

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA HOLDEN AT KAMPALA
IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF
UGANDA 1995 (AS AMENDED)

AND

IN THE MATTER OF THE CONSTITUTIONAL COURT (PETITIONS AND
REFERENCES) RULES, 2005

CONSTITUTIONAL PETITION NO. 07 OF 2018

- 1. NAMIRO MARGRET**
- 2. NALUNKUMA RITAH**
- 3. NAKIYINGI ANNET**
- 4. MUGERWA FRED LWANGA**
- 5. NAKABAALE JOHN**
- 6. NTALE KURAISH KALEMA**
- 7. SSALI ISAAC**
- 8. NATIONAL ACTION FOR AWAKENING**
UGANDA (SISIMUKA UGANDA)

:::::: PETITIONERS

VERSUS

- 1. ATTORNEY GENERAL**
- 2. ELECTORAL COMMISSION**
- 3. KASULE ROBERT SEBUNYA**

::::::::: RESPONDENTS

CORAM:

HON. MR. JUSTICE RICHARD BUTEERA, DCJ
HON. MR. JUSTICE KENNETH KAKURU, JCC
HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JCC
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JCC
HON. LADY JUSTICE IRENE ESTHER MULYAGONJA, JCC

JUDGMENT OF THE COURT

This Petition was brought under **Articles 1(1), (2), (3), (4); 2(1), (2); 3(1), (4) (a), (b), (5); 8A(1), (2); National Objectives and Directive Principles of State Policy; 1(i); II**



(i), (iii); III (i), (ii); Articles 126 (1), (2) (a), (e); 137(1), (3), (4) of the Constitution of Uganda and **Rule 3 of the Constitutional Court (Petition and Reference) Rules, S.1 91 / 2005.**

The petitioners pray this Court for grant of the following orders and redress that:-

- “
- (i) That the judgment, decisions and orders in the High Court Election Petition No. 004 of 2017 as confirmed and up-held by the decisions, orders and judgment of the Court of Appeal in Election Petition Appeal is and / or was in contravention and inconsistent with the Constitution of Uganda in so far as the appointment and declaration of the 3rd Respondent as an automatic winner of the Parliamentary Elections of Nansana Municipality Wakiso District without a re-election for the electorate. *(sic)*
 - (ii) That the High Court Judgment as confirmed and up-held by the Court of Appeal Judgment; **Section 63 (4), (5), 6(a), (b), (i), (ii), (c)** of the Parliamentary Elections Act Cap are inconsistent and / or on contravention of **Articles 1(1), (2), (3), (4)** in so far as it is usurps the power of the people and grants unfettered discretion to the High Court and Court of Appeal and is therefore null and void. *(sic)*
 - (iii) That the High Court Judgment as confirmed and up-held by the Court of Appeal judgment, the entire **Section 63** of the Parliamentary Elections Act are inconsistent with and /in contravention of **Article 2(1) and (2)** of the Constitution as such it usurps the powers and supremacy of the Constitution, and therefore null and void. *(sic)*
 - (iv) That the High Court Judgment as confirmed and up-held by the Court of Appeal Judgment, **Section 63** of the Parliamentary Elections Act are inconsistent with and /in contravention with **Articles 3(1), (2), (4) (a), (b) and (5)** of the Constitution as it allows the Court to take over the declaration, gazetting and appointing of representatives of Parliament as an arm of Government and is therefore null and void.
 - (v) That the High Court Judgment as confirmed and up-held by the Court of Appeal Judgment, **Section 63** of the Parliamentary Elections Act are inconsistent with and /in contravention of **Article 8A (i)** of the Constitution in so far as it does not allow or permit governance based on principles of national interest and common good enshrined in the National Objectives and Directive Principles of State Policy and it therefore null and void.

- (vi) That the High Court Judgment as confirmed and up-held by the Court of Appeal Judgment, **Section 63** of the Parliamentary Elections Act are inconsistent with and / in contravention of the National Objectives and Directive Principles of State Policy enshrined under; **1(i); II (i), (ii), (iii), iv (iii)** of the Constitution in so far as Democratic Principles; Interpretation of Objectives; National Unity and Stability; National Sovereignty, independence and territorial integrity and is therefore null and void.
- (vii) That the High Court Judgment as confirmed and up-held by the Court of Appeal Judgment, **Section 63** of the Parliamentary Elections Act are inconsistent with and /in contravention of **Article 137 (i), (3), (4)** of the Constitution in so far as the judgment of High Court confirmed and up-held by the Court of Appeal and the acts done arising out of the decree extracted from the judgment in so far as the declaration and gazetting of the 1st respondent is concerned and is therefore null and void.
- (viii) And any other remedies as the Court may deem fit to the petitioners a part from costs for or against the petitioners this being a public interest matter.”

