

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
{*Coram: Kasule, Mwangusya, Aweri Opio, Tibatemwa Ekirikubinza & Egonda-
Ntende, JJA*}

Constitutional Petition No. 24 of 2009

BETWEEN

Edward Kamy Lugonvu
Dr Adam Kimala
Charles Senkungu Walugendo Salongo
Savida Najjuka.....Petitioners

And

Attorney General.....Respondent

JUDGMENT OF FMS EGONDA-NTENDE, JA.

Introduction

1. The Kabaka of Buganda was scheduled to visit Kayunga District on the 13th September 2009. Prior to this date the Government of Uganda, for reasons it provided, stopped the Katikiro of Buganda from proceeding to Kayunga District to arrange for the visit and subsequently ordered the Kabaka not to proceed to Kayunga on the scheduled date for his visit. The order by the Government of Uganda preventing the Kabaka from visiting Kayunga on the 13th September 2009 aggrieved the petitioners who have come to this court seeking a declaration that such an order was inconsistent with Articles 20, 21 (1) (2) & (3), 24, 29(1) (d) (e) & 2 (a), 37, 43, 246, and clauses III and XXIV of the National Objectives and Directive Principles of State Policy in the Constitution of Uganda.
2. The respondent contends, in its answer to the Petition, that the Government of Uganda acted constitutionally in stopping the visit to go ahead and prays that this petition should be dismissed. The answer also contended that the

petition did not disclose a constitutional cause of action. This point was abandoned at the hearing of the petition by Ms Ijang, learned counsel for the respondent.

3. The answer to the petition is supported by 2 affidavits sworn by Mr Richard Mivule, the Regional Police Commander, with police responsibility -over Kayunga District and that of Major General Kayihura, the Inspector General of Uganda Police Force.

The Case for the Petitioner

4. The Petition states,

‘Your Petitioners, Edward Kamy Lugonvu, Dr. Adam Kimala, Charles Ssenkungu Walugendo and Saida Najjuka are affected and aggrieved by the following matters being inconsistent with the Constitution:-

That the act of the Government of Uganda barring the Kabaka of Buganda, the Katikkiro of Buganda, and the interested people of or in Buganda, both residents and visitors to the county of Bugerere, in the District of Kayunga, from going to or visiting the county of Bugerere, in Kayunga District, a part of the region of Buganda, was inconsistent with, and contravened Articles

20, 21 (2) & (3), 24, 29(1) (d) (e) & 2 (a), 37, 43, 246 and clauses 111 and XXIV of the National Objectives and Directive Principles of State Policy, all enshrined in the Uganda Constitution.

2. Your Petitioners state that by reason of the matters stated in paragraph 1 above, the acts of the Uganda Government were unconstitutional.

3. Therefore, your petitioners pray that court may grant declarations: That the act of barring the Kabaka of Buganda, the Katikkiro of Buganda and all the people from wherever from attending, enjoying, promoting and performing the functions connected with the visit of the Kabaka to Kayunga District projected for 12th September 2009, from visiting Bugerere in Kayunga District, or visiting any part of the Buganda Kingdom; or any part of Uganda; freely and without any impediment from any person or authority, basing it on any ostensible reason whatsoever; or barring assembling for and carrying out peaceful activities associated with the function of hosting the Kabaka in Kayunga District of Buganda, or hosting the Kabaka anywhere in Buganda, was in contravention of the Constitution.’

5. The petitioners prayed for costs of this petition.
6. The Petition was accompanied with four affidavits which provide the factual basis for the petition. There is no need to set out the same in this judgment as the answer to that petition does not put those facts in issue. Rather the answer to the petition contends that the actions of the Government were lawful and constitutional. It is necessary to set out the answer to the petition and supporting affidavits that seek to justify actions of Government

The case for the Respondent

7. The Answer to the Petition states in part,

'2. In reply to paragraph 1 of the petition, the Respondent:-

(a) avers that the act of the Government of Uganda in advising the Kabaka of Buganda not to go (to) Kayunga District and stopping the Katikkiro of Buganda from entering the District of Kayunga, was both lawful and Constitutional.

(b) Denies that there was a breach and or contravention of Articles 20 and 21 (1), (2), (3) of the Constitution as alleged in paragraph 1 of the Petition or at all.

(c) Denies that there was a breach and or contravention of Articles 24, 29(1), (d), (e), & 2(a) of the Constitution. The Respondent, again, avers that the action of the Government of Uganda in advising the Kabaka of Buganda not to go (to) Kayunga District and stopping the Katikkiro of Buganda from entering the District of Kayunga, was both lawful and Constitutional, it did not denigrate their human dignity and or divest them of their freedom of conscience, expression and of association. Consequently, breach of Articles 24 and 29 of the Constitution is denied, (d) In further reply to paragraph 1, the Respondent contends that the actions of the Government of Uganda did not contravene Articles 37, 43, 246 and Clauses 111 and XXIV of the National Objectives and Directive Principles of State Policy in the Constitution.'

8. The respondent contended that the petitioners were not entitled to any of the prayers sought in the petition and

prayed that the petition be dismissed with costs.

9. We shall set out in full the 2 supporting affidavits to the Petition. The first one of Mr Richard Mivule, states,

(1) That I am a male adult Ugandan of sound mind and I am the Regional Police Commander Central Region consisting of the Districts of Mukono, Kayunga, Nakaseke, Luwero, Nakasongola, Mityana, Mubende and Mpigi and I am conversant with the facts of this case and I am competent and authorised to swear this affidavit.

(2) That I have read and understood the petition and accompanying affidavits and I respond thereto as here below.

(3) That on 24 August 2009 Florence Bagunywa Nkalubo "Minister" of Youth and Employment of Buganda Kingdom wrote to the Resident District Commissioner (RDC) Kayunga and copied the letter to the District Police Commander (DPC) Kayunga informing the RDC that the Kabaka of Buganda would be visiting Bugerere County in Kayunga and requesting that the necessary security be provided to the Kabaka. A copy of the letter is attached hereto and marked "Annexure 1 "

(4) That on 3rd September 2009 Senkatuka Martin the "Prime Minister" of "Obukama bwa Banyala" handed a letter dated 2nd August 2009 addressed to the Inspector General of Police to the DPC Kayunga requesting for permission to hold a peaceful demonstration against the planned visit of the Kabaka of Buganda. The letter further stated that they would hand over a petition to the RDC against the planned visit of Kabaka scheduled for September 12th 2009. A copy of the letter is attached hereto and marked "Annexure 2."

(5) That on the 3rd September 2009 the DPC Kayunga wrote to me in his letter referenced KAY 28/06/20 informing me of the Kabaka's intended visit to Kayunga and the intended demonstration by the Banyala Community and further requesting for additional deployment of Anti Riot Police and logistical support in case of any security lapses in the District. A copy of the letter is attached hereto and marked "Annexure 3."

(6) That on 4th September 2009 I travelled to Kayunga with the Anti Riot Police to access the security situation and to further ensure that the intended demonstration is peaceful.

(7) That I heard on CBS Radio that one million people were being mobilized to accompany the Kabaka to Kayunga and participate in the Buganda Youth Week.

(8) That I further received Intelligence Reports that the Banyala community was also mobilizing Banyala of Busoga and Kidera, the Baruli of Nakasongola, the Abarusura a group in Bunyoro and some people from the Mount Elgon area to come to Kayunga and disrupt the Kabaka's visit.

(9) That further the proprietor of Kayunga Light College and "Prime Minister" of the Banyala Mr Senkatuka Martin complained to the Police that the he had gotten wind of plans to burn his school by Baganda loyalists.

(10) That as a result of the mobilization on both sides and reports of threats and counter threats it became apparent that the security situation in Kayunga could get

out of hand leading to, a destruction of life and property and a breakdown in the social cohesion of Kayunga District.

(11) That I was informed by the Inspector General of Police that the Central Government had invited both sides to engage in constructive dialogue so as to ensure a peaceful visit of the Kabaka to the District of Kayunga.

(12) That on 6th September 2009 around 10.30am, I found some youths digging holes to erect stalls at Ntenjeru Sub county Headquarters where the function of the Kabaka was slated to take place.

(13) That with the above background and cognizant of the fact that constructive dialogue between all the protagonists was being arranged by Government I advised the youth to stay the construction of the stalls pending the outcome of the discussions to ensure that the Kabaka visits Kayunga in a secure and stable environment. The youth agreed to stay the construction provided I and the officers that had accompanied me also left the site. I agreed and the youth and the police abandoned the site.

(14) That on the 7th September 2009 four Buganda Ministers came from Kampala with a number of Youths and began to construct the stalls at Ntenjeru Sub county headquarters.

(15) That I realized the Kampala group was militant, unruly and noisy and I knew they would confront the armed officers I was with so I commanded the armed officers to move further away from the scene and I sent my car to pick the Anti Riot Police in the event of any disturbance.

(16)-That I then approached the group unescorted in order to engage them in a civil way.

(17) That as I approached the group the four "Ministers" came to me and introduced themselves as ministers of Buganda who had come to prepare for the Kabaka's visit. I asked the "Ministers" if their preparations could await the outcome of the discussions which were underway.

