignation letter written by the petitioner to the Speaker of Parliament dated 28-5-2004. I have no doubt in my mind that the petitioner was never advised by the Commander-in-Chief or anyone else to resign. That is not how the army works. A Commander-in-Chief

does not advise his soldiers to do this or that. He orders, commands and directs them to do things. It is their duty as soldiers to obey the commands without questions. A soldier who does not obey the command of the Commander-in-Chief risks severe disciplinary action. In the instant case, the petitioner said certain things in Parliament and outside it which caused extreme displeasure to the Commander-in-Chief. Fie called him and directed him to resign his seat in Parliament. He was given 12 hours within which to comply. The petitioner had a choice to comply with the order or not to comply. If he had refused to resign, he would of course have risked severe disciplinary action but he would have remained a member of Parliament until he was recalled in accordance with article 84 of the Constitution. However, the petitioner chose to comply with the directive of his Commander-in-Chief. In doing this, he was simply doing his duty as a soldier. It is the duty of soldiers to obey commands or directives of their superiors. Although the letter of resignation stated that he was doing so under directives and that he had decided to comply, this could not have surprised the Speaker of Parliament who must know that soldiers are duty bound to obey orders from their superiors. That is how things are done in the army and the petitioner is a soldier. If he had not been a soldier, the Speaker would have had reason to hesitate before accepting the resignation. But a resignation coming from a soldier, even under a directive from the Commander-in-Chief, is as good and

effective resignation under article 83 of the Constitution as long as it is in writing, addressed to the Speaker and is signed by the member of Parliament. The letter of resignation fulfilled the three requirements. My answer to this issue is that the petitioner's letter dated 28-5-2005, amounted to a resignation of his seat in Parliament.

### ISSUE NO.3

The issue is:-

**Whether the notification to the Electoral commission that the Petitioner's seat had fallen vacant contravened articles 80, 83(1) and 84 of the Constitution**

I have held in issue No.2 above that the petitioner resigned his seat in Parliament by his letter dated 28-5-2005. The Speaker of Parliament was right to accept it as such. It therefore follows that he did not contravene the Constitution when he notified the Electoral Commission that the seat had fallen vacant. I would decide this issue in the negative.

### ISSUE NO.4

**Whether UPDF in pressing charges against the petitioner contravened articles 20, 21 and 29 of the Constitution.**

Mr. Kambona pointed out that after the arrest of the petitioner on the orders of the President, the petitioner was charged before the General Military Court Martial of four offences allegedly committed on 30 April 2005 for making a Speech at Central Broadcasting Services (CBS) 88.8 FM Radio without authority from the army. He was also charged with conduct prejudicial to good order and discipline in connection with allegedly making

a speech on 5<sup>th</sup> May 2005 without authority when he appeared on a talk show hosted by Radio One 90.0 FM radio station. The petitioner was also charged with spreading harmful propaganda for what he said on both occasions. Mr. Kambona submitted that these acts by UPDF contravened articles 20, 21 and 29 of the Constitution. He contended that the petitioner as a member of Parliament had the duty to defend the Constitution at all times and to deliberate on all national issues in Parliament or anywhere outside Parliament. In his view, it would amount to a breach of his constitutional rights to require him to always get permission from the army every time he wanted to speak. He asked us to declare that the petitioner is not liable to prosecution for speaking out without permission of the army while he is a member of Parliament and for the contents of what he says in defence of the Constitution.

In reply, Mr. Tibaruha submitted that the charges against the petitioner did not in any way contravene the Constitution. He argued that the rights and freedoms enshrined in the Constitution were not absolute and acceptable limits to them could be justified. The Petitioner being a soldier, was subject to the Army Code of Conduct, the UPDF Act and the Military Standing Orders enacted from time to time in accordance with the Constitution. He, in particular pointed out the provision of rule 20 of the Army Standing Orders (volume I) which states:

**Military personnel are not allowed to contact the press unless approved by the Army Commander.”**

In Mr. Tibaruha's view, this is an acceptable limitation to the rights and freedoms guaranteed to a soldier under the Constitution. He invited us to decide this issue in the negative.

