THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

CONSTITUTIONAL PETITION NO. 43 OF 2012

1. Nampogo Robert
2. Tumwesigye Moses :::::::::::::::::::::::::::: **Petitioners**

Versus

Attorney General ::**Respondent**

Coram: **Hon. Mr. Justice Kenneth Kakuru, JA**

Hon. Lady Justice Hellen Obura, JA

Hon. Mr. Justice Stephen Musota, JA

Hon. Mr. Justice Christopher Izama Madrama, JA

Hon. Mr. Justice Remmy Kasule, Ag JA

Judgment of Remmy Kasule, Ag. JA

The two Petitioners brought this Petition seeking Orders of this Constitutional Court to nullify specific Sections of specific Statutes of the laws of Uganda by reason of being inconsistent with the Constitution. They also assert that by the Government failing to provide for payment of a Judgment debt for specific financial years, is contrary to the Constitution.

The issues arising out of the Petition are:

1. Whether **Section 2(1) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap 72, is**

inconsistent with **Articles 28(1), 126(2)(b) and (c) and 139(1)** of the Constitution.

2. Whether **Rule 11 of the Government Proceedings (Civil Procedure Rules, SI 77-1** is inconsistent with **Article 21(1)** of the Constitution.
3. Whether **Section 19(4)** of the **Government Proceedings Act, Cap 77,** is inconsistent with **Articles 139(1), 128(1)(2) and (3), 28(1) and 126(2)(b) and (c)** of the Constitution.
4. Whether the omission by Government in providing for payment of the Judgment debt for financial years 201/2012 and 2012/2013 is contrary to **Articles 155(1) and 160** of the Constitution.
5. What are the remedies available.

Background:

The Petitioners are former Police Officers of the Uganda Police Force. In 2000 both of them, as Police Officers, were arrested, detained and tortured on the orders of the then Government Minister of State for Internal Affairs.

On regaining their freedom they jointly lodged with the Uganda **Human Rights Commission complaint No. 167 of 2000** against the Government for what had happened to them. The same was determined in their favour in 2004. The Government was ordered to pay damages of shs. 17,000,000= to the first Petitioner and shs. 16,000,000= to the second Petitioner.

The Government did not pay the damages to the Petitioners. Through **High Court Miscellaneous Cause No. 48 of 2009**, the Petitioners moved the High Court to order on 13.10.2009 that

the Secretary to the Treasury and/or Attorney General immediately pay the said damages to the Petitioners. The Government paid the Petitioners some money at a slow pace through the office of the Attorney General. By 18.09.2012 when this Petition was lodged in this Court a balance of Ug. Shs. 11,000,000= remained unpaid by the Government. The Government had no budget for Court awards during the financial years of 2011/2012 and 2012/2013. The Petitioners, in order to have a solution to their plight lodged this Constitutional Petition.

Legal Representation:

Learned Counsel Kwemara Kafuzi assisted by Stella Nakamya were for the Petitioners, while Karemera George, Commissioner Civil Litigation, assisted by Moses Mugisha, State Attorney appeared for the respondent.

Learned Counsel for the Petitioners and Respondent presented their respective submissions and rejoinders by filing the same in this Court.

Submissions for the Petitioners:

Issue 1:

The Petitioners' contention is that **Section 2(1)** of the **Civil Procedure and Limitation (Miscellaneous Provisions) Act** that provides that no suit shall lie or be instituted against the Government, Local Government or Scheduled Corporation until the expiration of forty-five days after written notice has been delivered is discriminatory in nature and thus in violation of

Articles 28(1), 126(2)(b) and (c) and 139(1) of the Constitution in that it delays justice thus violating the right to a speedy trial (Articles 28(1) and 2(b) since the Statutory Notice has to be served and complied with and it limits the jurisdiction of the High Court which is unlimited (Article 139 (1).

The Petitioners rely on the authority of **Kampala City Authority vs Kabandize and 20 Others: Supreme Court Civil Appeal No. 013 of 2014** for their submission.

Issue 2:

It is the Petitioners' contention that **Rule 11 of the Government Proceedings (Civil Procedure) Rules** is inconsistent with **Article 21(1) of the Constitution** because the Rule gives the Attorney General the mandate to file a defence to a Civil Suit within 30 days while other ordinary litigants have to do so within 15 days pursuant to **Order 8 Rule 1** of the Civil Procedure Rules. Rule 11 is thus discriminatory contrary to Article 21(1) that provides that all persons are equal before the law.

The India Supreme Court authority of **Nagendra Rao & Co. vs State of A.P. Air 1994 SC 2663 RM** and the **Ireland Supreme Court authority of Byren vs Ireland & AG: [1972] IR 241** as well as the **Uganda Constitutional Court Petition No. 15 of 2006: Caroline Turyatemba & Others vs Attorney General,** are relied upon by the Petitioners to support this contention.

Issue 3:

A declaration is sought by the Petitioners to the effect that **Section 19(4)** of the **Government Proceedings Act** is unconstitutional for being inconsistent with the Constitution Articles 139(1), that vests unlimited jurisdiction in the High Court, an Article 128(1), (2) and (c) whereby Courts of law while exercising judicial power have to be independent, with no interference from anyone, and State organs and everyone else must assist in ensuring the effectiveness of the Courts, on the cause the said Section 19(4) purports to limit the unlimited jurisdiction of the High Court by preventing the High Court from enforcing its decrees by execution process against the Government contrary. Further, the same Section fetters the independence of the Judiciary by barring the High Court from issuing execution process of its decrees and also causes delay of civil trials as well as denying a successful party to a cause from accessing an appropriate remedy contrary to **Articles 28(1) and 126(2)(b) and (c)** of the Constitution.

Issue 4:

It is the case of the petitioners that the Government's failure in providing in the budget for a financial year, in this case the relevant financial years being 2011/2012 and 2012/2013, for payment of Judgment debts arising out of Judicial Court decisions, amounts to the Government acting contrary to **Articles 155(1) and 160** of the Constitution. **Article 155(1)** requires the President to lay before Parliament 15 days before commencement of the financial year, estimates of revenues and expenditures of Government for that next financial year, while

Article 160 provides that the public debt is to be charged on the consolidated fund and other public funds. The Petitioners rely on the persuasive decision of the Constitutional Court of Peru in: **The State in Fulfilment of Judgments File No. 015-2001/A1/TC EI Peruanol, February, 2004.**

Submissions for the Respondent:

Issue 1:

The respondent opposes the Petitioners' contention on the ground that the Attorney General is not an ordinary litigant due to the unique obligations vested in that office by **Article 119 (3) and (4)** of the Constitution. The Attorney General is principal adviser to the Government, gives advice and legal services to Government on any subject, draws and peruses agreements, contracts treaties and all documents to which the Government is a party, represents Government in proceedings whereby Government is a party and carries out other duties that the President may assign. Therefore, the requirement to serve a statutory notice and the statutory period set out in **Section 2 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act** are necessary to enable the Attorney General, as principal legal adviser to Government, to be well informed about the suit and to seek and obtain the necessary information so as to be able to handle the case in a most appropriate manner.

Further, it is the respondent's contention that in no way is the right to a fair hearing negatively affected to the prejudice of any party to litigation by the operation of **Section 2(1) of the Civil**

Procedure Limitation (Miscellaneous Provisions) Act. There is hearing from everyone before the Court of law comes out with any decision in a cause before it.

The respondent, invited this Court to interpret the said Section 2(1) in accordance with the decision of **Kampala Capital City Authority vs Kabandize and 20 Others, Supreme Court Civil Appeal No. 013 of 2014** and also **Constitutional Court Petition No. 15 of 2006: Caroline Turyatemba and Others vs Attorney General** as to the subject matter of "Fair hearing".

The respondent thus prayed issue 1 to be disallowed.

Issue 2:

The respondent also opposed this issue. Basing on **Section 41(5)** of the **Judicature Act**, that vests in the Rules Committee crated by Section 40 of the Judicature Act, power to make rules regulating the practice in the Courts of law by issuance of a Statutory Instrument, this Rules Committee made and issued. **The Government Proceedings (Civil Procedure) Rules, SI 77-1** of which **Rule 11** is a part. Rule 11 was enacted to enable persons wronged by the Government to access justice in Courts of law. Relying on the persuasive authority of **HCT-00-CC-MA 437-2013 (Arising from Civil Suit No. 231 of 2013) Atukwase Nickson (suing through his Attorney Arinaitwe Reuben) vs Attorney General**, the respondent invited this Court to hold that **Rule 11**, does not bar a private litigant from suing Government. It only allows the Attorney General to seek and get necessary information from the organs, entities and officials of Government it represents so as to be enabled to file a proper

defence in a suit or cause that is before a Court of law. Accordingly **Rule 11** was not inconsistent or in contravention with **Article 21(1)** or any other provision of the Constitution.

Issue 3:

The respondent's case is that **Section 19(4)** of the Government Proceedings Act does not contravene any provision of the Constitution. The Section is necessary given the manner Government expends monies from the Consolidated Fund. The Legislature, as part of Government, considers estimates as proposed by the President, the head of the Executive, for any financial year pursuant to **Article 155** of the Constitution. Monies can only be withdrawn from the consolidated fund only to meet expenditures charged on the Fund by the Constitution or by an Act of Parliament, by way of Appropriation Acts. This mandatory constitutional requirement is embedded in **Article 154** of the Constitution. It is based upon the principle of separation of powers. It is the respondent's contention that **Section 19(4)** of the **Government Proceedings Act** gives effect to **Articles 154 and 155 of the Constitution** by actualizing the constitutional principle of separation of powers amongst the three arms of State: the Executive, the Legislature and the Judiciary. The Section cannot be inconsistent, or in contravention of the Constitution once the Constitution is taken as one integral whole with no particular provision destroying the other but each part sustaining the other. The respondent relied upon **Supreme Court Constitutional Appeal No. 4 of 2016: David Welsey Tusingwire vs Attorney General** and the

persuasive authorities of **Uganda High Court Miscellaneous Application No. 4 of 2017: Bank of Uganda vs Ajanta Pharma Ltd (Madrama, J. as he then was)** and the **Kenya High Court Miscellaneous Application No. 323 of 2016: Saira Banu Gandrokhia and Another vs Principal Secretary, Ministry of Interior and Co-ordination and Attorney General** in support of the submissions.

Counsel for respondent prayed this Court as regards issue 3 to hold that the **Section 19(4) of the Government Proceedings Act** is not inconsistent or contrary to the Constitution.

Issue 4:

Counsel for respondent submitted that since the petitioner had adduced no evidence to illustrate that the respondent had not provided for payments of Court Judgment debts for the financial years stated in the issue, the same ought to be dismissed under **Rule 12 of the Constitutional Court (Petition and References) Rules, SI 91 of 2005.**

Petitioners Submissions in Rejoinder:

Counsel for Petitioners in rejoinder contended that the assertion that the respondent has a unique position which calls for being given more time to respond to an intended suit is proof that the respondent is given special treatment, not availed to other litigants. This is discriminatory and is contrary to **Article 21(1)** of the Constitution whereby all persons are equal before and under the law.

Counsel further reiterated the submission that treating the respondent on an equal footing like any other litigant will not deny the respondent of the fundamental right to be heard in any cause where the respondent is a party to that cause. Counsel prayed for the petition to be allowed.

Resolution of the Issues by Court:

Duty of Court:

The duty of this Constitutional Court is set out by **Article 137 of the Constitution.** It provides:

"137. Questions 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 a declaration to that effect, and for redress where appropriate".

A petition brought under **Article 137(3) of the Constitution** discloses a cause of action, thus imposing a duty upon this Court to interpret that provision of the Constitution the subject of the petition if the petition in its body describes the Act of Parliament,

or any other law or anything done or omitted from being done under the authority of any law, or any act or omission by any person or authority; and points out the provision of the Constitution with which the Act of Parliament or any law or the act or omission by any person or authority, is alleged to be inconsistent or to have contravened; and the petition prays for a declaration to that effect. 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 Obudra vs Attorney General**.

It is therefore the duty of this Court sitting as a Constitutional Court to determine the correct original meaning that the framers of the Constitution had in its original context, which context might have been historical, socio-economic, political, literary or of other aspect that the framers of the Constitution had in mind. From that interpretation, this Court must then identify the underlying principle of the particular part of the Constitution, the subject of the Constitution, apply it to the constitution as a whole with no particular part destroying the other, but rather with each part supporting the other.

My appreciation of the duty of this Court as the Constitutional Court to interpret the Constitution includes deciding and/or explaining the meaning of the particular provision of the Constitution being alleged to be contravened or being inconsistent with the Constitution, show the facts constituting the contravention and/or the inconsistency, and then make or decline to make the necessary declaration(s) as the case may be.

In carrying out the above duty, this Court applies a number of principles of Constitutional interpretation.

These include Supremacy of the Constitution. The Constitution is the Supreme law with binding force over every authority and persons. Any other law that is inconsistent or in contravention of the Constitution is null and void to the extent of the inconsistency. See: **Article 2(2)**: See also: **Supreme Court Presidential Election Petition No. 2 of 2006: Rtd. Dr. Col. Kiiza Besigye vs Y.K. Museveni.**

Both purpose and effect of a legislation alleged to be in contravention or inconsistent with the Constitution must be considered in determining its constitutionality: See: **Supreme Court Constitutional Appeal No. 4 of 2016: David Welsey Tusingwire v Attorney General.** See also: **Attorney General (Tanzania) v Rev. Christopher Mtikila [2010] EA 13.**

The language of the Constitution has to be given its primary, natural and ordinary meaning and sense. The words of the Constitution that are clear and unambiguous have to be given their plain, ordinary and/or natural meaning and sense and be so construed.

Where the language of the Constitution or any other statute being interpreted vis-à-vis the Constitution is imprecise or ambiguous, then a general and/or purposeful interpretation should be given to it. See: **Supreme Court Constitutional Appeal No. 1 of 1997: Attorney General vs Major David Tinyefuza.**

Where a fundamental human right is embedded in a Constitutional provision, then that provision of the Constitution is taken as being permanent catering for all times to come and has

to be given a dynamic, progressive, broad, liberal and flexible interpretation, taking cognisance of the ideals of the people in their social, economic, political and cultural values thus extending its benefits to all the people. See: **Okello John Livingstone and 60 others vs Attorney General and Another: Constitutional Petition No. 1 of 2005.** See also **Attorney General vs Uganda Law Society: Supreme Court Constitutional Appeal No. 1 of 2006**.

The history of the country, including the legislative history of the Constitution as well as the National Objective and Directive principles of State Policy are all relevant and useful guides in interpreting the Constitution.

The Constitution has to serve the past, the present and the yet unborn generations. A Court interpreting the Constitution, as well as other Courts of law, have to breathe life into the Constitution so as to ensure there is growth of constitutionalism. It is the primary duty of this Constitutional Court to interpret, and for other Courts to apply the Constitution, so as to make it grow and develop in order to meet the just demands and aspirations of the people of Uganda and elsewhere in their governance based on concepts of human dignity.

The Constitution must be interpreted and applied so as to serve permanently, while at the same time accommodating, absolving and solving new changes and challenges in the country and in the whole world without derogating from the noble goals and intent of the original framers of the Constitution. It has always to be appreciated that:

"A Constitution must be capable of growth and development over time to meet the social, political and historical realities often unimagined by its framers .....": See: **Hunter vs Southern Inc [27].** See also: **Unity Dow V Attorney General of Botswana [1992] LRC (Const) 623.**

I shall be conscious of the above principles as I resolve the issues in this Constitutional Petition.

Issue 1:

This is whether **Section 2(1)** of the **Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap 72** is inconsistent with **Articles 28(1), 126(2)(b)** and **139(1) of the Constitution.**

Section 2(1) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act provides that, notwithstanding the provisions of any other written law, no suit shall lie or be instituted against the Government, local authority or scheduled corporation unless and until forty five days have expired from the day the written Notice, of the format prescribed in the schedule of the Act, had been delivered to the Attorney General in case of Government, Chief Administration Officer in case of a Local Government, Town Clerk in case of a Municipal Council and a Corporation Secretary in case of a Scheduled Corporation.

The **Supreme Court in Civil Appeal No. 013 of 2014: Kampala Capital City Authority vs Kabandize and 20 Others (Judgment of Mwangusya, JSC to which the other Justices concurred)** interpreted **Section 2(1) of CAP 72** as being not contrary to the

Constitution because the word ***"shall"*** in that Section was according, Their Lordships, directory and/or regulatory and not mandatory. Thus, according to this decision, failure to issue or serve a Statutory Notice of forty-five days before lodging the suit would not render illegal the suit instituted.

The **Kampala Capital City Authority vs Kabandize and 20 Others (Supra)**, though a Supreme Court decision, was not an appeal in a Constitutional matter whereby the constitutionality of **2(1) of Cap 72** was at issue. It was an ordinary Civil Appeal. The Court authority therefore cannot be taken as one that Constitutionally interpreted the subject matter at hand.