(18) That the noisy and rowdy youth took over the discussions heckling that the Kabaka must come to Bugerere as others sang the Buganda Anthem while others still continue erecting the stalls.

(19) That I asked the Ministers to prevail over the unruly youth they had come with but they could not.

(20) That the youth began to pull my uniform and informed me that they are the ones who "bought it". On realizing the situation was getting out of hand I uttered the words of proclamation to wit, "All people here assembled, are informed in the name of the Sovereign State of Uganda to disperse peacefully and go back to your respective duties and homes. Anybody who does not abide by this order will be dispersed by force which includes tear gas and rifle fire." I then repeated the words in Luganda. I uttered the words of the proclamation more than once in English and Luganda to ensure that the rowdy youths left peacefully and without incident.

(21) That at that time the Anti Riot Police had arrived and taken position. Realizing the words of proclamation were not being obeyed I signalled to the anti riot police to disperse the rowdy group. The group was then dispersed and five youths arrested.

(22) That on the 9th September 2009 I received information that some youth were

erecting an arch in the town centre. I went to the town centre with some policemen and officers of the Anti Riot Police and I found the youth digging with a pick axe trying to erect the arch.

(23) That on the basis of the information deponed to hereinabove I requested the youth to stop, pending the outcome of the discussions in Kampala.

(24) That the group objected and became rowdy, I then uttered the words of proclamation ordering them to disperse peacefully in both English and Luganda.

(25) That the rowdy youth then began throwing stones at the officers I was with and I then ordered our drivers to remove all police cars from the scene to avoid them getting badly damaged.

(26) That I then repeated the words of proclamation to no avail. I then ordered that they be dispersed which was done using tear gas canisters.

(27) That the youths ran into the adjacent buildings and began to sneak back and throw stones. Some rowdy youth stole old tyres from Hareed Petrol Station and set them ablaze on the road just next to the GAPCO petrol station in the middle of Kayunga town putting in jeopardy the lives and properties of scores of people in Kayunga town.

(28) That I quickly put out the fire and tactfully withdrew all police personnel from the centre of Kayunga Town to avoid any loss of life and property.

(29) That on realising the security situation in Kayunga had worsened I sought for additional man power from the Inspector General of Police which I was given and I then deployed heavily across Kayunga Town and in particular I put road barricades on all access points to stop the rowdy youths that had been mobilized by both Baganda and Banyala loyalists from entering Kayunga and further threatening the lives and property of the people of Kayunga.

(30) That I know we did not block or stop people from coming to Kayunga but we searched all persons and vehicles entering Kayunga and recovered catapults, knives, pick axes from the access points being used by both Banyala and Baganda.

(31) That I know that on 10th September 2009 the Deputy Director of Operations of the Uganda Police Force Mr Grace Turyagumanawe came to Kayunga and found us at Sezibwa bridge one of the access points to Kayunga town.

(33) That owing to the tense atmosphere in Kayunga the Deputy Director told the Katikiro to return to Kampala because the Katikiro's security could not be guaranteed.

(34) That I know that at all material times herein mentioned, the actions of the Uganda Police Force were intended to protect life and property, preserve law and order and to prevent and detect crime and were not intended to violate the constitutional rights of any person as alleged or at all.'

10. Annexure 1, written by Oweek.

Florence Bagunywa Nkalubo,
Minister for Youth and employment,
Buganda Kingdom and addressed
to the Resident District
Commissioner, Kayunga District,
with copies to the DFC and DISO,
Kayunga, stated,

'RE: KABAKA'S VISIT TO BUGERERE
COUNTY.

ON behalf of the
Ministry, I thank you
for the good works
you render to the
Kingdom and the
country at large. His
Majesty the Kabaka
will be making the
above mentioned
visit to celebrate the
Buganda Youth Day
on 12th September
2009. We are
expecting very many
youths to attend this
occasion. The
purpose of this letter
therefore, is to
request you provide
the necessary
security to His
Majesty.

Looking forward to your cooperation.'

11. Annexure 2, written by the
Prime Minister of Bukama bwa
Bunyala, dated 2nd August 2009,
with copies to RDC, DISO, and
DPC, Kayunga, addressed to the
Inspector General of Police stated,

'RE: PEACEFUL
DEMONSTRATION
AGAINST HIS
HIGHNESS
MUWENDA MUTEBI'S
PLANNED VISIT TO

BUNYALA

We are writing to inform you that we have planned a peaceful demonstration as stated in the reference above during which we shall march from Kayunga Town Council to the District Headquarters where we shall hand our petition to the Resident District Commissioner. The assembling point will be the hospital Ground. The purpose of this letter is therefore to seek permission to hold the demonstration and security coverage.'

12. Annexure 3 was from the District Police Commander, Kayunga to the Regional Police Commander, Central, and is dated 3rd September 2009. It states,

'RE: VISIT OF THE KABAKA TO BUGERERE COUNTY.

On the 31/08/09 I received a letter addressed to the DPC Kayunga without reference dated 24/08/09 signed by the Minister of Youth and Employment for Buganda Kingdom. Immediately I communicated the same message to the District Committee and later our district Committee (Police). Today 3/09/09 I again received a similar letter addressed to the Resident District Commissioner Kayunga without reference dated 24/08/09 signed by the Ministry of Youth and employment for Buganda Kingdom copied to the DPC, DISO Kayunga. I have attached copies of your reference.

Further more today"; September 20091 have received two written communications

from the Prime Minister of Banyala without a reference addressed to the Inspector General of Police and the DPC Kayunga dated 2nd September and 3rd September, 2009 respectively copies of which I have also attached herewith for your information and advice.

The chairperson of the District Security Committee in her verbal communication to me in the presence (of) the District Internal Security Officer and our District Crime and Intelligence Officer advised that the Police make enough security deployment, monitor and gather intelligence for the above public functions. The RDC herself cautions on the district security leaders against any press release.

I have mobilized personnel from the Police Posts and some from Kayonza MPPU Detach who are to report at the Main Station by 0600 hours of 4th September 2009. Meanwhile further to our security deployment, we shall intensify both foot and motorised patrols day and night plus the Force Transport officer have been requested for some logical support and fuel. It could also be better if the Anti-Riot Squad can be stationed at the District Police headquarters in case of any short comings prior to the commencement of the above said public functions.'

13. A supplementary affidavit sworn by the Inspector General of Police, Major General Kale Kayihura was filed in support of the respondent. I shall set out what it states below.

' 1. That I am a male Ugandan of sound mind and I am the Inspector General of the Uganda Police Force and I am conversant with the facts of this case and I am competent to swear this affidavit.

2. That I have read and understood the petition and its accompanying affidavits and I respond thereto as below.

3. That I know that the District of

Kayunga did prior to the intended visit of the Kabaka have insecurity leading to communal violence and murders in the District. Examples of the communal violence include the following; On 30th July 2009 Sekamatte, a land surveyor was murdered by a

mob in Kayunga. On 15th August 2009, Sakajugo Jabula was attacked and killed. On 16th August 2009, Samuel Mubiru a landlord who was trying to survey his land was beaten to death by a mob and his dead body was torched in his ear. His surveyor was fortunate enough to escape alive.

4. That as a result of the tension and violence in parts of Kayunga District, I travelled to Kayunga District on 21st August 2009 accompanied by the Regional Police Commander (RPC), Central Region Mr Richard Mivule, and the Regional CID Central Region Ms Florence Okot, to appraise myself with the security situation on the ground.

5. That I directed the RPC Central Region and the Regional CID Officer to remain in the District of Kayunga and ensure that peace and security are maintained in the District. I, also, deployed officers of the Mobile Police Patrol Unit / Anti- riot Police in Kayunga to ensure peace, security and stability in the area as necessitated by the situation.

6. That I know that on 24th August 2009 Florence Bagunywa Nkalubo 'Minister' of Youth and Employment of the Buganda Kingdom wrote to the Resident District Commissioner (RDC) Kayunga informing the RDC that the Kabaka of Buganda would be visiting Bugerere County in Kayunga and requesting that necessary security be provided to the Kabaka. A copy of the letter is attached and marked "Annexure 1".

7. That I subsequently received intelligence reports of plans to disrupt the Kabaka's intended visit to Kayunga and I further was aware of massive mobilization in Buganda area by Buganda loyalists from Baganda to go to Kayunga and 'protect' their Kabaka.

8. That I knew both these groups meeting in Kayunga would be a recipe for disaster and lead to a breakdown of law, order, peace and tranquillity in the District of Kayunga.

9. That as a result of the already tense atmosphere the National Security Council on which I sit representing the Uganda Police, discussed the issue of the Kabaka's visit to Kayunga and tasked the Chairman of the Council Hon. A1 Hajji Kirunda Kivejinja to ensure that the Kabaka's visit to Kayunga was peaceful by inviting the Katikiro to meet with Banyara groups and engage in constructive dialogue.

10. That the DPC wrote to the Regional Police Commander in his letter referenced KAY28/06/20 informing him of the Kabaka's intended visit to Kayunga and this intended demonstration by the Banyala Community and further requesting for additional deployment of Anti-Riot Police and logistical support in case of any security lapses in the District. A copy of the said letter is attached hereto and marked "marked 2".

11. That I authorised the deployment of the anti riot police in Kayunga and I ordered the RPC to personally make an assessment of the security situation in the District of Kayunga and ensure that there is peace and tranquillity in the District of Kayunga.

