

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO 09 OF 2016

ODONGA ALEX ORYANG:.....PETITIONER

5

VS

- 1. NABILLAH NAGGAYI SEMPALA**
- 2. ATTORNEY GENERAL**
- 3. THE INDEPENDENT ELECTORAL**



COMMISSION

:.....RESPONDENTS

10 **CORAM: HON. MR. S.B.K KAVUMA, DCJ (E)/JCC**

HON. MR. JUSTICE. RICHARD BUTEERA, JA/JCC

HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA /JCC

HON. MR. JUSTICE CHEBORION BARISHAKI, JA/JCC ✓

HON. MR. JUSTICE. PAUL KAHAIBALE MUGAMBA, JA/JCC

15 **JUDGMENT**

Introduction

This Petition was brought under **Article 137 (1), (3) (a)** and **(b)** of the Constitution, Rules 3,4,5 and 12 of the Constitutional Court (Petitions and

References) Rules, SI 91-2005, The Parliamentary Elections Act, 2005 and the Constitutional (Amendment) (No.2) Act, 2005.

Background to the Petition

On 18th February 2016, the Electoral Commission (3rd Respondent) conducted
5 Parliamentary elections for Woman Member of Parliament, among other
positions. The said elections were conducted pursuant to S.8 (1) of the
Parliamentary Elections Act, 2005 and the 1st respondent was subsequently
declared the winner on the 19th February, 2016. The petitioner, who is a
registered voter resident in Kampala, contended that Kampala is not a District
10 and as such the aforementioned elections should not have taken place. He
petitioned this Court contending that:

***1. Section 8(1) of the Parliamentary Elections Act, 2005 is inconsistent
with Articles 2(1) and 78(1) of the Constitution for providing for a
Parliamentary woman representative for a city.***

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***2. That the conduct of the elections by the 3rd respondent for a District
woman representative in Parliament for Kampala in the 2016
general elections was inconsistent with and contravened Article
61(1)(b) of the Constitution.***

20 He prayed for the following declarations, prayers and orders:

a)

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(i) That Section 8(1) of the Parliamentary Elections Act, 2005 is inconsistent with Articles 2(1) and 61(1)(b) of the Constitution.

(ii) That the conduct of the elections for a woman representative for Kampala by the second respondent (sic) pursuant to the Parliamentary Elections Act, 2005 is unconstitutional as it was in contravention with Articles 2(1) and 61(1)(b) of the Constitution the Constitutional (Amendment) (No.2) Act, 2005.

b) He prayed that this Court makes orders prohibiting the third respondent from entering the name of the successful candidate in the Gazette

c) Prohibiting the third respondent from conducting elections for a woman representative for Kampala or any other city that may be created under the Parliamentary Elections Act, 2005 in the absence of a legal provision for such elections in the Constitution of Uganda

d) Grant costs for this Petition

At the joint scheduling conference, the following issues were agreed upon namely;

i. Whether the Petition raises issues for constitutional interpretation

ii. Whether Section 8(1) of the Parliamentary Elections Act, 2005 is inconsistent with **Article 78(1)** of the Constitution.

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iii. Whether the conduct of the elections by the 3rd respondent for a District woman representative in Parliament for Kampala and the subsequent declaration of the 1st Respondent as winner in the 2016 general elections was inconsistent with and contravened **Article 61(1) (b)** of the Constitution.

iv. Whether the declaration of the 3rd respondent as the duly elected District woman representative in Parliament for Kampala in the 2016 general elections contravened **Article 61(1) (b)** of the Constitution.

v. Remedies (Sic)

10 **Representation**

During the hearing of the Petition, learned counsel, Badru Bwango, represented the petitioner, learned counsel, Muhirwe Naboth, represented the 1st respondent, Ms. Kiyingi Josephine, a Principal State Attorney in the Attorney General's Chambers represented the 2nd respondent and learned Counsel, Mr. Sabiiti represented the 3rd respondent.

Preliminary matter

At the beginning of the hearing, counsel for the petitioner brought it to the attention of Court that the 3rd respondent had filed a notice of no opposition to the Petition on the 18th of March, 2016 under Rule 7 of the Constitutional Court (Petitions and References Rules) 2005.

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Counsel for the 3rd respondent confirmed his position regarding the notice of no opposition to the Petition. He prayed that the third respondent be struck off as a party to the Petition because the orders of this Honorable Court can be enforced without the 3rd respondent necessarily being a party to the same.

- 5 Counsel for the petitioner submitted that it was important for the 3rd respondent to address Court on the manner, role of the 3rd respondent and procedure under which the 3rd respondent conducted the elections of the Kampala Woman Member of Parliament to enable Court determine the issues before it and deliver justice in the Petition.
- 10 Counsel for the 2nd respondent submitted that the Electoral Commission forms the gist of this Petition and it was essential for the Commission to address this Court on the issues before it.

In reply, counsel for the 3rd respondent argued that under Rule 7 of the Constitutional Court (Petitions and References Rules) 2005, the 3rd respondent
15 was not required to give reasons as to why it did not intend to oppose the Petition. In the alternative counsel submitted that the issues being raised concern the election of a Member of Parliament and as such these cannot be addressed by this Court in its original jurisdiction.

Court invoked its inherent powers under Section 98 of the Civil Procedure Act
20 and Rule 2 (2) of the Court of Appeal Rules and ordered the 3rd respondent to appear and respond to the Petition in the interest of justice.



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Submissions of counsel for the petitioner

Counsel for the petitioner adopted the order of the issues as they appear above in his submissions.

On the issue of whether the Petition raises questions for Constitutional interpretation, counsel submitted that it does citing **Article 137(3) (a)** of the Constitution. Counsel argued that Section 8(1) of the Parliamentary Elections Act of 2005 (herein PEA) contravenes **Article 78(1) (b)** of the Constitution in as far as it provides for a woman representative in Parliament for a District or city yet the Constitution provides for a woman representative in Parliament for only a District, not a city.

He further submitted that the act of the 3rd respondent in organizing and conducting elections for a District woman representative in Parliament for Kampala on the 18th February 2016 in which it declared the 1st respondent as the successful candidate on 19th February 2016 contravened **Articles 78(1) (b)** and **61(1) (b)** of the Constitution since Kampala is not a District under **Article 5 (2) (c)** which provides for the districts of Uganda as specified in the 1st Schedule to the Constitution. He relied on the case of **Anifa Bangirana Kawooya vs. Attorney General, Constitutional Petition No. 42 of 2010** to support his submission.

On the second issue of whether Section 8(1) of the Parliamentary Elections Act, 2005 is inconsistent with **Article 78(1)** of the Constitution, counsel reiterated his submission that S. 8(1) of the PEA is inconsistent with and/or contravenes Article 78(1) (b) of the Constitution.

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Regarding the third issue on whether the conduct of the elections by the 3rd respondent for a District woman representative in Parliament for Kampala and the subsequent declaration of the 1st Respondent as the winner in the 2016
5 general elections was inconsistent with and contravened **Article 61(1) (b)** of the Constitution, counsel submitted that the conduct of elections by the 3rd respondent for a District woman representative in Parliament for Kampala and the subsequent declaration of the 1st respondent as winner of those elections was inconsistent with and contravened Article 61(1) (b) of the Constitution. He
10 argued that Article 61 (1) (b) of the Constitution enjoins the Electoral Commission to organize, conduct and supervise elections in accordance with the Constitution and not any other law.

As for the fourth issue, counsel prayed for costs of the Petition to be awarded to the petitioner. He relied on **Twinobusingye Severino vs. Attorney General**
15 **Constitutional Petition No 47 of 2011** in support of his submission.

Submissions of counsel for the 1st respondent

Counsel for the 1st respondent opposed the Petition. He submitted that there was no cause of action against the 1st respondent adding that the **Serugo case** (supra) does not address the question of who the Petition is against. He therefore
20 described the Petition against the 1st respondent as **“political persecution”** because the right person to be sued was the Attorney General. He further submitted that the Petitioner omitted other matters of concern since Kampala

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was elevated to a city such as the status of the Labour Officer which remains like in other Districts.

On the second issue, counsel submitted that Section 8(1) of the PEA was not inconsistent with ~~or in contravention~~ of **Articles 2 (1) and 78(1) (b)** of the
5 Constitution. He relied on 3 principles of Constitutional interpretation to support his submissions to wit the liberal and purposive rule of interpretation, the rule of harmony, completeness, exhaustiveness and the mischief rule. It was his contention that the representation of Kampala was preserved as before by the Constitutional Amendment Act of 2005 that transformed it into a city and there
10 is no issue before this Court to interpret.

Counsel further submitted that the intention of the framers of the Constitution to provide for a woman representative for every District or city should be taken into consideration by this Court. He relied on **Charles Onyango Obbo and Anor v Attorney General, Constitutional Appeal No 0002 of 2002.**

15 Counsel further submitted that the intention of Parliament to provide for a woman representative for Kampala should not be ignored.

On the third issue, counsel for the 1st respondent submitted that the conduct and declaration of the 1st respondent as the woman Member of Parliament for Kampala by the 3rd respondent was not in contravention of **Article 61 (b)** and
20 **(c)** of the Constitution.



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On the fourth issue, counsel submitted that the Petitioner is not entitled to any remedies prayed for in the Petition. He prayed for costs to be awarded to the 1st respondent.

Submissions of Counsel for the 2nd respondent

- 5 On the first issue, counsel submitted that the Petition did not raise issues for constitutional interpretation.

Counsel responded to issues 2, 3 and 4 together. She submitted that Section 8(1) of the PEA was neither inconsistent with nor in contravention of **Articles 2 (1) and 78(1) (b)** of the Constitution in light of **Article 21** of the Constitution
10 whose underlying principle is equality before the law. It was her contention that if this Court found S. 8 (1) of the PEA unconstitutional, it would contradict **Article 1 (1) and (2)** of the Constitution by depriving the women of Kampala of their Constitutional right to have a representative in Parliament. They would thus be disenfranchised.

- 15 Further, she submitted that none of the orders and declarations sought for by the Petitioner should be awarded. She prayed that the Petition be dismissed with costs.

Submissions of counsel for the 3rd respondent

- Counsel submitted that he was addressing Court as an Officer of Court because
20 the 3rd respondent did not have evidence on record. He contended that the gist of the Petition is "whether the conduct of elections under the provisions of the

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law cited above contravened those of the Constitution?” He associated himself with the submissions of the counsel for the Petitioner. He contended that if it was the intention of the framers of the Constitution to treat Kampala as a District, it should have been numbered as such in the First Schedule, which was not the case.

He submitted that the prayers being sought in the Petition had been overtaken by events. That costs should be borne by the 1st and the 2nd respondents and the petitioner. He submitted that the 2nd respondent should pay 2/3 of the costs for failing to discharge their duty of advising the 3rd respondent.

10 **Rejoinder by counsel for the petitioner**

Counsel submitted that there was no political persecution of the 1st respondent by bringing this Petition because it seeks for the interpretation of sections of the PEA *vis-a-vis* the Constitution.

Counsel further submitted that the relevant and appropriate guideline of constitutional interpretation was the primary or literal rule because there was no ambiguity or absurdity in the text which is the subject of interpretation.

Counsel submitted that the 1st respondent cannot rely on **Article 21** on discrimination and further claim disenfranchisement of the people of Kampala since the composition of Parliament is clearly spelled out under **Article 78(1)(b)** of the Constitution. As such Kampala is not entitled to representation by a District Woman MP given that it is not a District, he argued.

He reiterated the petitioner's prayers for the declarations sought.

Resolution by Court

We find it relevant to reproduce here provisions of the law which are the subject of this Petition.

5 **Article 2 (1)** of the Constitution provides.

"This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda".

Article 137(3) (a) and (b) of the Constitution provides:

"A person who alleges that:

10 **(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
15 **redress where appropriate."**

Article 78(1) of the Constitution provides that:

"Parliament shall consist of;


a) Members directly elected to represent constituencies and

b) One woman representative for every District."

20 Section 8(1) of the Parliamentary Elections Act, 2005 provides that:



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As required by Article 78(1) (b) of the Constitution there shall be one woman representative in Parliament for every District or city.

Article 61 (b) of the Constitution provides that:

The Electoral Commission shall have the following functions –

- 5 b) *to organise, conduct and supervise elections and referenda in accordance with this Constitution;*

The duty of Court in statutory interpretation

The role of Court is to ascertain and give effect to the will of Parliament. In **Corocraft Ltd v Pan American Airways Inc. [1968] 3 WLR 714 at 732,**

10 Donaldson J described the role of the courts in these terms:

"The duty of the Courts is to ascertain and give effect to the will of Parliament as expressed in its enactments. In the performance of this duty the Judges do not act as computers into which are fed the statutes and the rules for the construction of statutes and from whom issue forth the

15 *mathematically correct answer. The interpretation of statutes is a craft as much as a science and the judges as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes to them in a*

state requiring varying degrees of further processing".

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Rules of constitutional interpretation

The main rule to guide this Court in interpreting the Constitution and any other law is National Objective I (i) which provides as follows:

I. Implementation of objectives.

- 5 ***“(i) The following objectives and principles shall guide all organs and agencies of the State, all citizens, organizations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society.”***

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Other rules of constitutional interpretation have been laid down in many cases. For purposes of this Petition, we shall refer to **Advocates Coalition for Development and Environment and 40 others vs. Attorney General & another (Constitutional Petition No 14 of 2011) (unreported)** where it was
15 held thus:

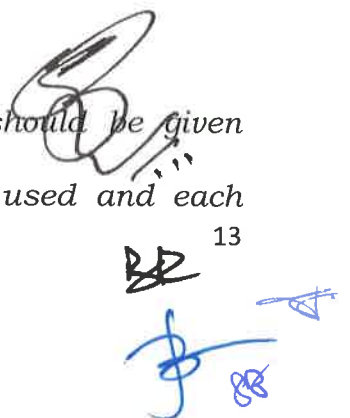
“We consider the following to be the relevant principles of Constitutional interpretation on the matter before court.

1. *The principles which govern the construction of statutes also apply to the construction of the constitutional provisions see **the Republic Vs. Elman [1969] E.A 357***

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- (i) *The widest construction possible in its context should be given according to the ordinary meaning of the words used and each*

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general word should be held to extend to all auxiliary and subsidiary matters. In certain contexts, a liberal interpretation of the Constitution may be called for

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

(iii) The entire Constitution has to be read together as an integrated whole and with no one particular provision destroying the other but rather each sustaining the other. This is the rule of harmony, completeness and exhaustiveness, the rule of paramouncy of the written Constitution **(Paul K. Semwogerere & 2 others Vs. Attorney General Supreme Court Constitutional Appeal Number 1 of 2002)**

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

(v) Judicial power is derived from the people and shall be exercised by the courts established under the Constitution in the name of the

people and in conformity with the law and with the values, norms and aspirations of the people and courts shall administer substantive Justice without undue regard to technicalities (**Article 126 (1) and (2) (e) of the Constitution of Uganda 1995**)

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

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

Bearing the above principles in mind, and other aids to constitutional
15 interpretation (both intrinsic and extrinsic), we shall proceed to resolve the issues as they appear above albeit combining issues (iii) and (iv).

i. Whether the Petition raises issues for constitutional interpretation

This issue phrased in another way would be whether the petitioner has a cause
20 of action. In **Baku Raphael v Attorney General, Supreme Court Constitutional Appeal No.1 of 2003**, Justice Kanyeihamba, JSC (as he then was) in his lead judgment stated in part as follows:

'In a number of cases such as Attorney General v Major General Tinyefuza, Constitutional Appeal No. 1 of 1997 (S.C.), and Serugo v Kampala City Council Constitutional Appeal No. 2 of 1998 (S.C.) this court has expressed the view that in constitutional petitions brought under Article 137 (3) of the Constitution, a cause of action is disclosed, if the petitioner alleges the act or omission complained of and cites the provision of the Constitution which has been contravened and prays for a declaration'.

The instant Petition describes the acts complained of in paragraph 2(a)-(h). It indicates the provisions of the Constitution allegedly contravened by those acts under paragraph 1 (a) and (b) and asks for declarations to the effect that those provisions of the Constitution were contravened and secondly for redress. We are therefore, of the considered view, that the petition raises issues for constitutional interpretation. The first issue is answered in the affirmative.

In line with the above, we shall address the issue of whether the 1st respondent was rightly sued. Counsel for the 1st respondent argued that the right party to sue was the Attorney General. Interestingly, counsel for the petitioner did not reply to this particular submission, which would ordinarily mean that he conceded to the same.


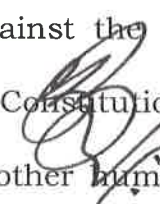
In **Attorney General V Major General David Tinyefuza Supreme Court Constitutional Petition No 1/1997**, it was held that **"a cause of action is a fact or a bundle of facts plainly appearing on the face of a plaint or a**

petition that the plaintiff (petitioner) must prove, if traversed, to be entitled to judgment against the defendant (respondent)..."

Apparent in the contents of the petitioner's affidavit sworn in support of the petition, there is no doubt that the only role played by the first respondent was participating in the election as a candidate. The petitioner does not show in his
5 affidavit any wrong doing by the 1st respondent. The only time he mentioned her was in paragraph 9 of his affidavit where he deponed that *"on 19th February 2016, the Returning Officer of Kampala announced Nabilah Naggayi Ssempala, the First Respondent, as winner of the parliamentary elections for Kampala District*
10 *Woman Member of Parliament race"*.

We are therefore of the considered view that the first respondent is not responsible for any alleged violation of the Constitution. In the circumstances we agree with counsel for the 1st respondent that the petitioner had no cause of action against her but against the Attorney General and Electoral Commission.
15 In **Advocates for Natural Resources Governance and Development v Attorney General & Anor, Constitutional Petition No 40 of 2013**, it was held that ***"in every constitutional petition or reference, the Attorney General is a statutory respondent, representing a Government elected by the people"***.

Counsel for the 1st respondent submitted that the Petition against the 1st
20 respondent is political persecution contrary to **Article 43** of the Constitution. **Article 43** provides for general limitation on fundamental and other human rights and freedoms. It states thus:



“(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—

5 ***(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.”

10 The Constitution does not define the term “political persecution” but recourse was had to the Dictionary. **Thesaurus Dictionary** defines the word “persecute” to mean ***“to pursue with harassing or oppressive treatment, especially because of religious or political beliefs, ethnic or racial origin, gender identity, or sexual orientation”***.

15 **Political repression** is the persecution of an individual or group within society for political reasons, particularly for the purpose of restricting or preventing their ability to take part in the political life of a society thereby reducing their standing among their fellow citizens.

No evidence was led by the 1st respondent to prove that the petitioner has
20 pursued her with harassment or oppressive treatment because of her political beliefs or affiliation. To the contrary, the petitioner has been proved to be a duly registered voter in Kampala Capital City as evidenced by his National ID. There exists no record of his capacity to repress the 1st respondent. As such, we find

that there is no evidence of political persecution that can be imputed on the petitioner.

ii. Whether Section 8(1) of the Parliamentary Elections Act, 2005 is inconsistent with Article 78(1) of the Constitution.

Counsel for the petitioner's main contention is that the Constitution as amended provides for women representation for a District, not city.

Article 257(1) (f) of the Constitution defines a "**District**" to mean "a District referred to in Article 5 of the Constitution". **Article 5(2)** of the Constitution provides that "***Uganda shall consist of the Districts specified in the First Schedule to this Constitution and such other Districts as may be established in accordance with this Constitution or any other law consistent with it***".

On the other hand, the PEA defines a "*District*" to mean "***an electoral District***".

Unfortunately, the Constitution does not define the word city. However, **Merriam Webster Dictionary** defines a "*city*" as "***a place where people live that is larger or more important than a town, an area where many people live and work***".

To appreciate the Petitioner's point of view regarding Kampala, it is important to look at **Article 5** of the Constitution before and after amendment.

Article 5 of the Constitution before amendment as far as is relevant provided as follows:

(1)

(2) Uganda shall consist of the Districts specified in the First Schedule to this Constitution and such other Districts as may be established in accordance with this Constitution or any other law consistent with it.

(3) The territorial boundary of Uganda shall be as delineated in the Second Schedule to this Constitution.

(4) The capital of Uganda is Kampala.

Article 5 of the Constitution (Amendment) Act provides as follows:

Article 5 of the Constitution is amended by substituting for clause (4) the following —

(4) Kampala, located in Buganda shall be the capital city for Uganda and shall be administered by the Central Government.

(5) The territorial boundary of Kampala shall be delineated by Act of Parliament.

(6) Parliament shall, by law, make provision for the administration and development of Kampala as the capital city.

Article 5 of the Constitution (Amendment) (No.2) Act provides as follows:

“Article 5 of the Constitution is amended by substituting for clause (2) the Following —

“(2) Subject to article 178 of this Constitution, Uganda shall consist of—



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(a) regions administered by regional governments when Districts have agreed to form regions as provided for in this Constitution;

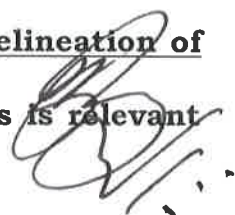
(b) Kampala; and

(c) the Districts of Uganda;

5 as specified in the First Schedule to this Constitution, and such other Districts as may be established in accordance with this Constitution any other law.”

The First Schedule to the Constitution is titled “*Kampala and Districts of Uganda*”. It lists Kampala first and then the other Districts.

10 From the above, what is clear is that Kampala was a District and the capital of Uganda at the same time. **Oxford Dictionary** defines “capital city” as “*the city or town that functions as the seat of government and administrative centre of a country or region*”. From this definition, it would appear that the only “novelty” about a capital city is a country treating it as seat of government
15 and administrative centre. The amendment shed more light on Kampala as Uganda’s capital city and its administrative hub. To understand the aim of the first amendment (clause 4), we referred to the long title which, as far as is relevant, states thus: “**An Act to amend the Constitution in accordance with Article 261 of the Constitution: to distinguish Kampala as the capital city**
20 **of Uganda and to provide for its administration and for the delineation of its boundaries**”. The Long title of Amendment No. 2 as far as is relevant



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states thus: “An Act to amend the Constitution to provide for Kampala as the capital city of Uganda; to provide for the Districts of Uganda...”

Cambridge Dictionary defines “*distinguish*” to mean “*to notice or understand the difference between two things, or to make one person or thing seem*
5 *different from another*”

Thesaurus Dictionary defines “*administration*” to mean among others “*the function of a political state in exercising its governmental duties*”.

Macmillan Dictionary defines “*delineate*” to mean “*to decide or show the exact limits of something or to show a line or border, for example on a*
10 *map*”

From the long title, it can be deduced that the intention of Parliament was to set Kampala apart as the capital city of Uganda, clearly demarcate its boundaries and provide for how it should be run. Under **Article 5**, Kampala is meant to be run under Central Government. It was not to do away with Kampala as a District.

15 The Central Government is responsible for national affairs and services; formulation of national policies and national standards in addition to monitoring the implementation of national policies and provision of services to ensure compliance with standards and regulations.

On the other hand, the powers which are assigned to the Local Governments
20 include powers of making local policy and regulating the delivery of services; formulation of development plans based on locally determined priorities, receive, raise, manage and allocate revenue through approval and execution of own

budgets; alter or create new boundaries; appoint statutory commissions, boards and committees for personnel, land, procurement and accountability; as well as establish or abolish offices in Public Service of a District or Urban Council.

What can be discerned from the above is that local governments among other
5 things implement policies that the central government formulates.

We have also used grammatical aid in interpreting **Article 5(2)** of the Constitution as amended (Amendment (No.2)) with particular reference to the word “and”. Counsel for the petitioner argued that “and” which appears in that provision meant that Kampala is not a District. The **Merriam Webster**
10 **Dictionary** states that the word “and” is ***“used as a function word to indicate connection or addition especially of items within the same class or type; used to join sentence elements of the same grammatical rank or function”***.

From the foregoing, the use of the word “and” indicated the connection between Kampala capital city and the other Districts in Uganda. It appears under the
15 same schedule with the other Districts, albeit, it appears first. We are of the view that Kampala City is in the same class as the Districts of Uganda.

Kampala was meant to be administered the same way as before the constitutional amendment of 2005 until Parliament passed a law to provide for its administration. **Article 289** of the Constitution (Amendment) Act, 2005 is
20 relevant in this respect. It provides for transitional provision relating to Kampala. It states thus:



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“Until Parliament passes a law in accordance with article 5 of this Constitution to provide for the administration and development of Kampala as the capital city for Uganda, Kampala the boundary of which is required to be delineated by article 5 of this Constitution shall be administered as a District in the manner in which Kampala was administered before the commencement of the Constitution (Amendment) Act, 2005”. That law came to be the Kampala Capital City Authority Act, 2010.

S.84 of the Kampala Capital City Authority Act provides:

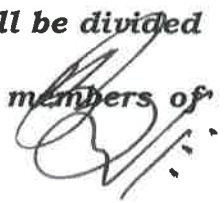
“For the avoidance of doubt, this Act shall not be taken to affect any enactment relating to presidential and parliamentary elections and the demarcation of constituencies by the Electoral Commission”.

Article 293 of the Constitution as amended relates to existing constituencies. It states thus:

“Until Parliament prescribes the constituencies under Article 63, the constituencies shall be those into which Uganda was divided before the coming into force of the Constitution (Amendment) Act, 2005”.

Article 63 of the Constitution provides for constituencies. It states as far as relevant to this case that:

“(1) Subject to clauses (2) and (3) of this article, Uganda shall be divided into as many constituencies for the purpose of election of members of



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Parliament as Parliament may prescribe; and each constituency shall be represented by one Member of Parliament”.

Kampala had 7 constituencies and one Woman Member of Parliament before the amendment of the Constitution. We therefore conclude that in accordance with

5 S.84 of the Kampala Capital City Authority Act and Articles 63 and 293 of the Constitution, the status quo was maintained after the amendment though the Constitution does not mention the word “city”. It is worth noting that Women Members of Parliament represent the entire District.

We also find it pertinent to highlight the rationale for “creating” the position of
10 Women Members of Parliament. It has been documented that women have been marginalized on grounds of gender in most spheres of life. The state wanted to address such marginalization when they enacted the Constitution. This can be deduced from the preamble to the National Objectives and Directive Principles of State Policy and several provisions of the Constitution.

15 The preamble as far is relevant states as follows:

“COMMITTED to building a better future by establishing a socio-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.”

20 National Objective II (i) and (iv) provide:

(i) The state shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels, subject to the Constitution.

