

Background

The petitioner was a 64-year-old male, Lango by tribe and the Legal Advisor of the Apala Omyek Clan. He stated that he was “*couth and sagacious*” in matters pertaining to the traditions and customs of the Langi, having lived in the household of the last recognised “*Won Deo Wonyachi*” of Lango, until the institution of traditional leaders was abolished in Uganda in 1966.

The petitioner claims he has studiously addressed his mind to Article 246 (2) and (6) of the Constitution. And that he is of the opinion that the Constitution did not envisage or provide for election of traditional leaders outside areas of Uganda where there are kings or similar traditional or cultural leaders, who derive allegiance from the fact of birth or descent according to customs, traditions, usage or consent of the people in the area that he is appointed. Further that the District Local Councils and Sub County Local Councils are political organs of the State and susceptible to partisan manipulation. And that as such they cannot reflect the traditional and cultural identity of a people in an area. That in view of that, subjecting the wishes and aspirations of the people to a resolution of the two bodies for purposes of instituting a traditional or cultural leader in an area is to subject the people to political manipulation rather than their traditional or cultural will.

The petitioner further states that the people of Lango do not have hereditary leadership. That as a result, the installation of Yosam Odur, the 2nd respondent as the cultural leader of Lango is inconsistent with or in contravention of the Constitution. Further that the current holder of the office of Wonyaci, Yosam Odur, is just one of the clan leaders of Lango elected by his clan on a personal to holder basis; he therefore does not derive allegiance by the fact of birth or descent in accordance with the customs, traditions and usage or consent of the people of

Lango. He added that he knows that the Langi as a tribe have never given any leader, least of all Yosam Odur, allegiance to lead them by the fact of his birth or descent in accordance with the customs, traditions, usage or consent of the people of Lango. Further, that when the said
5 Yosum Odur was chosen to be the cultural or traditional leader, the issue of a traditional leader in Lango had not been resolved and Parliament had not prescribed the method for resolving the issue. That the Constitution of the 3rd respondent by which he was allegedly installed was inconsistent with Article 246 of the Constitution of
10 Uganda. And that theretofore, the process of installation of the 2nd respondent as the cultural or traditional leader of Lango violates the Constitution of Uganda on the following grounds:

- a) The Institution of Traditional or Cultural Leaders Act, 2011 is inconsistent with the Constitution in so far as section 4 (1) (b)
15 provides that a traditional leader may be instituted in accordance with the wishes and aspirations of the people to whom it applies, through a resolution of not less than two thirds of all members of the district local councils and sub county local government councils, respectively, in the area.
- c. The continued holding out by the 2nd respondent as the traditional
20 leader or cultural leader of Lango is inconsistent with or in contravention of Article 246(2) and (6) of the Constitution in that:
 - i) At the time of the alleged election and installation of the 2nd
25 respondent as the traditional or cultural leader of Lango, he did not and still does not derive allegiance from the people of Lango from the fact of his birth or descent.
 - ii) At the time of his alleged election and installation the 2nd
30 respondent as the traditional and cultural leader of Lango, he was not the leader of the people of Lango, deriving their allegiance from birth or descent.

- iii) At the time of the alleged election and installation of the 2nd respondent, Parliament had not prescribed a method for resolving the issue of the traditional or cultural leader in Lango.
- 5 d. That the 3rd respondent's purporting to elect and its attempt to install the 4th respondent as the duly elected traditional or cultural leader of Lango, using a constitution allegedly promulgated under the provisions of the impugned Institution of Traditional or Cultural Leaders Act, 2011, is/was inconsistent with or in contravention of the Constitution in that:
- 10 i) At the time of the 4th respondent's purported election, the issue of traditional or cultural leader of Lango had not been resolved.
- ii) At the time of the 4th respondent's (election and installation) as traditional or cultural leader of Lango, Parliament had not passed a law prescribing a method for resolving the issue of traditional or cultural leaders in Lango.
- 15 iii) At the time of alleged election and installation of the 2nd respondent as the traditional or cultural leader of Lango, he had not been and still does not derive allegiance from the people of Lango from the fact of his birth or descent.
- 20 e. That the promulgation of any Constitution, act or thing done under the provisions of the impugned Institution of Traditional or Cultural Leaders Act 2011, particularly before Parliament had prescribed a method for resolving the issue of the traditional leader or cultural leader of Lango and other areas without hereditary leadership, was/is inconsistent with or in
- 25 contravention of the Constitution.

The petitioner amplified the facts stated in the background above in the petition, and they were reproduced in the affidavits in support thereof

30

sworn by the petitioner on 3rd May 2017, and by Joseph Bua Okol on the same date.

In his affidavit, the petitioner stated, in part, that the Langi as a tribe have never given to any leader, least of all Yosam Odur, allegiance to lead them by the fact of his birth or descent in accordance with the customs, traditions, usages or consent of the people of Lango. And that when the 2nd respondent was chosen to be the leader, the issue of traditional or cultural leader had not been resolved in Lango and Parliament had not yet prescribed the method for resolving it.

10 He further averred that the constitution of the 3rd respondent under which the 2nd respondent was elected and allegedly installed as the traditional or cultural leader of Lango was inconsistent with Article 246 of the Constitution of Uganda. And that the people of Lango do not have hereditary leadership as is defined under Article 246 (6) of the
15 Constitution. And that as result, the 2nd and 4th respondents do not derive allegiance of the people of Lango by the fact of their birth or descent in accordance with the customs, traditions, usage or consent of the people of Lango.

The petitioner further averred that using a resolution of the district local
20 councils and sub county local government councils to determine the expression of the wishes on cultural matters is inconsistent with or in contravention of the Constitution. And that the constitution of the 3rd respondent under which the 2nd respondent was elected and allegedly installed as the traditional and cultural leader of Lango was
25 inconsistent with Article 246 of the Constitution and was null and void *abinitio*, and so is the current constitution. That as a result, the installation of the 2nd respondent as the cultural or traditional leader was also inconsistent with or in contravention of Article 246 (6) of the

Constitution, so would be the purported election of and the attempt by the 3rd respondent to install the 4th respondent or any other person as cultural or traditional leader of the people of Lango. He added that the people of any area are free to adopt their own method of determining their wishes and aspirations on traditional and cultural matters in accordance with their customs, traditions, usage and consent.

The petitioner went on to explain that he knows that there was a craze for the establishment of a traditional or cultural leader for the people of Lango to fit within the scheme of some NGOs; to wit: ActionAid, which yearned to create a central authority for the people of Lango to deal with the exigencies of the time posed by the insurgency in Northern Uganda. He asserted that it was during one of such meetings that the Clan Leaders (*Owitong*) of Lango elected the said Yosam Odur, not as king or hereditary leader but as a chairman of the Council of *Owitong*. He emphasised that Yosam Odur has never been a king or similar traditional or cultural leader, by whatever name called, who derives allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people of Lango. And that as such he is an imposter to the throne of *Wonyaci* of Lango.

In his affidavit in support, Joseph Bua Okol stated that he is the *Awitong* of the *Apalamyek* Clan and therefore a member of the Lango Clan Leaders Council (*Owitong*). Further that as the *Awitong* of his clan, being a retired civil servant and a former member of the Apac District Council, he had clear understanding of the developments and the processes of the Lango Clan Leaders Council. That he swore the affidavit in that capacity.

The deponent further averred that as an elder of the Lango tribe from the *Apalamyek* Clan he has a keen interest in matters affecting the

leadership of the Council of *Owitong* of Lango and knows for a fact that the Langi are a “republican tribe” who do not believe in and do not and have never had hereditary leadership. That as a result, the current holder of the title of *Won Nyaci*, Yosam Odur, is just one of the clan
5 leaders of Lango elected by his clan on a personal to holder basis, and therefore, he does not derive allegiance by the fact of his birth or descent in accordance with the customs, traditions, usage or consent of the people of Lango.

He went on to aver that in 2001 when he was a member of Lira District
10 Council representing Olilim sub county, due to the prevailing serious insecurity that resulted from the LRA insurgency, there was a craze for the establishment of a Council of Clan Leaders, bringing all clan leaders together under one leader to help in coordination of efforts for peace and reconciliation. That in order to achieve this objective, ActionAid,
15 which too had the objective of creating a central authority for the people of Lango to deal with the results of the insurgency in Northern Uganda, sponsored a meeting of the Clan Leaders of the Districts of Apac and Lira. He explained that it was during that meeting that the idea of establishing the Council of Clan Leaders was mooted and adopted, and
20 Yosam Odur was elected as interim leader of the Council.

Joseph Bua Okol went on to state that subsequently, a meeting between the Clan Leaders and the District Councils of Lira and Apac was convened and it was during that meeting that a resolution ratifying the earlier resolution of the Clan Leaders’ Meeting was passed. He further
25 stated that during the same meeting a Committee composed of 30 eminent persons, 10 from each District was formed to draft a Constitution and he was a member of the Constitution Committee. He asserted that the said Committee never held any meetings and the idea

of coming up with a constitutional framework for the Lango Cultural Institution died at inception.