12. That I further informed the District Police Commander Central Region that the Central Government had invited both sides to engage in constructive dialogue so as to ensure a peaceful visit of the Kabaka to the District of Kayunga.

13. That I was informed by the Regional Police Commander Central Region that on the 7th September 2009 four Baganda Ministers came from Kampala with a number of Youths and began to construct stalls at Ntenjeru Sub County headquarters and that the regional Police Commander advised that the construction be stayed pending security preparatory meetings that were on-going which advice was ignored and that the group thereafter became rowdy and riotous and he uttered words of proclamation to disperse the group and later ordered tear gas canisters to be used to ensure that the riotous assembly was abandoned.

14. That I know that a number of youths were arrested and detained at Kayunga Police Station as a result.

15. That the Katikiro of Buganda Eng. John Baptist Walusimbi called me and personally requested that the youths be released unconditionally so as not to worsen the already tense atmosphere. I accordingly ordered the youths to be released without charge in order to ensure dialogue between all protagonists.

16. That I was informed by the Regional Police Commander Central Region that on 9th September 2009 the released youths and other youths began to construct an arch for the welcome of the Kabaka to Kayunga in the Middle of Kayunga Town. On being approached by the Regional Police Commander the youths became rowdy,

riotous and began to throw stones at the Police Officers and set tyres ablaze near a GAPCO petro station, an act that put the lives and property of residents of Kayunga in jeopardy.

17. That I know that the Regional Police Commander requested for additional deployment in Kayunga, I made the assessment that we needed to have preventive additional police deployment in Kayunga to avoid loss of life or property or breakdown of peace and security. I therefore sent reinforcements from the Anti Riot Police as well as support from other security agencies and requested the Uganda Police Forces to deploy on the outskirts of Kayunga and reinforce our Police numbers to ensure law and order in Kayunga.

18. That I know that we deployed heavily across Kayunga town and put barricades on all entry points to Kayunga Town and I further asked the Deputy Director of Operations of Uganda Police to go to Kayunga and take control of the operation.

19. That early in the morning of the 10th September 2009 I was informed by His Excellency the President that his Excellency had called the Kabaka of Buganda on the evening of 9th September 2009 and agreed to certain conditions prior to the visit to Kayunga to wit; that the radio station CBS ceases incitement and that the Katikiro meet with the Minister of Internal Affairs early in the morning of September 10th 2009 to ensure a peaceful and orderly visit of the Kabaka of Buganda to the District of Kayunga.

20. That I was informed by the Minister of Internal Affairs that the Katikiro of Buganda was slated to meet him and representatives of the Banyala on the morning of 10th September 2009 to discuss the possibility of a peaceful visit of the Kabaka to the District of Kayunga but the Katikiro did not turn up for the meeting but opted to instead go to Kayunga and prepare for the Kabaka's visit against the express advice of the Minister of Internal Affairs.

21. That the Deputy Director of Operations informed the Katikiro that he could not enter Kayunga because his security was not guaranteed in Kayunga town.

22. That I know that the groups on CBS radio and other Radio stations that had been inciting people to go to Kayunga began inciting the Public to demonstrate and

commit acts of
sectarian violence
and as a result,
demonstrations, acts
of looting, sectarian
violence and

generalised violence broke out in Kampala leading to the burning of Natete Police Station and other police posts in and around the city, looting of property and tragic death of over twenty people in the city of Kampala.

23. That the Police reinforced by the military quelled the riots and restored peace, order and tranquillity back to the city of Kampala.

24. That on the 11th September 2009 realising that the security situation in the City and surrounding suburbs was getting out of hand, I issued a statement advising that the Kabaka of Buganda should not go to Kayunga so as to stabilize the security situation in the country.

25. That late in the evening of September 11th 2009 the Kabaka of Buganda called off his intended visit to Kayunga an act that helped restore calm and order in the Country.

26. That I know that our preventive deployment in Kayunga and later in

Kampala helped to restore calm and order in the country.

27. That I know that the Uganda Police Force is commanded by Article 212 of the Constitution to protect life and property, preserve, law and order and to prevent and detect crime and the actions of the Uganda Police Force were bona fide and intended to obey the Constitutional command and not violate the constitutional rights of any person or authority as alleged or at all.

28.1 swear this affidavit in support of the respondent's Answer to the Petition.'

Analysis

The law in relation to the right and freedom to assemble

14. The main contention on this petition is with regard to the fundamental right of the people to assemble and movement and to what extent that this can be curtailed by the Police. I shall begin this analysis by setting out the relevant provisions of the Constitution and the Police Act.

15. Article 29 of the Constitution states,

'29. Protection of freedom of conscience, expression, movement, religion, assembly and association.

- (1) Every person shall have the right to—
 - (a) freedom of speech and expression which shall include freedom of the press and other media;
 - (b) freedom of thought, conscience and belief which shall include academic freedom in institutions of learning;
 - (c) freedom to practise any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with this Constitution;
 - (d) freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition; and
 - (e) freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organisations.
- (2) Every Ugandan shall have the right—
 - (a) to move freely throughout Uganda and to reside and settle in any part of Uganda;
 - (b) to enter, leave and return to, Uganda; and
 - (c) to a passport or other travel document.'

16. Article 43 provides the general limitation to the fundamental rights and freedoms. It states,

'43. General limitation on fundamental and other human rights and freedoms.

- (1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.
- (2) Public interest under this article shall not permit—
 - (a) political persecution;
 - (b) detention without trial;
 - (c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.'

17. The Constitution sets out the broad functions of the Uganda Police Force in Article 212. It states,

'212. Functions of the Uganda Police Force.

The functions of the Uganda Police Force shall include the following—

- (a) to protect life and property;

- (b) to preserve law and order;
- (c) to prevent and detect crime; and
- (d) to cooperate with the civilian authority and other security organs established under this Constitution and with the population generally.'

18. Article 214 provides that Parliament shall by law regulate the Police Force. Parliament enacted such law known as the Police Act, Chapter 303. This Act came in force on 14th October 1994. The relevant provisions of that Act to the current proceedings are sections 32, 33 and 34. We shall set them out in full.

'32. Power to regulate assemblies and processions.

(1) Any officer in charge of police may issue orders for the purpose of—

- (a) regulating the extent to which music, drumming or a public address system may be used on public roads or streets or at occasion of festivals or ceremonies;
- (b) directing the conduct of assemblies and processions on public roads or streets or at places of public resort and the route by which and the times at which any procession may pass.

(2) If it comes to the knowledge of the inspector general that it is intended to convene any assembly or form any procession on any public road or street or at any place of public resort, and the inspector general has reasonable grounds for believing that the assembly or procession is likely to cause a breach of the peace, the inspector general may, by notice in writing to the person responsible for convening the assembly or forming the procession, prohibit the convening of the assembly or forming of the procession.

(3) The inspector general may delegate in writing to an officer in charge of police all or any of the powers conferred upon him or her by subsection (2) subject to such limitations, exceptions or qualifications as the inspector general may specify.

33. Power to stop and to order to disperse assemblies and processions unlawfully convened.

Where an assembly is convened or procession formed in contravention of a prohibition under section 32, the inspector general or officer in charge of police may require the assembly to cease to be held or the procession to be stopped and may order the immediate dispersal of that assembly or procession.

34. Unlawful assemblies.

Any assembly or procession of three or more persons which neglects or refuses to obey any order for immediate dispersal given under section 33 shall be deemed to be an unlawful assembly within the meaning of section 65 of the Penal Code Act.

19. It is contended for the respondent that the actions taken by the Police Force in relation to the Kabaka's visit to Kayunga were authorised by law in terms of the Articles 43 and 212 of the Constitution in that the Police Force is mandated to

protect life and property, preserve law and order and to prevent and detect crime. In doing so limitations were appropriately imposed on the fundamental rights and freedoms.

20. It is important at this stage to note with regard to the law that this is not the first time that this court is considering the powers of the Police with regard to peaceful assemblies. This Court in Muwanga Kivumbi v Attorney General Constitutional Petition No. 9 of 2008 [unreported] considered this very question and came to the conclusion that section 32 (2) of the Police Act was unconstitutional. This decision was handed down in May 2008 well before the events complained of in this petition.

21. Byamugisha, JA., writing the lead judgment in that case, which was endorsed by all the judges, found,

'In the matter now before us, there is no doubt that the power given to the Inspector General of police is prohibitive rather than regulatory. It is open ended since it has no duration. This means that rights available to those who wish to assemble and therefore protest would be violated. The justification for freedom of assembly in countries which are considered free and democratically governed in my view is to enable citizens come together and express their views without government restrictions. The government has a duty of maintaining proper channels and structures to ensure that legitimate protest whether political or otherwise can find voice. Maintaining the freedom to assemble and express dissent remains a powerful indicator of the democratic and political health of a country.

I, therefore, find that powers given to the Inspector General of Police to prohibit the convening of an assembly or procession an unjustified limitation on the enjoyment of fundamental right. Such limitation is not demonstrably justified in free and democratic country like ours. The subsection is null and void. The petitioner is entitled to a declaration to that effect.'

