

**THE REPUBLIC OF UGANDA,**

**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**

**CONSTITUTIONAL PETITION NO 30 OF 2006**

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

**1. HON. ISSA KIKUNGWE}**

10 **2. JOHN KEN LUKYAMUZI} .....PETITIONERS**

**VERSUS**

**ATTORNEY GENERAL} .....RESPONDENT**

**JUDGMENT OF MADRAMA CHRISTOPHER, JCC**

15 The Petition was initially commenced jointly by Hon. Issa Kikungwe (deceased) and Hon. John Ken Lukyamuzi against the Attorney General under Article 137 of the Constitution and the Rules of the Constitutional Court (Petitions for Declarations under Article 137 of the Constitution) Directions, Legal Notice No. 4 of 1996. The Petitioners were Members of Parliament at the time of filing this petition and stated that they had a fair knowledge and  
20 understanding of the Constitution of the Republic of Uganda, 1995 and of the impugned agreement executed between the Government of Uganda and BIDCO Refineries Limited on the 4<sup>th</sup> April 2003. They commenced this petition in that capacity.

25 The Petitioners contend that the provisions of the agreement executed between the Government of the Republic of Uganda and BIDCO Refineries Limited contravene various provisions of the Constitution, namely:

- i. Article 2(2) of the Agreement contravenes Article 2 and 21 of the Constitution in so far as it promotes inequality of BIDCO Refineries Limited with other citizens before the law.
- 30 ii. Article 5(1) to (12) of the Agreement contravenes Article 154 of the

- 5 Constitution in so far as it is unconstitutional for Government to enter into financial obligations of the nature envisaged under the said Agreement without legislative authority.
- 10 iii. Article 5(1) to (12) and Article 10 of the Agreement contravene Article 159 of the Constitution which prohibits the Government from guaranteeing any person except by or under an Act of Parliament.
- iv. Article 5(1) to (12) of the Agreement contravene the rights of Ugandan Oil producers and processors to participate in lawful trade and business in the edible oil sector under the IFAD loan given to Government contrary to Article 40(2) of the Constitution.
- 15 v. Article 5(3) and (4) of the Agreement contravene Article 152(2) of the Constitution in so far as the exemption of withholding tax and stamp duty have not been made by the authority of the law imposing such tax and subject to the periodic monitoring by Parliament in accordance with the law.
- 20 vi. Article 5(7) of the Agreement contravenes Article 159(2) (3) and (7) of the Constitution in so far as the Government has never received Parliamentary approval, assent or resolution under any law or Act of Parliament.
- vii. Government's undertaking to pay duties, levies, fees and VAT under Articles 5(2) and (5) of the Agreement contravenes Article 153, 154(1), (2) and (3) of the Constitution.
- 25 viii. The whole Agreement contravenes Article 119 of the Constitution as it was never prepared under the advice of the Attorney General.
- ix. The whole Agreement contravenes Article 163 of the Constitution which requires a financial and value for money audit by the Auditor General in projects involving the use of public funds.
- 30

The Petitioners pray that this court be pleased to grant the orders prayed for in the petition namely:

- i. A declaration that Article 2(2) of the Agreement is inconsistent with

- 5 Article 2 and 21 of the Constitution of Uganda.
- ii. A declaration that Article 5 and 10 of the Agreement are inconsistent with Article 40(2), 152, 153, 154 and 159 of the Constitution of Uganda.
  - iii. A declaration that the whole Agreement contravenes Article 119 and 163 of the Constitution of Uganda.
  - 10 iv. A declaration that the continued payments of import, excise and Value Added Tax on behalf of BIDCO Refineries Limited with monies drawn from the Consolidated Fund is inconsistent with Article 153, 154 (1), (2) and (3) of the Constitution of the Republic of Uganda.
  - 15 v. A declaration that the actions taken by the Government in continuing to guarantee the Value Added Tax obligations of BIDCO Refineries Ltd is inconsistent with Article 159(2), (3)(a) and (7) of the Constitution of the Republic of Uganda.

The Petitioners further pray for costs of the petition.

20 The petition is supported by the affidavits of the Petitioners, Hon. Issa Kikungwe and John Ken Lukyamuzi. The facts in the affidavit of Hon. Issa Kikungwe are that on the 4<sup>th</sup> April 2003, the Government of Uganda and BIDCO Oil Refineries Limited entered into an agreement for the Development of the Oil Palm Industry in Uganda. A copy of the agreement is attached to the Petitioner's affidavit and marked Annexure A. The project was launched  
25 by the President of Uganda on the 19<sup>th</sup> July 2004 in Kalangala district and the agreement has since taken force. The Petitioner reproduced the grounds contained in the petition that I have already set out above.

In the affidavit of the second Petitioner, John Ken Lukyamuzi, the facts  
30 deposed to are that Uganda Revenue Authority in implementing the impugned agreement executed between the Government of Uganda and BIDCO Refineries Limited proceeded to enforce some obligations in the Agreement. He relied on a circular issued by Uganda Revenue Authority titled

5 ~~“Customs Clearance of BIDCO Project Cargo (Amended)”~~. The Circular is attached to the Petitioner’s affidavit and marked Annexure B.

The Petitioner further deposed that on the 1<sup>st</sup> April 2004, the Uganda Oil Seed Producers and Processors Association made a written presentation to the Parliamentary Committees on Finance, Planning & Economic  
10 Development and Agriculture, Animal Industry and Fisheries complaining about the BIDCO Oil Palm Project and the impugned agreement. A copy of the presentation is attached to the Petitioner’s affidavit and marked Annexure C. He stated that the said presentation shows that the Uganda Oil Producers and Processors were not consulted or given an opportunity to be  
15 involved in the bids under the IFAD Loan for the Development and Production of Vegetable Oil in Uganda contrary to the claims of advertised competitive bids under clause (c) of the preamble of the impugned agreement. That consequently, the Uganda Oil Producers and Processors have been deliberately sidelined by the impugned agreement in  
20 contravention of Article 21 and 40 (2) of the Constitution of Uganda in so far as they have been locked out of their lawful trade under the IFAD Loan in the edible oil sector which has virtually been handed over to BIDCO as a monopoly.

The Petitioner deposed that the contents of the impugned agreement have  
25 since been implemented as follows:

- i. The Government is paying Import, Excise and Value Added Tax on behalf of BIDCO Refineries Limited and the money is being drawn from the Consolidated Fund without the approval of the Auditor General and participation of the Parliament of Uganda.
- 30 ii. The Government has guaranteed and is continuing to guarantee BIDCO Refineries Limited’s Value Added Tax obligations without the participation of the Parliament of Uganda; and BIDCO Refineries Limited has set up a factory or Oil refinery in Jinja which has adversely

5           affected the rest of the Oil Processors in the country by reason of the  
unfair and unconstitutional acts complained of in the petition.

The Petitioner deposed that the Auditor General has never conducted a  
Financial and Value for Money Audit in respect of the Public Funds which  
were availed to BIDCO Oil Refineries Limited and from which BIDCO Oil  
10 Refineries Limited has benefited.

The Respondent's Answer to the petition is that:

Article 2 (2) of the agreement between the Government of Uganda and  
BIDCO Refineries Ltd does not in any way discriminate or promote superiority  
of BIDCO refineries Ltd with other citizens before the law as provided in  
15 Article 2 and 21 of the Constitution of the Republic of Uganda. Secondly that  
Articles 5 (1) – (12) of the agreement is not inconsistent with Article 154 of  
the Constitution as alleged or at all. Thirdly, adequate 5 (1) – (12) and Article  
10 of the agreement not inconsistent with Article 159 of the Constitution as  
alleged or at all. The agreement has not guaranteed BIDCO refineries limited  
20 without authority by or under an Act of Parliament and that the government  
supports the application of BIDCO refineries limited but does not bound itself  
for guarantee.

Further the Respondent asserts that Article 5 (1) – (12) of the Agreement is  
not in contravention of the rights of Uganda oil producers and processors  
25 and other citizens to participate in lawful trade and business in the edible oil  
sector as alleged. The Respondent contends that other persons are not  
restricted by the agreement to participate in lawful trade and business in the  
edible oil sector.

Further the Respondent asserts that Article 5 (7) of the Agreement does not  
30 in any way violate the provisions of Article 159 (2) (3) and (7) of the  
Constitution of the Republic of Uganda as alleged. The Respondent asserts  
that the Government of Uganda's undertaking under Article 5 (2) of the

5 agreement does not in any way contravenes the Articles 153, 154 (1), (2) and  
(3) of the Constitution of the Republic of Uganda 1995 as alleged and it was  
done within the framework of the Constitution and the laws of the Republic  
of Uganda. The Respondent also asserts that the whole agreement does not  
contravene Article 119 of the Constitution since it was drawn under the  
10 advice and direction of the Attorney General and was cleared by the said  
office as required by law. In the premises the Respondent asserts that the  
Petitioners are not entitled to any of the declarations as set out in the petition  
and the Petitioners should be put to strict proof of their allegations therein.  
Furthermore, the petition is misconceived and does not call for the  
15 interpretation of the Constitution and the petition is incompetent.

The affidavit in support of the answer to the petition is that of Ms. Caroline  
Bonabana, a State Attorney in the Attorney General's Chambers who states  
in brief that she read the petition and accompanying affidavits and knows  
that there is an agreement between the Government of Uganda and BIDCO  
20 oil refineries limited dated 4th of April 2004 arising out of a prior  
international agreement with the International fund for agricultural  
development (IFAD) to support the development and production of  
vegetable oil in Uganda.

Further she states that the agreement between the Government of Uganda  
25 and BIDCO oil refineries Ltd does not contravene the 1995 Constitution of  
the Republic of Uganda and was perused and approved by the Attorney  
General according to a copy of the approval letter annexed to the affidavit  
and marked Annexure "A". Further the agreement was audited by the Auditor  
General in accordance with the provisions of the Constitution of the Republic  
30 of Uganda 1985.

The deponent further deposes that she knows that the agreement does not  
in any way discriminate or promote superiority of BIDCO refineries Ltd over  
other citizens before the law and that the agreement does not in any way

5 contravenes any Article of the Constitution of the Republic of Uganda as  
alleged. The affidavit in rejoinder is that of Mr. Siraj Ali of Messieurs Muwema  
& Mugerwa advocates states that he read and perused the Respondent's  
answer to the petition. He asserts that the Auditor General never made any  
report in an audit exercise in respect of BIDCO agreement. Secondly, Uganda  
10 Revenue Authority, the revenue collection agency of the Government has  
gone ahead to enforce some of the Government obligations in the  
agreement without the participation of the Auditor General's office and  
annexed annexure "F" being an internal memo from Uganda Revenue  
Authority on the subject of customs clearance for BIDCO Project cargo.

15 At the hearing of the petition learned Counsel Mr. Fred Muwema appearing  
with the Learned Counsel Mr. Charles Nsubuga represented the Petitioners  
while Ebila Hilary Nathan, State Attorney represented the Respondent. The  
court was informed that the Petitioner passed away in November 2017 and  
ruled that as far as the 1st Petitioner is concerned, the petition abates. The  
20 parties agreed to file written submissions with the leave of court in light of  
the global pandemic of Covid 19. The Petitioners Counsel was required to file  
written submissions by 30 July 2020 and the Respondents to reply by 6  
September 2020. Any rejoinder was supposed to be filed 3 days from 6  
September 2020 and the matter was adjourned the for judgment on notice.

25 The parties did not comply with the schedule of the court for the filing of  
written submissions. The record indicates that the Petitioner's written  
submissions were received by the registry on 25 September 2020. No written  
submissions were received in respect of the Respondent by 27<sup>th</sup> October  
2020.

### 30 **Submissions of the Petitioner's Counsel**

In the written submissions, the Petitioner's Counsel set forth the following  
issues for determination namely:

- 5 1. Whether Article 2 (2) of the impugned agreement is inconsistent with Articles 2 and 21 of the Constitution of Uganda that promote the supremacy of the Constitution and the guarantee equality and freedom from discrimination respectively.
- 10 2. Whether Article 5 (1) – (12) of the impugned agreement is inconsistent with Article 154 of the Constitution in so far as the Government of Uganda entered into financial obligations of the nature envisaged under the said agreement without legislating authority.
- 15 3. Whether Article 5 (1) (12) and Article 10 of the impugned agreement is inconsistent with Article 159 of the Constitution in so far as the Government giving an investment guarantee and undertaking to indemnify the company without legislative authority.
- 20 4. Whether Article 5 (1) – (12) of the impugned agreement is in contravention with the rights of other citizens of Uganda to participate in lawful trade and business contrary to Article 40 (2) of the Constitution of Uganda.
- 25 5. Whether Articles 5 (3) and (4) of the agreement violates the provisions of Article 152 (2) of the Constitution of the Republic of Uganda in so far as the Government of Uganda exempting or accepting the company from payment of taxes for a period of 25 years without legislative authority.
- 30 6. Whether Article 5 (1) of the agreement violates the provisions of Article 159 (2), (3) and (7) of the Constitution of the Republic of Uganda.
7. Whether the Government of Uganda is undertaking to pay duties and levies and fees under Article 5 (2) and (5) of the impugned agreement contravenes the provisions of 4 Articles 153, 154 (1), (2) and (3) of the Constitution of Uganda and the implementation of government's



- 5           undertaking under Article 5 (2) and (5) of the agreement is unconstitutional.
8.       Whether the agreement is unconstitutional as it contravenes the provisions of Article 119 of the Constitution says it was neither drawn or prepared under the guidance or advise of the Attorney General of  
10       Uganda.
9.       Whether the said agreement is unconstitutional as it contravenes the provisions of Article 163 of the Constitution, which provides for the requirement of the financial and value for money audit from the Auditor General.
- 15   10.   Whether the acts of the Government of Uganda to pay import, excise duties and VAT on behalf of the company without the approval of the Auditor General and participation of the Parliament of Uganda is unconstitutional.
11.   Whether the parties are entitled to the remedies sought.
- 20   The Petitioners Counsel submitted that there is no dispute as to the supremacy of the Constitution under Article 2 of the Constitution. Secondly, submitted that the Constitution is not an ordinary document but a sacred legal instrument which is the fundamental and supreme law of the country. It is the embodiment of the expression of the people's vision, values, will and  
25   aspirations and governs the 3 arms of government as much as it governs the ordinary individual and society at large (see *Male Mabirizi & Others v The Attorney General*; Constitutional Petition Number 49 of 2017) where the Constitutional Court observed that the Constitution deserves to be accorded difference and the duration as the supreme legal instrument and the bedrock  
30   of constitutional governance. Further the Constitution prevails over any other compatible or inconsistent law, act or omission which is in conflict with any provision of the Constitution.

5 He submitted that the Government of Uganda violated this cardinal principle in law and executed an agreement with the private company that undermines the supremacy of the Constitution and the provisions thereunder. He relied on paragraph 7 of the first Petitioner's affidavit in support of the petition where he contended that there are a number of provisions in the agreement  
10 in question which contravenes several provisions of the Constitution in so far as they are not conformity with the provisions, standards and requirements of the Constitution as outlined in the petition. Similarly, the second Petitioner averred that Article 2 (2) of the agreement is inconsistent with the supremacy of the Ugandan Constitution and law as stipulated in Article 2 and 21 of the  
15 Constitution in so far as it promotes discrimination and superiority of BIDCO oil refineries other than equality with other citizens before the law.

