

**THE REPUBLIC OF UGANDA**  
**IN THE CONSTITUTIONAL COURT OF UGANDA**  
**AT KAMPALA**  
**CONSTITUTIONAL PETITION NO.45 OF 2012**

5 **RTD JUSTICE ALFRED N.KAROKORA.....PETITIONER**

**VERSUS**

**ATTORNEY GENERAL.....RESPONDENT**

**CORAM: HON.JUSTICE REMMY KASULE, JA**

**HON.JUSTICE ELDAD MWANGUSYA, JA**

10 **HON.LADY JUSTICE FAITH E.MWONDA, JA**

**HON.JUSTICE KENNETH KAKURU, JA**

**HON.JUSTICE GEOFFREY KIRYABWIRE, JA**

**JUDGMENT OF THE COURT**

15 **Introduction**

This is a Constitutional Petition where the Petitioner is aggrieved that S.13 (1) of the Pensions Act, cap 286 and its attendant regulation 13(2) (c) that put a ceiling to the number of months that an officer can serve in the public service when

computing one's pension to 435 months or expressed as a percentage 87% of the highest pensionable emoluments gained by a pensioner at any time in the course of their service, is inconsistent with **Article 254(1)** of the Constitution. The Article  
5 provides that: **“A public officer shall on retirement receive such pension as is commensurate with his rank, salary and length of service”**. Further, that the act of the Commissioner of Pensions in disregarding the total number of months that the Petitioner served in public service in the computation of his  
10 pension as provided for by the Constitution and instead applying S.13 (1) of the Pensions Act that restricts the number of months to 435 is in contravention and is inconsistent with **Article 254(1)** of the Constitution of the Republic of Uganda cited above.

### **Back ground**

15 The background to this Petition is that the Petitioner began working in the Judiciary in July 1963 and retired on the 5<sup>th</sup> of November 2006 at the rank of Justice of the Supreme Court when he attained the age of 70 years as required under **Article 144(1) (a)** of the Constitution. He had served in the Public  
20 Service uninterrupted for a total period of 520 months.

In the computation of his pension, the Commissioner of Pensions disregarded the 520 months that the Petitioner had served and instead took into account only 435 months as the qualifying period of service arguing that that was the maximum period a public servant could serve for purposes of computing pension. As a result, the Commissioner denied the Petitioner pension for a period of 85 months or roughly seven years. The Petitioner seeks the following declarations:

1. That the provisions of S.13(1) of the Pensions Act, cap 286 and its attendant regulations 13(1)(2)(c) are inconsistent with the provisions of **Article 254(1)** of the Constitution and are therefore null and void,
2. That the refusal by the Commissioner of Pensions to take into account the entire period of service of the Petitioner contravenes and is inconsistent with the provisions of **Article 254(1)** of the Constitution and his actions were therefore unconstitutional.

### **Grounds of the Petition**

The grounds upon which the Petition was premised were stated briefly in the Petition and laid out in detail in the affidavit in

support of the Petition sworn to by the Petitioner and dated 02<sup>nd</sup> October 2012. He averred, *among other things*, that:

- he was employed in the public service of the Republic of Uganda from July 1963 to 5<sup>th</sup> November 2006 when he retired at the age of 70 as required by Article 144(1) (a) of the Constitution of the Republic of Uganda,
- up to his retirement, he had worked for total period of 520 months in the public service,
- however, the pensions authority in the computation of his pensionable emoluments failed to take into account the total period of months that he had worked and instead took a period of 435 months,
- the respondent's agents reasoned that they were bound by S.13(1) of the Pensions Act cap 286 that placed a ceiling to the pensionable emoluments that any pensioner could get to 87% or 435 months,
- by taking a period of only 435 months instead of the 520 months that he had served, the respondent was disregarding 85 months or 7 years of his service to Government,

- the actions of the respondent's agent; the pensions authority are in total breach of **Article 254(1)** of the Constitution that stipulates that a public officer shall on retirement receive such pension as is commensurate to his or her rank, salary and length of service.

## Representation

At the hearing of the Petition, the Petitioner was represented by Mr. Andrew Munanura, (counsel for the Petitioner), while the respondent was represented by Ms Nanvuma Jane Frances and Ms Imelda Adongo, both State Attorneys, (counsel for the respondent).

## Issues

1. Whether the Petition is *res judicata*
2. Whether the application of **section 13(1) of the Pensions Act cap 286** and its attendant pension, regulation 13(2) (c) are inconsistent with the provisions of **Article 254(1)** of the Constitution.
3. Whether the Petitioner is entitled to the declarations, remedies and redress sought.

