THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 31 of 2013

ASANATH MUHUMUZA.....PETITIONER

VERSUS

1. ABIDAH TWIKIRIZE BEIHEHO

2. ATTORNEY GENERAL .....RESPONDENTS

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA/JCC
Hon. Lady Justice Hellen Obura, JA/ JCC
Hon. Mr. Justice Stephen Musota, JA/JCC
Hon. Mr. Justice Christopher Madrama, JA/JCC
Hon. Mr. Justice Remmy Kasule, Ag. JA/JCC

JUDGMENT OF JUSTICE KENNETH KAKURU, JA/JCC

I have heard the benefit of reading in draft the Judgment of Madram JA. I agree with him that this petition is misconceived and has no merit.

I would wish to add as follows:-

The background to this petition is important. It appears from the petition that Justice Lugayizi, refused to grant the petitioner a hearing on an application by notice of motion, intended to set aside a consent decree.

When High Court Civil Suit No. 96 of 2011 came up for hearing before Justice Lugayizi on 7th June 2012 the petitioner was present in Court as the defendant. The respondent herein was in Court as plaintiff Mr. Babigumira was present as Counsel for the defendant now petitioner while Ms. Kasande was present as Counsel for the plaintiff now respondent.

This suit was arising from High Court Probate and Administration Cause No. 482 of 2011 in which the respondent had applied for grant of probate of the Will of her late husband the late Eric John Beiheho who was also the father of the petitioner.

The petitioner lodged a caveat on the application for probate, contending that the deceased did not leave a Will and none-existed. The 1st respondent filed a suit High Court Civil Suit No. 96 of 2011 referred to above seeking to have the caveat vacated. The petitioner opposed the suit and filed a defence thereto.

The written statement of defence states as follows:-

1. *Save as hereinafter expressly admitted the Defendant denies each and every allegation and claim in the Plaint in toto as if the same were set out verbatim and traversed seriatim.*
2. *The contents of paragraph 1 are not much in dispute.*
3. *The contents of paragraph 2 are admitted save that the Defendant is a daughter of the deceased and of sound mind.*
4. *a) The contents of paragraph 4 (a) and 4 (h) of the plaint are the matters the court is to decide on and the Plaintiff shall be put to strict proof thereof.*

   b) The Defendant shall challenge the competence of the petition which was filed without complying with the mandatory provisions of the Succession Act.
5. *The contents of paragraph 4 (b) of the plaint is not much in dispute.*
6. *a) In answer to paragraph 4 (c) - (g) of the plaint, the Defendant states that the averments therein are totally misconceived and the Plaintiff shall be put to strict proof thereof.*

   b) In answer to paragraph 4 (f), the Defendant shall, apart from the distribution of the whole estate being disputed, aver and contend that before her father died he had applied for a title of all of his land which is only awaiting

collection. If the Plaintiff gets the grant, she will collect the title and dispose of all his land. (Photocopy of the Deed Sheet, Plan is attached and marked "D1 ").

c) In answer to paragraph 4 (g), the Defendant states that her instructions to her lawyers was to dispute the will, as she still disputes it, but it was a typing error of their secretary who missed out the word "purportedly" between the words "who" and "died." In her affidavit in support of caveat, she clearly disputed the will. (Photocopy of the receipt for the advertisement is herewith attached and marked as annexure "D2")

d) The Defendant shall aver and contend that validity of a will is a matter of law and no amount of admission can validate a will which is otherwise invalid.

7. *In answer to paragraph 5, the Defendant shall aver and contend that she has a claim of right.*

8. *In (answer to paragraphs 6-8, the Defendant shall aver and contend that by the statements therein, the Plaintiff is ignoring the fact that the mother of the Defendant was the only wedded wife to the deceased and her rights to the estate of her husband did not die with her, particularly when she is survived by children whereas the Plaintiff had no children with the deceased. (Photocopy of the Marriage Certificate and LCI letter from Rwere LCI are hereto Attached and Marked collectively "D_3")*

9. *In further reply to paragraph 8 of the, plaint, the Defendant shall aver and contend that there is no law forbidding, a person from administering the estates of more than one person, let alone one a married daughter from administering the estate of her deceased father.*

10. *In answer to paragraph 9, the Defendant categorically denies being dishonest. She further states that her husband was known as John Mohumuza Turyagyenda Kategaya, Kategaya being a clan/ family name.*

11. *In answer to paragraph 10, the Defendant shall aver and contend that if there was any such distribution, it was biased and partial resulting in the mother of the Defendant and her siblings getting inequitable share and unjust and to the benefit of the Plaintiff.*

12. *The Defendant submits to the jurisdiction of the High Court generally but at the time of his death, the deceased had his permanent residence and estate in Kanungu District which falls under Mbarara High Court Circuit.*

As already stated above, the petitioner had lodged a caveat as against the 1st respondent's application for grant of probate, it is dated 22nd July 2011. In her affidavit in support of her application to lodge a caveat she states as follows:-

1. *THAT I am a female adult Ugandan of sound mind, the daughter of the late Beiheho Eric John and the Applicant of Letters of Administration to administer the estate, of our late father and mother having been agreed upon in the family meeting.*
2. *THAT I am conversant with all the matters pertaining to the deceased's estate and I depone this Affidavit in that capacity.*
3. *THAT my siblings and I are not aware that our late father left a Will.*
4. *THAT since our late father died, on 5th June 2011, no one has ever come out with a Will to read it to the family, not even during the funeral on 7th June 2011.*
5. *THAT we put out an announcement for 'anyone with a Will to bring it out and nobody came up.*
6. *THAT we were surprised when a caveat was lodged on my application for Letters of Administration to the estate of our late father and the purported Will that was attached. (Photocopy of the caveat attached and marked "A").*
7. *THAT our mother was the only legally married wife to our late father (photocopy of the Marriage Certificate Attached and marked "B").*

8. *THAT the Applicant is not the executrix to the estate of our late father as she alleges and not even in the purported Will is it mentioned.*
9. *THAT the estate of my late father is situate in Kanungu District within Mbarara Circuit of the High Court and I am advised by my lawyer Mr. Blaze Babigumira, which advise I verily believe to be true, that the Application for Letters of Probate should have been lodged in Mbarara High Court.*
10. *That we believe that the Application was brought in Kampala to make it difficult for us to know and to challenge it.*
11. *THAT by the reasons stated herein above, the Petitioner is not entitled to the grant of Letters of Probate as petitioned.*
12. *THAT I swear this Affidavit in support of the Caveat not to grant Letters of Probate to the Petitioner.*
13. *THAT whatever I have stated herein is true and correct to the best of my knowledge and belief save on information/advice of my lawyer as herein stated, which information/ advice I verily believe to be true.*

The reason for lodging a caveat was that there was no Will. The defence to the suit is that the Will is invalid. Validity of a Will is both a question of law and fact. The written statement of defence does not state how and why the Will was invalid.

It appears clearly from paragraph 9 of the written statement of defence that she wanted to be one of the executors or administrators of her late father's estate.

Looking at the written statement of defence as a whole on the face of it, it does not amount to a valid defence to the suit, taking into account the fact that her affidavit in support of the caveat and her written Statement of defence in defence against its removal are at variance. Whereas in her application for a caveat she contended that there was no Will at all, in her written statement of defence she contends that, the Will exists but is not valid.

Be that as it may, the Will appears to be in compliance with the law. There is nothing on the face of it that would invalidate it. It is signed by the maker, it is witnessed by two persons.

The petitioner and her siblings clearly are not challenging its form but rather the manner in which the deceased distributed his property. The petitioner and her siblings are all adults. None of them was a dependent at the time the Will was executed at least no such assertion is made. Their mother had died prior to the making of the Will. A testator has a right to distribute his property in any way he/she desires except that reasonable provision must be made for the spouse, minors and dependants. Adult off springs (issues) of a testator have no right to a testator's estate except as provided in the Will. In this case the deceased had already distributed his property between the older children and their late mother on one hand and the younger wife and her child on the other.

The Will was to confirm this. He decided to give more property to his wife and the young child and less or nothing to his elder children for reasons he set out in his Will. This would not invalidate a Will. However, the Will does not name an executor or executrix.

