

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 17 OF 2014

5 **JAMES KIWANUKA WALAKIRA=====PETITIONER**

VS

ATTORNEY GENERAL=====RESPONDENT

CORAM: HON. MR. JUSTICE BUTEERA RICHARD, DCJ

10 **HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J.A. /JCC.**

HON. LADY JUSTICE ELIZABETH MUSOKE, J.A. / JCC.

HON. LADY JUSTICE HELLEN OBURA, J.A. / JCC.

HON. LADY JUSTICE MONICA MUGENYI, J.A. / JCC.

15 **JUDGMENT OF HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA/JCC**

Introduction

This Petition is brought under Article 137(3) of the Constitution of the Republic of Uganda 1995 (herein after referred to as the "Constitution") and the Constitutional Court (Petitions and References) Rules 2005.

20 **The background to the Petition**

The Petitioner, (a son to the Late Asalia Manjeri Nakawombe) was granted Letters of Administration to her Estate on 14th September 2010 by the Chief Magistrate of Nakawa. However, on 24th June, 2014 vide Misc. Application No.

001 of 2014 the Petitioner was ordered to surrender these Letters of Administration for cancellation, by the Chief Magistrates Court of Nakawa. The Petitioner alleges that the Order for cancellation was issued without giving the Petitioner notification of a hearing nor was he accorded an opportunity to be heard before the issuance of the Citation.

The Petitioner brought this Petition to challenge;

a) The Constitutionality of Rule 17 of the Administration of Estates (Small Estates) (Special Provisions) (Probate and Administration) Rules S.I 156-1.

b) The Constitutionality of the Court process and practice of recalling Letters of Administration from the Holder thereof without first according him or her opportunity to be heard.

c) The Constitutionality of the Order of the Chief Magistrate of the Nakawa Chief Magistrates Court recalling Your Petitioner's Letters of Administration dated 24th June 2014.

The Petitioner alleges that the above legal Provision and the highlighted actions of the Chief Magistrate contravene Articles 21(1), 28(1) and 44(c) of the Constitution of the Republic of Uganda.

The Petitioner sought the following declaration and Orders;

a) A declaration that Rule 17 of the Administration of Estates (Small Estates) (Special Provisions) (Probate and Administration) Rules is unconstitutional.

b) A Declaration that the practice and Order of Magistrate's courts and other Judicial Officers of recalling Letters of Administration vide

Citation Applications without giving Administrators of Estates a chance to be heard before the Order of recall is made, contrary to the Constitution of Uganda is null and void.

5 c) An Order that the Petitioner retains his letters of Administration until he is given a chance to be heard before the order recalling them can be issued.

d) An Order quashing the decision of the Chief Magistrate of Nakawa Court of recalling your Petitioner's letters before being heard.

10 e) An Order prohibiting the Respondent's agent the Chief Magistrate from treating the Petitioner unfairly and denying him his right to a fair hearing.

Representations

15 The Petitioner and his Advocate were absent while the Respondent was represented by Ms. Patricia Mutesi, Assistant Commissioner Legal in the Attorney General's Chambers.

Duty of the Court

Before I delve into the consideration of this Petition, I believe that it will be beneficial that I recall some of the Roles of a Constitutional Court and the principles that guide its decisions.

20 Article 126(1) of the Constitution provides that judicial power is derived from the people and shall be exercised by the Courts established under the Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people. In adjudicating cases, the Courts shall, subject to the law, apply certain principles including the concepts

that Justice shall be done to all irrespective of their social or economic status, promotion of reconciliation between the parties and the administration of justice without undue regard to technicalities.

With regard to principles of Constitutional Interpretation Article 137 (1) of the Constitution provides: -

"...Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court..."

Article 137(3) (a) (b) further provides that: -

"Any person who alleges that an act of parliament or any other law or anything in or done under the authority, of any law; or

"any act or omission by any 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..."

