

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

CONSTITUTIONAL PETITION NO. 47 OF 2011

TWINOBUSINGYE

SEVERINO :::::::::::PETITIONER

VS

ATTORNEY GENERAL :::::::::::

RESPONDENT

Coram Hon. Justice A.E.N Mpagi Bahigeine, DCJ/PCC

Hon. Justice S.B.K Kavuma, JA/JCC

Hon. Justice A. S Nshimye, JA/JCC

Hon. Justice M. S Arach Amoko, JA/JCC

Hon. Justice Remmy Kasule, JA/JCC

JUDGMENT OF THE COURT

This petition was brought under **Article 137(3)** of the Constitution of the Republic of Uganda. **Article 137(3)** provides:

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.

5 The Petitioner is an Advocate of the High Court. He originates from Kinkizi West constituency which the Hon Rt. Prime Minister Amama Mbabazi represents in the 9th Parliament. He states that he is a keen follower of parliamentary proceedings in the public gallery and an interested person in constitutionalism, democratic
10 governance and the rule of law in Uganda.

On the 10th, 11th, 27th October and 9th November 2011, he physically attended parliamentary proceedings which eventually culminated in Parliament passing Resolutions 9(a), 9(b) and 9(c),
15 he is petitioning against. He alleges that the said resolutions are inconsistent with or are in contravention of the provisions of the Constitution mentioned here below.

The petitioner thus petitions this Court contending that:

20

(i) **Resolution 9(a);** that an Ad-hoc Committee of Parliament be set up to investigate claims and allegations of bribery in the oil sector and report back to Parliament within three months is inconsistent with
25 or is in contravention of Articles **2, 28(1) (3)(c) (g), 42, 44(c) and 79 (3)** of the Constitution.

25

(ii) **Resolution 9(b);** that members to be named on the Ad-hoc committee observe high moral standards while
30 carrying out the above assignment is inconsistent with

30

or in contravention of Articles **2, 28(1) (3) (c) (g), 42, 44 (c) and 79 (3)** of the Constitution.

5 **(iii) Resolution 9(c);** that the government ministers (sic) namely; the Rt. Hon. Amama Mbabazi, Prime Minister of Uganda, Hon Sam K. Kutesa, the Minister of Foreign Affairs, and Hon Hillary Onek, the Minister of Internal Affairs who were named during the debate “**step aside**” from their offices with immediate effect,
10 pending investigations and report by the Ad-hoc committee of Parliament, is inconsistent with or in contravention of Articles **2, 28(1) (3) (c) (g), 42, 44(c) and 79 (3) of the Constitution.**

15 **(iv) Resolution 9(c);** in as far as it entails the Rt. Hon. Amama Mbabazi, the Prime Minister of Uganda to “**step aside**” from his office, is inconsistent with or is in contravention of **Articles 2 and 108A** of the Constitution.

20 3. The petitioner states that the above impugned Resolutions are inconsistent with or in contravention of the provisions of the Constitution due to the following reasons;

25 (a) The Rt. Honorable Amama Mbabazi, Prime Minister of Uganda and the named Honorable Ministers were denied a right to fair hearing prior to the passing of the impugned Resolutions in contravention of “*audi alteram partem*” principle.

(b) They were not accorded adequate time and facilities for the preparation of their respective defenses and Parliament acted capriciously on forged documents whose veracity it deliberately declined to test.

(c) They violated the named government officials' right to presumption of innocence.

(d) They violated the named government officials' right to just and fair treatment in administrative decisions.

(e) They set up an Ad-hoc Committee of Parliament which is inherently biased to investigate claims and allegations of bribery in the oil sector, thereby making Parliament a judge in its own cause by denying the named government officials a right to appear before an independent and impartial tribunal.

(f) They require the named government officials to step aside when such a requirement is not provided for by any law of the land.

(g) They do not define what stepping aside entails.

(h) They purport to confer jurisdiction over Parliament to remove the Prime Minister from office which jurisdiction it does not have.

(i) They undermine the supremacy of the Constitution and defeat Democratic governance.

The petitioner prays this Honorable Court to grant the following Declarations and Orders:

- 5 (i) That resolution 9(a) to the effect that an Ad-hoc
Committee of Parliament be set up to investigate
claims and allegations of bribery of the oil sector
and report to Parliament within three months is
inconsistent with or in contravention of **Article 2,**
10 **28(1) (3) (c) (g), 42, 44(c), 79(3) and 108A** of
the Constitution and therefore null and void;
- (ii) That resolution 9(b) to the effect that members to be
named on the Ad-hoc committee observe high moral
15 standards is inconsistent with or in contravention of
Articles **2, 28(1) (3) (c) (g), 42, 44(c) and 79(3)**
of the Constitution therefore null and void.
- (iii) That resolution 9(c) entailing the government
20 ministers (sic) who were named during the debate to
step aside from their offices with immediate effect
pending investigations and report by the Ad-hoc
committee of Parliament is inconsistent with or in
contravention of **Articles 2, 28(1) (3) (c) (g), 42,**
25 **44(c) and 79(3) of the Constitution** is null and
void.
- (iv) That resolution 9(c) in as far as it entails the Prime
Minister of Uganda to vacate office is inconsistent

with or in contravention of **Article 2 and 108A** of the Constitution and is therefore null and void.

(v) An order for costs of this petition.