This issue raises a very important question. Do army rules and regulations apply equally to an army soldier who is a member of Parliament as they apply to other ordinary soldiers? Once a soldier is elected to Parliament, whether by the Army Council or by a constituency, he/she subscribes to an oath of office to defend, support and uphold the Constitution at all times. From

that moment on, he/she is entitled to all the powers and privileges of any other member of Parliament. He has the duty to deliberate on all matter of national interest. He can attend functions and address rallies anywhere in the country. He is bound to attend functions where members of the press will inevitably be present. If he says anything at the function, the press is bound to report it. A member of Parliament is elected to speak not only for the good of his/her constituency but for the good of the whole country. Freedom of speech is extremely important for a member of Parliament and is the most important weapon for when he is acting in that capacity. A soldier who is elected to Parliament assumes duties and obligations which put him/her at a higher level than ordinary soldiers. Any rules or regulations of the army which impair his capacity to fulfil his obligations under the Constitution must be sub-ordinated to the Constitution. All members of Parliament have equal rights and obligations under the law. It would be discriminatory if some members of Parliament are free to speak freely to the press, to address rallies and to attend national and local functions while some other members of Parliament are prohibited from doing the same. It is of course a fact that freedom of speech is not absolute. It can be restricted as provided for under article 43 of the Constitution. In my judgment, a requirement that a soldier should not contact the press without authority is a reasonable restriction for an ordinary soldier. However, it is not a reasonable restriction for a soldier who is also a member of Parliament. He/she needs wider freedom in order to be able to fulfil his/her mandate under the Constitution. When a soldier member of Parliament is doing his duties, he will be bound to come into contact with the press even in situations where he/she may not be able to foresee it. He/she may be required to make impromptu addresses while greeting the people at rallies and functions. To require that such a person should not speak out at all or get into contact with the press without permission of military authorities is an unjustified and an unconstitutional interference in the work of a member of Parliament who is sworn to defend the Constitution at all times. It would be discriminatory and contrary to article 21 of the Constitution to allow some members of Parliament to enjoy in full freedom of speech and to restrict other members of Parliament from doing the same.

I am of course, aware that a soldier member of Parliament may annoy his Constituency by frequently saying things that may displease his Constituency. If that happens, the remedy is article 84 of the Constitution which gives the Constituency the power to recall. A member of Parliament who lives under the shadow of possible prosecution for getting in contact with the press or for a statement he may make at a public function cannot fulfil his oath to uphold, protect and defend the Constitution at all times.

In my humble opinion, soldier members of Parliament are not mere listening posts as Major General Masaba stated in his affidavit. They are fully fledged members of Parliament with equal rights and obligations with all other civilian members of Parliament. They should not be prosecuted for contacts and utterances they will be bound to make in order to fulfil their wider role of defending the Constitution, even if their Constituency is not pleased. A member of Parliament is, in my view, not a delegate, but a representative of his people. He is bound to say something that will not please the Constituency. If it is serious and persistent, the member of Parliament should be recalled but not prosecuted.

I would hold that the UPDF in pressing charges against the petitioner contravenes articles 20, 21 and 29 of the Constitution.

ISSUE NO.5

#### **What reliefs are available to the parties?**

Following my conclusion on the above four issues, I would make the following declarations:-

- (a) Actions of the President/Commander-in-Chief can be challenged in court.
- (b) The petitioners letter dated 28<sup>th</sup> May 2005, amounted to a resignation of his seat in

Parliament.

- (c) Notification to the Electoral Commission that the petitioner's seat had fallen vacant did not contravene articles 80, 83 and 84 of the Constitution.

- (d) The UPDF in pressing charges against the petitioner contravened articles 20, 21 and 29 of the Constitution.
- (e) The petition would succeed in part. Each party should bear its own costs.



**THE REPUBLIC OF UGANDA**

**IN THE CONSTITUTIONAL COURT OF UGANDA**

**AT KAMPALA**

**CORAM:** HON. LADY JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ. HON. LADY JUSTICE  
A.E.N. MPAGI-BAHIGEINE, JA.  
HON. MR. JUSTICE A. TWINOMUJUNI, JA.  
HON. LADY JUSTICE C.N.B. KITUMBA, JA.  
HON. MR. JUSTICE S.B.K. KAVUMA, JA.