With the above background, Justice Lugayizi endeavored to foster a reconciliation between the parties in the presence of the lawyers.

Thus the record in High Court Civil Suit No 96 of 2011 of 7th June 2012 indicates as follows:-

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT KAMPALA [FAMILY DIVISION]
HIGH COURT CIVIL SUIT NO. 96 OF 2011

(ARISING FROM PROBATE AND ADMINISTRATION

CAUSE NO. 483 OF 2011)

ABIDAH TWIKIRIZE BEIHEHO .....PLAINTIFF

VERSUS

ASANATH MUHUMUZA..... DEFENDANT

7/6/2012: 9.05 a.m.

Plaintiff in court.
Defendant in court. .
Mr. Babigumira for the defendant.
Mrs. Murangira for the Plaintiff.

Ms. C. Nakayima Court Clerk.

Court
Explains to the parties that the best way out of this matter is a settlement. The parties agree; & go out to try it out. The case is stood over until then.
7/6/2012: 9.49 a.m.
(Court as before)

Mrs. Murangira:

Our side was ready to settle but the other side needs a bit more time to enable all its people to be here. We are therefore proposing 2/7/2012 as the day to return to court.

Mr. Babigumira:

I agree.
Court:
This case is adjourned to 2/7/2012 at 9.00 a.m. with a view to reaching a settlement.
E.S.
Lugayizi
JUDGE
7/6/2012

On 2nd July 2012 the proceedings are recorded as follows:-

"2/7/2012: 10.30 a.m:

Plaintiff in court.

Defendant in court.

Ms. C. Nakayima Court Clerk.

Mrs. Murangira for plaintiff.

Mr. Babigumira for defendant.

Mr. Babigumira:

We have agreed as follows:-

1. *letters of Administration With the Will annexed be granted to the plaintiff and defendant to administer the deceased's estate for 1st 6 months and thereafter distribute it with the help of Batakas and LCs.*
2. *The parties will leave this court as one i.e. Caveat will be vacated & the suit herein will end here.*
3. *Each party to bear its own costs*

Mrs. Murangira:

Above is so.

Defendant:

Above is so.

Plaintiff:

I agree.

Court:

Judgment in this case is entered in the above terms.

E.S. Lugayizi

JUDGE

2/7/2012"

Following the above proceedings a consent Judgment was set out as follows:-

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA At

(FAMILY DIVISION)

HIGH COURT CIVIL SUIT NO. 96 OF 2011

(ARISING FROM PROBATE AND ADMINISTRATION CAUSE NO. 483 OF 2011)

ABIDAH TWIKIIRIZE BEIHEHO..... PLAINTIFF

VERSUS

ASANATH MUHUMUZA :::: ::::: :::::::::::: :::::::: :::::::::::: ::::::: DEFENDANT

CONSENT JUDGMENT

This Civil Suit coming for final disposal this 2nd day of July, 2012 before HON. JUSTICE E.S. LUGAYIZI in the presence of Murangira Kasande (Mrs.) Esq. Counsel for the Plaintiff and Blaze Babigumira Esq. Counsel for the Defendant in the presence of both parties together with their witnesses.

BY CONSENT OF BOTH PARTIES IT IS HEREBY AGREED THAT:-

1. *Letters of Administration with the Will annexed be granted to the Plaintiff and Defendant to administer the deceased's estate for 1st six (6) months and thereafter distribute it with the help of Batakas and LCS.*
2. *The Parties will leave this Court as one, the Caveat is hereby vacated and the suit herein will end here.*
3. *Each party to bear its own costs.*

WE CONSENT

MURANGIRA KASANDE & CO. ADVOCATES
(Counsel for the Plaintiff)

MS BLAZE BABIGUMIRA SOLICITORS & ADVOCATES
(Counsel for the defendant)

GIVEN under my hand and the seal of the Court this 2nd day of July, 2012.

Jointly Extracted by:-

1. *MURANGIRA KASANDE & CO. ADVOCATES*
   CHRIST THE KING PARISH, PLATINUM BUILDING,
   3RD FLOOR, PLOT NO.3, COLVILLE STREET,
   P.O .BOX 37002,
   KAMPALA.
2. *MIS BLAZE BABIGUMIRA SOLICITORS & ADVOCATES*
   GROUND FLOOR, TOTAL DELUXE,
   PLOT 29/33 JINJA ROAD,
   P. 0 BOX 9356,
   KAMPALA.

A decree was then extracted on exactly the same wording as the consent Judgment. It was signed by Counsel for both parties and the Judge on the same day 2nd July 2012.

On 24th June 2013 the petitioner sought to have the said consent Judgment set aside on the following grounds.

THE GROUNDS OF THIS APPLICATION ARE GENERALLY THAT:-

(a) The Court having not granted probate could not have intended that the distribution of the Estate be done in accordance with the Will.

(b) The Court having granted the Letters of Administration to Abidah Twikirize Beiheho and Asanath Muhumuza to administer the Estate for the first six

months and thereafter to distribute it with the help of Bataka and LCs, could not have intended that the distribution of the Estate should be done in accordance with the Will.

(c) The Court having ordered that the distribution be done as in (b) above could not have intended that the distribution be done by a stronger by confirming the Will.

(d) The Court having ordered that the distribution be done as in (b) above and the administrators to render a true inventory of the said properties and credits and exhibit the same in court within six months from the date of the grant, or within a year or within such further time as the court may from time to time appoint, did not intend that anyone of the administrators could do so alone.

(e) That the presence of the words "with the Will Annexed" and "Annexing the Will" to the Letters of Administration, contrary to the court's direction, has been capitalized on by the Plaintiff and her Counsel to insist that the distribution must be done in accordance with the Will which has caused a lot of confusion and made it very difficult to distribute the Estate.

(f) That the presence of the words "with the Will Annexed" and "Annexing the Will to Letters of Administration" has caused a gross miscarriage of justice to the defendant and her siblings/beneficiaries and put them to an enormous expense.

(g) That the Applicant and her siblings allowed their Counsel to sign a Consent Judgment upon Counsel's advise after getting assurance from Court that the Estate was not going to be distributed in accordance to the Will.

(h) That if counsel was mistaken in advising the defendant and her siblings, such mistake should not be visited on them.

(i) That it is in the interest of justice that this Application be allowed.

This is the application that Justice Lugayizi declined to entertain when it came up for hearing on 6th June 2013 almost one year after the parties had entered into consent Judgment. The estate was to be distributed within six months of the consent decree, which was signed on 20th July 2012. The six months lapsed on 2nd December 2012.

The grounds upon which a consent Judgment can be set aside are well settled. They include any ground that can vitiate a contract. No such ground is set out in the motion reproduced above. The agreement was made in Court in the presence of both parties and the lawyers. Each party in her own words accepted it as proceedings reproduced above clearly show.

Justice Lugayizi had settled the main contention between the parties to wit, who would be the executor of the Will since no one had been named as such. Ordinarily it would have been the spouse. But since there was a dispute, the petitioner and the 1st respondent were both by consent named administrators.

Letters of Administration with a Will annexed are issued where there is no executor, but the Will is annexed in order for that execution to distribute the estate in accordance with the Will. There is nothing else the Judge could have done since the Will had not been revoked.

I cannot fault the learned Justice Lugayizi for the position that he took. The right to be heard only extends to the extent that a person is granted an opportunity to be heard. In this case the petitioner has been granted all the opportunity to be heard. In this case the petitioner had been given all the opportunity to be heard and the dispute had finally been resolved by a consent Judgment.

The question to be answered in this petition is whether the petitioner's right to be heard was violated when the Court declined to entertain her application to set aside a consent Judgment entered into before the same Court almost 12 months earlier.