In this Petition it is alleged that Rule 17 of the Administration of Estates (Small Estates) (Special Provisions) (Probate and Administration) Rules (herein after referred to as the "Administration of Small Estates Rules") is inconsistent with the Constitution. It also alleged that the process and practice adopted by the Chief Magistrates Court when recalling the Petitioner's Letters of Administration from Administrators was unconstitutional.

As to remedies, Article 137 (4) provides that: -

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

(a) grant an order of redress; or

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

The above provisions set the jurisdiction and parameters for interpretation by the Constitutional Court. However, in addition to establishing jurisdiction the Petition in addition must disclose a cause of action. In the matter of **Baku**
10 **Raphael Obudra and Obiga Kania V Attorney General** Constitutional Appeal No. 1 of 2003 Justice Mulenga (JSC as he then was) recalling his holding in **Ismail Serugo V Kampala City Council & Attorney General** (Constitutional Appeal No.2 of 1998) held that a Petition discloses a cause of action if it describes the act or omission complained of and shows the
15 provision of the Constitution with which the act or omission is alleged to be inconsistent or alleged to have been contravened and prays for a declaration to that effect.

In **Davis Wesley Tusingwire V Attorney General** Constitutional Petition No. 2 of 2013 this Court laid down another guiding principle and held: -

20 *“... that a liberal and broader interpretation should be given to a constitutional petition than is given to a plaint in a normal civil suit when determining whether a cause of action has been established (**Baku Raphael Obudra and Another v Attorney General Constitutional Appeal No. 1 of 2003 (SC)**). The*
25 *same principal applies to subsidiary legislation...”*

In interpreting the Constitution, the rule of harmony or completeness is another guiding principle that requires that Constitutional provisions should not be looked at in isolation. Rather, the Constitution should be looked at as a whole with no provision destroying another but all provisions supporting each other.

There also exists the rule of paramountcy of the Constitution which subordinates all other legislation to it and any such legislation which is inconsistent with the Constitution shall be void to the extent of that inconsistency. These principles were enunciated in the matters of **Paul Semogerere v Attorney General Constitutional Appeal No. 1 of 2002 (SC); and Attorney General v Susan Kigula and Others Constitutional Appeal No. 03 of 2006 (SC).**

In determining the constitutionality of a section of a Statute or Act of Parliament, court has to consider the purpose and effect of the impugned Statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the court can still go further and examine the effect of its implementation. If either its purpose or effect of its implementation infringes a right guaranteed by the Constitution, then the impugned Statute or section thereof shall be declared unconstitutional. This principle was applied in **Salvatori Abuki v Attorney General Constitutional Petition No.2 of 1997.**

Finally it can also be deduced from the decisions of **Serugo, Raphael Baku and Wycliffe Kiggundu** (Supra) that the onus to prove that there is a controversy involving interpretation lies with the Petitioner.

I shall keep these principles and others in mind while resolving the issues in this Petition.

ISSUES FOR DETERMINATION

The Parties framed the following issues for the Court's determination;

5 **1. Whether or not Rule 17 of the Administration of Estates (Small Estates) (Special Provisions) (Probate and Administration) Rules contravenes Articles 21(1), 28(1) and 44(c) of the Constitution of Uganda.**

10 **2. Whether or not, the process and practice of courts of recalling Letters of Administration from the holder contravenes Articles 21(1), 28(1) and 44(c) of the Constitution of the Uganda.**

Whether or not the Order of the Chief Magistrate of the Nakawa Chief Magistrates Court in recalling Your Petitioner's Letters of Administration was unconstitutional.

Submissions of the Petitioner

Counsel for the Petitioner proposed to argue all the issues together since they were inter- related.

20 Counsel for the Petitioner submitted that the human rights and fundamental freedoms enshrined under Chapter 4 of the Constitution are inherent and not granted by the state. He relied on the case of **Rev. Christopher Mtikila v Attorney General of Tanzania** Civil case No.5 of 1993 for the proposition that fundamental rights are not gifts from the state. They are inherent in a person by reason of his (or her) birth and therefore prior to the state or the

law. He argued that such rights and fundamental freedoms could not be taken away by the law or state.

