

THE REPUBLIC OF UGANDA

**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 0023 OF 2009**

**DAN
PETITIONER**

MUGARURA:

VS

THE ATTORNEY GENERAL:

RESPONDENT

Coram:

Hon. Justice A.S. Nshimye, JA

Hon. Justice Eldad Mwangusya, JA

Hon. Justice Rubby Aweri Opio, JA

Hon. Justice Geoffrey Kiryabwire, JA

Hon. Justice Prof. LEkirikubinza Tibatemwa, JA

JUDGMENT OF COURT

Introduction

On the 5th August 2009, the President of the Republic of Uganda recommended the reappointment of Engineer Badru Kiggundu as Chairperson of the Electoral Commission; Joseph Biribonwa as Deputy Chairperson of the Electoral Commission, Tom Buruku, member; Jenny Okello, member; Stephen Ongaria, member. Mrs. Christine Mugabi member. The above names were forwarded to the Right Hon. Speaker of Parliament for approval. The petitioner, Dan Magarura who described

himself as an aggrieved person with interest and is affected by above re-appointment and appointment filed this petition on the following grounds:-

- 1) That the act by the President of the Republic of Uganda of appointing Engineer Badru Kiggundu as chairperson and Joseph Biribonwa as Deputy Chairperson of the Electoral Commission is inconsistent with and contravenes **Article 60 (2)** of the Constitution.
- 2) That the act of the President of the Republic of Uganda of appointing Tom Buruku, Jenny Okello, Stephen Ongaria and Christine Mugabi as commissioners of the electoral commission contravenes and/or is inconsistent with **Article 60 (2)** of the Constitution of the Republic of Uganda.
- 3) That the approval by the Appointments Committee of Parliament contravenes **Article 60 (1) and (2)** of the Constitution.
- 4) That the continual occupation of offices by the said commissioners is illegal and in contravention of **Article (60) (1)** of the Constitution.

Ground for the Petition

The petitioner outlined the following reasons as grounds for this petition:-

- a) The said commissioners have in the conduct of earlier elections failed to ensure free and fair elections, bungled the management of the voters register and made half-hearted attempts at implementing voter education programmes.
- b) The said commissioners had in earlier elections failed to take measures to ensure that the electoral process is conducted under conditions of freedom and fairness

or to ensure that its election officers comply with the law.

- c) The commissioners had failed to submit reports to parliament on elections, the commission had conducted as required by law.
- d) Several judgments of the Supreme Court, Court of Appeal and the High Court have found that the commission comprising of the said commissioners had failed to conduct elections in accordance with the law.
- e) Election observers and monitors accredited by the commission had made reports highlighting the failure of the commissioners.
- f) Despite these failures the President did in August reappoint them for another term ending after the general elections of 2016.
- g) The Appointments Committee approved the appointment but parliament itself never made any decision in the matter.
- h) The Constitution requires that the appointments be approved by parliament which was never done.
- i) The Constitution requires that to qualify to be appointed a commissioner the person must (i) have a record of proven integrity (ii) possess considerable experience in the conduct of public affairs (iii) have demonstrated competence in the conduct of public affairs.

j) The said commissioners submitted their curriculum vitae to parliament which do not meet the Constitutional requirements.

Prayers

The petitioner prays that this court may,

- I. Grant a declaration that the appointment and approval of the chairperson, Deputy Chairperson and Commissioners contravenes and /or is inconsistent with **Article 60 (1) and (2)** of the Constitution.
- II. Grant a declaration that the approval by the Appointments Committee of the said commissioners is inconsistent with and/or contravenes **Article 60 (1)** of the Constitution.

The petitioner prayed court do grant redress by making the following orders/declarations:-

- a) That the appointment and approval of Engineer Badru Kiggundu, Joseph Biribonwa, Tom Buruku, Jenny Okello, Stephen Ongaria and Christine Mugabi by the President and the Appointments Committee, respectively is unconstitutional.
- b) That the offices of chairperson, Deputy Chairperson and members of the commission are vacant.
- c) That the President should initiate a fresh process of appointment consistent with the amended Constitution adopting a multiparty system of governance.
- d) The continual occupation of the office of the chairperson, Deputy Chairperson and commission by Engineer Badru Kigundu, Joseph Biribonwa, Tom Buruku, Jenny Okello,

Stephen Ongaria and Christine Mugabi, contravenes **Article 60 (1)** of the Constitution.