The Petitioner's Counsel submitted that Article 2 of the agreement provides that the parties would abide by all the terms set out in the agreement and that any changes in law or policy would not affect or be prejudicial to the  
20 interests of the company and should any such changes impose any obligations or tax or any liability on the company, the Government undertook to discharge the same in full without any recourse to the company. Further the government undertook to indemnify and keep indemnified the company and each of its assets against all claims.

25 The Petitioner's Counsel submitted that in addition, the second Petitioner in the affidavit in support of the petition contends that Article 2 (2) and 5 (1) of the agreement is inconsistent with Objective X and XI of the Nation Objectives and Directive Principles of State Policy as provided for in the Constitution in so far as it derogates the role of the Ugandan people in the  
30 development and their right to equal opportunities in development. He submitted that this is further evidence of the fact that the government has not extended similar incentives as those extended to the BIDCO company in the agreement to other investors in the traditional edible oil sector who have

- 5 already made substantial contribution to the development of the palm oil subsector. He submitted that this sharply contrasts with the National Objective XI which is to the effect that "the State shall give the highest priority to the enhancement of legislation establishing measures that protect and enhance the right of the people to equal opportunities in development."
- 10 Secondly under The National Objectives X it is provided that: "The State shall take all the necessary steps to involve the people in the formulation and implementation of development plans and programmes which affect them."
- He submitted that the Government of Uganda was not mindful of its obligations and the provisions of the Constitution when it was executing the
- 15 agreement with the company.

#### Equality and Freedom from Discrimination:

- The Petitioner's Counsel submitted that Article 21 of the Constitution guarantees equality of all persons before and under the law and prohibits discrimination of any person on the basis of ethnicity, tribe, race, social or
- 20 economic standing. Further that Article 2 (1) of the International Convention on Civil and Political Rights to which Uganda is a state party recognizes the right of all persons to enjoy the rights recognized in the covenant without distinction of any kind. Counsel submitted that similarly Article 26 of the covenant provides that all persons are equal before the law and are entitled
- 25 without any discrimination to the equal protection of the law. In addition, that the African Charter on Human and People's Rights similarly prohibits discrimination and an equal treatment in all spheres of life and its Articles 2 and 3. He further relied on Article 2 of the Universal Declaration of Human Rights which entrenches the principle of equality and nondiscrimination
- 30 before and under the law. The Petitioners Counsel submitted that Article 21 (3) of the Constitution defines discrimination as the giving of different treatment to different persons attributable only or mainly to their respective

5 description by sex, race, social or economic standing. He further relied on section 1 of the Equal Opportunities Act, 2007 which defines discrimination to mean:

10 "Any act, omission, policy, rule, law, practice... Exclusion or preference which directly or indirectly has the effect of nullifying or impairing equal opportunities resulting in an equal treatment of persons in the enjoyment of rights and freedoms on the basis of social or economic standing among others."

He submitted that that the Article gives effect to the State's constitutional mandate to eliminate discrimination and inequalities against any individual or groups of persons. He relied on the decision of the Constitutional Court  
15 in **Carolyn Turyatemba and 4 others vs Attorney General & another; Constitutional Petition No 15 of 2006** where the court stated that:

20 "The prohibition against discriminatory conduct is based upon the universal principle of equality before the law. Therefore, there ought not to be one group of human beings entitled to privileged treatment as regards enjoyment of rights and freedoms over others, because of perceived superiority."

He submitted that the agreement was discriminatory nature and inconsistent with Article 21 of the Constitution. Further that under Article 5 of the agreement, the Government of Uganda provided various incentives for investment. Particularly under Article 5 (1), government recognized the palm  
25 oil project as being the pioneer in oil palm development in Uganda, wherein it was agreed that it will not extend any other favorable position to any other investor in the same field. The incentives included exemption from any tax liability, investment guarantee and indemnification from any loss or damage, provision of transport facilities and land at a rental fee of Uganda shillings  
30 10,000/= per annum for at least 99 years with an option for renewal.

The Petitioner's Counsel further submitted that the provisions of the agreement are not only discriminatory within the meaning of Article 21 of the Constitution but also under International covenants and Declarations to

5 which Uganda is a party because the same privileges have not been extended to other players or investors in the oil palm development projects. Further he submitted that by giving an equal treatment to the oil palm development sector players, the Government of Uganda does not only offend the provisions of the Constitution and other laws but contradicts its own policy  
10 of encouraging and promoting indigenous farmers and investors. Further, the unconstitutional practice of ring fencing investment incentives in oil palm development in Uganda and allowing only one company to enjoy such investment incentives has the adverse effect of killing other investment opportunities of other interested parties in the oil pump sector in Uganda  
15 and local farmers who outwardly denied the opportunity to also become actors in this sector of the economy/agriculture.

He submitted that the provisions of the agreement in so far as it gives exceptional treatment to the company is a clear expression of discrimination and is inconsistent with Article 21 of the Constitution. The agreement is  
20 segregated nature and does not promote equal treatment and respect for other stakeholders.

### Tax Exemptions

The Petitioner's Counsel submitted that the agreement offered the company generous incentives whose implementation render the whole agreement  
25 unconstitutional. That Article 5 of the agreement provides for incentives which were purportedly based on the consideration that the company was allegedly a pioneer investor in the oil palm development in Uganda whereas not. He contended that according to a report presented to the Parliamentary Committee on Finance, Planning and Economic Development, the  
30 Agricultural Animal Industry and Fisheries and the Parliament of Uganda on 1 April 2004 by the Uganda oilseed producers and the processors Association, the oilseed and vegetable oil subsector under which the oil pump project falls, is comprised of many players and investors. Besides the

5 farmers and traders, there are 62 oil Millers and 49 industries in the oils and  
soaps manufacturing business with a combined investment of approximately  
US\$250,000,000.

Further, the report cited above indicates that the males employ  
approximately 5000 people and have a combined capacity of 500 metric tons  
10 per day of raw materials engaging directly with over 947 farmers and over  
84,000 households. In light of such a large number of people who have  
already made a substantial contribution to the sector, the government made  
a commitment to pay the taxation for this company which was a new entrant  
into sector for which it was liable when it arises for a period of 25 years.

15 He submitted that the Government of Uganda made the following  
commitments:

- (a) To pay company taxation for which it was liable to as and when it arose  
for a period of 25 years without any recourse to the company.
- (b) To exempt the company from withholding tax on all interests on loans  
20 from any financial institutions both locally and overseas for a period of  
25 years.
- (c) The government undertook to exempt the company from payment of  
all stamp duties respect of the project for a period of 25 years.
- (d) The government further undertook to pay import duties, excise duties,  
25 cess, levy, imposition tax also tax imposed goods, pre-inspection fee  
and VAT on imported/local plant and machinery for a period of 25  
years.
- (e) The Government of Uganda also committed to pay the above-  
mentioned taxes on the due date and in the event of any delay to pay  
30 the said taxes, it undertook to bear and pay all the resulting additional  
costs, including all penalties, the authorities, taxes, etc.

5 Counsel submitted that Article 152 (2) of the Constitution is to the effect that where a law is enacted conferring upon persons or any person or authority to waive or vary a tax imposed, that person or authority shall report to Parliament to periodically on the exercise of those powers as shall be determined by law. Further, it makes it mandatory that any waiver or variation  
10 of the tax must be by authority of the law imposing such attacks must be monitored by Parliament. He submitted that the government never carried out its functions as constitutionally mandated. Further that the Government of Uganda was make such undertaking signed commitments when there was no law enacted to that effect and the Income Tax Act (as amended) does not  
15 contain any provision mandating the exemption of withholding tax. It followed that the implementation by the Government of Uganda of the exception of payment by the company of withholding tax and VAT for a period of 25 years as provided for in Article 5 of the agreement would render the same unconstitutional.

20 He further submitted that the Income Tax Act is a law that was made by Parliament in the exercise of its constitutional mandate and Article 79 (1) pursuant to Article 159 (1) of the Constitution. Its enactment was to impose taxes according to section 4 of the ITA payment of which is the duty of every citizen according to Article 17 (g) of the Constitution. It followed that all  
25 persons and items exempted from tax are provided for either under the Constitution or under the ITA. He relied on **Crane Bank vs Uganda Revenue Authority; Court of Appeal Civil Appeal No 96 of 2012** where the court held that:

30 "laws which permit tax exemptions must be construed strictissimi juris against the entity claiming the same. Thus, the law does not look with favour at tax exemptions and he who seeks to be this privileged must justify it by words too plain to be mistaken and so categorical to be misinterpreted."

The Petitioner's Counsel submitted that the Constitution creates authorities and vests certain powers and also imposes obligations in the same way as it

5 confers privileges and powers. He noted that the Constitution establishes the  
fundamental maxims by which the authorities it creates must guide their  
conduct. He submitted that the Constitution sets the standards by which the  
duties are measured, the obligations, the powers and privileges and the  
rights it has conferred or imposed. It followed that in the absence of an  
10 express provision of the law exempting the payment of taxes, the action of  
government in exempting the company from paying withholding tax was  
unconstitutional.

### Incentives for Investment

The Petitioners Counsel acknowledges that Uganda provides investment  
15 incentives packages for investors and such incentives are given priority areas  
whose projects involve significant investment in plant and machinery and  
other costs. He submitted that according to the Tax Incentive Guide for  
Investors in Uganda, 2019, the investment incentives in Uganda were:

- Investment capital allowances.
- 20 ▪ Duty and tax-free import of plant and machinery.
- First arrival privileges in form of duty exemptions for personal  
effects and motor vehicles (previously called for at least 12  
months) to all investors and expatriates coming to Uganda.
- Export promotion incentives and facilities.

25 The Petitioners Counsel submitted that the agreement in Article 5 thereof  
provides that whereas the government extended various incentives for the  
investment to the company, the same was done without any due regard to  
the law. Further the government commitment to the company has no  
institutional basis and there is no law governing the granting of such  
30 incentives. He contended that the government did not acquire the authority  
to exempt the company from the payment of withholding tax audit for the  
payment of all stamp duties in respect of the project for a period of 25 years.



5 He relied on the statement of the World Bank Supervision Mission over 2002  
warning the government against any deferral of the VAT. In addition, the  
submitted that the actions of Government of Uganda of failing to mention  
such incentives as provided in the agreement when it was advertising a  
tender to the Kalangala oil palm project only to execute an agreement ring  
10 fencing the said incentives to the detriment of other potential investors in  
the sector is discriminatory in nature and unconstitutional. He submitted that  
by providing the incentives to the company, the government ring fenced the  
company against possible competing investors who may not be able to  
invest up to US\$100,000,000 at one go in projects with long gestation  
15 periods.

#### Payment of Taxes on behalf of the Company.

The Petitioners Counsel submitted that under Articles 153, 154 (1), (2) and (3)  
of the Constitution, there shall be consolidated fund to which shall be paid  
all revenues or other money raised or received for the purpose of or on behalf  
20 of, or in trust for the Government. Counsel submitted that under Article 154  
(1) of the Constitution money can only be withdrawn from the consolidated  
fund to meet expenditure charged on the front by the Constitution or by an  
Act of Parliament or where it has been authorised by an Appropriation Act  
or a Supplementary Appropriation Act. Secondly Article 152 (2) of the  
25 Constitution prohibits withdrawal from any public fund of Uganda that the  
consolidated fund unless the issue of the money is being authorised by law.  
Thirdly, Article 154 (3) of the Constitution provides that no money shall be  
withdrawn from the consolidated fund unless the withdrawal has been  
approved by the Auditor General as prescribed by Parliament. Similarly, the  
30 Public Finance Act (cap 193) in section 9 thereof provides that no part of the  
consolidated fund shall be issued except under and in accordance with the  
Constitution and the Finance Act.

5 The Petitioners Counsel submitted that the law is that all revenue and other monies for the benefit of government paid into the Consolidated fund and such monies may only be withdrawn under the specified laws.

He submitted that at the implementation of the commitments of the government and that the agreement through payment of company tax  
10 complications under Article 5 (2) and (5) of the agreement is unconstitutional.

#### Investment Guarantee

The Petitioners Counsel further submitted that Article 10 of the agreement provides that the Government of Uganda undertook to mandatorily support an application by the company and its project partners to obtain a  
15 multilateral investment guarantee agency (MIGA) guarantee for its investment. He submitted that the agreement does not state who project partners of the company are and what exactly were the Government of Uganda's obligations with regard to the support the government undertook to give to the company and its project partners in this regard.

20 He submitted that Article 159 (2) of the Constitution is to the effect that the government shall not borrow, guarantee or raise a loan on behalf of itself or any public institution, authority or person except by or under an Act of Parliament. At the time of execution of the agreement, the government had not obtained the necessary authority to guarantee the company in its  
25 programme to acquire an investment guarantee from MIGA. He contended that the agreement appears one-sided and onerous on the part of the Government of Uganda. While the agreement provides for penalties for the Government of Uganda, in the event that it defaults or breaches the agreement, the same is silent regarding the default on the part of the  
30 company. Further the Petitioner's Counsel submitted that under Article 20 (1) of the agreement, it is provided that the Government of Uganda and BIDCO shall be co - chairs on the Vegetable Oil Development Council. Secondly

5 BIDCO shall be represented on the FF Pricing Committee set up under Article  
19. He submitted that these provisions are obnoxious because in essence  
they made the company a judge in its own case and a violation of the basic  
tenets of fair hearing espoused under Article 28 of the Constitution. He  
further submitted that it would be unfair to make the company a co - chair  
10 on a committee set up to determine the prices of the palm oil products and  
on the FFB when it's one of the companies producing these products. It is a  
basic principle of law that no man should be a judge in his own cause.  
Learned Counsel further submitted that the arrangement undercuts other  
stakeholders in the sector and as such is unconstitutional.

## 15 Economic Rights

The Petitioner's Counsel submitted that economic rights are provided for and  
guaranteed under Article 40 of the Constitution and specifically under Article  
40 (2) which provides that:

20 "Every person in Uganda has a right to practice his/her profession and to carry on  
any lawful occupation, trade and business."

That Article 5 (1) of the agreement provides that the Government of Uganda  
clearly noted that it recognizes the project as being pioneer in oil palm  
development in Uganda and shall not extent any more favorable position to  
any other investor in the oil palm sector. He submitted that Article 6 of the  
25 International Convention on Economic, Social and Cultural Rights [1976] are  
formed the international recognition of the right to work in the following  
terms:

30 "State parties to the present treaties recognize the right to work which includes the  
right of every one to gain his leaving by work which he freely chooses to accept  
and will take appropriate steps to safeguard this right."

