

THE REPUBLIC OF UGANDA

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

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**CORAM: HON. JUSTICE A.E.N MPAGI-BAHIGEINE, DCJ
HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE S.B.K. KAVUMA, JA
HON. JUSTICE A.S. NSHIMYE, JA
HON. JUSTICE M.S. ARACH AMOKO, JA**

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CONSTITUTIONAL PETITION NO. 38 OF 2010

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GEORGE OWOR.....PETITIONER

A N D

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1. **THE ATTORNEY GENERAL }**
2. **HON. WILLIAM OKECHO }RESPONDENTS**

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Constitutional law – election petition – participation of members of parliament in party primaries in a party they had deserted – the continued stay in parliament of a member of parliament after joining another party – contesting as an a member of parliament on a party ticket without resigning their sit in parliament –

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The facts of this petition are briefly that the 2nd respondent joined the 8th parliament as an independent. That in August 2010, without resigning his seat in parliament, the 2nd respondent offered himself on the NRM ticket to contest as a member of parliament in the 9th parliament. The petitioner therefore, contests the constitutionality of the 2nd respondent’s nomination hence this petition.

Held : the petition succeeds on all the grounds.

JUDGMENT OF THE COURT:

5 **[A] INTRODUCTION:**

The petitioner filed a petition in which he made the following averments:-

10 **“1) That your petitioner is a male adult Ugandan of sound mind and an ardent believer in the Rule of Law and Constitutionalism.**

2) That your petitioner is interested in and/or aggrieved by the following matters being inconsistent with the Constitution whereby your petitioner is aggrieved:-

15 a. **The act of 2nd respondent contesting in the National Resistance Movement Party Primary Elections when he returned the National Resistance Movement Membership Card in 2006, stood as an Independent and was elected Member of Parliament of West Budama North Constituency as an independent candidate is inconsistent with**
20 **and/or in contravention of articles 1(1)(2)(4), 2(1)(2), 3(1)(2), 4(a)(b), 20(1)(2), 21(1), 43(1)(2)(c), 45, 72(4)(5), 83(i)(g)(h), (3) and 81(4) of the Constitution of the Republic of Uganda, 1995.**

25 b. **The act of the 2nd respondent continuing to sit in Parliament as an Independent member of Parliament having joined the National Resistance Movement, a Political Party and contested in the said National Resistance Movement Party Elections on 30/8/2010 is inconsistent with and/or in contravention of articles 1(1)(2)(4), 2(1)(2), 3(1)(2), 4(a)(b), 20(1)(2), 21(1), 43(1)(2)(c), 45, 72(4)(5), 83(i)(g)(h), (3)**
30 **and 81(4) of the Constitution of the Republic of Uganda, 1995.”**

The petitioner prayed for the following declarations and orders:

“a) A declaration that the act of 2nd respondent standing in the National Resistance Movement Party Primary Elections when he returned the

National Resistance Movement Membership Card in 2006, stood as an independent and was elected member of Parliament of West Budama North Constituency as an Independent candidate is inconsistent with and/or in contravention of articles 1(1)(2)(4), 2(1)(2), 3(1)(2), 20(1)(2), 21(1), 43(1)(2)(c), 45, 72(4)(5), 83(i)(g)(h), (3) and 81(4) of the Constitution of the Republic of Uganda, 1995.

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b) A declaration that the act of 2nd respondent standing in the National Resistance Movement Party Primary Elections while having joined the National Resistance Movement, a Political Party and contested in the said National Resistance Movement Party Elections on 30/8/2010 is inconsistent with and/or in contravention of Articles 1(1)(2)(4), 2(1)(2), 3(1)(2), 4(a)(b), 20(1)(2), 21(1), 43(1)(2)(c), 45, 72(4)(5), 83(i)(g)(h), (3) and 81(4) of the Constitution of the Republic of Uganda, 1995.

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c) A declaration that the 2nd respondent ceased being a member of Parliament and or vacated his seat in Parliament upon joining the National Resistance Movement Party in or around August 2010.

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d) A declaration that the 2nd respondent unconstitutionally continues to draw emoluments, salaries, privileges and or allowances since his vacation of Parliament and he should refund to the consolidated fund all such public funds.