However in the Constitutional Petition, the subject matter of this Judgment, this Court as the Constitutional Court is being called upon to resolve as a matter of interpretation of the Constitution whether or not **Section 2(1)** of the Act, Cap 72 is in compliance with the 1995 Constitution. This Act, was enacted in 1969 and therefore was in existence before the 1995 Constitution was adopted. Accordingly, pursuant to **Article 274** of the Constitution, **Section 2(1)** of the **Act, Cap 72**, has to be construed with such modifications, adaptations qualifications and exceptions as may be necessary to bring it into conformity with the 1995 Constitution.

By providing that in case of failure to give the forty five days written notice to Government, Local Government or scheduled Corporation.

"Notwithstanding the provisions of any other written law, no suit shall lie or be instituted ....."

Section 2(1) of Cap 72 abolishes, deprives, suffocates and stifles the cause of action that one may legitimately have had against the Government, Local Government or Scheduled Corporation. Yet the same cause of action would remain unaffected if it is being pursued against another entity that is not Government, Local Government or Scheduled Corporation. This is grossly discriminatory. The Supreme Court in **Kampala Capital City Authority vs Kabandize and 20 Others (Supra)** does not explain how this aspect of the section would be interpreted to be merely directory and/or regulatory, when its effect is to destroy the whole cause of action, a legitimate litigant may have had against a Government, Local Government or Scheduled Corporation.

As a Constitutional Court, pursuant to **Article 137(1), (3)(a) and (b) of the Constitution,** and being guided by the **Preamble, the National Objective and Directive Principles of State Policy of the Constitution**, particularly;

(i) *the principle of equality to which Ugandans are committed in the preamble, and*

(ii) *the national objective and Directive Principle of State Policy III(IV) of establishing and nurturing institutions and procedures for the resolution of conflicts fairly and peacefully of the Constitution, finds that Section 2(1) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap 72 is inconsistent and/or contrary to the Constitution in a number of respects.*

Under Article 2, the Constitution is the Supreme law with binding force on all authorities and persons in Uganda. Any other law that is inconsistent with any provision of the Constitution shall be void to the extent of the inconsistency. It follows therefore that the words in Section 2(1) of the Act that: *"notwithstanding the provisions of any other written law ....."* are null and void in the said Section by reason of purporting to override **Article 2(1) and (2) of the Constitution**.

Article 21 of the Constitution provides for equality of all people before and under the law in all spheres, political, economic, social and cultural or in any other aspects. All persons have to enjoy equal protection of the law.

To discriminate is to give different treatment to different persons on various grounds including social standing.

Section 2(1) of Act 27 discriminates between the categories of ordinary litigants and those of Government, Local government and Scheduled Corporations. In respect of the latter, a suit does not exist against them if there is no forty five days notice first served upon them. The claimant loses the cause of action. Even where the forty five days notice is served, the suit has to be pursued within a stated period different from that which applies to other ordinary litigants. There is therefore discrimination of the application and protection of the law brought about by **Section 2(1) of Act 27** between the ordinary litigants and Government, Local Governments and Scheduled Corporations. Accordingly **Section 2(1)** and the whole **Act 27** is contrary to **Article 21(1)(2) and (4)(b) and (c) of the Constitution.**

Article 28(1) of the Constitution entitles one to a fair, speedy and public hearing before an independent and impartial Court or tribunal established by law in the determination of one's civil rights and obligations.

The basis of a fair trial is the treating of the litigants equally according to the law. Every litigant to a cause ought to be given an opportunity to be heard before resolving the dispute that has brought that litigant to Court.

Section 2(1) of Act 27 and, the whole Act, destroys the element of fairness when it discriminates amongst litigants by having Government, Local Governments and Scheduled Corporations not to be sueable unless and until a forty-five days statutory notice has been served upon them and to destroy the whole cause of action in case of a suit filed against any one of them where such a notice has not first been served. Yet these requirements are not applicable to ordinary litigants. This is in contravention of **Article 28(1) of the Constitution.**

Article 44(c) of the Constitution that makes the right to a fair hearing to be non derogable is also violated by **Section 2(1) of Cap 27** by reason of the Section being contrary to **Article 28(1) of the Constitution.**

By purporting that, notwithstanding any provision of any other written law no suit shall lie or be instituted against the Government, Local Authority or Scheduled Corporation, without first serving the written statutory notice of forty-five days, **Section 2(1) of Cap 27** violates **Article 50 of the Constitution** whereby one claiming that a fundamental right or freedom guaranteed

under the Constitution has been infringed or threatened is entitled to apply to a competent Court for redress, which may include compensation.

It is a fact that litigation in Courts of law in Uganda involves, in the main, determination of fundamental and other rights and freedoms, much of them guaranteed under the Constitution. **Article 139 of the Constitution** vests in the High Court with unlimited original jurisdiction in all matters, subject only to the Constitution.

Section 2(1) of Cap 27, therefore contravenes **Articles 50 and 139(1)** by purporting to bar litigants from taking their suits to the Court, if they have not first served the statutory forty-five days notice against the Government, Local Authority or Scheduled Corporation, out of all the other ordinary litigants. The Section further violates both **Articles 50 and 139(1)** of the Constitution by purporting to extinguish the cause of action selectively against the Government, Local Authority or Scheduled Corporation sued without first having been served with the forty-five days statutory notice.

It has to be appreciated that under **Article 126(1)** of the Constitution, Judicial power is derived from the people of Uganda and is exercised by the Courts in the name of those people and in conformity with law, their values, norms and aspirations.

The adjudication of cases by the Courts is based upon the principles of justice being done to all, irrespective of social or economic status, justice must not be delayed, victims of wrongs have to be awarded adequate compensation, reconciliation is to be

promoted between litigants and substantive justice, and justice is to be administered without undue regard to technicalities pursuant to **Article 126(2)** of the Constitution.

Having carefully considered the stated Articles of the Constitution vis-à-vis **Section 2(1) of Cap 72**, as a Court interpreting the Constitution, I come to the conclusion that the said **Section 2(1)** is contrary to and is inconsistent with the Constitution in the Articles herein stated above. Issue 1 of this Petition is accordingly so resolved.

Issue 2:

Issue 2 is whether **Rule 11 of the Government Proceedings (Civil Procedure) Rules** is inconsistent with **Article 21(1) of the Constitution.**

The **Government Proceedings (Civil Procedure) Rules SI 77-1** are enacted pursuant to **Section 41 of the Judicature Act** and **Section 25 of the Government Proceedings Act, Cap. 77**. The Government Proceedings (Civil Procedure) Rules are applied with the Principal Rules, which are the Civil Procedure Rules made by the Rules Committee to regulate the procedure of Court.

Rule 11 of the **Government Proceedings (Civil Procedure Rules),** provides:

> *"11. Time for filing defence:*
>
> *In the case of Civil Proceedings against the Government, Rule 1 of Order VIII of the principal Rules shall have effect as the words "thirty days" were substituted for the words "fifteen days" which occur in that Rule".*

Order VIII Rule 1 of the Civil Procedure Rules states:

"Order VIII- Defence and Counter-claim.

1. Written Statement

(1) The defendant may, and if so required by the Court at the time of issue of the summons or at any time thereafter shall, at or before the first hearing or within such time as the Court may prescribe, file his or her defence.

(2) Where a defendant has been served with a summons in the form provided by Rule 1(1)(a) of Order V of these Rules, he or she shall, unless some other or further order is made by the Court, file his or her defence within fifteen days after service of the summons".

The Petitioners assert that by **Rule 11 of the Government Proceedings (Civil Procedure) Rules** giving the Government the mandate to file a defence within thirty days, yet other litigants who are defendants are given only fifteen days by **Order 8 Rules 1(1) and (2)** of the **Civil Procedure Rules,** this is discrimination, contrary to and inconsistent with **Article 21(1)** of the Constitution.

The respondent, opposing the assertion of the Petitioners, contended that all the Rules in contention were made by the Rules Committee of the Judiciary pursuant to **Section 41(5)** of the **Judicature Act, Section 26(2)** of the **Government Proceedings Act** and also under the Civil Procedure Act, Cap. 71. Rule 11 is to enable those wronged by Government to access justice in Courts of law pursuant to **Section 26(2)** of the **Government Proceedings Act, Cap 77**, and **Article 250(1) of the Constitution**.

That the Government is given thirty days within which to file a defence, this is done in the public interest so as to ensure that the Government and Government entities have an opportunity to defend themselves against claims that have to be satisfied out of public revenue from the Government Consolidated Fund.

In resolving this issue, it is taken as a fact that the state of the law as of now is that **Rule 11 of the Government Proceedings (Civil Procedure) Rules,** entitles the Attorney General representing Government as defendant, to file a defence within thirty days, while **Order 8 Rule 1(1) and (2)** only allow an ordinary defendant to a suit to file a defence within fifteen days only. There is therefore inequality in the treatment of the Attorney General as defendant and any other ordinary litigant also as defendant to a cause.

Article 21(1) of the Constitution provides for equality of all persons before and under the law. The law must treat everyone the same way in terms of rights. Discrimination, which is the giving of different treatment to different persons, on the basis of sex, race, colour, ethnic origin, tribe, birth, religion, social and/or economic standing, political opinion or disability is expressly prohibited by **Article 21(2)** of the Constitution.

Unequal treatment before and under the law erodes the fundamental non derogable right to a fair hearing under **Articles 28(1) and 44 of the Constitution.** Under **Article 43(1) and (2) of the Constitution,** in the enjoyment of this right, amongst others, one ought not prejudice the fundamental or other human rights and freedoms of others or the public interest. Public interest does not permit any limitation of the enjoyment of such right and

freedom beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided for in the Constitution.

There are principles that determine whether a limitation on a fundamental right or freedom is justified in a free and democratic society. The limitation must be for the respect of the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity and faith in social and political institutions that enhance the participation of individuals and groups in society.

The onus to prove that a limit on a guaranteed right or freedom is reasonable and demonstrably justified in a free and democratic society is upon the party seeking to uphold the limitation. See: **The Queen V Oakes [1987] LRC 477.**

It is therefore the Uganda Attorney General to justify that **Rule 11 of the Government Proceedings (Civil Procedure) Rules** is reasonable and demonstrably justified in a free and democratic society by reason of the principles herein already stated above. See: **Charles Onyango Obbo & Andrew Mujuni Mwenda vs Attorney General: Constitutional Appeal No. 2 of 2002.**

In **HCT-00-CC-MA-437-2013 (Arising from HCCS NO. 231 of 2013) Atukwase Nickson (suing through his lawful Attorney Arinaitwe Reuben) vs Attorney General,** a High Court decision that is not binding upon this Court, the High Court (Wangutusi, J.) appreciated the said **Rule 11** as giving equal opportunity to two litigating parties to be heard on the same plane. The learned Judge

reasoned that the Attorney General when sued, has to trace responsible persons across the whole country in the departments and offices of Government so as to get the necessary information to file a defence in the suit, which is not the case with an ordinary litigant who has immediate knowledge of how the dispute arose. Since the Attorney General is protecting properties and interests of ordinary citizens, who are innocent of what has happened, public good demands that the Attorney General be given ample opportunity to file the defences so that everyone has equal opportunity of being heard. According to the learned Judge The Rules Committees found it necessary to have disparity in time spans for the promotion of fairness so that the *"equality of outcome"* is the same between the Attorney General and the ordinary litigant. Accordingly His Lordship of the High Court held **Rule 11** not to be discriminatory.

With the greatest respect, I am unable to agree with the above High Court decision of His Lordship. Ordinary litigants, both individuals and companies, who are sued, may also have to contact other people all over the country, who may be their employees or otherwise, for necessary information and material to make defences to the suits brought against them. Transporters, banks and/or communication companies like MTN, Airtel are under this category. It is also a fact that a suit against the Government may involve officers and materials just in one department or entity of the Government where the suit is instituted and there is no need at all to carry out inquires and contacts all over the country. For example, a suit against Government involving Mulago National Referral Hospital, lodged in the High

Court at Kampala, will most likely have all the personnel and materials necessary for a defence to that suit all stationed and kept at Mulago Hospital a few kilometres from the High Court at Kampala. There is no logical explanation in that case why the Attorney General is given thirty days within which to file a defence to that suit, and any other litigant, is restricted to fifteen days.

At any rate, under **Section 96 of the Civil Procedure Act** and **Order 51 Rule 6 of the Civil Procedure Rules,** and also under the exercise of discretion by a Court of law, a party to a suit who has a genuine reason for having failed to take a step in a suit, may apply to Court for extension of time within which the necessary action can be taken. There is therefore no justification why the Attorney General should be treated differently from other litigants when it comes to filing a defence in the suit.

I, accordingly find that the **High Court decision in HCT-00-CC-MA-437-2013: Atukwase Nickson vs Attonery General (Supra)** that **Rule 11 of the Government Proceedings (Civil Procedure) Rules** is not discriminatory, to have been arrived at without a proper appreciation of the facts and the law. I reject the decision as being persuasive to this Court on that issue.

I am enforced in this by the decision of this Court in **Rwanyarare and Others V Attorney General [2003] 2 EA 664 at 669 para d-e** that:

> *"That argument [whether an injunction can issue against the government] cannot hold under the present Constitution when judicial power is derived from the people and is exercised by Courts in the name of people.*

There is no sound reason under the Constitution why government should be given preferential treatment at the expense of an ordinary citizen".

I find that there is no justification for the discrimination and inequality in the law whereby the Attorney General is given 30 days within which to file a written statement of defence in a suit, while the other ordinary litigants are given only 15 days. This is not demonstrably justifiable in a free and democratic society. I answer issue 2 in the affirmative.

Issue 3:

Whether **Section 19(4)** of the **Government Proceedings Act** is inconsistent with **Articles 139(1), 128(1), (2) and (3), 28(1)** and **126(2)(b) and (c) of the Constitution**.

Section 19 of the Government Proceedings Act provides for satisfaction of Court Orders against the Government. It is to the effect that where in any civil proceedings by or against the Government any order is made by Court in favour of any person against the Government, or its department or officer of Government, the proper officer of the Court, on an application by the person or on behalf of that person in whose favour the order has been made by Court, at any time after the expiration of 21 days from the date of the order or, in case costs are awarded, any time after the taxation of such costs, whichever is the later, issue to that person a certificate containing the particulars of the Court Order, with a copy thereof, to the Attorney General.

If the order provides for payment of any money, the amount shall be stated in the certificate, and on the same being presented to the

Treasury Officer of Accounts or other Government Accounting Officer, shall pay the money so stated in the certificate to the person to whom the certificate has been issued.

Subsection 4 to Section 19, the subject of this Constitutional Petition, provides:

> ***"19.***
>
> ***(4) Except as is provided in the Section, no execution or attachment or process in the nature of an execution or attachment shall be issued out of any Court for enforcing payment by the Government of any such money or costs as are referred to in this Section, and no person shall be individually liable under any order for payment by the Government, or any Government department or any officer of the Government as such, of such money or costs".***

The exact meaning, import and extent of **Section 19(4) of the Government Proceedings Act** can best be appreciated when **Section 38 of the Civil Procedure Act Cap 71** is also considered.

It provides:

> ***"38. Powers of Court to Enforce Execution:***
>
> ***Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree holder, order the execution of the decree.....***
>
> ***(a) by delivery of any property specifically decreed;***
> ***(b) by attachment and sale, of any property;***

(c) by attachment of debts;

(d) by arrest and detention in prison of any person;

(e) by appointing a receiver; or

(f) in such other manner as the nature of the relief granted require".

It is to be appreciated that **Section 19(4) of the Government Proceedings Act** restricts itself to:

"Except as is provided in this Section, no execution or attachment or process in the nature of an execution or attachment shall be issued out of any Court for enforcing payment by the Government of any such money or costs as are referred to in this Section .....".

It follows therefore that execution against Government, a Department of Government or officer of Government, that does not involve *"enforcing payment by the Government of any such money or costs"* can be carried out by the Court of law under the powers vested in the Courts by **Section 38 of the Civil Procedure Act**.

It would thus be unconstitutional to regard and apply **Section 19(4) of the Government Proceedings Act** as the only law providing for the enforcement of Court orders against the Government including those that are not for *"enforcing payment by the Government of any such money or costs .....".*

The framers of the 1995 Constitution never intended to make Courts of law act or even appear to act in vain. This Court must therefore interpret the Constitution and the laws under the Constitution in such a way that the Government or any Department of Government or any officer of Government or any other Government authority or person does not make the Courts act or appear to be act in vain.

That is why **National Objective and Directive Principle of State Policy No. 111(iv) on National Unity and Stability** provides that:

"There shall be established and nurtured institutions and procedures for the resolution of conflicts fairly and peacefully".

Article 126 of the Constitution provides for the: **Exercise of Judicial Power** by Courts of law:

Judicial power is derived from the people and Courts of law exercise that power in the name of the people and in conformity with law, the values, norms and aspirations of the people, applying the principles of doing justice to all, irrespective of social or economic status, justice not being delayed, victims of wrongs being adequately compensated, reconciliation promoted and substantive justice, not based on technicalities, being administered.

The Courts of law carry-out the duty of adjudication of causes by being constitutionally protected to be independent and not being subjected to any control or direction of any one. As to the enforcement of decisions adjudicated upon by the Courts of law, Article 128(3) of the Constitution makes it a Constitution obligation that:

"All organs and agencies of the State shall accord to the Courts such assistance as may be required to ensure the effectiveness of the Courts".