The Petitioner's Counsel further relied on Article 15 of the **African Charter  
on Human and People's Rights (1981)** for the proposition that every

5 individual shall have the right to work under equitable and satisfactory  
conditions. He submitted that the constitutional provisions on economic  
rights is in tandem with the regional and international interests. He submitted  
that the argument that the oil palm industry is a new field and if the  
Government of Uganda, noted that it will not extent any more favorable  
10 positions to any other investor unless making investments of equal or more  
value than that of the company amounted to economic discrimination and  
denying others the right to participate in the business or trade of palm oil.  
That other entities cannot effectively compete with the company that pays  
no taxes for itself and is not liable for any of its acts and as such they are  
15 phased out of the business of oil development. He contended that this is  
buttressed by the second Petitioner's affidavit in support of the petition when  
he contends that the Uganda oil producers & processors has deliberately  
sidelined and defrauded by the agreement in contravention of Article 21 and  
40 (2) of the Constitution in so far as they have been locked out of the lawful  
20 trade/business in the edible oil sector which has virtually been handed over  
to BIDCO as a monopoly.

The Petitioner's Counsel prayed that this court be pleased to make the  
declarations and orders prayed for in the petition.

As noted by 27<sup>th</sup> October, 2020, the Respondent's Counsel had not filed any  
25 written submissions in reply to the Petitioner's submissions. In any case both  
parties were way outside the time schedule given by the court on the date of  
the hearing on 23<sup>rd</sup> July 2020 wherein the Respondent was required to file a  
reply by 6<sup>th</sup> September 2020 and a rejoinder to be filed by the Petitioner 3  
days later.

30 No written submissions were filed and therefore I have gone ahead to  
consider the materials on record bearing in mind that written submissions  
were directed primarily because the country was under a lockdown to stem

5 the tide of the Covid 19 pandemic. In the premises, I have considered the written submissions of the Petitioner albeit filed out of time.

### **Resolution of the petition**

I have carefully considered the Petitioner's petition as well as the answer to the petition by the Attorney General. I have also considered the written  
10 submissions of Counsel and the authorities cited as well as the law generally.

The Petitioners filed this petition on 13<sup>th</sup> November, 2006 and it was not heard until July 2020. The first Petitioner Hon. Issa Kikungwe passed away in November 2017 and the petition survived in the names of Hon Ken Lukyamuzi.

15 On the issue of the parties, it is a glaring fact that Messieurs BIDCO Oil Refineries Ltd was not cited as a Respondent though it is a party to the agreement that is challenged in this petition. In fact, the petition seeks for declaration that the agreement to which the BIDCO Oil Refineries Ltd is a party is inconsistent with several Articles of the Constitution of the Republic  
20 of Uganda. The law is clear that any law or custom that is inconsistent with an Article of the Constitution is null and void to the extent of that inconsistency in terms of Article 2 of the Constitution of the Republic of Uganda. Nonetheless I further explore this Article and note that Article 2 of the Constitution provides as follows:

25 2. Supremacy of the Constitution.

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

(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law customs shall, to the  
30 extent of the inconsistency, be void.

5 There are two aspects of Article 2 of the Constitution. The first aspect is that  
it is the supreme law of Uganda and has binding force on all authorities and  
persons throughout Uganda. This suggests that it has to be complied with  
by all authorities and persons throughout Uganda. Secondly, it provides that  
10 if any other law or custom is inconsistent with any provision of the  
Constitution, the Constitution shall prevail and that other law or custom shall  
to the extent of the inconsistency be void. The first aspect of the Article binds  
the Government of Uganda and BIDCO Oil Refineries Ltd. The second aspect  
depends on any pleading that there is a law or custom which is inconsistent  
with any provision of the Constitution. I shall examine this aspect in due  
15 course.

As far as parties are concerned, the petition clearly avers that it is brought  
under Article 137 of the Constitution of the Republic of Uganda 1995 as well  
as the rules made by Legal Notice No 4 of 1996. Article 137 of the  
Constitution provides in clause (1) thereof that any question as to  
20 interpretation of the Constitution shall be determined by the Court of Appeal  
sitting as the Constitutional Court. Secondly, in Article 137 (2), the Court of  
Appeal shall consist of a bench of 5 members of that court when sitting as a  
Constitutional Court. Thirdly, and specifically relevant to the point I wish to  
make, Article 137 (3) provides that a person who alleges that an Act of  
25 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 of a provision of the Constitution may petition the  
Constitutional Court for a declaration to that effect and for redress where  
appropriate.

30 The question is therefore whether any declaration of inconsistency with or  
contravention of a provision of the Constitution in the absence of the primary  
party to the agreement is not inconsistent with other provisions of the  
Constitution in terms of the right to a hearing, let alone a fair one. There are

5 two aspects of Article 137 (3) of the Constitution which need to be considered. The first aspect is that a person may allege that an Act of Parliament or any other law or anything done in or under the authority of any law is inconsistent with or in contravention of a provision of the Constitution. In this particular case, what is being challenged for being  
10 inconsistent with the Constitution is an agreement between the Government of Uganda and BIDCO Oil Refineries Ltd. It is therefore only possible that what is being challenged is anything in or done under the authority of the law though this has not been pleaded in the petition. I will further elaborate on this point when dealing with the issue of whether the petition discloses a  
15 cause of action in terms of whether it raises any question as to interpretation of the Constitution. Suffice it to say that, it is clear from the averments in the petition that what is being challenged is an agreement that is impugned for inconsistency with Articles of the Constitution and one of the parties to the agreement was not included as a Respondent. I will therefore in considering  
20 the petition also consider whether this is not an infringement of the right to a fair hearing which is non – derogable in terms of Article 28 (1) and 44 (c) of the Constitution.

The petition purports to be brought under the **Constitutional Court (Petitions for Declarations under Article 137 of the Constitution) Directions, Legal Notice No 4 of 1996**. It was lodged in this court on 7<sup>th</sup> November, 2006 and by that time, the applicable rules were the **Constitutional Court (Petitions and References) Rules, 2005** (which hereinafter may be referred to as the rules of this court) which rules were promulgated on 10<sup>th</sup> November, 2005 before this petition was filed.  
30 Moreover, rule 24 of the rules of this court revoked the **Constitutional Court (Petitions for Declarations under Article 137 of the Constitution) Directions, 1996**. The petition is therefore deemed to have been brought under the current rules cited above and not under the revoked rules of this court which were erroneously cited.

5 The rules of this court provide for the form and contents of the petition in  
the rule 3 thereof and in rule 6 provides that immediately upon presentation  
of the petition, the Petitioner shall serve a copy of the petition on the  
Respondent. The petition only cites the Attorney General as the only  
Respondent. It follows that there is no defence by Messieurs BIDCO Oil  
10 Refineries Ltd and the only Respondent is the Attorney General who has  
made very little effort in this matter. Firstly, though there is an answer to the  
petition, the Attorney General has not filed submissions in reply. It is  
therefore patently unfair on Messieurs BIDCO Oil Refineries Ltd to have the  
fate of the agreement determined without giving it a hearing. The petition in  
15 theory can only challenge the acts of the government in executing the  
agreement and perhaps implementing some of the terms of the agreement  
as far as the obligations of the government is concerned but that obscures  
the effect it has on the agreement to which BIDCO Oil Refineries is a party.

In the answer to the petition, the Attorney General alleged that no question  
20 as to interpretation of the Constitution has been raised in this petition. In as  
much as the Attorney General did not support the averment with written  
submissions as directed by the court, the question of jurisdiction is a  
preliminary one and has to be determined at the commencement of this  
judgment as it will affect whether this court should go ahead to determine  
25 matters raised in the petition and answer to the petition at all.

In the answer to the petition and particularly paragraph 11 thereof the  
Respondent averred as follows:

11. The Respondent shall aver and contend that the petition is misconceived and  
does not call for the interpretation of the Constitution and that the petition is  
30 incompetent and we pray that it be dismissed with costs.

The question of whether the petition discloses any question as to  
interpretation of the constitution maybe considered on the face of the  
pleadings as well as with regard to the affidavit evidence. Because the



5 petition is also supported by affidavit evidence, the question to be considered is whether the petition is maintainable on the ground of jurisdiction after considering the questions raised as well as the law and supporting evidence.

10 This petition was commenced under Article 137 of the Constitution and has to fulfil the criteria in Article 137 (1) and (3) of the Constitution. Article 137 (1) of the Constitution confers exclusive jurisdiction on the Court of Appeal sitting as the Constitutional Court to determine any question as to interpretation of the Constitution and provides as follows:

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

Further, Article 137 (3) has got to paragraphs which need to be considered the separately. These are:

(3) A person who alleges that –

20 (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.

25 Paragraph (a) deals with a challenge to an Act of Parliament or any other law or anything in or done under the authority of any law. It follows that the challenge should be as to the inconsistency of Act of Parliament or any other law or anything in or done under the authority of any law. Secondly with regard to paragraph (b) the inconsistency alleged ought to be of any act or omission by any person or authority. Before considering Article 137 (3), it  
30 must be shown that the Constitutional Court has jurisdiction on the ground that there is a question as to interpretation of the Constitution.

5 It has been held that it is not sufficient to only allege that a provision of the  
Constitution has been infringed or contravened or that an act or omission is  
inconsistent with or in contravention of the Constitution. There must also be  
disclosed, a question or questions as to interpretation of the Constitution.  
Any Article of the Constitution can be enforced by any person or authority  
10 so long as its meaning is not in doubt or in dispute or controversy. The  
leading precedent on the question of jurisdiction of the Constitutional Court  
to resolve questions as to interpretation of the Constitution is the decision  
of the Supreme Court in **Ismail Serugo v Kampala City Council & Attorney  
General; Constitutional Appeal No. 2 of 1998**, where Wambuzi CJ held  
15 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  
20 Article 50 of the Constitution by another competent court.

From the very outset, it should be emphasised that it is not only the violation  
of fundamental rights and freedoms enshrined in the Bill of Rights which are  
justiciable under Article 50 before a court of competent jurisdiction. The  
statement of law embraces any alleged violation of or any inconsistency with  
25 any provision of the Constitution including those granting powers to  
authorities and defining the limit of those powers. Such issues could  
ordinarily be filed in a court of competent jurisdiction for judicial review of  
any act or omission of the Executive alleged to be inconsistent with a  
provision of the Constitution. Such a competent court includes *inter alia* the  
30 High Court which is a court of unlimited original jurisdiction.

For a petition to be maintainable under Article 137 (1) of the Constitution, it  
must be shown that a question as to interpretation of the Constitution has  
arisen as it is not sufficient to show an infringement of a provision of the  
Constitution as expressly required by Article 137 (3) of the Constitution.

- 5 It is therefore a question of whether the court has jurisdiction under Article 137 (1) as well as whether the petition discloses a cause of action under Article 137 (3) of the Constitution respectively. Both jurisdiction and cause of action have to be present for the petition to survive for determination on the merits.
- 10 In **Ismail Serugo v Kampala City Council & Attorney General; Constitutional Appeal No. 2 of 1998**, Mulenga JSC held that a distinction should be made between an objection to pleadings 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
- 15 maintainable under Order 6 rule 29 of the Civil Procedure Rules (See **Nuridin Ali Dewji and others v G.M.M Meghji & Co and Others (1953) 20 EACA 132**). Order 6 Rule 29 of the Civil Procedure Rules is preceded by Order 6 rule 28 of the Civil Procedure Rules which allows a party to raise by pleadings a point of law:
- 20 Any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing.
- 25 Further, Order 6 rule 29 of the Civil Procedure Rules which provides that:
- If, in the opinion of the court, the decision of the point of law substantially disposes of the whole suit, or of any distinct cause of action, ground of defence, setoff, counterclaim or reply therein, the court may thereupon dismiss the suit or make such other order in the suit as may be just.
- 30 In **N.A.S Airport Services Ltd v the Attorney General of Kenya [1959] E.A.53**, at page 58, the East African Court of Appeal per Windham JA held that the object of the rule is expedition and the point of law must be one which can be decided *"fairly and squarely, one way or the other, on facts*

5 *agreed or not in issue on the pleadings, and not one which will not arise if*  
*some fact or facts in issue should be proved;"* Order 6 rule 29 of the Civil  
Procedure Rules proceeds from the assumption that the pleadings disclose  
a cause of action otherwise if it does not, it is mandatory to reject it under  
Order 7 rule 11 of the Civil Procedure Rules upon perusal of the plaint only  
10 and anything attached to it which forms part of the plaint. In **Kiggundu v**  
**Attorney General; Civil Appeal No 27 of 1993**, the Court of Appeal which  
was the highest appellate court at the time held that a distinction has to be  
drawn between the rejection of a plaint and a point of law set down as a  
preliminary issue for determination.

15 Finally, in **Ismail Serugo v Kampala City Council & Attorney General**  
(supra) Prof. Kanyeihamba JSC held that the matter of jurisdiction should be  
distinguished from that of cause of action:

20 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...

25 Before taking leave of the matter, the Civil Procedure Act and the Rules made  
thereunder are applicable to the Constitutional Court under rule 23 of the  
**Constitutional Court (Petitions and References) Rules, 2005; Statutory**  
**Instruments 2005 No 91**. The said rule 23 provides as follows:

30 23. Civil Procedure Act, and rules to apply  
(1) the practice and procedure in respect of a petition or a reference shall be  
regulated, as nearly as may be, in accordance with the Civil Procedure Act and the  
rules made under that Act and the Court of Appeal Rules, with such modifications

5 as the Court may consider necessary in the interest of Justice and expedition of proceedings."

Parties are bound by their pleadings and cannot argue a different case not disclosed in the pleadings. The Petitioner's grievance must be reflected in the petition itself and issues arise from the pleadings. According to Order 15 rule 10 1 (1) of the Civil Procedure Rules, issues arise when a material proposition of law or fact is affirmed by one party and denied by the other. Secondly, Order 15 rule 1 (2) of the Civil Procedure Rules provides that material propositions are those propositions of law or fact which the plaintiff must allege in order to show a right or a defendant must allege in order to constitute a defence. 15 Last but not least, the Civil Procedure Rules are construed with the necessary modifications necessary in the interest of Justice and expedition of proceedings. In the circumstances of this petition, the Petitioner's cause of action can be discerned from the declarations sought. In paragraphs 2, 3, 4, 5, 6, 7, 8, 9, and 10 of the petition, it is the terms of the agreement between 20 the Government of Uganda and BIDCO Oil Refineries Ltd dated 4<sup>th</sup> April, 2003 which is alleged to be inconsistent with or in contravention of the Constitution of the Republic of Uganda. Particularly, the following clauses of the agreement are the subject matter of the contention in the petition; namely, Article 2 (2) of the agreement, Article 5 (1) – (12) of the agreement and finally in the paragraph 10 it is alleged that the whole agreement is 25 unconstitutional as it contravenes the provisions of Article 163 of the Constitution which require financial and value for money audit by the Auditor General in such projects involving Public Funds.

The other ground is that the agreement was illegal for failure to seek the 30 consent of the Attorney General under Article 119 of the Constitution. In the answer to the petition, the Attorney General in the affidavit of Caroline Bonabana, State Attorney attached a letter Annexure "A" dated 18<sup>th</sup> of March 2003 indicating that the agreement was cleared by the Solicitor General. In any case the question of whether the agreement was cleared by the Attorney

5 General's Chambers or not in terms of Article 119 of the Constitution of the Republic of Uganda does not raise any question as to interpretation of the Constitution and cannot be considered by this court. It is merely a question of fact which can be enforced by the High Court.