22. Mukasa Kikonyogo, DCJ, opined,

'As long as there is no contravention of Article 43 of the Constitution and the rights are exercised within the confines of the law, there would be no justification for invoking the powers under S. 32 (2) of the Police Act. There is no convincing reason for restricting or stopping convening rallies or assembly or demonstrations.

As already pointed out the Police have powers under other provisions of the law to maintain law and order or deal with any situation for instance the one envisaged under S. 32 (2) of the Police Act. The police will not be powerless without the powers under subsection 2; they can deploy more security men. Further, they have powers to stop the breach of peace where it has occurred by taking appropriate action including arresting suspects.

I am, therefore, in agreement with my sisters and brother on this Coram that to interpret and uphold S. 32 (2) of the police Act as authorizing the Police to prohibit assemblies including public rallies or demonstrations would be unconstitutional. Clearly, it would be giving the Police powers to impose conditions which are inconsistent with the provisions of Article 29 (1) (d) of The Constitution which guarantee the enjoyment of the freedom to assemble and demonstrate. As it was rightly pointed out by Byamugisha, JA, in her judgment, the powers given under s. 32 (2) of the Police Act are prohibitive and not regulatory. They cannot, therefore, be justifiable, in the circumstances of this petition.

In the premises, section 32 (2) of The Police Act would be null and void.'

23. Okello, JA., [as he then was] stated,

'The imposing question is, does the power to prohibit the convening of an assembly or forming of a procession, in a public place, for whatever reason, fall within the limit prescribed in the above Article 43(2)(c)? My humble answer is that it does not. It goes beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided in this Constitution.

The reason is that the exercise of that power has the effect of denying the citizens enjoyment of the fundamental right guaranteed under Article 29(1)(d). Application of purpose and effect principle of constitutional interpretation enunciated in the Queen VS Big Drugmark Ltd (others intervening) 1996 LRC (Constitution) 332 and adopted in Attorney General VS Salvatori Abuki and Richard Obuga, Constitutional Appeal NO. 1 of 1998, in interpreting the impugned subsection 2 of section 32 produces that result.

It was argued for the respondent that if that subsection was nullified, the police would be powerless to maintain law and order. I do not, with respect, accept that argument because the police still have the power to arrest any person who conducts himself/herself in the assembly or procession in a manner contrary to the law or who threatens violence. That is what is required to maintain law and order. To prohibit the convening of a lawful assembly or ,fanning_ a lawful procession in any public place on subjective reasons is not regulating the assembly or procession but a denial of the enjoyment of the fundamental right in contravention of Article 29(1)(d) of the Constitution.

It is for these reasons that I support the conclusion of Byamugisha, JA that section 32(2) of the Police Act is inconsistent with Article 29(1)(d) and therefore unconstitutional and hence null and void.'

24. Mpagi-Bahegeine, JA, [as she was then] stated,

'This court has on many occasions stated that the right of assembly is the aggregate of the individual liberty of the person and individual liberty of speech. The liberty to have personal opinions and the liberty to express them is one of the purposes of the right to assemble, which right or freedom constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and therefore each individual's self-fulfillment.-

Consequently, where individuals assemble, if the police entertain a "reasonable belief" that some disturbances might occur during the assembly, all that can be done is to provide security and supervision in anticipation of disturbances. It is the paramount duty of the police to- maintain law and order but not to curtail people's enshrined freedoms and liberties on mere anticipatory grounds which might turn out to be false. Lawful assemblies should not be dispersed under any circumstances. Most importantly in such cases the conveners of the assemblies can be required to give an undertaking for good behaviour and in default face the law. I would thus hold Section 32 of the Police Act to be null and void'

25. This court in Muwanga Kivumbi v Attorney General (supra) was unanimous in holding that the Inspector General of Police and therefore all officers under his command have no prohibition powers in relation to Article 29 of the Constitution. The Police have no power to prohibit the enjoyment of this fundamental right or fundamental freedom. What is permitted for the Police Force to do is regulation in order for the right and or freedom to be enjoyed rather than diminishing or annihilating the same.

26.1 I am not aware that this decision of this court has been overturned. We are obliged to follow it. In light of the foregoing decision sections 32 (3), 33 and 34 of the Police Act were also rendered otiose. I suppose that explains the subsequent enactment of the Public Order and Management Act 2013. As it was not in force at the time of the occurrence of the matters complained of it has not been referred to, and is inapplicable to these proceedings.

27. Turning to the facts of this case there are four incidents that stand out for consideration. But before considering each one of them, I must mention that the evidence in this case is largely provided by the respondent in the two affidavits it filed and it is what we shall largely follow as it has not been contradicted by the petitioners. Similarly the evidence of the petitioners on the factual issues is also not contradicted. I accept it. When the evidence of the both parties is considered together it is not contradictory. What is in issue is basically the application of the law to those facts as well as the inferences to be drawn from the facts before this court.

28. The district authorities in Kayunga received notification of the

intending visit of the Kabaka as we have seen above. The Kabaka's visit was to be centred at Ntenjeru Sub-County headquarters. It was intended to celebrate Buganda Youth Day. A show was planned to be held at Ntenjeru Sub-County headquarters grounds. The Police also received notification of the intention of the Banyala to hold a peaceful demonstration against the Kabaka's visit and desire to march from Kayunga Hospital to the RDC's Office and hand the RDC, a petition. The initial reaction and only reaction we have from the district authorities is expressed in the letter of the District Police Commander of 3 September 2009 in which he notified that the District authorities including the police were making arrangements for the successful holding of the said two functions and they needed, as a precautionary measure, some stand-by force, which he requested for.

29. From the evidence on record the Regional Police Officer, Mr Mivule was instructed by the Inspector General of Police to go to Kayunga and take over the command of the situation and ensure that there was peace and security in the area prior to and during the visit.
30. On the 9 September 2009 some Baganda Youths started making preparations for the Kabaka's visit by building stalls at Ntenjeru Sub County Headquarters. The Regional Police Officer found them engaged in this task. He ordered them to stop on the ground that he was aware that the Government had called for talks between the Buganda Kingdom and the Banyala leaders. At this point the youths were engaged in any unlawful activity". No allegation of unlawful activity against this group is alleged. Neither were these youths threatening anybody or being threatened by anyone.
31. Clearly the reason given by the Regional Police Commander for stopping these preparatory acts for the Kabaka's visit is not sound in law. The Regional Police commander had no authority to interfere with the persons who were engaged in a lawful and peaceful activity. The building of stalls posed no threat to anyone. Neither was this activity infringing on anyone else's rights or freedoms for that matter. No one had reported to the Police or any other authority of the District that the stalls were being constructed where they were not supposed to be constructed.
32. The second incident was the following day on 7th September 2009. Four Buganda Ministers came with a number of youths to build stalls at Ntenjeru Sub County headquarters. The Regional Police Commander again intervened when this group of persons was engaged in an activity that has not been claimed to have contravened anyone's rights or freedoms or caused a breach of peace. He claims to have advised them to stop constructing stalls pending the outcome of the Kampala Talks. The advice

was not accepted. He was heckled and decided that the group had become riotous and decided that it disbands.

33. Again the Regional Police Commander had no lawful reason he put forth for the group to desist from carrying out an activity in preparation for the Kabaka's visit which was neither unlawful nor threatening anyone else's rights and freedoms. The group was not confronting any person whatsoever, nor was it being confronted by any other group save for the police. Clearly the Regional Police Commander was acting unlawfully in stopping a peaceful activity that threatened no one. Having acted unlawfully the Regional Police Commander had no legal basis for issuing the proclamation to disperse and use of tear gas to disperse citizens that were lawfully going about their business of preparing for the Kabaka's visit. It appears that it was the Regional Police Commander who was, contrary to the law, restricting the youths from carrying out, what to all intents and purpose, was a lawful activity, they were carrying out in order to properly welcome the Kabaka.
34. The third incident, again from the evidence submitted by the Respondent, occurred on the 9th September 2009. Some youths started building an Arch in Kayunga Town as part of the preparations for the Kabaka's visit. The Regional Police Commander again attended to this in his usual manner. He told them to disperse telling them there can be no preparation for the Kabaka's visit until the conclusion of the Kampala talks. When the youths resisted he ordered them to disperse and dispersed them forcefully, resulting in some fracas and fighting.
35. It may be pointed out that construction of temporary structures in urban areas is an activity that is controlled by law. Permission of the urban authority is required for this kind of activity. The Regional Police Commander was not concerned *with the* law at this point. He did not inquire whether the group had permission for the activity they were engaged in. He could well have been in his rights to stop the activity if they did not have the permission of the local authority. He continued with his position that not until the Kampala talks concluded would he allow preparatory actions for the Kabaka's visit. The reason provided to disperse this group is again clearly not good enough in law, even though it may amount to good politics.
36. The last incident was the visit of the Katikiro, again to prepare, for the Kabaka's visit on 10th September 2009. The Katikiro was stopped at River Sezibwa bridge where the police had a stop and search station established. The Katikiro was stopped from proceeding to Kayunga, and was told his security in Kayunga could not be guaranteed. The Police cited no legal

authority for this interference with or rather restriction of the Katikiro's right to free movement within Uganda including proceeding to Kayunga town in contravention of Article 29(2) (a) of the Constitution. Clearly the Katikiro had not threatened anyone's right or freedom. He was not involved in any unlawful activity.