The petition was supported by the affidavit of the petitioner dated 21st September 2009.

The respondents response to the petition.

The respondent opposed the petition and relied on the affidavits, to the contend as follows:-

- a) That the act by the President of appointing Engineer Badru Kiggundu as chairperson and Joseph Biribonwa as Deputy Chairperson of the Electoral Commission is consistent with and does not contravene **Article 60 (2)** of the Constitution.
- b) That the act of the President of appointing Tom Buruku, Jenny Okello, Stephen Ongaria and Christine Mugabi as commissioners of the Electoral Commission is consistent with and does not contravene **Article 60 (2)** of the Constitution.
- c) That the approval of the above appointments by the Appointments Committee of Parliament is consistent with and does not contravene **Article 60 (1) and (2)** of the Constitution.
- d) That the continual occupation of the offices by the said commissioners is legal and does not contravene **Article 60 (1) and (2)** of the Constitution.

The respondent contends further that:-

- I. In July 2005, the commissioners successfully organized, conducted and supervised a national referendum by which Uganda adopted a multiparty political systems
- II. Since February 2006, the commissioners have organized, conducted, and supervised the Presidential, parliamentary, local government and by-elections totaling 19,892 elections.
- III. In each of the 19,892 elections organized, conducted and supervised by the commissioners, the commissioners performed their constitutional and statutory duties, inclusive of compiling and maintaining an accurate and up to date registers, formulation and implementing voter education programs and submission of election reports to parliament.

- IV. Since their appointment the commissioners have identified short falls in the electoral process and have submitted for enactment 18 proposals for amendments of electoral laws and successfully introduced numerous administrative actions to deliver transparent free and fair elections.
- V. Out of the 19,892 elections and by-elections organized, conducted and supervised by the commissioners, 73 were challenged in various courts of law and 23 were nullified for reasons including irregularities and operational shortcomings electoral offences and illegal acts by candidates, want of academic qualifications and weaknesses in the electoral laws.
- VI. On account of their performance, the President properly appointed and parliament properly approved the appointments of the commissioners in accordance with the Constitution and the Rules of Parliament.
- VII. Each of the commissioners is possessed of the requisite constitutional requirements to be appointed commissioners of the electoral commission and have demonstrated their competence since their appointment.
- VIII. The courts of law of the Republic of Uganda have never inquired into the competence of any of the commissioners and neither have election observers whose statutory functions are limited to observation of electoral activities. Hon. Edward Ssekandi who was the Speaker of the 8th parliament of the Republic of Uganda, who was the chairperson of the appointments committee which vetted the appointments of the commissioners whose appointments, is the subject of this petition. The respondent also relied on the affidavits deposed by Engineer Badru Kigundu, Joseph Biribonwa, Tom Buruku, Jenny Okello, Stephen Ongaria and Christine Mugabi.

Agreed issues:-

- 1) Whether the petition discloses a matter for constitutional interpretation by the court.

2) Whether the act of the President of the Republic of Uganda in appointing Engineer Badru Kiggundu, Joseph Biribonwa, Tom Buruku, Jenny Okello, Stephen Ongaria and Christine Mugabi is inconsistent with and /or contravenes **Article 60 (2)** of the Constitution.

- 3) Whether the approval by the appointments committee of parliament is inconsistent with and/or contravenes **Article 60 (1) and (2)** of the Constitution,
- 4) Whether the continual occupation of office by Engineer Badru Kiggundu, Joseph Biribonwa, Tom Buruku, Jenny Okello, Stephen Ongaria and Christine Mugabi is inconsistent with and/or contravenes **Article 60** of the Constitution.
- 5) Whether the petitioner is entitled to the reliefs prayed for in the petition.

Representation

During the hearing of this petition Mr. Wandera Ogalo represented the petitioner, while M/s Christine Kaahwa, Commissioner from the Directorate of Civil Litigation in the Attorney Generals Chambers represented the respondent.

The case for the petitioner.

On the first issue whether the petition discloses a matter for constitutional interpretation, Mr. Wandera Ogalo submitted that all that has to be shown is an act complained against and the Articles in the Constitution contravened and then seek the necessary relief. Counsel relied on the case of **Baku Rapheal VS The Attorney General, Constitutional Appeal No. 1 of 2003** and submitted that the instant petition discloses a cause of action and that the first issue should be answered in the affirmative.