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The petition was supported by the petitioner's own original affidavit and a subsequent supplementary affidavit. It was also supported by other several affidavits of the following witnesses; Mr. John Ndungutse, Director of counter terrorism, (an
10 investigating Officer), Uganda Police, who categorically stated that he had carried out comprehensive investigations about the allegations of corruption on the instructions of the IGP and found them baseless and that the documents relied on to support the allegations were forgeries, Hon. Lyomoki Samuel, a member of
15 Parliament representing workers in Parliament; Hon. Karungi Elizabeth, a Woman Representative of Kanungu District in Parliament; Hon. Lanyero Sarah Ochieng, a Woman Representative in Parliament of Lamwo District; Mr. George Oyat, the Chairman National Resistance Movement, Pader District; and
20 Engineer Mubiru Elly, the National Resistance Movement Vice Chairman, Elder's League in charge of Central (Buganda Region). In essence, the above affidavits recited the above Resolutions and sought declarations of this Court as prayed in the petition.

25 In reply, the Respondent/Attorney General contended:

(a) That the petition was premature and raised no issues or questions for constitutional interpretation.

(b) That the respondent had not by any act or omission violated or infringed any provisions of the Constitution as alleged by the petitioner.

5 (c) That the petitioner's rights would not, in any way, be prejudiced by the dismissal of this petition by this Honorable Court.

10 (d) In reply to paragraph 2(i) of the petition, the respondent contended that the establishment of an Ad-hoc committee of Parliament to investigate claims and allegations of bribery in the oil sector and report back to Parliament did not in any way contravene the Constitution as Parliament was exercising its powers in accordance with **Article 90**
15 of the 1995 Constitution.

(e) In reply to paragraph 2(ii) of the petition, the respondent contended that the requirement of members of an Ad-hoc committee to observe high moral standards as they
20 consider their assignment was the nominal standard required of members carrying out such assignments and to expect otherwise would be to act in contravention of the Constitution.

25 (f) That the respondent stood in agreement with paragraphs 2(iii), (iv) and 3(f), (h) of the petition and was, prior to the hearing date, to bring the same to the attention of this Honorable Court .

(g) Further, in reply to paragraphs 3(a) (b) (c) (d) (e) (g) and (i), the respondent contended that the allegations therein were premature as the Right Hon. Prime Minister and the named Hon Ministers were expected to give their evidence before the committee investigating the oil sector and the named officials were to be given an opportunity to defend themselves adequately.

(h) For the forgoing reasons, the respondent contended that the petitioner is not entitled to any of the declarations and orders sought in the petition save for declarations number (iii) and (iv).

At the joint scheduling conferencing, the following issues were agreed upon namely;

I. Whether the petition raises a cause of action and the petitioner has locus standi.

II. Whether Resolution 9(a) in as far as it relates to investigating the Rt. Hon. Prime Minister and the named ministers is inconsistent with or is in contravention of the Constitution.

III. Whether Resolutions 9(b) and 9(c) are inconsistent with or are in contravention of the Constitution.

IV. Whether the act of Parliament directing the Rt. Hon. Amama Mbabazi, Prime minister of Uganda,

Hon Sam Kuteesa, the Minister Foreign Affairs, and Hon Hillary Onek, the Minister of Internal Affairs to “step aside” with immediate effect pending investigations and report by the ad-hoc committee of Parliament, was inconsistent with or in contravention of the Constitution.

V. Whether the procedures adopted by Parliament in ordering the Rt. Hon. Amama Mbabazi, the Prime Minister of Uganda and the two Honorable Ministers to step aside from their offices is provided for by the law.

VI. Remedies.

In his conferencing legal arguments dated 6th December 2011, the respondent made some concessions and thus reduced the issues. He conceded that:

On issue 1

The petition discloses a cause of action, has triable issues and the petitioner has locus standi.

On Issue 2

Resolution 9(c) and the act of Parliament directing the Rt. Hon Amama Mbabazi, the Prime Minister of Uganda, Hon. Sam Kutesa, the Minister of Foreign affairs and Hon Hillary Onek, the Minister of internal affairs to step aside from their offices with immediate effect pending investigations and the report by the

Ad-hoc Committee of Parliament was inconsistent with and or in contravention of the Constitution.

The concessions left us with only the following issues to resolve
5 namely;

***1. Whether Resolution 9(a), in as far as, it relates to investigating the Rt. Hon Prime Minister and the named ministers is inconsistent with or is in
10 contravention of the Constitution.***

***2. Whether Resolution 9(b), namely that members to be named on the said Ad-hoc committee are to observe high moral standards while carrying out the above
15 assignment is inconsistent with and/or is in contravention of the Constitution.***

During hearing of the petition, Mr. John Mary Mugisha assisted by Mr. Chris Bakiza represented the petitioner, while Mr. George
20 Kallemera, a Senior State Attorney assisted by Mr. Daniel Gantungo, a State Attorney, represented the Attorney General.

In his opening submission, Mr. Mugisha emphasized the supremacy of the Constitution which is entrenched in **Article 2
25 (2)** of our Constitution. He cited **Court of Appeal Constitutional petitions N0s 2 and 8 of 2002, Uganda Law Society and Another Vs Attorney General; M'membe and Another Vs Speaker of the National Assembly and Others; Zambia (1996) 1LRL 584, Supreme Court of Uganda
30 Constitutional Appeal N0. 1 of 2000 Paul Ssemwogerere Vs**

Attorney General, and Court of Appeal Constitutional
Petition NO. 4/2009 Ananias Tumukunde Vs Attorney
General.