10 Secondly, the entire petition does not anywhere aver that the agreement was an act or omission of the Government of Uganda which is inconsistent with or in contravention of a provision of the Constitution. Obviously the fact of execution of an agreement cannot by itself be a contravention of the Constitution. It can only be implied from the petition that the terms executed in the agreement contravened provisions of the Constitution. What is  
15 envisaged under Article 137 (3) is to aver 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 person or authority is inconsistent with or in contravention of a provision of the Constitution. From the premises that the petition shows that certain provisions of the agreement contravened provisions of the  
20 Constitution, there is a cause of action for consideration by this court and the issue remaining is whether any question arises as to interpretation of the Constitution in terms of Article 137 (1) of the Constitution to warrant the matter to be determined by the Constitutional Court and not by any other competent court. I say this because the High Court is seized with jurisdiction  
25 to conduct any review of any administrative decision that contravenes any provision of the Constitution or any other law or act provided there is no question or dispute as to interpretation of the Constitution.

Any question as to interpretation is a controversy about the application or scope of any provision of the Constitution that needs to be interpreted by  
30 the Constitutional Court for purposes of making the meaning and purpose or application clear so that the Constitution can be enforced on the terms as interpreted by the Constitutional Court. It has to be a doubt or a dispute as to the interpretation of any provision of the Constitution but not a question

5 of enforcement which may go for judicial review of administrative action or enforcement of fundamental rights and freedoms by a competent court under Article 50 of the Constitution. In **Hon. Ssekikubo Theodore (NRM) MP – Lwemiyaga County} and 10 Others v National Resistance Movement; Constitutional Petition No 09 of 2019**; this court relied on  
10 Black's Law Dictionary to define what is meant by *question as to interpretation* under Article 137 (1) of the Constitution and this is what I stated *inter alia*.

15 The word *question* in Article 137 (1) means the existence of a doubt about the meaning, scope, purpose, ambit etc. or a dispute or controversy about the meaning of an Article or Articles or their application in terms of scope, ambit etc. in short it means *a controversy as to interpretation*.

This was supported by a dictionary definition of the term 'Construction' which word I also derived from the word 'construe' applied under Article 274 of the Constitution which stipulates that existing law shall be *construed* with  
20 the necessary modifications, adaptations and qualifications so as to bring it into conformity with the Constitution. As far as the dictionary definition goes, **Black's Law Dictionary 8<sup>th</sup> Edition** states that:

25 The act or process of interpreting or explaining the sense or intention of a writing; the ascertainment of a document's meaning in accordance with judicial standards...

30 "Construction, as applied to written law, is the art or process of discovering and expounding the meaning and intention of the authors of the law with respect to its application to a given case, where that intention is rendered doubtful either by reason of the fact that the given case is not explicitly provided for in the law."

Henry Campbell Black, Handbook on the Construction and Interpretation of the Laws 1 (1896)

"Some authors have attempted to introduce a distinction between 'interpretation' and 'construction.' Etymologically there is, perhaps, such a

5 distinction; but it has not been accepted by the profession. For practical  
purposes, any such distinction may be ignored, in view of the real object of  
both interpretation and construction, which is merely to ascertain the  
meaning and will of the lawmaking body, in order that it may be enforced."  
William M Life et al Brief Making and the Use of Law Books 337 (3d ed. 1914)

10 ...” There is no explanation of the distinction between interpretation and  
construction [in Blackstone’s], nor can it be inferred from the matters dealt  
away under each head. The distinction is drawn in some modern works, but  
it is not taken in this book because it lacks an agreed basis. Some writers  
15 treat interpretation as something which is only called for when there is a  
dispute about the meaning of statutory words, while speaking of  
construction as a process to which all statutes, like all other writings, are  
necessarily subject when read by anyone. Others treat interpretation as  
something which is mainly concerned with the meaning of statutory words,  
20 while regarding construction as a process which mainly relates to the  
ascertainment of the intention of legislature.” Rupert Cross, Statutory  
Interpretation 18 (1976).

It is my judgment that the last meaning in the immediately preceding passage  
quoted above is the meaning of interpretation adopted by the Constitutional Court  
and Supreme Court. This postulates that interpretation is only called for when there  
25 is a dispute about the meaning of statutory words. This captures precisely the  
purpose of Article 137 (1) of the Constitution which confers jurisdiction on the  
Constitutional Court to determine any dispute as to the meaning of statutory words  
in the Constitution. It is clearly the plain and unambiguous meaning of Article 137  
(1) (supra) to refer questions as to interpretation to the Constitutional Court which  
30 has the exclusive mandate to resolve any such doubt or dispute as to the meaning  
of an Article of the Constitution. For instance, a court of law before which a  
question as to interpretation of the Constitution arises refers the matter to the  
Constitutional Court to get directions about the meaning. On the other hand, the  
High Court ascertains the meaning of any provision of the Constitution inclusive of  
35 those dealing with fundamental rights and freedoms before applying the relevant  
law where there is no dispute about the meaning of a provision.

The petition alleges that certain provisions of the agreement are inconsistent  
with the provisions of the Constitution in compliance with Article 137 (3) of



5 the Constitution. However, after perusal of the petition, it only shows that certain matters are inconsistent with the Constitution. It does not go as far as showing whether there is any question as to interpretation of the Constitution in the terms defined above. I have carefully considered all the provisions of the petition.

10 Paragraph 2 of the petition alleges that Article 2 (2) of the agreement between the Government of Uganda and BIDCO refineries Ltd is inconsistent with the supremacy of the Ugandan Constitution and law as provided for in Article 2 and 21 of the Constitution in so far as it promotes superiority rather than equality of BIDCO Oil Refineries with other citizens before the law. It

15 alleges unequal treatment or discriminatory practices introduced by the agreement and is supported by other averments in the supporting affidavits and particularly the affidavit of Hon. Ken Lukyamuzi who avers in paragraph 7 of his affidavit that clause 2 (2) of the agreement is inconsistent with the supremacy of the Ugandan Constitution and law as provided in Articles 2 and

20 21 of the Constitution in so far as it promotes discrimination and superiority over BIDCO rather than equality with other citizens before the law. In paragraph 8 he asserts that the agreement is inconsistent with Articles 10 and 11 of the National Objectives of the Constitution of Uganda in so far as it derogates from the role of the Ugandan people in the development of the

25 right to equal opportunities in development. He raises other issues which are pertinent to the averment of discrimination or infringement of Article 21 and I shall deal with the same eventually.

In my judgment, *prima facie*, a substantial question arises as to whether the agreement by its nature and purpose violates the rights of other persons

30 involved in the vegetable oil industry to equal treatment in terms of Article 21 and I will deal with the matter after considering the merits rather than preliminarily.

5 The other averments in the petition seek to enforce provisions of the  
Constitution rather than attempt to raise any question as to interpretation of  
any provision of the Constitution. This include averments that it is  
unconstitutional under Article 154 of the Constitution for the Government of  
Uganda to enter into financial obligations of the nature envisaged under the  
10 agreement, the subject matter of the petition. Article 154 of the Constitution  
deals with withdrawal of funds from the Consolidated Fund.

154. Withdrawal from the Consolidated Fund.

(1) No monies shall be withdrawn from the Consolidated Fund except—

15 (a) to meet expenditure charged on the fund by this Constitution or by an Act of  
Parliament; or

(b) where the issue of those monies has been authorised by an Appropriation Act,  
a Supplementary Appropriation Act or as provided under clause (4) of this Article.

(2) No monies shall be withdrawn from any public fund of Uganda other than the  
Consolidated Fund, unless the issue of those monies has been authorised by law.

20 (3) No monies shall be withdrawn from the Consolidated Fund unless the  
withdrawal has been approved by the Auditor General and in the manner  
prescribed by Parliament.

25 (4) If the President is satisfied that the Appropriation Act in respect of any financial  
year will not or has not come into operation by the beginning of that financial year,  
the President may, subject to the provisions of this Article, authorise the issue of  
monies from the Consolidated Fund Account for the purposes of meeting  
expenditure necessary to carry on the services of the Government until the  
expiration of four months from the beginning of that financial year or the coming  
into operation of the Appropriation Act, whichever is the earlier.

30 (5) Any sum issued in any financial year from the Consolidated Fund Account under  
clause (4) of this Article in respect of any service of the Government—

5 (a) shall not exceed the amount shown as required on account in respect of that service in the vote on account approved by Parliament by resolution for that financial year; and

(b) shall be set off against the amount provided in respect of that service in the Appropriation Act for that financial year when that law comes into operation.

10 Article 154 of the Constitution is very clear and I do not perceive any question arising as to interpretation thereof from a reading of the Article and anybody alleging that something done by any authority or the Government of Uganda inconsistent with Article 154 can apply to the High Court for judicial review or file a suit in the public interest to enforce Article 154 of the Constitution. I  
15 therefore find that there is no question as to interpretation of the Constitution disclosed.

Thirdly, it is alleged that Article 10 of the agreement is inconsistent with Article 159 of the Constitution of the Republic of Uganda because it prohibits the government from guaranteeing any person except as authorised by or  
20 under an Act of Parliament. I set out Article 159 of the Constitution for ease of reference. The Article is so clear about its terms that I do not see any question arising as to interpretation of the Article. It provides as follows:

159. Power of Government to borrow or lend.

25 (1) Subject to the provisions of this Constitution, Government may borrow from any source.

(2) Government shall not borrow, guarantee, or raise a loan on behalf of itself or any other public institution, authority or person except as authorised by or under an Act of Parliament.

(3) An Act of Parliament made under clause (2) of this Article shall provide—

30 (a) that the terms and conditions of the loan shall be laid before Parliament and shall not come into operation unless they have been approved by a resolution of Parliament; and

- 5 (b) that any monies received in respect of that loan shall be paid into the Consolidated Fund and form part of that fund or into some other public fund which is existing or is created for the purpose of the loan.
- (4) The President shall, at such times as Parliament may determine, cause to be presented to Parliament such information concerning any loan as is necessary to show—
- 10 (a) the extent of the total indebtedness by way of principal and accumulated interest;
- (b) the provision made for servicing or repayment of the loan; and
- (c) the utilisation and performance of the loan.
- 15 (5) Parliament may, by resolution, authorise the Government to enter into an agreement for the giving of a loan or a grant out of any public fund or public account.
- (6) An agreement entered into under clause (5) of this Article shall be laid before Parliament and shall not come into operation unless it has been approved by
- 20 Parliament by resolution.
- (7) For the purposes of this Article, the expression "loan" includes any money lent or given to or by the Government on condition of return or repayment and any other form of borrowing or lending in respect of which—
- (a) monies from the Consolidated Fund or any other public fund may be used for
- 25 payment or repayment; or
- (b) monies from any fund by whatever name called, established for the purposes of payment or repayment whether in whole or in part and whether directly or indirectly, may be used for payment or repayment.
- (8) Parliament may by law exempt any categories of loans from the provisions of
- 30 clauses (2) and (3) of this Article, subject to such conditions as Parliament may prescribe.

I have carefully read Article 159 and I find that it is very clear and unambiguous. No question as to interpretation of Article 159 arises and any

5 violation of the Article requires a court of competent jurisdiction to review the action of the Executive and to apply the Article through judicial review of any administrative action taken by the Government of Uganda.

The Petitioner further avers that the agreement is in contravention of the rights of Uganda oil producers and processors and other citizens to  
10 participate in lawful trade and business in the edible oil sector under the IFAD loan to Uganda Government contrary to Article 40 (2) of the Constitution. Article 40 (2) provides as follows:

"(2) Every person in Uganda has the right to practice his or her profession and to carry on any lawful occupation, trade or business."

15 The question of whether the agreement violates the right of Ugandan oil producers and processors and other citizens to participate in lawful trade and business in the edible oil sector requires an interpretation of Article 40 (2) of the Constitution and I will handle it on the merits.

The petition further avers that the agreement contravenes Article 152 (2) of  
20 the Constitution in so far as the exemption of withholding tax and stamp duty has not been made under the authority of the law imposing such tax and subject to the periodic monitoring by Parliament in accordance with the law. Article 152 (2) of the Constitution provides that:

"(2) Where a law enacted under clause (1) of this Article confers powers  
25 on any person or authority to waive or vary a tax imposed by that law, the person or authority shall report to Parliament periodically on the exercise of those powers, and shall be determined by law."

I have found no controversy or question as to interpretation in Article 152 (2) because it clearly stipulates that where the law enacted by Parliament confers  
30 powers on any person or authority to waive or vary a tax imposed by that law, that person or authority shall report to Parliament periodically on the exercise of those powers as shall be determined by law. The Article is clear

5 that the authority which may waive tax is required to report to Parliament periodically on the exercise of those powers. Failure to do so may lead to an administrative lawsuit and not a petition for declarations on the ground that there is a question or questions arising as to interpretation of the Constitution. I find that no question as to interpretation of the Constitution  
10 arises and the matter is incompetent before this court.

Similarly, the petition alleges that the government has never received parliamentary approval, assent or resolution under any law or Act of Parliament as required by Article 159 (2) (3) and (7) of the Constitution and I find nothing that requires interpretation of the Constitution because there is  
15 no question as to interpretation of those provisions that arise. It is a matter for adjudication by a court of competent jurisdiction.

In paragraph 8 of the Constitution, it is averred that the Government of Uganda's undertaking to pay duties, levies, fees and VAT contravenes the provisions of Article 153, 154 of the Constitution. Articles 153 deal with the  
20 establishment of the Consolidated Fund and I see no question as to interpretation of the Constitution that arises. As earlier noted, Article 154 deals with withdrawals from the consolidated fund and no question as to interpretation of those Articles arise in this petition or even in the submissions of Counsel. I find that the above averments are incompetent  
25 before this court.

In paragraph 9 it is averred that the whole agreement contravenes the provisions of Article 119 of the Constitution because it was neither drawn by or prepared under the advice or direction of the Attorney General who is the principal legal adviser to the government. Article 119 of the Constitution  
30 does not require any interpretation because no question as to interpretation of the Constitution arises. Article 119 (supra) has also been the subject of several pronouncements of the courts.

5 In **Nsimbe Holdings Ltd v Attorney General and Inspector General of Government; Constitutional Petition No. 2 of 2006**, the Constitutional Court considered Article 119 (5) of the Constitution and the issue of advice of the Attorney General. The Article stipulates that:

10       ...no agreement, contract, treaty, convention or document by whatever name called to which the Government is a party or in respect of which the Government has an interest, shall be concluded without the legal advice from the Attorney General.