REPRESENTATION

At the hearing of the Petition Mr. Nsamba Geoffrey and Mr. Dennis Nyombi appeared for the petitioners.

Mr. Sam Tusubira Senior State Attorney appeared for the 1st respondent.

Mr. Lule Kennedy Ben and Mr. Kalali Steven appeared for the 3rd respondent.

The 7th petitioner was in Court and Mr. Frank Gashumba was in Court on behalf of the 8th petitioner.

Counsel for all the Petitioners and the respondents had filed written submissions which they adopted and Court shall proceed to give its judgment on the basis of the parties pleadings, the lower court record, parties written submissions and relevant authorities.

THE BACK GROUND FACTS OF THE PETITION

Parliamentary Elections for the directly elected members of Parliament for Nansana Municipality in Wakiso District were conducted by the 2nd Respondent on 18th February 2016. Six (6) Candidates contested for the seat. Wakayima Musoke Nsereko polled

25,053 votes and was declared winner. The respondent polled 23,415 votes and was the 2nd overall.

The third respondent challenged the results of the election and filed an Election Petition in the High Court herein referred to as Election Petition No. 004 of 2016.

The Election Petition was heard by Justice Vincent Okwanga, who annulled the election on the ground that Wakayima Musoke Nsereko was not a registered voter and lacked academic qualifications.

The Court declared the 3rd respondent (Hon. Robert Kasule Ssebunya) the validly elected Member of Parliament for Nansana Municipality.

Wakayima Musoke Nsereko being dissatisfied with the High Court decision appealed to the Court of Appeal.

The Court of Appeal heard the appeal and upheld the Judgment of the High Court.

The petitioners were aggrieved by the decision, orders and Judgment of the Court of Appeal. They contend that the Court of Appeal decision contravened sections of the Constitution hence this Constitutional Petition.

PRELIMINARY POINTS OF OBJECTION

All the three respondents raised preliminary points of objection to the Petition in their submissions. The issue raised by the three respondents is basically the same although stated slightly differently by each of the respondents.

Counsel for the 1st respondent submitted that the Petition is incompetent, without merit and does not disclose any question for Constitutional Interpretation under **Article 137** of the Constitution. According to Counsel, the Court therefore, has no Jurisdiction to entertain the Petition.

Counsel contended further that, the acts complained of and imputed on the 1st respondent relate to a Court Judgement of a competent Court with Jurisdiction. Counsel contended that the Petition is a disguised Election Petition Appeal which ought to be

dismissed on the authority of **Mbabali Jude Versus Hon. Edward Kiwanuka Sekandi Constitutional Petition No. 28 of 2012.**

Counsel for the 2nd respondent submitted that the Petition is misconceived, frivolous and discloses no plausible issues meriting consideration by the Constitutional Court against the 2nd respondent and should be dismissed with costs as the Petition alleges no act or omission by the 2nd respondent, it discloses no reasonable cause of action against the 2nd respondent, is redundant and a total abuse of court process as it is a disguised Election Petition Appeal.

Counsel for the 3rd respondent submitted that the petitioners filed the Constitutional Petition as a disguised Appeal against the decision of the Court of Appeal as a final Appellate Court in election matters.

Counsel contended that the petitioners' complaint is set out in all their respective paragraph 3 of their affidavits in support as follows;

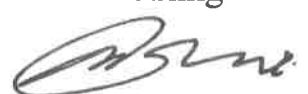
“That I bring this Petition seeking interpretation of the High Court Judgment, decision and orders by His Lordship Justice Vincent Okwanga J vide HIGH COURT ELECTION PETITION NO. 004 OF 2016 as confirmed and / or upheld by Judgment of the Justices of Court of Appeal in ELECTION PETITION APPEAL NO. 0050 AND 102 OF 2016.”

According to Counsel, the petitioners' are attempting to turn the decision of these two courts into a constitutional question and the effect would amount to the Constitutional Court being turned into a second appellate court in election matters which the very Constitution intended to be concluded by the Court of Appeal in order to bring an end to litigation as the last appellate court.

Counsel submitted that the sum effect of this petition is that litigants would therefore formulate constitutional questions in order to overturn the decisions of any court including the decisions of the Supreme Court. Counsel contended that there is nothing

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constitutional about this complaint and the court can make any decision and apply the constitutional provisions and no such constitutional issues for interpretation can arise from a Judgment to justify or warrant the institution of a Constitutional Petition.

Counsel contended further that the petitioners have not raised any constitutional issue for that Constitutional Court should interpret.

The petitioners answer to the Preliminary Objections raised against the Petition can be discerned from the petitioners joint rejoinder to the 3rd respondents submissions and their reply to the respondents answer to the Petition.

Counsel for the petitioners submitted that the Petition is not a disguised appeal, but rather seeks Courts constitutional interpretation in so far as the grounds, Judgment, decision of the Court of Appeal are concerned in light of the provisions of the Constitution and The Parliamentary Elections Act.

Counsel contended that the Petition is not about what the Court found, the petitioner is about the inconsistencies, contradictions of the provisions by the Judgment, its grounds and decisions and the contradictions and contraventions of Section 63 of the Parliamentary Elections Act and to the unconstitutional extent of declaring the 3rd respondent a validly elected Member of Parliament for Nansana Municipality.

Counsel for the petitioners contended further that the conducting of a valid election with an invalid candidate makes the entire electoral process invalid and Court cannot server the wheat from the chaff since they all form collectively an electoral process.

Counsel contended that invalidating an elected Member of Parliament in an election, after the conduct of casting the votes renders the whole process invalid.

He submitted further that, the inconsistency and contravention is envisaged in the removal of an elected candidate in an invalid election without any recourse for a bye-election. Counsel submitted that the failure to order for a bye-election meant that court

became the electorate, The Electoral Commission and conducted an election by removal of a candidate and substituting and declaring another candidate as a validly elected winner without due regard to the provisions of **Articles; 1(1), (2), (3), (4); 2(1), (2), (3)(i); 4(a), (b), (5); 8A(1), (2), National Objectives and Directive Principles of State Policy; I(i); II(i), (ii), (iii); III(i), (ii) of the Constitution.**

THE DECISION OF COURT

The objections raised are basically on the issue whether, the Petition raises any Constitutional questions for this Courts determination interpretation.

Being a preliminary objection on a point of law we are required to resolve it first.

The Supreme Court and this Court have had occasion to discuss the jurisdiction of the Constitutional Court, under Article 137 of the Constitution.

The Supreme Court in **Ismail Serugo Versus Kampala City Council and the Attorney General Constitutional Petition No. 2 of 1998**. Wambuzi, C.J, observed as follows:

“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 any rights have been violated as claimed, these are enforceable under Article 50 of the Constitution by another Court”.

Justice Mulenga JSC in the same case stated as follows:-

“I shall start by clearing the apparent dispute on the import of the decision of this Court in Attorney General v. David Tinyefuza (supra). Although there are a number of issues in that case decided on basis of majority view, it is evident from “proper reading of the seven judgments in that case, that it was the unanimous holding of the Court



that the jurisdiction of the Constitutional Court was exclusively derived from Article 137 of the Constitution. It was not a holding in any of the Judgment that Article 50 of the Constitution confers, on the Constitutional Court, any additional and /or separate jurisdiction to enforce the rights and freedoms guaranteed under the Constitution. It seems to me that what Mr. Mbabazi may have misconstrued is the holding, variously expressed in several of the Judgments, that the Constitutional Court was “a competent Court” for purposes of Articles 50 to which an application (for redress) may be made when such right or freedom is infringed or threatened. It must be noted, however, that this holding is subject to a rider, again variously expressed in the several Judgments, to the effect that such application for redress can be made to the Constitutional Court, only in the context of a petition under Article 137 brought principally for interpretation of the Constitution. It is the provisions in clauses (3) and (4) of Articles 137 that empower the Constitutional Court, when adjudicating on a petition for interpretation of the Constitution, to grant redress where appropriate. Clause (3) provides in effect, that when a person petitions for a declaration on interpretation of the Constitution, he may also petition for redress where appropriate. Clause (4) then provides:

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

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

It follows that a person who seeks to enforce a right or freedom guaranteed under the Constitution, by claiming redress for its

infringement or threatened infringement, but whose claim does not call for an interpretation of the Constitution, has to apply to any other competent Court. The Constitutional Court is competent for that purpose only upon determination of a petition under Article 137(3).