5 Counsel submitted that when Parliament was debating and passing the Resolutions, the subject of the petition, it acted as a tribunal but did not observe nor adhere to **Article 28** of the Constitution. It did not observe the right to fair hearing and maintenance of presumption of innocence of the ministers
10 concerned until the allegations are proved or disproved.

He referred to some of the statements made by some members of Parliament as reported in the Hansard. A certified copy of the Hansard was annexed to the petition and formed part of the
15 evidence before us in support of the petition.

The statements, according to counsel, showed that some members of Parliament had already found the affected ministers guilty of the allegations. This is because some of the members
20 who contributed to this highly charged and emotive debate are recorded as having referred to the ministers as “**these thieves,**” “**thugs**” who should be censored. Another member, to the applause of the House, wished that if he had executive powers like the late Idi Amin, “**he would execute all these individuals**
25 **while the public is looking on**”.

Counsel submitted that with such predetermined parliament, no Ad hoc committee constituted from its already biased membership would accord a fair hearing to the ministers
30 concerned. He added that those who were nominated to the

investigating ad- hoc committee did not disassociate themselves from the already biased Parliament.

With such a highly charged house, counsel argued, that the
5 ministers could not have a fair hearing from the Ad-hoc committee membership.

In conclusion, he prayed that we find and declare that the act of Parliament in passing resolutions 9(a), 9(b) and 9(c) contravened
10 **Articles 2, 28, (1) (c),(g) 42, 42(c), 79 (3) and 108(a)** and was therefore unconstitutional. He further prayed for costs of the petition.

In reply Mr. Kallemera argued 2 issues contained in paragraphs
15 2(i) and paragraph 2 (ii) of the petition. He pointed out that issues 3 and 4 had been conceded by the respondent. He disagreed, that the Prime Minister and the ministers were denied the right of hearing, contrary to the principle of ***Audi Alteram Partem***. He cited **Constitutional Petition N0. 15 of 2006 Caroline**
20 **Turyatamba and Others Vs Attorney General and others** in which the Constitutional Court held that the right to be heard is a fundamental basic right.

25 He submitted that Parliament had constitutional powers under **Article 90(1) (2)** to appoint an Ad-hoc committee and under its Rules of procedure to prescribe the powers of the committee. Parliament set up the Ad-hoc committee and this Committee was in the process of hearing evidence, including that of those whose
30 names were the subject of the resolutions together with that of

any relevant experts in the field, until when Court issued an injunction stopping hearing pending the disposal of this petition.

5 In his view, the issue regarding fair hearing was brought to Court prematurely, since the committee appointed by Parliament had not finished its mandate.

10 As to whether the Prime Minister and other ministers had not been accorded a right to be heard, counsel invited Court to take judicial notice of the fact that the Rt. Hon Prime Minister and other ministers had already appeared before the committee and presented their evidence. The process was still ongoing and therefore the prayers were premature.

15 On the petitioners' allegation that resolution 9(b) be held as inconsistent with the Constitution, counsel referred to Paragraph 4 of the respondent's answer to the petition which reads as follows;

20 ***“ (4) In reply to paragraph 2(ii) of the Petition, the respondent shall contend that the requirement of members of an Ad hoc committee to observe high moral standards as they consider their assignment is the nominal standard required of members carrying***
25 ***out such assignments and to expect otherwise would be to act in contravention of the Constitution”.***

He cited **Supreme Court Constitutional Appeal N0. 2 of 2006 Brigadier Henry Tumukunde Vs Attorney General,**

where Justice Engwau who was then acting Justice of the Supreme Court, at page 10 paragraph 2 stated;

“The legislature must be allowed to enjoy its independence as an institution in the performance of its legislative duties under Article 79 of the Constitution”.

Counsel prayed that we find that the requirement that members do observe high standards is obvious for members of Parliament. In any case, no evidence had been adduced by the petitioner to illustrate that the ad hoc committee of Parliament had in any way acted in contravention of the rights of the ministers concerned. He asked us to find that the evidence that had been adduced was about deliberations that took place in the House and could not be used for any measure of moral standards. Finally, he prayed that we dismiss the petition.

Additional Submissions of Mr. Gantungo Daniel, State Attorney for the respondent.

The learned State Attorney differed from the submissions of counsel for the petitioner that Parliament was acting as a tribunal when passing the resolutions. He contended that Parliament only acts as a tribunal under **Article 107** of the Constitution, in case of impeachment of the President and under **Article 118 (6)** on censure of ministers.

He contended that during the debate, when the Resolutions were passed, Parliament was not acting as a tribunal because it made

no conclusions. However, the Ad-hoc Committee of Parliament is a tribunal. Contrary to what the petitioner alleged that the members of the committee had been biased and that they had taken part in a partisan debate and yet they were the same people constituting the committee, counsel explained that no evidence had been adduced against any single member of that committee that he or she was so biased. He submitted that Parliament had mechanisms to challenge any member of the committee for being biased. Counsel contended that, if this Court was to agree with that allegation of bias of the committee members, it would be taking away powers of Parliament to manage its own internal matters including, disciplining its members.

On the heckling, which members of Parliament subjected to the ministers concerned, counsel cited **Article 97** of the Constitution which provides for the Privileges and Immunities of members of Parliament. He explained that under **The Parliamentary Powers and Privileges' Act, Cap 258**, members of Parliament were free to say anything on the floor of the House without being prosecuted. This was meant to allow free debate. Parliament has Rules under which it can discipline a member who misuses his or her privileges.