Compliance by the Government to decisions of Courts of law is fundamental to democratic governance based on the Rule of Law. A central tenet of the rule of law is that no person is above the law. Respect for the authority of the Court and their effectiveness to grant remedies are the basic components of the rule of law and democratic governance. Everyone regardless of any status, social,

economic, political, sexual or otherwise is subject to the law. Respect for the rule of law would be grossly eroded were Courts to permit any Government official to tell the litigant, who has successfully sued the State in a Court action, that the State does not value Court Orders. Such a Government official must be severely subjected by the Court to an order for contempt. See: **Mangwiro V Minister of Justice and Legal Affairs (N.O) and Others HH-172-17 and CCZ: a decision of South Africa.** In Nigeria, it has been pronounced by the Court that the execution or enforcement of a Judgment of the Court must be taken seriously as it is an essential aspect of the administration of justice where the rule of law thrives: See: **Yaro vs Arewa Construction Ltd [1989] 7 NWLR 558.**

Article 119(3)(4) and (5) of the Constitution provides that the Attorney General shall be the principal legal adviser of the Government giving legal advice and legal services on any subject, draw and peruse contracts, agreements, treaties, conventions and other documents to which the Government is a party, and represents the Government in Courts of law. Under **Article 250** of the Constitution one with a claim against the Government may enforce it as a right by proceedings against the Government instituted against the Attorney General upon whom all documents and Court processes of the claim shall be served.

The Attorney General therefore has the Constitutional duty to ensure that decisions of Courts of law calling for compliance by the Government are promptly and strictly complied with by the Government

It follows therefore that when it comes to enforcing any Judgment against the Government under **Section 19 of the Government Proceedings Act,** the Attorney General and the responsible accounting officer of Government on being served with a certificate issued by the Court containing the particulars of the order/Judgment of Court to be enforced, ought to comply with that order, unless the Attorney General, as the legal Counsel and representative of the Government, obtains an order from the Court determining the cause, stopping compliance. It is up to those managing the affairs of Government to ensure that at any time, there are, within the budgetary provisions of Government, funds to satisfy Courts decisions so that at no time, the Government is not made to appear as disobeying such orders when Courts of law make them.

Subject to the above, I find that **Section 19(4) of the Government Proceedings Act**, is not contrary to the Constitution. This is because **Article 153** of the Constitution provides that all Revenues of Government are to be paid to the Consolidated Fund, except where the Legislature dictates otherwise. Any funds to be withdrawn from the Consolidated Fund must be authorized by the Legislature through Appropriation Acts of Parliament pursuant to **Article 154 of the Constitution**.

Payments in satisfaction of Court decisions must therefore be in compliance with **Articles 153 and 154** of the Constitution. They have to be covered under the Government budget, that is the Government plan of revenue and expenditure for a financial year.

The requirement of **Section 19 of the Government Proceedings Act** to have such payments being demanded of the Treasury officer of Accounts or such other Government accounting officers is for them to ensure that under the Dinancial Management of and by the Government, provision of such funds is catered for in any particular financial year. The system of management of funds of Government is constitutional based on the stated **Articles 153 and 154 of the Constitution** and other enabling laws such as the **Public Finance Management Act, 2015**. See also: the persuasive decision of **Bank of Uganda vs Ajanta Pharma Limited and Attorney General: High Court at Kampala Miscellaneous Application No. 601 of 2017** arising from **Arbitration Cause No. 3 of 2016 (Original CAD 22 of 2011).**

I accordingly find that **Section 19(4), of the Government Proceedings Act, Cap 77,** is to facilitate the management process of the funds of Government in compliance with the Constitution. The same is accordingly not inconsistent with **Articles 139(1), 128(1)(2) and (c) of the Constitution.** Issue 3 is so resolved.

Issue 4:

Under this issue the Petitioners contend that the Government omitted to make provision for payment of the Judgment debt for the Financial years 2011/2012, 2012/2013 and that this is contrary **to Articles 155(1) and 160 of the Constitution.**

The basis of the contention of the Petitioners is the fact that there are many Judgment creditors in possession of Court decisions requiring the Government to pay them money by way of damages

or contractual claims or otherwise, who have waited for years without the Government satisfying their Judgments. Some of the awards that are unsatisfied include those made by the Uganda Human Rights Commission.

The Petitioners however availed to this Court no credible evidence that no budgetary provisions were made to satisfy Court awards for the financial years 2011/2012 and 2012/2013, or even before or after those years. It is very possible that provision was made for satisfaction of these awards under the overall budgetary provisions of the various Government Ministries, departments and other entities, and the funds were so managed or mismanaged that those entitled to be paid in satisfaction of the Court awards were not paid.

In the absence of more plausible evidence, this Court had no basis to make the Constitutional declaration prayed for. Issue 4 is so resolved.

In conclusion I make the following declarations:

1. **Section 2(1) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act** is inconsistent with **Articles 28(1), 126(2)(b) and (c) and 139(1) of the Constitution.**
2. **Rule 11 of the Government Proceedings (Civil Procedure) Rules** is inconsistent with **Article 2191) of the Constitution**.
3. **Section 19(4) of the Government Proceedings Act** is consistent with the Constitution.
4. The Petitioners have not proved that Government omitted to provide for payment of the Judgment debt for the financial

years 2011/2012 and 2012/2013 and as such it is not proved that Government contravened **Articles 155(1) and 160 of the Constitution.**

The result of resolution of this Petition is that the Petitioners have been successful on issues 1 and 2 and have been unsuccessful on issues 3 and 4.

As to costs, the Petitioners have been successful on the substantive issues 1 and 2 and had also to resort to this litigation by reason of the apparent contempt that the Government officers exhibited to them when they sought satisfaction by the Government of the decision of the Uganda Human Rights Commission that awarded them damages and the Government officers appeared to resist such satisfaction by refusing to pay the damages awarded to the Petitioners. It is only fair that the Petitioners are awarded substantial costs of this Petition. I accordingly award 2/3 of the costs of this Petition to the Petitioners

Dated this ..... **day** of ..... **2021.**

.....

Remmy Kasule

Ag. Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Kakuru, Obura, Musota, Madrama & Kasule, JJCC)

CONSTITUTIONAL PETITION NO. 43 OF 2012

1. **NAMPOGO ROBERT}**
2. **TUMWESIGYE MOSES:::PETITIONERS**

VERSUS

ATTORNEY GENERAL:::RESPONDENT

JUDGMENT OF HELLEN OBURA, JA/JCC

I have had the opportunity to read in draft the judgment of my learned brother, Hon. Justice Stephen Musota In the above Constitutional Petition. I agree with his findings and conclusions on issues 1, 3 and 4 with nothing useful to add. However, I have another view as regards issue 2 for the reasons stated below.

The background of this petition has been well set out by my learned brother and there is no need for me to repeat them here. I will therefore straight away proceed to deal with issue 2 which is framed thus; **Whether Rule 11 of the Government Proceedings (Civil Procedures) Rules is inconsistent with Article 21 (1) of the Constitution.**

The petitioners averred in paragraph 1 (b) of the petition that;

> *"Rule 11 Government Proceedings (Civil Procedures) Rules for providing that where the Attorney General is the defendant, he or she is entitled to file a defence within 30 days, when O. VIII r.1 CPR requires every defendant to file a defence within 15 days, is inconsistent with the Constitution in Art 21 (1) which provides that all persons are equal before and under the law."*

In paragraphs 17 and 18 of the affidavit in support of the petition deposed by the 1st petitioner, it was averred as follows;

17. "That r.11 Government Proceedings (Civil Procedures) Rules provides that the Attorney General is entitled to 30 days to file a defence whereas other litigants are entitled to only 15 days."

18. "That r.11 aforesaid is discriminatory contrary to Art. 21 (1) of the Constitution which outlaws discrimination."

In their written submissions on this issue, counsel for the petitioners argued that section 21 (1) of the Constitution provides that all persons are equal before the law but rule 11 of the Government Proceedings (Civil Procedures) Rules (hereinafter referred to as rule 11) gives the Attorney General 30 days within which to file a defence yet other defendants are given 15 days under Order VIII of the (Civil Procedure Rules (CPR). They contended that this amounts to discrimination among litigants. Counsel supported their submission with the decision in the Indian case of ***Nagendra Rao & Co. vs State of A.P AIR 1994 SC 2663 RM***, where Sahai J in paragraph 24 of his judgment stated that;

> *"No legal or political system today can place the state above the law as it is unjust and unfair for a citizen to be deprived of his property illegally by the negligent acts of officers of the state without any remedy. The modern social thinking of progressive societies and the judicial approach is to do away with archaic state protection and place the state or the government at par with any other juristic legal entity."*

Counsel also cited the decision of the Supreme of Ireland as per Walsh J in ***Byrne vs Ireland & AG [1972] IR 241 at 281*** and the decision in ***Caroline Turyatemba & Ors vs AG: Constitutional Petition No. 15 of 2006***, where this Court held that; *"the prohibition against discriminatory conduct is based upon the universal principle of equality before the law."* They then submitted that the Constitution provides for equality of all persons before 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. Counsel added that Article 126 (2) (b) & (c) of the Constitution enjoins courts to administer justice to all irrespective of their social or economic status and not to delay justice. They concluded that rule 11 gives Attorney general special treatment thus being discriminatory which is inconsistent with Article 21 (1) of the Constitution.

The respondent's answer to the petition and the affidavit in support did not address the averments in the petition and the affidavit in support as relate to rule 11. Be that as it may, counsel for the respondent in their written submissions addressed this issue. They supported their submissions with Articles 21 (4) (a) & (b) and 250 (1) & (3) of the Constitution, section 26 (2) (a) of the Government Proceedings Act, sections 40 and 41 of the Judicature Act Cap 33; ***Constitutional Appeal No. 3 of 2011: Bukenya Church Ambrose vs Attorney General and High Court MA No. 437 of 2013 (Arising from Civil Suit No. 231 of 2013) Atukwase Nickson (Suing through his lawful Attorney Arinaitwe Reuben) vs Attorney General.***

Counsel submitted that rule 11 does not bar a private litigant from bringing a civil suit against government but only allows Attorney General to seek instructions from government ministries, departments and agencies it represents to enable it file a defence. They argued that unlike ordinary litigants, when a suit is filed against Attorney General, the responsible entity/officer wherever they are found across the country must be traced and the circumstances that gave rise to the claim inquired into together with a search for potential witnesses must be carried out.

Therefore, counsel concluded that the thirty-day notice period is in the public interest to ensure that the government entities are given opportunity to defend themselves given the unique position especially considering that the stakes involve financial implications on the consolidated funds of Uganda. Counsel prayed that this Court finds that rule 11 is not inconsistent with or in contravention of Article 21 (1) of the Constitution.

As I proceed to address this issue, I do appreciate the history of Attorney General's chambers and its enormous responsibility as elaborately set out in the judgment of my learned brother. It is an established principle that a petitioner who alleges that his right has been affected must demonstrate a prima facie case that his rights is affected and the onus would shift to the person raising limitation to show that such limitation is justifiable in a free and democratic society. In ***Regina vs Oakes, 26 DLR (4th) 201*** the Supreme Court of Canada at page 225 held;

"The onus of proving that a limit on a right or freedom guaranteed by the charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of S.I (Equivalent to our article 43 of the Constitution) that the limit on the rights and freedoms enumerated in the charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking S.I can bring itself within the exception criteria, which justify their being limited. This is further substantiated by the use of the word "demonstrably" which indicate that the onus of justification is on the party seeking to limit."

Counsel for the respondent justified the special treatment given to Attorney General under rule 11 by their above arguments especially that the government ministries, departments and agencies that Attorney General serve are spread across the country and so, unlike ordinary litigants, when a suit is filed against Attorney General, the responsible entity/officer wherever they are found across the country must be traced and the circumstances that gave rise to the claim inquired into together with a search for potential witnesses must be carried out. It is a very convincing argument.

However, I wish to point out that unlike in the past when the office of Attorney General was centralised and it had to reach all the far ends of the country from the centre, there are now fully fledged regional offices set up to take services nearer to each of the other four regions of the country. It is my view that it is now easier for the regional offices to seek instructions from government ministries, departments and agencies in their respective regions to enable them file a defence within the 15 days prescribed under Order VIII of the CPR.

In any event, the forty five-day statutory notice required to be given to Attorney General under section 2 (1) of the Civil Procedure & Limitation (Miscellaneous Provisions) Rules prior to filing a suit, in my view, gives the chambers of Attorney General ample time to investigate a claim and prepare a possible defence in the event that the matter is not settled upon receipt of the notice.

For that reason, I do not find the special treatment given to Attorney General by rule 11 over other litigants justifiable in a free and democratic society. The circumstances that justified the inclusion of rule 11 in the Government Proceedings (Civil Procedures) Rules have since changed by the establishment of regional Attorney General's offices as explained above.

I must observe that many of the average defendants who live in remote parts of this country also face enormous challenges of accessing counsel to assist them file a defence within the 15 days given under Order VIII of the CPR. But they still have to comply with that provision in those difficult circumstances. I believe Attorney General will also manage if the ground is levelled.

I would therefore, with due respect, depart from the decision of my learned brother on issue 2 and instead find that rule 11 of the Civil Procedure & Limitation (Miscellaneous Provisions) Rules is discriminatory and as such declare that it is inconsistent with and contravenes Article 21 (1) which provides for equality for all under the law.

I would allow the petition on this ground with an order that the respondent pays a quarter of the taxed costs to the petitioner.

Otherwise, I agree with the orders proposed by my learned brother on the rest of the issues.

Dated at **Kampala** this.....9th.....day of.....Feb.....2020

.....

Hellen Obura

JUSTICE OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 43 OF 2012

NAMPOGO ROBERT

TUMWESIGYE MOSES ..... 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

The background to this petition has been ably set out by my learned brother Musota, JA I have no reason to repeat it here.

He has also set out the representations, the issues, submissions of Counsel and the general principles of Constitutional Interpretation. I have found it unnecessary to repeat them.

I will therefore proceed to determine the issues before me.

Issue 1:-

1. *Whether Section 2 (1) of the Civil Procedure Act Limitation (Miscellaneous Provisions Act) CAP 72 is inconsistent with Article 28 (1), 126 (2) (b) & (c) and 139 (1) of the Constitution.*

The impugned Section of the law set out above stipulates as follows:-

2. *Notice prior to suing.*

(1) After the coming into force of this Act, notwithstanding the provisions of any other written law, no suit shall lie or be instituted against—

(a) the Government;

(b) a local authority; or

(c) a scheduled corporation, until the expiration of forty-five days after written notice has been delivered to or left at the office of the person specified in the First Schedule to this Act, stating the name, description and place of residence of the intending plaintiff, the name of the court in which it is intended the suit be instituted, the facts constituting the cause of action and when it arose, the relief that will be claimed and, so far as the circumstances admit, the value of the subject matter of the intended suit.

I must confess that I have not been able to discern from the background of this petition and from the pleadings as a whole, the relevancy of this issue to the facts upon which the petition is premised. It appears from the petition and the accompanying affidavit, that this issue is unrelated to facts before us.

It appears to be a standalone challenge on the constitutionality of the impugned Section of the Civil Procedural Act Limitation (Miscellaneous Provisions) Act (CAP 72), by public spirited litigants frustrated by the entire process of seeking legal redress against government.

Be that as it may, I am satisfied that it is within the right as citizen of this Country to raise the issue set out above.

As far as I understand the law, Section 21(1) of the Civil Procedural Act Limitation (Miscellaneous Provisions) Act is not applicable to proceedings brought to enforce fundamental rights and freedoms under Chapter Four of the Constitution as alleged by the petitioners in paragraph 14 of the affidavit of Nampogo Robert the 1st petitioner, which states as follows:-

14. That my counsel Rwakafuuzi believes that this section was meant to be limited to only suits in tort and contract but the section has in practice been applied to all claims including redress for statutory

and constitutional breaches including breaches of the bill of rights, with the resultant unconstitutional effect.

This question was determined in *Dr. JW Rwanyarare and 2 others vs Attorney General, High Court Miscellaneous Application No. 85 of 1993.* This was before the coming into force of the 1995 Constitution. The principle set therein has been applied in all cases brought to enforce fundamental Rights and Freedoms enshrined under Chapter Four of the Constitution.

The argument that a litigant proceeding under Article 50 of the Constitution for enforcement of rights and freedoms enshrined under Chapter Four thereof is required to comply with Section 2 of the Civil Procedural and Limitations (Miscellaneous Provisions) Act is misconceived.

I have not found it necessary to reproduce excerpts of the *Rwanyarare case* (supra) suffice it to say, it sets out correctly the position of the law and I adopt it in its entirety. Although it related to the Article 22 of 1967 Constitution the principles of law set out herein are equally applicable to Article 50 of the 1995 Constitution, the two are in *pari materia.*

Any person seeking to enforce fundamental human rights and freedoms enshrined in the bill of rights is at liberty to do so under Article 50 of the Constitution. The procedure for bringing such action was governed by the fundamental Human Rights and Freedoms (Enforcement Procedure) Rules S1 No.55 of 2008. It has since been replaced with The Human Rights (Enforcement) Act 2019. Section 2 of the Civil Procedural Act Limitation (Miscellaneous Provisions Act is therefore inapplicable.