37. The only logical inference from these four incidents is that the Police Force had decided to prevent all preparatory acts for the Kabaka's visit.
38. Of course the Central Government may have decided that it should broker talks between the Katikiro and the Banyala of Kayunga. Whether these talks went ahead or not was no justification in law for stopping preparatory visits for the Kabaka to Kayunga. The functions of the Police must be carried out in accordance with the law. The law is clear. The Police has no prohibition powers in relation to the exercise of fundamental rights and freedoms. Neither are these fundamental rights and freedoms enjoyed only at the pleasure or with the fiat of the Police Force or Government. The rights are inherent to the people in accordance with Article 20(1) and not granted by the State. The fundamental rights and freedoms are simply recognised and protected by Chapter 4 of the Constitution and all agencies of State are obliged under Article 20(2) to respect, uphold and promote their enjoyment.
39. Following the barring of the Katikiro from entering Kayunga riots broke out in Kampala and they were so serious that the Kabaka called off his visit to Kayunga on the 11th September 2009. It is contended by the respondent that the riots in Kampala were the result of incitement by Central Broadcasting Station. Without wishing to enter the debate on the causes for this breakdown of law and order in parts of Kampala it is clear that the Police actions in Kayunga in relation to the four incidents enumerated above may have provided the trigger or spark to those riots or added 'petrol' to the 'fire'.
40. Both the Inspector General of Police and the Regional Police Commander have alluded to the existence of 2 protagonist groups in Kayunga which they named as the Buganda Kingdom and the Banyala. However, on a review of the facts that the Regional Police Commander has outlined in his affidavit, it is clear that the only confrontations we have evidence of is between Buganda Kingdom officials or followers and the Police. The only incidents of confrontations show the Police in action against people lawfully going about their business.
41. There is no evidence brought forth to suggest that the Buganda Kingdom officials were threatening the Banyala or vice versa though the Police claim

that intelligence suggested that this was likely to happen and was a toxic mix. The initial police response was that the planned activities by either group could be held. And even if that were not to be the case the duty of the Police would be to arrest and prosecute those threatening violence rather than to suggest that those engaged in lawful activity should cease such activity until they attended to talks with those bent on disrupting their lawful activity.

42. The Prime Minister of the Banyala stated that they wanted to peacefully demonstrate and had asked for permission from the Inspector General of Police to do so. In his affidavit the Inspector General of Police did not show that he had responded to this letter directly. The Banyala were entitled to peacefully assemble and demonstrate for any legitimate reason and this was an activity that they could pursue without infringing on the right of those associated with Buganda Kingdom who wanted to assemble and celebrate with the Kabaka of Buganda their Youth Day.

43. From a review of all available evidence in this matter it is clear that the Police Force acted without justification in stopping preparations for the Kabaka's visit to Kayunga and I would hold that the Police unconstitutionally interfered with the Petitioners' rights and freedom to assemble and associate with other like minded Ugandans on the occasion of the Kabaka's visit to Bugerere or Kayunga District slated for 12th to 13th September 2009 in contravention of Article 29(1) (d) of the Constitution. The police actions as recounted by the Regional Police Commander in his affidavit, and repeated by the Inspector General of Police in his affidavit, were in the main unconstitutional. The police, in respect of the four incidents enumerated above, was disrupting lawful activities and in that regard

its claim to be maintaining law and order is not supported by evidence adduced by the Police itself. The Police had determined that it would not allow the Kabaka's visit to go ahead and Mr Mivule the Regional Police Commander, in concert with the Inspector General of Police, implemented this position, in disregard of the constitutional rights and freedoms of the Petitioners and its constitutional duty to respect, uphold and promote the said rights and freedoms under Article 20(2) of the Constitution.

Discrimination against the Kabaka

44. It was contended that Article 21 of the Constitution had been violated by the actions of the Police and Government of Uganda in so far as the Kabaka had been the subject of discrimination. This claim is without merit as no cause of action was made out upon which such a claim could succeed. Discrimination 'means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, colour, ethnic origin, tribe, creed or religion, social or economic standing, political opinion or disability.' See *Article 21(3) of the Constitution*. It has not been alleged on the petition that the Kabaka was treated differently from other persons on account attributable only to or mainly on account of any of the categories enumerated in Article 21(3). Nor was it shown on the petition which other persons were treated differently. Clearly no cause of action was made out on this account in the petition. It cannot succeed.

Decision

I would hold that the Uganda Police Force acted unconstitutionally to prevent the Kabaka of Buganda visiting Kayunga District by disrupting all lawful activities for the preparation of the Kabaka's visit. The Police contravened articles 29 (1) (d) and (2) (a); and 20(2) of the Constitution of Uganda in this regard. I would grant a declaration to that effect. I would allow this petition with costs.

Dated, signed and delivered this 17th day of December 2015

FMS Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 24 OF 2009

BETWEEN

1. Edward Kamyá Lugonvu
2. Dr. Adam Kimala
3. Charles Senkungu Walugendo Ssalongo
4. Saida Najjuka:.....:Petitioners

AND

The Attorney General of Uganda:.....: Respondent

Coram: Hon. Justice Remmy Kasule, JA/CC
Hon. Justice Eldad Mwangusya, JA/CC
Hon. Justice Rubby Aweri-Opio, JA/CC
Hon. Justice Prof. Lillian Ekirikubinza Tibatemwa, JA/CC
Hon. Justice F.M.S. Egonda-Ntende, JA/CC

JUDGMENT OF HON. JUSTICE REMMY KASULE

I have had the advantage of reading the draft of the lead Judgment by my brother Hon. Justice F.M.S. Egonda-Ntende, JA/CC, and I agree with the conclusion he has arrived at. I have however a few observations to make by way of emphasis.

As to the contention of the respondent that the petitioner's petition did not disclose any question for constitutional interpretation, Aiticie 13/ (3) (a) and (b) provides:

"137 Questions as to the interpretation of the Constitution.

(1).....

(2).....

(3) 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."

A cause of action is the entire set of circumstances giving rise to an enforceable claim. Those circumstances must consist of acts or omissions that are justiciable or actionable in law, that is, they must present a real and substantial controversy founded in law calling for adjudication. The existence or absence of a cause of action is determinable by the relevant Court from the pleadings of the parties to the cause that are presented before that Court. See-

Constitutional Appeal No. 1 of 1997: AG V Major General David Tinyefuza (Sc)

In interpreting the Constitution, the true text of the Constitution must not be overlooked or ignored. It is that text which is the Constitution. Where the text is imperfect/or not clear, the Court must ascertain the meaning of that text of the Constitution by being guided by the overall spirit of the Constitution. Kanyeihamba, JSC, in the **Tinyefuza case** (Supra) stated the overall spirit of the Constitution to be:

The Constitution is to be interpreted contextually as a whole and as an ambulatory living instrument for the good governance, liberties, welfare and protection of all persons in Uganda.

Bearing in mind the above and applying the same to Article 137(3) in particular and the whole Constitution in general, an examination of the petitioners petition shows that the petitioners allege that they are affected and aggrieved by an act of the Uganda Government barring the Kabaka, the Katikkiro, and others, from going to or visiting Bugerere County, Kayunga District, on/or about 12.09.09 and that this act was in contravention of stated Articles of the Constitution. The petition then prayed that the Constitutional Court issues declarations to that effect.

The respondent in answer to the petition admitted that the Government of Uganda had barred the Kabaka, the Katikkiro and others, from entering Kayunga District, but that this had been done bonafide and under the mandate of Uganda Police to protect life and property, preserve law and order and to prevent and detect crime.

I am accordingly satisfied that the petitioners' petition complied with **Article 137 (3) (b)** and showed on its face that there was a matter for Constitutional interpretation. Counsel for respondent 85 was thus right to so concede.

As to the merits or demerits of the petition, it has to be appreciated that the

right to freedom of movement is vested in every Ugandan by Article 29 (2) (a). It provides:

“29

(1).....

(2) Every Ugandan shall have the right.....

(a) to move freely throughout Uganda and to reside and settle in any part of Uganda;

The right to move freely throughout Uganda, being enshrined in s Chapter Four of the 1995 Constitution, has to be respected, upheld and promoted by all organs and agencies of Government and by all persons pursuant to **Article 20 (2)** of the Constitution.

The enjoyment of the right to move freely in Uganda is only subject to the general limitation to the fundamental rights and freedoms set out in **Article 43** of the Constitution. Thus one enjoying the right must not prejudice the fundamental or other human rights and freedoms of others or the public interest. Further, any limitation of the enjoyment of the right must not exceed what is acceptable and demonstrably justifiable in a free and democratic society or what is provided in the Constitution.

Articles 20 (2) and **43** thus define how the Uganda Police has to carry out its Constitutional and Statutory functions under **Article 212** of the Constitution and under the Police Act, Cap. 303. These functions are to protect life and property, preserve law and order, prevent and detect crime and co-operate with the civilian authority and other security organs as well as the population generally.

In Constitutional Petition No. 9 of 2008: Muwanga Kivumbi V

Attorney General this Constitutional Court dealt with the issue of the Uganda Police's role with regard to respecting the right of the people to freely assemble or to form a procession in a public place under **Article 29(1) (d)**.