He further stated that he was surprised to realise that Yosum Odur gradually started referring to himself and came to be called *Won Nyaci* of Lango and started behaving like a king. He added that he knows for a fact that the Langi as a tribe have never given their allegiance by the fact of his birth or descent in accordance with the customs, traditions, usage or consent to any leader, least of all Yosam Odur. And that therefore, Yosam Odur has never been a king or similar traditional leader or cultural leader, by whatever name called, who derives allegiance from the fact of his birth or descent in accordance with the customs, traditions, usage or consent of the people of Lango; and therefore, he is an imposter on the throne of *Won Nyaci* of Lango.

Joseph Bua went on to state that he heard from other clan leaders that the 3rd respondent promulgated a Constitution under which the 4th respondent was allegedly elected as the traditional or cultural leader of Lango. But as far as he was concerned, there could never have been an election by the Council of Clan Leaders as there was no meeting properly called for that purpose. Further that he knows as a fact that the people of Lango do not have a hereditary leader as defined under Article 246 (6) of the Constitution. Further, that the 2nd and 4th respondents do not derive allegiance to lead the people of Lango from the fact of their birth or descent in accordance with the customs, traditions, usage or consent of the people of Lango. And that therefore, neither of the two has been a king or similar traditional or cultural leader of Lango, by whatever name called, who derives allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people of Lango.

He concluded that the purported election of, and the attempt by the Lango Cultural Foundation (also referred to as the “LCF”) to install the 4th respondent or any other person as the traditional or cultural leader of the people of Lango would not be in line with the customs, culture, desires, aspirations and usage of the people of Lango; it would also be in contravention of the Constitution. Finally, that he is of the strong conviction that the people of his area are under the Constitution of Uganda free to adopt their own method of determining their wishes and aspirations on traditional or cultural matters in accordance with their customs, traditions, usage or consent.

On that basis, the petitioner prayed for the following declarations and orders:

- i) That Article 246 (1) to (6) of the Constitution does not envisage the installation of a traditional or cultural leader in areas outside those areas with such leaders by birth or descent.
- ii) That using a resolution of the district local councils and sub county local government councils to determine the expression of the wishes on cultural matters, is inconsistent with or in contravention of the Constitution.
- iii) That the people of any area are free to adopt their own method of determining their wishes and aspirations on traditional or cultural matters in accordance with their customs, traditions, usage or consent.
- iv) That the Constitution of the 3rd respondent under which the 2nd respondent was elected and allegedly installed as the traditional or cultural leader of Lango was inconsistent with Article 246 of the Constitution of Uganda and was null and void *abinitio*.

- v) That the current Constitution of the 3rd respondent is null and void for being inconsistent with Article 246 (6) of the Constitution of Uganda.
- 5 vi) That the installation of the 2nd respondent as the traditional or cultural leader of Lango is inconsistent with or in contravention of Article 246 (6) of the Constitution.
- vii) That the purported election of and the attempt by the 3rd respondent to install the 4th respondent or any other person as the traditional or cultural leader of the people of Lango would be
10 in contravention of the Constitution.
- viii) An order for redress declaring that the 2nd respondent is illegally acting as the cultural or traditional leader of Lango.
- ix) A permanent injunction against the respondents, their agents, servants and anybody acting under their instruction, jointly and
15 severally from holding any election, installing any person and or performing any functions in the name of the cultural or traditional leader of Lango until determination of the Petition.

Before I go on to consider the answers to the petition and the affidavits in support thereof, it needs to be clarified whether the 3rd respondent is
20 still a party to this petition, following the statement of Mr Okello Oryem in court that he was not a proper party.

At the hearing of the petition, court inquired of Mr Okello Oryem, counsel for the 3rd and 4th respondents, whether the 3rd respondent had the legal capacity to stand as a party in this matter, viz: whether she
25 was an incorporated association. The question was raised on the assumption that only legal persons may bring or have petitions brought against them under Article 137 of the Constitution. Counsel's response was that the 3rd respondent was not a body corporate. And on that basis he stated that the 3rd respondent was not properly before court.

The court did not expunge the 3rd respondent from the record at that time, as the transcript for the hearing on that day shows. However, it is trite law that only natural and artificial persons, bodies which have legal personality, have the capacity to sue and be sued. The 3rd respondent is not an incorporated body. It therefore has no capacity to sue or be sued and so was not properly before this court. The petition against the 3rd respondent is therefore dismissed with no order as to costs.

I will now review the contents of the answers of the rest of the respondents to the petition and the evidence contained in the affidavits filed in support thereof.

The 1st respondent filed an answer to the petition on 8th June 2017 in which he prayed that the petition be dismissed because it does not raise any questions requiring interpretation of the Constitution. However, the Hon Attorney General also responded to the substance of the other claims of the petitioner therein as follows:

With regard to the inconsistency of section 4 (1) (b) of the Institution of Traditional or Cultural Leaders Act (hereinafter also referred to as the "ITCL Act"), he asserted that it is not and did not contravene the Constitution. In answer to the contention that the election of a traditional leader under the Act was not according to birth or descent and therefore unconstitutional, the Attorney General stated that Article 246 (6) is not restricted to cultural leaders by birth or descent only, if it includes leaders installed by the consent of the people led by the traditional or cultural leader to whom it applies.

The 1st respondent further stated that the absence of a prescribed method of resolving the issue of traditional or cultural leaders by Parliament did not affect the election and installation of a traditional or cultural leader as any aggrieved party still had recourse to the courts of

law. In the alternative, the 1st respondent further contended that Article 246 (1) and (6) of the Constitution prescribe the manner in which a traditional or cultural leader should be installed. That therefore none of the provisions named in the petition are inconsistent with or in
5 contravention of the Constitution.

Further, that the ITCL Act deals with situations where a community has not resolved the issue of a traditional or a cultural leader. That the Constitution and the impugned Act prescribe that traditional or cultural leaders shall be installed in areas with hereditary leadership only but
10 recognises the leader to whom a particular community has consented to pay allegiance. That in addition, the Constitution recognises cultural or traditional leaders in any part of Uganda where the traditional leader derives allegiance from, among others, consent of the people led by the traditional or cultural leader.

15 The rest of the facts stated in the 1st respondent's affidavit in support to the answer were a summary of the contents of his answer to the petition. I therefore will not repeat them here. The 1st respondent concluded that as a result, the petitioner is not entitled to any of the reliefs sought.

20 In the answer to the petition, the 2nd respondent stated that there was no breach of the Constitution as alleged by the petitioner and the petitioner had no legal grievance against him. That he was installed as a traditional or cultural leader of Lango under the authority of the Constitution of Uganda and installed after being elected by the Council
25 of Clan Leaders expressing the consent, wishes and aspirations of the people they represent culturally as their clan leaders (*Owitong*), according to Article 246 (1) of the Constitution.

He added that the 4th respondent has never been elected as the traditional or cultural leader of Lango because under the Lango Cultural Foundation Constitution, the *Won Nyaci* serves for life, and the 2nd respondent is the legitimate traditional leader or *Won Nyaci* of Lango.

5 The 2nd respondent deposed an affidavit in support of his answer on the 11th May 2017. He stated that he was elected to the office of *Won Nyaci* by the Council of Clan Leaders convened for that purpose, as dictated by Lango culture and custom. He added that he is well versed with Lango culture and custom and all matters relating to the Lango cultural
10 institution.

The 2nd respondent further averred that the petition was frivolous, vexatious, bad in law and without any basis, and an abuse of the process of the court and therefore ought to be dismissed with costs, at the earliest opportunity. He went on to state that the petition was in
15 vain because the petitioner admitted in paragraph I that before the installation of the 2nd respondent, the Langi traditionally had a "*Won Nyaci*." That the cultural institution has always existed and is not strange to the petitioner or the people of Lango.

He went on to contend that he was installed as traditional leader before
20 the enactment of the ITCL Act, 2011, and his installation was in accordance with Article 246 (1) of the Constitution. He added that according to Article 246 (3) of the Constitution, subscribing to a cultural or traditional leader is voluntary and therefore the petitioner has a choice to either subscribe to the Lango cultural leadership or not; he
25 therefore has no claim that can be maintained against the 2nd respondent because none of his rights was violated and none of the issues that he raises warrant interpretation of the Constitution. That in

fact, the petitioner did not demonstrate/illustrate how the institution of *Won Nyaci* violates his or any other person's rights.

The 2nd respondent then went on to explain that he was installed as a traditional leader before the advent of the ITCL Act, but in accordance
5 with the culture, customs and traditions of the Langi which allow the 'Gwotong' or Clan Leaders to elect one of them as 'Won Nyaci.' Further that this happened as it was stated by the petitioner in paragraph 10 of his affidavit in support of the petition.

