



***in a court of law other than a field court martial, the court-***

5           ***a) may, if it is of the opinion that the question involves a substantial question of law; and***

10           ***b) shall, if any party to the proceedings requests it to do so, refer the question to the constitutional court for decision in accordance with Clause (1) of this article.***

The Petitioner herein is a plaintiff in ***High Court Civil Suit No. 435 of 2011*** and the respondent is a defendant in that suit,

***Brief Background:***

The brief background to this reference is as follows:-

15   The Petitioner is private limited liability company dealing in stationery among other things and the 1<sup>st</sup> respondent a statutory body established by law. The 2<sup>nd</sup> respondent, the Attorney General, was not a party to the suit from which this reference arose, but was sued in a statutory respondent under the  
20   provisions of Statutory Instrument No. 91 of 2005

On 19<sup>th</sup> January 2009 at the instance of the respondent the parties entered into a contract in which the petitioner was to supply 1540 books of business levy and licenses to the 1<sup>st</sup> respondent.

The books were delivered on 16<sup>th</sup> December, 2010. On 7<sup>th</sup> April 2011 the 1<sup>st</sup> respondent paid to the petitioner USD 83,160.80, leaving an outstanding balance of USD. 156,371.52.

5 When the petitioner demanded payment, the 1<sup>st</sup> respondent wrote back informing them that no payment could be made as the Solicitor General had advised that the contract signed between the petitioner and the 1<sup>st</sup> respondent was unenforceable on account of illegality.

10 The petitioner then brought a suit against the 2<sup>nd</sup> respondent at the High Court Commercial Division seeking to recover the said unpaid sum.

15 When the suit was called for hearing at the Commercial Division of the High Court on 16<sup>th</sup> October, 2012, the Court and the parties agreed first to refer a question of law to this court for interpretation under **Article 137 (5)** of the Constitution.

The learned judge in agreement with the parties framed the reference question as follows:

20 ***“Whether non-compliance with Article 119 (5) of the Constitution by not obtaining the advice from the Attorney General in a contract is a bar to payment where goods and services are supplied, to and consumed by a government entity”***

At the hearing of this reference Mr. Cephas Birungyi appeared for the petitioner, Ms. Patricia Mutesi appeared for the Attorney General and Mr. Caleb Mugisha and Mr. Dickson Akena appeared for Kampala Capital City Authority.

5 Mr. Birungyi submitted that the question is as a result of the holding of the Supreme Court in the case of Nsimbe Holdings LTD versus The Attorney General and Another Constitution Petition No. 2 of 2006.

10 He submitted that in the Nsimbe Holdings case (Supra) the court found other illegalities, in this particular case there were no illegalities in respect of the contract.

15 He cited the case of Attorney General versus Osotraco Court of Appeal, Civil Appeal No. 32 of 2002 for the authority that under the Constitution ordinary citizens and other parties like government enjoy equal rights and protection before the law in such dealings.

He submitted that Article 199 (5) was not applicable.

20 Mr. Akena submitted that the contract was not binding on the parties and that Nsimbe Holdings case (Supra) was good law. He argued that this Court is bound by its earlier decisions and those of the Supreme Court under the doctrine of *stare decisis*.

He submitted further that Local Government Regulations require that no bids are to be made without the consent of the Attorney General.

He submitted that *estoppel* cannot operate against the law. He concluded that the reference question herein must be answered in the affirmative.

Ms. Mutesi contended that non compliance with **Article 119 (5)** is a bar to payment in this case even if goods have been supplied and consumed.

She submitted that within the question itself there is an admission of non compliance with the provisions of **Article 119 (5)** of the Constitution.

That court cannot enforce a contract which is admitted to be unconstitutional.

She submitted further that the **Local Government Regulations 2006** stipulate that there shall be no conveying of an acceptance prior to obtaining approval from the Attorney General.

She prayed that the reference question be answered in the affirmative.

The reference question as it is framed is self explanatory and is not difficult to answer. In fact the answer is contained in the question itself as submitted by Ms. Mutesi. It is reproduced below for clarity.

**“Whether non-compliance with article 119(5) of the Constitution by not obtaining the advice from the Attorney General in a contract is a bar to**

***payment where goods and services are supplied to and consumed by a government entity”***  
(Emphasis added).

The principles of constitutional interpretation are now well settled.

5 This court set them out in detail in the case of **Advocates Coalition for Development and Environment and 40 other versus The Attorney General (Constitutional Petition No. 14 of 2011)** (unreported) as follows:

10 (i) *The widest construction possible in its context should be given*

15 (ii) *according to the ordinary meaning of the words used and each general word should be held to extend to all auxiliary and subsidiary matters. In certain contexts, a liberal interpretation of the Constitutional may be called for*

20 (iii) *A constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come and therefore should be given a dynamic progressive and liberal flexible interpretation keeping in mind the ideals of the people and their social economic and political cultural values so as to extend fully the benefit of the right to those it is intended for: **(South Dakota Vs. North Carolina 192, US 2681940 LED 448)***

25 (iv) *The entire Constitution has to be read together as an integrated whole and with no one particular provision*

*destroying the other but rather each sustaining the other. This is the rule of harmony, completeness and exhaustiveness, the rule of paramouncy of the written Constitution***(Paul K. Semwogerere & 2 others Vs. Attorney General Supreme Court Constitutional Appeal Number 1 of 2002)**