On the 2nd issue whether the appointment of the commissioners is inconsistent with or contravenes **Article 60 (2)** of the Constitution, Mr. Wandera Ogalo submitted that under the above Article, every nominee for electoral commission must have and pass three attributes.

If a nominee does not pass the test then the appointment would be unconstitutional.

Those three tests are:-

- 1) Record of proven integrity.
- 2) Considerable experience in the conduct of public affairs.
- 3) Demonstrated experience in the conduct of public affairs.

It was the contention of Mr. Ogalo that, save for commissioner Ongaria, all the rest of the nominees do not pass the above tests stipulated in **Article 60 (2)** of the Constitution. Mr. Ogalo submitted that the nominees lack experience in the conduct of public affairs and have not demonstrated experience in the conduct of public affairs. Mr. Ogalo contended that between 2002 and 2009 numerous decisions of courts show that the commissioners were found wanting in experience. He singled out the decision in **Election Petition No. 1 of 2006** where the commissioners were ruled to have not done their jobs properly. He concluded that the 1st term of the commissioners should not be considered as part of their experience for the purpose of **Article 60** of the Constitution.

On the 3rd issue whether the approval by the Appointments Committee of Parliament is inconsistent with and/or contravenes **Article 60 (1) and (2)** of the Constitution, Mr. Wandera Ogalo submitted that it is the duty of parliament to approve members nominated for the electoral commission. He submitted that it was wrong for Parliament to delegate that function through its Rules to the Appointments Committee.

Mr. Ogalo accordingly contended that the Rules of Procedure of Parliament must be in line with the Constitution. He cited the case of **Ssemwogere & others VS Attorney General, Constitutional Appeal No. 1 of 2002** and **Oulanya Jacob Vs**

Attorney General, Constitution Petition No. 25 of 2006, to

buttress the above contention. Mr. Ogalo contended that any approval by the Committee should have been reported to the Parliament for approval as the final stamp. Mr. Ogalo contended that Rule 146 clearly recognizes that Parliament should have a role in approving nominees because it states that in those instances where the Appointment Committee has rejected a nominee of the President, the President can appeal to the whole House and the whole House shall make a decision, so there is a recognition that this role is for the whole Parliament. Counsel reasoned that since the Committee of Parliament does work on behalf of Parliament, so it would need that stamp of approval at the end contrary to the Rules₁ that state that the decision of the

Committee is not subject to debate.

Issue No. 4

It was the contention of Mr. Wandera Ogalo that issue No.4 flows from issue No. 3 that if the appointment is unconstitutional then the holding of the offices are illegal calling for an order for initialing of a new process for appointment of the members of the electoral commission.

In conclusion, Mr. Wandera Ogalo prays that this court finds that the acts complained of do contravene the Constitution and allow the petition. Counsel submitted that since this is public interest litigation, the petitioner is not asking for costs from the respondent but disbursements which he quantified at shs. 200,000/=.

THE RESPONDENTS CASE

On the 1st issue whether the petition discloses a question for constitutional interpretation, M/s Christine Kaahawa contended that the petition does not disclose any question for constitutional interpretation in so far as the President of the

Republic of Uganda properly exercised his mandate in appointing the said commissioners under **Article 60 (1)** of the Constitution whose names were submitted to and duly approved by the Appointments Committee of Parliament.

On the 2nd issue whether the act of the President in appointing Engineer Badru Kiggundu, Joseph Biribonwa, Tom Buruku, Jenny Okello, Stephen Ongaria and Christine Mugabi is inconsistent with and/or contravenes **Article 60 (2)** of the Constitution, Ms Kaahawa submitted inter alia that, the approval of the Appointments Committee was consistent with the provisions of **Article 60 (2)** of the Constitution basing on the qualifications of the nominees. Counsel contended that no evidence was led to support the contention by the petitioner that, the approval by the Appointments Committee of Parliament was inconsistent with **Article 60 (2)** of the Constitution.

It was contended further that, no evidence was produced to prove that the courts of law had declared the electoral commission as incompetent. Counsel argued that the electoral commission, being a body corporate, should have been joined as a party to the current proceedings. However, neither were they made a party nor the commissioners whose competence are being challenged.

On demonstrated competence in the conduct of public affairs, Ms Kaahawa submitted that the CVs that were attached to the affidavits of all the commissioners show that there is demonstrated competence in the conduct of public affairs. She submitted that all the commissioners save M/s Mugabi, were electoral commissioners from 2002 before their reappointments. They held several elections and by-elections thereby proving that they have had the experience and demonstrated competence in the conduct of election matters. Their CVs have

also shown that they attended other courses and seminars where electoral matters were discussed.