The 2nd respondent then asserted that he is a Lango, a clan leader
10 (*Awitong*) who qualifies to be elected as a *Won Nyaci* under the Lango culture, customs and traditions. And that the Langi, as a custom, elect their *Won Nyaci* from amongst the *Gwitong* (All Clan Leaders), through an assembly called for that purpose. That in addition, Article 246 (6) of the Constitution is elaborate and it provides for the three ways or
15 options in which a person may be installed as a traditional or cultural leader. Further that there is no conflict between the impugned Act and the Constitution due to the provisions of section 5(1) of the Act. That the assumption that Article 246 of the Constitution does not envisage the installation of traditional or cultural leaders in 'republican' areas of
20 Uganda is misleading since Article 246 (1) of the Constitution provides that the institution of traditional or cultural leaders may exist in "any area of Uganda."

He further averred that there is no provision in the impugned Act that states that the office of a traditional or cultural leader must be
25 hereditary and therefore his election as a traditional leader was neither illegal nor unconstitutional. He asserted that he is a Lango by birth and descent and qualified to be an 'Awitong' or clan leader and any clan leader in Lango tradition and custom is a potential *Won Nyaci*; therefore,

he is not an imposter because the people of Lango consented to his leadership through their clan leaders who elected him.

He asserted that the 4th respondent has never been elected as a traditional leader (*Won Nyaci*) of Lango and the Lango Cultural Foundation (LCF) has not at all attempted to install him contrary to the petitioner's allegations and the 4th respondent's false claim in his affidavit in support of his answer. He further stated that he knows that under the constitution of LCF, the *Won Nyaci* serves for life and the petitioner's and 4th respondent's claims that the latter was elected as *Won Nyaci* is not only false but also redundant and or the result of their "weird imaginations."

The 2nd respondent went on to explain that there was an attempt by the 4th respondent to oust the authority of the *Won Nyaci* through a syndicate which was denounced by the majority of clan leaders and copies of their affidavits would be produced at the hearing. He added that the 4th respondent did not have the authority to represent the 3rd respondent or to swear affidavits on its behalf. He denied that Okello Oryem & Co. Advocates were instructed by the 3rd respondent to represent it. He concluded that the petition did not raise any question for interpretation of the Constitution because all issues raised could have been determined by the Civil Division of the High Court.

Although the 2nd respondent claimed to have filed his affidavit on behalf of the 3rd respondent, on the 11th May 2017, the LCF and 4th respondents filed an answer to the petition. It was accompanied by the affidavit of Engineer Dr. M. M. Odongo Okune, the 4th respondent, sworn on 11th May 2017. When he appeared before us on 13th June 2022, Mr Okello Oryem stated that he represents LCF and the 4th respondent. Regarding the conflicting set of submissions and affidavits

which showed that the 2nd respondent and LCF filed theirs jointly, he explained that when the petition was filed in 2017, the 4th respondent was not the head of the LCF but he now is. He prayed that court adopts the submissions filed in 2021 for both LCF and the 4th respondent.

5 Since LCF is no longer a party to the petition, I will consider the submissions filed for the 3rd and 4th respondents as those of the 4th respondent only.

In the answer to the petition filed on 11th May 2017 for the 2nd and 3rd respondents, they denied all of the contents of the petition. They further

10 contend that it is grossly misconceived, an abuse of court process and should be dismissed with costs. The answer is now that of the 2nd respondent alone for the reasons given above.

The salient contents of the answer are that traditional leadership is not a creature of statute. That the question of the traditional leader of the

15 people of Lango was resolved by clan leaders who constituted themselves into a Council of Lango Clan Leaders as the highest and most representative organ of the people of Lango. That they adopted a constitution to determine the traditional leader of the people of Lango (*Won Nyaci*). That the 2nd respondent was elected and installed as the

20 traditional leader of the people of Lango, to serve until 19th June 2017, in accordance with the Constitution of the Republic of Uganda, and the Constitution of the Lango Cultural Foundation of 2003. That the latter was a formal codification of the culture, customs, traditions or wishes and aspirations of the people of Lango in that regard.

25 It was further stated that the 4th respondent was elected and was at the time to be installed as the traditional leader of the people of Lango on 19th June 2017, in accordance with the Constitution of Uganda and the Constitution of Lango Cultural Foundation of 2016. That the 4th

respondent derives allegiance from the people of Lango in accordance with the culture, traditions or wishes and aspirations and the Constitution of the people of Lango, which among others required his birth and descent to be Langi, as it was required of the 2nd respondent
5 before his election to the same position.

The 4th respondent's reply was more particularly set out in his affidavit in support of the answer to the petition dated 11th May 2017. In the affidavit, he averred that he is the clan leader of the *Okar Omono* Clan of the people of Lango, having been elected by the leaders of the clan
10 based on his personal qualities of birth and descent from the *Okar Omono* Clan, education and marriage, to succeed his father, Joseph William Okune who was himself a Clan Leader of the same clan. The 4th respondent asserted that he is well versed with the facts in this matter relevant for determination of the issues raised in the petition.

15 He denied that the impugned processes were in contravention of the Constitution of Uganda and repeated the contents of the answer to the petition in respect of his appointment and that of the 2nd respondent before him. He stated that he knows that when the Constitution of Uganda was enacted it provided for the people of Lango to pursue their
20 culture, customs, traditions or wishes and aspirations, with regard to their traditional leadership and the institution of a traditional leader. And that in 2003, the people of Lango, through their traditional clan leaders promulgated the Constitution of the LCF which provided for the paramount traditional leader and the institution of a traditional leader
25 of the people of Lango.

The 4th respondent further stated that the clan leaders resolved all the questions of a traditional leader of the people of Lango when they constituted themselves into a Council of Lango Clan Leaders, as the

highest and most representative organ of the people of Lango, and adopted a Constitution to determine their traditional leaders. He attached a copy of the said Constitution to his affidavit as **Annexure A**. He added that the Constitutions of the people of Lango of 2003, which
5 was replaced by that of 2016 was promulgated in accordance with the letter and spirit of the Constitution of the Republic of Uganda, as well as the impugned Act.

He further contended that the allegations in the petition are speculative, misconceived, without merit and simply misrepresentations of fact.
10 That the supreme authority in Lango is the Council of Clan leaders comprised of all Leaders or Heads of Clans. The Council, amongst others, elects the traditional leader or cultural leader (*Won Nyaci*) in line with Lango customs, traditions and practices. That the *Won Nyaci* derives power and authority from the Council of Clan Leaders and it
15 may cause his replacement as the situation dictates, who emerges only from the ranks of Clan Leaders (*Owitong*) who themselves are elected by respective clans as leaders, according to the constitution of each clan.

He went on to state that the Constitution of *Tek Kwaro Lango* 2003 and 2016 reflect the wishes and aspirations of the people of Lango in as far
20 as cultural leadership is concerned. And that this resulted from wide consultations starting from Clan Constitutions, women/youth groups, the national Constitution and Laws, civil society, written works by Driberg, John Tosh, Fr. Tarantino, Dr Absolom Oteng, Julius Odwee and others in the process of making the constitution. He further stated
25 that republicanism is alien to Lango culture, customs and practices; Lango society is still based on fiercely independent clans with unique totems and practices. And that the clans loosely associate under Lango-wide state structures for a common purpose and when they so

associate, their leader who emerges from the Council of Clan Heads is the traditional or cultural leader (*Won Nyaci*).

The 4th respondent further explained the hierarchical structure of Lango leadership from the level of the family to the Council. Further that the people of Lango have elective traditional leadership in accordance with culture, customs and traditions and their aspirations from the lowest to the highest level, the traditional leader of the LCF. He stated his cultural lineage from his father through to his paternal and maternal ancestors to justify his authority from birth and descent, as well as consent of the people of Lango. He also listed the prominent households of elders of Lango that were associated with his upbringing, and who passed on to him knowledge about the culture, customs, relationships and history of the people of Lango. He added that it was only natural that he becomes the *Awitong* of his clan as successor of his father who was a Paramount Chief of Lango.

The 4th respondent finally discredited the leadership of the 2nd respondent as having led to degeneration of the cultural institution of the people of Lango. He alleged that the petitioner was through the years absent from the management of the affairs of the people of Lango, leading to his lack of knowledge about the processes through which cultural or traditional leaders were elected and installed, as well as the development to their community. He similarly classified Joseph Bua Okol who he said was a newly appointed clan leader, yet to grasp the culture and practices of the people of Lango.

The petitioner filed a rejoinder to the 4th respondent's answer on 23rd May 2017. He first of all contended that the contents of the 4th respondent's affidavit in reply are false. He further stated that the 4th respondent could not rely on the 2003 Constitution of the LCF because

he flouted it. That contrary to the culture, customs and traditions, wishes and aspirations of the people of Lango, the said constitution provided that the tenure of the cultural leader would inure for life.

5 He asserted that by virtue of Article 246 of the Constitution of the Republic of Uganda, where the question of a cultural leaders has not been resolved, like it was not for the people of Lango by 2001, 2003 and 2016, the command was that the resolution of the question shall be achieved by using a method prescribed by Parliament. And that therefore the resolution of the question has to be by statute.