**CONSTITUTIONAL PETITION NO. 6 OF 2005**

**BRIGADIER HENRY TUMUKUNDE.....PETITIONER**

**VERSUS**

**1. ATTORNEY GENERAL**

**2. THE ELECTORAL COMMISSION.....RESPONDENTS**

**JUDGMENT OF HON. JUSTICE S.B.K. KAVUMA, JA.**

I have had the advantage of reading in draft the joint judgment of My Lords, Lady Justice L.E.M. Mukasa-Kikonyogo, DCJ, and Lady Justice C.N.B. Kitumba, JA and those of My Lords Lady Justice A.E.N. Mpagi-Bahigeine, JA, and Mr. Justice A. Twinomujuni, JA. The circumstances giving rise to this petition, and its background, the contents of the petition, the agreed issues, the declarations and reliefs sought and the constitutional interpretation guidelines applicable are all well and clearly set out in My Lords' judgments and I need not

reproduce them. I will go straight to the submissions of both counsel, where necessary, and the resolution of the agreed issues.

On issues 2, 3, and 4, I concur with the reasoning adopted and the conclusions arrived at by My Lords Lady Justice L.E.M. Mukasa- Kikonyogo, DCJ and Lady Justice C.N.B. Kitumba in their joint judgment and have nothing to add.

On issue one, however, I respectfully hold a different view from my Lords and would deal with it in the following terms: -

On issue one, whether the actions of the Commander-in- Chief/President can be challenged in a court of law, Mr. Oscar Kambona, for the petitioner argued that the acts of the Commander-in-Chief/President were challengeable in court for the following reasons: -

**Article 2(1)** of the Constitution provides for the supremacy of the Constitution and it has binding force over all authorities and persons throughout Uganda. It follows therefore, that the observance and protection of the Constitution is mandatory on all persons and authorities including the Commander-in-Chief. The petition, counsel argued further, is not about the person of the President, it seeks for orders aimed at observance of the Constitution by seeking the observance of fundamental human rights and freedoms of the petitioner and this court has jurisdiction to hear the petition. He further argued that the petition was brought against the Attorney General and not the Commander-in-Chief/President. It was Mr. Kambona's contention that in the petition and under **article 137 (1)** of the Constitution, the Court is to determine questions, among which are, whether certain actions of the Commander-in-Chief/President and UPDF officers were unconstitutional.

Mr. Tibaruha, for the respondent did not agree. The learned Solicitor General contended, the acts of the Commander-in-Chief/President cannot be challenged in court. He relied on **article 98 clauses 1 and 4** of the Constitution.

According to Mr. Tibaruha, the inport of **article 98 (1)** is that each of the four attributes mentioned in the clause namely, Head of State, Head of Government, Commander-in-Chief of the UPDF and Fountain of Honour, constitutes the person and office of the President. By virtue of **article 98 (1)**, counsel contended, the President cannot be sued or made liable to any proceedings in any court, whether in his official or personal capacity whether as Head of State, Head of Government or Commander-in-Chief of the UPDF. By challenging the actions of the Commander-in-Chief/President, counsel asserted, the petitioner is subjecting the President to proceedings in court which is clearly prohibited by the Constitution. The Solicitor General pointed out that in the Constitution there was one exception which is contained in **article 104 (8)** which deals with challenging a Presidential election.

In the present petition, Mr. Tibaruha argued, the bedrock of the case is the alleged act of the Commander-in-Chief/President in directing the petitioner to resign from his position as an army representative in Parliament. The petitioner, the Solicitor General pointed out, seeks a declaration that the act of the Commander-in-Chief/President and the army command, in directing the petitioner to resign, is inconsistent <sup>10</sup> with and contravenes **Articles 80, 83, and 84** of the Constitution. The whole of the petitioner's case hinges on that action of the Commander-in-Chief/President and the other reliefs sought are secondary to and dependent on it. Mr. Tibaruha argued further that according to the unchallenged affidavit deponed to by Major General Joshua Masaba, the UPDF Chief of Staff in support of the answer to the petition, it is clear that the President and Commander-in-Chief advised the petitioner to resign his position as an army representative in Parliament on the 27<sup>th</sup> May 2005. The petitioner, according to Mr. Tibaruha, accepted the advice of the Commander-in-Chief/President. This act of the Commander-in-Chief is not unconstitutional.