The right to be heard is on the tenets of natural justice. It is distinguishable from a right to a fair hearing. In the former access is denied, in the latter the process is flawed. There could be overlaps but they are not relevant in this case. The right to be heard is not absolute. It is subject to the limitations set out under Article 43(2)(C) of the Constitution. It provides as follows:-

> *(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.*

On the other hand the Courts exercise of judicial power is derived from *Article 126* which provides as follows:-

> ***126. Exercise of judicial power.***
>
> *(1) Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people.*
>
> *(2) In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles—*
>
> *(a) justice shall be done to all irrespective of their social or economic status;*
>
> *(b) justice shall not be delayed;*
>
> *(c) adequate compensation shall be awarded to victims of wrongs;*
>
> *(d) reconciliation between parties shall be promoted; and*
>
> *(e) substantive justice shall be administered without undue regard to technicalities.*

Whereas the Court has a constitutional duty to ensure that each litigant gets an equal and fair opportunity to be heard, this must be balanced with the duty to ensure that justice is not delayed, reconciliation between parties is promoted and justice is administered without undue regard to technicalities. The process of administering justice has often been abused by litigants and lawyers. Courts have inherent power to restrain and or prevent the abuse of Court process.

Common law and other jurisdiction exercise this power in order to prevent improper use of civil and criminal procedure for intended or unintended, malicious perverse reasons.

Courts therefore have to maintain a delicate balance between the right to be heard and prevention of abuse of Court process. Under Order 6 Rule 30 of the Civil Procedure Rules a suit maybe struck out on account of being frivolous or vexatious.

Lack of reasonable or probate cause for initiating proceedings may amount to abuse of process.

In conclusion a right to be heard in essence is to be given an opportunity to be heard. It is not an absolute right, it is subject to limitation. One of such limitation is where Court determines that the proceedings before it were brought in abuse of Court process.

From the detailed background I have painfully endeavored to set out above I have no doubt that the application to set aside a consent judgment in High Court Miscellaneous Application No. 94 of 2013 was an abuse of Court process. It was frivolous and vexatious. It was brought in bad faith intended to frustrate the administration of the estate of late Eric John Beiheho by the petitioner who was unhappy with the Will. The Court had by consent of all parties decreed that the estate be distributed by 2nd December 2012. There was no estate administrator or

distributor at the time the application was brought to Court on 6th June 2013. The Judge was within his right, when he declined to hear it. Perhaps he should have gone ahead to strike it out on that account. The proceedings before us too appear clearly to be misconceived, as this Court has no jurisdiction to hear and determine this petition. The proceedings before us are frivolous and vexatious. It is another attempt to perpetuate abuse of Court process. I find no reason why High Court Miscellaneous Application No. 94 of 2013 should remain on Court record. It would be a waste of Courts valuable time. I would order that it be struck out with costs.

Accordingly this petition ought to fail. I would order that it be struck out with costs.

We now make the following orders.

1. By the unanimous decision of this Court this petition fails and is hereby struck out with costs.

2. By majority decision Kakuru, Obura, Musota, JJA/JJC and Kasule Ag. JA/JC, High Court Miscellaneous Application No. 94 of 2013 is hereby struck out with costs.

It is so ordered.

Dated at **Kampala** this 16th day of Sept 2020.

.....

Kenneth Kakuru

JUSTICE OF APPEAL/ CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION N0.31 OF 2013

(CORAM: Kenneth Kakuru, Hellen Obura, Stephen Musota, Christopher Madrama and Remmy Kasule, JJCC)

ASANATH MUHUMUZA ::PETITIONER

VERSUS

1. ABIDAH TWIKIRIZE BEIHEHO}
2. ATTORNEY GENERAL }:::::::::::::::::::::::::::::::::RESPONDENTS

JUDGMENT OF HELLEN OBURA, JA/JCC

I have had the benefit of reading in draft the judgment of my learned brother, Madrama, JA/JCC. I concur with his conclusion that this petition be struck out with costs as it does not disclose any question for interpretation of the Constitution under article 137 (1) of the Constitution of the Republic of Uganda.

For purposes of emphasis, I wish to observe that what the petitioner packaged and brought here as a Constitutional Petition was a simple matter that could have been administratively sorted out at the High Court by assigning the case file to another Judge.

However, as regards the pending High Court Miscellaneous Application No. 94 of 2013 which is the subject matter of this petition, I do not agree with my learned brother

Madrama, JA/JCC that it should be fixed for hearing before another Judge of the High Court. I have had the opportunity to peruse the record and my view is that it was an afterthought and an abuse of the court process. The petitioner having been personally present in court and having confirmed that what was stated in court was true, turned around eleven months later and filed the application to have the Consent Judgment varied by removing the words; "with the Will annexed". In my view, that was a backdoor attempt to disregard the Will without determining its validity. I therefore cannot fault the learned trial Judge for declining to hear the application.

In the result, I would order that High Court Miscellaneous Application No. 94 of 2013 be struck out with costs.

Dated at Kampala this 16th day of Sept 2020.

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Hellen Obura

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 31 OF 2013

ASANATH MUHUMUZA :: PETITIONER

VERSUS

1. **ABIDAH TWIKIRIZE BEIHEHO**
2. **ATTORNEY GENERAL :::::::::::::::::::::::::::::::: RESPONDENT**

CORAM: HON. JUSTICE KENNETH KAKURU, JA/JCC
HON. JUSTICE HELLEN OBURA, JA/JCC
HON. JUSTICE STEPHEN MUSOTA, JA/JCC
HON. JUSTICE CHRISTOPHER MADRAMA, JA/JCC
HON. JUSTICE REMMY KASULE, JA/JCC

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA/JCC

I have had the benefit of reading in draft the judgment of Justice Madrama, JCC. I agree with him that this petition is misconceived and has no merit for not disclosing any question for interpretation of the constitution and should be struck out.

I however do not agree that the application, the subject matter of this petition should be set down for hearing before another Judge of the High Court Family Division for reasons advanced by Justice Kakuru, JCC in his concurring judgment with which I agree.

The estate in contention was distributed within six months of the consent decree entered by Justice Lugayizi. The six months lapsed on 2nd December 2012. The agreement was made in court in the presence of both parties and the lawyers. Each party in her own words accepted it. The petitioner has been granted all the opportunity

to be heard and the dispute had finally been resolved by the consent judgment. Therefore Lugayizi, J. had settled the main contention between the parties, to wit, who would be the executor of the Will since no one had been named.

The Will was annexed to enable the distribution of the estate in accordance with the Will. I therefore agree that there is nothing else the Judge could have done since the Will had not been revoked. The learned Justice Lugayizi cannot be faulted for the position that he took. The Civil Application No. 94 of 2013, the subject of the petition which was brought a year after the consent decree is frivolous and vexatious and an abuse of court process. It was brought in bad faith to frustrate the administration of the estate of the late Eric John Beiheho by the petitioner.

I further agree with Justice Kakuru, JCC that there is no reason why High Court Miscellaneous Application No. 94 of 2013 should remain on court record. It would be a waste of court's valuable time and should be accordingly struck out with costs.

This petition is therefore struck out with costs.

Dated at Kampala this.....16th.....day of .....Sept.....2020

.....

Stephen Musota

JUSTICE OF APPEAL/CONSTITUTIONAL COURT.

THE REPUBLIC OF UGANDA,

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO 31 OF 2013

(CORAM: KAKURU, OBURA, MUSOTA, MADRAMA, KASULE, JJA)

ASANATH MUHUMUZA} .....PETITIONER

VERSUS

1. **ABIDAH TWIKIRIZE BEIHEHO}**
2. **THE ATTORNEY GENERAL} .....RESPONDENTS**

JUDGMENT OF CHRISTOPHER MADRAMA, JCC

The Petitioner filed this petition under the provisions of Article 137 (3) of the Constitution of the Republic of Uganda for a declaration that the refusal by Hon. Mr. Justice E.S Lugayizi to hear her application on merit and his directing the parties to find a way of sorting out their problems is inconsistent with and/or contravenes Articles 20, 28 (1), 44 (c), 126 & 138 (2) of the Constitution. Secondly, she seeks consequential orders for an order setting aside the consent Judgment, decree, letters of administration and ordering a trial de novo by another Judge. Alternatively, the Petitioner seeks leave without prejudice of an order that Civil Application No 94 of 2013 be heard by another Judge. The Petitioner also sought an order maintaining the *status quo* by staying the distribution of the estate of the late Eric John Beiheho restraining the first Respondent from intermeddling with the estate pending the hearing of the suit *de novo*. Finally, the Petitioner also prays for costs of the petition to be paid by the second Respondent.

The facts disclosed in the petition show that the Petitioner is the daughter of the first and legally wedded wife of the late Eric John Beiheho (hereinafter referred to as the deceased) who left property at Rwere LC1 Cell, Kambuga

Parish, Kanungu District. Secondly, the petition shows that the first Respondent was the second wife to the deceased and had applied for probate to the estate of the deceased alleging that the late had left a will and the Petitioner on her own behalf and on behalf of her siblings lodged a caveat against the petition for probate. The first Respondent filed Civil Suit No 96 of 2011 in the Family Division seeking *inter alia* an order to vacate the caveat. The Petitioner asserts that she is challenging the will and when the case came for hearing the trial Judge Hon. Mr. Justice E.S. Lugayizi promoted reconciliation but the parties did not agree. The trial Judge insisted that reconciliation was the best solution proposing that the parties agree to the grant of letters of administration to the estate of the deceased with the will annexed. She alleges that she, together with her siblings, were uncomfortable with the annexing of the will but her lawyer Counselled that since probate had not been granted, the will, will not be annexed and would not be a basis for distribution of the estate and a consent judgment was recorded accordingly. She avers that the Respondent and her lawyers took advantage by annexing the will and insisted that the distribution of the estate of the deceased would be done in accordance with the alleged will. Between 30th and 31st January 2013, the Respondent with the support of the police went to the village and purported to distribute the estate by confirming the will.

Subsequently, the Petitioner filed an application under the 'slip rule' citing sections 98 and 99 of the Civil Procedure Act to have the consent judgment they had executed set aside or varied by deleting the words "with the will annexed". When the application came for hearing the learned trial Judge directed the parties to find a way of sorting out their problem and therefore that left the applicant and her siblings stranded whereupon she filed this petition.

The Petitioner avers that the following matters are inconsistent with the Constitution in that the act of the Hon. Justice E.S. Lugayizi's by refusal to

hear and determine the application on merits and directing the parties to find a way of sorting out their problem is inconsistent with or in contravention of Articles 20, 28 (1), 44 (c), 126 & 138 (2) of the Constitution. Secondly, that the trial Judge closed the doors of the court against her leaving her without any other recourse in law.

The petition is supported by the affidavit of Asanath Muhumuza, the Petitioner herein that primarily attaches the record of the court by availing the various photocopies of documents in the proceedings before the High Court.

In reply, the second Respondent in the answer to the petition avers that the Attorney General (who represents the State) has not done any act or omitted to do anything which violated or infringed any provisions of the Constitution of the Republic of Uganda as alleged. Secondly, and in further reply to the petition the Respondents aver that the petition is misconceived, frivolous and vexatious and raises no issues or questions for interpretation of the Constitution by this court. Thirdly, the Respondents aver that the Respondent has not by any act or omission violated or infringed any provisions of the Constitution as alleged by the Petitioner in the matter. In the premises, the Respondent avers that the Petitioner is not entitled to any of the remedies sought in the petition. The answer to the petition is supported by the affidavit of Genevieve Kampiire, a State Attorney in the Attorney General's Chambers that confirms on oath, the averments in the answer to the petition.

The first Respondent in the answer to the petition averred that she would raise a preliminary objection to the effect that the petition does not raise any issues for interpretation of the Constitution. Secondly, that the Petitioner has no cause of action against her as the acts alleged to be inconsistent with the Constitution are acts of the Hon. Mr. Justice E.S Lugayizi, head of the Family Division, High Court of Uganda. Thirdly, that the petition is frivolous and vexations. Fourthly that the petition is an abuse of the judicial process since

there are similar complaints by the Petitioner in Court of Appeal Civil Applications No 185 of 2013 and 184 of 2013 between the Petitioner and the Respondent pending hearing. In the premises the petition serves no useful purpose. Fourthly, the matter complained of in the petition is *res judicata*.

On matters of fact it is averred that by the time of the death of the deceased, the first wife had long since died and the first Respondent was the lawful wife of the deceased. Further that the deceased bequeathed his property *inter vivos* to his two separate wives. Secondly, the first Respondent worked with the deceased and acquired the properties which the Petitioner and her siblings are fighting to grab from the first Respondent.

The first Respondent avers that the she and the Petitioner consented to the grant of letters of administration with the will annexed. The consent judgment was entered in terms proposed by Counsel for the Petitioner and the consent decree was signed by the parties. Furthermore, Civil Application No 94 of 2013 between the Petitioner and the first Respondent is still pending in the High Court of Uganda, family division and if the Petitioner was interested in pursuing it, she would have made an application for it to be fixed before another Judge for hearing and disposal. The Petitioner chose to abandon Civil Application No 94 of 2013 because it lacks merit. Generally, the first Respondent avers that the petition lacks merit and ought to be dismissed with costs.

The answer to the petition of the first Respondent is supported by the affidavit of Abidah Twikirize Beiheho, the first Respondent herein and the affidavit repeats the averments in the answer to the petition and attached relevant documents from the court such as the will of the deceased the record of proceedings.

When the petition came for hearing learned Counsel Mrs. Kasande Murangira appeared for the first Respondent and learned Counsel Ms. Adongo Imelda,

State Attorney appeared for the second Respondent. Neither the Petitioner nor her Counsel were in court. The court was satisfied that the Petitioner was duly served and the hearing took place in the absence of the Petitioner. The first and second Respondents Counsel adopted their written submissions filed on record and judgment was reserved on notice.

I have carefully considered the written submissions of the Petitioner's Counsel, that of the first and second Respondent's Counsel and it shows that the parties addressed the issue of whether the petition raises any issues for interpretation of the Constitution under Article 137 of the Constitution of the Republic of Uganda. The nature of that issue is preliminary and affects the jurisdiction of the Constitutional Court. Where the Constitutional Court has no jurisdiction, it does not have to entertain any other matter raised in the petition. I shall therefore deal with the issue of jurisdiction of the Constitutional Court before I may handle any other matter.

The first Respondent's Counsel *inter alia* raised two preliminary issues namely:

1. That the petition does not raise any issues for constitutional interpretation.
2. That in the petition, the Petitioner has no cause of action against the first Respondent as the allegations of facts are attributed to Hon. Mr. Justice E.S Lugayizi, head of the High Court of Uganda, Family Division.

Other questions were raised but for the moment I have also considered the submissions of the second Respondents Counsel which raises the question of whether the petition discloses a cause of action. On that first issue, the second Respondent's Counsel also contends that the petition does not raise any issue for interpretation of the Constitution under Article 137 of the Constitution but instead raises allegations that are enforceable by the High Court under Article 50 of the Constitution.

The first Respondent's Counsel submitted that the issues raised are fundamental and affect the competence of the petition. The Petitioner's submissions do not address the fundamental issues which were raised in the answer to the petition and therefore should be taken to have conceded to the preliminary objections averred in the answer to the petition by the Respondents. The first Respondent's Counsel submitted that the petition before the court does not show any act of Parliament or any law or anything done under the authority of any law by the first Respondent neither does it show any act or omission by the first Respondent that is inconsistent with or in contravention of a provision of the Constitution in terms of Article 137 (3) thereof, that would warrant that the Constitutional Court to interpret the Constitution. He submitted that Articles 20, 28 (1), 44 (c), 126 and 138 (2) of the Constitution cited in the petition was cited out of context and were not contravened the by the first Respondent.

On the other hand, the second Respondent's Counsel submitted that the Respondent filed an answer to the petition and the question is whether the petition discloses a cause of action. She submitted that under Article 137 (3) of the 1995 Constitution, it is provided that a person who alleges that an act of Parliament or any other law or anything in or done under the authority of any law; or any act or omission by any persons or authority is inconsistent with or in contravention of a provision of the Constitution, may petition the Constitutional Court for a declaration to that effect or for redress where appropriate. She submitted that in **Constitutional Petition No 53 of 2010; Behangana Domaro and Another v Attorney General** and in consolidated **Constitutional Petitions Nos 1 and 22; Asiimwe Gilbert v Attorney General and others**; the Constitutional Court cited with approval the case of Ismail Serugo versus Kampala City Council and another for the proposition of Mulenga JSC that a petition brought under Article 137 of the Constitution sufficiently discloses a cause of action if it describes the act or omission complained off and shows the provision of the Constitution with which the

act or omission is alleged to be inconsistent or which is alleged to have been contravened by the act or omission and prays for a declaration to that effect.

Further she submitted that there is a difference between enforcement and interpretation according to the decision of the Supreme Court in **Constitutional Appeal No 1 of 1997, Attorney General versus Major General Tinyefuza**.

Finally, Ms. Adong submitted that the current petition does not meet the test as it does not raise any issues for interpretation of the Constitution as its primary objective. On the contrary, the acts complained of, if proved, would amount to an infringement of rights by which the Petitioner's right would be to apply for enforcement of the rights under Article 50 of the Constitution.

I have carefully considered the submissions of the Petitioner's Counsel on the above 2 issues and it only discloses that the petition discloses a cause of action under Article 137 according to the facts and averments therein. He submitted that the Articles of the Constitution which were contravened were clearly set out in paragraph 16 of the petition. Secondly, the omissions of the first Respondent were clearly stipulated in paragraph 21 of the affidavit in support of the decision/omission of Justice Lugayizi which was to the advantage of the first Respondent. He submitted that a beneficiary to an unconstitutional act who acquiesces in the acts of the wrong of the wrongdoer can constitutionally and legally be joined in the petition.

Ruling on preliminary issues

I have carefully considered the petition and the facts upon which the Petition is based are that: When the deceased passed away, the first Respondent applied for probate of his will whereupon the Petitioner lodged a caveat against the grant of probate. The first Respondent filed a suit for removal of the caveat. The matter was heard by Hon. Mr. Justice Lugayizi, Judge of the High Court, Family Division. When the parties appeared before the learned

trial Judge, he tried to reconcile the parties whereupon a consent judgment was entered by agreement of the parties by the Judge. Letters of administration with the will annexed were issued. The record has a will of Beiheho Eric John dated 28th of June 2003 and witnessed by two witnesses namely Kesiime Miriam, an advocate and Kanaahe Livinhac, a Head teacher. The contents of the will are not material for purposes of resolution of this dispute, since the matter before the court was an application for probate.

After lodging the caveat, High Court Civil Suit No 96 of 2011 between the first Respondent as plaintiff and the Petitioner as defendant was filed in the Family Division of the High Court. The record of proceedings attached show that the parties appeared before Justice Lugayizi on 7th June, 2012 where the court explained to the parties that the best way out of the matter would be a settlement and that if the parties are agreeable they should go out to work it out and the court proceedings were stood over until a later time. When the court resumed, the plaintiff's side stated that they were ready to settle but the defendant's side needed more time and the matter was adjourned to 2nd July, 2012. Learned Counsel Mr. Babigumira appeared for the defendant while learned Counsel Mrs. Murangira appeared for the plaintiff. On 2nd July, 2012 Counsel for the plaintiff and Counsel for the defendant were in court whereupon the learned trial Judge recorded the terms of the settlement represented by both counsel of the parties as follows:

1. Letters of administration with the will annexed be granted to the plaintiff and the defendant to administer the deceased's estate for the first six months and thereafter distributed with the help of Batakas and LCs.
2. The parties will leave this court as one i.e. caveat will be vacated & the suit hearing will end here.
3. Each party to bear its own costs.

The consent judgment was endorsed by the learned trial Judge on 2nd July, 2012. Further a decree was extracted on the same day before the learned trial Judge endorsed by Murangira Kasande & Co. Advocates (Counsel for the

plaintiff) and Blaze Babigumira Solicitors & Advocates (Counsel for the defendant)

The decree was in the same exact words as the Consent Judgment recorded by the learned trial Judge. On 3rd August, 2012, the learned trial Judge granted letters of administration with the will annexed to the estate of the deceased pursuant to the consent judgment/decree entered on 2nd July, 2012 jointly to Abidah Twikiirize Beiheho (Widow) and Asanath Muhumuza (Daughter), being the first Respondent and the Petitioner in this petition respectively.

Subsequently, the Petitioner became aggrieved in that she complained that the first Respondent and her lawyer took advantage of annexing the will and insisted that the distribution be done according to the alleged will. She filed an application under what she terms "a slip rule" sections 98 and 99 of the Civil Procedure Act set aside the consent judgment by deleting the words "with the will annexed". The Petitioner's complaint is that when the application came for hearing, the learned trial Judge refused to hear it and directed the parties to find a way of sorting out their problem leaving the applicant and her siblings stranded. She contends that the act of the learned trial Judge violated several constitutional provisions in that it contravened Articles 20, 28 (1), 44 (c), 126 & 138 (2) of the Constitution.

In my judgment, where a Judge refuses to hear a cause or matter filed in court, it can always be heard by another Judge. The record of the learned trial Judge in High Court Miscellaneous Application No. 94 of 2013 (arising out of Civil Suit No 96 of 2011) reads that:

> I do not understand the application; and I do not think I should handle it. If the parties herein have moved away from what was agreed, they should find a way of sorting out their problem. I did what I was supposed to do and completed it. I will not return to it.

It is clear that the Judge fostered a consent judgment between the parties and was not ready or willing to hear the application to set it aside. I further note that paragraph 2 of the consent judgment the *"caveat will be vacated & the suit hearing will end here"*. The suit indeed was determined and presumably Miscellaneous Application No 94 of 2013 was meant not to resurrect the suit but to vary the consent judgment by excluding the will of the testator. In practical terms the dispute would come back because the purpose of the Petitioners application is to do away with the will of the deceased in distribution of the estate. Whatever, the position of the trial Judge in not reopening the suit, the Petitioner was not precluded from having the application heard by another Judge. Secondly, the Petitioner undertook in the letters of administration granted to her jointly with the first Respondent to administer the estate of the deceased in accordance with the will that was annexed. In Miscellaneous Application No. 94 of 2013 she prays in the Notice of Motion she had filed *inter alia* for the court to issue fresh letters of administration to her and the first Respondent without annexing the will. The grounds in the notice of motion before the High Court, the subject matter of the petition averred *inter alia* that the applicant and her siblings allowed their Counsel to sign the consent judgment upon advice of Counsel after getting assurance from court that the case it was not going to be distributed in accordance with the will. They further aver that if Counsel was mistaken in advising the defendant and her siblings, such mistake should not be visited on them. The application is supported by the affidavit of the Petitioner and in the affidavit in support, there is no single averment or deposition that the will is illegal or unlawful or not valid. It is merely averred that the Petitioner and her siblings were not happy with annexing the will because it would seem that the distribution would be done according to it. It is apparent that the will was being contested on the ground that the Petitioner and her siblings were not happy with the distribution of property as directed in the will.

Turning back to the petition itself it is averred in paragraph 16 thereof thus:

> 16. THAT your Petitioner is interested in and or aggrieved by the following matters being inconsistent with the Constitution whereby your Petitioner is aggrieved.
>
> (a) That the act of Hon. Justice E.S Lugayizi's refusal to hear and determine the application on merit and directing the parties to find a way of sorting out their problem is inconsistent and/or in contravention of Articles 20, 28 (1), 44 (c), 126 & 138 (2) of the Constitution.
>
> 17. THAT the Hon. Justice literally closed the doors of the court against her leaving her without any recourse as by law provided.

Article 20 of the Constitution of the Republic of Uganda provides that fundamental rights and freedoms of the individual are inherent and not granted by the state. The Petitioner relies on Article 20 (2) which provides that:

> (2) The rights and freedoms of the individual and groups enshrined in this chapter shall be respected, upheld and promoted by all organs and agencies of government and by all persons.

The above Article only indicates that all organs and agencies of government and all persons shall respect and uphold and promote the fundamental rights and freedoms in chapter 4 of the Constitution of the Republic of Uganda. The fundamental right of freedom relied on to allege infringement has to be read in conjunction with Article 20 (2) of the Constitution. In the circumstances of this petition, the Petitioner relies on Articles 28 (1), and 44 (c). These Articles confer a right of a litigant to fair hearing before an independent and impartial court or tribunal established by law and particularly Article 28 (1) of the Constitution of the Republic of Uganda provides that in the determination of Civil Rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. The head note of the Article shows that it is about "fair hearing". In the

circumstances of this petition, the learned trial Judge declined to hear an application to set aside a consent judgment. The High Court itself had not been barred from hearing the application and the matter could have been put before another Judge. Secondly, Article 126 of the Constitution of the Republic of Uganda sets out the principles to be applied by courts, subject to the law, in administering Justice. Last but not least Article 138 deals with the establishment of the High Court. Obviously the establishment of the High Court is not in issue. What is called for determination of its constitutionality is the act of a High Court Judge declining to hear an application.

In the circumstances therefore it is only the refusal of the learned trial Judge to hear the application on merits that is the subject matter of this petition and it is clearly a matter that could be dealt with by the High Court. The Constitutional Court has exclusive jurisdiction to determine any dispute as to the interpretation of the Constitution in terms of Article 137 (1) of the Constitution. In a petition brought under Article 137 of the Constitution, it is not enough to merely allege that a provision of the Constitution has been infringed or contravened or that an act of omission is inconsistent with or in contravention of the Constitution. It must also be shown that a question as to interpretation of the Constitution has arisen for this court to have jurisdiction. The Petitioner merely alleged that the act of refusal contravened the Constitution but does not show that this calls for interpretation of the Constitution.

There is a necessary distinction between enforcement of the Constitution and determination of questions as to interpretation of the Constitution under Article 137 of the Constitution of the Republic of Uganda. This distinction was echoed by the Constitutional Court in **Constitutional Petition No 22 of 2010; Asiimwe Gilbert v Barclays Bank Uganda Ltd, Manirahuha Charles and Kototyo W. William Consolidated with Constitutional Petition No.**

01 of 2010 Asiimwe Gilbert v Attorney General, where the Constitutional Court cited earlier decisions of the Supreme Court and held that:

> The jurisdiction of this Court has been firmly resolved in a number of decisions of this court and of the Supreme Court in its appellate capacity as the Constitutional Appeal Court. First in the case of **Attorney General versus Major General David Tinyefuza Constitutional Appeal No. 1 of 1987** and again in **Ismail Serugo vs. KCC and Attorney General** (supra). Those authorities have been followed ever since.
>
> It was held in the above authorities that this Court has jurisdiction only under Article 137 of the Constitution to interpret the Constitution. It is not concerned with and has no jurisdiction to entertain matters relating to violation of rights under the Constitution for which parties seek redress. Such matter ought to be brought before a competent Court under Article 50 for redress.

In the earlier decision of **Ismail Serugo v Kampala City Council & Attorney General; Constitutional Appeal No. 2 of 1998,** the Supreme Court had laid the test when Wambuzi CJ held that:

> In my view for the Constitutional Court to have jurisdiction the petition must show, on the face of it, that interpretation of a provision of the Constitution is required. It is not enough to allege merely that a Constitutional provision has been violated. If therefore any rights have been violated as claimed, these are enforceable under Article 50 of the Constitution by another competent court.

For the petition to be maintainable under Article 137 (1) of the Constitution, it should be disclosed therein that a question as to interpretation of the Constitution has arisen. It is not sufficient to only allege an act or Act is inconsistent with a provision of the Constitution as required by Article 137 (3) of the Constitution. The question of whether the court has jurisdiction can be determined after considering the petition together with the affidavit evidence in support and opposition to the Petition as demonstrated herein below.

The first and second Respondents submitted that the petition does not disclose a cause of action. This is tantamount to asking the court to dismiss the petition on the basis of pleadings (i.e. for disclosing no cause of action under Order 7 rule 11 of the Civil Procedure Rules). On the other hand, evidence may be considered to reach a conclusion on whether the petition is maintainable on a point of law. The need to be clear about the distinction between rejection of a plaint for disclosing no cause of action or dismissal of a suit for not being maintainable in constitutional petitions was held by Mulenga JSC in **Ismail Serugo v Kampala City Council & Attorney General; Constitutional Appeal No. 2 of 1998** when he stated that a distinction should be made between an objection to a plaint on the ground that it discloses no cause of action under Order 7 rule 11 of the Civil Procedure Rules and an objection on a point of law on the ground that the suit is not maintainable under Order 6 rule 29 of the Civil Procedure Rules.

Where it is alleged that the plaint discloses no cause of action, the decision is made on the basis of perusal of the plaint or the petition as the case may be alone without considering the evidence. It follows that the petition on the face of it may disclose a cause of action because it complies with Article 137 (3) of the Constitution. This is because there is an averment that the act of refusal to hear an application by the learned trial Judge was inconsistent with the cited provisions of the Constitution. However, mere allegation of inconsistency does not necessarily mean that the court has jurisdiction to hear the petition unless and until the court also establishes that a question for interpretation of the Constitution arises under Article 137 (1) of the Constitution of the Republic of Uganda.

In **Ismail Serugo v Kampala City Council & Attorney General** (supra) it was held by Mulenga JSC that it is not essential for the Petitioner's rights to have been violated by the alleged inconsistency or contravention of the

Constitution for there to be a cause of action. In a petition for declarations, the court considers the alleged inconsistency or contravention of a provision of the Constitution in terms of Article 137 (3) of the Constitution. Where a cause of action is disclosed in terms of the averment of inconsistency or contravention of a provision of the Constitution, Mulenga JSC held that it would be a proper case for the petition to be dismissed under Order 6 rule 29 of the Civil Procedure Rules on a point of law on the ground that the petition is not maintainable rather than having it rejected under Order 7 rule 11 of the Civil Procedure Rules on the basis of pleadings alone.

In the facts under consideration, the question is only whether any question as to interpretation of the Constitution arises. It is immaterial that there is no cause of action against the first Respondent as contended by Counsel for the first Respondent. Further in **Ismail Serugo v Kampala City Council & Attorney General** (supra) Prof. Kanyeihamba JSC held that the question of jurisdiction should be distinguished from that of cause of action:

> However, I am constrained to comment very briefly on some other issues raised by the pleadings in this appeal. In my opinion, the question of cause of action must be distinguished from the matter of jurisdiction. The court may have jurisdiction while the plaint lacks a cause or a reasonable cause of action and vice versa. In other words, a plaintiff may have a perfectly legitimate and reasonable cause but the court before which the plaintiffs filed lacked jurisdiction, just as the court may have jurisdiction but the litigant before it lacked cause of action…

In the circumstances of this case, this court lacks jurisdiction because there is no question or issue as to interpretation of the Constitution that is disclosed. The question of whether the Petitioner's application should be heard is a matter that can be handled by the High Court. A Judge can recuse himself or herself from hearing any matter for good reason. The long and short of it is that a litigant cannot force a Judge to hear any particular dispute where the Judge has on reasonable grounds for instance decided to recuse himself or

herself from hearing it. The learned trial Judge never decided the application which remained pending and never barred the parties from having the application heard by another Judge of the High Court. In any case, as held above, the High Court remained open for the Petitioner to pursue her application. The only purpose of the Petitioner is to have Miscellaneous Application No. 94 of 2013 heard and determined by another Judge as prayed for in paragraph 19 (b) and (c) of the Petition.

In the premises I would strike out the petition with costs on the ground that it was totally unnecessary, a waste of the time of the Court and the parties and the petition does not disclose any question as to interpretation of the Constitution of the Republic of Uganda as envisaged by Article 137 (1) thereof. Let the Petitioner have her application, the subject matter of the struck out petition, fixed for hearing before another Judge of the High Court Family Division.

Dated at Kampala the 16th day of Sept 2020

Christopher Madrama

Justice Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

Constitutional Petition No. 31 of 2013

Asanath Muhumuza:: Petitioner

Versus

1. Aidah Twikiirize Beiheho
2. Attorney General **:::::::::::::::::::::::: Respondents**

Coram: Hon. Justice Kenneth Kakuru, JA/JCC
Hon. Justice Hellen Obura, JA/JCC
Hon. Justice Stephen Musota, JA/JCC
Hon. Justice Christopher Madrama, JA/JCC
Hon. Justice Remmy Kasule, JA/JCC

Judgment of Justice Remmy Kasule, Ag. JA/JCC

I have had the benefit of reading the draft lead Judgment of Honourable Justice Christopher Madrama, JCC, and I agree with his conclusion that the petitioner's petition does not disclose any question or issue for interpretation of the constitution and as such the petition ought to be struck out.

Article 137 of the Constitution provides for questions as to the interpretation of the constitution. The provisions of the Article relevant to this petition are:

"137

(1)Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.