10 The petitioner further challenged the application of the document that was presented to court as the Constitution of Lango Cultural Foundation because it was not registered as a document. Further that on the basis of information supplied to him by the Chairman of the Electoral Commission of Lango for purposes of electing the cultural
15 leader, one Vincent Oling, the 4th respondent was never elected because there was no election held on 19th June 2017. He explained that this was so because the said Vincent Oling and others were arrested and detained by the Police in Lira on that day.

The petitioner reiterated that the Lango Community is republican, as it
20 is stated in the guiding Principles of the 2016 Constitution of *Tekwaro Lango*, **Annexure A** to the affidavit in support to the 4th respondents' answer to the petition. He reiterated that the 4th respondent is an imposter without any legal capacity to act on behalf of the people of Lango. The rest of the affidavit contained invective and insults to the
25 person of the 4th respondent, such as the statement in paragraph 26 that his appointment as a cultural leader was the result of his "*wild and rapacious ambition;*" the statement in paragraph 28 that the 4th respondent had gotten accustomed to "*stardom as a giant among*

intellectual dwarfs;” and in paragraph 32 where the petitioner stated that, the 4th respondent would not be allowed to “*quench his insatiable thirst for power and exercise his infantile and egotistic buffoonery, flamboyance and outlandish mimicry of HE President Yoweri Museveni,*”
5 among others. I will comment about this conduct of the petitioner, in the light of the fact that he is an advocate known to be the proprietor of the firm that filed his petition, M/s Ayena Odongo & Co. Advocates.

Determination

10 In his answer to the petition, the 1st respondent raised a preliminary point of law in paragraph 4 that the petition does not raise any questions requiring the interpretation of the Constitution. The 2nd and 4th respondents also raised the same, though the 4th respondent added that the petitioner has no cause of action to bring him before this court.

15 However, I observed that in the submissions filed for the 1st respondent on 13th June 2022, the preliminary point of law was abandoned. Counsel for the 1st respondent instead stated in those submissions that there is a question for consideration of this court relating to the interpretation of the Constitution.

20 Going on to the 2nd respondent, perusal of the submissions filed for the 2nd and 3rd respondent by Bashasha & Co. Advocates on 14th September 2021, which were abandoned by the 3rd respondent, now represented by Okello Oryem & Co. Advocates continued to pursue this objection, I believe for the 2nd respondent.

25 It is also evident from his pleadings and affidavit that the 4th respondent is of the view that there is no question as to the interpretation of the Constitution. Mr Okello Oryem addressed it as the 1st issue in his submissions. I will therefore address that question, and whether there

is a valid cause of action that requires this court to invoke its jurisdiction in this matter.

Order 6 rule 28 of the Civil Procedure Rules (CPR) which is applicable in this court by virtue of rule 23 of the Constitutional Court (Petitions and Reference) Rules, SI 91 of 2005, provides that:

10 **Any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing.**

In **Attorney General v Major General David Tinyefuza, Supreme Court Constitutional Appeal No 1 of 1997**, in respect of the disposal of preliminary points of law, Tsekoko, JSC (RIP) ruled as follows:

15 *“I think that where a preliminary objection is raised at the beginning of the trial, it is prudent to give reasons for or against the objection before the trial proceeds. The matter is normally discretionary. Reasons may be given either before the hearing of the case or in the judgment after*
20 *conclusion of the hearing of the case. Certainly, where the trial judge is satisfied that the objection is such that upholding it would conclude the case, it would be an exercise in futility to postpone giving reasons till after hearing the case...”*

In view of the holding above, with which the majority of the Supreme Court considering a matter on appeal from this court agreed, I will
25 address the preliminary points of law raised by the 2nd and 4th respondents before I go any further in the resolution of this petition, if at all, because if they are answered in the positive they could dispose of the whole the petition.

30 **Whether there is a question as to the interpretation of the Constitution.**

In his submissions, counsel for the 2nd respondent stated that according to the contents of the affidavits of the petitioner and the 4th respondent, there appear to be personal differences between the petitioner and the 4th respondent. That the personal conflict between the two parties is not necessarily a constitutional matter. Counsel then briefly submitted about the impugned Act vis-à-vis the Constitution of Uganda and concluded that the dispute between the two parties could have been resolved under the provisions of section 16 of the Institution of Cultural or Traditional Leaders Act, since the institution of a cultural leader does exist in Lango. That as a result, there is no question for constitutional interpretation before this court.

In reply, counsel for the 4th respondent submitted that the question that the petition sought to have interpreted by this court is not clear. Further that what is clear is the petitioner's contention that section 4 (b) of the Institution of Cultural or Traditional Leaders Act is inconsistent with Article 246 of the Constitution. He added that the provision merely prescribes one of the ways in which traditional or cultural leaders may be instituted: by a resolution of not less than $\frac{2}{3}$ of all members of the district local council and sub county local government councils in the particular area, provided it is in accordance with the wishes of the people to whom it applies.

Counsel for the 4th respondent continued that the petitioner contends that Article 246 of the Constitution did not envisage the installation of a traditional or cultural leader in the manner that the 4th respondent was installed. That in his view, the constitution only envisaged and recognises traditional kings that existed before the promulgation of the 1995 Constitution. He contended that the Constitution does not limit the scope of traditional or cultural leaders in that manner and that Article 246 (6) provides clarity to the effect that such leaders shall be

included in the scope. That it then follows that whether the process that the 4th respondent went through to become a traditional or cultural leader in Lango contravened the Constitution, or any other law, then becomes a matter that does not require interpretation of the
5 Constitution.

He further submitted that according to the petitioner's affidavit and submissions it appears that he is very sure that the process which the respondents claim to have gone through violated the Constitution because it was under the ITCL Act, which it was not. That as a result,
10 he does not need the Constitutional Court to approve his claim in order to seek redress from a competent court.

The petitioner made no response to the objection in his rejoinder filed on 23rd May 2017.

The jurisdiction of this court is provided for by Article 137 of the
15 Constitution. The relevant parts of Article 137 of the Constitution provide as follows:

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

20 **(2) When sitting as a Constitutional Court, the Court of Appeal shall consist of five members of that 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

25 **(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.

In **Ismael Serugo v Kampala City Council, Constitutional Appeal No. 02 of 1998**, the Supreme Court (per Kanyeihamba, JSC) reviewed its decision in **Attorney General v Major General David Tinyefuza**, (**supra**) and stated thus,

5 “There is a number of facets to the decision of the Supreme Court in that
case. Nevertheless, when it comes to that Court’s view of the jurisdiction
of the Court of Appeal as a Constitutional Court, its decision in that case
is that the Constitutional Court has no original jurisdiction merely to
10 enforce rights and freedoms enshrined in the Constitution in isolation to
interpreting the Constitution and resolving any dispute as to the meaning
of its provisions. The judgment of the majority in that case, [Wambuzi,
C.J., Tsekooko J.S.C., Karokora J.S.C., and Kanyeihamba J.S.C], is that
to be clothed with jurisdiction at all, the Constitutional Court must be
15 petitioned to determine the meaning of any part of the Constitution in
addition to whatever remedies are sought from it in the same petition. It
is therefore erroneous for any petition to rely solely on the provisions of
Article 50 or any other Article of the Constitution without reference to the
provisions of Article 137 which is the sole Article that breathes life in the
jurisdiction of the Court of Appeal as a Constitutional Court.”

20 The Supreme Court (per Wambuzi, CJ) in **Tinyefuza (supra)** then set
out the limits of the jurisdiction of this court as provided for in Article
137 of the Constitution, as follows:

25 “In my view, jurisdiction of the Constitutional Court is limited in Article
137 (1) of the Constitution to interpretation of the Constitution. Put in a
different way no other jurisdiction apart from interpretation of the
Constitution is given. In these circumstances, I would hold that unless
the question before the Constitutional Court depends for its determination
on the interpretation of the Constitution or construction of a provision of
the Constitution, the Constitutional Court has no jurisdiction.”

30 The petitioner’s main complaint is that section 4 (1) (b) of the ITCL Act,
which provides for the creation of the office of traditional leader by
resolution of a district local council and sub county local government
councils, is inconsistent with Article 246 (2) and (6) of the Constitution.

He gives other reasons to support his contention under this and prays for a declaration to that effect.

It is my view that this requires this court to render an interpretation of the impugned provisions of the Act, as they relate to Article 246 (2) and
5 (6) of the Constitution and the complaint falls squarely under the provisions of Article 137 (3) (a) of the Constitution.

The petitioner further complains that the appointment of a cultural or traditional leader by or for the people of Lango was done prematurely because by the time the 2nd respondent was appointed and installed as
10 such, Parliament had not prescribed a method for resolving the question for Lango. That therefore the appointment of the 2nd respondent contravened the provisions of Article 246 of the Constitution. He sought a declaration to that effect.

