

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA KAMPALA
CONSTITUTIONAL APPLICATION NO 57 OF 2010
ARISING FROM CONSTITUTIONAL PETITION NO. 47 OF 2010

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BETWEEN

DR. JAMES AKAMPUMUZA..... APPLICANT

AND

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- 1. ATTORNEY GENERAL**
- 2. MAKERERE UNIVERSITY BUSINESS SCHOOL**
- 3. WASWA BALUNYWA**
- 4. DR. SAMUEL SSEJJAKA**
- 5. MOYA MUSA.....RESPONDENTS**

RULING OF HON. MR. JUSTICE KENNETH KAKURU

15 This Constitution Petition was cause listed for hearing this morning at 9:30 am before a Coram
of the following Justices;

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HON. MR. JUSTICE A. S. NSHIMYE, JA
HON. MR. JUSTICE RUBBY AWERI-OPIO, JA
HON. LADY. JUSTICE SOLOMY B. BOSSA, JA
HON. MR. JUSTICE RICHARD BUTEERA, JA
HON. MR. JUSTICE KENNETH KAKURU, JA

However, due to unforeseen reasons only Hon. Mr. Justice Richard Buteera and Hon. Justice
Kenneth Kakuru were available this morning. The hearing of the petition therefore could not
25 proceed.

However, the Justices convened court to do the following;-

(1) Inform the parties and their counsel of the lack of Coram.

(2) To hold a scheduling conference.

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(3) To adjourn the matter for hearing before a full coram.

Mr. **Geoffrey Kandebe Ntambirweki** appeared for the petitioner together with **Mr. Simon Tendo Kabenge**. The respondent was represented by **Ms. Patricia Mutesi** while the rest of the respondents were represented by **Mr. Charles Nsubuga**. The petitioner was in court.

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Mr. Kandebe then made an application to file written submissions. He also raised an issue that the respondents had not filed an answer to the petition and as such the petition was unopposed.

Mr. Nsubuga then pointed out to court that Mr. Tendo Kabenge had been served and had acknowledged receipt of service.

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It was then conceded by Mr. Kabenge that he had been served. However, he contended that the service had not been brought to his personal attention.

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Mr. Kandebe intimated to court he would require time to file a reply to the answers to the petition.

Court then asked the parties to frame issues for determination before the court.

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Mr. Kandebe presented to court the petitioner's conferencing notes which contained his proposed issues.

It was noted by court that the issues framed by Mr. Kandebe had not taken into account the answers to the petition. Rightly so, as he had not been served with the answers although Mr. Kabenge had been served.

5 In view of the above, court inquired as to whether other issues raised in the respondents' reply would not be added to the issues already framed by Mr. Kandebe. Ms. Patricia Mutesi agreed that those issues would be added. Court then asked counsel to consider the following issues which had not been included in those framed by Mr. Kandebe. Those issues were;-

10 (1) *Whether the petition raised any issues for Constitution interpretation.*

(2) *Whether the petition was not an abuse of court of process.*

15 (3) *Whether the petition would not be consolidated with an earlier petition filed by the same petitioner in respect of interpretation of the same issues by the court.*

Issue three arose after Mr. Nsubuga had pointed out to court that the petitioner had filed a similar petition in this court earlier seeking same declarations and remedies. Mr. Kabenge was unwilling to have the two petitions consolidated and heard together.

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The court then granted counsel one hour within which to frame issues. That matter was stood over.

25 During the time the matter was stood over I summoned all counsel to my chambers and inquired from them whether or not the legal status of the 2nd petitioner was also not an issue to be determined by the court. In which case they needed to address the same in their framing of issues. All counsel agreed it was not an issue.

When court reconvened after one hour Mr. Kabenge raised issues of bias against both Justices of Appeal. In respect of Justice Buteera learned counsel stated that he had prior knowledge of the matter when he held the office of the Director of Public Prosecution and as such he is biased.

5 In respect of myself he stated I had shown open hostility and bias as he had already made up my mind about the petition. That this was expressed both in court and in my chambers.

In reply Ms. Mutesi submitted that Justice Buteera as DPP has no role in this petition. That complaint was against Police for usurping the powers of DPP. That this petition was not against
10 DPP and that the Attorney General in this petition was representing the Police and not the DPP.

On the issue of bias in respect of myself Ms. Mutesi submitted that the issues I raised had already been raised by both respondents in their pleadings and the respondents were going to frame them anyway. That the discussions held in my chambers were simply to highlight probable
15 issues for court's determination.

Mr. Kandebe then applied to court to allow the petitioner filed his reply to the respondent's pleadings in view of the fact that he had only been served with the same in court this morning and had not been aware of their existence.

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That he was unable to proceed with the scheduling as the pleadings had not been closed.

Mr. Kabenge then asked Justice Buteera and myself to disqualify ourselves from the hearing of the petition or any other proceedings including scheduling.

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Two justices of the court can not constitute a coram to hear a constitutional petition. Therefore the petition could not having been heard in absence of a full Coram.

A scheduling conference is not a hearing. I do not agree with Mr. Kabenge that it is. The fact
30 that scheduling conferencing takes place before a Registrar of this court or a single Justice of

this court both of who do not have jurisdiction to hear the petition in my view is a clear indication that a scheduling conferencing is only required to guide the process and is not a hearing. Black's law Dictionary defines as hearing as follows;-

5 ***“A proceedings of relative formality (though generally less formal than a trial) generally public, with definite issues of fact or law to be tried in which witness are heard and evidence is presented. It is a proceeding where evidence is taken to determine issues of fact and to render decision on basis of that evidence”***

10 In this particular case, both learned counsel for the petitioner stated in court that they had not been aware of the fact that the respondents had filed answers to the petition. Mr. Kandebe has applied for time to allow him file the necessary replies.

The conferencing of this petition therefore cannot be completed in view of Mr. Kandebe's application.

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In the interest of justice, I would allow Mr. Kandebe 10 (ten) days from today within which to file and serve all the necessary replies and the respondents 7 (seven) days from today within which to file and serve their respective rejoinder if any.

20 The above process therefore should be completed by 10th July 2014.

After this date the Registrar of this court should set down the petition for a scheduling conference before a single Justice of this court.

25 I find that the issues of bias raised by the Mr. Tendo Kabenge are misconceived, pre-mature and a waste of court's time as this matter was not for hearing today when the same were raised. They should have been raised before a full coram at the hearing of the petition.

As I have already stated a scheduling conference is not a hearing.

30 In any event the petition itself is not even ready for hearing as I have already stated above.

Learned counsel should feel free to raise the issues of bias or any other issues when the petition itself comes for hearing.

5 I note that this petition has been pending in this court for a long time. For almost four years. No effort has been made by the petitioner to prosecute it. It was fixed at court's own motion.

10 It appears that after the petitioner obtained an interim order of injunction from this court he simply sat back. That interim order was open ended. The petitioner it appears is not interested in having the petition heard and determined. All he wanted from this court was an order of injunction.

15 In the interest of justice and in order to prevent abuse of court process, I hereby direct that the said interim order shall lapse on date the scheduling conference of this petition is completed by a Justice of this court. On that date, that Justice of Appeal shall make such orders in respect of that interim order as he shall deem appropriate in the circumstances of the matter and in the interest of justice.

It is so ordered.

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Dated at Kampala this 23rd day of June 2014.

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL