

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CONSTITUTIONAL PETITION NO. 14 OF 2009**

**BETWEEN**

5 **UGANDA NETWORK ON TOXIC**  
**FREE MALARIA CONTROL LIMITED.....PETITIONER**

**AND**

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

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**CORAM:                   HON. JUSTICE A.S. NSHIMYE, JA**  
**HON. MR. JUSTICE ELDAD MWANGUSYA, JA**  
**HON. LADY JUSTICE FAITH E. MWONDHA, JA**  
**HON. MR. JUSTICE KENNETH KAKURU, JA**  
15 **HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA**

**JUDGMENT OF THE COURT**

The petitioner describes itself in the petition as a company limited by guarantee and a civil society organization duly incorporated and registered in Uganda having an interest and effected  
20 by residual spraying of *Dichlorodiphenyltrichloroethane* (DDT) as a method of malaria control in Uganda.

The petitioner brings this petition under Articles 50 and 137 of the Constitution.

The petitioner in paragraph 2 of the petition contends that in April and May 2008, the respondent commenced spraying of DDT in Oyam and Apac Districts for Malaria control. In paragraph 3 of  
25 the petition it is contended that the spraying of DDT amounts to violation of the right to a clean and healthy environment as enshrined under Article 39 and is a violation of the right to life as enshrined under Article 20 of the Constitution.

In paragraph 4 of the petition it is then contended as follows;-

“(4) (i) *DDT is being sprayed without following proper procedure and as such will*  
30 *have irreparable consequences on human health.*”

(ii) Uganda has no capacity to use DDT a persistent organic pollution (POP) for;

a) It has no substantial financial resources to finance the exercise to the required standard.

b) It has no adequately trained personnel to effectively carry out the exercise.

c) It has no specialized transport facilities for the hazardous chemicals DDT.

d) It has no legal frame work for the Management of Persistent Organic Pollution such as DDT.

e) No adequate laboratories for Chromatography and residual analysis.

f) Has no standard monitoring and evaluation tools.

(iii) There is no clear regulatory framework for the use of DDT which would ensure against its misuse.

(iv) That the applicant has on its own supervised the spraying of the above drug in the districts of Oyam and Apac and confirmed that no single guideline as to the spraying of DDT was adhered to;

(v) Uganda being an agricultural Country using DDT will continue to hurt the export market as some Ugandan exporters have already received warnings from the export buyers such as European Union, Japan and U.S.A to reject their products if found contaminated with DDT.”

Finally the petitioner seeks the following remedies or reliefs.

(i) A declaration that the acts of Ministry of Health as represented by the respondent are inconsistent with the Constitution and are in violation of Articles 20 and 39 of the Constitution ( after interpreting the Constitution).

- (ii) *An Order for a permanent injunction restraining the respondent or any other person whatsoever from interfering or threatening to introduce DDT for indoor residual spraying for Malaria Control in Uganda till all its requirements for use are adhered to OR IN THE ALTERNATIVE BUT WITHOUT PREJUDICE to the foregoing; that the matter be referred to the High Court for an appropriate redress.*
- (iii) *Costs of the petition.*
- (iv) *Any other remedy this Court may think fit and sufficient.*

The petition is accompanied by the affidavit of one **Ellady Muyambi** who is said to be the Secretary General of a petitioner and a further affidavit in support of the petition is deponed to by **Dr. Ogaram David** who describes himself as a toxicologist by profession.

The affidavits are further supported by a number of annexures including press reports, studies, a copy of the Stockholm convention on persistent organic pollutants (POPs), Ministry of Health Environmental Impact Assessment Statement on proposed re-introduction of DDT for indoor residual spraying for malaria control in Uganda dated August 2005.

An inventory report prepared by National Environment Management Authority (NEMA) on persistent organic pollutants (POPs) dated December 2007 among others.

The petition is also supported by a further affidavit in support deponed to by one **Oweyegha Afunaduula** who describes himself as an Environmental Ecologist and Conservation Biologist but does not state his qualifications.

The respondent filed an answer to the petition generally responding to the issues raised in the petition. The answer to the petition is accompanied by affidavits of **Martin Mwambutsya** a State Attorney in the Attorney General's Chambers.

An affidavit in reply to the petition is deponed by **Dr. Aryamanya-Mugisha Henry** who at the time was the Executive Director of NEMA, and describes himself as a trained analytical chemist with training in Environmental Management. There is also a supplementary affidavit in support of the answer to the petition deponed by **Professor G. S. Bimenya** an Associate Professor in Pathology department, college of Health Science at Makerere.