Mr. Gantungo further submitted that this Court had no power to inquire into what members of Parliament debated or said on the floor of Parliament. Court only has power to inquire into the constitutionality of the conclusions of those debates, and not before. He disagreed with the submissions of counsel for the

petitioner that the ministers had not been given a chance to speak. In counsel's view, the named ministers had been given time to present their case. He referred us to the Hansard, at page 1349 where Hon. Kutesa made a point of order and exercised his right to be heard. Also At page 1372, Hon Amama Mbabazi had an opportunity to speak. On pages 1373, 1374, 1375, 1379, Hon Kutesa made a lengthy submission in answer to the allegations against him. At page 1364 Hon. Hillary Onek also made a brief response.

He finally submitted that the petitioner had not made out his case and his petition ought to be dismissed as regards to those prayers where the Attorney General had not conceded.

Mr. Mugisha's submission in rejoinder

He maintained that much as Parliament was empowered to form committees under **Article 90** of the Constitution, it should not be oblivious of the fundamental rights embedded in the earlier **Article, 28**. It was not true that Parliament was in the process of a hearing. Parliament had already passed its judgment and was just going on further to contravene the principles of natural justice. "**Contempt charges**" were lingering on the heads of the said ministers. The concern of the petitioner was that the rule of law had to be maintained. The entire membership of Parliament had no moral authority to sit in judgment of fellow members. The Supreme Court had held that Parliament is not always infallible. See: **Paul Ssemwogerere Vs Attorney General; Supra, where Court relied on the** **Zambian case of M'mbembe &**

Another Vs The speaker of the National assembly and Others (Supra). This Court has powers to question what goes on in Parliament under the doctrine of the Supremacy of the Constitution.

5

The Parliamentary Powers and Privileges Act is not absolute. The Act was made under **Article 28** which is supreme. On the bias of the committee, he maintained that the Ad-hoc
10 committee is inherently biased. It's members, from what transpired in Parliament, were part of the heckling and applauding. None of the members of the whole House dissociated themselves from what transpired in the House. He concluded that the ministers were not given adequate opportunity to defend
15 themselves. They were not accorded what was envisaged in the Constitution.

He asserted that the Court should exercise it's mandate of relating what happened in the House with the Constitution and
20 find that the same contravened the provisions of the Constitution as indicated in the petition.

Counsel reiterated his earlier prayers that the petition be allowed with costs.

25

Decision of the Court

We have carefully perused the record and considered the authorities cited to us. The submissions of counsel representing both parties have also received our utmost attention and
30 consideration.

Before we pronounce ourselves on the issues raised, we have felt it appropriate to restate the constitutional background from which these matters arise.

5

There is no dispute as to the supremacy of the Constitution of Uganda, 1995 (**Article 2**). Everybody, including institutions and organs of Government are bound and must respect it. The Constitution was structured in such a way that it gave the three
10 organs of Government namely the Executive, Parliament and Judiciary different roles and powers. Each organ is obliged to perform its role in accordance with the Constitution and other enabling laws without interference from the others, except as provided under the Constitution.

15

However, a mechanism of checks and balances was built in the Constitution to ensure that no single organ of the State acts in contravention of the Constitution without being stopped by the
20 rest of the other two organs, or any of them. Otherwise when everything is normal and in accordance with the Constitution, the internal management of the organs of the state is a no go area for the others. For example, the judiciary has no powers to interfere or question methods of internal management and running of the
25 affairs of Parliament unless a complaint is raised by an aggrieved person in courts of law.

In the matter before us, the aggrieved petitioner alleged under **Article 137 (3)** of the Constitution that Parliament violated the
30 Constitution when it passed resolutions 9(a), 9(b), and 9(c), and

pointed out the constitutional Articles he contends were violated and sought redress and so we have powers to intervene.

Issue one

- 5 This issue was on whether the petition discloses a cause of action and has triable issues, and whether the petitioner has locus standi. It was, however, conceded by the respondent, and rightly so in our view. It is thus unnecessary for us to deal with it.

10 **Issue Two**

The petitioner alleged that resolution 9(c), whereby Parliament directed the Rt. Hon. Amama Mbabazi the Prime Minister of Uganda, Hon Kutesa, the Minister of Foreign Affairs, and Hon Hillary Ongek, the Minister of Internal affairs to step aside from
15 their respective offices with immediate effect pending investigations and the report of the Ad- hoc committee, contravened the Constitution. The respondent conceded that the Resolution was unconstitutional. The respondent's concession notwithstanding, given the public importance of the matter, we
20 have resolved to consider the issue in some detail. The term "**stepping side**" is not specifically mentioned in the Constitution. The dictionary meaning of the term is to leave an important job/position, allowing another person to take one's place, position or job; See:

25

***Oxford: Advanced Learner's Dictionary
(1998), Page 1169, and***

***Oxford: Advanced Learner's Encyclopaedic
Dictionary,***

In modern democracies, the term “stepping aside” is now
5 generally taken as part of the responsibility of the holder of a
public office in discharging his or her duty of being accountable to
the people. Thus a culture has developed in modern democracies,
Uganda inclusive, whereby a Public officer whose conduct in a
public office is being questioned steps aside, on his or her own, to
10 enable investigations to be carried out without his or her
influence.