In addition to the above, the commissioners acted as election observers in several jurisdictions which go to show that they were qualified.

On proven integrity, it was the contention of M/s Kaahwa that no evidence was led for prove that the commissioners do not have the requisite integrity. She submitted that, paragraph 13 of the petitioner's affidavit merely states that the petitioner is not aware of the nominees' integrity. She concluded that the petitioner having failed to prove lack of requisite qualification, the continual occupation of the offices by electoral commissioners is not inconsistent with **Article 60** of the Constitution. It was the contention of counsel that orders to vacate offices should not have been prayed for because the commissioners are not parties in this suit. Therefore such an order would be against natural justice contrary to Article 28 of the Constitution.

Counsel accordingly prayed that this ground/issue should be dismissed.

ISSUE NO. 3

Whether the approval by the Appointment Committee of Parliament is inconsistent with and /or contravenes **Articles 60 (1) and (2)** of the Constitution. Ms Kaahwa submitted that Parliament delegated its power of approving nominees for appointments to the Appointments Committee and as such, it was not necessary for the committee to refer the matter to the whole house.

The learned counsel submitted accordingly that the authority of **Jacob Oulanya** (supra) was distinguishable

facts of the case. Learned counsel accordingly concluded that the mandate to approve the appointment is bestowed on the Appointments Committee of Parliament on behalf of parliament. Therefore the approval by the Appointments Committee is not inconsistent with and/or contravenes **Article 60 (1) and (20)** of the Constitution.

Rejoinder by counsel for the petitioner

Mr. Ogalo in his rejoinder submitted that the method through which Parliament gives its consent is in **Article 89** and that is by voting of members of Parliament. He submitted that Parliament can allow the Appointments Committee to approve the nominees but the report should be brought to the house under **Article 89** for it to give its approval to comply with the provision of **Article 60 (1)** of the Constitution.

Counsel submitted that **Article 60 (1)** requiring approval by parliament cannot be segregated from **Article 89** because **Article 89** gives the process of approval.

Mr. Ogalo emphasized that the Rules of Parliament must be consistent with the constitution as decided in the case of P.K Ssemwogerere VS Attorney General, Constitutional Appeal No. 1 of 2002 and Jacob Oulanya VS Attorney General, Constitutional Petition No. 25 of 2006.

The learned counsel submitted further that it is wrong for the Rules to provide for an appeal to the whole House only when a nominee is rejected. He submitted that the whole process should be stamped by the whole house.

Lastly learned counsel submitted that this court should make an order that the commissioners should vacate their offices even though they are not parties to the petition. He argued that the commissioners chose to defend their legibility

for appointment by swearing affidavits instead of praying to court that they be joined. On costs, counsel argued that it was wrong for the Attorney General to ask for costs because the petitioner had not prayed for costs of the petition but asked 5 for disbursements only. He reiterated his submissions.

The decision of the court.

Issue No. 1:-

Whether the petitioner discloses a matter for constitutional interpretation.

It is trite that the matter brought before the constitutional court under **Article 137 (3) of the Constitution must give rise to the interpretation of the Constitution. In other words the petition must disclose a matter for constitutional interpretation. In Baku Raphael VS The Attorney General, Constitutional Appeal No 1 of 2003, the Supreme Court held inter alia that to disclose a cause of action the petition must show the act complained against and the articles of the Constitution alleged to have been contravened and the reliefs being sought/**

In the instant case, the petitioner has alleged that the act 20 of appointing the electoral commissioners contravene **Articles 60 (1) (2)** of the Constitution in that the said nominees lack the necessary qualifications and that the process of their approval contravened **Article 60 (2) and 89** of the Constitution. The petitioner sought for a declaration to that effect.

In view of the above conclusion, we agree with Mr. Ogalo and hold that the petition does disclose a matter for constitutional interpretation. This issue is accordingly answered in the affirmative.

Issue No. 2:-

Whether the act of the President of Uganda in appointing Engineer Badru Kiggundu, Joseph Biribonwa, Tom Buruku, Jenny Okello, Stephen Orgaria and Christine Mugabi, is inconsistent with and /or contravenes **Article 60 (2)** of the Constitution.

Article 60 (2) of the Constitution provisions as follows:-

“Electoral Commission.

1.....