It is also my opinion that this issue requires this court to establish
15 whether the provisions of Article 246 (2) limited the institution of traditional or cultural leader to particular areas of Uganda until the prescription by Parliament of a method for resolving that question. In other words, it requires this court to render an interpretation of that particular provision in order to establish the limits of its operation
20 before the prescription of a method by Parliament.

The petitioner raised other matters related to the operation of the ITCL Act, which he contends would violate or violated the constitutional rights of the people of Lango. These too are meritorious in the circumstances because they arise from the interpretation of the
25 Constitution vis-à-vis the provisions of the impugned Act. The jurisdiction of the court in such cases appears to be distinct from that where a petitioner only requires the court to declare that his/her constitutional rights have been violated and seeks remedies that arise

therefrom, which amounts to enforcement of the Constitution. The Supreme Court clarified that aspect of the jurisdiction of this court in **Tinyefuza's case** (supra) where the majority agreed that:

5 "... to be clothed with jurisdiction at all, the Constitutional Court must be petitioned to determine the meaning of any part of the Constitution in addition to whatever remedies are sought from it in the same petition."

The Supreme Court (per Kanyeihamba, JSC) reiterated this in **Ismail Serugo (supra)** in the following terms:

10 "The judgment of the majority in that case, [Wambuzi, C.J., Tsekooko J.S.C., Karokora J.S.C., and Kanyeihamba J.S.C], is that to be clothed with jurisdiction at all, the Constitutional Court must be petitioned to determine the meaning of any part of the Constitution **in addition to whatever remedies are sought from it in the same petition**. It is therefore
15 erroneous for any petition to rely solely on the provisions of Article 50 or any other Article of the Constitution without reference to the provisions of Article 137 which is the sole Article that breathes life in the jurisdiction of the Court of Appeal as a Constitutional Court."

However, I will not consider the further complaints presented by the petitioner, in respect of which he seeks declarations that the
20 Constitution of the 3rd respondent is void and that the election and installation of the 2nd and 4th respondents under that constitution was also void. This is because the 3rd respondent is no longer a party to this petition. I also do not think there is sufficient evidence before the court to determine the two issues.

25 In addition, there is information on the record, in **Constitutional Application No. 22 of 2017** which arose from this petition, that the dispute that the petitioner presented to this court between him and the 2nd and 4th respondents is the subject of another suit in the High Court at Lira as **High Court Civil Suit No. 019 of 2017**. It was also evident
30 from the pleadings in that application that there is an appeal pending before this court; **Civil Appeal No 81 of 2021, Engineer Dr. Michael**

Moses Odongo Okune v Yosam Odur Ebie & Another. According to the copy of the Memorandum of Appeal that was attached to the affidavit of the 4th respondent in that application, Engineer Michael Odongo Okune, also the 4th respondent to this petition, the appeal
5 arises from Orders that were made in **HCMA 87 of 2018**.

It is not clear to me from the record in that application, which too was placed before us, whether the matters in the High Court at Lira and Kampala in respect of similar disputes have been resolved. It is therefore prudent not to make the orders prayed for by the petitioner in this
10 matter lest they contradict or forestall the decisions in the suits and applications that I have referred to above. The decision of this court in the petition before us will therefore be confined strictly to aspects that fall under Article 137 (3) (a) of the Constitution.

Whether there is a cause of action

15 Counsel for the 4th respondent submitted that the petition has nothing to do with the 4th respondent because he was not appointed under the impugned provisions of the ITCL Act. He was instead appointed through traditional means by a Council constituted by clan heads from the various clans in Lango. That as a result, the petitioner had no cause of
20 action against the 4th respondent.

A “*cause of action*” for purposes of interpretation of the Constitution was defined, among others, in **Attorney General v. Tinyefuza** (supra) where Mulenga, JSC stated thus:

25 *“A cause of action in simple language is a happening or circumstances which in law, give rise to a right to sue or take action in court for redress or remedy. Clause (3) of Article 137 sets out several happenings and circumstances which give rise to a right to petition the Constitutional Court for a declaration. The cause of action under that clause therefore is not constituted by an “allegation” made by the petitioner ... Rather, it is*

constituted by the fact of such happening as for example under (3) (b) the commission of an act which contravenes a provision of the Constitution, or under clause (3) (a) the enactment or existence of an Act of Parliament whose provisions are inconsistent with any provision of the Constitution. If a petition to the constitutional court contains an allegation of the existence of any such happening or circumstance, then it discloses a cause of action which should be tried and determine by the Court.”

In view of the definition above, there is no doubt at all in y mind that the petition now before us discloses a cause of action. The issues for determination by this court were framed by the parties in their submissions as follows:

- i) Whether section 4 (1) (b) of the ITCL Act, 2011 is inconsistent with or in contravention of Article 246 of the Constitution.
- ii) Whether the appointment and installation of the 2nd and 4th respondents as traditional or cultural leaders of Lango before the enactment of the Traditional or Cultural Leaders Act, 2011 contravened the provisions of Article 246 of the Constitution.
- iii) Whether the parties are entitled to the remedies claimed.

I will dispose of those issues in the order that they are set out above and will review the submissions of counsel on each of them before I dispose of it. But before I do so, I noted that in his submissions, the petitioner prayed that paragraphs 4 of the 2nd respondent’s affidavit, as well as paragraphs 28, 29 and 32 of the 4th respondent’s affidavits in support of their answers be expunged from the record for being malicious, argumentative, scandalous and libellous testimonial evidence.

I will not consider the arguments relating to the stated contents of the affidavits being scandalous, libellous and malicious because there is no law for me to refer to in determining whether such affidavits ought to be expunged or relied upon in evidence. What is available is the law

relating to affidavits that are admissible, and those that are not, contained in the Civil Procedure Rules. As I have already noted above, the CPR are applicable to the proceedings in this Court by virtue of rule 23 of the Constitutional Court (Petitions & References) Rules, SI 91 of 5 2005.

Order 19 rule 3 CPR provides as follows:

3. Matters to which affidavits shall be confined.

10 **(1) Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated.**

15 **(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall, unless the court otherwise directs, be paid by the party filing the affidavit.**

In his submissions, the petitioner specifically claims that paragraphs 28, 29, 30 and 31 of the 4th respondent's affidavit are argumentative and ought to be expunged from the record. The petitioner's further argument is that the contents of the said paragraphs are also irrelevant 20 to the disposal of the petition.

I observed that in paragraph 28, the 4th respondent gives the details of his paternal and maternal lineage, and particulars of his clan. In paragraph 19, he gives details of his upbringing, which the petitioner describes as "*vagabond-like*." In that paragraph, he explains the source 25 of his knowledge of the culture and traditions of the people of Lango and why he became a clan head. In paragraph 30, he explains how he joined the Council of Clan Leaders of Lango. In paragraph 31 he goes on to state that he has observed that the leadership of the 2nd respondent caused divisionism and that he (4th respondent) participated in 30 resolution of disputes arising therefrom as one of the Clan leaders.

I am of the opinion that the contents of the 4 paragraphs are not argumentative in view of the substance of this petition. This is because the petitioner brings into focus the provisions of section 5 of the impugned Act about the rationale of the Institution of Traditional and Cultural Leaders. Section 5 provides that persons may be installed as traditional or cultural leaders in any area of Uganda if they “*derive allegiance*” from “*birth or descent, in accordance with the customs, traditions, usage or consent of the people led by that traditional or cultural leader.*” The 4th respondent tries to justify his installation as traditional or cultural leader, if at all, on the basis of those facts, among others. I therefore do not think that the facts in those paragraphs are irrelevant to the substance of the petition before this court. The issue of the improper language employed by the rivalling parties will be addressed at the end of this judgment.

Having found so, it is important to note that rule 3 (2) of Order 19 CPR requires the deponent of an affidavit that does not comply with the provisions therein to be penalised in costs. It does not say that statements that are argumentative will be expunged. I therefore find that the prayer to expunge the impugned paragraphs of the 4th respondent’s affidavit was not justified; neither was it justified that the 4th respondent should be penalised in costs for his averments. The petitioner’s prayer to expunge the impugned 4 paragraphs from the the affidavit is therefore denied.

Principles for Constitutional interpretation

In **Rubaramira Ruranga v Electoral Commission & The Attorney General; Constitutional Petition No.12 of 2006**, this court stated the following as some of the principles for constitutional interpretation:

1. That words used in the Constitution must be given the widest possible consideration according to their ordinary meaning.
2. Provisions of the Constitution must be given liberal interpretation unfettered with technicalities.
- 5 3. That fundamental rights provisions must be given dynamic, progressive liberal and flexible interpretation.

That in addition, the purpose and effect of a statute ought to be put in perspective in determining its constitutionality. I am guided by the stated principles, and others not stated here but applicable, in the
10 determination of the questions in this petition.

i) Whether section 4 (1) (b) of the ITCL Act, 2011 is inconsistent with or in contravention of Article 246 of the Constitution.