The necessity of being accountable to the people, by one holding
a public office in Uganda is clearly embedded in the National
15 objective and Directive Principle of State Policy XXV1 of the
Constitution. It provides:

“Accountability

XXV1 Accountability

20

**(i) All public offices shall be held in trust for the
people.**

25

**(ii) All persons placed in positions of leadership and
responsibility shall in their work be answerable
to the people.**

30

**(iii) All lawful measures shall be taken to expose,
combat and eradicate corruption and abuse or
misuse of power by those holding political and
other public offices”.**

It is necessary for us to decide whether resolution 9(c) falls within the category of lawful measures envisaged under the National objective XXVI(iii).

5

The essence of “stepping aside” from public office is to vacate that public office, however temporary or whatever the nature of conditions that may be attached to the said vacation of the public office. The scenario envisaged in Resolution 9(c) is that the Honourable Prime Minister and the other two Ministers do step
10 aside from their respective offices with immediate effect pending investigations and a report by the Ad-hoc committee of Parliament.

15

What then is the law that governs vacation of office by the Prime Minister and/or a Minister? The overriding principle with regard to vacating public offices that are constitutionally provided for has been pronounced upon by the **Uganda Supreme Court** in the case of **Brigadier Tumukunde Vs Attorney General and**

20

Another (supra). The principle is that where the Constitution sets out the parameters under which one has to vacate office, such one should never have to resign under the direction of any other person or authority but in compliance with those parameters of the Constitution. Thus under this principle, their
25 Lordships of the Supreme Court held that the High command of the army council, had no powers to force the resignation from Parliament of Brigadier Tumukunde as an army representative since to do so was not provided for in the Constitution.

Under **Article 108A** of the Constitution, the office of the Prime Minister becomes vacant if the President revokes the appointment or if the incumbent resigns on his or her own accord, or dies, or if the incumbent becomes disqualified to be a Member of Parliament.

Article 116 of the Constitution provides for vacation of the office of a Minister on revocation of the appointment by the President or if the holder resigns or becomes disqualified to be a Member of Parliament or dies.

It is worth noting that even where Parliament, by resolution passes a vote of censure against a Minister under **Article 118** of the Constitution, it is not vested with powers under the Constitution to order that the censored Minister vacates the office of Minister. **Article 118(2)** of the Constitution limits the powers of Parliament to:

“118

(2) Upon a vote of censure being passed against a Minister, the President shall, unless the Minister resigns his or her office, take appropriate action in the matter”.

In our considered view, the framers of the Constitution saw it fit, to vest the Powers to remove the Prime Minister and/or a minister from office into the President who is the Chief Executive, except where the Minister dies, or on his or her own accord decides to vacate office, or unless he or she becomes disqualified to be a member of Parliament.

We accordingly come to the conclusion that Parliament is not vested with powers under the Constitution to order the Prime Minister, or a Minister of Government to “**step aside.**” We find
5 that the Attorney, General, as a respondent to the petition, rightly conceded to this issue as to its constitutionality. It is the onerous responsibility of the Prime Minister and each of the ministers to, with the consent of the head of the executive, take an individual decision, each one on his own to step aside pending investigation.
10 That is the constitutional position.

Issue three

Whether Parliament acted unconstitutionally to appoint an Ad-hoc committee to investigate the allegations. Article
15 **90** of the Constitution vests powers in Parliament to appoint Committees necessary for the efficient discharge of its functions and these committees have the powers of the High Court as provided for in **Article 90(c)**

20 ***Article 90 provides;***

“(1) Parliament shall appoint standing committees and other committees necessary for the efficient discharge of its functions.

25 ***(2) The Committees of Parliament shall include sessional committees and a committee of the whole house.***

(3) Rules of procedure of Parliament shall prescribe the composition and functions of the committee of Parliament.

5 **(4) In exercise of their functions under this article, committees of Parliament;**

(a) May call any Minister or any person holding public office and private individuals to submit memoranda or appear before them to give evidence.

10

(b) May co-opt any Member of Parliament or employ qualified persons to assist them in the discharge of their functions.

15 **(c) Shall have the powers of the High Court for**

(i) Enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise

20

(ii) Compelling the production of documents and

(iii) Issuing commission or request to examine witnesses abroad.”

25 We do appreciate the efforts of counsel for the petitioner demonstrating to us that resolution 9(b) was passed in a very emotional, hostile and un parliamentary fashion, perhaps, unprecedented in history of this country since her return to

30 Parliamentary Democracy.

We hasten to observe in this regard, that although members of Parliament are independent and have the freedom to say anything on the floor of the House, they are however, obliged to exercise and enjoy their Powers and Privileges with restraint and decorum and in a manner that gives honour and admiration not only to the institution of Parliament but also to those who, inter-alia elected them, those who listen, to and watch them debating in the public gallery and on television and read about them in the print media. As the National legislature, Parliament is the fountain of Constitutionalism and therefore the Honourable members of Parliament are enjoined by virtue of their office to observe and adhere to the basic tenets of the Constitution in their deliberations and actions.

15

The Speaker, as the head of the House, has a big role to play in guiding parliamentarians not to use unparliamentary and reckless language that may infringe on other people's rights which are entrenched in the Constitution, by calling them to order. Parliament should avoid acts which are akin to mob justice because such acts undermine the respect and integrity of the National Parliament. It is not in keeping with the basic tenets of the Constitution, for example, when an Honourable Member of Parliament advocates for executing people without trial, like Idi Amin did to many Ugandans and this member is not called to order, but is just cheered on by the rest of the House. This happened when Honourable members were deliberating the issues about the Prime Minister and the three other ministers. The matter in which the deliberations of Parliament were conducted

during the debate that led to the passing of the impugned resolutions was unfortunate.