2. Members of the commission shall be persons of high moral character, proven integrity and who possess considerable experience and demonstrated competence in the conduct of public affairs”.

From the above Article, to qualify to be a member of the Electoral Commission, one must therefore have the following attributes:-

1. High moral character and proven integrity;
2. Considerable experience in the conduct of public affairs and;
3. Demonstrate competence in the conduct of public affairs.

Lack/absence of the above attributes or tests need to be proved before court and the burden of proof lies on the petitioner.

As far as the 1st test is concerned, the Constitution does not define what amounts to a high moral character and proven integrity. However, Wikipedia encyclopedia throws some guidance on the subject. It defines moral character as follows:- **“evaluation of particular individuals stable moral qualities.**

The concept of characters implies a variety of attributes including the existence or lack of virtues such as empathy, courage, fortitude, honesty and loyalty or of good behavior or habits”.

Integrity on the other hand is defined as **“the quality of being honest and having strong moral principles, moral uprightness, the state of being whole and undivided”**. Integrity is therefore synonymous with honesty, probity, rectitude, honour, principles, good character, sincerity, faithfulness, wherever, cohesion.

Moral character and integrity are basic qualifications for people who engage in the conduct of Public affairs. The importance of moral character and proven integrity in Uganda is noted by the fact that in Uganda, it is a prerequisite for appointment in all the constitutional commissions. These commissions include Human Rights Commission (**Article 51 (4)**); The Parliamentary Commission (**Article 87 A**). The Judicial Service Commission (**Article 146 (5)**); the Public Service Commission (**Article 165 (3)**); the Education Service Commission (**Article 167 (4)**); Health Service Commission (**Article 169 (4)**) etc. Its importance is more critical for the Electoral Commission because this is a commission which guarantees that citizens express their will as to who should govern them through a free and fair elections thereby guaranteeing the stability of the nation.

A person with moral character is one who shows courage of convictions and one who stands up for such convictions.

It is incumbent on the petitioner to prove that the electoral commissioners in question lacked the requisite moral character and integrity. There must in this regard be pleaded clear particulars of character and integrity with substance and

not mere allegations. This is because attack on someone’s reputation should not be taken lightly because reputation is one of the most lucrative resources human beings have, far and above academic or professional qualifications. In the instant case, the petitioner should have pinpointed particulars of moral character and integrity of the commissioners which are wanting, which the President and the Committee on Appointments overlooked while considering their nomination and approval.

These particulars should have been outlined in the petitioner’s affidavit. However, the petitioner’s affidavit, in paragraph 13 merely states

that the petitioner is not aware of the integrity of the nominees. This is contrary to the rule of evidence which states that he who alleges must prove. Having is failed in presenting the above evidence, the presumption would be that the President and the Appointment Committee were satisfied with the moral character of the nominees and found them fit for approval.

With regard to possession of considerable experience and Competence in the conduct of Public Affairs, we must point out that, it is only in the Electoral Commission where the framers of the Constitution set a very high standard which required one to have shown and demonstrated competence in the conduct of Public Affairs prior to being appointed to the commission. The other constitutional commissions outlined above do not have the above requirement as part of their qualification before nomination and appointments.

This high standard must have been prescribed for good reasons. If not to promote the quality of electoral process, the quality of democracy and good governance in this country.

The Constitution does not define what amounts to experience and competence. However, Oxford Learners Dictionary defines experience as follows:-

“The process of gaining knowledge or skill over a period of time through seeing and doing things rather than through studying”

“The same dictionary defines incompetence as not having or showing the necessary skills or qualification to do something successfully”

From the above definition experience is synonymous with *exposure, acquaintance, involvement or participation* while competence refers to *capability, proficiency, expertise, mastery*. Experience is therefore a function of time.

In the instant case, the petitioner annexed to his pleadings the Curriculum Vitae of nominees to prove that they lack the necessary experience and competence.

We have perused the impugned CVS meticulously. Dr Badru Kiggundu, the chairperson of the Electoral Commission is a PHD holder in the field of Civil Engineering.

Before being appointed chairperson Electoral Commission; he was Dean of Faculty of Technology Makerere University. He was at the level of Associate Professor. He had held a number of managerial positions including being President Uganda Institute of Professional Engineers.