(v) *No one provision of the Constitution is to be segregated from the others and be considered alone but all provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate a greater purpose of the instrument.*

(vi) *Judicial power is derived from the people and shall be exercised by the courts established under the Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people and courts shall administer substantive Justice without undue regard to technicalities* **(Article 126 (1) and (2) (e) of the Constitution of Uganda 1995)**

(vii) *The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent or in contravention of the Constitution is null and void to the extent of that inconsistency* **Article 2 (1) and (2) of the Uganda Constitution 1995**

(viii) *Fundamental rights and freedoms guaranteed under the Constitution are to be interpreted having general regard to evolving standards of human dignity. **See the case of Uganda Law Society Vs. Attorney General ;Constitutional Petition Number 18 of 2005***

As already stated above the reference question itself provides the answer. In the question itself, there is an admission of non compliance with Article 119(5).

10 Non-compliance with any Article of the Constitution has its consequences under Article 2(2).

Article **119(5)** states that:-

15 ***“(5) subject to the provisions of this Constitution, no agreement, contract, treaty, convention or document by whatever name called, to which the Government is a party or in respect of which the government has an interest, shall be concluded without legal advice from the Attorney General, except in such cases and subject to such conditions as Parliament may by law prescribe”***  
20 ***(Emphasis added).***

On the other hand Article 2 (2) states that:-

***“2(2) If any other law or any custom is inconsistent with any of the provisions of this***



***constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void”***

Principle (vi) of Constitutional interpretation set out above which  
5 is derived from **Article 2 (1)** and **(2)** of the Constitution clearly states that the Constitution is the Supreme law and forms the standard upon which all other laws are judged.

If therefore any law, custom or act of whatever nature or description is inconsistent with any provision of the Constitution  
10 such law, custom or act would to the extent of the inconsistency be *void*.

It follows therefore that, since it is admitted in the reference question that there was non-compliance with **Article 119 (5)** of the Constitution, the contract made in contravention of the  
15 Constitution was void under **Article 2 (2)** of the Constitution.

The way the question is framed cannot be answered in any other way.

We are left but to wonder what the learned judge and both counsel had in mind when they framed the question.

20 It appears from the background of this matter that question ought to have been framed differently.

This Court has no power to amend or rephrase the reference question. Its duty is limited to interpreting it.

An amendment to the reference question can only be made by the parties before the Registrar of this Court under **Rule 20** of the **Constitutional Court (Petitions and References) Rules, Statutory Instrument No. 91 of 2005**.

- 5 This Court in its ruling in the case of **Akankwasa Damian versus Uganda, Constitutional Reference No. 5 of 2011** declined to entertain additional issues for determination while considering a reference from a lower court.

In that case this court said:-

10 ***“Rule 20 (supra) allows amendments on issues that had been framed by the lower court. In determining the reference, it is exercising special and limited jurisdiction, on matter and issues that have arisen in the proceedings before the***  
15 ***court which sent the reference. The additional issues which were framed by counsel for the applicant are outside the scope of the reference which was sent to us by the lower court”***

20 In this particular case the parties themselves ought to have realized that the question as framed did not in fact require any constitutional interpretation and should have sought to have it amended under Rule 20 of Statutory Instrument No. 19 of 2005 (supra).

It appears that both the court and the parties were in a hurry to have a reference question framed. As it transpired at the hearing in this court more questions required to be answered and evidence to be adduced before the High Court in order for it to  
5 determine the proper reference question.

In our view the High Court should have first sought to have the following issues resolved before framing reference question.

**(1) Did KCCA seek advice from the Attorney General**

10 **at any one time before or after the execution of the agreement?**

**(2) If so did the Attorney General object to the contract and if so what reasons did he give?**

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The answer to the above questions would have given rise probably to a different references question which would probably have been framed as follows:-

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**“Whether the advice of the Attorney General referred to in Article 119 (5) of the Constitution must be given prior to the signing of any agreement, contract, treaty, convention or document to which government is a party or whether such advice could be given after the signing of such an agreement, contract, treaty, convention or document but before such an**

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***agreement, contract, treaty, convention or document is concluded?”***

We shall not attempt to answer this question for the reasons we have already set out above. However, we think this is a very  
5 important question that requires an answer.

In the premises we would remit this matter to the High Court with directions that although the question set out in this reference has been answered that in itself does not resolve the legal dispute between the parties.

10 We order the that the High court should proceed to hear the evidence from both parties and at an appropriate stage of the trial if the need so arises and if the court considers it desirable it may rephrase the question and send it back to this court for determination.

15 The costs of this reference shall abide the results of the High Court suit.

It is so ordered.

**Dated at Kampala** this 4th day of April 2014.

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**HON. MR. JUSTICE A.S. NSHIMYE**  
**JUSTICE OF APPEAL**

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**HON. MR. JUSTICE RUBBY OPIO-AWERI JA**  
**JUSTICE OF APPEAL**

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**HON MR. JUSTICE RICHARD BUTEERA**  
**JUSTICE OF APPEAL**

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**HON. LADY JUSTICE SOLOMY BALUNGI BOSSA**  
**JUSTICE OF APPEAL**

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**HON. MR. JUSTICE KENNETH KAKURU**  
**JUSTICE OF APPEAL**

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