#### 4. Costs

##### **Court's consideration of the Petition**

In addressing Constitutional Petitions, this Court derives its jurisdiction from **Article 137(3)** of the Constitution which  
5 provides that:-

**“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, is inconsistent with or in contravention of a  
10 provision of this Constitution, may petition the  
constitutional court for a declaration to that  
effect, and for redress where appropriate.”**

While exercising that jurisdiction, the constitutional court is  
guided by a number of principles of interpretation. These  
15 include: the rule of harmony; the generous and purposive rule  
which requires that the provisions of the Constitution are given  
generous and purposive construction; the rule that all provisions  
concerning an issue should be considered together to give effect  
to the purpose of the instrument ;the liberal rule which allows

the court to give the words of the Constitution liberal and wide interpretation and the literal rule which allows the court to primarily look at the words of the Constitution and if they are clear and unambiguous, they must be given their natural and ordinary meaning irrespective of the consequences. These were laid out extensively in the case of **Maj.Gen. David Tinyefuza v Attorney General Supreme Court Constitutional Appeal No.1 of 1997.**

In the instant case, the Petition is centered on two issues; the principle of *res judicata* and the constitutionality of section 13(1) Pensions Act and regulation 13(2) (c) plus the possible remedies available to the petitioner. We shall address those issues in that order.

## **Issue 1**

### **Res judicata**

Counsel for the respondent argued that the Petition cannot be raised in this court because it is *res judicata*. She observed that the principle of *res judicata* which is governed by *section 7* of the *Civil Procedure Act cap 71(CPA)* was considered by the

Constitutional Court in the case of **Cheborion Barishaki v Attorney General Constitutional Petition No.04 of 2006** where the Court held:

5           **“we consider the petition before us as an attempt by the petitioner to bring in another way and in the form of a new cause of action a matter which he has already put before another court of competent jurisdiction and which has been adjudicated upon...We accordingly uphold the plea of res**  
10           **judicata and allow the objection raised by the respondent.”**

Counsel thus submitted that the principle of *res judicata* is an embodiment of the rule of conclusiveness of Judgment and it is applied to prevent a fresh suit being brought between the same  
15           parties for the same relief. She added that the petitioner in *High Court Civil Suit No.591 of 2007* raised the issue of computation of his pension in respect of the entire period of service in public service and that the matter was adjudicated upon by the court and the court decided that the pension authority was right in  
20           doing what it did and it acted within the law.



She contended that though the court made that Judgment, the petitioner did not appeal against it and is instead coming to the Constitutional Court for interpretation of a matter which has already been handled by the High Court. Counsel added that  
5 much as **Article 254(1)** of the Constitution provides that pension should be paid in respect of the length of the period of service, the same should be read together with **Article 144(1) (a)** of the Constitution. She also contended that when the issues were being raised in respect of the interpretation in the High Court,  
10 the Petitioner should have requested court to refer the matter to the Constitutional Court for interpretation rather than wait for the Judgment to be delivered and then go to the Constitutional Court. She argued that the Constitution should be interpreted broadly, liberally and purposively as was considered by this  
15 court in the case of **Hon. Sam Kuteesa & 2 others v Attorney General Constitutional Petition No.46 of 2011.**

### **Case for the Petitioner**

On the issue of *res judicata*, it was counsel for the Petitioner's submission that the learned trial Judge merely canvassed around  
20 the issues being raised by the petition but did not pronounce

himself on these since he noted that he did not have the jurisdiction to interpret the Constitution and make a direction but only applied the Constitution before arriving at his decision.

### **Resolution of Issue 1**

5 Section 7 of the Civil Procedure Act, cap 71 provides for *res judicata* and it states:

10                   **“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 the 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**  
15                   **subsequently raised, and has been heard and finally decided by that court.”**

Counsel for the respondent referred this court to the case of **Barishaki Cheborion** (supra) where this court discussed the principle of *res judicata* and observed:

5 “Essentially the test to be applied by court  
when determining the question of res judicata  
is this: Is the plaintiff in the second or  
subsequent action trying to bring before the  
court in another way and in the form of a new  
cause of action, a matter which he has already  
put before a court of competent jurisdiction in  
earlier proceedings and which has been  
adjudicated upon? If the answer is in the  
10 affirmative, the plea of res judicata applied  
not only to points upon which the first court  
was actually required to adjudicate but to  
every point which properly belonged to the  
subject matter of litigation and which the  
15 parties or their privies exercising reasonable  
diligence might have brought forward at the  
time: See *Greenhalgh v Mallard* [1947]2 All ER  
255.”