Joseph Biribonwa, the Deputy Chairperson Electoral Commission holds a B.Com Degree from Nairobi University (1972). He has been at the helm of several government/corporate institutions in Uganda. Among them are the following:- *Board member Uganda Aids Commission, member Makerere University Council, Deputy Managing Director*

Uganda Electricity Board. He has participated in International Election observation missions in South Africa Zimbabwe, Angola, Zambia, Nigeria, Tanzania among others.

Tom Buruku holds LLB (Hons) Dar-es-salam University. He has been electoral commissioner since 2002. He has been at the helm of the Uganda Red Cross society. He has been Honorary Consul General of the Republic of Ghana since 2001. He participated in election observation missions in Mexico, Kenya and Ethiopia.

Jenny Okello is PHD holder in Linguistics. She has been lecturer of Linguistics in various universities in USA, Nigeria, Ghana and Uganda. She has practiced corporate management. She participated in election observation missions in Rwanda, Mozambique, Zimbabwe and Ethiopia. She also attended courses in elections and democracy.

David Stephen Ongaria has been General Manager Rayon Textiles Manufactures Ltd, General Manager Uganda Spining Mill Lira; General Manager Pamaba Textiles Ltd, General Manager Uganda Bags and Hessian Mills. He was a member of parliament Tororo South East Constituency. He also participated in elections observation missions in South Africa, Ghana, Kenya and Nigeria.

Lastly, Ahabwe Christine Mugabi holds Bachelor of Education. She has been a classroom teacher since 1991. She has held several positions in the education sector.

It is very clear from the above CVs as confirmed by the affidavits of the nominees that all the seven commissioners have professional qualifications in different disciplines. All the electoral commissioners, save for Mrs. Mugabi have been electoral commissioners since 2002. They held several elections and by-elections. They have participated in international

elections observation missions in several jurisdictions across the world. They have also attended various courses and conferences relating to elections and democracy. In carrying out their duties mentioned above, it cannot be said that the electoral commissioners did not get enough exposure and acquaintance in electoral process.

We are further fortified by the fact that it is not disputed that in July 2005, the commissioners successfully organized, conducted and supervised a referendum by which Uganda adopted a multiparty political dispensation. As part of their exposure since February 2006, the commissioners have organized, conducted and supervised the Presidential, Parliamentary, Local Government and by-elections totaling 18892 elections.

It is our conviction that the nominees have shown that they have had experience in the conduct of public affairs.

They have also demonstrated competence in the conduct of election matters regardless of the fact that in some elections there were some faults and irregularities. It is worth noting that out of 18,892 elections and by-elections organized, conducted and supervised by the commissioners, only 73 were challenged in various courts of law and only 23 were nullified for reasons including irregularities, operational short-comings, electoral offences, illegal act by candidates, want of academic qualifications and weaknesses in the electoral law. Certainly, those faults and irregularities do not find their roots to lack of experience and incompetence. To the contrary to confirm their competence, the respondent has established that since their appointment, the commissioners have identified shorts falls in the electoral process and have submitted for enactment 18 proposals for amendments of electoral laws and also

introduced numerous administrative actions to deliver transparent, J:ree and fair elections.

In conclusion therefore, we hold that the President properly appointed the commissioners considering their considerable experience and demonstrated competence in the conduct of public affairs. We are constrained to make a specific reference to Engineer Badru Kiggundu whose experience and competence was seriously attacked by counsel for the petitioner that he only had considerable experience in the academic world but not in the conduct of public affairs. With greatest respect to counsel, we do not agree with the above insinuation.

A person who has been the Dean of Faculty of Technology cannot be said to be

wanting in experience in the conduct of public affairs. He has been in charge of Local and International Professional conferences. He has been President of Uganda Institution of Professional Engineers.

Counsel for the petitioner further submitted that not only did the nominees for the position of Commissioner lack experience in public affairs, which we have addressed above, but that between 2002 and 2009 there are numerous decisions of the Courts that show that some of these same Commissioners were found to be wanting in experience. He particularly referred to the decision of **Rtd. Col Dr. Kizza Besigye VS Electoral Commission and Yoweri Kaguta Museveni Election Petition No.1 of 2006** where he stated that the Court had ruled that the commissioners had not done their work properly and therefore their re-appointment would be unconstitutional.

We have had an opportunity to review the decision in Rtd. Col Dr. Kizza Besigye (Supra) and especially so the lead Judgment of the Hon. Justice B. Odoki (CJ as he then was).

At page of 20 of that Judgment Justice Odoki had this to say about the management of then when the Court found that about 150,000 people were improperly removed from the voters register.