He further submitted that the wording of Rule 17(1) of the Administration of Small Estates Rules is unconstitutional in as far as it allows a magistrate to settle a citation at that stage ex-parte. He argued that it violates the right to a fair trial as it gives a judicial officer power to adjudicate over a matter after hearing only one side of the case. He buttressed his argument by submitting that the right to a fair hearing was a non-derogable right protected under Article 44(c) of the Constitution.

Counsel for the Petitioner further submitted that the Court of Appeal had already dealt with the issue of equality before the law in the case of **Kabandize and 20 Ors v Kampala Capital City Authority** (Civil Appeal No.28 of 2011) where this court held that all persons are equal before and under the law and therefore the requirement of a 45 days' notice to statutory corporations was unconstitutional.

Preliminary Point of law

In Reply, counsel for the Respondent first raised a preliminary point of law that the Petition did not raise any matter for Constitutional interpretation and therefore ought to be dismissed.

She argued that counsel for the Petitioner did not show how the impugned legislation or other acts or omissions by the Respondent were in conflict with the Constitution.

She further submitted that even though the Petitioner alleged that Rule 17 of the Administration of Small Estates Rules is unconstitutional he did not go

further and demonstrate how Article 21(1) and 28(1) and 44 (c) were violated by the Respondent.

Reply to the Preliminary Objection

5 Counsel for the Petitioner did not reply to the Preliminary Objection in his skeleton arguments.

Court's findings on the Preliminary Objection

10 In order to determine whether this court has jurisdiction over the complaints set in the Petition in the instant matter, the test set in the matter of **Ismail Serugo v Kampala City Council & another** Constitutional Appeal No. 2 of 1998 becomes very instructive. In the Judgment of Wambuzi C.J. as he then was held:-

15 *"...for the constitutional court to have Jurisdiction the Petition must show, on the face of it that interpretation of a provision of the Constitution is required. It is not enough to allege merely that a Constitutional provision has been violated. If therefore rights have been violated as claimed, these are enforceable under Article 50 of the Constitution by another competent court..."*

20 The Petitioner's Counsel submitted that the complaints raised fall within the ambit of "acts" and "omissions" which this Court is enjoined to entertain under Article 137(3)(b) of the Constitution. In my view, this Petition raises a question for Constitutional Interpretation only in as far as it seeks to challenge the constitutionality of Rule 17 of the Administration of Small Estates Rules. I find that any question as to the procedure any given court may adopt while implementing the said provision does not call for constitutional

interpretation, but rather appellate review for determining existence of legal error and granting a relevant remedy.

The Merits

The Petitioner did not file his submissions.

5 Respondent's submissions on the merits

Counsel for the Respondent submitted that a Citation does not revoke Letters of Administration rather it notifies the current bearer of the Letters of Administration to show cause why the grant of the same should not be revoked.

10 She submitted that Rule 17 (5) of the Administration of Small Estates Rules avails the person against whom the Citation is issued an opportunity to file a statement giving an account of their side before the Magistrate revokes the Letters of Administration.

15 Counsel for the Respondent submitted that these steps by court emphasize the parties' right to be heard before a final step of revocation of the Letters of Administration or Probate is taken.

20 She further submitted that the Petitioner was accorded a right to be heard when he was served with the Citation and therefore the Chief Magistrate's court at Nakawa neither discriminated against him nor denied him a right to be heard.

She prayed that the Petition be dismissed with costs to the Respondent.

Court's Findings

I have considered the Petition and the answer to the Petition. I have also considered the submissions by the counsel to the parties to the Petition and the legal authorities relied on for which I am grateful.

5 The Petition before court contains an allegation that Rule 17 of the Administration of Small Estates Rules is unconstitutional.

The Petitioner alleges that this Rule contravenes Article 21(1), 28(1) and 44(c) of the Constitution. These Articles provide that: -

- 10 i. Article 21(1) – All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.
- ii. Article 28(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.
- 15 iii. Article 44(c) - Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms-
 - (a).....
 - (b).....
 - 20 (c) The right to a fair hearing..."