It was held that the advice of the Attorney General is mandatory in contracts in which Government has an interest and the transaction in question should  
15 not have proceeded without advice of the Attorney General in accordance with Article 119 (5) of the Constitution rendering the agreement null and void by virtue of Article 2 of the Constitution. In **Arnold Brooklyn & Company v Kampala Capital City Authority and the Attorney General; Constitutional Petition No 23 of 2013** at the instance of KCCA on the 19<sup>th</sup> of January 2009  
20 the parties entered into a contract in which the Plaintiff/Petitioner was to supply 1540 books of business levy and licenses. The books were duly delivered as contracted on 16<sup>th</sup> December 2010. On 7<sup>th</sup> April 2011 KCCA paid to the Petitioner US \$ 83,160.80 leaving an outstanding balance of US\$ 156,371.52. When the Plaintiff/Petitioner demanded payment KCCA declined  
25 to pay on the ground that the contract was not enforceable for want of advice of the Attorney General and the matter was referred to the Constitutional Court for determination. In the Constitutional Court it was submitted for the Attorney General that non-compliance with Article 119 (5) of the Constitution is a bar to payment even if goods have been supplied and consumed. The  
30 Constitutional Court held that the way the questions were framed could only lead to one answer that contravention of Article 119 (5) of the Constitution meant that the contract made in disregard of it was a nullity by virtue of Article 2 of the Constitution. They noted that there was no question for

5 interpretation of the Constitution and the Court had no power to amend the questions referred for interpretation.

In my judgment, once a provision of the Constitution has been interpreted, it ought not to be made another subject of allegation that a question arises as to interpretation of that Article. In the premises, there is no further  
10 question as to interpretation of Article 119 (5) of the Constitution of the Republic of Uganda and that part of the petition is incompetent before this court. Anybody who wants to enforce Article 119 (5) of the Constitution can file an action, whether for judicial review or any other action in a court of competent jurisdiction.

15 In the premises, I have found only two matters for consideration on the merits and these are whether the agreement is discriminatory or violates the provisions of Article 21 of the Constitution and whether it infringes the right of persons in Uganda to practice his, her or their profession or carry out any lawful occupation, trade or business as guaranteed by Article 40 (2) of the  
20 Constitution. The rest of the averments in the petition are struck out for want of jurisdiction. The matters to be considered arise from declarations 1 and 4 sought by the Petitioner that:

1. Article 2 (2) of the Agreement contravenes Article 2 and 21 of the Constitution in so far as it promotes inequality of BIDCO Refineries  
25 Limited with other citizens before the law.
2. Article 5 (1) - (12) of the Agreement contravene the rights of Ugandan Oil producers and processors to participate in lawful trade and business in the edible oil sector under the IFAD loan given to Government contrary to Article 40(2) of the Constitution.

30 The issues for consideration are therefore:

**(1) Whether Article 2 (2) of the agreement violates Articles 2 and 21 of the Constitution?**



5       **(2) Whether Articles 5 (1) – (12) of the agreement contravenes the rights of Ugandan oil producers and processors to participate in lawful trade and business in the edible oil sector under the IFAD loan given to Government contrary to Article 40 (2) of the Constitution.**

10       **Whether Article 2 (2) of the agreement violates Articles 2 and 21 of the Constitution?**

Article 2 of the agreement provides as follows:

Article 2

TERMS AND CONDITIONS

15       (1) The parties agreed to abide by the terms set out in this Agreement.

20       (2) Unless otherwise provided for in this Agreement, this Agreement shall not be adversely affected or be prejudicial to the interest of BIDCO/companies by such changes in law and/or policy and should such changes impose any obligation or tax or any other liability whatsoever on BIDCO/companies then government hereby agrees and undertakes to discharge in full the same without recourse to BIDCO/companies and to indemnify and keep indemnified BIDCO companies and each of their assets and effects from and against all claims, demands, actions, proceedings, damages and losses arising there from.

25       The agreement purports to insulate BIDCO companies against any changes in law or policy where such changes impose any obligations or tax or other liability whatsoever other than what is provided for in the agreement. I do not see how an agreement can override the provisions of law as any action contrary to law can be nullified by a court of competent jurisdiction. The question for consideration is whether the agreement is discriminatory in the sense of being a violation of Article 21 of the Constitution of the Republic of Uganda.

30

- 5 Article 21 of the Constitution has a head note that gives its intention and shows that it is about "Equality and freedom from discrimination."

**21. Equality and freedom from discrimination.**

- 10 (1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.
- (2) Without prejudice to clause (1) of this Article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.
- 15 (3) For the purposes of this Article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.
- (4) Nothing in this Article shall prevent Parliament from enacting laws that are necessary for—
- 20 (a) implementing policies and programmes aimed at redressing social, economic, educational or other imbalance in society; or
- (b) making such provision as is required or authorised to be made under this Constitution; or
- 25 (c) providing for any matter acceptable and demonstrably justified in a free and democratic society.
- (5) Nothing shall be taken to be inconsistent with this Article which is allowed to be done under any provision of this Constitution.

A plain reading of Article 21 of the Constitution leads to the conclusion that it has the following elements namely; In Article 21 (1) it is provided that all  
30 persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. What is clear from the above passage is that it deals with equality of persons before and under the law. The head note

5 suggests that equality can be considered on its own while freedom from  
discrimination may also be considered on its own. Equality is a concept that  
has to be dealt with separately from the concept of discrimination. What may  
be highlighted from the above passage is that it deals with law and therefore  
it can be proposed that all persons are supposed to be treated equally by  
10 the law in all spheres of political, economic, social and cultural life and in  
every other respect. The focus of Article 21 (1) of the Constitution is the law.  
It sets forth a declaration that all persons are equal before and under the law  
in all spheres of political, economic, social and cultural life and in every other  
respect and there are entitled to enjoy equal protection of the law.

15 Terms like "*equal protection of the law*" need to be put in their proper  
context. The first context is whether there is any law that promotes inequality.  
What has been presented to the court is not a law but an agreement of the  
parties and can be taken to be an act or omission. The question for  
consideration is whether Article 21 (1) deals with law and the right of all  
20 persons to enjoy equal protection of the law. In that regard I shall consider  
what courts have held about the elements of equality as well as the other  
ramifications of Article 21.

The second element of Article 21 is Article 21 (2) of the Constitution that  
specifically, and without prejudice to Article 21 (1) of the Constitution, deals  
25 with discrimination and forbids discrimination against any person on the  
ground of sex, race, colour, ethnic origin, birth, creed or religion, social or  
economic standings, political opinion or disability. The question of whether  
any person has been discriminated against on any of the grounds mentioned  
in Article 21 (2) of the Constitution may be a question of fact and perhaps a  
30 question of law in terms of definition of what amounts to discrimination as  
well as what are the classifications on which discrimination are thereunder. I  
will consider that together with judicial precedents on equal rights and  
freedoms or benefit of the law as enshrined in Article 21 (1) (supra).

5 The third aspect which is related to the first two is that Article 21 (3) of the Constitution specifically defines the expression "discriminate" and provides that it is to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, crime, birth, creed or religion, social or economic standings, political opinion  
10 or disability. Article 21 (2) of the Constitution has to be read together with Article 21 (3) of the Constitution and therefore is interpreted together and the judicial precedents deal with the same.

Finally, Article 21 (4) of the Constitution deals with the limitations to the preceding rights or declarations and enables Parliament to enact any law or  
15 implement policies and programs aimed at redressing social, economic, educational or other imbalances in society. The matter in this petition does not concern any law enacted to implement policies and programs for redressing imbalances in society. Secondly, Article 21 (4) of the Constitution allows Parliament to enact law and make provision that is required or  
20 authorised by the Constitution. It also enables Parliament to make a law which is acceptable and demonstrably justifiable in a free and Democratic society. Lastly it is provided that nothing provided for in the Constitution shall be taken to be inconsistent with Article 21 of the Constitution. The mandate of Parliament is to enact laws that are necessary for the matters set  
25 out under Article 21 (4) and 21 (5) of the Constitution. It makes an exception of those matters in the law enacted by Parliament and does not deal with the action or inaction of the government. It therefore resurrects the conception that Article 21 (1) deals with equality before and under the law and equal protection of the law.

30 Having said that, the question is whether government can do anything that is not provided for in the law or which violates the law and at the same time is discriminatory. That is the danger of dealing with Article 21 of the Constitution out of its specific context. Where for instance, an agreement is

5 being challenged on the ground of favouring BIDCO Oil Refineries Ltd on tax matters without addressing the tax Act under which the matters are supposed to be taken care of, Article 21 would be applied out of context. For instance, what does the Income Tax Act provide about tax exemptions or  
10 or waivers? What does the Value Added Tax Act, provide about tax exemptions or waivers? Was the exemption if any, permitted by the laws enacted by Parliament?

As far as judicial precedents are concerned, I have considered some precedents which interpret a statute in *pari materia* with Article 21 of the Constitution of Uganda by the Supreme Court of Canada. These precedents  
15 interpret section 15 (1) of the **Canadian Charter of Rights and Freedoms** (also hereinafter referred to as the Canadian Charter) which provides that:

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour,  
20 religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

25 While the wording of section 15 of the Canadian Charter is slightly different from that of Article 21 of the Ugandan Constitution, its object is the same in that it provides that every individual is equal before and under the law and has a right of equal protection and equal benefit of the law without discrimination. Secondly, it provides that enjoyment of the equal rights shall  
30 be without discrimination on the grounds of the classification of individuals on basis of race, nationality or any other classifications contained therein. Secondly, it provides for exceptions to classifications or discrimination that positively deal with the amelioration of conditions of disadvantaged individuals or groups on account of their classification as stated therein.

5 In **Andrews v Law Society of British Columbia [1989] 1 S.C.R. page 143**  
Section 15 (1) of the Canadian Charter of Rights and Freedoms was  
considered by the Supreme Court of Canada. Mr. Andrews, a British subject  
permanently resident in Canada met all the requirements for admission to  
the British Columbia bar except that of Canadian citizenship. He brought an  
10 action for declaration that the requirement for Canadian citizenship violated  
section 15 (1) of the Canadian Charter and his action was dismissed by the  
trial court and allowed on appeal. A constitutional question was framed for  
the Supreme Court and the question for consideration was whether the  
Canadian citizenship requirement for admission to the British Columbia bar  
15 infringed or denied the equal rights provisions and freedom from  
discrimination enshrined in section 15 (1) of the Charter; and if so, whether  
the infringement was justified. McIntyre J held that section 15 (1) of the  
Charter provides for every individual a guarantee of equality before and  
under the law as well as the equal protection and benefit of the law without  
20 discrimination. This is what he stated at pages 163 and 164:

This is not a general guarantee of equality; it does not provide for equality between  
individuals or groups within society in a general or abstract sense, nor does it  
impose on individuals or groups an obligation to accord equal treatment to others.  
It is concerned with the application of the law. No problem regarding the scope of  
25 the word "law", as employed in section 15 (1), can arise in this case because it is an  
Act of the Legislature which is under attack.

McIntyre J at pages 164 and 165 went on to consider the concept of equality  
and stated that:

30 The concept of equality has long been a feature of Western thought. As embodied  
in section 15 (1) of the Charter, it is an elusive concept and, more than any of the  
other rights and freedoms guaranteed in the Charter, it lacks precise definition....

It is a comparative concept, the condition of which may only be ascertained or  
discerned by comparison with the condition of others in the social and political  
setting in which the question arises. It must be recognized at once, however, that

5 every difference in treatment between individuals under the law will not necessarily  
result in inequality and, as well, that identical treatment may frequently produce  
serious inequality. This proposition has found frequent expression in the literature  
on the subject but, as I have noted on a previous occasion, nowhere more aptly  
10 than in the well-known words of Frankfurter J, in *Denis v United States*, 339 U.S.  
162 (1950), at p. 184:

It was a wise man who said that there is no greater inequality than the equal  
treatment of unequals.

The same thought has been expressed in this Court in the context of section 2 (b)  
of the Charter in *R v Big M Drug Mart Limited* [1985] 1 S.C.R 295: ...

15 In simple terms, then, it may be said that a law which treats all identically and which  
provides equality of treatment between "A" and "B" might well cause inequality for  
"C", depending on differences in personal characteristics and situations. To  
approach the ideal of full equality before and under the law – and in human affairs  
an approach is all that can be expected – the main consideration must be the  
20 impact of the law on the individual or the group concerned. Recognizing that there  
will always be an infinite variety of personal characteristics, capacities, entitlements  
and merits among those subject to a law, there must be accorded, as nearly as may  
be possible, an equality of benefit and protection and no more of the restrictions,  
penalties or burdens imposed upon one than another. In other words, the  
25 admittedly unattainable ideal should be that a law expressed to bind all should not  
because of irrelevant personal differences have a more burdensome or less  
beneficial impact on one than another.

I have considered the above passage and I am persuaded that the concept  
of equality and what stands out in that the decision deals with equality from  
30 the perspective what a law or laws provide. It is clear from the petition before  
this court that there is no challenge to any law on the ground of promoting  
inequality or of being discriminatory on the ground of the numerous  
classifications such as sex, race, tribe, political creed etc. mentioned in Article  
21 (3) of the Constitution. This does not resolve my concern about the  
35 challenge to Article 2 of the agreement before the court as to whether it is  
not an act or omission of the Government of Uganda in the sense that no

5 law has been cited under which the agreement was made. It cannot be  
perceived whether the agreement violates some or certain provisions of law  
enacted by Parliament in relation to the regulation of tax. The mere fact that  
no law has been challenged makes it impossible to argue that other persons  
involved in the edible oil sector production have been treated unequally  
10 before or under the law. Which law? The Law envisaged in Article 21 is an Act  
of Parliament which must conform to the standard in Article 21. Can it be  
said that they have been discriminated against as far as the facts stand? Is it  
not possible to argue that the agreement violates the tax laws of Uganda and  
there is no question as to interpretation of the Constitution? The mandate of  
15 this court is to decide questions as to interpretation of the Constitution but  
not merely to enforce constitutional provisions whose terms are clear and  
unambiguous.

The question that ought to have been addressed is whether Article 21 (1) of  
the Constitution includes in its purview other acts or omissions which are not  
20 necessarily authorised by the law. The scope of the expression "law" as stated  
by McIntyre in **Andrews v the Law Society of British, Colombia** (supra)  
needed to be explored and resolved. The decision however clearly  
demonstrates that section 15 of the Canadian Charter (supra) deals with  
equality before and under the law and the enjoyment of equal protection of  
25 the law. I wish to emphasize that equality before and under the law in all  
spheres of political, economic, social and cultural life and in every other  
respect and the enjoyment of equal protection of the law, does not refer to  
Article 21 (1) of the Constitution which declares the right but to any other  
laws enacted by Parliament under which the enjoyment of the Article 21  
30 rights may be considered. Where no law has been cited, I doubt whether  
there is any cause of action for consideration of the court in terms of Article  
21 (1) of the Constitution.