“...the confusion and frustration of voters who were unable to vote suggests lack of adequate civic education”

The learned Justice at page 113 further found

also agree with the Observer Group that the 1st respondent (i.e Electoral Commission) exhibited significant improvement in the conduct of these elections since 1980 and also this was first time the Presidential and Parliamentary elections were being held on the same day.....”

We find with respect to the submissions of Counsel for the appellant that this decision does not support the charge that the Commissioners were found to be wanting in

experience. Indeed the judgment is clear that the Commissioners were increasingly getting better at their work. This progressive improvement by the Commissioners cannot be a basis for not reappointing them under the Constitution.

We accordingly answer the 2nd issue in the negative.

Issue No. 3

Whether the approval by the appointments committee of Parliament is inconsistent with and /or contravenes Article 60 (1) of the Constitution.

The gist of the petitioners case is that approval by the appointments committee must be placed before the House for

confirmation and that the rules of parliament must be consistent with **Article 89** of the Constitution.

The respondent on the other hand contends that the power to approve nominees was properly delegated by the House to the Appointment Committee of Parliament.

Before we resolve this issue, we have found it pertinent firstly to restate constitutional principles which are relevant to the determination of the above constitutional issue and secondly to highlight the decision in **SSemwogerere and Oulanya** (supra).

There are two relevant constitutional principles to consider in this issue:-

- 1) Where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language must be construed in its natural and ordinary sense.
- 2) Where the language of the Constitution or statute sought to be interpreted is imprecise or ambiguous, a liberal or generous or purposeful interpretation should be given to it; see **Attorney General VS Major General David Tinyefuza**.

In Ssemogerere & others VS Attorney General (supra) the Supreme Court held inter alia that:-

“Parliament has power to make Rules of Procedure to govern its business, but those Rules had to be consistent or intervires the Constitution. Parliament cannot change provisions of the Constitution through its Rules. It can only make Rules to implement the provisions of the Constitution”.

Article 60 (1) of the Constitution provides as follows:-

“There shall be an Electoral Commission which shall consist of a chairperson, a deputy chairperson and five other members appointed by the President with approval of Parliament”

Article 90 of the Constitution provides for committees of Parliament. It states as follows:-

1) Parliament shall appoint committees necessary for the *efficient discharge of its functions.*

10 **2) *Parliament shall by its rules of procedure, prescribe the power; composition and functions of its committees”.***

(emphasis added)

It is on the strength of **Article 90** of the Constitution that Standing Committees, one of which is the Committee on Appointments, was created.

15 Rule 137 provides for the composition of Standing Committee on Appointments.

It provides that the appointment committee shall comprise twenty members designated by party whips on the basis of proportional party membership in the House taking into consideration the numerical strength of the parties and interest of independent members.

Rule 139 provides that the meetings of the Committee on Appointments shall be convened by the speaker and in his or her absence by the Deputy Speaker. The proceedings of the Appointments Committee shall be closed.

Rule 141 provides that the Committee on Appointments shall be responsible for approving on behalf of Parliament for

appointment by the president under the Constitution or any other appointment required to be approved by Parliament under the law.

Under Rule 141, the chairperson of the Committee on Appointments shall report to the House any appointment approved by the committee and the report shall not be subject to debate.

In our view, the constitution clearly delegated the power to approve nominees to the standing Committee of Appointments. The objective of the delegation to the Appointment committee is for the efficient discharge of functions of Parliament. The same Constitution mandated Parliament to prescribe rules of procedure, the powers, composition and functions of the Standing Committees. The Parliamentary Rules of Procedure mandated the Appointment Committee to approve nominees on behalf of parliament.

It provided that the proceeding of the Appointments committee shall be closed. It further provided that the chairperson of the committee shall report to the House any appointment approved by the Committee and the report shall not be subject to debate. It is only when approval is denied and the President makes an appeal, that the matter is placed before the Full House. This provided under Rule 146.

We are convinced that the words of the Constitution clearly delegate the power of approval to the Committee on Appointment and the Regulations thereto fortify the words of the Constitution.

In other words, the power of the Appointments Committee to approve nominees are predicated by **Article 90** of the Constitution.

The language and intention of the Constitution are very clear and unambiguous and they must be given their primary, plain, ordinary or natural meaning.

We believe that if it was the intention of the drafters of a Constitution to have the names of nominees placed before the floor of Parliament for voting as contended by the Petitioner, the Constitution would have made a specific provision to that effect.