This leg of ground one is misconceived and has no merit. I would answer it in the negative.

I now proceed to consider the second leg of ground one. Whether or not Section 2(1) of the Civil Procedural Act Limitation (Miscellaneous Provisions) Act applies to ordinary suits?

This question was considered by the Court of Appeal in *Kabandize and 20 others Vs Kampala Capital City Authority, Court of Appeal Civil Appeal No. 28 of 2011.* The Court of Appeal held as follows:-

"While construing Section 2 of The Civil Procedure and Limitations (Miscellaneous Provisions Act) already set out above, Courts of law must therefore take into account the provisions of Articles 274 and Article 21(1) of the Constitution of Uganda.

Article 21(1) of the Constitution provides as follows;-

> *"All persons are equal before and under the law in all spheres of political, economic, social and culture life and in every other respect and shall enjoy equal protection of the law."*

This article in our view requires that parties appearing before Courts of law must be treated equally and must enjoy equal protection of the law.

The reading of Article 21(1) above and Article 274 of the Constitution together would require Section 2 in CAP 72 to be construed with such modifications, adaptations, qualifications and exceptions as is necessary to bring it into conformity with the Constitution.

Section 2 above is a law that gives preferential treatment to one party to a suit by requiring the other party to first serve it with a 45 days mandatory notice of intention to sue. The section is also discriminatory in that it requires one party to issue statutory notice to the other without a reciprocal requirement on the other. None compliance renders a suit subsequently filed by one party incompetent.

Government and all scheduled corporations are under no obligation to serve statutory notice of intention to sue to intended defendants. On the other hand ordinary litigants are required to first issue and serve a

45 days mandatory notice upon Government and scheduled corporations.

We find that in view of Article 21(1) of the Constitution a law cannot impose a condition on one party to the suit and exempt the other from the same condition and still be in conformity with Article 21(1) of the Constitution."

On appeal to the Supreme Court in *Supreme Court Civil Appeal No. 13 of 2014* Mwangusya JSC held as follows:-

"The use of the word "shall" was interpreted by the High Court to mean that the requirement to issue statutory notice was mandatory. In the case of Sitenda Sebalu vs Sam K. Njuba and the Electoral Commission (Election Appeal No 26 of 2007) (unreported) the Supreme Court of Uganda discussed Section 62 of the Parliamentary Elections Act where the word "shall" is used and held as follows:- "It is common ground that although prima facie the use of the word "shall" in a statutory provision gives the provision a mandatory character, in some circumstances the word is used in a directory sense. Much as we agree with learned Counsel for the appellant to the extent that where a statutory requirement is augmented by a sanction for non compliance it is clearly mandatory that cannot be the litmus test because all too often, particularly in procedural legislation, mandatory provisions are enacted without stipulation of sanctions to be applied in case of non compliance. We also find that the proposal by Counsel for the 2nd respondent to restrict the directory interpretation of the word "shall" to only where it is shown that interpreting it as a mandatory command would lead to absurdity or to inconsistence with the

Constitution or statute or would cause injustice, to be an unreliable formula, which is supported by precedent or any other authority"

The Supreme Court cited with approval the observation of Lord Steyner in Regina Vs Soveji and other [2005] UKHL 49 (HL Publications and internet where he stated as follows:-

> *"A recurrent theme in drafting of statutes is that Parliament casts its Commands in imperative form without expressly spelling out the consequences of failure to comply. It has been the source of a great deal of Litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement was mandatory, a failure to comply invalidates the act in question. Where it is merely directory a failure to comply does not invalidate the act in question. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of purely regulatory character where a failure to comply would never invalidate an act provided there was substantial compliance."*

Lord Steyner after reviewing decisions from the English Court of Appeal, the privy Council and Courts in New Zealand, Australia and Canada made the following conclusion:-

> *"Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements have out lived their usefulness. Instead, as held in Attorney General's Reference (No. 3 of*

1999) the emphasis ought to be on the consequences of non- compliance, and posing the question whether parliament can be fairly taken to have intended total invalidity".

As already stated in this judgment the rationale for the requirement to serve a statutory notice was to enable a statutory defendant investigate a case before deciding whether to defend it or even settle it out of court. There was a claim that no statutory notice was served but the appellant was able to file a written statement of defence and adduce evidence in support of his defence. There was also nothing that stopped the parties from settling the case if ever a settlement was an option. This is a clear illustration that failure to serve the Statutory Notice does not vitiate the proceedings as the Court of Appeal rightly found. A party who decides to proceed without issuing the Statutory Notice only risks being denied costs or cause delay of the trial if the Statutory defendant was unable to file a defence because she required more time to investigate the matter.

In my view the emphasis should not be on the failure to serve the Statutory Notice but on the consequences of the failure so long as both parties are able to proceed with the case and Court can resolve the issues which the High Court should have done after going through the hearing. Parliament could not have intended that a plaintiff with a cause of action against a Statutory defendant would be totally denied his right to sue even where the defendant knew the facts and was able to file a defence as it was in this case simply because of the failure to file a statutory notice."

The rest of the members of the Court agreed with him.

My understanding of the Supreme Court's decision is that, Section 2(1) of the Civil Procedural Act Limitation (Miscellaneous Provisions) Act is not unconstitutional because it is not mandatory, this is so because the *'Shall'* in that section ought to be construed as directory or regulatory. The Court of Appeal on the other hand found that, the impugned section being an existing law under predating the 1995 of the Constitution ought to be read, construed and applied in conformity with the Constitution in accordance with Article 274. In so doing the Court found that the word 'shall' in the impugned section was no longer mandatory. Consequently the Court construed the mandatory requirement for statutory notice as unconstitutional. The Court of Appeal held that, the impugned law imposed a condition on one party to an intended suit that was not applicable to the other in contravention of Article 21(1) which guarantees all persons equality before the law. In the result the Court held that, failure to issue and serve a statutory notice under the impugned law did not vitiate a suit.

On appeal, the Supreme Court did not directly determine the constitutional question raised in the Court of Appeal Judgment. Applying a liberal approach or purposeful interpretation, it found that the word *'shall'* in the impugned law was not mandatory but rather directory. This reasoning is in *pari-passu* with the decision of the Court of Appeal, in *Edward Byaruhanga Katumba vs Daniel Kyewalabye Musoke, Court of Appeal Civil Appeal No.2 of 1998* and *Kayondo vs The Co-operative Bank Ltd in Supreme Court Civil Appeal No. 10 of 1991.*

The Supreme Court appears clearly to have agreed with the position by the Court of Appeal, to the extent that, the word *'shall'* in the impugned Section ought to be construed as not being mandatory. Both Courts therefore, came to the same conclusion that Section (2) of CAP 72 is not mandatory. In other words failure to issue and or serve a statutory notice under the impugned section does not vitiate a suit. The impugned Section would be unconstitutional when 'shall' therein is construed as being mandatory. It is constitutional when construed as directory or regulatory.

The above decisions of the Supreme Court sitting on appeal from the decision of the Court of Appeal is not binding on this Court. This Court is now required to make its own finding and come to its own conclusion on this issue. I shall proceed to do so.

Although it appears clearly to me that the original intention of the legislature sitting in 1969 was to provide for a mandatory notice of intention to sue to the

Attorney General, before any suit could be instituted against Government by any person, the law has since evolved and moved away from that position.

The framers of the 1995 Constitution were quite alive to the existence of such laws. The main justification for the promulgation of a new Constitution was to establish a new constitutional order by departing from our colonial and post-colonial repressive past.

The impugned law squarely stands a symbol of the past authoritarian governments and has no relevancy in the present or future of this Country.

At this point I am constrained to revert to the history of this legislation as it has been dealt with rather at lengthy by my able and learned brother Musota JCC in his Judgment in this petition.

He traces the nature, functions, powers position of the office of the Attorney General in Anglo-Norman system of Government through the times, to the present. I must admit, the research was quite an impressive. I am indebted to him in that regard.

As far as I understand the history of English law and jurisprudence, the Anglo-Norman legal system was established by William 1 of Normandy who reigned from 1066 to 1087. He defeated the Anglo Saxons and largely replaced their legal system with his own.

The Anglo-Norman system government is summarised here below. See: https://www.bbc.co.uk/bitesize/guides.

> *"Invading and conquering England had been expensive for William. Loyal supporters were rewarded with land rather than cash but by 1085 the Norman land owners were beginning to argue over who held what piece of land. William had spent nearly twenty years imposing Norman control over all of England and he did not want his work to be undone by disunity amongst his own followers.*
>
> *In December 1085, William met his Great Council in Gloucester to discuss how to solve these problems. At this meeting William decided to order a survey. It would list all the landowners and their tenants and the lands they held. It would describe any other people who lived on the land, from villagers to slaves. It would describe how the land was used,*

for example if it was used for woodland, meadow or animals. All buildings such as castles, churches or mills were to be recorded.

The Domesday Book was designed to perform three key functions.

- *To record the transfer and possession of land. After the conquest huge amounts of land in England changed hands and a record of these changes was needed to keep track.*
- *To record the value of each estate (land owned by an individual).*
- *To introduce a new system of taxation on each estate that allowed the king to raise more money from all landholders quickly."*

Under this legal system it is apparent that the Attorney General was an extremely busy man entrusted with the duty to institute or defend all actions for or against the King.

This legal and constitutional system still largely exists in form and practice in United Kingdom. It is a feudal system in which at the apex is The King or Queen (*Rex* or *Regina*). *The Lord The Sovereign* upon whom all the power of government is vested, the Constitutional devolution of power over centuries notwithstanding.

The government is referred to as Her Majesty's Government. The Courts are Her Majesty's Courts. The King's/Queen's Bench! The armed force belong to the sovereign so does Parliament.

In that context, Justice Musota correctly reminded us that the office of the Attorney General was in essence "The King's Attorney". In a feudal system, the King, the Lord, the Sovereign could not and does not enjoy the same rights and privileges as those as his or her subjects. He is the King. They are his subjects. They are subjected to his Rule and the laws that he proclaims. This feudal legal system was extended to Uganda when it was occupied by force and ruled as a British protectorate between 1897 and 1962. We continued also 60 years to apply the English feudal laws complete with precedents and Rules of procedure, after independence. Judges in this country still don the medieval entire of English feudal Lords compete with their titles, woolen wigs, red gowns, flaps and collars! Without doubt they do so with pride! It is time we relinquished these relics together with the jurisprudence they carry with. We cannot in my view continue

applying principle of a feudal legal system established in the 11th Century England! This principle of total independence is set out clearly in Article 1 of the Constitution which provides as referred to by Justice Musota. "All power belongs to the people who shall exercise their sovereignty in accordance with the Constitution.

The world has moved on since 1243 when Laurence De Brok was Attorney General of England. Everyone throughout the world was flat! Last year the world marked the 50th anniversary of the landing of a man on the moon. On 5th September 1977, NASA launched the Voyager space ship into space. It is still travelling at 38,000 miles per hour and is 11.7 billion miles away from the Earth taking pictures and sending them back along the way!

At that time of De Brok there were no trains, no electricity, no motor vehicles. Letters were delivered by men on horse backs. The world has moved leaps and bounds in all spheres of life. There is however, no sphere of human life that has been as revolutionilsed as that of communication technology. From wire telegrams to telephones. From analog to digital technology. We can now hold 'zoom' conferences in the comfort of our offices. The whole world in our palms in form of 'smart phones'. We can at a click of a button access information and rely it back almost instantly. In the meantime this Court and generally the whole judicial system in this Country is still stuck in the distant past.

We still apply the 1909 Evidence Act a vintage statute bequeathed to us by our colonial masters today the reading of which makes no sense to law students and legal practitioners of today. The Indian Penal Code Act is still largely in use in this country having been adopted in 1950. It still contains medieval offences such as *'Defamation of foreign princes!.* (See: - Section 53). The purpose of Article 274 of the Constitution in my view was to empower Courts to move away from obsolete to progressive jurisprudence.

Let me now consider the more recent history of the impugned law.

Between 1968-1970 the UPC Government initiated an ideological program of creating a socialist state, which was referred to by President Milton Obote as "the move to the left" It begun with the "Common man's charter' and by 1970 had culminated into the 'Nakivubo pronouncements'.

See:-Tertit Aaslad. On the move to the left 1969-1970.

The Nakivubo pronouncements of 1970, nationalised foreign owned companies. Thereafter these became Government owned or controlled enterprises. They did form the bulk of the "scheduled corporations" set out in the 3rd scheduled of the impugned Act. They were accorded the same status and privileges as the Government under this Act. If indeed it was the case and I hasten to add that it was not, that Attorney General by necessity of office required more time to investigate a claim, the same could not and does not apply to the "schedule corporations".

Overtime the 3rd schedule has dramatically changed from Government Corporation to Government companies and now to statutory authorities. This change in form has not altered the substance. They have all remain commercial enterprises in practice and form. There is no reason why such enterprises in an open market economy such as that prevailing in this Country ought to enjoy privileges which individual citizens and private companies are denied by the law. This in my view clearly contravenes Article 21(1) of the Constitution, is therefore null and void pursuant to Article 274(supra).

Article 21(1) was deliberate as a positive step towards addressing the inequities of the past legal regimes.

Had the frames of our Constitution intended that government and state owned enterprises to be placed under a different footing from the citizens of this country in regard access to justice, they could have provided so in the Constitution. They did not. We cannot read it into it.

In any event the impugned law that allows the Attorney General to file written statement of defence within 45 days whereas the citizens are limited to 15 days cannot be justified on the arguments set out in support of the statutory notices in this petition. Having been availed 45 days (formerly 60 days) statutory notice to prepare his defence there is no justification for granting the Attorney General another 30 days to file the same defence. This is because in the first instance this 45 days notice was to enable him file a good defence within the time given to all other litigants by the law. This disparity is unjustifiable in view of Article 21(1) supra.

Section 3 of the impugned Act, also fall in same category as Section 2 of the impugned Act. The section relates to limitations of time within which a suit may be instituted against government or scheduled corporations clearly reveals that

the intention of the impugned Act was not as it has been argued to facilitate the smooth functioning of government but rather to limit the rights of citizens by making it extremely difficult for them to succeed in any claim against government. This cannot be a proper and legitimate purpose of legislation.

Under the Section 3(1) the impugned Act the limitation period for actions in Tort against government by citizens is limited to only two years. In practice the statutory notice of 45 days period set out in the impugned Section 2(1) notice period is also inclusive. The limitation period for actions in contract against Government is limited to only three years.

Hon. Francis M. Ssekandi retired Justice of the Court of Appeal now Supreme Court of Uganda in his treatise, *Autochthony: "The Development of Law in Uganda" NYLS Journal International and Comparative Law (1983)* discussed this subject as follows:-

> *"One other means devised to entrench the imported law, in addition to the repugnancy clause, was to forego providing a remedy through the courts on the ground that the cause of action is time barred. In the majority of civil customary law cases the litigants do not articulate their claims in the pigeon-holes known to the common law (i.e., property or marriage law). If a party is aggrieved he will go to court for a remedy and time is of no consequence. Litigation is often a last resort after the traditional means of reconciliation have failed. As a result, courts have always been faced with what, under the imported law, are stale claims. The statute of limitation was specifically excluded from application to customary law, which was administered almost entirely by native courts. With integration, however, native courts were abolished. The magistrates' courts that replaced them did not enjoy the same exclusive jurisdiction.*
>
> *In Olowo v. Akenya Judge Nyamuchoncho stated:*
>
> > *The Limitation Act did not apply to customary claims instituted in so called African courts. It would be unfair to apply the law of limitation to stale [customary] claims simply because of integration of courts . . . . This would result in grave injustice to the respondent and his sons who had occupied the land for such a long time.*

We think that this is the proper view. The Limitation Act has no application to customary civil suits. . ."

Although the above excerpt does not relate to statutory notices nevertheless it highlights dichotomy between reality and legal fiction. Whereas a government that has all the national resources at its disposal requires 45 days notice before a suit can be filed against it and a further 30 days before it can present its defence an ordinary citizen is expected to do the same act in for less time. The argument that such a notice is required to enable sufficient time for government to investigate the nature of the claim does not appeal to me at all. It has no basis and I reject it. In any event no such justification was proved in this petition. The facts show otherwise.

I would uphold the second leg of the 1st ground of the petition.

I would also uphold ground 2 of the petition in respect of Rules 11 of the Government Proceedings (Civil Procedure) Rules. I find that it is unconstitutional as it contravenes Article 21(2) of the Constitution.

In respect of Section 19(4) of the Government Proceeding Act, which prohibits executions against government by way of attachment of money held in the consolidated fund, I agree with Madrama JA that, the restriction imposed is not unconstitutional. The right to attach, property to recover a decretal sum is very limited. I can be limited by statute and such limitations is justifiable under Article 43(2)(c). In view of the decision in *Attorney General vs Osotraco Ltd (Civil Appeal No 32 of 2002)* that decree holder against government may apply to attach movable or other property. This is not a limitation that is unjustified. This ground must fail.