I have given careful consideration to the submissions of both counsel on the question of whether or not the acts of the Commander-in- Chief/President are challengeable in court. I have also given careful consideration to the provisions of **Article 98(1), (4) and (5)**. The article provides:

**“98 (1) There shall be a President of Uganda who shall be the Head of State, Head of Government and Commander-in-Chief of the Uganda Peoples’ Defence Forces and the Fountain of Honour.**

(2) ...

(3) ...

(4) **While holding office, the President shall not be liable to proceedings in any court.**

(5) **Civil or criminal proceedings may be instituted against a person after ceasing to be President in respect of anything done or omitted to be done in his or her personal capacity before or during the term of office of that person and any period of limitation in respect of any such proceedings shall not be taken to run during the period while that person was President.”**

The sum total of these provisions is clearly, in my view, to grant the President total immunity against court proceedings both criminal and civil arising out of his/her acts or omissions done or omitted to be done either before or during his/her term in office as President. Any person who wishes to challenge those acts or omissions of the President in court, has to wait until the President has ceased to be one. The only exception to this is for a challenge of the election of a President of a person who happens to be the incumbent President at the time of the challenge. This may appear a hard position but that is what the Constitution says. If the framers of the Constitution had intended that the acts of an incumbent President should be challengeable in

court, they would have clearly stated so given the fairly detailed manner in which the Constitution deals with the question of Presidential immunity in **Article 98**. Where they wanted an exemption to this immunity, the framers of the Constitution said so in **article 109 (8)**. The duty of this Court is to interpret not to amend or re-write the Constitution. Courts should resist the temptation to venture into unnecessary judicial interpretations of the Constitution contrary to its clear provisions as they are in the instant case.

I find the cases of **William Jefferson Clinton Vs. Paula Cobin Jones 520 U.S. 681 (1971)** and **Baker Vs. Cart 369 U.S. 1962** quite distinguishable from the present petition. In those cases, the Constitution of the United States of America, which was in issue, does not have the equivalent of **article 98 (4) and (5)** of the Uganda Constitution.

It is my considered opinion that where we have specific provisions in our Constitution on any matter, the persuasive nature of foreign decisions and principles over the same matter is very minimal. This is because in Uganda, sovereignty lies with the people and where the people have made a constitutional provision, their sovereignty must be respected by all by giving unquestioned observance and effect to the provision irrespective of what happens elsewhere.

I am not persuaded by the petitioner's argument that this petition is not about the person of the President. Clearly, the main thrust of the petition is about challenging the act of the Commander-in-Chief/President when he advised the petitioner to resign his seat as an army representative in Parliament. Mr. Kambona himself confirms this when he asserts in his submissions that in the petition, under **article 137 (1)** of the Constitution the Court is to determine questions among which are, whether certain actions of the Commander-in- Chief/President and UPDF officers were unconstitutional. Most of the other alleged contraventions of the Constitution and most of the declarations and reliefs sought flow from this thrust. I accept the Solicitor General's submission that each of the four attributes of the

President in **article 98** namely: - Head of State, Head of Government, Commander-in-Chief of the UPDF and Fountain of Honour constitutes the person of the President.

Unquestionably, the Constitution is the supreme law of the land with binding force over all persons and authorities including the President. The Constitution did not create a monarch in the person of the President. However, for a complete picture to emerge about the relationship of **article 2 (1)** and the person of the President in both his/her official and private capacities under **article 98 (1), (4) and (5)** and the challengeability of his/her acts under **article 137**, all these articles must be read together. This is because,

**“No one provision of the Constitution is to be segregated from the others and to be considered alone.**

**All the provisions bearing upon a particular subject are to be brought into view and interpreted together so as to effectuate the great purpose of the instrument.”**

*See South Dakota Vs. North Carolina 192 U.S. 268 (1940).*

**“The Constitution is a logical whole each provision of which is an integral part thereof, and it is, therefore logically proper and indeed imperative to consider one part in the light of the provision of the other parts.”**

*See Gopal Vs. State of Madras (1950) 5 CR 88.*

Furthermore, the spirit as well as the letter of the Constitution must be considered. Once these provisions are read and construed together and the spirit of the Constitution is taken into account, it becomes clear that as long as a person remains President, his/her liability to challenges or challenges to his/her acts in courts of law are suspended by the Constitution. That way, **articles 2 (1), 98 (1), (4) and (5) and 137** will have a harmonious existence without any, destroying the others.