On that point we are persuaded by the celebrated presumptions for the interpretation of statutes that there should be absolute trust in the ordinary wisdom of the legislature; in this instance, the constitutional assembly that the legislature is presumed to make no mistake. It is presumed to have intended what it puts in the contents of any provision of the law it enacts.

Accordingly, we opine that if it was the intention of the constitutional assembly that such would have been to approval placed before the House for debate, it should have been provided for precisely in the manner the Kenyan Constitution did in **Article 124** of the Constitution where all proceedings before the Committee on approval is open to the public and the recommendation tabled in the House for final approval.

The Article provides as follows:-

- 1. "Each House of Parliament may establish committees, and shall make Standing Orders for the orderly conduct of its proceedings, including the proceedings of its committees.*

- 2. Parliament may establish joint committees consisting of members of both Houses and may jointly regulate the procedure of those committees.*

3. *The proceedings of either House are not invalid just because of a vacancy in its membership; or the presence or participation of any person not entitled to be present at, or to participate in, the proceedings of the House.*
4. *When a House of Parliament considers any appointment for which its approval is required under this Constitution or an Act of Parliament.*
 - a) *the appointment shall be considered by a committee of the relevant House;*
 - b) *the committee's recommendation shall be tabled in the House for approval; and*
 - c) *the proceedings of the committee and the House shall be open to the public”.*

We accordingly find that the case of **Ssemogerere and other VS The Attorney General** (Supra) adopted by Mr. Wandera Ogalo is inapplicable because the impugned Rules of parliament are not inconsistent with the Constitution. Similarly, we also find that the case of **Jacob Oulanya VS Attorney General** (supra) was quoted out of context. In Oulanya, Parliament in electing members of the East African Legislative Assembly delegated the same to the political parties in their respective caucuses thereby disfranchising independent members of parliament.

The above process was concluded in accordance with Rules 11 and 12 of the Rules of procedure of Parliament whereby the clerk to parliament was mandated to publish the names in the gazette to be transmitted to the Secretary General of the East African Community.

The court held that the election that was conducted by the political parties was not the election of parliament as the electoral college. That no decision of parliament was made or taken in accordance with **Article 89 (1)** of the Constitution, consequently the court ruled that rules 11 and 12 of the Rules of Procedure of Parliament contravened **Article 89 (1) and 94 (1)** of the Constitution.

The distinction in this matter is that the Constitution did not empower political parties in their respective caucuses to elect the members of the Assembly. It was to the whole House which was to be the Electoral College thereby, making Rules 11 and 12 of the procedure of Parliament to be in conflict with the Constitution. On the other hand in the instant case, the Constitution empowers the Appointments Committee to approve nominees on behalf of Parliament.

We strongly believe that, the exercise of the committee to approve a nominee for public office is an internal democratic function of parliament which this court cannot interfere with as long as it is done within the confines of the Constitution and the Rules of Parliament as in the instant case: see **Hon. Lt. (RTD) Kamba Saleh VS The Attorney General, Constitutional Petition No. 38 of 2012.**

We hasten to add that, the above function is the brain child of the doctrine of separation of powers. Accordingly, it is our conclusion that the approval by the Appointments Committee is not inconsistent and/ or contravenes **Articles 60 and 89** of the Constitution.

We accordingly answer issue No. 3 in the negative.

Issue No. 4 and 5

Whether the continual occupation of office by Engineer Badru Kigundu, Joseph Biribonwa, Tom Buruku, Jenny Okello, Stephen Ongaria and Christine Mugabi, is inconsistent and /or contravenes **Article 60 (1)** of the Constitution.

Issue No. 4 flows from issue No. 3. Having found that the holding of the offices of the above officers are not illegal, we cannot order for initiating the process for the appointment of new members of the Electoral Commission. Neither can we order them to vacate their offices. Their appointments were done within the provisions of the Constitution.

Accordingly, we find that the petition has no merit and it being a public interest litigation where the petitioner never prayed for costs but asked for disbursement quantified at shs. 200,000/=, we find it appropriate in the circumstances to order that each party should bear own costs.

We so order.

Dated this 29th day of September 2015

Hon. Justice. A.S. Nshimye.JA

Hon.Justice.Eldad Mwangusya JA

Hon. Justice.Rubby Aweri Opio JA

Hon. Geoffrey Kiryabwire JA

Hon.Justice. Prof. L .Ekirikubinza Tibatemwa JA