Submissions of Counsel

In this regard, the petitioner first of all referred us to the definition of
15 “*traditional or cultural leader*” in Article 246 (6) of the Constitution and section 2 of the ITCL Act “*the Act.*” He then submitted that section 5 (2) of the Act strongly suggests that unless one is a king or similar traditional leader, by whatever name called, who derives his allegiance from the fact of his birth or descent in accordance with the customs,
20 traditions, usage or consent of the people lead by that traditional leader, he cannot be installed as a traditional or cultural leader. He explained that such a leader must first be a king by birth or he must have descended from a hereditary lineage in accordance with customs, traditions, usage or consent of the people he intends to lead. He
25 contended that otherwise, the leadership of such leader is inconsistent with or in contravention of the Constitution. He added that this definition underpins the intentions of the framers of the Constitution to restore kingdoms that were abolished in 1966.

The petitioner went on that the import of Article 246 (1), (2) and (5) is that any community that intends to institute a traditional or cultural leader must do so subject to the Constitution. He explained that according to Article 246 of the Constitution there are two ways or
5 procedures for instituting a traditional or cultural leader; either by recognition or assumption under paragraph 5 of Article 246, in those areas where the existence of such leaders obtained before 1966 when they were abolished, if the people wish to revive them. He added that in communities where the question has not been resolved, it was by the
10 community first resolving it in a manner prescribed by Parliament.

The petitioner then submitted that the people of Lango had not resolved the issue by the time the 1995 Constitution was promulgated. And that as admitted by the 4th respondent in paragraph 4 of his affidavit, Lango is still based on fiercely independent clans with totems and practices
15 and the people loosely associate under a Lango-wide state structure for common purposes. He emphasised that this was also stated by Professor Bua in paragraph 4 of his affidavit.

The petitioner went on to assert that the people of Lango are republican within the meaning of not being a government that is a monarchy or
20 dictatorship, and that republicanism is usually associated with the opposition of monarchism. He pointed out that the 4th respondent admitted, in paragraph 25 of his affidavit, that the institution of the Lango hierarchy of traditional leadership has no birth rights attached. He added that the 4th respondent contradicted himself in paragraph 26
25 where he stated that the people of Lango have elective traditional leadership. He asserted that he rejects the notion that cultural leaders in Lango derive allegiance by birth and descent.

The petitioner went on to state that the people of Lango have not resolved the issue of a traditional or cultural leader since Parliament

has not resolved the issue as provided for in the Constitution. Further, that the 4th respondent has not demonstrated that it has, since there is no evidence that district councils and sub county local government councils in Lango made resolutions purported to be the basis of establishing the institution of a cultural/traditional leader in Lango.

The petitioner further submitted that section 4 (1) (b) of the ITCL Act is *ultra vires* the Constitution in so far as it purports to ascribe to district and local government councils the role to resolve the issue of traditional or cultural leaders, which cannot be resolved by a mere resolution. He prayed that this court finds that the impugned provisions of the Act are *ultra vires* and therefore inconsistent with the provisions of Article 246 of the Constitution.

In reply, counsel for the 1st respondent submitted that it is a cardinal rule in constitutional interpretation that provisions of a Constitution concerned with the same subject should, as much as possible, be construed as complementing and not contradicting one another. He went on to submit that Article 246 of the Constitution established a principle that cultural institutions are recognised by the Constitution. That they operate within parameters set within the law and are governed in accordance with the cultural wishes and aspirations of the people to whom they apply, in as far as the law permits. Further, that Article 246 of the Constitution allows for the existence of cultural leaders in *any area of Uganda* in accordance with the culture, customs and traditions or the wishes of the people to whom it applies.

The 1st respondent's advocate went on to submit that Article 246 (2) of the Constitution provides for situations where the issue of traditional leaders has not been resolved, by providing for a method prescribed by Parliament. Further that in the light of that provision Parliament passed

the ITCL Act, to provide for cultural leaders as it is stated in section 4 (1) (b) thereof, and that this was the grievance of the petitioner.

Counsel went on that the petitioner did not lead any evidence to show that the will of the people of Lango is subject to political manipulation, as it was alleged in paragraph 5 (ii) of his petition. That in the circumstances, the petitioner's grievances still had to be substantiated by proving that the impugned provision and the practices that were applied in the election of the *Won Nyaci* contravened the culture, wishes and aspirations of the people of Lango and consequently the Constitution. He charged that the petitioner failed in this regard.

Counsel further submitted that clause 6 of Article 246 means that the people in areas where there is no hereditary leadership have the freedom and the right to choose, by consent, to be led by a traditional or cultural leader. That this is according to the wishes and aspirations of the people and the petitioner did not prove that the manner in which the Lango traditional or cultural leader was not installed in accordance with the wishes and aspirations of the people. He prayed that court finds that section 4 (1) (b) of the Act is not inconsistent with or in contravention of Article 246 of the Constitution.

In reply to the petitioner's submissions on the first issue, counsel for 4th respondent submitted that contrary to the submissions of the petitioner that what was envisaged by Article 264 was the restoration of traditional or cultural leaders in areas where they already existed, the same provision provides that a cultural leader may exist in any part of Uganda. That the latter was the intention of the framers of the Constitution; that is that in areas that did not originally have such leaders they could be established and institutionalised.

He went on to submit that Article 246 also provides that institutionalisation of such leaders in any part of the country shall be according to the culture, customs, traditions or wishes and aspirations of the people to whom it applies, and that it is not based on what
5 obtained before but what obtains after promulgation of the Constitution. That as a result, such an institution emerges organically from the culture, customs and traditions or wishes and aspirations of the people to whom it applies.

Counsel for the 4th respondent further pointed out that the petitioner's
10 issue with the 2nd and 4th respondents seems to be the manner in which they were appointed. He asserted that the 4th respondent went through processes that were consistent with both the Constitution and the ITCL Act, as he stated in his affidavit in paragraphs 8, 9, 12, 13, 14, 15 and 22. He added that the process that the 4th respondent went through was
15 consistent with the wishes and aspirations of the clan heads of the people of Lango.

Counsel emphasised that the process that the 4th respondent went through, as shown in his affidavit, was consistent with the spirit and letter of Article 246 of the Constitution and the Act. He further pointed
20 us to the 4th respondent's eligibility for the position from his lineage and heritage and submitted that the institution of the 4th respondent as cultural leader is consistent with who qualifies to be so instituted under Article 246 of the Constitution and section 2 of the impugned Act.

The 4th respondent's advocate went on to state that though the
25 petitioner alleges that the issue of traditional or cultural leader had not been resolved in Lango by the time the Constitution was promulgated, and that it falls within the categories envisages under Article 246 (2) of the Constitution, the argument has no merit because the issue was

already resolved. That this was shown by the 4th respondent in the averments in paragraphs 12-16 of his affidavit. And that in view of the process through the clans of the people of Lango, Parliament could not prescribe any other method that would not involve the community in resolution of this question.

The 4th appellant's counsel concluded that the petitioner did not address the alleged inconsistency of section 4 (1) (b) of the ITCL Act. Rather, he sought to litigate a suit against the 4th respondent which could have been resolved in the High Court. That as a result, the petitioner abused the process of the court and the petition should be dismissed.

Resolution of Issue 1

It is evident from the submissions above that the petitioner's complaint has many facets and it relates to the whole of Article 246 of the Constitution. Further, that the petition as well as the submissions of the petitioner require this court to consider more than the question whether section 4 (1) (b) of the ITCL Act of 2011 is inconsistent with or in contravention of Article 246 of the Constitution. The manner in which the petition was framed points to the need for this court to interpret the whole of Article 246 of the Constitution, as well as to determine whether section 4 (1) (b) of the ITCL Act is inconsistent with or contravenes Article 246 of the Constitution of Uganda.

In his submissions, the petitioner raised 6 sub-issues from the 1st issue framed in his submissions which I have summarised to aid the analysis of the main question that needs to be determined by this court in this petition as follows:

- i) Whether Article 246 of the Constitution limited the institution of traditional or cultural leaders to only areas in Uganda that had such leaders before 1996 when such institutions were abolished.
- 5 ii) Whether all traditional and cultural leaders must derive allegiance from the fact of their birth or descent in accordance with the customs, traditions, usage, or the consent of the people led.
- 10 iii) Whether the appointment and installation of a traditional or cultural leader who does not derive his/her allegiance from the fact of birth or descent contravenes Article 246 of the Constitution.
- iv) Whether prescription by Parliament was the only mode of resolving the question of traditional or cultural leaders in areas where they did not already exist before the coming into force of the 1995 Constitution?
- 15 v) Whether Parliament resolved the question of a traditional or cultural leader for Lango.
- 20 vi) Whether section 4 (1) (b) of the Institution of Traditional or Cultural Leaders Act is *ultra vires* and therefore inconsistent with Article 246 of the Constitution, in as far as it purports to ascribe the duty to identify such leaders by resolutions of local government and sub county councils.