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e) A declaration that the 2nd respondent's candidature in the National Resistance Movement Party Primaries was unconstitutional ab initio for contravening article 83(h).

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f) A declaration that the 2nd respondent is not qualified to stand as candidate be it as an Independent candidate or on a political party ticket.

g) An Injunction restraining the respondents unconstitutional actions.

h) **An Injunction restraining the 2nd respondent from continuing to contravene the Constitution by purporting to stand in any election as Member of Parliament on dual identities.**

5 i) **Costs of this petition.”**

10 The petition is accompanied by an affidavit sworn by the petitioner and filed in this Court on 14th September 2010 in which he narrates the background to the petition and the reasons that led him to file the petition. The respondents filed answers to the petition which are also accompanied by affidavits in which they deny liability and pray that the petition be dismissed due to the fact that it does not raise any issues for constitutional interpretation.

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[B] THE ISSUES:

20 The parties held a Scheduling Conference before His worship, Asaph Ruhinda Ntengye, the Registrar of this Court on 3rd November 2010 and framed the following issues for determination by this court.

1. Whether the petition raises issues for constitutional interpretation.
- 25 2. Whether the act of the 2nd respondent contesting in NRM Party Primary Elections having been elected as an Independent member of Parliament for West Budama North is inconsistent with and/or is in contravention of Articles 83(1)(h)&(g), 1(1)(2)(4), 2(1)(2), 3(1)(2), 4(a)(b), 20(1)(2), 21(1), 43(1)(2)(c), 45, 72(4)(5) and 81(4) of the Constitution of the Republic of Uganda, 1995.
- 30 3. Whether the act of the 2nd respondent continuing to sit in Parliament as an Independent member of Parliament having joined the NRM political party is inconsistent with and/or is in contravention of articles 83(1)(h) & (g), 1(1)(2)(4),

2(1)(2), 3(1)(2), 4(a)(b), 20(1)(2), 21(1), 43(1)(2)(c), 45, 72(4)(5), 83(i)(g)(h), (3) and 81(4) of the Constitution of the Republic of Uganda, 1995.

4. Whether the petitioner is entitled to the remedies prayed for.

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[C] REPRESENTATION:

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At the trial of this petition, Dr. James Akampumuza represented the petitioner and Mr. Richard Adrole, a State Attorney and Ms Eva Kabanda, also a State Attorney jointly represented the first respondent. Mr. Alfred Okello Oryem represented the second respondent.

[D] THE CASE FOR THE PETITIONER:

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(a) ISSUE NO.1.

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Dr. Akampumuza contended that the petition disclose issues for constitutional interpretation which were agreed upon during the scheduling conference and which are now before the Court upon which constitutional interpretation is being sought. He cited the Supreme Court decision in **Baku Raphael Abudra and Abiga Kania vs The Attorney General Constitutional Petition No.1 of 2003** in which the Court per Kanyeihamba JSC (as he then was) stated:-

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In a number of cases Attorney General v Major General Tinyefuza, Constitutional Appeal No.1 of 1997 (S.C.) and Serugo v. Kampala City Council, Constitutional Appeal No.2 of 1998 (S.C.) this court has expressed the view that in constitutional petitions brought under Article 137(3) of the constitution, a cause of action is disclosed if the petitioner alleges the act or omission complained of and cites the provision of the Constitution which has been contravened and prays for a declaration.”

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He submitted that in this petition, the decision of the Supreme Court (Supra) and Article 137 of the Constitution are complied with as the petition alleges

and specifies the acts of the respondents which have contravened specified articles of the Constitution and prays for declarations and remedies. Counsel also cited other authorities to the same effect and called upon us to proceed and determine the petition as it was properly before us.

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(b) ISSUE NO.2.

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The gist of this issue is whether the 2nd respondent who is currently a Member of Parliament for North Budama Constituency where he was elected as an Independent can at the same time be nominated as a flag bearer of NRM Party when he has not resigned from Parliament as required by article 83 and other provisions of the Constitution.

