

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

CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
5 HON. JUSTICE S.G. ENGWAU, JA
HON. JUSTICE C.N.B. KITUMBA, JA
HON. JUSTICE C.K. BYAMUGISHA, JA
HON. JUSTICE A.S. NSHIMYE, JA.

CONSTITUTIONAL PETITION NO. 07 OF 2007

10 BETWEEN
DR. KIZZA BESIGYE & 10 OTHERS PETITIONERS
AND
THE ATTORNEY GENERAL RESPONDENT

THE RULING OF THE COURT.

15 This petition was fixed for hearing on the 20th July, 2009. At the commencement of the hearing, Mr. Henry Oluka, Principal State Attorney, representing the respondent together with Mr. Vincent Wagona, Principal State Attorney, raised a preliminary objection on a point of law.

The objection was to the effect that public interest litigation challenging the acts of security
20 agents at the High Court, Kampala and simultaneous prosecution against the current petitioners was contested and was finally resolved in this court in *Uganda Law Society vs Attorney General in Constitutional Petition No.18 of 2005*.

In that case, the Uganda Law Society instituted a public interest litigation in this Court under Article 137 of the Constitution, challenging the constitutionality of-

- 25 a) *acts perpetrated by security agents at the High Court premises to prevent the release of persons granted bail pending their trial on criminal charges in the High Court;*
- b) *subsequently criminal proceedings in the General Court Martial against the said persons on charges based on the same facts as the charges in the High Court and*
- 30 c) *provisions of section 119(1)(g) and (h) of the Uganda People's Defence Forces (UPDF) Act.*

The following issues were framed for determination by the Constitutional Court:

- 35 “(1) *Whether the acts of security agents at the premises of the High Court on the 16th*
November 2005 contravened Articles 23(1) and (6), 28(1) and 128(1), (2) and (3) of the
Constitution.
- 40 (2) *Whether the concurrent proceedings in High Court Criminal Case No.955/05*
and Criminal Case No.UPDF/GCM/075/05 in the General Court Martial
against the accused contravened Articles 28(1) and 44(c)of the Constitution and
are inconsistent with articles 28(9) and 139(1) of the Constitution
- 45 (3) *Whether section 119(1)(g) and (h) of the UPDF Act is inconsistent with Articles*
28(1), 126(1) and 210 of the Constitution.
- (4) *Whether the joint trials of civilians and members of Defence Forces in military*
court for offences under the UPDF Act is inconsistent with Articles 28(1),
126(1) and 210 of the Constitution.
- 50 (5) *Whether the trial of the accused persons before the General Court Martial on a*
charge of terrorism contravenes Articles 22(1), 28(1) and 126(1) of the
Constitution.
- (6) *Whether the trial of the accused persons for the offences of terrorism and*
unlawful possession of firearms before the general Court Martial is inconsistent
with the provisions of Articles 28(1), 120(1) and (3)(b) and (c), 126(1) and 210
of the Constitution”.

55 By majority decisions, the Constitutional Court answered issues nos.1,2,5 and 6 in the
affirmative. On appeal to the Supreme Court, *Attorney General vs Uganda Law Society,*
Constitutional Appeal No.1 of 2000, the majority decisions of the Constitutional Court were
upheld.

60 Mr. Oluka’s contention, therefore, is that the rules of this court, and specifically the provisions of
section 7 of the Civil Procedure Act, demand that there must be an end to litigation. In other

words, Mr. Oluka is of the view that the doctrine of res judicata applies in the present case, especially in respect of item no. 3.2 that reads:

65 **“3.2 Whether the prosecution of the Treason Trial, the
First GCM proceedings, the second GCM Proceedings, the
Bushenyi Murder Charges and the Arua Murder Charges
Contravene Articles 24, 28(1), 28(3), 44(a) and 44(c) of the
Constitution”.**

70 Mr. Oluka submitted that the circumstances in *Uganda Law Society vs Attorney General, Constitutional Petition No.18 of 2005 and Attorney General vs. Uganda Law Society, Constitutional Appeal No.1 of 2000* relate to the same First GCM and second GCM proceedings. According to Mr. Oluka, item 3.2 above falls within Articles 28(1) and 44 (c) of the Constitution. In his view, this court and the Supreme Court have already made pronouncements
75 on the matter. According to him, this court cannot adjudicate on the same matter. Mr. Oluka premised his contention on “explanation 6” of section 7 of the Civil Procedure Act, which reads:

80 **“Explanation 6 ___ where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in that right shall, for the purpose of this section, be deemed to claim under the persons so litigating”.**

In conclusion, Mr. Oluka submitted that the 1st and 2nd GCM proceedings were declared unconstitutional. He, therefore, asked this court to proceed with constitutional proceedings but saver what has already been adjudicated upon. In support of his argument, Mr. Oluka relied on the decision of *Karshe vs Uganda Transport Co. Ltd [1967] EA 774*.

85 In that case, Sir Udo Udoma, former Chief Justice of Uganda summarized section 7 of the Civil Procedure Act thus:

90 **“Once a decision has been given by a Court of competent jurisdiction between two persons over the same subject matter, neither of the parties would be allowed to re-litigate the issue again or to deny that a decision had in fact been given, subject to certain conditions”.**

According to counsel Oluka, res judicata has the same effect as a judgment in rem, and he wants us to expunge what this court and the Supreme Court have already adjudicated in *Uganda Law Society case (supra)* from the averments of the petition of the present petitioners.

Mr. F.K. Mpanga assisted by Mr. Fred Mpanga, for the petitioners, did not agree. In the first place, counsel pointed out that the preliminary objection is misguided. The State, according to counsel, has repeatedly done the same bad things against the petitioners. Counsel pointed out that this petition concerns the second besiege of the High Court premises. In that respect, counsel submitted that this matter is not res judicata. In support of his argument, counsel relied on the decisions of *Karia & Another vs Attorney General [2005] EA 83 and Karshe vs Uganda transport Co. Ltd [1967] EA 774*, and submitted further that these cases should be read together with the provisions of Article 50 of the Constitution.

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In conclusion, Mr. Mpanga submitted that unless counsel Oluka concedes to the averment in item 3.2 stated above, this matter should be heard on merit because the doctrine of res judicata does not apply in the instant case.

110 Section 7 of the Civil Procedure Act provides:

“Res judicata – No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court”.

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Clearly, in *Uganda Law Society vs Attorney general (supra)* and in *Attorney General vs. Uganda Law Society (supra)* the present petitioners were not a party to that case although Mr. Oluka would like them to be in view of ***“explanation 6”*** of section 7 of the Civil Procedure Act. The acts or events of the State, which the present petitioners are complaining about, are a repetition of the previous acts that must be heard on their merits. In the premises, we are unable to invoke the doctrine of res judicata on this matter.

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In the result, preliminary objection is over-ruled. Costs shall abide the results of the petition.

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Dated at Kampala this ...01st ...day ofSeptember....2009.

A.E.N. Mpagi-Bahigeine

JUSTICE OF CONSTITUTIONAL COURT

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S.G. Engwau

JUSTICE OF CONSTITUTIONAL COURT

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C.N.B. Kitumba

JUSTICE OF CONSTITUTIONAL COURT

C.K. Byamugisha

JUSTICE OF CONSTITUTIONAL COURT

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A.S. Nshimye

JUSTICE OF CONSTITUTIONAL COURT