This Court unanimously declared in that case that the Uganda Police has no powers under to **Article 29** of the Constitution to prohibit the enjoyment of a right guaranteed under that Article.

The Court defined the role of the Police to be regulatory by providing security and supervision in case of any actual or anticipated disturbances.

The Police should exercise the power vested in it by dealing with those causing the breach of the peace, law and order, including arresting and criminally prosecuting them. But the Police must not extinguish the enjoyment of the rights guaranteed under Article 29;

'--except only as provided under. Article 43 of the Constitution.-

Though the **Muwanga Kivumbi** case, (supra) primarily dealt with the enjoyment of the right to assemble and protest, the decision equally applies to the lawful exercise of the right to move freely, reside and settle in any part of Uganda.

In this particular case, the Uganda Police admits that it prohibited the Kabaka, the Katikiro and others from moving to and entering Kayunga District. In answer to the petition, the respondent stated in paragraphs 2(a) and (c) of the reply that:

“the act of the Government of Uganda in advising the Kabaka of Buganda not to go to Kayunga District and stopping the Katikkiro of Buganda from entering the District of Kayunga was both lawful and Constitutional”

The facts giving rise to the cause of action in this petition appear to arise from a relationship of two indigenous communities recognized in the 1995 Constitution; namely the Baganda and the Banyara.

Kabaka is the king of Buganda, while the “Obukam Bwa Bunyala” have their leader whose headquarters are in Bugerere County, Kayunga District. The District is part of Buganda.

On 02.08.09 the “**omwikirwaku**” i.e. Prime Minister of “**Obukama Bwa Bunyala**” wrote to the Inspector General of Police to the effect that the Banyara planned a peaceful demonstration from Kayunga

Town Council to the District Headquarters, where they will hand their petition to the Resident District Commissioner. The demonstration was against -“*His Highness Muwenda Mutebi’s planned visit to Bunyala*” The assembly point was to be the hospital ground. They requested for permission to hold the demonstration as well as security coverage. Copies were sent to the RDC, DISO and DPC, Kayunga District.

Later on, on 24.08.09, one Florence Bagunywa Nkalubo, Minister of Youth and Employment, Buganda Kingdom, also wrote to the Resident District Commissioner, Kayunga District, with copies to DPC and DISO, Kayunga District, to the effect that the Kabaka was to visit Kayunga District to celebrate Buganda Youth Day on 12.09.09. The letter requested for security to be provided for the King.

It is of significance that neither the Baganda nor the Banyara threatened to cause any violence against each other. The Police Force, if their intelligence reports so showed, had every right to deal with any one, whether by way of arrest, criminal prosecution or otherwise threatening such a violence. This right was not exercised by the Police as no one was criminally prosecuted in Courts of

Law for threatening violence or other related crimes before the intended visit. The Banyara, though intending to demonstrate against the Kabaka's visit, did not demand that the Kabaka or those with the Kabaka must not step foot in Kayunga District. Such a demand if made, would have been unconstitutional because under **Article 246(1)** of the Constitution, the Institution of Traditional Leader or Cultural Leader exists in any area of Uganda subject to the provisions of the Constitution. Therefore every such institution of traditional leader or cultural leader is by **Article 29 (2) (a)** bound to let every Ugandan exercise the right to move freely throughout Uganda and to reside and settle in any part of Uganda. Such institution or leader has no powers to declare a particular area of Uganda to be the preserve of only members of his/her community to the exclusion of other Ugandans as regards the right to move freely throughout Uganda and to reside and settle in any part of Uganda.

In going to Bugerere, Kayunga District, the Kabaka and those accompanying him, were thus exercising their Constitutional right to move freely throughout Uganda under **Article 29 (2) (a)** while in demanding to peacefully demonstrate against the Kabaka's visit, the Banyara community were exercising their right of freedom to assemble and to demonstrate together with others peacefully and unarmed under **Article 29 (1) (d)**.

The role of Uganda Police was not to extinguish the enjoyment of the right of the Kabaka to move freely or that of the Banyara to assemble and demonstrate, but rather to regulate and supervise both sides by providing security and putting in place measures to ensure that each side enjoys its respective right. The police had to employ its machinery, resources and powers that constitute its capacity as the Police Force of Uganda to achieve this, including the power to arrest and criminally prosecute those causing the breach of the peace and upsetting law

and order. Any challenge to the capacity of the Uganda Police Force to carry out its constitutional duties under Article 121 must be met by the said Police Force deploying all the powers vested in it and all the resources available to it, but such a deployment must be geared towards respect, compliance and ensuring enjoyment of the rights guaranteed under the Constitution and not by trampling upon them and extinguishing their being enjoyed.

However, from the very evidence provided by the police itself, as stated in the reply to the petition, the Uganda Police from the outset acted to stop the enjoyment of the rights in question. Hence on 6th, 7th and 9th September, 2009 Mr. Richard Mivule, the Regional Police Commander, Central Region, which also included Kayunga District, stopped the Baganda youths and later a delegation of the Kabaka from building stalls at Ntenjeru Sub County Headquarters to welcome the Kabaka.

This Police Officer acknowledges in paragraph 11 of his affidavit that the Government had engaged both the Baganda and the Banyara sides so as to ensure that the Kabaka's visit to Kayunga goes on smoothly. There was therefore, no plausible reason why the same police officer used the ongoing dialogue talks to stop those who were carrying out construction of stalls and other activities intended to welcome the Kabaka to Kayunga. Similarly there were no valid reasons in law for stopping the Katikkiro at River Sezibwa bridge from proceeding to Kayunga. Those constructing the stalls reacted angrily and rudely at what the Police was doing to them. But apart from that reaction, there is no assertion in the affidavits of the Inspector General and that of the Regional Commander that the Banyara attacked the Baganda or vice versa at any one time before the intended-visit of the Kabaka.

The affidavit of Major General Kale Kayihura, the Inspector General of Police, also just explains why the Uganda Police prohibited the Kabaka and the

Katikkiro from the enjoyment of the right to freely move in Uganda including Kayunga District in September, 2009. The Inspector General does not explain why the police did not pursue a supervisory and regulatory role that would have ensured the Kabaka and the Katikkiro to enjoy the right to freely move to Kayunga and also the Banyara to assemble and carry out their protest against the visit, intended or otherwise.

The affidavits of both the Inspector General and that of the Commander, Central Region, reveal no incidents whereby the Baganda and Banyara meted out or threatened to carry out violence or other unlawful acts against each other. There are also no particulars of those arrested, charged or prosecuted in courts of law for breach of the peace or other criminal acts. The incidents of criminality stated in paragraph 3 of the affidavit of the Inspector General of Police happened before the planned visit of the Kabaka to Kayunga District, and it is not stated in the affidavit that they were in any way connected with the said planned visit.

I, too, therefore come to the conclusion that the Uganda Police acted in contravention of Articles 20(2) 29 (1) (d) and (2) (a), 43(1) and 2(e) of the Constitution: in -preventing the- Kabaka? from visiting- Kayunga District. I accordingly issue a declaration to that effect.

As to the allegation that the Kabaka had been discriminated against, I, too, agree that the petitioners did not adduce any evidence to support the said assertion. The essence of discrimination lies in treating someone differently, and most often, worse than the other. **Article 21(3)** of the Constitution sets out the meaning of “*discriminate?* for purposes of the 1995 Constitution. There is nothing before this Court to support the assertion that the Kabaka was discriminated against in the terms defined in the Constitution. I thus decline to issue a declaration to that effect.

In conclusion this petition by a majority of 3 to 2 is allowed. A declaration is hereby issued that the Uganda Police Force acted unconstitutionally to prevent the Kabaka of Buganda from visiting Kayunga District by disrupting all lawful activities for the preparation of the said Kabaka’s visit which was scheduled to take place on 12th September, 2009.

Since the petitioners have been substantially successful, they are awarded the costs of the petition.

Dated at Kampala this 17th day of December 2015

Remmy Kasule

JUSTICE OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL PETITION NO. 0024 OF 2009

- 1. EDWARD KAMYA LUGONVU**
- 2. DR. ADAM KIMALA**
- 3. CHARLES SENKUNGU: WALUGENDO
SALONGO**
- 4. SAYIDA
NAJJUKA:.....PETITIONERS**

VS

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

CORAM:

HON. JUSTICE REMMY KASULE, JA HON.

JUSTICE ELDAD MWANGUSYA, JA HON.

JUSTICE RUBBY AWERI OPIO, JA

HON. JUSTICE PROF. LILLIAN

EKIRIKUBINZA TIBATEMWA, JA HON.

JUSTICE FMS EGONDA-NTENDE, JA

JUDGMENT OF HON. JUSTICE RUBBY

AWERI OPIO, JA Introduction

**I have read the draft judgment of my brother Hon.
Justice F.M.S Egonda-Ntende, JA with which I do
agree.**

In his judgment Egonda Ntende JA, sets out the background facts and the summary of the petition. I may only repeat them where I find necessary to highlight a point here and there.

The kabaka of Buganda was scheduled to visit Kayunga District on the 13th September 2009. The office of the Kattikiro was charged with preparation of the visit. However, the Government of Uganda stopped the Kattikiro of Buganda from proceeding to Kayunga to superintend the preparation of the visit.