There is also an additional affidavit by **Dr. Lugemwa Myres** at the time the Deputy Program Manager and Head of the Monitoring and Evaluation and Research in National Malaria Control Program of the Ministry of Health.

At the hearing of this petition learned counsel Mr. Obed Mwebesa appeared for the petitioner while Mr. Martin Mwambustya State Attorney appeared for the respondent, The Attorney General.

The following issues were agreed upon by both parties;-

- 1) **Whether the petition is rightly before this Court.**
- 2) **Whether the petition discloses a cause of action.**
- 3) **Whether the acts of the respondent complained of in the petition violate the petitioner's right to a clean and healthy environment, as enshrined in Article 39 of the Constitution.**

### **Issue 1**

***Whether the petition is rightly before Court.***

It was submitted by Mr. Mwambustya that the petition is wrongly before this Court because it was brought under Articles 50 and 137 of the Constitution whereas this Court is only concerned with Article 137.

He contended that the petition seeks to enforce rights but it does not show any matter that requires Constitutional interpretation by this Court.

That the remedies sought are still available to the petitioner under the National Environment Act (Cap 153) and that as such the petitioner ought to have instituted an action under Article 50 of the Constitution in a another competent Court and not in this Court.

The learned State Attorney asserted that, the petition when looked at as a whole, does not disclose any issues that require Constitutional interpretation.

He submitted further that if indeed the acts of the respondent complained of in the petition violate the petitioner's right to a clean and healthy environment that would then be an issue of enforcement of rights under Article 50 and not for interpretation under Article 137

5 He submitted further that the answer to the petition indicates that the Government and its institutions in charge of environment followed and applied the law and as such there was no violation of the Constitution.

10 An Environment Impact Statement (EIS) was prepared by the project implementer. The public was invited to submit comments on it, NEMA then conducted a public hearing on the issues raised by the public before issuing an Environmental Impact Assessment Certificate which set out a number of conditions to be followed by those implementing the project. He argued that there was no violation of the Constitution and there were no questions for Constitutional interpretation.

He prayed for the dismissal of the petition.

15 Mr. Mwebesa learned counsel for the petitioner contended that indeed the petition disclosed matters for Constitutional interpretation and he argued that this Court also has jurisdiction to enforce the Constitution and to grant remedies sought. He cited the Supreme Court case of ***Ismail Serugo versus Kampala City Council and The Attorney General, Supreme Court Constitutional Appeal No. 2 of 1998.***

20 He submitted that although NEMA issued an Environmental Impact Assessment Certificate to the Ministry of Health, the implementers of the project, the guidelines issued by NEMA and conditions set out in the EIA Certificate were not followed, in the result that people and the environment were affected and their rights guaranteed under Article 39 of the Constitution were violated.

25 It appears from the submissions of both counsel that issues 1 and 2 as framed were argued together.

We have carefully listened to the submissions of both counsel, and read the petition and the answer to it and all the accompanying annexures. We have also read and considered the authorities submitted to us by both parties. We are grateful to both learned counsel for that.

The issue as to whether a petition such as this, can be brought before this Court under both Article 50 and Article 137 has been discussed by this Court in a number of cases.

Suffice it to say, a petition is not vitiated by a mere fact that the petitioner cited both Article 50 and Article 137 of the Constitution as being the provisions under which the petition is brought.

This Court has jurisdiction under both Article 50 and Article 137.

However, before this Court can exercise jurisdiction as a competent Court under Article 50, a matter must have first been properly before it for a question for Constitutional interpretation under Article 137. See;- *The Attorney General vs Major General David Tinyefuza Supreme Court Constitutional Petition No. 1 of 1997 and Ismail Serugo vs KCC and Attorney General* (Supra).

In the case of *Serugo vs KCC and Attorney General* (Supra) Justice Kanyeihamba JSC (as then he was) referring to the case of *Attorney General versus Major General David Tinyenfuza* (Supra) had this to say on the jurisdiction of this Court.

*“as far as the case of Major General David Tinyefuza Constitutional Petition No. 1 of 1997 is concerned . There is a number of facts to the decision of the Supreme Court in that case.*

*Nevertheless, when it comes to that Court’s view of the jurisdiction of the Court of Appeal as a Constitutional Court, its decision in that case is that the Constitutional Court had no original jurisdiction merely to enforce rights and freedoms enshrined in the Constitution in isolation to interpreting the Constitution and resolving any dispute as to the meaning of its provisions. The Judgment of the majority in that case (Wambuzi, C.J, Tsekooko JSC, Karokora JSC, and Kanyeihamba JSC), is that to be clothed with jurisdiction at all, the Constitutional Court must be petitioned to determine the meaning of any part*