I considered the sub issues framed above sufficient to resolve the question set before us for interpretation in this petition. I now proceed to consider the issues in the order that they appear above.

25 **Sub Issue 1**

The petitioner contends that Article 246 of the Constitution limited the institution of traditional or cultural leader to areas where they already

existed before 1966 when they were abolished. In order to get the full import of Article 246, it is necessary to lay it down in its entirety prior to further analysis of the issues raised by the petitioner in his pleadings and submissions. It provides as follows:

5 **246. Institution of traditional or cultural leaders.**

(1) **Subject to the provisions of this Constitution, the institution of traditional leader or cultural leader may exist in any area of Uganda in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies.**

10 (2) **In any community, where the issue of traditional or cultural leader has not been resolved, the issue shall be resolved by the community concerned using a method prescribed by Parliament.**

15 (3) **The following provisions shall apply in relation to traditional leaders or cultural leaders—**

(a) **the institution of traditional leader or a cultural leader shall be a corporation sole with perpetual succession and with capacity to sue and be sued and to hold assets or properties in trust for itself and the people concerned;**

20 (b) **nothing in paragraph (a) shall be taken to prohibit a traditional leader or cultural leader from holding any asset or property acquired in a personal capacity;**

25 (c) **a traditional leader or cultural leader shall enjoy such privileges and benefits as may be conferred by the Government and local government or as that leader may be entitled to under culture, custom and tradition;**

(d) **subject to paragraph (c) of this clause, no person shall be compelled to pay allegiance or contribute to the cost of maintaining a traditional leader or cultural leader;**

30 (e) **a person shall not, while remaining a traditional leader or cultural leader, join or participate in partisan politics;**

(f) **a traditional leader or cultural leader shall not have or exercise any administrative, legislative or executive powers of Government or local government.**

35 (4) **The allegiance and privileges accorded to a traditional leader or a cultural leader by virtue of that office shall not be regarded as a discriminatory practice prohibited under article 21 of this**

Constitution; but any custom, practice, usage or tradition relating to a traditional leader or cultural leader which detracts from the rights of any person as guaranteed by this Constitution, shall be taken to be prohibited under that article.

5 **(5) For the avoidance of doubt, the institution of traditional leader or cultural leader existing immediately before the coming into force of this Constitution shall be taken to exist in accordance with the provisions of this Constitution.**

10 **(6) For the purposes of this article, “traditional leader or cultural leader” means a king or similar traditional leader or cultural leader by whatever name called, who derives allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people led by that traditional or cultural leader.**

15 However, a comprehensive resolution of this sub-issue requires me to briefly consider the provisions of the law relating to cultural or traditional institutions in Uganda before 1995, in order to establish which ones had such institutions before that date.

20 Chapter 1 of the repealed 1962 Constitution of Uganda, provided for what constituted Uganda and its territories. Article 2 specified them as follows:

2. (1) Uganda consists of Federal States, Districts and the territory of Mbale.

25 **(2) The Federal States are the Kingdom of Buganda, the Kingdom of Ankole, the Kingdom of Bunyoro, the Kingdom of Toro and the territory of Busoga.**

(3) The Districts are the Districts of Acholi, Bugisu, Bukedi, Karamoja, Kigezi, Lango, Madi, Sebei, Teso and West Nile.

30 The instrument that was used by the Government then to abolish the kingdoms and others that had constitutional heads was Article 118 of the 1967 Constitution of Uganda. It provided for the *“Abolition of the institution of kingship, etc.”* in the following terms:

5 **118. (1) The institution of King or Ruler of a Kingdom or Constitutional Head of a District, by whatever name called, existing immediately before the commencement of this Constitution under the law then in force, is hereby abolished.**

(2) Notwithstanding any provision of this Constitution, the immediately preceding clause shall have effect from 24th May, 1966, in relation to the Kingdom of Buganda.

10 **(3) Parliament may make provision for the payment of a pension, gratuity or other allowances to any of the persons to whom clause (1) of this article applies and to such of their dependants as Parliament may prescribe.**

15 **(4) Notwithstanding any provision of this Constitution, Parliament may make provision for the devolution of any property held by any person to whom clause (1) of this article applies by virtue of his office or by any other person or authority, being property connected with or attaching to the institution of King, Ruler or Constitutional Head.**

20 **(5) No action may be instituted in any court of law in respect of any matter or claim by any person under this article or under any provision made by Parliament pursuant thereto.**

25 The petitioner now claims that it is only the five (5) areas of Uganda that were provided for by Article 2 of the 1962 Constitution of Uganda whose cultural or traditional leaders, by whatever name called, had these cultural leaders provided for or restored by virtue of Article 246 of the 1995 Constitution. The petitioner referred to clause 5 to support his contention, which he said implies that the traditional or cultural leaders of the five areas designated in the 1962 Constitution that were in existence prior to 1995 could be revived either by recognition or
30 assumption, as is implied therein.

 It is a cardinal rule of constitutional interpretation, and general statutory interpretation, that while interpreting the constitution or any statute, the court must adhere to the words mentioned in it. Under this rule, *the literal rule*, the court focuses on the literal meaning of the

constitutional provision; the words, phrases and sentences of the statute are ordinarily understood in their literal or grammatical meaning.

At the risk of repetition, but for clarity, clause (5) of Article 246 provides
5 as follows:

(5) For the avoidance of doubt, the institution of traditional leader or cultural leader existing immediately before the coming into force of this Constitution shall be taken to exist in accordance with the provisions of this Constitution.

10 In 1993, the Government of Uganda resolved to restore kingdoms that were abolished in 1966, as it was confirmed in the 1995 Constitution.¹ This was followed by the enactment of the Traditional Rulers (Restitution of Assets and Properties) Act (Cap 243) which came into
15 force on 30th June 1993. Section 2 of that Act provided that any assets or property confiscated by the State in relation to any traditional ruler under the 1967 Constitution would, with effect from the date of commencement of the Act, be returned to such cultural leader. This included traditional regalia that had been confiscated, which was to be
20 returned without negotiation, signifying the restoration of the five (5) cultural institutions named in the 1962 Constitution.

The petitioner's contention therefore is that by virtue of Article 246 (5) of the 1995 Constitution, only the traditional and cultural institutions of Buganda, Bunyoro, Ankole, Toro and the territory of Busoga were provided for by Article 246 of the Constitution, since it was these that
25 exited immediately before the coming into force of the 1995 Constitution.

¹ Uganda National Cultural Policy Review, Ministry of Gender Labour and Social Development, 2019

However, it has been held in several decisions of this court and the Supreme Court in **Paul K Semogerere & 2 Others v Attorney General, Constitutional Appeal No. 1 of 2002**, following the decision of the U.S. Supreme Court in **South Dakota v. North Carolina, 192 U.S. 268**
5 **(1940) L. Ed**, that:

“(The) Elementary rule of Constitutional Construction is that no one provision of the Constitution is to be segregated from all others to be considered alone, but that all provisions bearing on a particular subject are to be brought into view and to be so interpreted as to effectuate the
10 *great purpose of the instrument.”*

Clause 1 of Article 246 provides that the institution of traditional leader or cultural leader “*may exist in any area of Uganda*” in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies. The provisions of clause 5 of the same Article
15 therefore cannot override or contradict this paramount intention of the framers of the Constitution. Their intention was to open up the possibility of establishing such institutions in areas where there were not. However, it is important to note that this finding is not meant to answer the question whether or not the institution of a traditional or
20 cultural leader existed in Lango prior to the enactment of the 1995 Constitution, because there is insufficient evidence before us to do so in this petition.

Sub Issues 2 and 3

With regard to the issue whether all traditional and cultural leaders
25 must derive allegiance from the fact of their birth or descent in accordance with the customs, traditions, usage, or consent of the people led, it is necessary to analyse and establish the meaning of the definition in clause 6 of Article 246 of the Constitution.

In order to do so, I will employ the principle that the interpretation of a provision of the Constitution must also be purposive in order to give it the effect that was intended by the framers thereof. The “*purposive approach*” is the method used by courts to interpret what statutes mean; it requires the court to look at the purpose of the statute, and Parliament’s intention when they enacted the statute, as well as the words written in the statute itself. The words must be interpreted in the broader context of the statute itself. It then becomes necessary to break down the contents of this clause in order to establish what it really means. It provides as follows:

(6) For the purposes of this article, “traditional leader or cultural leader” means a king or similar traditional leader or cultural leader by whatever name called, who derives allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people led by that traditional or cultural leader.

The Cambridge Online Dictionary defines the word “*allegiance*” to mean loyalty and support for a ruler, country or group.² The same dictionary defines “*descent*” as the state or fact of being related to a particular person or group of people who lived in the past;” while “*birth*” is defined as the process of bringing forth an individual from the body of a parent.³ Therefore, descent embraces more relations than the fact of birth of an individual; it has a wider scope and duration than the fact of birth which only refers to the parents of an individual.