This Court cited and relied on the **Serugo (Supra)** decision in **Constitutional Petition No. 28 of 2012. Mbabali Jude Versus Hon. Kiwanuka Sekandi, Charles Kabagambe Versus Uganda Electricity Board (Constitutional Petition No. 2 of 1999)** and many others. On the authority of the above decisions, this Court has to satisfy itself that the petitioners have raised an issue or issues for Constitutional interpretation in the instant Petition. They have to show that this Court has the Jurisdiction to entertain and determine this Petition.

The respondents are objecting to the Petition on the ground that there are no Constitutional issues raised for this Court to interpret.

According to the respondents the Petition is a disguised appeal against the decision of the Court of Appeal in **Court of Appeal Election Petition No. 50 of 2016** that up held **The High Court decision in High Court Election Petition No. 50 and 102 of 2016.**

We shall restate some facts as they are presented in the Petition to illustrate what the instant Petition is all about.

The Petition states: in Paragraph

“11(iii) The 1st to 7th petitioners herein did actively cast their votes in favour of one of the contestants, **WAKAYIMA MUSOKE NSEREKO**, being their candidate who emerged winner with 25,053 votes (Twenty Five Thousand Fifty Three votes) against the 3rd Respondent who was runner-up with 23,415 votes (Twenty Three Thousand Four Hundred Fifteen votes)”.

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(xvii) That having heard all the parties in the Election Petition, **HIS LORDSHIP**

JUSTICE VINCENT OKWANGA J pronounced himself on the matter by way of **delivering judgment** on the **20th day of July 2016** in which he nullified the Election of the said Wakayima Musoke Nsereko as the elected member of Parliament of Nansaana Municipality, Wakiso District and therein made the following orders that;

(a) “The petitioner having polled a total of 23,415 votes (Twenty Three Thousand Four Hundred Fifteen votes) as against the 1st respondent 25,053 votes (Twenty Five Thousand Fifty Three votes) and coming second runner up in that election is hereby declared duly elected as directly elected Member of Parliament for Nansaana Municipality constituency” (Find attached hereto the High Court Judgment marked Annexure “D”)

(xviii) That being dissatisfied with the decision, orders and judgment of the High Court Judge, the said Wakayima Musoke Nsereko appealed to the Court of Appeal vide **Election Petition Appeal No. 0050 and 102 of 2016** appealing against the decisions, orders and judgment and prayed for orders to be set aside and /or quash the decisions and judgment be declared the duly elected winner and Member of Parliament representing Nansaana Municipality, Wakiso District. **(Find attached hereto the Election Petition Appeal marked Annexure “E”)**

(xix) That during the Joint Scheduling Conference at the Court of Appeal among the legal issues framed agreed upon by the parties for determination before Court was Issue No. 3; **“Whether the trial Judge erred to declare the respondent as the duly elected Member of Parliament for Nansaana Municipality?”**

(xx) That in determination of the matter and in resolution of the issue, the Court of Appeal agreed with the conclusion of the Trial High Court Judge that the 1st respondent in the Appeal was the duly elected Member of Parliament for

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Nansaana Municipality thereby up-holding and confirming the decisions, orders and judgment of the Trial High Court Judge and in so doing the 3rd respondent herein was confirmed and declared and gazetted by the 2nd respondent as the duly elected Member of Parliament by the 3(three) Justices of the Court of Appeal in their Judgment dated the **15th day of September 2017. (Find attached hereto the judgment of Court of Appeal marked Annexure “D”).**

(xxi) That it's upon that background that the 1st to 8th and 9th petitioners feel aggrieved by the unconstitutional law and /or judgment of the Trial Judge of High Court as confirmed and up-held by the Court of Appeal Justices.

(xxii) That your 1st to 6th and 7th petitioners are hereby aggrieved and further state that;

(i) That the High Court judgment, decisions and orders as confirmed and up-held by the Court of Appeal in so far as declaring and gazetting of the 3rd respondent herein as the duly elected Member of Parliament of Nansaana Municipality, Wakiso District are in total contravention and inconsistent with the following Articles of the Constitution; **Articles 1(1) where all power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.**

(ii) That Article 1(2) of the Constitution of the Republic of Uganda guarantees that all authority in the state emanates from the people of Uganda and the people shall be governed through their will and consent.”