In conclusion I would allow this petition in part and make the following orders and declarations:-

1. Section 2(1) of the Civil Procedure & Limitations (Misc Prov.) Act (CAP 72) is unconstitutional only when it is construed as being mandatory. I find that, it is not mandatory but directory.

2. Section 2(1) of the Civil Procedure & Limitations (Misc Prov.) Act (CAP 72) is not applicable in respect of suits brought under the provisions of Article

50 of the Constitution for the enforcement of Fundamental Rights and Freedoms.

3. Rule 11 of the Government Proceedings (Civil Procure) Rules which provides for the Attorney General as a defendant to file a defence within 30 days while Order VII Rule 1 of the CPR requires every other defendant to file a defence within 15 days is inconsistent with Article 21(1) of the Constitution. The said rules must be construed in accordance with Article 274 of the Constitution to read 15 days.

4. Section 19(4) of the Government Proceedings Act that provides that no execution may issue against government for payment of judgment debt is not inconsistent with Articles 139(1), 128(1),(2) & (3), 28(1) and 126(2)(b) & (c) of the 1995 Constitution of the Republic of Uganda.

5. The omission by government in providing for payment of judgment debt for the financial years 2011/2012, 2012/2013 is not contrary or inconsistent with Articles 155(1) & 160 of the 1995 Constitution of the Republic of Uganda.

6. I would allow this petition only in part and award the petitioners $^1/_3$ of the costs of this petition.

In the result, this petition succeeds only in part as follows:-

(1) Ground 2 succeeds by majority decision of Kakuru, Obura, Madrama JJA and Kasule Ag. JA with Musota JA dissenting. It is hereby declared that, Rule 11 of the Government Proceedings (Civil Procedure) Rules is inconsistent with the Constitution.

(2) Ground one substantially fails by majority decision of Obura, Musota and Madrama JJA with Kakuru JA and Kasule Ag. JA dissenting. In respect of this ground, this Court by majority decision declares that, Section 2(1) of the Civil Procedure and Limitations (Miscellaneous Provisions) Act CAP 72 is not inconsistent with the Constitution, as it is not mandatory. It is directory.

(3) By unanimous decision grounds 3 and 4 fail and are dismissed.

(4) The petitioners are awarded ¼ of the costs.

We so order.

Dated at **Kampala** this ....9th....day of ....Feb.... 2021.

.....

Kenneth Kakuru

JUSTICE OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 43 OF 2012

1. NAMPOGO ROBERT

2. TUMWESIGYE MOSES::PETITIONER

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 STEPHEN MUSOTA, JA/JCC

Background

The back ground of this petition as can be gathered from the petition and the affidavit in support of the Petition by the 1st Petitioner is that in the year 2000 the petitioners were Police Officers. They were arrested and detained on the orders of a Minister of State for Internal Affairs. They lodged a complaint No.167 of 2000 in the Uganda Human Rights Commission (UHRC) claiming

that they had been tortured while in detention. In the year 2004 the UHRC Tribunal found in the Petitioners favour and ordered the Attorney General to pay damages of Uganda Shillings 17,000,000 to the 1st Petitioner and Uganda Shillings 16,000,000 to the 2nd Petitioner.

For several years, they moved up and down the corridors of the Attorney General's Chambers seeking to be paid but to no avail. It is then that they instructed Mr. Rwakafuzi to represent them in filing for a writ of mandamus directed to the Secretary to the Treasury/Attorney General compelling him to pay them. The High Court in Miscellaneous Cause No.48 of 2009 allowed and granted a writ of mandamus to the Secretary to the Treasury ordering him on the 13th day of October, 2009 to pay the Petitioners. They allege to have served onto the Secretary to the Treasury the order who ignored it and no money was paid. Thereafter, the Attorney General paid some installments but a portion of it remained unpaid or outstanding. It is then that the petitioners allegedly discovered that there was no budget for court awards in the year 2012 and yet they had expected to be paid.

The Petitioners then instructed their lawyers to file Execution Cause No.1258 of 2011 seeking for a Garnishee order to attach Government funds in any bank in satisfaction of the orders of the decree but the Registrar in charge of execution citing ***Section 19(4) of the Government Proceedings Act*** that bars execution against government, dismissed the application. The petitioners felt that their right to speedy trial had been infringed upon and found that the court was powerless to execute its decrees. They consulted their lawyers further and they were informed of other provisions in the law which they thought to be unfair and unconstitutional. It is for these reasons that they instructed their lawyer, to file this petition.

The Petition

This petition was brought under Articles 1(3), 21(1), 28(1), 126(2)(b)&(c), 128(1)(2)&(3), 137(3)(a), 139(1), 155 & 160(1) of the Constitution of Uganda; Section 33 Judicature Act; Sections 19(4) & 27 of the Government Proceedings Act; and R.11 of the Government Proceedings (Civil Procedure) Rules and section 2 of the Civil Procedure & Limitation (Miscellaneous) Act seeking several declarations and orders nullifying S.2(1) of the Civil Procedure & Limitation (Miscellaneous Provisions) Act, Rule 11 of the Government Proceedings (Civil Procedure) Rules, Section 19(4) of the Government Proceedings Act for being inconsistent with Articles 28(1), 139(1), 21(1), 128(1)(2)&(3), 126(2)(b)&(c) of the Constitution. They also seek declaration that the omission by government to provide for payment of judgment debts for financial years 2011/2012, 2012/2013 is contrary to the Articles 155(1) and 160 of the Constitution. The petitioners also pray for costs in their petition.

Representations

At the hearing of the petition on the 27th July, 2020, Mr. Kwemara Kafuzi and Stella Nakamya appeared for the petitioner and Mr. Karemera George (Commissioner Civil Litigation) and Moses Mugisha (State Attorney) of Attorney General's Chambers appeared for the respondent.

Issues

The conferencing in this case was done in absence of the respondents or their representatives. The petitioners had filed conferencing notes. The Assistant registrar deemed the matter conferenced and adopted the

petitioner's conferencing notes. Therefore there were no agreed issues. However, the petitioner in their conferencing notes raised issues for this court's determination which are;

Issues 1: Whether section 2(1) of the Civil Procedure & Limitation (Miscellaneous Provisions) Act is inconsistent with Articles 28(1), 126(2) (b) & (c) and 139(1) of the Constitution

Issue 2: Whether Rule 11 of the Government Proceedings (Civil Procedure) Rules is inconsistent with Article 21(1) of the Constitution?

Issue 3: Whether Section 19(4) of the Government Proceedings Act is inconsistent with Articles 139(1), 128(1), (2) & (3), 28(1) and 126(2)(b) & (c) of the Constitution?

Issue 4: Whether the omission by government in providing for payment of judgment debt for financial years 2011/2012, 2012/2013 is contrary to Articles 155(1) & 160 of the Constitution?

Issue 5: What are the remedies available?

In their written submissions the petitioners still maintained the same issues for determination by this court.

I shall adopt those issues raised in the submissions and deal with them in the same order as they have been raised. However, before I do so it is important to look at the origins of the office of Attorney General.

History of Attorney General's Chambers

The concept of an Attorney General dates back to the Anglo-Norman system of Government. During that time, French legal terms were introduced into the English system of Government. The first mention of the term attornus Regis, or "king's attorney," was made in 1253. In 1472, the first formal appointment was made. The office of the Attorney General has always been of great importance as the Attorney General was both legal representative of the King and Royal Government as well as the, parens patriae, or "guardian of public interests." As such, the Attorney General was charged with protecting the rights of both the crown and the public.

I find the writing of ***The Rt Hon. Sir Elwyn Jones A.G, Q.C, MP in an Article entitled "The Office of Attorney General"*** as giving some good history of the office, himself having been Attorney General of the United Kingdom at one point. Particularly I am interested in how he describes the role of the Attorney General and how he demonstrates the complexity of the work involved in the office and the workload that bedevils the daily life of the Attorney General's office.

He shares in that Article Published in ***The Cambridge Law Journal Vol.27 No.1 (Apr.1969), pp 43-53 (11 pages)*** the comments of Francis Bacon who once said that the office of Attorney General was "the painfullest task in the realm". He also shares the comment of Patrick Hastings a few centuries later who said "to be a law officer (government lawyer) was to be in hell". As if to demonstrate that the work of the Attorney General's office is not only complex but also enormous as it covers the entire country.

Although the office of Attorney General has become a great office of State, its whole origin and early history is wrapped in obscurity and that is why I find ***The Rt Hon. Sir Elwyn Jones's*** article very important. The basis of the office as I gather, appears to have been that as the sovereign could not appear in person in his own courts to plead in any case in which he had an interest, an attorney appeared on his behalf. As early as 1243 one Lawrence Del Brok, a professional attorney, was prosecuting pleas of particular concern to the sovereign. However, as the functions of sovereignty became more complex and more extensive and acquired a more public character, so did the role and the duties of the Attorney General which became wider and wider and wider and continue to do so.

Already by the end of the 13th Century the duties attaching to the King's Attorneys Office (Office of the Attorney General) had become burdensome. When Richard de Brettiville performed the duties, a medieval clerk added the postscript at the foot of a list of cases in which the King's Attorney was to appear-***"oh Lord, have pity upon Brettville"***. Yet in medieval times the political duties which now fall upon the same Attorney General were completely absent at that time. The only function of the King's Attorney at the time was to maintain the crown's interests before the courts. The year 1461 marked the turning point in this history when the modern rule of the Crown's Principal Law Officer (Attorney General) was first used and he was called upon to parliament to the House of Lords to advise upon legal matters. This was the beginning of the Political Role of the Attorney General in parliament.

In the early days the Attorney General was largely concerned with litigation which was the very first and primary role of the Office of Attorney General.

The Attorney General was and still is responsible for all crown (Government) litigation. Given this unique history of the office of the Attorney General it demonstrates the necessity of special provisions of the law to assist the Attorney General's office perform its functions better. The special provisions of the law enacted especially on the conduct of litigation were intended to bridge the gap and bring the office of Attorney General at *per* with any other litigant and also ensure that both Government interest and public interest are not unfairly defeated in the courts of law.

This history of the office of the Attorney General in the United Kingdom is relevant to Uganda because it is on the basis of this History that the office of the Attorney General was provided for in the laws of Uganda both during colonialism and after.

Constitutional Court Jurisdiction

The Jurisdiction of the Constitutional Court of Uganda is derived from the provisions of ***Article 137 of the 1995 Constitution***.

> ***Article 137 provides that:***
>
> ***"(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.***
>
> ***(3) A person who alleges that__***
>
> ***a) an Act of Parliament or any other law or anything in or done under the authority of any law; or***

b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.

(4) Where upon determination of the petition under clause (3) of this article the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may__

a) grant an order of redress; or

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

The Supreme Court has interpreted this Article in several cases. The first case is **Ismail Serugo v Kampala City Council Constitutional Appeal No. 2 of 1998 (SC).** This case was referred to by Odoki CJ, (as he then was) in the case of **Raphael Baku Obudra v Attorney General Constitutional Appeal No. 1 of 2003 (SC)**. While addressing the issue of what amounts to a cause of action in constitutional matters. He observed:

"According to the principles in Serugo (supra) the petitioner had to show that the provisions of the section he is complaining about violated a right guaranteed by the Constitution. The instant petition does not allege those facts, which are alleged to contravene the provisions of the Constitution or those that are inconsistent with its provisions. For those reasons we think the petition does not

disclose a cause of action. There would be nothing to interpret. The petition would be dismissed with costs.

In Serugo vs Kampala City Council, Constitutional Appeal No.2 of 1998, this Court pronounced itself on the meaning of a cause of action as regards Constitutional petitions. Generally, the main elements required to establish a cause of action in a plaint apply to a Constitutional petition. But specifically, I agree with the opinion of Mulenga, JSC in that case that a petition brought under Article 137 (3) of the Constitution "sufficiently disclose a cause of action if it describes the act or omission complained of and shows the provision of the Constitution with which the act or omission is alleged to be inconsistent or which is alleged to have been contravened by the act or omission and pray for a declaration to that effect."

In my opinion, where a petition challenges the constitutionality of an Act of Parliament, it sufficiently discloses a cause of action if it specifies the Act or its provision complained of and identifies the provision of the Constitution with which the Act or its provision is inconsistent or in contravention, and seeks a declaration to that effect. A liberal and broader interpretation should in my view be given to a Constitutional petition than a plaint when determining whether a cause of action has been established." (sic)

Principles for Constitutional Interpretation

Let me restate here below some of the time tested principles of constitutional interpretation which I consider pertinent in the determination of the Constitutional Petition before me. These have been laid down in several decided cases by the Supreme Court, this Court and Courts of other jurisdictions. They have also been expounded upon in a number of legal literature of persuasive authority.

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

2. In determining the constitutionality of a legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality, of either an unconstitutional purpose or an unconstitutional effect animated by the object the legislation intends to achieve. ***See:- Attorney General vs. Salvatori Abuki Constitution Appeal No. 1 of 1998.(SCU)***

3. The Constitution must be interpreted as a whole. This principle was settled in the case of **South Dakota V North Carolina 192 US 268 (1940) 448** by the Supreme Court of the US that "no single provision of the constitution is to be segregated from others and be considered alone but that all provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the purpose of the instrument". Therefore in law, the Constitution is a wholesome legal document and all provisions must be

regarded as constituting it. The normal logic in this canon is that in order to ascertain the true meaning and intention of the legislators, all relevant provisions must be considered. It is thus dangerous to consider any one particular human right provision in isolation of all others, and any Court which tries to do this is bound to get an inconsistent conclusion.

4. Where words are clear and unambiguous, they must be given their primary, plain, ordinary and natural meaning. Such language must be given in its common and natural sense and, natural sense means that natural sense which they bore before the Constitution came into force. The cardinal rule for the construction of Acts in parliament is that they should be construed according to the situation expressed in the Acts themselves. The tribunal that has to construe an Act of a legislature or indeed any other document has to determine the intention as expressed by the words used. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law giver.

5. Narrow construction to be preferred in case of derogation from a guaranteed right. It is not in doubt that save for the rights mentioned in article 44 which are stated to be non-derogable, the rest can be limited. But the power to do so is not at large and is not to be arbitrarily exercised by Courts. Indeed under article 43, it is stated that in the enjoyment of the rights and freedom prescribed in this chapter, no person shall prejudice the fundamental or other human rights and

freedom of others or the public interest. Public interest is in turn stated not to permit among others any limitation of the enjoyment of those rights beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided in this constitution.

6. A constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come and must be given an interpretation that realizes the full benefit of the guaranteed right (**Attorney General V Uganda Law Society Constitutional Appeal No. 1 of 2006 (SC)**).

7. The Constitutional Court has no jurisdiction in any matter which does not involve the interpretation of a provision of the Constitution. Also for the Constitutional Court to have jurisdiction, the petition must show on the face of it that the interpretation of a provision of the Constitution is required. An application for redress can be made to the Constitutional Court only in the context of a petition under Article 137 Constitution, brought principally for interpretation of the Constitution (**Attorney General v Tinyefuza Constitutional Appeal No. 1 of 1997**).

Determination of Issues

Issues 1: Whether section 2(1) of the Civil Procedure & Limitation (Miscellaneous Provisions) Act is inconsistent with Articles 28(1), 126(2)(b)&(c) and 139(1) of the Constitution?

The petitioners' submissions on this issue

The petitioners submit that **section 2(1) of the Civil Procedure & Limitation (Miscellaneous Provisions) Act** is inconsistent with the

constitution because it delays Justice and violates the right to a speedy trial since the statutory notice has to be served and complied with yet it also limits the unlimited jurisdiction of the High Court since the High Court cannot entertain a matter until the party aggrieved has proof of service of this notice. That it is true that the Supreme Court said in the case of ***Kampala Capital City Authority vs Kabandize & 20 Ors SCCA No.13 of 2014*** that a suit should not be defeated for failure to serve the notice but there should be no risk of a litigant being denied costs either for want of service. The petitioners submitted that they are seeking a clear and final decision on this point. They then prayed that we find the section inconsistent with the Constitution **Articles 28(1), 126(2) (b) &(c) and 139(1) of the Constitution.**

The respondent's submission

The respondent submitted on this issue that the Supreme Court in the case of ***Kampala Capital City Authority vs Kabandize & 20 Ors SCCA No.13 of 2014*** found the use of the word ***"shall"*** in Section 2 of the Civil Procedure (Miscellaneous Provisions) Act as directory and not mandatory. They quoted the Supreme Court in that same case where it stated that;

> ***"the rationale for the requirement to serve a statutory notice was to enable a statutory defendant investigate a case before deciding whether to defend it or even settle it out....This is a clear illustration that failure to serve the Statutory Notice does not vitiate the proceedings as the Court of Appeal rightly found. A party who decides to proceed without issuing the Statutory Notice only risks being denied costs or cause a delay of the trial if the***

Statutory defendant was unable to file a defence because she required more time to investigate the matter"[Emphasis Added]

Therefore the High Court is not precluded from hearing a matter for failure to serve a Statutory Notice. The Attorney General cannot be treated like an ordinary litigant due to the unique nature of his constitutional obligation under Article 119 of the Constitution. This position mandates the office to receive notices of intention to sue for and on behalf of the different Government entities and represent them in Courts of Law. This unique position of the Attorney General's Chambers gets served with the notices of intention to sue prior to serving the client and needs all the necessary information in order to appreciate the allegations and make a decision on how best to handle the case on behalf of the Government Ministries, Departments and Agencies.