Challenging any act of an incumbent President in court, as the petitioner in this petition is clearly doing, is, in effect, subjecting the Commander-in-Chief/President to proceedings in court contrary to **article 98 (4) and (5)**. To strike a difference between challenging acts of the President in court and making the President a party to court proceedings, or arguing that where a party seeks to challenge the acts of the President in court, such party sues the Attorney General, is, in my opinion, academic. The effect of either, is to erode the Presidential immunity embodied in **article 98**. Doing so, would greatly undermine the rationale behind the article which is to cater for the people's aspirations about the person and office of the President. This is the preservation of the dignity of both the person and the office of the President. The President should be above prosecution and his/her acts above challenge in any court of law save as expressly exempted by the Constitution. It would be absurd if the President, who takes precedence over all people in the country is liable to or his/her acts are easily challengeable in court proceedings. The office of the President and his/her acts should have dignity, honour and respect from all.

The Constitution in **articles 98 and 99** concentrates enormous executive powers and authority in the President. We have already reproduced **article 98** above. **Article 99** of the Constitution provides:

**“99 (1) The executive authority of Uganda is vested in the President and shall be exercised in accordance with this Constitution and the laws of Uganda.**

**(2) The President shall execute and maintain this Constitution and all laws made under or continued in force by this Constitution.**

**(3) It shall be the duty of the President to abide by, uphold and safeguard this Constitution and the laws of Uganda and to promote the welfare of the citizens and protect the territorial integrity of Uganda.**

**(4) Subject of the provisions of this Constitution, the functions conferred on the President by clause (I) of this article may be exercised by the President either directly or through officers subordinate to the President.**

These are indeed extensive powers and authority concentrated into a single head but in whose choice, the whole nation has a part, making the President the focus of public hopes and expectations. It is important that at all times there be a President who has complete control and able to perform those duties. Courts should not encourage burdens to be placed on the President that will hamper the performance of his/her duties. Opening the gets to challenges to President’s acts or omissions while in office, as this petition asks court to sanction, and considering the volume of litigation a holding in the affirmative on this issue may result into, may impose an unacceptable and unnecessary burden on the President’s time and energy that would definitely impair the effective performance of his office.

It is of particular significance that in this case, the petition specifically and mainly challenges the act of the President as the Commander-in- Chief of the UPDF.

**Speaking of the ‘Commander-in-Chief clause’ in the Constitution of the United States of America, Edward. S. Lorwin in his “The Constitution and what it means to-day, 1978 edition at page 157 had this to say: -**



“The purely military aspects of the Commander-in-Chiefship were those which were originally stressed. Hamilton said, the office would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy”. Story wrote to the same effect in his *commentaries* and in 1850 the Court, speaking by Chief Justice

Taney, asserted: “His (President’s) duty and power are purely military”.

*Article II Section II (1)* of the Constitution of the United States of America provides: -

#### Section 11

“The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.”

Although the above American clause is more extensive, it is substantially the same as ours in the Constitution with regard to the Commander-in-Chief aspect of the Presidency. I find this article and the way it has been interpreted, as indicated above, relevant to the Uganda situation.

Of all the attributes of the office of the President, the purely military aspects of the Commander-in-Chiefship is to be stressed otherwise the office of Commander-in-Chief/President in that respect would amount to nothing more than the supreme command of the military as first general in the forces. In my view, where the acts of the Commander- in-Chief are in issue, such matters must be treated with more care and caution by all, the courts inclusive. These are purely military powers dealing with military matters. They are not civilian political matters and should not be treated as such.