(2).....

(3)A person who alleges that-

(a) An act of parliament or any other law or anything in or done under the authority of any law: or

(b)Any act or omission by any person or authority,

Is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.

(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 Constitutional Court may

(a) grant an order of redress: or

(b) refer the matter to the High Court to investigate and determine the appropriate redress.

(5)

(6)

(7)"

The 1995 Constitution does not define in specific terms the meaning of the term "interpretation of this Constitution". It only sets out in Article 137 (3) instances when one has a cause of action to petition the Constitutional Court to carry out the constitutional duty of interpreting the Constitution. This is when one alleges that the Act of Parliament, or any other law or anything in or done under the authority of any law; or any act or omission by any person or authority is inconsistent with or in contravention with a provision of the Constitution. One may petition the Constitutional Court for a declaration to the alleged effect, and for redress where the Constitutional Court finds it appropriate. Where, of Course, the petitioner fails to establish the cause of action as set out above, the Constitutional Court will decline to grant the prayed for declaration and will dismiss the petition. If the Constitutional Petition itself on the face of it does not disclose the necessary cause of action in its body, then the Constitutional Court strikes it out.

There is therefore a difference between the Constitutional Petition showing a cause of action in the same way as a plaint in an ordinary civil suit may show a cause of action on the face of it, and the petitioner proving that cause of action before the Constitutional Court in the same way as the plaintiff must prove the cause of action in a case stated in the plaint.

Constitutional Appeal No. 1 of 1997: Attorney General Vs Major General Tinyefuza is an authority for the proposition that the Constitutional Court only has jurisdiction if a matter is raised under Article 137 of the Constitution. The Constitutional Court has no jurisdiction for matters arising under Article 50 of the Constitution where one claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened. The Jurisdiction to enforce such is with other Courts vested with competent jurisdiction and not necessarily with the Constitutional Court.

The issue whether the petitioner's Constitutional Petition before this Court discloses a cause of action so as to fall within the Jurisdiction of this Constitutional Court to interpret the Constitution depends on the facts as stated in the petition.

These facts are that the petitioner is the daughter of the first and legally wedded wife of the late Eric John Beiheho, who was the biological father of the petitioner and who died testate on 05.06.2011, having executed a will on 28.06.2003.

Before his death, Eric John Beiheho had two wives, the first wife, Juliet Tisaasire Beiheho, was the mother of the petitioner and she died in 2010. The second wife, now a widow, is Aidah Twikiriize Beiheho, the first Respondent to this Constitutional Petition.

After the death of Eric John Beiheho, the second wife, Aidah Twikirize Beiheho, who was the only surviving wife of the deceased, through **High Court at Kampala, Probate and Administration Cause No.**

483 of 2011 lodged in Court on 23.06. 2011, petitioned for grant of probate of the estate of the late Eric John Beiheho as the executrix of the will of her deceased husband.

On 22.07.2011, the petitioner in the Constitutional Petition, Muhumuza Asanath, caveated the application for grant of probate to Aidah Twikirize Beiheho in Probate and Administration Cause No. 483 of 2011. The reasons for the caveat were that no one had come up with a will to read it to the family of the deceased since the death of the deceased on 05.06.2011.

Earlier on 01.07.2011, the petitioner to this Constitutional Petition, Asanath Muhumuza, had through the Magistrate's Court Grade 1 of Kanungu, in Administration Cause No. 058 of 2011 applied to be granted letters of Administration to the estate of the deceased Eric John Beiheho. The first respondent to this Constitutional Petition, Aidah Twikiirize Beiheho had caveated the grant in Administration Cause No. 058 of 2011 on 14. 07. 2011.

On 07.09.2011, the first respondent, Aidah Twikiirize Beiheho sued the petitioner in the High Court at Kampala through High Court Civil Suit No. 96 of 2011. The suit prayed the High Court to order the vacating of the caveat lodged by the petitioner on the first respondent's application for Probate in High Court Probate and Administration Cause No. 483 of 2011 and for an order that Probate be granted to her, the first respondent.

The petitioner, as defendant, filed a defence to HCCS No. 96 of 2011 contending that no one produced a will when the deceased died and

so the will produced as being that of the deceased was suspicious and was not in compliance with the provisions of the Succession Act.

At the closure of the pleadings in HCCS No. 96 of 2011, the case came up for hearing before His Lordship E.S. Lugayizi of the High Court, Family Division, Kampala on 07.06.2012, when all the parties to the suit and their respective counsel were present. The case was stood over and later adjourned to 02.07.2012 with a view of exploring a possible settlement of the suit by the parties.

On 02.07.2012, all parties and respective counsel were present in Court and a settlement of the suit that had been reached by the parties was stated out to the Court. Each party to the suit as well as each counsel for each party individually expressed agreement to the terms of the settlement and the Court recorded the consent of each one on the Court record.

His Lordship Judge E.S. Lugayizi then entered Judgment in HCCS No. 96 of 2011 in the terms of the settlement. A consent Judgment endorsed upon by counsel for each one of the parties to the suit and signed by the trial judge was drawn and filed on the Court file. So too was a Court decree.

From 02.07.2012, when the parties and their respective counsel to HCCS No. 96 of 2011 left the High Court, it was on 24.04.2013, when the petitioner lodged in the High Court at Kampala Miscellaneous Application No. 94 of 2013 against the first respondent where in it was prayed that the High Court recalls the consent Judgment entered in HCCS No. 96 of 2011 so that the said Judgment is altered by

deleting from it the words ***"with the will annexed"*** from the wording of the consent Judgment in Number 1 that:

"Letters of Administration with the Will annexed be granted to the Plaintiff and Defendant to administer the deceased's estate for 1st six (6) months and thereafter distribute it with the help of Batakas and LC'S"

The effect of the prayer in Miscellaneous Application No. 94 of 2013, would be to change the consent Judgment to be to the effect that the deceased's estate would be administered by the Court appointcd administrators not necessarily in accordance with the Will of the deceased.

The Petitioner, as applicant to High Court Misccllaneous Cause No. 94 of 2013, asserted in the said Application that in entering the consent Judgment in HCCS No. 96 of 2011, she never agreed and it was never the intention of the Court that the Letters of Administration so issued in the consent Judgment were to be authority for the appointed administrators to administer the deceased's estate in accordance with and following the Will left by the deceased.

The same petitioner, as applicant in Miscellaneous Application No. 94 of 2013, in the affidavit in support of that Application claimed that, at the time of executing the consent Judgment in HCCS No. 960 of 2011, while in Court before His Lordship E.S. Lugayizi, that the said His Lordship E.S. Lugayizi told her and her other siblings that the Will was being annexed to the Letters of Administration as a

matter of form only and not that the estate of the deceased had to be administered in accordance with the said Will. She further stated in the same affidavit that her lawyer, Counsel Blaze Babigumira, advised her to accept the advice of His Lordship the learned Judge E.S. Lugayizi, and that is why she consented to the terms of the Consent Judgment in HCCS No. 96 of 2011. This was a mistake of her said Counsel and the same ought not to be visited upon her and her siblings.

Miscellaneous Application No. 94 of 2013 came before His Lordship E.S. Lugayizi on 06.05.2013 in the presence of Counsel for the applicant and the one for the respondent. The learned Judge then expressed himself as follows:

> *"I do not understand the application; and I do not think I should handle it. If the parties herein have moved away from what was agreed, they should find a way of sorting out their problem. I did what I was supposed to do and completed it. I will not return to it".*

The simple understanding I attach to what the learned Judge meant is that having been the presiding Judge when the parties to HCCS No. 96 of 2011 as well their respective Counsel consented to the terms of the consent Judgment, which terms the learned Judge recorded on the Court record; and in respect of which he, as the presiding Judge, called for and got the respective individual consents from each individual party to the suit as well as that of Counsel for that party, he could not now re-open the case by entertaining this

High Court Miscellaneous Cause No. 94 of 2013. He accordingly declined to entertain the same.

It is this decline to determine Miscellaneous Application No. 94 of 2013, that the petitioner relies upon to assert that:

(a) The act of Hon. Justice E.S. Lugayizi's refusal to hear and determine the application on merit and directing the parties to find a way of sorting out their problem is inconsistent and or in contravention of Articles 20, 28(1), 44(c) 126 and 138(2) of the Constitution.