Subsequently the Government ordered the Kabaka not to proceed to Kayunga for the scheduled visit. According to Government, the Kabaka's visit would cause chaos between the Banyala Community who were opposed to the intended visit and the loyal Baganda Community who were ready and willing to welcome His Highness, the Kabaka.

The petitioners were among those who were aggrieved by the order of the Government stopping the intended visit to Kayunga. They petitioned this court for the declaration that the order preventing

the Kabaka from visiting Kayunga was inconsistent with articles 20;
clauses III and XXIV of the National Objectives and Directive

Principles of **State** Policy in the Constitution.

The only pertinent issue is whether the police acted unconstitutionally to prevent the Kabaka of Buganda from visiting Kayunga District.

In answering the above issue I must emphasize the role of this Court as a Constitutional Court in the governance of the country. It is one of the most extra ordinary institutions in our system of Government being charged with the role of interpreting the Constitution. It also bears the duty of patrolling the boundaries of the Constitution. The above two roles of interpretation and patrolling are complimentary.

The determination of the above issue revolves around Article 29 and 43 of the Constitution.

Article 29 (2) (a) of the Constitution provides as follows:-

Every Ugandan shall have the right to move freely throughout

Uganda and to reside and settle in any part of Uganda”.

Article 43 on the other hand provides for limitations on freedom. It states as follows:-

1) “In the enjoyment of the rights and freedoms prescribed in this chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

2) Public interest under this article shall not permit.

a) Political persecution;

b) Detention without trial;

c) Any limitation of the enjoyment of the rights and freedom prescribed by this chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided in this Constitution”.

While interpreting the above two articles Mulenga JSC (RIP) in the case of Charles Onyango Obbo and Andrew Mwenda VS Attorney General Constitutional Appeal No. 2 of 2012 said thus:-

Protection of the guaranteed rights is a primary objective of the Constitution. Limiting their enjoyment is an exception to their protection, and is therefore a secondary objective. Although the Constitution provides for both, it is obvious that the primary objective must be dominant.

It can be overridden only in exceptional circumstances that give rise to the secondary objective. In that eventuality, only minimal impairment of enjoyment of the right, strictly warranted by the exceptional circumstances is permissible. The exceptional circumstances set out in clause (1) of Article 43 are the prejudice or violation of protected rights and others prejudice or breach of social values categorized as public interest”

In my considered view, it may be stated that Article 29 is about interpretation of rights while Article 43 patrols or limits the enjoyment of those rights.

As far as I am concerned it was the primary duty of the police to ensure that the Kabaka was free to visit Kayunga District. The

**reasons given for preventing the Kabaka from visiting Kayunga
could**

not fall under exceptional circumstances defined in the case of Onyango Obbo (supra). In that case the learned Justice defined exceptional circumstances in the following passage-

Clause (1) of Article 43 allows for derogation of rights or limitation of their enjoyment in respect of two exceptional circumstances or scenarios, namely, where the enjoyment of ones right “prejudices” either the personal rights of others or the public interest. Those are grave circumstances presenting actual mischief or danger to “the rights of others” or to “the public interest”. In those exceptional circumstances, the Constitution allows for derogation or limitation in order to avert or remove real mischief or danger. The clause does not expressly or implicitly extend to a third scenario, where the enjoyment of ones right is “likely to cause prejudice”. I don't understand the clause to permit derogation of guaranteed right or limitation of their enjoyment, in order to avert speculative or conjectural mischief or danger to public interest”.

In the instant case, the visit was not going to prejudice the Banyala Who were demonstrating in their own rights. The Kabaka’s visit was not in violation of any protected rights or breach of social values categorized as public interest. Further more the purported impasse did not present --actual mischief or danger. They.-were, to use the words of Justice Mulenga, merely

speculative or conjectural mischief or danger. In any case, the primary duty of the police to ensure that rights are enjoyed and not trumped upon without justification must always be dominant.

For the above reasons, I find that the act of preventing the Kabaka's visit was clearly out of step with the Constitution. The police force as an institution of Government was duty bound to use all resources from the state to sustain the necessary security for the visit, including cooperation with other security organs of the state. These are powers provided under Article 212 of the Constitution.

Moreover, in my considered view, and this is very important, the right of the Kabaka to move in any part of the Kingdom is inherent and protected by Article 246 of the Constitution. Inherent rights, unlike personal rights cannot be limited. Kayunga being part of the Buganda Kingdom was within the Royal Jurisdiction of the Kabaka. But also the Kabaka as a citizen of Uganda had a right to be in Kayunga, like he' had a right to be in any other part of Uganda, for lawful **purpose.**

It is for those reasons that I agree with Hon. Justice Egonda-Ntende JA that the act and omission of the police contravened Articles 20 (2) 29 (1) (d) and (2) (a); and Article 43 (1) and 2 (c) of the Constitution. I must say that the impact of the above contravention constituted a regrettable chapter in the History of the country. There were wide spread riots in and around Kampala which might have taken more resources to contain than could have been necessary to provide for the Kabaka's

Kayunga security. As a matter of judicial notice, the country almost degenerated into another Buganda crisis!

As I conclude, I would like and I remind all Ugandans to be guided by the Preamble of the 1995 Constitution: “WE THE PEOPLE OF UGANDA

RECALLING our history which has been characterized by political and constitutional instability;

***RECOGNIZING** our struggles against the forces of tyranny, oppression and exploitation;*

***COMMITTED** to building a better future by establishing a social economic and political order through a popular and durable national Constitution based on' the principles of unity, peace, equality, democracy, freedom, social Justice and progress;”*

Articles 29 and **43** of the Constitution might have been framed to remind Ugandans of their past and the promissory future in the new Constitution. The two articles should accordingly be interpreted and applied in light of the preamble to avoid mistakes of the past. Limitation of the enjoyment of rights by emphasis, should only be in exceptional circumstances and only minimal impairment of enjoyment strictly warranted by exceptional circumstances should be permissible. There were clearly no exceptional circumstances to warrant the stopping of the Kabaka’s visit to Kayunga.

I accordingly agree that the petition should be allowed with costs.

Dated at Kampala this 17th day of December 2015

HON. JUSTICE RUBBY AWERI OPIO, JA

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION N0.0024 OF 2009

1. EDWARD KAMYA LUGONVU
2. DR.ADAM KIMALA
3. CHARLES SENKUNGU WALUGENDO
SALONGO
4. SAVIDA NAJJUKA

PETITIONERS

VS

ATTORNEY GENERAL :::::::::::::::::::::::::::::::::::::: RESPONDENTS

CORAM: HON. JUSTICE REMMY KASULE, JA

HON. JUSTICE ELDAD MWANGUSYA, JA

HON. JUSTICE RUBBY AWERI OPIO, JA

**HON. JUSTICE PROF. LILLIAN TIBATEMWA
EKIRIKUBINZA, JA**

HON. JUSTICE F.M.S. EGONDA NTENDE, JA

**JUDGMENT OF HON. JUSTICE PROF. LILLIAN TIBATEMWA
EKIRIKUBINZA. JA (Dissenting)**

I have had the opportunity of reading through the draft lead

judgment of Hon. Justice F.M.S Egonda Ntende. The same sets out the facts and submissions of both the petitioners and the respondent as well as the issues to be determined by the Court. I shall not repeat them save where it is necessary for emphasis. My analysis of the arguments of counsel for both parties indicates that the present petition hinges on balancing of the right to free movement provided under Article 29(2)(a) on one hand and the right of the public under Article 43, as well as the duty of the Police under Article 212 on the other hand.

Article 29(2) (a) of the Constitution provides:

**Every Ugandan shall have the right-
To move freely throughout Uganda and to
reside and settle in any part of Uganda.”**

Article 43 of the Constitution provides:

“(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

(2)Public interest under this article shall not permit—

(a) political persecution;

(b) detention without trial;

(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.” (Underlining mine)

Article 212 of the Constitution provides:

“The functions of the Uganda Police Force shall include the following-

(a) To protect life and property

(b) To preserve law and order

(c) To prevent and detect crime

(d) To cooperate with the civilian authority and other security organs established under this Constitution and with the population generally.”

In answering this petition, I have adopted the balance test approach a test embraced/ **espoused** by other courts in dealing with the need to protect rights and freedoms of petitioners. (See **e.g. BERNARD OTIM V UGANDA: Constitutional Reference NO. 35 of 2010 (Constitutional Court), BAKER V WINGO 407 U.S (Supreme Court), R V MORIN [1992] 1 S.C.R 771(Supreme Court)**). The balance test approach in essence weighs the rights of individuals with the rights of society or the community as a whole.

In my view, **Article 43 (supra)** is an acknowledgment of the balance test; i.e. balancing the rights of individuals envisaged in articles such as **Article 29 (2)**, rights which are not non-derogable, with that of the public in **Article 43**.

Article 212 of the Constitution obligates the police to protect life and property, to preserve law and order and to prevent and detect crime.

Thus, if the Police in the instant petition obtained information which necessitated action to ensure protection of life and property, preservation of law and order and prevention of crime, the Police was under obligation to take appropriate action. Had no action been taken, such would tantamount to failure by the Police to fulfill then-constitutional mandate to the public and the nation at large.