Therefore, the service of the Statutory Notice and the Statutory period thereto enables the Attorney General as principal legal advisor to be informed of the suit and then to begin seeking the necessary information in order to handle the case in the most appropriate manner. The pleadings are served on the Attorney General's chambers before the Attorney General is made aware of the facts surrounding the case. The concept, appreciation, and application of fair hearing should apply to both parties. The Attorney General needs to be given more time since he is in a unique position to file an appropriate response to the intended suit so that they are not condemned unheard.

The respondents further submitted that the fact that the Attorney General has 45 days in which to respond to an intended suit filed against them does

not in any way prejudice the Petitioners' right to a fair hearing since they shall still be heard before an impartial tribunal or court and a judgment shall be arrived at which is not based on the Statutory notice time frame given to the respondent.

The respondent then prayed that we find that **section 2(1) of the Civil Procedure & Limitation (Miscellaneous Provisions) Act** is not in any way inconsistent with **Articles 28(1), 126(2)(b)&(c) and 139(1) of the Constitution**

Determination of issue 1

I have considered the submissions of both parties on this issue and extensively studied the petition before us and the laws referred to by the parties. The impugned provision of the Act states as follows;

> ***2. Notice prior to suing.***
>
> ***(1) After the coming into force of this Act, notwithstanding the provisions of any other written law, no suit shall lie or be instituted against—***
>
> ***(a) the Government;***
>
> ***(b) a local authority; or***
>
> ***(c) a scheduled corporation,***
>
> ***until the expiration of forty-five days after written notice has been delivered to or left at the office of the person specified in the First Schedule to this Act, stating the name,***

description and place of residence of the intending plaintiff, the name of the court in which it is intended the suit be instituted, the facts constituting the cause of action and when it arose, the relief that will be claimed and, so far as the circumstances admit, the value of the subject matter of the intended suit.

(2) The written notice required by this section shall be in the form set out in the Second Schedule to this Act, and every plaint subsequently filed shall contain a statement that such notice has been delivered or left in accordance with the provisions of this section.

The provisions which the petitioners claim the above section to be inconsistent with are as follows;

Article 28(1) states;

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 impartial court or tribunal established by law.

Article 126(2) (b) & (c) states;

126. Exercise of judicial power.

(1).....

(2) In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles—

(a).....

(b) justice shall not be delayed;

(c) adequate compensation shall be awarded to victims of wrongs;

(d).....

(e) .....

Article 139(1) states;

139. Jurisdiction of the High Court.

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

(2).....

According to the Limitation Act in the Laws of Uganda, a litigant has a minimum of three years to prepare his case before he files the same against the Attorney General. When he does so he expects the Attorney General to investigate, gather information, work out all the legal modalities required of a competent attorney to decide on the contents of the Written Statement of Defence and file the same within 14 days! This to me seems the most unfair

line of interpretation of the Constitution that this honorable court could ever make against the Attorney General. I am not persuaded by the argument put forward by counsel for the petitioners. A fair hearing cannot be said to be denied just because steps to be followed have been put in place before the formal claim is filed. Should we also interpret as an infringement of the right to a fair hearing, the legal requirement to first file a civil suit before an application for an injunction can be lawfully filed and heard?

My view is that the petitioner's feeling that the requirement, that, Statutory Notice of Intention to sue must be served on the Attorney General or a local government and on all scheduled corporations, before a civil suit is filed is an infringement of the right to a fair hearing and unconstitutional, is misconceived.

I agree with the respondents' submission that the fact that the Attorney General Local Government or a scheduled corporation has 45 days in which to respond to an intended suit to be filed against them does not in any way prejudice the Petitioners' right to a fair hearing since they shall still be heard before an impartial tribunal or court and a judgment shall be arrived at which is not exclusively based on the Statutory notice time frame given to the respondent.

Further I am bound by the reasoning of the Supreme Court in the case of ***Kampala Capital City Authority vs Kabandize & 20 Ors SCCA No.13 of 2014*** where it was held and found that the use of the word ***"shall"*** in Section 2 of the Civil Procedure (Miscellaneous Provisions) Act is directory and not mandatory and as such the section cannot be said to be inconsistent with

the Constitution. In that case, it was stated if I may quote the authority as cited by the Petitioners in their submissions and attached thereto, that;

> ***"As already stated in this judgment the rationale for the requirement to serve a statutory notice was to enable a statutory defendant investigate a case before deciding whether to defend it or even settle it out of court. There was a claim that no statutory notice was served but the appellant was able to file a written statement of defence and adduce evidence in support of his defence. There was also nothing that stopped the parties from settling the case if ever a settlement was an option. This is a clear illustration that failure to serve the Statutory Notice does not vitiate the proceedings as the Court of Appeal rightly found. A party who decides to proceed without issuing the Statutory Notice only risks being denied costs or cause delay of the trial if the Statutory defendant was unable to file a defence because she required time to investigate the matter.***
>
> ***In my view the emphasis should not be on the failure to serve the Statutory Notice but on the consequences of the failure so long as both parties are able to proceed with the case and Court can resolve the issues which the High Court should have done after going through the hearing. Parliament could not have intended that a plaintiff with a cause of action against a Statutory defendant would be totally denied his right to sue even where the defendant***

knew the facts and was able to file a defence as it was in this case simply because of the failure to file a statutory notice."

For the reasons I have given I am inclined to agree with the respondent's submissions and find that **section 2(1) of the Civil Procedure & Limitation (Miscellaneous Provisions) Act** is not in any way inconsistent with **Articles 28(1), 126(2) (b) & (c) and 139(1) of the Constitution**

Issue 2: Whether Rule 11 of the Government Proceedings (Civil Procedure) Rules is inconsistent with Article 21(1) of the Constitution?

Submission of the petitioners

The petitioners submit that **Rule 11 of the Government Proceedings (Civil Procedure) Rules** is inconsistent with Article 21(1) of the Constitution because it gives the Attorney General the mandate to file a defence within 30 days yet other persons who are defendants are supposed to file their defence within 15 days as per Order VIII Rule 1 of the Civil Procedure Rules (CPR). That this is discrimination among litigants.

The Petitioner relied on the case of **Nagendra Rao & Co. vs State of A.P AIR 1994 SC 2663 RM Sahai J.** In paragraph 24 of his judgment he stated that:

"No legal or political system today can place the state above the law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent acts of officers of the state without remedy. The modern social thinking of progressive societies and judicial approach is to do away

with archaic state protection and place the state or the government at par with any other juristic legal entity."

The petitioners also relied on **Bryne vs Ireland & AG [1972]IR 241 at 281** where it was held that it is as much a duty of the state to render justice against itself in favour of citizens as it is to administer the same between private individuals. There is nothing in the Constitution envisaging the writing into it of the theory of immunity from suit of the scale stemming from or based upon the immunity of a personal sovereign.

Further that the prohibition against discriminatory conduct is based upon the universal principle of equality before the law. That statutory defendants such as the Attorney General are persons and under the law all persons are equal before the law. Therefore ***Rule 11 of the Government Proceedings (Civil Procedure) Rules*** gives the Attorney General special treatment thus being discriminatory which is inconsistent with Article 21(1) of the Constitution.

Respondent's submission

Learned counsel for the respondent submitted in summary that the Rules were made under ***Section 41(5) of the Judicature Act*** by the rules committee to enable persons wronged by the Government access justice in the courts of law in accordance with ***Article 250(1) of the Constitution and Section 26(2) (a) of the Government Proceedings Act Cap 77***.

The respondents also rely on the decision of the High Court in ***Atukwase v Attorney General (HCT - 00 - CC - MA - 437 - 2013)*** for the submission that ***Rule 11 of the Government Proceedings (Civil Procedure) Rules*** is not

discriminatory and does not create inequality before and under the law. That it therefore cannot be found to be unconstitutional.

The thirty day notice period is in the public interest and is intended to ensure that the Government entities are given an opportunity to defend themselves given their unique position especially considering that the stakes involve financial implications on the consolidated fund of Uganda.

Determination of issue 2

I have already stated in this ruling the brief history of the office of Attorney General and the unique position that the office holds. It is clear right from history what informed the legislation of the provisions of the Government Proceedings Act and the rules there under. Although it is a High Court decision, Wangutusi J. of the High Court expounded on this position well and I agree with him entirely on this issue. He stated in his ruling in ***Atukwase v Attorney General (HCT - 00 - CC - MA - 437 - 2013)*** that;

> ***In my opinion the inequality referred to in the constitution would not as much affect things like affirmative action or as in this case procedures that are aimed at giving equal opportunity to two litigating parties to be heard on the same plane.***
>
> ***The Attorney General represents all government bodies far and near its Headquarters. When the Attorney General is sued, he has the duty to trace the responsible person across the country, inquire into the circumstances in which it is***

alleged that the liability of Government has arisen and as to the departments and officers of the Government concerned.

The foregoing is not necessarily the bother individual litigants go through. This is so because the ordinary litigant is normally himself the Defendant and has immediate knowledge of how the dispute arose.

The Attorney General is sued on matters that have or allegedly been committed by employees of various ministries whose cooperation is at times not easily obtained. Imagine an accident caused by an officer in the forces. These are mobile and deployed at very short notice. The Attorney General gets to know about the accident after some time when the alleged offender may be at a front line. He then has to contact the relevant ministry, trace the offender, obtain statements before he files a defence. Such is not necessarily the case of an ordinary Defendant. These are not things that can be done in 15 days, moreover with weekends in between when offices that form addresses of alleged offenders or which are sources of their whereabouts are closed.

In view of the above to limit the Attorney General to 15 days would be to deny it access to justice in as much as the Written Statement of Defence would not in most cases be on court record at the close of the time span.

The other reason is that of public interest because the property that the Attorney General protects belongs to the ordinary citizen who most times is innocent of what has happened. It is therefore for the public good that ample opportunity be given to Attorney General to file his defences.

The disparity in the time spans is to try as much as possible to have pleadings of both parties on the court file before hearing. It is when every one of the parties has an "equal opportunity" of being heard that the equality that Counsel for the Applicant pressed for can be achieved.

I would add that justice does not only lie in the law and that the law is not necessarily justice. Justice also lies in the context in which the parties operate. Even the constitution that speaks of equality and is intended to promote justice, is based on context which I may call the story behind the story. So the equality before the law that the constitution talks of includes the opportunity for both parties to have access not only to the courts but having reached there to justice.

Fair opportunity in legal practice includes measures taken by the committees responsible for procedural rules like the rules committee does and or Parliament in its legislative function. Those measures are responsible for the disparity in things like time spans such as the one under

consideration. The disparity in time spans is however for the promotion of fairness by enabling the Attorney General to file his defence like the ordinary litigant can in the time afforded.

Equality in this case can be measured by the criteria of equality of outcome.

Going by the above criteria, one should be able to answer in the positive the question – if the Attorney General was also restricted to 15 days, would he be able like other Defendants be able to put in his Written Statement of Defence? - If the answer is in the negative, and it is in my view in the negative, then, the need to enlarge the time span to enable such filing so as to level the procedural path of litigation cannot be referred to as preferential treatment.

It is in my view with that in mind that the Applicant in this case decided to file for leave to be granted a judgment in default under Section 26(2)(b) of the Government Proceedings Act yet he would not have gone through all that trouble if he was proceeding against an ordinary litigant under Order IX rule 8.

For the reasons I have given herein above, I find that the disparity in time span that the Applicant sought to be declared unconstitutional, necessary to enable both parties equal opportunity to be heard and administration of justice. They do not offend the constitution in its protection of

equality. I find Rule 11 of the Government Proceedings (Civil Procedure) Rules, not discriminatory and so the defence that was filed within 30 days, was well in time.

As already stated, I agree with the views of the Judge of the High Court and would for the same reasons find and I hereby do so that ***Rule 11 of the Government Proceedings (Civil Procedure) Rules*** is not discriminatory, does not create inequality before and under the law and is not inconsistent with any provision of the constitution. ***Rule 11 of the Government Proceedings (Civil Procedure) Rules*** is in the category of provisions of the law that promote affirmative action for persons that may otherwise not fully enjoy their rights. It is also important to note that the 30 days which the petitioners are challenging are not exactly 30 days. They are just an additional 15 days on top of the regular 15 days provided for generally. Government bureaucracies dictate that the Attorney General gets extra time to be able to effectively represent the government interests in court. Some of the procedures which must be followed by government agencies before they take a particular position as their defence to a case are actually provided for by law and the public service laws which the Attorney General may not be at liberty to waive or by-pass unlike a private company or private citizen who know the facts of the case already and do not have to navigate any bureaucracies. The additional days given to the Attorney General also include weekends where government offices are closed. In reality the 15 additional days are actually 11 if we take into consideration the 4 weekend days.

I do not see any real practical injustice caused by these additional days other than being merely idealistic without any due regard to the realities of government functioning and administration in Uganda.

I find that ***Rule 11 of the Government Proceedings (Civil Procedure) Rules*** is not discriminatory, does not create inequality before and under the law and is not inconsistent with any provision of the constitution.

Issue 3: Whether Section 19(4) of the Government Proceedings Act is inconsistent with Articles 139(1), 128(1), (2) & (3), 28(1) and 126(2) (b) & (c) of the Constitution?

Submissions of the Petitioners

The petitioners submitted that contrary to the ***Articles 128(1) (2) & (3), Article 28(1) and 126(2) (b) & (c) of the Constitution*** the fact that court cannot issue process for execution of its decrees and the time within the Attorney General will comply with the court's decree is left to the whim of the judgment debtor and at times no decree is ever satisfied in time or in full. The failure or refusal by the Government to pay its judgment debt and the disempowerment of the court by ***Section 19(4) of the Government Proceedings Act*** to issue execution against government undermines the jurisdiction of the court and the rule of law and constitutional governance. The disempowerment of the court from issuing process to execute its own decrees breaches the law including abuse of human rights because no obligation is placed on government to redress the wrongs caused by such breaches of the law in a timeous manner.

Further that section ***19(4) of the Government Proceedings Act*** denies a successful party a remedy that is appropriate. Relying on the case of ***Nagendra Rao & Co. vs State of A.P AIR 1994 SC 2663 RM Sahai J and Bryne vs Ireland & AG [1972]IR 241 at 281*** it is the duty of the Government to render justice against itself in favour of its citizens and since the process for execution of decrees against Government cannot be issued, then ***Section 19(4) of the Government Proceedings Act*** is inconsistent with ***The Constitution Articles 139(1), 128(1),(2)&(3), 28(1) and 126(2)(b)&(c).***

Respondent submissions.

The respondent submitted on this issue that section 19(4) of the Government Proceedings Act does not contravene the Constitution. In their view in order to appreciate the rationale behind the enactment of the Section 19(4) of the Act we must critically analyze the manner in which Government expends monies from the consolidated fund.

The legislature has a primary role whereby it considers estimates for the financial year under Article 155 of the Constitution as proposed by the Head of the Executive (The President). That Article 154 of the Constitution illustrates the manner in which withdrawals can be made from the consolidated fund. Therefore it is their submission that Section 19(4) of the Government Proceedings Act gives effect to Articles 154 and 155 of the 1995 Constitution and actualizes the cardinal constitutional principle of separation of powers. That in this regard the alleged breach of ***Articles 139(1), 128(1),(2)&(3), 28(1) and 126(2)(b)&(c)*** cannot be looked at in isolation of the provisions of ***Articles 154 and 155 of the Constitution***.

Further that this submission is fortified by the ***Supreme Court in SCCA No.4 of 2016 Davis Wasely Tusingwire vs Attorney General*** where it was held that the entire Constitution has to be read together as an integrated whole with no particular provision destroying the other but each sustaining the other. The respondents then prayed that we find ***Section 19(4) of the Government Proceedings Act*** is not in any way inconsistent with the Constitution.

Determination of issue 3

As rightly observed by this court in the case of ***Dr. James Rwanyarare and Another v Attorney General, Constitutional Petition No. 5 of 1999*** the entire constitution has to be read as an integrated whole with no one particular provision destroying the other but each sustaining the other. In that case it was observed as follows;

> ***Manyindo, DCJ 9****(as he then was)* ***stated in Major General Tinyefunza Vs The Attorney General Constitutional Petition No. 1 of 1996, Constitutional Court of Uganda (unreported).***
>
> > ***"...the entire constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution."***

Oder JSC, while also talking about principles of constitutional interpretation remarked on appeal in the same case that:

> ***"Another important principle governing interpretation of the Constitution is that all provisions of the Constitution concerning an issue should be considered all together. The Constitution must be looked at as a whole.***

Likewise, in South Dakota Vs North Carolina 192. US 268 (1940) L.ED 448, the US Supreme Court said at page 465:

> ***'Elementary rule of constitutional construction is that no one provision of the Constitution is to be segregated from all others and considered alone. All provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the instrument'.***
>
> ***In my judgment the principles of interpretation of the constitution to which I have referred above should be applied to the interpretation of our Constitution."***

Therefore, different Articles of The Constitution on the same subject must be looked at and construed together without destroying each other so as to create harmony among them.