From the above, it goes to show that for *res judicata* to apply,  
20 the issue in the second suit should have been conclusively dealt

with by a court of competent jurisdiction. In the case of **Norbert Mao v Attorney General Constitutional Petition No.9 of 2002**, this court while addressing the issue of res judicata under section 7 CPA, held:

5                   **“The expression "former suit" appearing in**  
the section has been defined to mean "a suit  
which has been decided prior to the suit in  
question whether or not it was instituted prior  
thereof...The issues in this petition are the  
10                   **same or substantially the same as those in**  
**Misc. Application No. 0063 of 2002. The**  
**learned trial judge, having heard and finally**  
**decided the issues and made declarations and**  
**orders the applicants sought, this Court is**  
15                   **barred from trying those issues again.**

In the instant case, as counsel for the petitioner submitted, the High Court only canvassed the constitutional articles the petitioner relied on to reach his decision but could not make any declarations therein because he did not have the jurisdiction to  
20 interpret them. In fact, the learned trial Judge while

acknowledging his lack of jurisdiction observed on page 9 of his judgment:

5           **“This Court is aware of the fact that it possesses no jurisdiction to declare any provision of an Act of Parliament unconstitutional and, therefore, null and void to the extent of the inconsistency. It is also aware that it has jurisdiction in any case where it considers any provision of the law that existed before the coming into force of the Constitution not to be in conformity with the Constitution, to invoke the provision of Article 272(1) of the Constitution and to apply that provision of the law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it in conformity with the Constitution.”**

10

15

A look at the Petition before us shows clearly that the learned Judge resolved the issue of whether the pension office basing on  
20 the Pensions Act and regulations had rightfully calculated the

petitioner's pension based on the 87% ceiling. However, the question before this court is whether the law on which that 87% is premised contravenes **Article 254(1)** of the Constitution and for that we do not find that the High court answered that question. Even if it had, we cannot find that it conclusively did so since the High Court does not have the jurisdiction to do that. As will be shown it is only this Court that is seized with the jurisdiction to make such an interpretation.

The case of **Barishaki** (supra) which was relied on by counsel for the respondent is distinguishable from the instant Petition. In that case, the Petitioner while applying for Judicial Review alleged that his removal from office by the Solicitor General was done in contravention of **Articles 28(1), 42 and 44** of the Constitution in that he was not given an opportunity to defend himself against the allegations levied against him. On petitioning the Constitutional Court, he sought a declaration that his removal from office contravened **Articles 28(1), 42 and 44** of the Constitution. The Constitutional Court found that the same issue had already been conclusively dealt with by the High Court and the Petitioner was only seeking to bring in another

way, a matter which had already been decided by a competent court.

In this case, however, the issue that was dealt with at High Court was whether the Commissioner for Pensions was right in  
5 computing the Petitioner's pension at 435 instead of 520 months and the issue here before us is whether section 13(1) (a) of the Pensions Act that puts a ceiling of 87% of the highest pensionable emoluments gained by a pensioner at any time in the course of his/her service, contravenes **Article 254(1)** which  
10 requires one's pension to be commensurate to the person's rank, salary and length of service. This far, we find that this is a distinct issue which cannot be said to have been dealt with by the High Court.

Before leaving this issue, we wish to point out that the principle  
15 of *res judicata* applies with equal force to constitutional cases as with ordinary suits. The law refers to "former suit" and we strongly believe that the relevance of *res judicata* is to avoid unnecessary multiplicity of suits and to also put an end to litigation. Once a suit has been heard and finally determined, all  
20 the issues that were canvassed should not be re-packaged and

brought to the Constitutional Court just because a party was defeated in other courts except where like in this case a constitutional matter arises and it is only this Court that is seized with the original jurisdiction of its interpretation.