**This Court held, inter alia, in *Constitutional Application No. 7 of 2003: - Uganda Law Society and another vs. Attorney General*: “It is not right to mix up civilian political matters with security and military matters.”**

I find that when the Commander-in-Chief/President met the petitioner in the meeting of the 27<sup>th</sup> May 2005 chaired by no other than the President as Commander-in-Chief himself, where he advised or directed the petitioner to resign his seat as an army member of Parliament, the Commander-in-Chief/President was exercising purely military powers of the office of the Commander-in-Chief/President to be handled as such.

**I am greatly persuaded by what is referred to elsewhere as “the political question doctrine”.**  
**Writing in his “The Enduring Constitution, A Bicentennial Perspective” Jethro. K. Liberman at page 128 had this to say on the ‘political question doctrine’ in the context of the Constitution of the United States of America.**

**“Even when constitutional rights are asserted, some questions are too political for the courts to give legal answers. This ‘political question’ doctrine is another way of saying that over certain issues, the Constitution commits complete discretion to the other branches. No matter how justiciable the claim seems - the parties have been injured, they have standing, the cause is ripe for appeal, it will not be moot before the decision is rendered, the claim is clearly based on a constitutional provision, the courts will dismiss it because they are the wrong place to take the grievance.”**

I am of the considered opinion that, though from a foreign jurisdiction, the above concept is relevant to the Uganda situation regarding the issue now under consideration. The Constitution puts the question of how to promptly handle the liability to court proceedings by an incumbent President or immediately

subjecting his/her acts or omissions to judicial review, beyond the courts competence. It leaves it to the people who, through the exercise of their sovereignty, either directly or through their representatives in Parliament, may bring an end to the incumbent's presidency thereby opening the door for legal action to be taken against him or her. I so find.

The words of My Lord Justice Kanyeihamba, JSC in *The Attorney General vs. Major General David Tinyefuza, Constitutional Appeal No. 1 of 1997*, are also pertinent here. His Lordship said - "The rule appears to be that courts have no jurisdiction over matters which are within the constitutional and legal powers of the legislature or the executive. Even in cases, where courts feel obliged to intervene and review legislative measures of the Legislature or administrative decisions of the executive when challenged on the grounds that the rights or freedoms of individuals were clearly infringed or threatened, they do so sparingly and with the greatest of reluctance."

My Lord Justice Kanyeihamba, JSC goes on to say when expounding on the doctrine of the separation of powers in *The Attorney General vs. Major General David Tinyefuza* (supra).

"The doctrine of separation of powers demands and ought to require that unless there is the clearest of calling for intervention for the purposes of determining constitutionality and legality of action or the protection of the liberty of the individual which is presently denied or imminently threatened, the courts must refrain from entering arenas not assigned to them either by the Constitution or laws of Uganda. It cannot be overemphasized that it is necessary in a democracy that courts refrain from entering into areas of disputes best suited for resolution by other government agents. The courts should only intervene when those agents have exceeded their powers or acted unjustly causing injury thereby."

I find His Lordship's authoritative statements above of great fortification here because the non justiciability of "*Political questions*" is preliminarily a function of the principle of the separation

of powers which is, itself, firmly enshrined in our Constitution. Under this principle, I find, this court would decline to interfere in the President's/Commander-in-Chief's acts complained of in this petition.

Before taking leave of this issue, I find it appropriate to stress that the Constitution is not short of safeguards against a President who may be tempted to become a menace to this country through misusing or abusing the enormous powers entrusted to him/her by the Constitution.

By article 1 of the Constitution, the sovereignty of Uganda lies with the people. It provides: -

**“1. (1) AH power belongs to the people who shall exercise sovereignty in accordance with this Constitution.**

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

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

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

By and through this article, a free and fair election would, in the first place go a long way to ensure that a person of high integrity is elected to the office of President. Such person would have thorough knowledge and understanding of, and would not easily offend the Constitution. Furthermore, an incumbent President is constantly reminded that should his conduct or exercise

of the executive authority of Uganda fall short of what the people expect, he/she may incur the wrath of the peoples' sovereignty through which they may, come the next Presidential election, reject his re-election bid thus bring about the end of his presidency.