In the instant case, I agree with the submission of the respondents that ***Articles 139(1), 128(1),(2)&(3), 28(1) and 126(2)(b)&(c)*** cannot be looked

at in isolation of the provisions of ***Articles 154 and 155 of the Constitution***. A reading of all these Articles drives to the inevitable conclusion that indeed if execution issued without the particular court debt being provided for as required under ***Articles 154 and 155 of the Constitution*** it would create a contradiction and an absurdity which is undesirable. Therefore to create harmony this court cannot find the provisions of ***Section 19(4) of the Government Proceedings Act*** to be inconsistent with the constitution. For those reason I find that because of the existence of ***Articles 154 and 155 of the Constitution, Section 19(4) of The Government Proceedings Act*** is consistent with the provisions of Constitution when construed as a whole.

Issue 4: Whether the omission by government in providing for payment of judgment debt for financial years 2011/2012, 2012/2013 is contrary to Articles 155(1) & 160 of the Constitution?

Submissions of the Petitioners.

On this issue the Petitioners submitted that they relied on paragraph 11 of the affidavit in support of the Petition which states that there are many judgment creditors who have waited for more than 7 years without being paid by the Government, including several awards made by the Uganda Human Rights Tribunal which have not been satisfied.

In the Constitutional Court of Peru in **STATE IN FULFILLMENT OF JUDGMENTS FILE NO.015-2001/A1/TC El Peruanol February 2004** it was stated that ***"the principle of budgetary legality should be made consistent with the effective enforcement of a court judgment, upholding of the first does not justify ignoring or irrationally delaying compliance with judgment. Consequently, priority should be accorded***

to the payment of the oldest debts and of interest that has accrued due to the unjustified delays in payment"

The petitioners further submitted that much as any payment made by the Government must be drawn from the budget, it should not be used to prolong fulfillment of Judgment debts and endless refusal to enforce judgments against the Government. The Government should therefore consider the pending judgment debts in the Budget by including them in financial years for easy budgeting and planning to cater for Judgment debtors or set up a reserve fund catering for future judgment debts. However, the Government omitted to provide for payment of judgment debt for financial year 2011/2012 and 2012/2013 is contrary to Articles 155(1) & 160 of the Constitution of the Republic of Uganda.

Respondent's Submissions.

On this issue, the respondent submitted that the Petitioners did not produce any evidence in court to prove that the respondent has not provided for payments of judgment debts for the financial years alleged. It is upon this premise that they pray that this issue is dismissed for lack of supporting evidence as required under ***Rule 12 of the Constitutional Court (Petitions and References) Rules S.I 91/2005***.

Determination of issue 4

I do agree with the respondents that the Petitioners did not produce any evidence to prove the allegations of fact made by them on this issue. They have an affidavit in support of the Petition deposed by the 1st Petitioner but it does not provide any evidence on the provisions of the budget of the

impugned financial years and also completely omits to say anything on the issue. The Rules of this court state in ***Rule 12 of the Constitutional Court (Petitions and References) Rules S.I 91/2005*** that;

> ***12. Evidence at trial***
>
> ***(1) All evidence at the trial in favour of or against a petition shall be by way of affidavit filed in Court.***
>
> ***(2) With the leave of the Court, any person swearing an affidavit which is before the Court, may be cross examined or recalled as a witness if the Court is of the opinion that the evidence of the witness is likely to assist the Court to arrive at a just decision.***
>
> ***(3) The Court may, of its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence of the witness is likely to assist the Court to arrive at a just decision.***
>
> ***(4) A person summoned as a witness by the Court under subrule (3) may, with the leave of the Court, be cross examined by the parties to the petition.***
>
> ***(5) The Court may refer the matter to the High Court to investigate and determine the appropriate redress.***

Therefore on this ground alone I would dismiss the petition on this issue.

However, for purposes of completeness, I shall give my view on whether if indeed the respondent did not provide for court awards for two consecutive

financial years it would be unconstitutional. My view is that it would be unconstitutional.

Article 155(1) of the Constitution provides;

> ***155. Financial year estimates.***
>
> ***(1) The President shall cause to be prepared and laid before Parliament in each financial year, but in any case not later than the fifteenth day before the commencement of the financial year, estimates of revenues and expenditure of Government for the next financial year.***

Article 160 of the Constitution provides;

> ***160. Public debt.***
>
> ***(1) The public debt of Uganda shall be charged on the Consolidated Fund and other public funds of Uganda.***
>
> ***(2) For the purposes of this article, the public debt includes the interest on that debt, sinking fund payments in respect of that debt and the costs, charges and expenses incidental to the management of that debt.***

If the only way Government can satisfy judgment debt is through the processes which the respondents explained in issue 3 above, then it means that the only way the government can comply with the orders of court to pay is if judgment debt is provided for in the budget. If the Government omits to make provision for judgment debt even for one financial year, then it will be in contempt of court as long as there are judgment debts outstanding in that

financial year. This is the only way that judgment creditors can realize the fruits of their judgment and in the process the Rule of law will be promoted. Otherwise all court orders for payment can easily be rendered mere paper writings if they are not taken as priority debts. Indeed it is an injustice and contrary to the obligations of Government under ***Articles 155(1) and 160 of the Constitution*** to omit making provision for such an important budget line.

Issue 5: What are the remedies available?

Having found in favour of the respondents on all the issues in this Petition I would dismiss this petition with each party bearing its own costs of the Petition.

This Petition fails and is accordingly dismissed with each party to bear their own costs of the Petition.

I so order

Dated at Kampala this 9th day of Feb 2020

STEPHEN MUSOTA

JUSTICE OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA,

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO 43 OF 2012

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

1. NAMPOGO ROBERT}
2. TUMWESIGYE MOSES} .....PETITIONER

VERSUS

ATTORNEY GENERAL} .....RESPONDENT

JUDGMENT OF MADRAMA CHRISTOPHER, JCC

I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Stephen Musota, JCC and I agree with his analysis of the facts and resolution of the issues save for issue 2 as set out below. I would nonetheless add a few words of my own and the reasons therefore as hereunder.

The Petitioner alleges that section 2 (1) of the **Civil Procedure & Limitation (Miscellaneous Provisions) Act** by providing for notice before suing where a party's claim is based on a statutory or constitutional breach including the breach of a bill of rights, is firstly inconsistent with the Constitution in Article 28 (1) and Article 126 (2) (b) & (c) of the Constitution that entitle a party to a speedy trial and outlaws delayed justice. In the second leg, the Petitioner alleges that it is inconsistent with Article 139 (1) of the Constitution that empowers the High Court with unlimited original jurisdiction because the notice before suing limits the unlimited original jurisdiction of the High Court since a party cannot claim a remedy from the High Court and the High Court cannot grant a remedy to a wronged party without prior notice.

The second issue is that rule 11 of the **Government Proceedings (Civil Procedure) Rules** by providing that where the Attorney General is the defendant, his or her office is entitled to file a defence within 30 days when **Order 8 rule 1 Civil Procedure Rules** requires every defendant to file a defence within 15 days, is inconsistent with Article 21 (1) of the Constitution which provides that all persons are equal before and under the law.

Thirdly, the Petitioner alleges that section 19 (4) of the Government Proceedings Act by providing that no execution may issue against government for the payment of a judgment debt is inconsistent with the Constitution –

(i) With Article 139 (1) which confers on the High Court original unlimited jurisdiction because if the court cannot enforce its decrees by its execution process then the court's unlimited jurisdiction is limited.

(ii) With Article 128 (1), (2) & (3) which guarantees the independence of the judiciary because where court cannot issue process for the execution of its decrees, its independence is fettered.

(iii) With Article 28 (1) and 126 (2) (b) & (c) of the Constitution which guarantees a speedy trial and causes delayed justice because where court cannot issue process for the execution of its decrees, the time within which the Attorney General will comply with the courts decree is left to the whim of the judgment debtor.

Fourthly, the Petitioner alleges that the omission by government in satisfying the judgment debt for the financial years 2011/2012, 2012/2013 is inconsistent and contrary to Articles 155 (1) & 160 of the Constitution which requires *inter alia* that government includes in its annual budgeting process monies by which it must defray the public debt from the Consolidated Fund.

The Petitioner prays for orders of this court to nullify the impugned sections of the law as being inconsistent with the Constitution and for costs of the petition.

In terms of paragraph 1 (a) of the petition, the issue is **whether section 2 (1) of the Civil Procedure & Limitation (Miscellaneous Provisions) Act by providing for prior notice of 45 days before suing the Attorney General is inconsistent with Article 28 (1), 126 (2) (b) & (c) of the Constitution because it delays speedy trial and causes delayed justice.**

I agree with the holding of my learned brother Hon. Mr. Justice Stephen Musota, JA in handling issue number 1 that section 2 (1) of the Civil Procedure & Limitation (Miscellaneous Provisions) Act is not inconsistent with Article 28 (1), Article 126 (2) (b) & (c) of the Constitution. I also agree with the reasons he has given and the precedents he cited.

I further note that the action only challenges statutory notice period to the Attorney General prior to suing. I would like to add that Article 28 (1) of the Constitution does not deal with prior procedure to the filing of a suit or proceeding before an independent and impartial court or tribunal established by law. It deals with speedy trials and therefore it deals with matters and causes which have been lodged in a court or tribunal established by law for adjudication. For emphasis Article 28 (1) of the Constitution of the Republic of Uganda 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 impartial court or tribunal established by law.

It is clear from the above Article that in terms of criminal proceedings, there has to be a criminal charge whereupon in the determination of the case, the

accused person as well as the prosecution is entitled to a fair and speedy trial. Article 28 (1) of the Constitution does not deal with the duration of investigations and preparations prior to charging in court. The trial commences with the charging of a suspect in a court of law. Article 28 (1) of the Constitution does not deal with investigations conducted prior to the laying of the charge against the suspect in a court of law. Investigations can be delayed provided the suspect is not detained or charged. Investigations can take several years.

Secondly, it is also clear that in the determination of civil rights and obligations, the matter must be before a competent court or tribunal before Article 28 (1) of the Constitution can be invoked for purposes of discussing or dealing with the fair, speedy and public hearing of the matter before the said independent and impartial court or tribunal established by law. It follows that Article 28 (1) cannot be invoked to test the constitutionality of a matter that exists or occurs before it is lodged in a court of law. Article 28 (1) deals with trials and not with statutory notice or any notice or negotiations between the parties before the matter is forwarded or lodged in a court or tribunal for adjudication. Section 2 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act cannot be tested on the basis of Article 28 (1) of the Constitution. A speedy trial provision deals with civil or criminal proceedings that have been commenced in court.

To illustrate further, a person may sit on his or her rights for several years so long as he or she is not caught up by the law of limitation and may finally commence proceedings in court. It is only after the matter has been commenced in court that the duty is on the court and the parties to actualise the provisions for, *inter alia*, a fair and speedy trial under Article 28 (1) of the Constitution.

Similarly, Article 126 (2) (b) of the Constitution deals with matters which are before the courts. It deals with the principles, subject to law, which are

applied by courts in adjudicating cases of both a criminal and civil nature. It does not apply to prior matters before filing the matter in court by way of commencement of a civil suit or a criminal charge. Similarly, section 2 (1) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act cannot be tested against Article 126 of the Constitution which deals with matters that are already before the courts. For that matter the submissions of the Petitioner and the petition itself in challenging the provisions for notice prior to suing is misguided on that particular point.

The second issue deals with the period prescribed for the filing of a defence after summons to do so within the time specified therein and challenges the disparity between an ordinary litigant and the Attorney General in that the Attorney General is entitled to file a defence within 30 days whereas an ordinary defendant is only given 15 days within which to file a defence after being served with summons to do so.

I dissent from the finding of my learned brother Hon. Justice Stephen Musota, JA\JCC on the second issue on the ground that equality before and under the law has only to be established on a prima facie basis whereupon the onus shifts on the Attorney General as Respondent to demonstrate that the limitation to the rights of other litigants in terms of giving the Attorney General preference by having more time to file a defence is demonstrably justifiable in a Free and Democratic Society, or as is provided in the Constitution in terms of Article 43 (2) (c) of the Constitution. There is a rule that does not treat litigants equally. The Attorney General has not demonstrated to Court that the Rule in question is justifiable in a Free and Democratic Society. Further the Constitution has not given preference to the Office of the Attorney General. The office of the Attorney General is created by Article 119 of the Constitution and particularly Article 119 (3) (c) of the Constitution gives one of the functions of the Attorney General as being:

"to represent the government in courts or any other legal proceedings to which the government is a party;"

The Attorney General is entitled to 45 days' statutory notice prior to being sued in any matter and that is sufficient time to either settle the matter or prepare to defend it. It was sufficient for the Petitioner to raise the issue of inequality in violation of Article 21 of the Constitution by virtue of rule 11 of the Government Proceedings (Civil Procedure) Rules giving a right to the Attorney General to file a defence within 30 days when other ordinary litigants are given 15 days under Order 8 rule 1 of the Civil Procedure Rules within which to file their defence upon being served with summons to do so.

The answer to the petition of the Respondent in paragraphs 5 and 6 do not contain any answer to the allegation that rule 11 of the Government Proceedings (Civil Procedure) Rules is discriminatory and does not create inequality before and under the law. This is a procedural point. Further the affidavit in support of the answer to the petition of Elisha Bafirawala only has the following assertions namely:

3. That the requirement of notice under Section 2 (1) of the Civil Procedure & Limitation (Miscellaneous Provisions) Act do not in any way contravene the Constitution and this matter has been adjudicated on and settled by Courts of law.

4. That once the party has brought its claim properly before a court of law using the correct legal procedure under the law there is no bar to administration of justice.

5. that I know that the provisions under section 19 (4) of the Government Proceedings Act provides for the procedure by which orders against Government can be enforced and further that this process is pursuant to justifiable public policy considerations.

6. That the Parliament of Uganda appropriates funds in accordance with the law and according to competing constitutional obligations and it will in effect be unconstitutional to allow execution of public funds to satisfy private judgment debts and would undoubtedly paralyze operation of Government institutions.

name a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions, which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

The rights and freedoms guaranteed by the Charter are not however absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realisation of collective goals of fundamental importance. For this reason, section 1 provides criteria for their justification for the limit on rights and freedoms guaranteed by the Charter. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principle of a free and democratic society.

The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of section 1 that limits on the rights and freedoms enumerated in the charter are exceptions to the general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking section 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word 'demonstrably', which clearly indicates that the onus of justification is on the party seeking to limit.

The procedural point is that once such a prima facie case has been established by the Petitioner the onus shifts to the Respondent to demonstrate that what is being challenged as inconsistent with a provision of the Constitution is demonstrably justifiable in a free and democratic society and the standard of proof is higher than that on the balance of probabilities.

The Petitioner having shown that ordinary defendants have 15 days within which to file a written statement of defence upon being served with summons to do so and the Attorney General has 30 days within which to file a defence in similar circumstances, prima facie demonstrated that there is inequality in legislation in terms of Article 21 of the Constitution of the Republic of Uganda and the only question that remains is whether such inequality is demonstrably justifiable in a Free and Democratic Society. The onus shifted on the Attorney General to demonstrate that the rule 11 of the Government Proceedings (Civil Procedure) Rules is demonstrably justifiable in a Free and Democratic Society. The Respondent's answer to the petition does not provide any evidence or answer to demonstrate that the disparity between ordinary defendants in civil suits and the Attorney General as defendants in civil suits is justifiable as stated above. In the absence of such explanation or evidence, the Attorney General has abandoned his or her responsibility and has not met the onus and standard required for the court to determine the issue of whether having 30 days within which to file a written statement of defence compared to the 15 days for ordinary litigants is demonstrably justifiable in a Free and Democratic Society.

In the premises, and on that ground alone, I would find that the rule 11 of the Government Proceedings (Civil Procedure) Rules is inconsistent with Article 21 (1) of the Constitution of the Republic of Uganda in that all persons are not treated equally before the law and the Attorney General has discriminatorily been given more days within which to file a defence than other ordinary defendants. Moreover, the Attorney General has 45 days within which to consider the matter after being given statutory notice. The period of 45 days enables the Attorney General to liaise with the Government Department in investigating the claim and in considering whether to settle the suit or settle it or defend it at the end of the statutory notice period. For the same reason, I cannot conclude that the period of 30 days given to the Attorney General was in the public interest. There is simply no evidence or

7. That the grant of remedies in courts of law cannot operate oblivious of the practicalities of the resource envelope available to satisfy national goals and objectives hence the provisions in the Constitution, Statute Books and common law that make the Attorney General a unique litigant.

8. That the petition discloses no question for constitutional interpretation as against the Respondent and the same should be dismissed with costs.

Apart from the general assertion that the Attorney General is a unique litigant, there is no effort on the part of the Attorney General to demonstrate that the limitation to the rights of other defendants before the courts by giving them less days (i.e. 15 days) and conversely that giving the Attorney General more days being 30 days to file a defence is demonstrably justifiable in a free and Democratic Society.