Further, if the police gauged the situation and came to the conclusion that they would not be in position to offer/afford adequate security to individuals and to the public, the police was duty bound to find appropriate, practical and reasonable means in exercising their mandate under **Article 212**.

Nevertheless, there is no doubt that the right of a citizen to move freely throughout Uganda should not be taken lightly. Therefore in engaging in conduct which limits a right provided by the constitution, the police must be conscious that whatever limitation they impose on an individual is acceptable and demonstrably justified in a free and democratic society. The police can only be faulted if on evaluation of their conduct it is apparent that the decisions they took in the circumstances could not be demonstrably justified.

In conclusion, it is my finding that in the circumstances, the police

acted constitutionally.

I would therefore dismiss the petition with no costs.

Dated at Kampala this 17th Day of December 2015

HON. JUSTICE. PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT
KAMPALA ,
CONSTITUTIONAL PETITION NO. 0024 OF 2009

1. EDWARD KAMYA LUGONVU
2. **DR. ADAM KIMALA**
3. **CHARLES SENKUNGU**.....
PETITIONERS WALUGENDO SALONGO
4. **SAVIDA NAJJUKA**

VS.

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

CORAM: HON. JUSTICE REMMY KASULE, JA
HON. JUSTICE ELDAD MWANGUSYA, JA

HON. JUSTICE RUBBY AWERI OPIO, JA

HON. JUSTICE PROF. L.E. TIBATEMWA, JA

HON. JUSTICE F. M. S. EGONDA NTENDE, JA

JUDGMENT OF ELDAD MWANGUSYA, JA (Dissenting)

I have had the opportunity of reading through the draft Judgment of my brother, Hon. Justice F.M.S. Egonda- Ntende, JA. The same sets out the case for the petitioners and that of the respondent plus the affidavits in support of the respective cases very well. I need not repeat them except where it shall be necessary to emphasize a point.

As a brief introduction, the Kabaka of Buganda was scheduled to visit Kayunga District on 13th September 2009. The visit was stopped by the Uganda Police ostensibly on the ground that the visit would create chaos between the Banyala Community who had expressed disquiet at the intended visit and the Baganda Community who were ready to welcome the Kabaka on a visit within his kingdom. The affidavits of Mr. Richard "Mivule, the Regional Police Commander Central Region and General Kale Kayihura, the Inspector General of Police, indeed create a very grim picture of the security situation in the area to justify the action of the respondent to stop the Kabaka's visit.

The central issue of the petition which the lead judgment answers in the positive is whether the Uganda Police acted unconstitutionally to prevent the Kabaka of Ruganda visiting Kayunga District by disrupting all lawful activities for the preparation of the Kabaka's visit. The discussion of the issue revolves around the following Articles of the Constitution:-

Article 29 (2) (a) in particular provides:

“Every Ugandan shall have the right to move freely throughout Uganda and to reside and settle in any part of Uganda”

Article 43 on the other hand provides:

- (1) "In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.**
- (2) Public interest under this article shall not permit_**
- a) Political persecution;**
 - b) Detention without trial;**
 - c) Any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution."**

From the interpretation of the two Articles, an issue arises as to whether the right to move freely in Uganda is absolute or it may be restricted in certain circumstances.

During the trial, court inquired of Mr. Godfrey Lule SC as to whether there may be circumstances where the Police can analyse a situation and in the interest of peace, prevent someone from proceeding to a particular area. His response was that there may be such a situation but hastened to add that every incident has to be looked at on its own

merit. From the response of Mr. Lule, it is not invariably unconstitutional to restrict freedom of movement because a particular situation "**warrants** it and that is how I view this petition.

The respondent argues that it was within the mandate of the Inspector General of Police to stop the visit of the Kabaka to Kayunga District because the security situation created by the impasse between the Banyala and the Baganda Communities warranted it. According to the respondents, the acts of violence were reported and intelligence reports projected violence during the visit. The - Government would have failed in its duties if it had allowed a volatile situation to escalate and the intervention by the Police was within its mandate. The Police analysis of a situation may include its own capacity in terms of equipment and personnel to handle it and if in their own assessment they may not contain it, they would be obliged to take measures to stem it under **Article 212** of the Constitution.

Article 212 of the Constitution defines the constitutional mandate of the Police in Uganda. It provides:

"The functions of the Uganda Police Force shall include **the** following:

- a) To protect life and property;**
- b) To preserve law and order;**
- c) To prevent and detect crime; and**
- d) To cooperate with the civilian authority and other security organs established under this Constitution and with the population generally.”**

Article 43 provides for instances when the freedom of movement may be restricted. **Article 29 (2) (a)** provides that every Ugandan shall have the right to move freely throughout Uganda and to reside and settle in any part of Uganda.

The central issue is whether the right to move freely is so absolute that it will not be restricted in justifiable circumstances. In my view, a balance has to be struck.

A balancing test is any judicial test in which the jurists weigh the importance of multiple factors in a legal case. Proponents of such tests argue that they allow a deeper consideration of complex issues than a bright line rule can allow. But critics say that such tests can be used to justify any conclusion which the judge might arbitrarily decide upon.

The case of **Ryan v Attorney General [1965]** IR 294, established that no personal rights are unlimited. Kenny J observed:

“None of the personal rights of the citizen are unlimited: their exercise may be regulated by the Oireachtas when the common good requires this.”

The above view involves a balancing exercise between affording rights to citizens, but not letting those rights be abused. The question then becomes, if no right is absolute, when may grounds for legitimate interference emerge (i.e. when can rights be infringed upon?) There are several grounds: The “common good”, “Public order and morality” and the “principles of social justice”

In addition to the above, the proportionality test is in fact the best measure. This requires that the limitation imposed on the right must be proportionate to the objective being pursued. Proportionality can be understood and assessed as explained in **R v Oakes [1986] 1**

S.C.R. 103. A party must show that:

"First, the measures adopted **must** be carefully **designed to achieve the** objective in question. **The}**' must **not be arbitrary, unfair or based on irrational**

considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”.

Applying the above test to the instant case, it is evident that the halting of the Kabaka’s visit to Kayunga at the time it was, was based on the need to restore calm and peace since from the evidence adduced from the respondent, there was a likelihood of violence and chaos. The action was preventive and precautionary and its constitutionality is embedded in **Article 212** of the Constitution already cited. The decision to halt the visit was not only based on

reliable Intelligence information but there were already signs of violence evidenced by the rowdy behavior of the Buganda youths and inciteful messages going on across some Radio stations.

The above test points out further that the objective should ‘impair as

little as possible' the right or freedom in question. It was stated by counsel for the petitioners that once the chaos that characterized the cancelled visit was settled, the Kabaka eventually visited Kayunga District and was given maximum support and security by the Uganda Police. This to me, vindicates the Police action to stop the visit when there was mayhem.

Finally, on the need for proportionality between the 'effects of the measures which are responsible for limiting the right or freedom, and the objective which has been identified as of sufficient importance', in the instant case, it is notable that it was important to halt the visit so as to restore calm and peace in the area.

From the above, it is my view that the right to movement may be limited where it is established and justifiable that to do so is for the greater good and to secure the other stakeholders, in this case, the public. Of course, each case must be determined according to its unique facts to avoid the limitation of certain rights being abused by those limiting.

The issue of proportionality has been addressed by Ugandan courts. In the case of **Charles Onyango Obbo & Anor v Attorney General**

Constitutional Petition No. 15 of 1997, while looking at the limitations permitted under **Article 43** of the Constitution, court observed:

"This is the phrase used in article 43 (2) of our Constitution. In the Canadian Constitution they use "reasonable and demonstrably justified." In my view there is no significant difference between the two phrases. In the Canadian case of Regina Vs Oakes (supra) the phrase was given meaning as follows:-

"To establish that a limit (to rights and freedoms) is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective that the measures responsible for the limit on a charter right or freedom are designed to serve must be of sufficient importance

to warrant overriding a constitutionally protected right or freedom.

The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s.l (Our article 43 (2)) protection. It is necessary at a minimum, that an objective related to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important.

Secondly, once a sufficiently significant objective is recognised, then the party invoking s.l must show that the means chosen are reasonably and demonstrably justified. This involves a form of PROPORTIONALITY TEST.... Although the nature of the proportionality test will vary depending on the circumstances, in each case the Court will be required to balance the interest of society with those of individuals and groups. There are in my view three important components of the proportionality test. First, the measures adopted must be

carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question: R Vs Big M Drug Mart Ltd Supra. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the charter right or freedom and the objective which has been identified as of "sufficient importance." (sic)

In effect, I find that court must find that the cause for limiting the freedom or right was proportional or fell under **Article 43** of the Constitution. That is where I differ from my colleagues. The Police halted the intended visit by the Kabaka at the time they did in the performance of their constitutional duty of keeping peace and order. Counsel for the petitioners observed that the Kabaka eventually visited his subjects in Kayunga District without any incidence whatsoever. Therefore, the Police in initially halting the visit acted constitutionally and I would thus find that this petition

has no merit and should be dismissed with no order as to costs.

I so find.

Dated at Kampala this 17th day of December 2015

Eldad Mwangusya

JUSTICE OF APPEAL