It is the contention of the Petitioner that by declining to entertain Miscellaneous Application No. 94 of 2013, the learned Judge failed to uphold and promote the right of the petitioner, applicant in the application, by shutting the doors of Court against her, thus violating and being in consistent with Articles 20 and 138 of the Constitution. The right to a fair hearing under Article 28(1) and which right is non derogable was also violated contrary to Articles 28 and 44 of the Constitution. Article 126 of the Constitution was also contravened by the learned Judge as he failed to exercise Judicial power derived from the people and in the name of the people and in conformity with the law, values, norms and aspirations of the people, including the petitioner. The learned Judge failed, subject to the law, to do justice to the petitioner, irrespective of the petitioner's social or economic status. Justice was thus delayed, and substantive justice was not done to the petitioner due to technicalities. Thus Article 126 of the Constitution was violated.

The first respondent to the petition contends that the petition does not raise any issues for constitutional interpretation as it does not show any law or anything done under the authority of any law by the respondents that is inconsistent with or in contravention of any provision of the Constitution that would warrant the constitutional interpretation by this Constitutional Court.

In resolving the issue whether or not the petitioner has established in this Constitutional Petition any cause of action for this Constitutional Court to exercise its jurisdiction to interfere the Constitution, I find it necessary to consider Article 128(1) of the Constitution. The Article provides that:

"128. Independence of the Judiciary

(1) In the exercise of judicial power, the Courts shall be independent and shall not be subject to the control or direction of any person or authority".

Article 139 provides for the jurisdiction of the High Court as being:

"139

(1)The High Court shall, subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law".

Section 39(1) of the Judicature Act provides that the jurisdiction vested in the High Court by the Constitution, the Judicature Act or any other law, shall be exercised in accordance with the practice and

procedure provided by the Judicature Act or any other enactment or by such rules and orders of the Court as may be made or existing under the Judicature Act or any other enactment.

Section 39(2) of same Judicature Act vests in the High Court, in its discretion to adopt a procedure justifiable by the circumstances of the case, where in a case no procedure is laid down for the High Court by any written law or by practice.

When the petitioner in this Constitutional Petition, as applicant in High Court Miscellaneous Application No. 94 of 2013, lodged that application in the High Court at Kampala, on 24.04.2013, she in effect, accused the learned trial Judge His Lordship E.S. Lugayizi of having, for the sake of securing a Consent Judgment from the parties and their respective Counsel in HCCS No. 96 of 2011, advised that the Will of the deceased, Eric John Beiheho, was being attached to the grant of the Letters of Administration merely as a matter of form only and not that the estate of the deceased had to be administered in accordance with and in compliance with the said Will.

It was this alleged advice of the learned Judge that led the Petitioner, Applicant in the Application No. 94 of 2013 and defendant in HCCS No. 96 of 2011, to accept the terms of the Consent Judgment executed by the parties represented by their respective lawyers before the learned Judge on 02.07.2012 and entered as the Judgment in HCCS NO. 96 of 2011.

High Court Miscellaneous Application No. 94 of 2013 is in effect seeking to alter the Consent Judgment by reason of the mistake

attributed by the Petitioner, Applicant in the Application, to the learned trial Judge.

There is therefore no way the learned trial Judge, His Lordship E.S. Lugayizi, accused of having been the cause for lodging the Miscellaneous Application No. 94 of 2013, could sit in Judgment of that application.

Indeed, it is a matter of regret, that learned Counsel Blaze Babigumira for the petitioner, never made an affidavit to confirm or exonerate the learned Judge E.S. Lugayizi, of this accusation by his client, the petitioner. It is also of greater regret that the same learned Counsel could have taken steps to have that very Miscellaneous Application No. 94 of 2013 placed before the very same His Lordship E.S. Lugayizi for determination on 06.05.2013 without any objection from him as Counsel for the applicant.

The learned Judge E.S. Lugayizi was therefore absolutely right to recuse himself from handling High Court Miscellaneous Application No. 94 of 2013 because the circumstances of the situation, justified his decision that:

"I do not think I should handle it".

The learned Judge, in my view, appropriately acted correctly under Section 39(2) of the Judicature Act.

The appropriate step that the petitioner, as applicant in High Court Miscellaneous Application No. 94 of 2013, should have taken, is to apply either informally or formally to have the Court file of High Court

Miscellaneous Application No. 94 of 2013 placed before another Judge of the High Court for determination, if the petitioner, the applicant in the Application, still wanted the application to be determined by the High Court. The petitioner has availed no explanation at all to this Court as to why she did not pursue this course of action.

It is incomprehensible, and this Constitutional Court must refrain from setting a precedent that, every time a Judicial Officer recuses himself or herself from determining a cause, for reasons where that Judicial Officer has come to the conclusion that the cause of justice will better be served by recusing himself/herself from the cause, that the party affected rushes to the Constitutional Court for interpretation of the Constitution as to why the Judicial Officer is recusing himself/herself from the cause.

I too have come to the conclusion that the Constitutional Petition is wanting on the issue of the cause of action. The petitioner herself through her affidavit and submissions on her behalf has also not established a cause of action in this Constitutional Petition. As such the Constitutional Petition ought to be struck out.

His Lordship Christopher Madrama, JA, holds that High Court Miscellaneous Application No. 94 of 2013, the subject matter giving rise to this Constitutional Petition, be fixed for hearing before another Judge of the High Court, Family Division.

Article 137(4)(a) provides that:

"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 Constitutional Court may .....

(a) Grant an order of redress; or

(b) Refer the matter to the High Court to investigate and determine the appropriate redress".

From the pleadings and submissions of the parties to this Constitutional Petition, it has become obvious that the main essence of High Court Miscellaneous Application No. 94 of 2013 is for a prayer that the High Court alters the Consent Judgment entered in HCCS No. 96 of 2011 on 02.07.2012 by deleting the words *"with the Will annexed"* from No. 1 of the agreed terms of the said Consent Judgment so that the term is worded that:

"1. Letters of Administration be granted to the plaintiff and defendant to administer the deceased's estate for the 1st six (6) months and thereafter distribute it with the help of Batakas and LCs".

The effect of the prayed for alteration, if allowed, would be to render the estate of the deceased Eric John Beiheho to be administered as if the deceased died intestate, without leaving a Will, when in actual fact, the said deceased died testate having executed a valid Will. The prayer, if allowed, would amount to revoking the deceased's Will, which is valid in all respects. This would be contrary to the law. Section 74 of the succession Act, Cap. 162, provides that:

"74. Testator's intention to be effected as far as possible:

The intention of the testator is not to be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible".

A Court of law, like any other person or authority, is therefore under statutory obligation to give effect to the testator's intention as expressed in a valid Will of the testator.

The petitioner, who is the applicant in High Court Miscellaneous Application No. 94 of 2013, is not in any way asserting that the Will of the deceased Eric John Beiheho, is invalid in any aspect. She is just unhappy with the way the deceased distributed the properties of his estate in the said Will. That cannot be a valid ground in law for the High Court to order that the estate of the said deceased be administered by the Court appointed administrators without following the deceased's Will.

There is therefore, as a matter of law, no merit at all in High Court Miscellaneous Application No. 94 of 2013. It is simply seeking a prayer that is contrary to the law. As a redress, under Article 137(4)(a) of the Constitution, having fully appraised of the nature of this application No. 94 of 2013 and having come to the conclusion that it is seeking a prayer that is wrong in law, I too would hold that the said application No. 94 of 2013 be struck out by reason of its illegality. There is no reason why it should remain pending disposal by the High Court when the deceased's estate has to be administered in accordance with the law and not otherwise.

In conclusion I strike out this Constitutional Petition on the grounds already stated.

By way of further redress, I hold that High Court Miscellaneous Application No. 94 of 2013 be struck out by reason of its illegality in law.

I too award the costs of the struck out petition to both respondents to the petition and those of the struck out Miscellaneous Application No. 94 of 2013 to the respondent to that application.

Dated at Kampala this ....16th.... day of ....Sept..... 2020.

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Remmy Kasule

Ag. Justice of Appeal/Constitutional Court