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Dr. Akampumuza submitted that there is no dispute that in 2006, the second respondent resigned his party membership from NRM in order to stand as an Independent. He was elected as an Independent and he has not yet resigned that position. Yet, he has just been nominated as a flag bearer of NRM in the same constituency which is prohibited by the Constitution. He called upon us to decide this issue in the affirmative that the act of being nominated contravened the article specified in the issue.

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(c) ISSUE NO.3.

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The gist of this issue is whether the second respondent can continue to sit in Parliament as an Independent representative of the people of North Budama Constituency while he is the nominated flag bearer of NRM Party. In Dr. Akampumuza's view, the conduct of the 2nd respondent contravenes the Constitution and he should be disqualified from sitting in Parliament as an Independent.

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(d) ISSUE NO.4

Dr. Akampumuza submitted that because of the reasons he advanced in issues No.2 and 3 above, his client is entitled to all the remedies prayed for.

[E] THE CASE FOR THE RESPONDENTS:

a) 1ST RESPONDENT:

5 Mr. Adrole, the learned State Attorney who represented the 1st respondent did not seek to contest the petition except on only the 1st and 4th issues of this petition. On the 1st issue as to whether the petition raised issues for constitutional interpretation, he advanced a simple answer, to wit, that under article 86 of the Constitution, the 2nd respondent is still an Independent
10 Member of Parliament since his seat has not yet been declared vacant by the Hon. Speaker of Parliament in accordance with that article. Mr. Adrole argued that the petitioner did not use the remedies available under that article and therefore this petition is wrongly before this court and should be dismissed. He cited the case of **Hon. Isha Otto Awizi vs Hon. Betty Amongi and 26 Others H.C Misc. Appl. No.134 of 2010** in support of his arguments.
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b) 2ND RESPONDENT:

20 Mr. Okello Oryem argued issue No.2 and No.3 together. Though he appeared to concede that the conduct of the 2nd respondent contravened a set of articles of the Constitution as averred by the petitioner, yet in his view, it was consistent with another set of articles in the same Constitution, to wit, the National Objectives and Directions Principles of State Policy and Articles 1, 2, 20, 21, 29, 38, 40, 44, 45, 50, 61, 67, 69 and 83 of the Constitution. Put
25 simply, his argument is that the second respondent is allowed by the Constitution to stand for an election in any party or as an Independent and the people of Uganda, being sovereign, have a right to elect whoever they wish. He called upon us to look at all the provisions of the Constitution together as required by the rules of interpretation and to hold that the 2nd respondent had a
30 constitutional right to offer his candidature as a member of NRM political party while at the same time representing his Constituency as an Independent member of Parliament. He called upon us to dismiss the petition.

[F] DETERMINATION OF ISSUES

This petition is extremely important for the people of Uganda. It raises very pertinent questions that must be answered in light of the forthcoming national parliamentary elections in which a sizeable number of sitting members of Parliament have offered themselves and have been nominated for election to the next Parliament of Uganda. Determination is necessary if Uganda's current political system as a multiparty democracy is to have any meaningful survival and orderly growth. It raises two main questions:-

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(a) Can a Member of Parliament elected on an Independent ticket be validly nominated as a flag bearer candidate of a political party while still holding the Parliamentary seat? (Issue No.2)

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(b) If such a person offers himself for nomination as a flag bearer of a political party, and he/she is nominated, can he/she validly continue to sit in Parliament up to its dissolution? (Issue No.3)

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We have carefully considered the issues that are raised by this petition. We have also considered the pleadings of the parties to this petition, the arguments and authorities relied upon by counsel and the rationale of the constitutional amendment that gave rise to article 83 of the Constitution. We are in position to give a short but well considered decision on these issues as follows:-

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(a) ISSUE NO.1

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The leading authorities on this matter are **Baku Raphael and Anor vs Attorney General (supra) Serugo vs Kampala City Council, Const. Appeal No.2 of 1998 and Nakachwa Joyce vs Attorney General & 2 Others Constitutional Petition No.2 of 2001.** The opinion expressed in the judgment of his Lordship Odoki, CJ, in **Baku Raphael** (supra) summarises neatly the law on this point. He said:

5 **“In my opinion, where a petition challenges the constitutionality of an Act of Parliament, it sufficiently discloses a cause of action if it specifies the Act or its provision complained of and identifies the provision of the Constitution with which the Act or its provision is inconsistent or in contravention, and seeks a declaration to that effect. A liberal and broader interpretation should in my view be given to a constitutional petition than a plaint when determining whether a cause of action has been established.”**

10 We have no doubt that this petition is on all fours with this opinion as expressed by His Lordship the Chief Justice of Uganda. The issue is answered in the affirmative

15 (b) ISSUE NO.2 AND NO.3

Issue No.2

This is whether the 2nd respondent’s act of contesting in the NRM party primaries elections having been elected as an Independent Member of Parliament contravenes and or is inconsistent with specified articles of the Constitution.

Issue No.3

Whether the 2nd respondent’s continuing to sit in the 8th Parliament having participated in the NRM party primary elections is inconsistent and or contravenes the constitution.

30 These two issues appear to us to be two sides of the same coin and we propose to handle them together. Though many articles of the Constitution are cited as being inconsistent with the alleged acts of the 2nd respondent, we find only two of them the most relevant and we cite them hereunder:-

 Article 72(4) provides:-

“Any person is free to stand for an election as a candidate, independent of a political organisation or political party.”

Article 83(1)(g) and (h) provides:-

- 5 **“(i) A Member of Parliament shall vacate his or her seat in Parliament –**
 (g) If the person leaves the political party for which he or she stood as a
 candidate for election to Parliament to join another party or to remain in
 Parliament as an Independent Member;
 (h) If, having been elected to Parliament as an Independent candidate,
 that person joins a political party.”

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We are alive to the cardinal principles of Constitutional interpretation and especially one which commands that all provision of the Constitution must be looked at and be considered together as an integrated whole. Therefore, all the articles of the constitution sighted or not sighted in the petition will be brought in focus in order to determine the meaning of articles 72(4) and (5) and 83(1)(g) and (h) of the Constitution

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Meaning of Article 83(1)(g) of the constitution

This provision is a recent addition to the Constitution brought in by the 2005 constitutional amendment. It was necessary to give meaning to the constitutional provision relating to the decision of the people of Uganda to turn to a multiparty political system of government. It’s a very simple and clear provision. It is not ambiguous and should be construed basing on the natural meaning of the English words used in the relevant clause. In our judgment the provision means:-

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- (I) A Member of Parliament must vacate his/her seat if he/she was elected on a political party/organisation ticket and then before the end of that Parliament the member joins another party.
- (II) He/she must vacate his/her seat if she was elected on a party ticket and elects to be nominated as an Independent before the term of the Parliament comes to the end.
- (III) If he/she was elected to parliament on a party ticket, he/she cannot remain in Parliament as an independent member.

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(IV) Common sense dictates that if one was elected to Parliament on a political party ticket and join another party, he/she cannot be validly nominated for election on the ticket of that latter party unless he/she has at the time of nomination resigned or vacated the seat in Parliament.

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(V) If one was elected to Parliament on a party ticket and he/she leaves that party to become independent, he/she cannot validly be nominated as an independent unless he/she has ceased to be or has vacated the seat in Parliament.

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The rationale of this interpretation is easy to see. You cannot, in a multiparty political system continue to represent the electorate on a party basis in Parliament while at the same time offering yourself for election for the next Parliament on the ticket of a different political party or as an independent. It would be a betrayal of the people who elected you and an exhibition of the highest form of political hypocrisy and opportunism the evil, we believe, article 83(1)(g) of the Constitution was designed to prevent. It is also an exhibition of political indiscipline and an abuse of peoples sovereignty which is so strongly enshrined in our Constitution.

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Meaning of Article 83(1)(h) of the Constitution.

The simple and straightforward construction of this article is in our view as follows:-

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(i) If an Independent Member of Parliament joins a political party before the end of the term of Parliament he/she was elected to, he/she must resign the seat. If he or she fails to vacate or resign from Parliament, he/she cannot be validly nominated on a political party ticket for election to the next Parliament. This is because one cannot continue representing ones electorate as an independent while at the same time he/she is campaigning to be elected on the ticket of a Political Party. Again this would be a betrayal of the electorate that elected you as an independent Member of Parliament and exhibits the greatest form of political hypocrisy,

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opportunism and indiscipline, which, we believe article 83(i)(h) was designed to prevent.

