

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NUMBER 37 OF 2011
PETITION FOR A DECLARATION UNDER ARTICLE 137 (3)
OF THE CONSTITUTION AS AMENDED

AND
THE CONSTITUTIONAL COURT (PETITIONS AND REFERENCE) RULES
2005 SI 91 OF 2005

FRANCIS DRAKE LUBEGA===== PETITIONER

VERSUS

- 1. THE ATTORNEY GENERAL**
- 2. THE COMMISSIONER FOR LAND REGISTRATION**
- 3. HORIZON COACHES LTD:::RESPONDENTS**

CORAM: THE HON MR. JUSTICE ELDAD MWANGUSYA, JA/CC
THE HON MR. JUSTICE RUBBY OPIO AWERI, JA/CC
THE HON MR. JUSTICE RICHARD BUTEERA, JA/CC
THE HON MR. JUSTICE GEOFFREY KIRYABWIRE JA/CC
THE HON MR. JUSTICE FRED EGONDA NTENDE JA/CC

RULING

The Petitioner is the registered proprietor and owner of the land comprised in Leasehold Register Volume 3958 Folio 10 Plots 50-52 Nakivubo Road popularly known as Qualicel Bus terminal (formerly known as the “Baganda Bus Park” and hereinafter referred to as the “petition property”).

From the

petition it is deponed that the petitioner and the third respondent over the years have been involved in a series of suits which are pending in various Courts over the petition property. During this period, it is the case for the petitioner that the third respondent in a bid to circumvent the Courts and get preferential treatment complained to His Excellency the President of Uganda who in turn directed the Minister of Lands, Housing and Urban Development to investigate the dispute through his letter dated 10th August 2010. The Minister of Lands, Housing and Urban Development then set up a committee of inquiry into the Baganda Bus Park land dispute which issued its report in January 2011. On receipt of the Report His Excellency the President of Uganda then on the 20th July 2011 wrote a letter to the Minister of Minister of Lands, Housing and Urban Development in which the petitioner alleges that the President directed the cancellation of the title of the petition property. It is the case for the petitioner that the directive, order and or instruction contained in the letter of the 20th July 2011 is inconsistent with and contravenes Articles 8A, 21, 26, 28, 42 126 and 128 of the Constitution (as detailed in the petition).

In reply to the petition the third respondent in particular states *inter alia* that the petition discloses no question for constitutional interpretation and therefore lacks merit.

The respondents also filed a cross petition. When this matter came up for hearing it was established by Court that the cross petition had never been served on the petitioner/cross-respondent. The cross petitioner prayed that it be withdrawn and the court granted leave for the cross petition to be withdrawn with no Order as to costs because it had not been served.

The lawyers for the respondents then proceeded to raise preliminary objections which we have decided to dispose of first before addressing the main grounds in the petition.

The petitioners were represented by Mr. A. Kirumira while the respondents 5 were represented by Mr. A. O. Oryem, Mr. B. Othieno, Mr. C. Alaka and Mr. S Muyizi. The Attorney General was absent.

Objections by the third respondent

It is the case for the third respondents that the petition does not raise any question for constitutional interpretation and that there are three grounds in support of this contention.

Objection 1:

Counsel for the third respondent submitted that in filing a petition under Article 137 (3) of the Constitution the petitioner is also required to file an affidavit in support detailing their case for interpretation. However in this case the petitioner filed an affidavit founded on matters not within his knowledge. He argued that the whole affidavit, save for paragraphs 16 and 17 were merely background information and that paragraphs 16 and 17 20 were founded on information given to the petitioner by his lawyers. He submitted that an affidavit not founded on the matters within the knowledge of the petitioner cannot support a petition under Articles 137 (1) and (2) of the Constitution and that this Court has held so in the past. In this regard, he relied on the decision in the constitutional case of *Charles Mubiru V The Attorney General*, Constitutional Petition No **601** of **2001**.