(ii)

(iii)

(iv) ***The composition of Government shall be broadly representative of the national ~~character~~ and social diversity of the country.***

5 **National Objective VI** on gender balance and fair representation of marginalized groups provides as follows:

The State shall ensure gender balance and fair representation of marginalized groups on all constitutional and other bodies.

National Objective XV provides for recognition of the role of women in society.

10 It states as follows:

The State shall recognize the significant role that women play in society.

To achieve these national objectives especially the principle of equality and democracy, the Constitution provided for **Articles 21, 32, 33 and 78** among others.

15 **Article 21(1) and (4)** provide as follows:

“(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

(4) Nothing in this article shall prevent Parliament from enacting laws that are necessary for—

(a) implementing policies and programmes aimed at redressing social, economic, educational or other imbalance in society; or

(b) making such provision as is required or authorised to be made under this Constitution; or

(c) providing for any matter acceptable and demonstrably justified in a free and democratic society.”

5 **32. Affirmative action in favour of marginalised groups.**

“(1) Notwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them.

10 *(2) Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalised group to which clause (1) relates or which undermine their status, are prohibited by this Constitution.*

15 *(3) There shall be a Commission called the Equal Opportunities Commission whose composition and functions shall be determined by an Act of Parliament.*

(4) The Equal Opportunities Commission shall be established within one year after the coming into force of the Constitution (Amendment) Act, 2005.

20 *(5) Parliament shall make laws for the purpose of giving full effect to this article.”*

Article 33 (5) provides as follows:

“Without prejudice to article 32 of this Constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.”

5 **78. Composition of Parliament.**

(1) Parliament shall consist of—

(a) members directly elected to represent constituencies;

(b) one woman representative for every District;

10 ***(c) such numbers of representatives of the army, youth, workers, persons with disabilities and other groups as Parliament may determine; and***

(d) the Vice President and Ministers, who, if not already elected members of Parliament, shall be ex officio members of Parliament without the right to vote on any issue requiring a vote in Parliament.

15 **Article 78 (2)** of the Constitution mandates Parliament to review the composition of Parliament. It provides as follows:

“Upon the expiration of a period of ten years after the commencement of this Constitution and thereafter, every five years, Parliament shall review the representation under clause (1)(b) and (c) of this article for the purposes of retaining, increasing or abolishing any such representation and any other matter incidental to it”.

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It is against such backdrop that Section 8(1) of the PEA which provides that ***“As required by Article 78(1) (b) of the Constitution there shall be one woman representative in Parliament for every District or city”*** should be compared

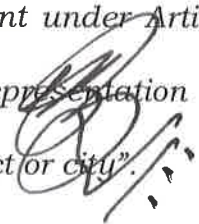
with **Article 78(1) (b)** of the Constitution. In interpreting Section 8(1) of the PEA and **Article 78(1) (b)** of the Constitution, we will follow the same principles as was held in **Republic Vs. Elman [1969] E.A 357**.

5 In determining the constitutionality of Section 8(1) of the PEA, a liberal interpretation should be applied so as to meet the requirements of the National objectives and Principle Directives of State Policy Nos II (i) and (iv), VI and XV and the provisions of **Articles 21, 32 and 33** of the Constitution.

The Constitution (Amendment) Act, 2005 commenced on 30/9/2005 while the PEA commenced on 21/11/2005 and the Constitution (Amendment) (No.2) Act, 10 2005 commenced on 30/12/2005. This shows that it was the same Members of Parliament that legislated all the three laws.

Representation has been reviewed thrice i.e. 2005, 2010 and 2015. We have had the benefit of looking at the Hansards for the years 2005, 2013 and 2015. The 2015 Hansard contains the latest resolution of Parliament in respect of 15 representation and was in these terms:

"That in accordance with Section 8(3) of the Parliamentary Elections Act, 2005 and Article 78(2) of the Constitution, the representation in Parliament under Article 78(1)(b) and (c) is reviewed for the purpose of retaining the representation as follows: One woman representative in Parliament for every District or city".



The wish of the people as evidenced by the deliberations in Parliament reflected in the Hansard is that women should be represented in Parliament both at the District and City levels.

5 The Constitution as amended did not expressly abolish Kampala as a District and neither did it abolish it having a Woman Member of Parliament. Parliament had the power to do so under **Article 78 (2)** of the Constitution but it did not do so which, in our view, reflects its intention to retain representation of Kampala regardless of it being referred to as a capital city. The location, demarcation and people of Kampala remained the same. Mere change of descriptive name to city
10 and/or District in the law should not be a reason to disenfranchise the people of Kampala. Participation in the affairs of Government individually or through his/her representatives is guaranteed by Article 38(1) of the Constitution.