I shall now examine Rule 17 of the Administration of Small Estates Rules. It provides: -

17. Citations.

“

(1) Every citation shall issue from the court and shall be settled by a magistrate before **being issued in the appropriate form 4 of the first Schedule to these Rules.**

5 (2) The citor shall enter a caveat before issuing a citation.

(3) Every citation shall be served personally on the person cited unless the court, on good cause shown, directs some other mode of service, which may include notice by advertisement.

10 (4) Every will referred to in a citation shall be lodged in court before the citation is issued, except where the will is not in the citor's possession and the court is satisfied that it is impracticable to require it to be lodged.

15 (5) A person who has been cited to appear may, within twenty-one days of service of the citation upon him or her inclusive of the day of the service, or at any time thereafter if no application has been made by the citor for a grant, file a statement in court in duplicate. The court shall thereafter serve on the citor a copy of the statement...” (Emphasis added)

Rule 17 of the Administration of Small Estates Rules is titled “**Citations**”. According to the Osborn's Concise Law Dictionary Twelfth Edition page 84 a Citation means: -

20 “the calling upon a person who is not a party to an action or proceeding to appear before the court.”

To my mind, Rule 17(5) of the Administration of Small Estates Rules gives the person against whom the citation is issued, an opportunity to file a statement

within 21 days and give an account of their side of a compliant before the Magistrate revokes the Letters of Administration. Furthermore, the Citor must also be served with the Statement and this is what enables him to file a reply to the allegations made.

- 5 Form 4(c) of the First Schedule to the Rules provides the particular form that can be adopted by Judicial Officers.

I am unable to see how Rule 17 of the Administration of Small Estates Rules contravenes the Constitution as it upholds the tenets of a fair hearing and ensures that there is equality before the law.

- 10 I will now also inquire as to what happened in this matter by reproducing the citation which was issued by the Chief Magistrate. It reads: -

THE REPUBLIC OF UGANDA

IN THE CHIEF MAGISTRATE'S COURT OF NAKAWA AT

15 **NAKAWA**

MISC. APPLICATION NO. 001 OF 2014

(ARISING FROM ADMINISTRATION CAUSE NO.67 OF 2010)

IN THE MATTER OF REVOCATION OF LETTERS OF

ADMINISTRATION TO THE ESTATE OF THE LATE ASALIA

20 **MANJERI NAKAWOMBE (DECEASED)**

AND

IN THE MATTER OF AN APPLICATION FOR CITATION TO

RETURN

LETTERS OF ADMINISTRATION

FLORENCE NAKIWADDE:.....APPLICANT

5

VERSUS

JAMES KIWANUKA WALAKIRA:.....RESPONDENT

CITATION

TO:

JAMES KIWANUKA WALAKIRA

10 **WHEREAS it appears by the statement on Oath of FLORENCE NAKIWADDE SWORN ON THE 20th day of June 2014 at Kampala that Letters of Administration to the estate of the late ASALIA MANJERI NAKAWOMBE were granted to you on the 14th day of September 2010 by this Honourable Court as the Administrator of the said deceased's estate.**

15 **AND WHEREAS it is alleged that you obtained the said grant through fraud well knowing that the Applicant herein was the deceased's immediate beneficiary entitled to the grant and to benefit from the estate of the deceased.**

20 **AND WHEREAS it is alleged that you have intermeddled in the Estate of the deceased using the said grant by selling part of the estate to the detriment of the beneficiaries' interests.**

NOW THIS IS TO COMMAND YOU THE SAID JAMES KIWANUKA WALAKIRA that you are required within 21 days after the service hereof on you, inclusive of the day of service, bring into and leave in this court at Nakawa the original of the aforesaid Letters of Administration in order that the said FLORENCE NAKIWADDE (Applicant) may proceed in due course of law for the revocation of the same.

If you, the said JAMES KIWANUKA WALAKIRA neglects to obey this order by the time herein stipulated, you will be liable to the process of execution for purposes of compelling you to obey the same Order.