Consequently, we have ventured to make the above observations
5 so as to ensure that strict observance of decorum in the House is maintained. However, our observations notwithstanding, we find that the setting up of the ad-hoc committee by Parliament in that heated atmosphere was constitutional under **Article 90** of the Constitution and this Court cannot interfere with it. To do so
10 would amount to this Court interfering with the legitimate internal workings of Parliament. In agreement with counsel for the Attorney General, we are also of the view that the fear by the petitioner that the Prime Minister and other Ministers concerned may not get a fair hearing is premature. The committee has
15 powers of the High Court and is expected to exercise its powers judiciously and in accordance with the Rules of Natural Justice. On the contrary, if it makes errors of law, any aggrieved party has the right, through appropriate court actions to have the committee subjected to the checks and balances tool of the
20 Judiciary. See **Picture Houses Ltd Vs Wednesbury Corporation [1948]1KB 223, at 229, where** Greene MR. stated:

25 ***“If any authority misdirects itself in law, or acts arbitrarily on the basis of considerations which lie outside statutory powers, or unreasonably that its decisions cannot be justified by any objective standard of reasonableness, then it is the duty and function of the courts to pronounce that such***

decisions are invalid and when these are challenged by any one aggrieved by them and who has the necessary locus standi to do so”

- 5 The learned Chief Justice John D. Richard, of the Federal Court of Canada, in an Article entitled **“The Role of the Judiciary in Canada”** has persuasively opined that:

10 ***“Our declaration that the Constitution is the Supreme Law of Canada has altered one of the fundamental principles of our Parliamentary democracy. It has conferred upon the courts the responsibility to decide whether legislation (in this case read resolution) is consistent with or offends against the Constitution.***
15 ***The supervisory jurisdiction of the courts is now grounded in the rule of law in the Constitution and the charter.”***

In the final result, we find that Parliament acted within its
20 constitutional powers in setting up the Ad-hoc committee to investigate the allegations made against the Honourable Prime Minister and other two Ministers of Government. We answer issue 3 in the negative.

25 **Issue 4 on Resolution 9(b)** on whether the resolution to demand for high moral Standards was unconstitutional, we find nothing unconstitutional to demand and expect observance of high moral standards of members of the committee while carrying out their mandate which Parliament did in the Resolution. The

Resolution in our considered view just emphasized the obvious.
We also answer this issue in the negative.

In the final result, the petition partly succeeds. We make the
5 following declarations and orders:-

(1) The petition raised a cause of action and the petitioner
had a locus standi to lodge and prosecute the same.

10 (2) Resolution 9(c) which required the Prime Minister and
other ministers to step aside with immediate effect pending
investigations and a report of the Ad-hoc committee of
Parliament is unconstitutional and therefore null and void.

15 (3) Resolution 9(a) which set up the Ad-hoc committee and
its membership to investigate allegations against the Prime
Minister and other Ministers is constitutional.

(4) Resolution 9(b) requiring members of the Ad-hoc
20 Committee to have high moral standards while carrying out
their assignment is merely emphasising the obvious and was
constitutional.

(5) We order that the injunction issued to Parliament to
25 halt it's investigations on matters complained of in the
petition until this petition is disposed of, be and is hereby
lifted.

As to Costs, we are of a considered view that this is a matter of
30 great National importance and timely for the maintenance of

the Rule of Law, constitutional harmony and peace, in this Country. Though the petitioner has not succeeded on all the prayers, in the petition, we have deemed it appropriate to award him some costs. We award him 2/3 of the costs with a certificate
5 for 2 counsel.

Dated at Kampala this21st.....day of ...February....2012

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**HON. A.E.N MPAGI BAHIGEINE,
DEPUTY CHIEF JUSTICE/PRESIDENT
CONSTITUTIONAL COURT**

15
**HON. S.B.K KAVUMA(Dissenting)
JUSTICE OF APPEAL**

20
**HON. A. S NSHIMYE,
JUSTICE OF APPEAL**

25
**HON. M. S ARACH AMOKO,
JUSTICE OF APPEAL**

30
**HON. REMMY KASULE,
JUSTICE OF APPEAL**

35
**THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA**

CONSTITUTIONAL PETITION NO. 47 OF 2011

TWINOBUSINGYE

SEVERINO:.....PETITIONER

VS

ATTORNEY

GENERAL:.....RESPONDENT

CORAM:

HON. JUSTICE A.E.NMPAGI-BAHIGEINE,
DCJ/PCC

HON. JUSTICE S.B.K KAVUMA, JA/JCC

HON. JUSTICE A.S NSHIMYE, JA/JCC

HON. JUSTICE M.S ARACH AMOKO, JA/JCC

HON. JUSTICE REMMY KASULE, JA/JCC

JUDGEMENT OF S.B.K KAVUMA (JA/JCC)

I have read, in draft, the majority judgment by
Lady Justice A.E.N Mpagi-Bahigeine, the Hon.
Deputy Chief Justice/President of the Constitutional
Court, A.S.Nshimye, M.S.Arach Amoko and Remmy
Kasule JJA/CC. I agree with their finding that the
Constitution is the supreme law of the land and
that everybody, organ of state and institution,
(***including Parliament***), emphasis mine, must
respect it.

