THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

CORAM: HON LADY JUSTICE L.E.M MUKASA-KIKONYOGO, DCJ, HON MR. JUSTICE G.M. OKELLO, JA HON MR. JUSTICE S.G ENGWAU, JA HON LADY JUSTICE C.K. BYAMUGISHA, JA HON MR. JUSTICE S.B.K KAVUMA, JA

CONSTITUTIONAL APPLICATION NO 07 OF 2005

BETWEEN

RTD COL DR KIZZA BESIGYE AND 5 **OTHERS::::::::::APPLICANTS**

AND

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

{Application arising from Constitutional Petition No 16 of 2005 as amended.}

RULING OF THE COURT

This application was brought by Notice of Motion under section 98 of the Civil Procedure Act, seeking orders that Hon Justice S.B.K Kavuma does not sit on the coram of the court to hear Constitutional Petition No 16 of 2005.

The reasons on which the application was based, which we think are not relevant for this ruling, are contained in the affidavit of Caleb Alaka, one of the advocates who were instructed to represent the applicants in the petition. Basically, the reasons are centred on allegation of bias or likelihood of bias on the part of the impugned judge against the applicant. The affidavit was sworn at Kampala on the 20 day of December 2005.

The brief background facts of the application may be summarised as follows :-

On 15/12/2005, Constitutional Petition No 16 of 2005 was called for scheduling conference before the panel of judges that had been set to hear the petition. At this conference, Mr. John Matovu, learned counsel for the petitioners, notified the court of his intention, when the petition would come for hearing, to raise an objection seeking an order that Hon Justice Kavuma does not sit on the coram of the court that would be hearing the petition. According to him, those were the instructions given to him by Rtd. Col Dr Kizza Besigye who, Mr. Matovu said, would be called to testify to substantiate the reasons for the objection.

Mr. Joseph Matsiko, the Acting Director of Civil Litigation, who represented the respondent at the conference, intimated that the respondent would oppose the objection, if raised, because the grounds on which the objection was intended to be based, were worthless.

On 20/12/2005, this formal application was filed and was fixed for hearing on 22/12/2005. When it was called for hearing, Mr. Matsiko raised a preliminary objection challenging the proprietary and competence of the application before court. He gave essentially two reasons, namely:-

(1) that there was no petition from which this application is based. Therefore, it is not competently before court,

(2) that even if there had been a petition from which the application was based, it is not supported by a valid affidavit. The affidavit sworn by Caleb Alaka on 20/12/2005 in a purported support of the application, was fatally defective.

He, therefore, asked us to strike out the application. Mr. Matovu responded that the objection was misconceived as it attacked the competence of the petition on which the application is based before the petition was called for hearing.

After hearing both counsel on this objection, we reserved our ruling to be delivered later on notice.

This is the ruling:-

We have carefully studied the Notice of Motion and the supporting affidavit. We have also carefully studied the submissions of both counsel on the objection. We think, with respect, that the filing of this formal application to this court, to object to one of the members of the coram of the court scheduled to hear the petition, to sit on the coram, was erroneous. That procedure is fundamentally wrong. By filing such a formal application before this court, applicants are in effect asking the four members of the coram to try their impugned colleague as to his integrity. Those four members of the coram have no jurisdiction to try their impugned colleague. The decision whether or not to disqualify himself is a matter for the sole discretion of the impugned judge.

We take solace in saying so from the decision of the Supreme Court in the case of **Uganda Polybags Ltd vs Development Finance Co Ltd and 3 others, Miscellaneous Application No 2 of 2003, Supreme Court Case, unreported.**

In that application, the applicant had sought leave from the Supreme Court to appeal against the decision of this court refusing to entertain an appeal against the decision of Justice Twinomujuni, as a single judge. Hon Justice Twinomujuni was on the coram of the court to

hear **Constitutional Petition No 1 of 2000.** The application seeking to disqualify himself from the coram was made to him as a single judge. He wrote a Ruling refusing to disqualify himself. He gave reasons for his said decision.

The applicant asked the full bench of the Constitutional Court to intervene against Justice Twinomujuni's Ruling. The full bench refused to entertain an appeal against the refusal of Justice Twinomujuni. It also rejected the application for leave to appeal against Justice Twinomujuni's ruling. The applicant then filed this application in the Supreme Court for leave to appeal the decision of the full bench of this court.

In dismissing that application, the Supreme Court said:-

> **" The decision whether a judge should disqualify himself or herself from sitting in a case where charges of or likelihood of bias are levelled against him or her, must be left entirely in his or her discretion. It would be improper for the rest of the members of the coram to determine that issue as to do so would tantamount to trying him or her in respect of his or her integrity which they have no jurisdiction to do so."**

Clearly, we have no jurisdiction to try our colleague in respect of his integrity. It is, therefore, improper to file a formal application seeking an order, in effect, from us the other four members of the coram, that the impugned member should not sit on the coram.

In another case, **Attorney General vs Major General David Tinyefunza, Constitutional Appeal No 1 of 1997,** at the opening of the hearing of the appeal, counsel for the respondent, on instruction of his client, raised an objection to Hon Justice Kanyeihamba being on the coram of the court hearing the appeal. The reason was fear of bias on the part of Justice Kanyeihamba against the respondent.

This objection was made informally and only Justice Kanyeihamba responded to it. He wrote a four page reasons why he declined to step down.

The objection in the instant case should have been made informally, then the impugned judge alone would decide on whether or not to disqualify himself. We, accordingly, hold that the application is wrongly before this court.

The two reasons advanced to challenge the competence of the application are, therefore, rendered irrelevant.

We should, however, observe that we were rather taken aback when Mr. Matsiko stated that Petition No 16 of 2005 on which the application was based is incompetent. At the scheduling conference, it was agreed that **Constitutional Petition Nos 16 of 2005 and 17 of 2005** were consolidated. The amendment of the Petition No 16 of 2005 was to incorporate Petition No 17 of 2005 to effect the consolidation as it were. We think, that the need to pay fresh fees does not arise in such a situation. During the scheduling conference, counsel on both sides agreed on the issues arising from the amended petition to be determined by the court. We think that the respondent can not be heard to say that the petition is incompetent because no fees had been paid. He is estopped.

In the result, we strike down the formal application for being wrongly before this court..

Dated at Kampala this 13th day of January 2006.

L.E.M MUKASA KIKONYOGO
DEPUTY CHIEF JUSTICE

G.M. OKELLO

JUSTICE OF APPEAL

S.G. ENGWAU
<u>JUSTICE OF APPEAL</u>

C.K. BYAMUGHISHA
<u>JUSTICE OF APPEAL</u>

S.B.K KAVUMA
<u>JUSTICE OF APPEAL</u>