The Presidential immunity provided for in **article 98 (4)** is to be restrictively interpreted to exclusively apply to the person of the President where he/she personally exercises the powers and duties of the office of President. Where the President assigns any of his executive powers to ministers or other officers, under **articles 99 (4), and 113 (3) of the Constitution**, that immunity does not extend to such other ministers or officers. Where such ministers or officers act or omit to act in such a manner as to attract legal challenge or liability <sup>20</sup> to Government, the Attorney General is sued in his representative capacity under **article 119 (c ) of the Constitution**. Furthermore, under **article 106 (5)** the President shall not hold any other public office other than those conferred by the Constitution or any office of profit or emolument likely to compromise the office of President.

The combined effect of all this, is to leave a very narrow scope of executive acts or omissions that cannot be readily challenged or of which the Government cannot be immediately held liable, on account of presidential immunity.

**Article 98** itself does not impose permanent absolute immunity from judicial review to the person of the President. It only postpones such liability and subjection to legal challenge until such a time the person holding the office of President ceases to so hold the same. The President is, therefore, constantly reminded that when he ceases to hold that office, he may be called upon to answer for his acts or omissions while holding the office. This keeps the President on his toes.

**Article 107 (1)** provides for the removal of an incumbent President from office. It provides: -

**107 (1) The President may be removed from office in accordance with this article on any of the following grounds -**

**(a) abuse of office or willful violation of the oath of allegiance and the presidential oath or any provision of this Constitution;**

**(b) misconduct or misbehaviour-**

**(i) that he or she has conducted himself or herself in a manner which brings or is likely to bring the office of President into hatred, ridicule, contempt or disrepute; or**

**(ii) that he or she has dishonestly done any act or omission which is prejudicial or inimical to the economy or security of Uganda; or**

**(c)**

It is clear from these provisions that in appropriate cases, Parliament can be moved to remove an incumbent President from office on any of the many grounds laid out in the article following the laid down procedure. Again, the threat of a possible impeachment and removal from office, keeps an incumbent President on his/her toes.

Another way a President who, in the view of the people, ceases to be fit to continue holding that office can be handled, is by the people through civil society action to make it impossible for him/her to continue in office thereby forcing him/her to resign under **article 105**

**(4) and (5) of the Constitution.**

The article provides: -

**“105 The President may, by writing signed by him or her, and addressed to the Chief Justice resign from office as President.**

**(5) The resignation of the President shall take effect when it is received by the Chief Justice.”**

We have dwelt at some length on the question of constitutional safeguards against a President who may pose a threat to society or individuals in Uganda through misuse or abuse of his/her enormous executive powers and authority mainly to emphasize the following matters. While the person and office of the President must be treated with honour, respect and dignity by all, the President is kept on 10 his/her toes throughout his/her incumbency. His/Her immunity is not permanently total and his/her incumbency in office can be shortened and legal proceedings and challenges to his/her acts commenced. The Constitution provides for immediate political sanctions against an offending incumbent President to be invoked through the sovereignty of the people rather than immediate judicial containment.

In the circumstances of this petition and bearing all the above in mind, any legal proceedings against or any challenge to the acts or omissions of the Commander-in-Chief/President would, in my opinion, be pre-mature.

I, therefore, hold that the acts of the President/Commander-in-Chief are, as long as he/she is President, not to be challenged in court.

My holding on this issue would be wholly sufficient to dispose of this petition. Since however, Court was addressed on the other issues, I have taken the liberty to express my views on them as earlier indicated.

On issue 5, on what reliefs are available to the parties I would make the following declarations:

- (a) Actions of the President/Commander-in-Chief cannot be challenged in court and while holding office, the President shall not be liable to proceedings in court.
- (b) On issues 2, 3 and 4, I concur in and fully associate myself with the declarations of My Lords Lady Justice L.E.M. Mukasa-Kikonyogo, DCJ and Lady Justice C.N.B. Kitumba, JA in the joint judgment.
- (c) The petitioner is not entitled to damages and I would award him none.

In the premises this petition must fail.

I would dismiss it and order each party to bear its own costs.

Dated at Kampala this 25<sup>th</sup> day of August 2005

**S.B.K. KAVUMA**

**Justice of Appeal**