Issue one

I am in complete agreement with my lords' conclusion and decision in the majority judgment on issue one.

Issue two

5 With regard to issue two, I agree the notion of ***stepping aside*** is not specifically provided for in the Constitution. The dictionary meaning of the term, as clearly brought out in the majority judgment, makes the notion, in my view,
10 synonymous with resignation. It is basically dealing with vacating an important office.

When it comes to vacating the office of the Rt. Hon. Prime Minister or a Minister, the Constitution states comprehensively what that means and what
15 it entails in the terms of **Articles 108(4)** and **116** of the Constitution respectively. By **Articles 108 A(3)** and **117**, the Prime Minister and a Minister are individually accountable to the President. The president has a very crucial role to play in the
20 process leading to an effective vacation of office by a Prime Minister or a Minister to the extent that even when Parliament embarks on the process of

censuring a Minister, the President's role is clearly of great significance as provided in **Article 118** of the Constitution.

In my view, however, and this can be taken judicial
5 notice of, according to a practice that is commendably developing in this country and is widely recognized and applied in functional democracies the world over, a Prime Minister or a Minister may voluntarily and as guided by his or
10 her own conscious, take the decision to temporarily leave his or her office, with the consent and approval of the President in the case of Uganda, until such a time as the matters that may have made him or her take the decision, are
15 sorted out. That would be taking leave as opposed to **stepping aside**. Parliament, therefore, has no Constitutional powers to order a Prime Minister or a Minister to **step aside** nor does it have the Constitutional power to order a Prime Minister or a
20 Minister to take leave of his or her office, not even temporarily, by forcing him or her to go on leave. For Parliament, therefore, to attempt to force the

Rt. Hon. Prime Minister Hon. Amama Mbabazi and the other two Ministers, Hon. Sam Kutesa, Minister of Foreign Affairs and Hon. Hillary Onek, Minister of Internal Affairs to vacate their offices, as it
5 attempted to do through the impugned resolution No.9(C) is clearly unconstitutional.

Issue three

As to issue three, the gist of which is the question as to whether Parliament acted unconstitutionally
10 to appoint an Adhoc Committee to investigate the allegations leveled against the Rt. Hon. Prime Minister, Hon. Amama Mbabazi, Hon. Sam Kutesa, the Minister of Foreign Affairs, and Hon Hillary Onek, the Minister of Internal affairs, I agree with
15 the majority judgment to the extent that it recognizes that the manner in which the Hon. Members of Parliament and the Rt. Hon. Speaker of Parliament conducted the affairs of that August House during the period the impugned resolutions
20 were debated and passed, the unparliamentarily language used by some Hon. members of Parliament as reflected in the official Hansard of

the House and the very emotional and hostile fashion, hitherto unprecedented, since the time this country returned to parliamentary democracy, was not in keeping with the basic tenets of the Constitution and was, therefore, in my view, necessarily and logically unconstitutional.

That conduct offended the cardinal principles of natural justice as enshrined in **Articles 28** and **42** of the Constitution and it was in contravention of **Articles 2,44(c), 79** and **108 A** of the Constitution. From the evidence on record, it is clear Parliament fell into the error, probably unconsciously, of turning itself into the investigator, the prosecutor and the judge, all three in one, in a matter it was clearly an interested party when it deliberated on the matters that were on the House floor at that time. Perhaps a wise choice would have been to opt for a judicial commission of inquiry conducted independently of Parliament.

It was argued that at that time Parliament was not acting as a court or as a tribunal. What must not

be lost sight of, however, is the fact that traditionally and conventionally, Parliament enjoys some quasi judicial status and powers, for instance, to punish for contempt of Parliament. It also has, under, **Article 118**, powers of censuring a Minister. As a fountain of democracy and as an organ of state, Parliament has, in all its workings to always observe the Constitution under the doctrines of the supremacy of the Constitution and the separation powers.

The learned Chief Justice John D. Richard, of the Federal Court of Canada, in an article entitled “**The Role of the Judiciary in Canada**” partly put it candidly:

“Our declaration that the Constitution is the Supreme Law of Canada has altered one of the fundamental principles of our Parliamentary democracy. It has conferred upon the courts the responsibility to decide whether legislation (in this case read

resolution) is consistent with or offends against the Constitution. The supervisory jurisdiction of the courts is now grounded in the rule of law in the Constitution and the charter.”

The Supreme Court, in **Major General David Tinyefuza Vs Attorney General, Constitutional Petition Appeal No.1 of 1997** emphasized the fact that the constitutional platform is to be shared by Parliament, the Executive and the Judiciary. His Lordship George Kanyeihamba, JSC (as he then was), authoritatively stated:

“...The Constitution provides that the constitutional platform is to be shared between the three institutional organs of Government whose functions and powers I have already described (supra). The Uganda Constitution recognized these organs as the Parliament, the Executive and the Judiciary. It

was not by accident either that it created, described and empowered them in that order of enumeration. Each of them has its own field of operation with different characteristics and exclusivity and meant by the Constitution to exercise its powers independently. The doctrine of separation of powers demands and ought to require that unless there is the clearest of cases 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.”(Sic)

5
10 Clearly, in my view, where there is a clear case calling for intervention to determine the constitutionality or legality of any action, or where a government agent has exceeded his /her/its powers or have acted unjustly causing injury
15 thereby, the courts, and this Court more especially, are obliged to interfere and to do so without fear or favor.