5 In the case of **Kikonda Butema Farm Ltd v Attorney General Constitutional Petition No.10 of 2012**, this court observed:

10 **“the respondent had in reply, raised the issue of res judicata arguing that all the matters raised in the Petition had been litigated upon before and determined by Courts of competent jurisdiction. We agree that in ordinary cases, this matter would have been res judicata. However, since the Constitutionality of this matter had not been raised in any of the said cases and since it is only this Court that is**  
15 **seized with the original jurisdiction over the interpretation of the Constitution, we find that res judicata does not apply in this case.”**

The above principle is applicable to the instant Petition and the  
20 finding of this court is that it is not res judicata. We also wish to



point out that this is one case where the High Court could have referred the question of the constitutionality of section 13(2) of the Pensions Act for interpretation before deciding whether the pension granted to the petitioner was proper. This should have  
5 been done by the trial court especially on realization that it had no jurisdiction to resolve a constitutional issue which was apparent. This is the better procedure and practice the trial court ought to have followed. Court ought to adopt it to ensure reliability of Judgments.

10 The other aspect of this matter is that the Pensions Act was enacted in 1946 and hence predates the 1995 Constitution whose provisions this Court is required to interpret. **Article 274** of the Constitution which relates to existing law at the coming into force of the Constitution stipulates as follows:-

15 **“(1) Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be**  
20 **construed with such modifications,**

**adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.”**

The application of this Constitutional provision has been  
5 discussed in a number of decisions of this Court and most  
recently in the case of **Advocates for Natural Resources  
Governance and Development & 2 others v Attorney  
General & Another Constitutional Petition No.40 of 2013**  
(unreported) where this Court was required to construe *Section*  
10 *7(1)* of the *Land Acquisition Act* to bring it into conformity with  
the Constitution as required by **Article 274** of the Constitution.  
After citing a number of authorities on the application of the  
article, the Court summarized the position as follows:-

15 **“We agree entirely with the decision that the  
object of Article 274 was to allow courts and  
other judicial bodies to construe the old laws  
that predate the 1995 Constitution in  
conformity with it. The Petitioner in this  
matter should have filed a suit in any  
20 competent court and requested that court to**

**construe Section 7(1) of the Land Acquisition Act in such a way as to bring it into conformity with the Constitution as provided under Article 274. This would simply require to read into that Section, the phrase “prior payment”. Be that as it may, since the matter is before this court we are required to resolve it...”**

5

The resolution of Issues 2 and 3 raised in this Petition will in our view harmonize the application of the impugned Section 13(1) of the Pensions Act with **Article 254(1)** of the Constitution so that if there is any inconsistency between the two, it will be resolved once and for all.

10

### **Issues 2 and 3**

#### **15 Case for the Petitioner**

Counsel for the Petitioner while referring to **Article 254(1)** of the Constitution submitted that it is unconstitutional to take into consideration a person’s rank and salary only and ignore the length of service or put a ceiling to the time served. He added

that the Article should not be applied restrictively as it defeats the intention of its framers.

He pointed out that **Article 2(1)** emphasises the supremacy and the binding force of the Constitution on all authorities and persons throughout Uganda. The article provides that if any law or custom is inconsistent with any provisions of the Constitution, the Constitution shall prevail and the other law or custom shall to the extent of the inconsistency be null and void.

Regarding *section 13(1)* of the *Pensions Act* which provides that the pension granted to an officer under the Act shall not exceed 87% of the highest pensionable emoluments gained by a pensioner at any time in the course of his/her service, counsel contended that the 87% ceiling was applied to the Petitioner and in effect it deleted almost 7 years or 85 months from his uninterrupted service to the people of Uganda.

He thus prayed that court grants a declaration that the provisions of *section 13(1)* of the *Pensions Act cap 286* and its attendant regulations, *regulation 13(1)(c)* are inconsistent with the provisions of **Article 254(1)** of the Constitution. He further sought a declaration that the refusal by the pensions' authority

with the commissioner to take into account the entire period of service of the petitioner contravenes and is inconsistent with the provisions of **Article 254(1)** of the Constitution and his actions are null and void.

5 Counsel prayed that the Commissioner of Pensions re-computes the petitioner's pension and take into account his entire period of service of 520 months. He also prayed that the Commissioner of Pensions pays interest on the resultant figure and monthly pension from the date of the petitioner's retirement until  
10 payment in full. He proposed interest at the commercial rate of 40% taking into account the fluctuations and the costs of this petition.

### **Case for the respondent**

Citing **Article 144(1) (a)**, counsel for the respondent further  
15 submitted that a judicial officer may retire at 60 and that the Article is entirely permissive. She submitted that although the retirement age for the Justices of the Supreme Court is 70 years, they may retire once they clock 60 years. It was her view that *Section 13(1)* and *regulations 13(2) (c)* do not contravene the

Constitution and should therefore not be declared unconstitutional.