Objection No. 2:

Counsel for the third respondent submitted that the jurisdiction of this Court under Article 137 (1) of the Constitution is to interpret the Constitution and this is where the petition and together with its supporting affidavit raises questions for interpretation which is not the case in this matter. He submitted

that this Court has held that where a petition does not raise a question for Constitutional interpretation then it should be dismissed. In this regard counsel relied on the following string of cases:

- 1) Charles Kabagambe V Uganda Electricity Board, Constitutional Petition No 02 of 1999.**
- 2) Ismail Serugo V Kampala City Council and another, Constitutional Petition No 14 of 1997.**
- 3) Paul Kwanga Ssemwogerere and another V Attorney General, Constitutional Petition No 3 of 1999.**
- 4) Horizon Coaches Ltd V Mbarara Municipal Council, Constitutional Petition No 07 of 2014.**
- 5) National Council for Higher Education V Kawooya Anifa Bangirana, Constitutional Appeal No 04 of 2011.**
- 6) Tukamuhebwa George & 2720 others V Attorney General, Constitutional Petition No 59 of 2011.**
- 7) Hon. Lt (Rtd) Kamba Saleh V Attorney General, Constitutional Petition No 38 of 2012.**

Counsel submitted that it is not enough for a petitioner to demonstrate that the constitution is applicable or needs to be enforced under Article 50 of the Constitution but that there must be a question for interpretation for this Court to have jurisdiction. He suggested that if the petitioner merely sought to enforce his right, then he had many avenues to follow. First, he could file an ordinary suit and in this regard there are already numerous suits that have been filed in this dispute which the petitioner can take advantage of to get redress. Secondly, the petitioner could file an action for judicial review to quash the impugned report in which case there would be no need for this Court to make an interpretation. He submitted that there was a difference between the role of this Court to interpret and that of enforcement. In this regard, he referred to the case of *Uganda Network on Toxic Free Malaria Control Ltd V The Attorney General*, Constitutional Petition No 14 of 2009.

Counsel for the third respondent submitted that a careful look at the impugned letter would show that it

was not a directive because the President urged that all titles that were fraudulently acquired be immediately cancelled.

He submitted that since this petition merely seeks to enforce constitutional rights then it does not belong to this Court.

Objection No 3:

The third reason was that the present petitioner is a man who has been held by this Court to be in contempt of Court and he has not purged himself of the contempt and therefore cannot enjoy the right under Article 137 (3) of the Constitution to file a question for interpretation. Counsel for the third respondent submitted that the petitioner had procured from this Court an interim Order to maintain the Status quo where the third respondent would remain in possession of the property but instead went on to cause the eviction of the third respondent. He submitted that this Court should not exercise its discretionary powers in favour of the petitioner unless he first purges himself of the contempt.

Reply by the petitioners

Objection No 1:

Counsel for the petitioner submitted that the petition and its supporting affidavits are in order. He pointed out that the petitioner's affidavit (from paragraph 3 onwards) shows a series of events which in the opinion of the petitioner culminated in a violation of his rights and thus invites this court to interpret the Constitution in light of those events. He added that paragraphs 16 and 17 mentioned by the third respondents allude to matters of law for which the petitioner is not an expert so he had to get legal advice, the source of which he disclosed.

Counsel for the petitioner submitted that the petitioner contends that the impugned letter by His Excellency the President contravened the law and

the only way this Court can arrive at that conclusion is through the interpretation of the Constitution in light of that letter under Article 137 (3) of the Constitution. He referred Court to the case of **Hon. Hanifa Kawooya** (*supra*) where **Hon Justice J. Mulenga, JSC** (as he then was) held that a petition brought under the provisions of Article 137 (3) of the Constitution sufficiently discloses a cause of action if it describes the act or omission complained of and shows the provision of the Constitution with which the act or omission is alleged to have been contravened and asks for a declaration to that effect. He submitted that as long as the petitioner has complied with this provision then he has access to the Court, the result notwithstanding.

Objection No 2:

As to whether this was a matter purely for enforcement of the Constitution under Article 50 before the High Court, Counsel for the petitioner submitted that the petitioner did try to stop the Minister from acting the way he did but that did not stop him as he continued to act to the detriment of the petitioner hence this petition. He argued that it would be a denial of the petitioner's right to justice and a fair hearing if this Court were to merely throw him out on a mere technical argument that there was nothing to interpret when the Constitution enjoins this Court to actually hear him. Furthermore, counsel submitted that the actual matter relating to His Excellency the President which is the main thrust of the petition in this Court is not one of the issues before the High Court.

Objection No 3:

On the matter of contempt of Court, counsel for the petitioner submitted that it was unfair because the petitioner was condemned unheard by the Court. In this regard the petitioner was ambushed by the allegation of contempt and was not given an ample opportunity to respond to the allegation.