In the instant case where Parliament acted in outright violation of **Articles 28(1)** and **42** of the
20 Constitution, and where **Article 28** is an underogable article under **Article 44(C)** of the Constitution, **Article 28** being the article in which

the cherished and always jealously guarded principles of natural justice are embodied, in my view, is one of those clearest cases where Court must firmly intervene.

5 In **Picture House Ltd Vs Wednesbury corporation [1948]1KB 223**, at page 229 Greene, MR. stated:

10 ***“If any authority misdirects itself in law, or acts arbitrarily on the basis of considerations which lie outside statutory powers, or so unreasonably that its decisions cannot be justified by any objective standard of***
15 ***reasonableness, then it is the duty and function of the courts to pronounce that such decisions are invalid and when these are***
20 ***challenged by any one aggrieved by them and who has the necessary locus standi to do so”***

In **De Souza Vs Tanga Town Council, Civil Appeal No. 89 of 1960** reported in **1961 EA 377** at page **388** the East African Court of Appeal held;

“If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. That decision must be declared to be no decision.”

I accept the case made by counsel for the petitioner in his submissions that a House which conducted its business the way Parliament did in the entire process of passing the impugned resolutions, was a biased House. A House with predetermined views and conclusions about the Rt. Hon. Prime Minister and each of the two Ministers in issue. I am persuaded that although the Rt. Hon. Prime Minister and each of the two Ministers

addressed Parliament at some point of its deliberations, they did so in an atmosphere and environment which was so polluted that it did not measure up to the tenets of the rules of natural
5 justice particularly that of a fair hearing as provided for in the Constitution.

Further, I am of the strong view that the Adhoc Committee appointed by Parliament from among its membership which was tainted with the
10 unconstitutional acts and regrettable manner in which it handled the debate leading to the passing of the impugned resolutions and the setting up the Adhoc Committee, does not itself, measure up to the test of a disinterested and impartial tribunal
15 within the meaning of **Article 28(1)** of the Constitution. It is irredeemably tainted with the unconstitutional acts of the whole House from which it was constituted and from which it drew its character and derived its authority.

20 There is no doubt Parliament has the power to set up committees including Adhoc ones under **Article 90** of the Constitution. That power, however, must

be exercised in full compliance with the provisions of the Constitution. This court, being a constitutional court, cannot justifiably abdicate its constitutional responsibility of ensuring such compliance even for fear of appearing to be interfering with the internal workings of Parliament. As it was put in **Paul Kawanga Ssemwogerere and Another vs Attorney General, Constitutional Appeal No.1 of 2000**(Sic)

“.....the court cannot avoid its constitutional duty to adjudicate a dispute arising from rules of internal procedure of parliament.”(Sic)

In **Okello Okello Livingstone and Others Vs The Attorney General and Another, Constitutional Petition No. 4 of 2005** this court stated:

“We must make it categorically clear that the doctrine of separation of powers does not bar this Court from

**investigating the contravention
by the Legislature or the
Executive in instances of clear
excess or abuse of their
powers.”**

5

In conclusion on this issue, I find that in its deliberations leading to the passing of the impugned resolutions and its acts and decision in setting up the Adhoc Committee, Parliament acted
10 in contravention of **Articles 2, 28 (1) 42, 44, 79** and **108 A** of the Constitution. That unconstitutional conduct contagiously spread to and infected the Adhoc Committee itself in terms of its constitution and character. The right under
15 **Article 28(1)** being a non derogable one under the provisions of **Article 44(c)** of the Constitution, is sacrosanct. Any infringement by Parliament of **Article 28(1)** in its deliberations in issue, including the setting up of the Adhoc Committee are,
20 therefore, null and void. Clearly, in my view, in so acting, Parliament exceeded its powers and acted illegally in contravention of all the principles of

natural justice. All its acts and decisions, therefore, are clear strangers to the law.

Parliament acted unconstitutionally and it is the duty of this court, as the custodian of the
5 Constitution, to so find and I would, therefore, find in the affirmative on issue three.

Issue four

The gist of this issue is the demand by Parliament as it set up the Adhoc Committee that members of
10 that committee exhibit a high standard of moral standards and whether such demands are constitutional. That would be unquestionably and perfectly alright had all things regarding the committee been normal and free from any
15 unconstitutionality.

However, in a situation where the setting up, the composition and the character of the committee are themselves of questionable constitutional credentials and, therefore, unconstitutional, it is
20 inconceivable that it could be comfortably and justifiably argued that anything to do with such a committee can be free from the unconstitutional

infection affecting it from all the circumstances surrounding it. Given the committee's unconstitutional background, could the demanded attributes be expected of it? The logical answer, in
5 my view, is a clear no. The constitution must be religiously observed and obeyed both in letter and spirit. I am, therefore, constrained to find those demands infected with the unconstitutionality surrounding the whole circumstance giving rise to
10 this petition especially considering that the decision giving birth to the committee is no decision at law, is null and void and ultimately unconstitutional. I, therefore, find those demands unconstitutional.

15 In the final result, I would find that this petition would succeed.

I would, however, decline to make any declarations.

I would order that the petitioner gets the costs of
20 the Petition.

Dated at Kampala this 21st day

Of February 2012

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S.B.K Kavuma

5 **Justice of Appeal/Justice of The Constitutional Court**

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