*of the Constitution in addition to whatever remedies are sought from it in the same petition.”*

Hon. Justice Mulenga JSC who wrote the lead Judgment in the *Serugo Case* (Supra) settled this issue as follows;-

5                    *“I shall start by clearing the apparent dispute on the import of the decision of  
this Court in Attorney General v. David Tinyefuza (supra). Although there are a  
number of issues in that case decided on basis of majority view, it is evident  
from “proper reading of the seven judgments in that case, that it was the  
10 unanimous holding of the Court that the jurisdiction of the Constitution Court  
was exclusively derived from Article 137 of the Constitution. It was not a  
holding in any of the Judgment that Article 50 of the Constitution confers, on  
the Constitution Court, any additional and /or separate jurisdiction to enforce  
the rights and freedoms guaranteed under the Constitution. It seems to me that  
what Mr. Mbabazi may have misconstrued is the holding, various expressed in  
15 several of the Judgments, that the Constitution Court was “a competent Court”  
for purposes of Article 50 to which an application (for redress) may be made  
when such right or freedom is infringed or threatened. It must be noted  
however that this holding is subject to a rider, again variously expressed in the  
several Judgments, to the effect that such application for redress can be made  
20 to the Constitutional Court, only in the context of a petition under Article 137  
brought principally for interpretation of the Constitution. It is the provisions in  
clauses (3) and (4) of Articles 137 that empower the Constitutional Court, when  
adjudicating on a petition for interpretation of the Constitution, to grant redress  
where appropriate. Clause (3) provides in effect, that when a person petitions  
25 for a declaration on interpretation of the Constitution, he may also petition for  
redress where appropriate. Clause (4) then provides:*

*(4) “Where upon determination of the petition under clause (3) of this Article the Constitutional Court considers that there is need for redress in addition to the declaration sought, the Constitution Court may-*

- a) grant an order of redress; or
- b) refer the matter to the High Court.....”

5                   It follows that a person who seeks to enforce a right or freedom guaranteed under the Constitution, by claiming redress for its infringement or threatened infringement, but whose claim does not call for an interpretation of the Constitution, has to apply to any other competent Court. The Constitutional Court is competent for that purpose only upon determination of a petition under Article 137(3).”

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On his part WW Wambuzi C. J in *Attorney General versus Major General David Tinyefuza* (Supra) had this to say at Page 24 of this Judgment.

15                   **“In my view, jurisdiction of the Constitutional Court is limited in Article 137(1) of the Constitution to interpretation of the Constitution. Put in a different way no other jurisdiction apart from interpretation of the Constitution is given. In these circumstances I would hold that unless the question before the Constitutional Court depends for its determination on the interpretation or construction of a provision of the Constitution, the Constitutional Court has no jurisdiction.”**

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The learned Chief Justice in the same Judgment went on to observe as follows:-

**“Indeed in the subsequent decision in *Uganda Journalists Safety Committees and Anor versus Attorney General* Constitutional Petition No. 6/97 (unreported) upholding an objection to jurisdiction, the Court held, quite rightly in my view as follows:-**

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**“The Constitutional Court is thus a new Court created by Article 137 of The Constitution for the sole purpose for the interpretation of the Constitution either following a reference under Legal Notice 3 or by means of a Petition under Legal Notice No. 4 of 1996. The jurisdiction of Court to entertain both matters i.e. ‘Reference’ and ‘Petition’ are derived from Article 137 of the Constitution. The Constitutional Court is therefore not a proper forum for a person seeking redress under Article 50 of the Constitution. This is clear from the provision of the Article itself,.....**

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***The application for redress under Art. 50 ought to have been brought by way of an ordinary civil action in a competent Court of Judicature”***

We have perused the petition herein but we are unable to find anywhere it calls for an interpretation of the Constitution. The petition itself does not directly or by inference raise any issue or question that calls for Constitutional interpretation.

Indeed none of the three issues framed and agreed upon by both counsel which we have set out above require this Court to interpret any of the provisions of the Constitution.

None of the affidavits that were filed by the petitioner even remotely alludes to the question of interpretation of the Constitution.

Mr. Mwebesa learned counsel for the petitioner seemed to concede that the petition raises no question for Constitutional Interpretation when he submitted that the petition is based on the fact that the spraying of DDT was carried out in contraventions of guidelines and conditions set out by NEMA in the EIA Certificate issued to project implementers, the Ministry of Health, dated 26<sup>th</sup> December 2006. He contended that those conditions were not fulfilled as can be ascertained from the spray performance report.

He argued that since the conditions were not met, the spraying of DDT was done unlawfully and in violation of the Constitution.