The position of Hon. William Okecho M.P. [The 2nd respondent.]

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On the 4th January 2006 Hon. William Okecho M.P. wrote the following letter to his then political party NRM as follows:-

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Date: January 4, 2006

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**The District Registrar/Returning Officer
NRM Secretariat Tororo District
TORORO**

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Dear Sir

RE: WITHDRAW OF NRM MEMBERSHIP

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Please refer to my letter of petition dated December 8, 2005 arising out of the mismanaged and grossly rigged NRM Parliamentary primary elections in West Budama North Constituency.

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Following your and the NRM Electoral Commission's failure to resolve the issues raised therein, I wish to inform you and through you the NRM Party that I have decided to withdraw from the party. I am therefore returning herewith the NRM Membership Card No.00551802 which was issued to me by your office.

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In view of my withdrawal from NRM Party, I am, by copy of this letter, also informing the Chairman NRM Tororo District that I hereby resign all the positions I hitherto held in the Party in Tororo District. I am ready to handover to you any property of the Party in my custody pertaining to such office(s) at your convenience.

Wishing all of you a happy and prosperous 2006.

Yours faithfully

William Okecho

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CHAIRMAN

cc Chairman, NRM Tororo District.”

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Shortly after that, he offered himself for nomination as an Independent candidate for the 8th Parliament. He was subsequently elected and he has not, up to this minute, to our knowledge, resigned his seat in Parliament. Late last year, he offered himself for nomination as a candidate for election as Member of Parliament for the 9th Parliament on NRM ticket. He was accordingly nominated as a flag bearer of NRM in the same Budama North Constituency where he is still an Independent member of Parliament. Is that permitted by our Constitution?

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The 2nd respondent contends that by virtue of article 29(i)(e) which guarantees freedom of association and article 72(4) (supra), he is at liberty and it is his right to stand as an independent candidate on a political party ticket. We do not agree with this submission.

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The right to associate and the right to stand as an independent or on a political party ticket, like most rights and freedoms in the Constitution, are not absolute. They can be derogated from as long as the derogation is done within the limits provided for in article 43 of the constitution. In our view, article 83(i)(g) and (h) is a legitimate derogation of those freedoms. As already discussed above, the 2nd respondent should have vacated his seat in Parliament before offering himself for election as a flag bearer of NRM. He did not. His nomination for election to the 9th Parliament is therefore invalid and null and void.

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At the same time, by seeking the nomination of a political party when he was still a seating Independent Member of Parliament, he clearly joined NRM and was accepted as its flag bearer. He is deemed to have vacated his seat in

Parliament from the date of the purported nomination as a flag bearer of NRM. He is not entitled to continue to represent the people of Budama North as the Constitution requires and cannot continue to enjoy its privileges from the date of that nomination. If Mr. William Okecho wanted to be elected to the 9th Parliament on NRM or any other political party ticket, he should have resigned his seat before offering himself for nomination. Issues No.2 and No.3 are answered in the affirmative.

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10 [G] **CONCLUSION**

There may be several other Ugandans who have been nominated as Independents while they are still holding on to their seats in Parliament to which they were elected as political party flag bearers. There may also be some who are holding on to their seats as Independent members of Parliament but have now been nominated as flag bearers of political parties. All those should read this judgment very carefully and take corrective measures before it is too late. We direct the Registrar of this Court to serve, as soon as possible, a copy of this judgment to the Hon. Speaker of Parliament and the Chairman Electoral Commission to take note of its contents and take appropriate action.

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In the result, the petitioner succeeds on all the four issues. He is entitled to all the prayers contained in paragraph 4 of the petition.

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Dated at Kampala this...**01st** ..day of...**February**...**2011**

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.....
Hon. Justice A.E.N. Mpagi Bahigeine

DEPUTY CHIEF JUSTICE.

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Hon. Justice A. Twinomujuni

JUSITCE OF APPEAL.

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Hon. Justice S.B.K. Kavuma

JUSITCE OF APPEAL.

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Hon. Justice A.S. Nshimye

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