GIVEN under my hand and the SEAL of this Honourable Court this 24th day of June 2014.

CHIEF MAGISTRATE

This citation as drawn up to my mind substantially follows form No 4 to the first schedule of the Administration of Small Estates Rules. It clearly provides that the letters of administration were to be taken to court so that "***FLORENCE NAKIWADDE (Applicant) may proceed in due course of law for the revocation of the same***". I am unable to agree with the arguments of the Petitioner that this citation was made "ex-parte" and or was made without an opportunity for the Petitioner to be heard as the due course of the law under Rule 17 of the Administration of Small Estates Rules was expected to be followed by the Applicant therein. The only visible flaw in the said Citation is that the Magistrate in signing did not indicate his or her name. If the Petitioner

wanted to contest the citation then he could do this in the normal course of the proceedings provided for under the Administration of Small Estates Rules and not by filing a Constitutional Petition.

It is clear to me therefore that Rule 17 of the Administration of Small Estates Rules does not violate Articles 21 (1), 28 (1) and 44 (c) of the Constitution of Uganda.

Final Orders

This Petition stands dismissed.

As to costs, given the age of this dispute and given that the subject matter of the dispute is an estate of a deceased person I Order that each party bear their own costs.

I so Order.

Dated at Kampala this13th.....day ofJuly.....2022.


.....
GEOFFREY KIRYABWIRE

JUSTICE OF THE CONSTITUTIONAL COURT/COURT OF APPEAL

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 17 OF 2014

JAMES WALAKIRA KIWANUKA PETITIONER

VERSUS

ATTORNEY GENERAL RESPONDENT

CORAM: HON. MR. JUSTICE RICHARD BUTEERA, DCJ
HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JCC
HON. LADY JUSTICE ELIZABETH MUSOKE, JCC
HON. LADY JUSTICE HELLEN OBURA, JCC
HON. LADY JUSTICE MONICA MUGENYI, JCC


JUDGMENT OF MR. JUSTICE RICHARD BUTEERA, DCJ

I have heard the advantage of reading in draft the Judgment of my brother Justice Geoffrey Kiryabwire.

I agree with his findings and the conclusion. As Justice Elizabeth Musoke, Justice Hellen Obura and Justice Monica Mugenyi agrees the appeal is dismissed.

Each party shall bear their costs.

Dated ^{13th} day of July, 2022.

.....

Richard Buteera
DEPUTY CHIEF JUSTICE

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

(Coram: Buteera, DCJ, Kirabwire, Musoke, Obura & Mugenyii, JJA/JCC)

CONSTITUTIONAL PETITION NO. 17 OF 2014

BETWEEN

JAMES KIWANUKA WALAKIRA.....PETITIONER

AND

ATTORNEY GENERALRESPONDENT

JUDGMENT OF HELLEN OBURA, JA/JCC

I have had the benefit of reading in draft the judgment of my learned brother Hon. Justice Geoffrey Kirabwire, JA/JCC. I agree with his findings and conclusion and I have nothing useful to add.

Dated at Kampala this...13th...day of...July.....2022.



Hellen Obura

JUSTICE OF APPEAL/CONSTITUTIONAL COURT



THE REPUBLIC OF UGANDA

**THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA**

CORAM: BUTEERA, DCJ; KIRYABWIRE, MUSOKE, OBURA AND MUGENYI, JJCC

CONSTITUTIONAL PETITION NO. 17 OF 2014

JAMES KIWANUKA WALAKIRA PETITIONER

VERSUS

ATTORNEY GENERAL RESPONDENT

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JUDGMENT OF MONICA K. MUGENYI, JCC

I have had the benefit of reading in draft the lead Judgment of Hon. Justice Geoffrey Kiryabwire, JCC in this Appeal. I agree with the decision arrived at and the reasons therefore, and have nothing useful to add.

Dated and delivered at Kampala this ^{13th} day of July, 2022.



Hon. Lady Justice Monica K. Mugenyi
Justice of the Constitutional Court