5 Before taking leave of the matter, I would further refer to the Canadian Supreme Court decision in **Nancy Law v Canada (Minister of Employment and Immigration)** [1999] 1 S.C.R 497. In the unanimous decision of the court read by Iacobucci J, the question before the court concerned the constitutionality of sections 44 (1) (d) and 58 of the Canada Pension Plan RSC,  
10 1985 which drew distinctions on the basis of age with regard to entitlement to survivors' pensions. Even in that decision, there was a challenge to the law. The learned judge noted that the matter before the Pensions Appeals Board was whether or not the impugned section violated section 15 of the Charter. What was under consideration were the provisions of the law. The entire  
15 analysis shows that many laws created legal distinctions, and not all amounted to discrimination within the meaning of section 15 (1) of the Canadian Charter (supra). In re-visiting the decision of the court in **Andrews v Law Society of British Columbia** (supra) Iacobucci J noted that the approach was to focus on three central elements namely: (1) whether a law  
20 imposes differential treatment between the claimant and others; (2) whether an integrated or analogous ground of discrimination is the basis for the differential treatment; and (3) whether the law in question has a "discriminatory" purpose or effect. The approach in **Andrews v Law Society of British Columbia** (supra) was a two-step analysis which was to determine  
25 whether section 15 (1), on the aspects of its guarantee of rights to equality, had been violated and that is to determine whether due to a distinction created by the questioned law, the claimant's right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law had been denied. In the first step, the inquiry focuses upon whether the  
30 challenged law has drawn a distinction between the claimant and others, based on personal characteristics. The second step is to determine whether the distinction created by the law results in discrimination. On the one hand the court determines whether the equality right was denied on the basis of a personal characteristic defined in the Charter or which is analogous to those

5 enumerated and secondly, whether the distinction has the effect on the  
claimant of imposing a burden, obligation or disadvantage not imposed on  
others or of withholding or limiting access to benefits or advantages which  
are available to others. Iacobucci J noted that the court has had the  
opportunity to develop the principles relating to the indicia of an analogous  
10 ground to the specified characteristics or basis for discrimination. Iacobucci  
J at page 524 noted that the analysis of whether there was discrimination  
should be based on the following criteria namely:

... a court that is called upon to determine a discrimination claim under section 15  
(1) should make the following three broad enquiries. First, does the impugned law  
15 (a) draw a formal distinction between the claimant and others on the basis of one  
or more personal characteristics, or (b) fail to take into account the claimant's  
already disadvantaged position within Canadian society resulting in substantially  
differential treatment between the claimant and others on the basis of one or more  
personal characteristics? If so, there is differential treatment for the purpose of s.  
20 15 (1). Second, was the claimant subject to differential treatment on the basis of  
one or more of the enumerated and analogous grounds? And third, does the  
differential treatment discriminate in a substitute sense, bringing into play the  
purpose of s. 15 (1) of the Charter in eliminating such ills as prejudice, stereotyping,  
and historical disadvantage? The second and third enquiries are concerned with  
25 whether the differential treatment constitutes discrimination in the substantive  
sense intended by s. 15 (1).

At page 525:

Since the beginning of its section 15 (1) jurisprudence, this court has recognized  
that the existence of a conflict between an impugned and the purpose of s. 15 (1)  
30 is essential in order to found a discrimination claim. This principle holds true with  
respect to each element of a discrimination claim. The determination of whether  
legislation fails to take into account existing disadvantage, or whether the claimant  
falls within one or more of the enumerated and analogous grounds, or whether  
the differential treatment may be said to constitute discrimination within the  
35 meaning of s. 15 (1), must all be undertaken in a purposive and contextual manner.

5 Further in **Gosselin v Quebec (Attorney General)** [2002] 4 S.C. R. 429  
McLachlin C.J who read the judgment of the Supreme Court of Canada at  
page 460 noted that to establish a violation of section 15 (1) of the Canadian  
Charter:

10 To establish a violation of section 15 (1), the claimant must establish on a civil  
standard of proof that: (1) the law imposes a differential treatment between the  
claimant and others, in purpose or effect; (2) one or more enumerated and  
analogous grounds are the basis for the differential treatment; and (3) the law in  
question has a purpose or effect that is discriminatory in the sense that it denies  
15 human dignity or treats people as less worthy on one of the enumerated or  
analogous grounds. In this case, the first two elements are clear, and the analysis  
focuses on whether the scheme was discriminatory.

The first element deals with the law which is the subject of the challenge for  
violation of the Charter. As I have noted above, there is no challenge to any  
law in this petition. And the question of whether the right of the beneficiaries  
20 of the petition to equality before and under the law and to enjoyment of  
equal protection of the law has been violated cannot be considered. This is  
*inter alia* because where the law does not provide for discriminatory  
grounds whether expressly, in its purpose or effect, the action or inaction  
of the government can be the subject of an application for judicial review  
25 for purposes of declaratory orders or injunctions and orders nullifying  
whatever action has been taken. Such a matter does not call for  
interpretation of the Constitution in terms of a controversy as to the  
meaning of Article 21 of the Constitution and in any case may be  
enforceable by a court of competent jurisdiction as the violation of the  
30 fundamental right of freedom under Article 50 of the Constitution. Without  
much ado, I would proceed to consider Article 21 (2) of the Constitution.

Article 21 (2) as noted above, without and prejudice to the issue of  
jurisdiction of this court, provides that a person shall not be discriminated  
against on the grounds of sex, race, colour, ethnic origin, tribe, birth, creed

5 or religion, social or economic standing, political opinion or disability. The  
question still remains whether the discrimination has to be in the law or in  
the purpose or effect of the impugned legislation. This is because any  
discrimination by any person is actionable in a court of law and does not  
require determination of any question as to interpretation of the  
10 Constitution. The inquiry as to whether there is any legislation that  
discriminates on the ground of sex, race, colour, ethnic origin, tribe, birth,  
creed or religion, social or economic standing, political opinion or disability  
must still be made.

In the circumstances of this case, there is no averment that there is any  
15 legislation that discriminates on the basis of the classifications mentioned in  
Article 21 (2) of the Constitution. It follows without saying that what can only  
be considered is whether there is an act or omission that discriminated on  
the basis of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social  
or economic standing, political opinion or disability as set out in the Article.  
20 The question as to whether the act or omission was authorized by law cannot  
be considered and was not even pleaded. If for instance the Income Tax Act  
or the Value Added Tax Act did not authorize or does not authorize the terms  
of the agreement, there is no question as to inequality before or under the  
law or equal protection of the law that arises. No law is in issue. As noted  
25 above, the word "discriminate" was further defined by Article 21 (3) to mean  
giving different treatment to different persons attributable only or mainly to  
their respective descriptions by sex, race, colour, ethnic origin, tribe, birth,  
creed or religion, social or economic standing, political opinion or disability.  
The giving of different treatment to different persons per se on the basis of  
30 their respective classifications as defined above may be a basis for  
enforcement of their Article 21 rights.

Nevertheless, the question remains as to whether the different treatment is  
the purpose or effect of a law or is the action of an authority or government.

5 For the matter to be handled by this court, there has to be a controversy  
about the interpretation of the word "discriminate" or any other controversy  
relating to the meaning of what is meant by being equal before or under the  
law and being entitled to equal protection of the law. That will require an  
analysis of the legislation in question. The agreement presented before this  
10 court is not an Act of Parliament. It is the act of a Department of Government  
or the Executive Arm of Government. It purports to give certain rights in  
relation to tax to BIDCO Oil Refineries Ltd but the question as to the law  
under which the Executive Arm of Government relied to give privileges by  
way of tax exemptions and waivers has firstly to be considered under the tax  
15 laws. It cannot be considered in isolation and where the tax law is neutral and  
not discriminatory in purpose or effect, it can be challenged as having been  
executed *ultra vires* the Parent Act. That cannot be a question as to  
interpretation of the Constitution. Article 152 of the Constitution clearly  
provides that no tax shall be imposed except under the authority of an Act  
20 of Parliament. Particularly Article 152 (2) of the Constitution provides that:

(2) Where a law enacted under clause (1) of this Article confers powers on any  
person or authority to waive or vary a tax imposed by that law, that person or  
authority shall report to Parliament particularly on the exercise of those powers, as  
shall be determined by law.

25 It is therefore clear that any imposition of tax or waiver of tax has to be under  
an Act of Parliament. In the absence of the law or legislation enabling the  
action, it cannot be determined whether, in executing the agreement, the  
official of Government who represents Government in the agreement acted  
*ultra vires* the Parent Act. Simply put, any allegation of infringement of Article  
30 21 in tax incentives in the terms, effect or purpose of an agreement is an  
allegation that has to be examined in light of the law that enables taxation  
or waiver of tax.

Last but not least, BIDCO Oil Refineries Ltd was not involved in this matter as  
a party and it will be a violation of the rights of BIDCO Oil Refineries Ltd as

5    enshrined under Article 28 (1) as well as a 44 (c) of the Constitution to have  
that matter determined without hearing from them. The company is directly  
affected by any determination affecting the agreement between it and the  
Government of Uganda.

10    The agreement can be struck down by the High Court if it was executed  
contrary to an Act of Parliament. If it was executed in line with an Act of  
Parliament, then the question of the purpose or effect of the legislation as to  
whether it violates Article 21 rights can be considered. In considering those  
rights, the question of whether it is discriminatory in purpose or effect can  
15    also be considered. Article 21 rights should not be argued in a vacuum. What  
the Petitioner has presented are grounds for challenging the agreement in a  
competent court but not questions as to interpretation of the Constitution.

In the premises issue number 1 as to whether clause 2 of the agreement  
violates Articles 2 and 21 of the Constitution of the Republic of Uganda in as  
far as it promotes superiority rather than equality of BIDCO Oil Refineries Ltd  
20    with other citizens before the law cannot be answered as presented. This is  
firstly because Messieurs BIDCO Oil Refineries Ltd is not a party. Secondly,  
there is no law to consider. Thirdly, the Petitioner or any other interested  
person could have brought a public interest action in the High Court for the  
appropriate remedy of declaration of illegality or nullity of the agreement on  
25    the grounds advanced and it would be considered on the merits. No question  
as to interpretation of the Constitution arises and issue number 1 is dismissed  
for want of jurisdiction.

With regard to the second issue, the issue is set out below:

30    **Whether Article 5 (1) – (12) of the impugned agreement is in  
contravention or in conflict with the rights of other citizens of Uganda  
to participate in lawful trade and business contrary to Article 40 (2) of  
the Constitution of Uganda.**

5 Article 40 of the Constitution of the Republic of Uganda provides *inter alia* that:

40. Economic rights.

(1) Parliament shall enact laws –

10 (a) to provide for the right of persons to work under satisfactory, safe and healthy conditions;

(b) to ensure equal pay for equal work without discrimination; and

(c) to ensure that every worker is accorded rest and reasonable working hours and periods of holidays with pay, as well as remuneration for public holidays.

15 (2) Every person in Uganda has the right to practice his or her profession and to carry on any lawful occupation, trade or business.

The applicant would like to enforce or have interpreted Article 40 (2) which provides that every person in Uganda has the right to practice his or her profession and to carry on any lawful occupation, trade or business. The petition suggests that the agreement in paragraph 5 (1) – (12) thereof  
20 violates the rights of other persons engaged in the edible oil industry to practice any trade or business (or any lawful occupation).

The facts in support of the assertion as stated in the affidavit of John Ken Lukyamuzi and particularly paragraphs 9, 10 and 11 thereof which state as follows:

25 9. That to my knowledge on the 1<sup>st</sup> day of April 2004, the Uganda Oilseed Producers and Processors Association made a written presentation to the Parliamentary Committees on Finance, Planning & Economic Development and Agriculture, Animal Industry and Fisheries complaining about the BIDCO Oil Palm Project and the agreement with the Government of Uganda. A copy of the said  
30 presentation is attached hereto as Annexure "C".

10. That the said presentation shows that Uganda Oil Producers and Processors were not consulted or given an opportunity to be involved in the bids under the

5 IFAD loan for the development and production of vegetable oil in Uganda contrary to the claims of advertised competitive bids under clause (c) of the preamble to the agreement.

10 11. That consequently, the Uganda Oil Producers and Processors have been deliberately sidelined and disenfranchised by the agreement in contravention of Article 21 and 40 (2) of the Constitution in so far as they have been locked out from their lawful trade/business under the IFAD loan in the edible oil sector which has virtually been handed over to BIDCO as a monopoly.

15 I have carefully considered Annexure "C" which outlines some of the potential problems of the agreement between the Government of Uganda and the BIDCO oil refineries Ltd. Annexure "C" is a detailed 16 – page document and I will only highlight a few areas of concern in relation to the assertions on the economic implications of the agreement on other producers. Clause 3.4 of the annexure deals with anomalies/problematic provisions in the BIDCO/GOU agreement. The following are some of the  
20 issues which are stated in the document namely:

3.4.1 The extension of incentives to the Jinja refinery does not fit in with the objective of increasing Uganda's vegetable oil production and thereby reducing her importation of crude palm oil/saving valuable foreign exchange.

25 (1) There is nothing pioneering about an oil refinery in Uganda; Uganda currently has a combined refining capacity of 500 metric tons per day and currently utilizes only 45% of such capacity.

30 In case of plantation farmers in both Kalangala and Bundibugyo have been growing oil and processing palm for over 30 years. The only new aspect in the project is the variety and type of farming. This is not pioneering and therefore does not require incentives.

(2) What is the rationale behind establishing an oil refinery, as part of the project, long before the oil palm production will be producing fresh fruit bunches?

(3) The Jinja refinery will not be precluded from importing crude palm oil from abroad.



5 (4) What mechanism will be used to differentiate between finished and intermediate products made from crude palm oil from the project and crude palm oil imported from abroad?

10 3.4.2 The current production of vegetable oils through the small-scale oilseed farms is more appropriate in environmental terms than oil palm productions for the following reasons;

(1) Small holders fully own their estate and can cultivate profitably on a small scale without the need of large investments.

(2) The oilseed seasons span 3 – 6 months and therefore the small-scale farmer can realise a profit quicker and more frequently.

15 (3) It is easy to switch to an alternative oilseed crop or to another food crop all together while maintaining income continuity. This is not true of oil palms; an investment in oil palm is a twenty-five-year commitment having no option of switching without disrupting income continuity.

20 (4) Oil palm plantations can only be grown on a commercial scale on Kalangala Islands and at Bundibugyo while oilseeds can be grown throughout Uganda and impacts upon.

3.4.3 Government's commitments to BIDCO have no institutional basis.

25 (1) There is no law governing the granting of such incentives. Even the World Bank supervision mission of October 2002 reminded the government that IDA/IMF had advised GOU against any deferral of VAT.

(2) When government advertised a tender for the Kalangala Oil Palm Project there was no mention of such incentives.

(3) The incentives were apparently granted at the instance of alternative proposals offered by BIDCO.

30 (4) In providing the incentives to BIDCO, government "ring fenced" BIDCO against possible competing investors who may not be able to invest up to US\$100,000,000 at one go in projects with long gestation periods. UOSPA fears it will be a victim of this policy especially as the majority of its members are small to medium scale enterprises.

5 3.4.4 In 1996 – 97 on realising a daily excess refining capacity was more than the 300 metric tons, Uganda adopted the policy of import substitution. The palm oil project was conceived to answer these needs.

10 Within the succeeding 5 years the production of oil seeds e.g. sunflower, Sim Sim, soya bean and cotton advanced rapidly, reducing the gap between the installed refining capacity and the operational capacity. This negated the policy of import substitution. Following liberalisation and globalisation there has been a general shift in policy emphasis towards competitiveness and comparative advantage.

The BIDCO Oil Palm Project in its current form does not address import substitution nor comparative advantage.

15 3.4.5 The BIDCO project is to be implemented by the following 4 companies:

(1) Oil palm Uganda Ltd (OPUL), to develop the nucleus estate and a mill(s) to be established at Bugala Island in Kalangala district.

(2) Oil Palm Bundibugyo Ltd (OPBUL) at Bundibugyo.