The right to participate in the management of the affairs and representation in Parliament as provided for in Principle No II (i) of the National Objectives and
15 Directive Principles of State Policy and **Article 38(1)** of the Constitution require that **Article 78(1) (b)** be given a dynamic, progressive and liberal flexible interpretation so as to protect the rights of the people living in Kampala City. This would be in concert with the holding in **South Dakota v North Carolina (supra)**.

20 **Articles 21(1) and (4), 32, 33, 63, 293,289** and the said National Objectives should be read as an integrated whole and harmonized pursuant to the holding



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in **Paul Semwogerere v AG** (supra) in order to achieve the objective of having all people in Uganda represented in Parliament and achieve gender representation.

We are therefore, of the considered view, that Section 8(1) of the PEA is not inconsistent with **Article 78(1) (b)** of the Constitution. To the contrary, it

5 harmonizes and gives full effect to it and to the National Objectives contained in the Constitution. To hold otherwise would lead to an absurdity where the people in the city would be disenfranchised and unequally represented in Parliament and the Constitution would contradict itself.

We shall combine issues three and four because we find them to be interrelated.

10 **Article 61 (b)** of the Constitution provides that:

The Electoral Commission shall have the following functions –

b) to organise, conduct and supervise elections and referenda in accordance with this Constitution;

We having answered the second issue in the affirmative, it naturally follows that we answer issues three and four too in the affirmative. We therefore find that the conduct of the elections by the 3rd respondent for a woman representative in Parliament for Kampala and the subsequent declaration of the 1st Respondent by the 3rd respondent as the winner in 2016 general elections was not inconsistent with and not in contravention of **Article 61(1) (b)** of the

20 Constitution. We take exception to the admission of counsel for the 3rd respondent that they organized and held elections under an unconstitutional

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law. The decent step the 3rd respondent should have taken to avoid doubt would have been to seek for interpretation from Court.

On the remedies available, we find that prayers (b) and (c) which were orders prohibiting the third respondent from gazetting the 1st respondent and
5 conducting elections for a woman representative for Kampala or any other city have been overtaken by events and as such are redundant. On the issue of costs, in **Col (RTD) Besigye Kizza versus Museveni Yoweri Kaguta and Electoral Commission, Presidential Election Petition No. 1 of 2001**, Odoki (CJ) (as he then was) stated as follows:

10 ***“It is well settled that costs follow the event unless the court orders otherwise for good reason. The discretion accorded to the court to deny a successful party costs of litigation must be exercised judicially and for good cause. Costs are an indemnity to compensate the successful litigant the expenses incurred during the litigation.***
15 ***Costs are not intended to be punitive but a successful litigant may be deprived of his costs only in exceptional circumstances. See Wambugu vs. Public Service Commission [1972] E.A. 296”.***

In **Advocates for Natural Resources case** (supra), their Lordships held that

20 ***“Articles 50 and 137 of the Constitution threw open Court doors for public interest litigation. The courts ought not to close them by condemning parties to costs except where circumstances dictate that a Court in the***

exercise of its discretion awards costs to a party against another for the sake of advancing the cause of Justice”.

They further held that *“where in public interest petition cases costs are awarded, the actual amounts taxed and allowed should be nominal in respect of professional fees, the rest should simply be awarded only in respect of disbursements”.*

The authority of **Twinobusingye v AG** cited to guide Court on the award of costs is not finally determined. There is a pending reference challenging the award of Shs. 13.5 billion as costs. As such, this Court cannot safely rely on the same.

Bearing the above principles in mind, we are of the considered view that each party bears their costs of this Petition.

In conclusion, we decline to make the declarations sought by the Petitioner and accordingly dismiss the Petition. Each party shall bear its own costs.

We so order.

Dated this..... day of..... 2017


HON. MR. JUSTICE S.B.K KAVUMA, DCJ (E)/JCC

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HON. MR. JUSTICE. RICHARD BUTEERA, JA/JCC

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HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA /JCC


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HON. MR. JUSTICE CHEBORION BARISHAKI, JA/JCC

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HON. MR. JUSTICE. PAUL KAHAIBALE MUGAMBA, JA/JCC

Constitution Petition No. 9/16

O SUGA ALFA ORTANG

VS

1. NABILLAH NAGAYI SEMPATA

& 2 other.

Aminis - I claim
Badm Burays for the
~~petitioner~~ who

- Baprawala Elsha P.S.A
for the 2nd resp
- None for the 1st & 3rd

resp. we are
happy to receive the

present
Ch: present delivered
with open Court
17/1/18.