Secondly, the Order that the petitioner was in contempt of Court was made on the 31st May 2013 and was on several occasions extended until 17th June 2013 when it expired as a result of the Court's inability to sit and hear the application for an interim order. In this regard, he referred Court to the

authority of *Kyaggwe Coffee Curing Estates V Emmanuel Lukwajju*, CA No. 327 of 2014 (COA) where it was held that all court orders remain in force until they are complied with, set aside or until they expire provided the expiration is set out in the order itself.

Decision of the Court

We *have* heard the objections and perused the authorities given to us by both counsel for which we are grateful.

In our view, the main objection in this petition is a jurisdictional one that the petition filed is not properly before this Court under Article 137 of the Constitution; as there is no issue involving the interpretation of the Constitution. This is the substantive objection to be resolved first before the main petition can be heard. This Court and the Supreme Court have in the numerous cases like *Ismail Serugo (Supra)* and *Attorney General V Major General David Tinyefuza*, Constitutional Appeal No 1 of 1997 (SC) dealt with the jurisdiction of this Court.

The holdings in those cases are loud and clear, that is, where there is no question for interpretation then this Court has no jurisdiction in the matter. We agree with counsel for the petitioner as to the test put by the *Hon Justice J. Mulenga, JSC* (as he then was) in the *Hon. Hanifa Kawooya case (Supra)* as to when there can be said to be a question for Constitutional interpretation. In this matter the petitioner claims ownership of the petition property and his constitutional protection to it under Articles 8A (National Interest); 21 (Equality and freedom from o discrimination); 26 (Protection from deprivation of property); 28 (Right to a fair hearing); 42 (Right to just and fair treatment in administrative decisions); 126 (The exercise of judicial power) and 128 (Independence of the Judiciary). The dispute involving the petition property has already generated a multitude of actions in the High Court, Court of Appeal, is Constitutional Court and Supreme Court. However for purposes of this petition, the actions complained of are found in a letter from His Excellency the President of Uganda dated 20th July 2011 to the Minister of Minister of Lands, Housing and Urban

Development. This followed a Report from a Committee of Inquiry set up by the said Minister. In his petition, the petitioner seeks declarations, orders and reliefs that:

“1. That the directive, order and or instruction contained in the letter of 20^k July 2011 is unconstitutional

2. The Report of the Committee of Inquiry into the Buganda Bus Park Land dispute dated January, 2011 including its establishment, proceedings; findings, recommendations, decisions and/or orders is unconstitutional... ”

The active matter that appears to be complained of is found in the letter of 20th July 2011 where the President wrote:

“... I am thus urging you to ensure that all the titles that were fraudulently acquired in respect to that land are immediately cancelled... ” (Emphasis ours)

To our mind, the President is simply urging or imploring the Minister to act on titles if fraudulently acquired and see to it that they are cancelled. The wording therein does not appear to us to meet the definition of a directive or order or instruction. The acquisition and ownership of the petition property is at the heart of all the numerous disputes in our court system involving the petition property many of which are still to be resolved. We do not see a letter urging action to be a basis for Constitutional interpretation under Article 137 of the Constitution. It is simply not enough to cite provisions of the Constitution and plead that this opens a door for constitutional interpretation. As stated by the Supreme Court in Major General David Tinyefuza case (*Supra*) that there is a big difference between applying and enforcing the provisions of the Constitution and interpreting it. It seems to us that the petitioner wishes to apply and enforce the Constitution as far as his rights to the petition property are concerned and that we find is not the jurisdiction of this Court. We accordingly agree with the submissions of counsel for the third respondent that this objection being a jurisdictional one is sufficient to dispose of the petition itself.

Final Result and Remedies

We accordingly uphold the preliminary objection as to jurisdiction and dismiss the petition with costs to the third respondent.

We so Order.

Signed, dated and delivered at Kampala this 3rd day of November 2015

THE HON MR. JUSTICE ELDAD MWANGUSYA, JA/CC

THE HON MR. JUSTICE RUBBY OPIO AWERI, JA/CC

THE HON MR. JUSTICE RICHARD BUTEERA, JA/CC

THE HON MR. JUSTICE GEOFFREY KIRYABWIRE, JA/CC

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