We agree with Mr. Mwebesa’s submissions that spraying of DDT in this matter was not done in accordance with the guidelines and conditions set out by NEMA in the EIA Certificate, the said praying can be challenged in Court. However we do not agree that they raise any issues for Constitutional interpretation.

On the other hand, they seem to raise very strong and pertinent issues for the enforcement of the Constitution and environment laws specifically the National Environment Act.

We agree with the learned State Attorney Mr. Mwambutsya that since the petition in the way it is presented, does not raise any matter for Constitutional interpretation under Article 137 of the Constitution, this Court therefore has no jurisdiction to grant the remedies sought under Article 50.

For this Court to entertain any matter under Article 50 of the Constitution and to enforce the Constitution and grant specific remedies that matter, must first have come under Article 137 and must have disclosed questions for Constitutional interpretation.

We must repeat here what Justice Kanyeihamba JSC (as he was then) stated in the now famous case of the *Attorney General versus Major General David Tinyefuza* (Supra) that not every violation of the Constitution must end up in the Constitutional Court.

At page 24-26 of his Judgment he stated as follows;-

10 *“I do believe that the jurisdiction of the Constitutional Court as derived from Article 137(3) is concurrent with the jurisdiction of those other Courts which may apply and enforce the articles enumerated above, but there is an important distinction that I see, and that is, that for the Constitutional Court to claim and exercise the concurrent jurisdiction, the validity of that claim and the exercise of the jurisdiction must be derived from either a petition or reference to have the Constitution or one of its provisions interpreted or construed by the*  
15 *Constitutional Court. In the other words, the concurrent original jurisdiction of the Court of Appeal sitting as a Constitutional Court can only arise and be exercised if the petition also raises questions as the interpretation or construction of the Constitution as the primary objection or objectives of the petition. To hold otherwise might lead to injustice and, in some situation,*  
20 *manifest absurdity.”*

*Take the case of a pupil who comes late in a primary school. The teacher imposes a punishment upon the pupil who is required to clean the classroom after school hours. Can it have been the intention of the framers of the Constitution that as an alternative to the pupil’s right to complain and seek*  
25 *redress from the headteacher or the school board of governors, the pupil would be entitled to petition the Constitutional Court under Article 137(3) (b) on the grounds that his or her rights under Article 25 (3) have been violated in that he or she has been compelled to do “forced labour?” A prison officer*

*opens and reads a sealed letter addressed to one of the inmates suspecting that the letter contains secret information advising the prisoner how to escape from jail. Would it be reasonable for the prisoner to petition the Constitutional Court on the grounds that the opening of his mail was inconsistent with Article 27(2) of the Uganda Constitution which provides that no person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property or should the prisoner's only resort be to the Board of Governors of the institution concerned or should the prisoner complain to the Minister of State responsible for prisons?*

*A resident in suburbia is constantly awakened from sleep by the loud noise from a disco nearby. Should the resident petition the Constitutional Court under Article 43(1) on the ground that the enjoyment of music by musicians and dancers has directly interfered with the right of quiet and peaceful enjoyment of property or, should the resident be advised to go to the local government council for possible reconciliation and redress? In my opinion, it could not have been the intention of the framers of the Uganda Constitution that such matters, inconsistent as they may appear to be with the provisions of the Constitution, would have direct access to the Court of Appeal which happens to be one of the busiest Courts in the land, entertaining appeals from other diverse Courts and Judges. This Court must give guidelines on those matters by construing the Constitution, so as to avoid these absurdities and so direct such suits and claims to lower tribunals, Magistrates' Courts and, where appropriate to the High Court.*

We agree with the above observations. This petition raises no question for Constitutional interpretation under Article 137. The petitioner who seems to have raised a number of pertinent issues concerning public health and the Environment should seek redress in a competent Court under Article 50 or any other relevant law.

We agree with Mr. Mwambutsya that this petition ought to be dismissed.

We accordingly dismiss it.

Since this petition was brought in the public interest in accordance with the decision of this Court in *Advocates for Natural Resources Government and Development and 2 others versus Attorney General and Another Constitutional Petition No 40 of 2013*, we shall make no order  
5 as to costs.

**Dated at Kampala** this 11<sup>th</sup> day of March 2014.

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

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**HON. MR. JUSTICE ELDAD MWANGUSYA  
JUSTICE OF APPEAL**

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**HON. LADY JUSTICE FAITH E. MWONDHA  
JUSTICE OF APPEAL**

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

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**HON. MR. JUSTICE GEOFFREY KIRYABWIRE**  
**JUSTICE OF APPEAL**