### **Resolution of Issues 2 and 3**

*Section 13(1) Pensions Act* provides:

5                   **“Except in cases provided for by sub-section  
(2), a pension granted to an officer under this  
Act shall not exceed 87 percent of the highest  
pensionable emoluments drawn by him or her  
at any time in the course of his or her service  
10                   under the Government.”**

**Article 254(1)** of the Constitution provides:

**“A public officer shall, on retirement, receive  
such pension as is commensurate with his or  
her rank, salary and length of service”**

15 **Article 144(1)** provides:

**“A judicial officer may retire at any time after  
attaining the age of sixty years, and shall  
vacate his or her office-**

**a) In the case of the Chief Justice, the Deputy Chief Justice, a justice of the Supreme Court and a justice of Appeal, on attaining the age of seventy years;”**

5 Our simple understanding of **Article 144(1) (a)** is that upon attaining the age of 60, the judicial officers mentioned therein may retire but can continue serving until 70 at what age they must vacate their offices. Simply put, those judicial officers may retire after 60 but they may also serve till they are seventy and  
10 once they opt to serve until they are seventy, it is improper to put a ceiling on the length of service of a public officer as this may exclude a person’s substantial period of service hence denying them pension for that period. This is in contravention of the Constitution which clearly does not impose such a ceiling.

15 To us, it is clear that to determine how much pension one should be paid, the authority should consider, among others, the length of period the pensioner has served. That is the command of **Article 254(1)** which is clear and without qualification or restriction. To do otherwise would, in our view, defeat the  
20 purpose of pension which seeks to appreciate one’s service.

Otherwise, there would be no need to put a minimum number of years in service before one can qualify for pension. If anything, a person like in the case of judicial officers who has clocked 60 years but still has the willingness to serve more ten years should  
5 be rewarded by giving him/her pension in accordance with the Constitution.

Therefore, we would find that as far as the Pension Act seeks to put a ceiling on the number of years one can be considered for pension, it contravenes **Article 254(1)** which provides that one  
10 shall, on retirement, be paid pension commensurate with his or her rank, salary and length of service. “Commensurate” has been defined by Advanced Learners Dictionary, page 227 as:

**“in the right proportion; appropriate”**

We should observe that pension can only be appropriate if it  
15 takes into proper consideration all the factors based on to calculate one’s pension without any form of limitation. In that regard, we would allow this Petition and declare that *Section 13(1) of the Pensions Act* contravenes **Article 254(1)** in as far as it bases calculation of pension of a pensioner to only 87% of the  
20 length of service, instead of the whole period of service of that



Pensioner and so did the action of the Commissioner for Pensions in refusing to consider the petitioner's entire length of service when computing his pension.

As to whether the petitioner is entitled to a remedy, counsel for the respondent submitted that this matter having been handled in the High Court, the Petitioner should have appealed against the High Court decision instead of coming to the Constitutional Court and as such, this Court should not grant any declarations sought by the petitioner and the petition should be dismissed with costs.

From what we have discussed, the Petitioner is entitled to the remedies sought in this Petition and we accordingly make the following orders:

1. That the Commissioner of Pensions is hereby directed to compute and pay the petitioner all his unpaid pension taking into account his entire period of service of 520 months.

2. That the Commissioner of Pensions pays interest on the unpaid amount resulting from (1) above at 15% per annum from date that amount accrued until payment in full.

3. That the Commissioner of Pensions pays to the petitioner  
5 monthly pension computed in accordance with (1) above from date hereof until payment in full.

#### **Issue 4**

#### **Costs**

On the question of costs, it is trite that costs follow the event. In  
10 the Supreme Court case of **Impressa Infortunato Federici v Irene Nabwire (suing through her next friend Dr. Julius Wabwire) Supreme Court Civil Appeal No.3 of 2000**, court held that costs follow the event *under S.27(1) of the Civil Procedure Act, cap 65(now cap 71)*, unless there are sound  
15 reasons why costs should not follow the event. In this case the petitioner is a pensioner who diligently served his country for a very long period up to the level of Justice of the Supreme Court. He is now above 70 years old. Having allowed this Petition, we see no reason to deny him costs. He is hereby granted costs

against the respondent with interest at court rate from the date of this judgment until payment in full.

Dated at Kampala this 20<sup>th</sup> Day of December 2013

5 Remmy Kasule

**Justice of Appeal**

Eldad Mwangusya

**Justice of Appeal**

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Faith E. Mwendha

**Justice of Appeal**

Kenneth Kakuru

15 **Justice of Appeal**

Geoffrey Kiryabwire

**Justice of Appeal**