20 (3) Oil Palm Mainland Ltd (OPML), to develop 20,000 ha plantations and two or more mills on the Mainland.

(4) BIDCO Uganda Ltd (BUL) to establish an oil complex at Jinja for the purpose of processing crude oils and oilseeds and byproducts into finished products and also as defined in the project along with all the supporting and ancillary production facilities.

25 It is noteworthy that under Article 2 (a) of the agreement between GOU and BIDCO the latter shall have the right to hold 100% shareholding in BUL.

30 The Jinja complex will make profits within year one of the investment schedule. The other components may begin making profits in year 12. The profits made from Jinja will wholly go to BIDCO and not to the other stakeholders. It's conceivable that artificial losses could be created in the other companies so as to transmit profits to Jinja company.

It's urged that this project will benefit the people of Kalangala by introducing income generating activities. However, while BIDCO will own 26,500 ha, out growers will only own a mere 3500 ha (11% of the whole estate). Because of

5 economies of scale the production cost on BIDCO Plantation, the BIDCO FFB will be much cheaper than that of the out growers; determination of the price FFB will be based on the lower BIDCO cost price.

3.4.6 GOU has undertaken to mandatory support an application by BIDCO and its project partners for the obtaining of a MIGA guarantee for its investment in Uganda. The agreement does not provide for the following

(1) Who are BIDCO's project partners?

(2) What are GOU's exact obligations with regard to the support it is to give BIDCO and its project partners in this regard?

3.4.7 The agreement is very one-sided and onerous on GOU:

15 the agreement provides for penalties on GOU in the event that it defaults the agreement [Article 4 (1) (b)]

The agreement is silent regarding default on the part of BIDCO; there is no mention about the nature default, compensation to GOU, and the interests of out growers.

3.4.8 Article 20 (1) of the agreement provides as follows:

20 (1) that GOU and BIDCO shall be co-chair of the Vegetable Oil Development Council.

(2) That BIDCO shall be represented on the FFB Pricing Committee set up under Article 19

25 These provisions are obnoxious. They make BIDCO judge in its own case. It's unfair to make BIDCO a co-chair to determine the price of palm oil products and FFB when it's only one of the competitors producing these products. An impartial body representative of stakeholders is recommended to co-chair with GOU. The arrangement in the current form undercuts other competitors.

### 3.5 Unconstitutional Aspects of the BIDCO Agreement

30 The agreement between GOU and BIDCO offers the latter generous tax incentives whose implementation would render the agreement unconstitutional ...

5 Just taking a few of the issues mentioned in relation to the economic rights,  
what features is the extension of incentives to the Jinja refinery and whether  
it increases Uganda's vegetable oil production and reduces importation of  
crude palm oil thereby saving valuable foreign exchange. Secondly it is  
asserted that BIDCO oil refineries Ltd was not a pioneer in the oil refinery in  
10 Uganda and did not deserve incentives. Further that incentives ought to have  
been given to small-scale farmers rather than having a large plantation based  
farming and processing. The document questions the rationale behind the  
establishment of an oil refinery as part of the project funded by IFAD. It is  
also clear that there was a project funded by IFAD to increase Uganda's  
15 vegetable oil production. The government is being faulted for engaging  
BIDCO oil refineries Ltd and committing an investment of over  
US\$100,000,000 in one project.

On the other hand, the document clearly indicates that the existing oil palm  
producers were efficient and better. Fears were expressed about BIDCO oil  
20 refineries Ltd out competing the small scale producers on the pricing. In  
other words, the generous tax incentives were likely to give undue advantage  
to BIDCO oil refineries against other small-scale producers in the field.  
Further, it was likely to be unnecessary since Uganda already had oil refining  
capacity. Thirdly it competed with other traditional food crops such as Sim,  
25 soya beans used in the vegetable oil industry.

There is no suggestion anywhere that the right of any person to practice his  
or her profession would be compromised. It must be noted that Article 40 (2)  
of the Constitution, clearly and unequivocally declares the right of every  
person in Uganda to practice his or her profession and to carry out any lawful  
30 occupation, trade or business. The said Article of the Constitution cannot  
prevent the government from promoting one sector of the economy above  
others.

5 A similar petition had been filed in this court in the **Constitutional Petition No 85 of 2011; Spedag Interfreight Uganda Ltd, Transami (U) Ltd, Damco Logistics (U) Ltd, Threeways Shipping Services (Group) Ltd v Attorney General and Great Lakes Port Ltd**. In that petition, the facts were that the Petitioners were duly licensed companies and engaged in various  
10 aspects of the business of clearing, forwarding and handling import and export of goods. The Petitioner's grievance was that the government of Uganda executed an agreement giving a monopoly to the second Respondent by giving it a 10 year exclusive right to receive all imported goods from and deliver all exported goods to ocean vessels in Mombasa,  
15 Kenya and the right to expedite delivery of all imported goods from Mombasa to Uganda and deliver export goods from Uganda to Mombasa, the right to receive imported goods at the inland port in Uganda, offloading and storing of the goods, the right to facilitate verification of goods by any competent authority and the right to undertake custom, exercise and other  
20 formalities required by importers or exporters to facilitate the work of the Uganda Revenue Authority. Obviously the agreement because of giving exclusive rights to the second Respondent adversely affected the right of the Petitioners to carry on their business of clearing, forwarding and handling import and export of goods from Uganda.

25 The lead judgment of this court was delivered by Hon. Mr. Justice Frederick Egonda – Ntende, JCC/JA with the concurrence of all other Justices. Egonda – Ntende stated at page 11 that Article 40 (2) of the Constitution guarantees that all citizens have the right to practice any profession, or to carry on occupation, trade or business. However, the right to carry on a profession,  
30 trade or business is not unqualified and can be restricted or regulated by authority of the law under Article 43 of the Constitution which allows limitations on fundamental and other human rights and freedoms which is acceptable and demonstrably justifiable in a free and Democratic society or which is provided for in the constitution. It also allows limitation in the public

5 interest and limitation on the ground of prejudice to the fundamental or other human rights and freedoms of others. At page 13 Hon. Justice Egonda-Ntende stated that:

10 The Respondents do not contend that the limitation in this instance is justified as the enjoyment of the right by the Petitioner prejudices the right of any other person. It is simply contended that the rights in question have limitations in the public interest without more. The Respondents do not point to any law that sets out to this limitation. Neither do they provide any justification for the limitation given the burden of proof that lies upon them. In my view, before the 1<sup>st</sup> Respondent could countenance entering into an agreement of this kind, there had  
15 to be legislation that expressly authorised them to do so given the fact that the impugned provisions of the contract between the Respondents contravened the Petitioner's fundamental rights under Article 40 (2) of the Constitution.

The Court held that the government does not have the power, to enter into a contract that limits the Petitioner's fundamental rights under Article 40 (2)  
20 of the Constitution.

The decision in **Spedag Interfreight Uganda Ltd, Transami (U) Ltd, Damco Logistics (U) Ltd, Threeways Shipping Services (Group) Ltd v Attorney General and Great Lakes Port Ltd** (supra) is clearly distinguishable from the facts of the instant petition and not applicable thereto. In the circumstances  
25 of the petition, the Petitioner's show that there would be unfair competition but not that the right to practice any occupation or profession, lawful trade or business would be affected. Secondly, the Petitioners had a remedy to challenge the agreement on other grounds in a court of competent jurisdiction. To be justiciable, the Petitioner ought to have produced in this  
30 court the IFAD loan terms under which the project had been initiated. Secondly, the Petitioner took the matter to Parliament for consideration and the outcome of that has not been specified. There are simply no facts by which the court can conclude that the support for a large scale oil palm

5 plantation violated the right of persons in the edible oil sector to practice their profession or business.

Finally, the issue stated in this petition does not indicate whether there is any question as to interpretation of Article 40 (2) of the Constitution because the provision is very clear that every person in Uganda has the right to practice  
10 his or her profession and to carry on any lawful occupation, trade or business. It was incumbent upon the Petitioner to show that the Respondent has by any act or omission or by any law prevented a specified category of persons in Uganda to practice his, her, or their profession and to carry on any lawful occupation, trade or business. The Petitioner has not on the balance of  
15 probabilities established even a prima facie case against the Respondents.

In the premises, I find that the petition has no merit and the second issue of whether Article 5 (1) – (12) of the impugned agreement is in contravention or in conflict with the rights of other citizens of Uganda to participate in lawful trade and business contrary to Article 40 (2) of the Constitution of  
20 Uganda, stands dismissed.

Overall the petition stands dismissed some parts having been struck out earlier. On the question of costs, the Petitioner brought this petition in the public interest on behalf of other persons engaged in the edible oil industry. I would in the circumstances, make an order that the petition is dismissed  
25 with no order as to costs.

Dated at Kampala the 1<sup>st</sup> day of March 2020



**Christopher Madrama**

**Justice of Constitutional Court/Court of Appeal**





## AT KAMPALA

# CONSTITUTIONAL PETITION NO. 30 OF 2006

**Attorney General ::::::::::::::::::::::::::::::::::::Respondent**

20

**Judgment of Remmy Kasule, Ag. JA**

25 to **Rule 14(1) of the Constitutional Court (Petitions and**  
**References). Rules: S.I: 2005 No. 91** this petition abated as  
 far as the same concerned the first Petitioner. The Petition thus  
 proceeds with John Ken Lukyamuzi as the sole Petitioner.

30 **the Constitution.** It arises from an agreement executed between  
the Government of Uganda and Messrs Bidco Refineries Limited

on 4<sup>th</sup> April, 2003. The said agreement was for the development of Oil Palm Industry in Uganda. It shall be referred to as the "Agreement" in this Judgment.

35 It is the case of the petitioner, who was a sitting Member of Parliament at the material time, that the agreement contravened various provisions of the Constitution set out in the petition and in the affidavit in support of the petition by the petitioner dated 8<sup>th</sup> November, 2006. The petitioner, through this petition, thus prays  
40 that parts of the Agreement that are inconsistent with the Constitution be so declared.

The respondent's answer to the petition, as can be discerned from the conferencing notes, is that the petition is an abuse of Court process since it is a replica of **Constitutional Petition No. 07 of**  
45 **2004** dismissed by the Constitutional Court on 26<sup>th</sup> September, 2006 for none appearance of the petitioners and their Counsel. The petitioner never applied for reinstatement of the dismissed petition but instead proceeded to file this fresh **Petition No. 30 of 2006** on 13<sup>th</sup> November, 2006.

50 It is also the contention of the respondent that the petition, apart from alleging that some parts of the agreement are in contravention of some provisions of the Constitution, does not disclose any cause for interpretation of the Constitution. Therefore, the petition is incompetent and ought to be dismissed.

55 At the hearing, learned Counsel Fred Muwema and Charles Nsubuga appeared for the petitioner while learned state Attorney Hillary Nathan Ebila was for the respondent.

On 27<sup>th</sup> July, 2020 when the Petition was called for hearing this Court gave directives to the petitioner and respondent to file and  
60 serve written submissions within the set time lines. All submissions had to be on the Court record by the 10<sup>th</sup> August, 2020. None of the parties complied with the Court's directives. The Petitioner's written submissions were filed in Court as late as 25<sup>th</sup> September, 2020. The respondent did not file any  
65 submissions in response at all.

However, both the Petitioner and the Respondent had earlier filed on Court record conferencing notes, the petitioner on 6<sup>th</sup> February, 2007 and the respondent on 16<sup>th</sup> March, 2007 with petitioner's  
70 response on 22<sup>nd</sup> March, 2007. The petitioner's written submissions, though filed late, were also on record. This Court relied upon all these as the submissions for the respective parties to the Petition.

From the pleadings and submissions on record, the issues that arise for resolution by this Court are:

- 75 1. Whether this Constitutional Petition is in law properly before this Court.
2. Whether this Constitutional Petition discloses a cause for constitutional interpretation.
3. What remedies are there for the parties.

80 **Issue 1:**

Whether this Constitutional petition is in law properly before this Court.

This issue raises two aspects;

**First:** Whether this Constitutional Petition is not barred by  
85 law from being instituted in this Court.

**Second:** Whether the Right to a fair hearing is not being violated,  
given the fact that a principal party to the agreement  
giving rise to the issues to be resolved in this  
Constitutional Petition, is not a party to the Petition.

90 As to whether or not this Constitutional Petition is not barred by  
law, it is a fact that the petitioner, and other petitioners, first  
lodged in this Court **Constitutional Petition No. 7 of 2004**  
**Anagodurand Patrick Musisi, Issa Kikungwe, Ken Lukyamuzi**  
**vs Attorney General**. In that Petition (**07 of 2004**) the very issues  
95 arising from the very Agreement against the same respondent as  
those raised in this Petition (**30 of 2006**) were also raised. In both  
petitions, the same firm of lawyers, Messrs Muwema & Mugerwa,  
Advocates, acted for the petitioner(s).

**Constitutional Petition No. 7 of 2004** came up for hearing on  
100 18<sup>th</sup> September, 2006. The respondent was present. The  
Petitioners were absent but learned Counsel Mr. Birungi held a  
brief for the lawyers for the Petitioners. The Court adjourned the  
hearing of the Petition to 26<sup>th</sup> September, 2006 to enable the  
petitioners and their lawyers to be present for the hearing and to  
105 prosecute the petition. On that date of 26<sup>th</sup> September, 2006, the  
respondent was present, the petitioners and their Counsel were  
absent. No explanation was given to Court for their absence.  
Counsel for the respondent prayed for the dismissal of the Petition.  
The Court dismissed **Constitutional Petition No. 07 of 2004** for

110 want of prosecution. The Petitioners were condemned to pay costs to the respondent.

Thereafter, on 13<sup>th</sup> November, 2006, the Petitioner together with the late Issa Kikungwe, who were also petitioners in the dismissed **Constitutional Petition No. 07 of 2004** lodged in this Court a  
115 similar **Constitutional Petition No. 30 of 2006**, the subject of this Judgment.

**Rule 23** of the **Constitutional Court (Petitions and References) Rules** that apply to Constitutional Petitions provides that, subject to those very Rules, the practice and procedure in accordance with  
120 the **Civil Procedure Act** and the **Rules** made under that Act and the Court of Appeal Rules shall apply to Constitutional Petitions.

**Order 9 Rule 22** of the **Civil Procedure Rules** provides that where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that  
125 the suit be dismissed. Then **Rule 23** provides that where a suit is dismissed under **Rule 22**, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action, but such a one may apply for an order to set the dismissal aside.

The position of the law therefore is that Mr. John Ken Lukyamuzi,  
130 the petitioner, having been one of the petitioners in **Constitutional Petition No. 07 of 2004** which was dismissed on 26<sup>th</sup> September, 2006, by reason of non-appearance of the petitioners and their Counsel, is barred from instituting a similar Constitutional Petition seeking the same reliefs based on the same facts, like  
135 those in the dismissed **Constitutional Petition No. 07 of 2004**. Yet this is what Mr. John Ken Lukyamuzi has done by lodging

**Constitutional Petition No. 30 of 2006**, the subject of this Judgment.

The Petitioner in reply to the respondent's conferencing notes does  
140 not dispute the fact that his **Constitutional Petition No. 30 of 2006** is similar to the dismissed **Constitutional Petition No. 07 of 2004**. The Petitioner however contends that what he has done in filing a fresh Constitutional Petition, instead of applying to set aside the dismissed **Constitutional Petition No. 07 of 2004** is a  
145 mere technicality which ought not to hinder the administration of justice. He relies on **Article 126(2)(e)** of the Constitution which provides that substantive justice shall be administered without undue regard to technicalities.