The above quoted paragraphs clearly indicate that, this Petition is a complaint by the petitioners who are dissatisfied with the Court of Appeal Judgment that confirmed the High Court Judgment.

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It is the Court of Appeal Judgment the petitioners are complaining about in the instant Petition. The right of appeal in respect of election petition appeals is limited by section 66 of the Parliamentary Election Act as amended by the Parliamentary Elections (Amendment) Act, 2010.

The Law on this matter was put to rest by the Supreme Court in *Baku Raphael Obudra and Obiga Kania v Attorney General (2) (Constitutional Appeal 2005 (1) UGSC 56 (15 March 2006)*

Article 137 (3) (b) of the Constitution allows any person to petition the Constitutional Court for a declaration that any act or omission by any person or authority, is inconsistent with or in contravention of a provision of the Constitution and may also petition for redress where appropriate.

The Court of Appeal Justices delivered a Court Judgment. The act of delivering a judgment cannot be inconsistent with the Constitution. On the other hand, the contents of the judgment can always be the subject matter of an appeal, where a right of appeal is available. For the judgment to be challenged on the ground that the contents of the judgment are erroneous in law, that is a matter on the merits of the judgment and the rules of the Court of Appeal particularly 2 (2) allows the Court to set aside any judgment or portion of the judgment which has been proved to be null and void in law. **Rule 2 (2) of the Judicature (Court of Appeal) Rules** provide that:

“(2) nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay.”

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It is therefore possible to apply for review of a judgment but not to challenge the judgment in another court other than an appellate Court. Where any question arises in any judicial proceeding as to interpretation of the Constitution, the relevant Court may refer that question to the Constitutional Court. The Constitution only provides for reference to the Constitutional Court under article 137 (5) of the Constitution in the following terms:

- (5) Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a field court martial, the court-
 - (a) May, if it is of the opinion that the question involves as substantial question of law; and
 - (b) Shall, if any party to the proceedings requests it to do so, refer the question to the Constitutional Court for decision in accordance with clause (1) of this article.

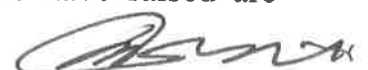
This procedure could arise in the process of the trial of case and not upon its conclusion. In the circumstances of this petition, the only option available to the petitioners, whatever the merits, was to apply to the Court of Appeal to set aside the judgement on the ground that it was issued contrary to the provisions of the Statute or the Constitution.

The petitioners in the instant case have instead framed their grievance as a question for Constitutional interpretation. What are the petitioners asking this Court to do?

They are petitioning the Court to re-examine the decision of the Court of Appeal in Election Petition Appeal No. 04 of 2016 and overturn it on a ground they have framed as a Constitutional issue.

We find that this Petition is a disguised appeal.

The petitioners are simply asking this Court to sit on an appeal against a decision of the Court of Appeal in an Election Petition. The issues the petitioners have raised are



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matters that were heard and resolved by the Court of Appeal in the Election Petition Appeal. They are not issues for Constitutional interpretations by this Court.

The Petition does not raise issues for Constitutional Interpretation under **Article 137 (3)** of the Constitution and therefore this Court has no jurisdiction to entertain the Petition.

We, for that reason strike out the Petition under **Rule 23 of the Rules** of this Court and **Order VI Rule 30 of the Civil Procedure Rules**.

The Petition having been a disguised appeal lacks merit. It cannot have been brought in public interest. It was frivolous and vexatious.

We accordingly order that the petitioners pay costs to the respondents.

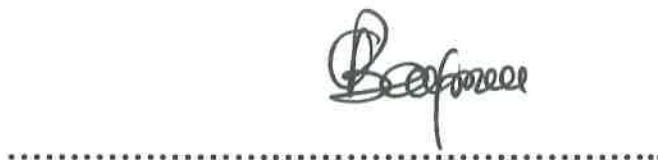
DATED at Kampala on this^{14th} day of^{March} 2021.



RICHARD BUTEERA
DEPUTY CHIEF JUSTICE



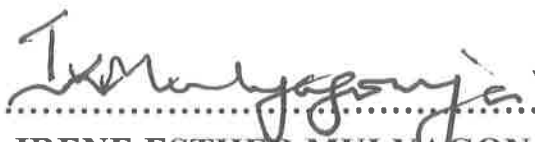
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