As noted above, the onus is on the Attorney General to demonstrate the justification for the disparity. Article 43 (1) of the Constitution provides that:

> In the enjoyment of the fundamental rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights or freedoms of others or the public interest.

Public interest is defined by limitation under Article 43 (2) (c) which provides that it does not permit:

> (c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this constitution.

The onus is on the person raising limitation to demonstrate that such limitation is justifiable in a free and democratic society. In **NTN Pty Ltd and N.B.N. Ltd vs The State 1988 (Const) LRC 333**, it was held that in considering legislation that derogated from a right, the party impugning the legislation had to show a prima facie case that his right is affected. Kapi DCJ of Papua New Guinea held that the party impugning the legislation must show a prima facie case that his right has been affected.

> The Petitioner must demonstrate a prima facie case that his rights has [have] been affected ··· The nature of the evidence depends on the manner in which the fundamental rights is said to be affected by legislation...

Further in **Charles Onyango Obbo and Andrew Mujuni Mwenda v the Attorney General Constitutional Appeal No. 2 of 2002,** Kanyeihamba J.S.C. held that:

> ···under Article 43 (1) and (2) mean that the freedom of speech and expression which included the freedom of the press and other media is not absolute, but if the Executive or Parliament are to act or legislate in favour of these exceptions, they must do so strictly in accordance with the provisions of the Constitution and if called upon, justify what they have done or legislated for before the Courts of law which have the duty to protect the Constitution and the laws of Uganda and harmonize- the same.

On the same point Karokora J.S.C held that:

> Moreover, I think that the Respondent in the instant case could not justify prosecution of the Appellant under Section 50 of the Penal Code Act by claiming that they did so in public interest, because the onus was on the Respondent to adduce evidence, which they never did, to prove that the existence of Section 50 of the Penal Code Act is acceptable and demonstrably justifiable in a free and democratic Uganda today within the meaning of Article 43(2) (c) of the Constitution.

The general principles to inquire into whether limitations on fundamental rights are justifiable was extensively considered in **The Queen v Oakes [1987] LRC page 477** where the Supreme Court of Canada held at page 498 – 499 that:

> A second contextual element of interpretation of section 1 is provided by the words 'free and democratic society'. Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to

name a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions, which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

The rights and freedoms guaranteed by the Charter are not however absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realisation of collective goals of fundamental importance. For this reason, section 1 provides criteria for their justification for the limit on rights and freedoms guaranteed by the Charter. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principle of a free and democratic society.

The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of section 1 that limits on the rights and freedoms enumerated in the charter are exceptions to the general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking section 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word 'demonstrably', which clearly indicates that the onus of justification is on the party seeking to limit.

The procedural point is that once such a prima facie case has been established by the Petitioner the onus shifts to the Respondent to demonstrate that what is being challenged as inconsistent with a provision of the Constitution is demonstrably justifiable in a free and democratic society and the standard of proof is higher than that on the balance of probabilities.

The Petitioner having shown that ordinary defendants have 15 days within which to file a written statement of defence upon being served with summons to do so and the Attorney General has 30 days within which to file a defence in similar circumstances, prima facie demonstrated that there is inequality in legislation in terms of Article 21 of the Constitution of the Republic of Uganda and the only question that remains is whether such inequality is demonstrably justifiable in a Free and Democratic Society. The onus shifted on the Attorney General to demonstrate that the rule 11 of the Government Proceedings (Civil Procedure) Rules is demonstrably justifiable in a Free and Democratic Society. The Respondent's answer to the petition does not provide any evidence or answer to demonstrate that the disparity between ordinary defendants in civil suits and the Attorney General as defendants in civil suits is justifiable as stated above. In the absence of such explanation or evidence, the Attorney General has abandoned his or her responsibility and has not met the onus and standard required for the court to determine the issue of whether having 30 days within which to file a written statement of defence compared to the 15 days for ordinary litigants is demonstrably justifiable in a Free and Democratic Society.

In the premises, and on that ground alone, I would find that the rule 11 of the Government Proceedings (Civil Procedure) Rules is inconsistent with Article 21 (1) of the Constitution of the Republic of Uganda in that all persons are not treated equally before the law and the Attorney General has discriminatorily been given more days within which to file a defence than other ordinary defendants. Moreover, the Attorney General has 45 days within which to consider the matter after being given statutory notice. The period of 45 days enables the Attorney General to liaise with the Government Department in investigating the claim and in considering whether to settle the suit or settle it or defend it at the end of the statutory notice period. For the same reason, I cannot conclude that the period of 30 days given to the Attorney General was in the public interest. There is simply no evidence or

grounds to reach that conclusion in the absence of a demonstration by the Attorney General that the 30 days' period within which to file a defence is demonstrably justifiable in the free and Democratic society. I would allow this ground of the petition and hold that rule 11 of the Government Proceedings (Civil Procedure) Rules is inconsistent with Article 21 (1) of the Constitution.

The third matter for consideration is **whether section 19 (4) of the Government Proceedings Act is inconsistent with Articles 139 (1), 128 (1), (2) & (3), 28 (1) and 126 (2) (b) & (c) of the Constitution**.

On this third issue, I agree with my learned brother Hon Mr. Justice Stephen Musota, JCC that Articles 154 and 155 of the Constitution, as well as section 19 (4) of the Government Proceedings Act is not inconsistent with the cited provisions of the Constitution. The issue of failure to pay has nothing to do with the law but is a problem of failure to operationalize the law according to the Constitution and the Financial Management Act 2015 and previous enactments on management of Public Funds. I would like to add that a similar matter was considered by the High Court; Executions and Bailiffs Division, in **Bank of Uganda v Ajanta Pharma Ltd and Attorney General; Miscellaneous Appeal No 04 Of 2017 (Arising from Miscellaneous Application No 601 of 2017) (Arising out of Arbitration Cause No 03 of 2016) ((Original CAD – 02 OF 2011))** where the issue before court was whether the Petroleum Fund could be attached to satisfy a judgment debt. This is what I held:

> The issue here is whether the Petroleum Fund can be attached. The system of management of funds by Government is constitutional. Its foundation is Article 154 of the Constitution. Starting with the Consolidated Fund, it is created in a similar way like the Petroleum Fund by an Act of Parliament. Article 153 of the Constitution provides as follows:
>
> **"153. Consolidated Fund.**

(1) There shall be a Consolidated Fund into which shall be paid all revenues or other monies raised or received for the purpose of, or on behalf of, or in trust for the Government.

(2) The revenues or other monies referred to in clause (1) of this Article shall not include revenues or other monies—

(a) that are payable by or under an Act of Parliament, into some other fund established for a specific purpose; or

(b) that may, under an Act of Parliament, be retained by the department of Government that received them for the purposes of defraying the expenses of that department."

Article 153 (1) provides that money in the Consolidated Fund shall be where all revenues or other monies raised and received for the purposes of or on behalf of or in trust for the Government shall be paid. Secondly, Article 154 provides that there shall be no withdrawal from the Consolidated Fund except as authorized by law. It provides as follows:

"154. Withdrawal from the Consolidated Fund.

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

(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.

(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.

(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.

(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—

(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.

Expenditure out of the Consolidated Fund has to be charged by the Constitution or by an Act of Parliament, otherwise money shall not be withdrawn from the fund. It follows that the court cannot order a withdrawal from the Consolidated Fund since it is the preserve of Parliament to authorise the Executive Arm of Government to do so. Similar provisions have been enacted to apply to the Petroleum Fund. Under section 3 of the **Public Finance Management Act 2015** the term Petroleum Fund is defined. "Petroleum Fund" means the fund established under section 56. The term "petroleum revenue" also means tax paid under the Income Tax Act on income derived from petroleum operations, Government share of production, signature bonus, surface rentals, royalties, proceeds from the sale of Government share of production, any dividends due to Government, proceeds from the sale of Government's commercial interests and any other duties or fees payable to the Government from contract revenues under a petroleum agreement. Finally, the "Petroleum Revenue Investment Reserve" means the investment reserve referred to in section 62 of the Public Finance Management Act.

...

The subsequent **section 58 of the Public Finance Management Act, 2015** prescribes how monies shall be withdrawn from the Petroleum Fund. Section 58 is couched in mandatory terms. Withdrawals shall only be made under an authority of an Appropriation Act of Parliament. Appropriation Acts are passed after Government presents a budget for approval of Parliament. Section 58 of the Public Finance Management Act, 2015 provides as follows:

> "58. Withdrawals from the Petroleum Fund.
>
> Withdrawals from the Petroleum Fund shall only be made under authority granted by an Appropriation Act and a warrant of the Auditor General—
>
> (a) to the Consolidated Fund, to support the annual budget; and
>
> (b) to the Petroleum Revenue Investment Reserve, for investments to be undertaken in accordance with section 63."

The only way to withdraw funds from the Petroleum Fund is through an Act of Parliament. To make an order or cause through court order to withdraw funds from the Consolidated Fund or from the Petroleum Fund without an appropriation of the funds by Parliament after considering a budget to justify and have approved proposed expenditure to be charged on the fund offends the cardinal doctrine of separation of powers and is unconstitutional. The term "appropriation" is defined by section 3 of the Public Finance Management Act to mean "an authorization made under an Appropriation Act permitting payment out of the Consolidated Fund or the Petroleum Fund under specified conditions or for a specified purpose". Secondly, the term "Appropriation Act" means "the Act passed in accordance with Article 156 of the Constitution, which authorizes expenditure of public money for a financial year." Finally, the expenditures of Government are presented to Parliament in a budget and may be approved. The term "budget" is also defined and means the Government plan of revenue and expenditure for a financial year"

A garnishee order nisi or absolute attaching and transferring revenues in the Petroleum Fund usurps powers of the Executive to present a budget for approval of Parliament and also usurps powers of Parliament to authorize any expenditure out of the Petroleum Fund. It is unconstitutional because it offends the doctrine of separation of powers as stated in the Zimbabwean case of **Smith v Mutasa and Another [1990] LRC 87.** In that case the Supreme Court of Zimbabwe held that

the Constitution is the supreme law of the land and Parliament though supreme in the legislative field assigned by the Constitution cannot go beyond its constitutional limits. The Supreme Court of Zimbabwe cited with approval the decision of Gajendragadkar C.J. of the Supreme Court of India in **Special Reference No. 1 of 1964 (1965) 1 SCR 413 at 446** that:

> "…just as the legislature are conferred legislative authority and their functions are normally confined to legislative functions, and functions and authority of the executive lie in the domain of executive authority, so jurisdiction and authority of judicature in this country lie within the domain of adjudication …" (reported in All India Reporter (1965) (Volume 52) page 745 SC pages 1 – 1200).

In **Smith vs. Mutasa (Supra)** the Court held at page 95 that:

> "the Constitution of Zimbabwe divides powers between the executive, the legislature and the judiciary as I have mentioned above, and …leaves to courts of law the question of whether there has been any excess of power, and require them to pronounce as void any act which is ultra vires."

Let the Executive present a budget to get funds out of the Petroleum Fund and it is up to Parliament to exercise its mandate to see whether the withdrawal from the fund as proposed by the Executive Arm of Government should be made or not. The court cannot interfere with that process by imposing another route for withdrawals out of the Petroleum Fund in the name of satisfying judgment debts in execution. In the premises the garnishee proceedings as attach and purport to transfer any money from the Petroleum Fund is an illegality and is null and void. Whether the procedure followed in moving the court is right or wrong the law is that an illegality once brought to the attention of court overrides all questions of pleadings including any admissions made therein as held in the Ugandan case of **Makula International v His Eminence Cardinal Nsubuga and another reported in [1982] HCB 11**…

Similar to the question of the Petroleum Fund, section 19 of the Government Proceedings Act provides for the procedure for execution against Government for payment of a judgment debt. This would avoid the attachment of any fund that has been appropriated by Parliament for a

specified purpose that has been budgeted for. Appropriations are based on budgets submitted by ministries and expenditure outside the budget by ministries is forbidden. Monies are appropriated for particular purposes specified in the submission of ministries in their budgetary documents. For instance, money meant for drugs or procurement of fuel for vehicles should not be attached to satisfy a judgment debt otherwise the supplier who is entitled to prompt payment under a contract may also sue the Government for payment of dues together with damages and a vicious circle begins again.

Section 19 of the Government Proceedings Act, requires that a certificate of order against the government containing the particulars of the payment as stipulated in the decree or order of Court should first be issued by the Registrar. Secondly, it has to be served upon the Attorney General and the Treasury officer of accounts or such other government accounting officer as may be appropriate. This allows for verification of the judgment debt. The accounting officer shall subject to other provisions pay to the person entitled or his or her advocate the amount appearing by the certificate that is due to him or her together with the interest if any due on the amount.

The only way that payment may be delayed is if there is a stay of execution ordered issued by a competent court obtained by the Attorney General. This is expressly provided for by section 19 (3) of the Government Proceedings Act, which, *inter alia* provides that:

> ··· Government accounting officer as may be appropriate shall, subject as hereafter provided, pay to the person entitled or to his or her advocate the amount appearing by the certificate to be due to him or her together with the interest, if any, lawfully due on that amount; **but the court by which any such order as is mentioned in this section is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part of it, shall be suspended, and if**

the certificate has not been issued may order any such directions to be inserted in the certificate. (Emphasis added)

The question of the budget and appropriation by Parliament does not arise except as a matter of practice for any factors which are not before court. There should be in place, sufficient funds to meet judgment debts. If there are no sufficient funds, it is a problem of management. There are extraordinary circumstances in which money that is budgeted for is not paid out in cases of contracts or tenders resulting in suits for breach of contract. Hypothetically, the money for supply of services to Government ought to have been returned to the Treasury if not paid and if the matter ends up as a civil suit, resulting in a judgment debt payable by the government, the money should be available because the activity was budgeted for and money appropriated for it by Parliament except for the award of damages and interest. This should apply to all contracts executed for which money is supposed to be budgeted for to fulfil the contract. It is only the unexpected matters like Torts or other breaches of contract or duties which may be of surprise to the Executive. Even then, there must be a budget to satisfy judgment debts estimated from various demands that have been served upon the Attorney General as the legal representative of Government. If there is to be a delay in payment, such delays have to be explained to the satisfaction of court. Based on documents served on the Attorney General, a budget can be generated for the next financial year. Generally, the line Ministry responsible for the provision of the service, the subject matter of the suit or the servant of the Ministry responsible for the commission of the tort or breach of the litigants right should have a budget to satisfy debts ordinarily incurred by the Ministry.

In the premises, section 19 of the Government Proceedings Act, Cap 77 is not inconsistent with any provision of the Constitution. The only hard question is whether an order of mandamus compelling the Treasury officer of accounts or the accounting officer for the Ministry responsible who is required to pay

the judgment debt in mandatory terms under section 19 (3) of the Government Proceedings Act, can be compelled to pay immediately. Section 19 of the Government Proceedings Act envisages payment within a reasonable time because the requirement to pay by the Treasury officer of accounts or such other government accounting officer is couched in mandatory language. Payment ought to be processed soon after service of the court documents signifying the amount to be paid to the judgment creditor. Failure to do so is breach of the law and the remedy is to file an action directing the Treasury officer of accounts or the accounting officer to pay or risk being imprisoned or be made to pay at the time and in the manner directed by the court. In the very least it should be demonstrated to the satisfaction of the court executing the decree or order that payment has been initiated and delays are based on the system of payment which system when commenced guaranties the payment with a specified time.

In the premises, failure to pay for a long period of time even after service of the material documents signifying the decree of the court directing payment, or an order of mandamus directing payment, is a constitutional crisis. Court orders are enforceable with the assistance of the Executive. Article 128 of the Constitution clearly provides in Article 128 (3) thereof that the state shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts. Article 128 (3) provides that:

> (3) All persons and agencies of the State shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts.

Failure to assist the courts in the matter of satisfaction of a judgment debt is a clear violation of Article 128 (3) of the Constitution though no question arises for interpretation of the Constitution and it is an issue for enforcement of the Constitution only. Even arresting the Treasury officer of accounts or the accounting officer responsible to make the payment can be done by an

appropriate officer of the Executive. In the circumstances, failure to assist the court is a failure of the constitutional order.

In the premises, I agree that section 19 of the Government Proceedings Act is not inconsistent with any provision of the Constitution and it is only the enforcement of that provision that is wanting.

The last issue of **whether any omission by The government in providing for payment of the judgment debt for the financial years 2011/2012, 2012/2013, is contrary to Article 155 (1) & 160 of the Constitution which requires *inter alia* that the government includes in its annual budgeting process monies by which it must defray the public debt from the Consolidated Fund**.

I agree with the decision of my learned brother Hon Mr. Justice Stephen Musota, JCC on this issue and I have nothing useful to add.

In the premises, I would allow the petition partially by allowing issue number 2 with costs and would dismiss the rest of the petition as proposed in the judgment of my learned brother Hon Mr. Justice Stephen Musota, JCC with an order that each party bears its own costs of the dismissed portion of the petition.

Dated at Kampala the 9th day of Feb 2020

Christopher Madrama

Justice of Constitutional Court