The Petitioner also further argues that the issue at hand is one of  
150 public importance concerning the constitutionality of a Government project and as such it should not be struck out due to a mere technicality.

Finally, the petitioner submits that the non appearance in Court when **Constitutional Petition No. 07 of 2004** was dismissed was  
155 due to the mistake of his advocates and the same should not be visited upon him as the client.

I am unable to appreciate the above reasoning of the Petitioner. **Order 9 Rules 22 and 23** are statutory law. They must be complied with as such. It is not for anyone to choose whether to  
160 comply with them or not.

Substantive justice is only done when the law, statutory or otherwise, is complied with. That is why **Article 126(1)** provides that:

## **“126. Exercise of Judicial Power**

165           (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”.*

170 Failure to comply with the statutory law, undermines the  
rendering of substantive justice. Such a failure ought not be  
tolerated under the guise of doing away with technicalities.

In the same measure, the fact that the issue under litigation is one  
of public importance dealing with the constitutionality of a  
175 Government project, is no valid ground for non-compliance with  
the requirement of the law.

The argument for the petitioner that the conduct of the advocates  
of the petitioner for being absent from Court when **Constitutional  
Petition No. 07 of 2004** was called for hearing and was dismissed  
180 by reason thereof, should not be visited upon the petitioner as the  
client, has no validity at all.

According to the Court record, **Constitutional Petition No. 07 of  
2004**, came up for hearing on 16<sup>th</sup> March, 2006. The Petitioners’  
lawyers Fred Muwema and Herbert Kiggundu were in Court for the  
185 Petitioners. The record does not show any Petitioner being present  
in Court. The same was adjourned. When on 18<sup>th</sup> September,  
2006, the Constitutional Petition next came up for hearing,  
Learned Counsel Wycliffe Birungi appeared for the Petitioners.  
Messrs Muwema and Mugerwa Advocates had communicated to  
190 Court on 15<sup>th</sup> September, 2006 that they no longer had

instructions from the petitioners. The petitioners were again absent from Court on 18<sup>th</sup> September, 2006. Counsel Birungi applied for time to get the necessary documents and files to be able to be ready for the hearing. The Constitutional Petition was then  
195 adjourned for hearing to 26<sup>th</sup> September, 2006. On that date the Petitioners as well as Counsel Birungi were absent from Court without any explanation as for their absence. The Constitutional Petition was dismissed by the Court with costs.

The record is very clear that since the lodgement of **Constitutional**  
200 **Petition No. 07 of 2004**, none of the Petitioners ever attended Court in person every time the Petition was fixed and called for hearing. There is no evidence on record to prove that such a conduct of the Petitioners of being absent from Court every time the said **Constitutional Petition No. 07 of 2004** was called up  
205 for hearing, was as a result of mistake of their Counsel.

I accordingly find no merit in the submission of the Petitioner in **Constitutional Petition No. 30 of 2006** that the dismissal of **Constitutional Petition No. 07 of 2004** was due to mistake of his then Counsel and as such the same ought not to be visited upon  
210 him as a client.

I have also come to the conclusion that **Constitutional Petition No. 07 of 2004** was substantially the same as **Constitutional Petition No. 30 of 2006**. Since **Constitutional Petition No. 07 of 2004** was dismissed for absence of the Petitioner and his  
215 Counsel when the same was called for hearing on 26<sup>th</sup> September, 2006, the petitioner Mr. John Ken Lukyamuzi, ought to have moved the Constitutional Court to set aside the order of dismissal



of **Constitutional Petition No. 07 of 2004** in terms of **Order 9 Rule 23** of the Applicable Civil Procedure Rules. The Petitioner,  
220 John Ken Lukyamuzi was barred by the same **Order 9 Rule 23**  
from instituting in this Constitutional Court **Constitutional  
Petition No. 30 of 2006** similar to the dismissed one of  
**Constitutional Petition No. 07 of 2004**. It is my holding  
therefore that this **Constitutional Petition No. 30 of 2006** is  
225 incompetent by reason of having been lodged in this Court  
contrary to **Order 9 Rules 22 and 23** of the Civil Procedure Rules.

The second aspect as regards **Constitutional Petition No. 30 of  
2006** is that it is brought by the Petitioner against the Attorney  
General only. Yet the chief prayer of the petitioner is for this Court  
230 to declare that the agreement executed between the Uganda  
Government and Messrs Bidco Refineries Limited on 4<sup>th</sup> April,  
2003, is unconstitutional and thus unenforceable. The Petitioner,  
however, did not make Messrs Bidco Refineries Limited a party to  
this Petition.

235 **Article 28(1)** of the Constitution provides that:

***“28. Right to a Fair Hearing***

*(1) 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  
240 impartial Court or tribunal established by law”.*

The right to a fair hearing is non derogable under **Article 44** of the  
Constitution. Since Messrs Bidco Refineries Limited’s rights under  
the agreement are to be affected, positively or negatively,  
depending on how the issues in this **Constitutional Petition No.**

245 **30 of 2006** are to be resolved, the Petitioner ought to have made them a party to the Petition so that they are heard in the cause.

In conclusion, I hold that this Constitutional Petition, as presented in Court, with Messrs Bidco Refineries Limited being not made a party to the same, violates the right to a fair hearing as regards  
250 Messrs Bidco Refineries Limited.

I thus, for the reasons stated above, answer issue 1 affirmatively that this Constitutional Petition is in law not properly before this Constitutional Court.

**Issue 2:**

255 Whether this Constitutional Petition discloses a cause for Constitutional interpretation:

The Petitioner asserts that he has a cause for moving this Court to interpret specific provisions of the Constitution and then resolve whether or not specific parts of the agreement are not contrary or  
260 inconsistent with the particular provisions of the Constitution.

The respondent on the other hand contends that the petition does not call for interpretation of the Constitution, but just alleges that some matters in the agreement are inconsistent with specific provisions of the Constitution and as such ought not to be  
265 implemented or enforced.

This Petition is brought under **Article 137** of the Constitution which provides:

***“137. Question as to the interpretation of the Constitution:***

*(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  
redress where appropriate”.*

Interpreting the Constitution, as a cause of action in a  
Constitutional Petition, comes into play, if the Petition describes  
an act or omission that is asserted to be contrary and/or  
inconsistent with a particular provision of the Constitution and  
then there is a prayer in the Constitutional Petition for the  
Constitutional Court to declare whether or not there is  
contravening or inconsistency of the said act or omission with the  
Constitution.

See: **Supreme Court Constitutional Appeal No. 2 of 1998:  
Ismail Serugo vs Kampala City Council.** See also **Supreme  
Court Constitutional Appeal No. 1 of 2003: Raphael Baku  
Obidra vs Attorney General.**

The Constitutional Court in interpreting the Constitution,  
discovers and ascertains the meaning of the particular provision  
of the Constitution in issue, then determines on the basis of that  
ascertained meaning whether the Act of Parliament or act or

omission of anyone complained of is consistent or inconsistent with the ascertained meaning of the Constitutional provision. Then the Constitutional Court makes the appropriate declaration.

There are principles of constitutional interpretation that the  
300 Constitutional Court must follow and apply in carrying out this process. Some of these are the principle of Supremacy of the Constitution, whereby the Constitution is the law upon which all other laws in the country are subject. A law that is contrary or inconsistent with the Constitution is null and void to the extent of  
305 the contravention and/or inconsistency. See **Article 2(2) of the Constitution**. The purpose and effect of a legislation must be examined in determining the constitutionality of such legislation. See: **Attorney General vs Salvatori Abuki (Supra)**. A provision of the Constitution containing a fundamental right must be given  
310 an interpretation that realizes the full benefit of that guaranteed right: See: **Attorney General vs Uganda Law Society: Supreme Court Constitutional Appeal No. 1 of 2006**.

Where words of the provision of a Constitution are unambiguous, the Constitutional Court has to apply them by giving them a plain,  
315 ordinary and natural meaning as well as a common and natural sense.

The Constitution has to be interpreted as a whole so as to effectuate its purpose.

The Constitutional Court's jurisdiction is restricted to interpreting  
320 the Constitution only and as such a Constitutional Petition for interpreting the Constitution must show on its face a requirement to interpret a provision of the Constitution. The Constitutional

Petition must not merely allege that a provision of the Constitution has been violated. See **Attorney General V Tinyefuza: Supreme Court Constitutional Appeal No. 1 of 1997.**

A careful analysis of the **Constitutional Petition No. 30 of 2006** amounts for the petitioner asserting that a number of specific provisions in the agreement executed by the Uganda Government and Messrs. Bidco Oil Refineries Limited are contrary to a number of provisions of the Constitution and as such the said agreement ought not to be enforced.

The agreement is asserted to violate **Articles 21 of the Constitution**, namely the principle of Supremacy of the Constitution and of equality before the law, because Bidco Oil Refineries Ltd is treated differently from those others in the Palm Oil production businesses. It is also contrary to the Constitution for Bidco Oil Refineries Ltd to access funds from the consolidated Fund and for the government to guarantee the company's loans when Parliament had not so legislated.

The agreement is also stated to be illegal because it was not drawn under the advice and direction of the Attorney General contrary to **Article 119 of the Constitution**. Further that the agreement is in breach of **Article 163 of the Constitution** as the Auditor General does not audit the company's Books of Accounts.

Another area of alleged contravention is that **Article 152(2)** of the Constitution is violated by the agreement because it purports that the Minister for Finance will not report to Parliament as regards the activities of Messrs Bidco Oil Refineries Ltd.

It is also the case of the Petitioners that the agreement contravenes  
350 **Article 40(2)** of the Constitution for it restricts others to  
participate in the business of the edible oil Sector.

For the respondent, it was submitted that the agreement does not  
contravene any provisions of the Constitution.

Having carefully considered the contents of the agreement, it is  
355 noted that the agreement only states that Government shall  
support the activities of Messrs Bidco Oil Refineries Ltd, the same  
was drawn under the advice and direction of the Attorney General,  
the Auditor General is also not prevented from auditing the  
company's accounts, the exemption from any taxes by the  
360 company will have to be allowed or refused when the company so  
applies according to the Income Tax Act and the Stamps Act.

I have come to the conclusion on the basis of the pleadings and  
the submissions for the respective parties, that the Constitutional  
Petition just points out what, as far as the Petitioner is concerned,  
365 aspects of the agreement are taken to be contrary to the  
Constitution, while the respondent responds to the same by  
asserting that there is no contravening the Constitution. There is  
therefore no need shown that this Court must interpret the  
Constitution. The Petitioner could as well have instituted an  
370 ordinary suit for a declaration that the impugned agreement was  
illegal in law by being contrary to the Constitution and other laws.

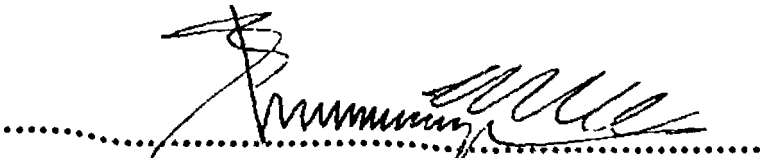
I accordingly hold that the Constitutional Petition does not disclose  
that Court has to carry out an interpretation of the Constitution.  
The Constitutional Petition is incompetent by reason thereof.

375 For all the reasons stated herein above this Constitutional Petition  
is incompetent in law. The same stands dismissed.

I award the costs of the dismissed Petition to the respondent.

Dated this .....<sup>24<sup>th</sup></sup> day of .....<sup>April</sup>..... **2021.**

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.....  
**Remmy Kasule**  
**Ag. Justice of Appeal**

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**THE REPUBLIC OF UGANDA**  
**IN THE CONSTITUTIONAL COURT OF UGANDA**  
**CONSTITUTIONAL PETITION NO. 30 OF 2006**

1. ISSA KIKUNGWE  
2. JOHN KEN LUKYAMUZI.....PETITIONERS

**VERSUS**

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

**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**

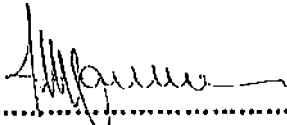
**JUDGMENT OF JUSTICE KENNETH KAKURU, JA/JCC**

I have had the benefit of reading in draft the Judgment of my learned brother Madrama JCC. I agree with him that this petition has no merit and ought to be dismissed.

I also agree with him that, no orders be made as to costs.

As the other members of this Coram also agree, it is so ordered.

**Dated at Kampala this .....<sup>th</sup>.....day of .....*March*..... 2021.**


  
.....  
**Kenneth Kakuru**  
**JUSTICE OF APPEAL/CONSTITUTIONAL COURT**



1. HON. ISSA KIKUNGWE  
2. JOHN KEN LUKYAMUZI ..... PETITIONERS

ATTORNEY GENERAL.....RESPONDENT

Dated at Kampala this 14<sup>th</sup> day of March 2021

  
Hellen Obura

**JUSTICE OF APPEAL/CONSTITUTIONAL COURT**

# **THE REPUBLIC OF UGANDA**

**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**

**CONSTITUTIONAL PETITION NO. 30 OF 2006**

**1. HON. ISA KIKUNGWE**

**2. JOHN KEN LUKYAMUZI ::::::::::::::: PETITIONERS  
VERSUS**

**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, Ag. JA/JCC**

## **JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA/JCC**

I have had the benefit of reading the draft judgment of my brother Hon. Justice Christopher Madrama, JA/JCC and I agree with his finding that this petition raises no questions for constitutional interpretation.

The petitioner alleges that the terms of the agreement between the Government of Uganda and BIDCO OIL Refineries dated 4<sup>th</sup> April 2005 are inconsistent with or in contravention of the Constitution of the Republic of Uganda. However, under Article 137(3), the challenge should be as to the inconsistency of an Act of Parliament or any other law or anything in or done under the authority of any law. The fact of execution of an agreement cannot by itself be in contravention of the constitution.

The issue of illegality of the agreement for failure to seek the consent of the Attorney General under Article 119 of the Constitution has

been the subject of several pronouncements by the courts such as the decision in **Nsimbe Holdings Ltd. Vs, Attorney General & The Inspector General of Government, Constitutional Petition No. 2 of 2006**. Therefore, it does not raise any question as to the interpretation of the Constitution because severally, the petition raises matters for enforcement of the Constitution which are merely questions of fact which can be enforced by the High Court.

The questions for constitutional interpretation as laid out in the lead judgement by Justice Madrama, JA/JCC do not challenge any law or action of government for being unconstitutional. The issue being raised by the petitioner can be addressed by the High Court in Judicial Review. If the law does not provide for discriminatory grounds in its purpose or effect, the action or inaction of the government can only be subject of an application for judicial review.

This petition therefore stands dismissed with no order as to costs.

Dated this 14<sup>th</sup> day of March 2020



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**Stephen Musota, JA/JCC**