The word “*custom*” is defined as a traditional and widely accepted way of behaving or doing something that is specific to a particular society. while a “*tradition*” is defined as a belief, principle or way of acting that people in a particular society or group have continued to follow for a

² Cambridge online dictionary; <https://dictionary.cambridge.org/dictionary/english/allegiance>

³ Merriam-Webster online dictionary; <https://www.merriam-webster.com/dictionary/birth>

long time, or all these beliefs in a particular society or group. The Oxford English Dictionary gives a slightly different meaning to the word “*tradition*,” as the transmission of customs or beliefs from generation to generation, or the fact of being passed on in this way. To my mind
5 therefore, traditions are customs of a particular group of people or society handed down from generation to generation, over a long time.

The word “*usage*” is defined by the Oxford Dictionary (supra) as the “*habitual or customary practice, especially as creating a right, obligation or standard*.” It is therefore synonymous with the word “*custom*.” In the
10 parlance of statutory interpretation, the words “*custom, tradition and practice*” in the provision above are employed *ejusdem generis*.

A traditional leader is therefore identified according to those customs that have been handed down over time and become the traditions of the community or group. It must therefore now also be established what
15 the expression “*cultural leader*” means.

The word “*culture*” is defined by the Oxford Online Learners’ Dictionary⁴ as the ideas, customs, and social behaviour of a particular society. Merriam Webster’s Online Dictionary⁵ defines it, among others, as the
20 “*customary beliefs, social forms and material traits of a racial, religious or social group*”. “*Culture*” therefore appears to be different from “*tradition*” in that while traditions inure over a long period of time, culture need not; it may change from time to time.

It then follows that one of the modes of identifying and installing traditional leaders among a tribe or group of people/community is the
25 emergence of the leader by birth, that is, of parents or a parent that is designated to birth such leaders. Traditional leaders may also emerge

⁴ <https://www.oxfordlearnersdictionaries.com/>

⁵ <https://www.merriam-webster.com/>

from descendants, ancestors, or lineages that are designated as the source of traditional leaders in a tribe/community or an area, though these descendants may not be parents (lineal descendants) of the person appointed as a traditional leader. A good example of such a source is a “clan,” which is defined by the Oxford Online Learners’ Dictionary⁶ as “a close-knit group of interrelated families.”

That then leaves us with the limb of the definition which states that a traditional or cultural leader can be identified by “consent of the people led by that traditional or cultural leader.” This appears to be a separate and distinct source because of the use of the conjunction “or” between the category of “customs, traditions, usage” and “consent of the people.”

The ordinary meaning of the word “consent” is to give approval or agree. It also means compliance in or approval of what is done or proposed by another, (Merriam-Webster’s Online Dictionary, supra). The word “consent” is also synonymous with “assent, acquiesce, concur, accede and subscribe.” It signifies consensus and harmony.

Consequently, pursuant to Article 246 (1) of the Constitution, a traditional or cultural leader may be identified and installed by agreement, acquiescence, concurrence or assent between the people in an area, or a tribe in Uganda. This need not be in accordance with customs, traditions, or usage of the people in that area. However, that leader must emerge from persons born in that area, or having descendants among the indigenous people in that area. There need not be a designated group of people, that is family, clan or lineage from which such a leader is identified by the people to be led.

⁶ <https://www.oxfordlearnersdictionaries.com/>

That resolves the 3rd sub issue framed above. The installation of a traditional or cultural leader who **does not** derive allegiance from “*birth or descent*” would be in contravention of and inconsistent with Article 246 of the Constitution.

5 **Sub Issues 4 and 5**

The 4th issue is whether prescription by Parliament is the only method through which the question of a traditional or cultural leader can be resolved in an area where it had not been resolved prior to the coming into force of the 1995 Constitution. The 5th issue is related to this in
10 that it seeks to address the question whether Parliament resolved the question of a traditional or cultural leader for the people of Lango.

This calls for the interpretation of clause 2 of Article 246 of the Constitution which provides as follows:

15 **(2) In any community, where the issue of traditional or cultural leader has not been resolved, the issue shall be resolved by the community concerned using a method prescribed by Parliament.**

The answer to the question whether prescription by Parliament in the ITCL Act is the only method for resolving the question of traditional or
20 cultural leaders where they did not exist before the promulgation of the Constitution in 1995, is in clause 2 set out above. It clearly states that it provides for “*any community, where the issue of traditional or cultural leader has not been resolved.*” There cannot be any other method for resolution of that question other than that provided for by Parliament
25 as ordained in the Constitution.

With regard to the question whether Parliament had prescribed a method for resolution of the question of a traditional or cultural leader for Lango, the main contentions of the petitioner turns around the

words “*resolve*” and “*prescribe*” in Article 246 (2) of the Constitution. It appears the petitioner expected Parliament to resolve the question of a traditional or cultural leader specifically for each community where such an institution did not already exist as recognised by law. It is for
5 that reason that he contends that Parliament still has not resolved the question for the people of Lango.

However, Black’s Law Dictionary defines the word “*prescribe*” to mean “to dictate, order or direct, to establish authoritatively (as a rule or guideline).” Even without this definition, there can be no doubt that Acts
10 of Parliament “prescribe” the intentions of the legislature about the particular subject of a statute enacted by it. Therefore, the long title of the ITCL Act, which came into force on 4th December 2011, states that it is:

15 **“An Act to operationalise article 246 of the Constitution on the institution of traditional or cultural leaders; to provide for the existence of traditional or cultural leaders in any area of Uganda in accordance with the Constitution; to provide for the privileges and benefits of the traditional or cultural leaders; to provide for the resolution of issues relating to traditional or cultural leaders and**
20 **for related matters.”**

{My Emphasis}

Therefore, by virtue of the ITCL Act, Parliament did prescribe a method, or methods for resolving the question of traditional or cultural leaders both in areas where they already existed and were recognised by law,
25 and in areas where they did not. This of course includes Lango.

Sub Issue 6

This sub issue addresses the main question in the petition: whether section 4 (1) (b) of the ITCL Act is *ultra vires* and therefore inconsistent with Article 246 of the Constitution, in as far as it purports to ascribe

the duty to identify such leaders by resolution of the district local council and the sub county local government councils.

It is my view that section 4 (1) (b) which the petitioner complains about cannot be analysed on its own for us to understand the full extent of its meaning. I will therefore reproduce the whole of section 4 here below, in order to facilitate an understanding of its import, as well as to facilitate the analysis of the issues raised by the petitioner. It provides for the institution of traditional or cultural leaders as follows:

- 10 **(1) A traditional or cultural leader may be instituted in the following ways-**
- (a) in accordance with the culture, customs and traditions of the people to whom it applies; or**
- (b) in accordance with the wishes and aspirations of the people to whom it applies, through a resolution of not less than two thirds of all members of the district local councils and sub**
- 15 **county local government councils respectively in the area.**
- (2) The institution under sub section (1) shall be communicated in writing to the Minister.**

{Emphasis was supplied}

20 It is observed that section 4 of the ITCL Act sets out the two modes of procedure for instituting traditional or cultural leaders, pursuant to Article 246 of the Constitution. Paragraph 1 (a) thereof deals with the institution of a traditional leader according to the customs and the traditions of the people to be led. The petitioner approves of this method, save that he challenges the 2nd and 4th respondent for not following the procedures through which they were appointed and installed as

25 traditional or cultural leaders of Lango.

With regard to subsection 4(1) (b) ITCL Act, the petitioner's contention is that it is *ultra vires* the provisions of Article 246 (1) in that it gives

30 authority to political bodies to decide the question on behalf of the

people, outside of the customs and traditions referred to in clause (1) of Article 246. The petitioner asserts that the question of a traditional or cultural leader cannot be resolved by a mere resolution. The 1st respondent's principal reply is that while Article 246 recognises culture, it also recognises the wishes and aspirations of the people.

In order to facilitate a closer analysis of the contents of clause 1 of Article 246, it is reproduced on its own here below:

(1) Subject to the provisions of this Constitution, the institution of traditional leader or cultural leader may exist in any area of Uganda in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies.

In clause 2 of the same Article the framers of the Constitution went on to recognise the fact that in some communities in Uganda, the question of a traditional or cultural leader had not been resolved and so provided that:

(2) In any community, where the issue of traditional or cultural leader has not been resolved, the issue shall be resolved by the community concerned using a method prescribed by Parliament.

Consequently, Parliament prescribed for the resolution of the question of traditional or cultural leaders by enacting the ITCL Act in 2011.

The question that arises from the statute above then becomes, what is meant by the phrase "*wishes and aspirations of the people*" in clause 2 of Article 246 of the Constitution?

A cardinal rule for the interpretation of the Constitution and all other statutes is the literal rule. This is the rule that statutes are to be interpreted using the ordinary meaning of the language of the statute, unless a statute explicitly defines some of its terms otherwise.

The word “*wish*” as a noun is defined by the Oxford Learners English Dictionary (supra) to mean “*a desire or hope for something to happen.*” “*Aspiration*” is defined by the same source to mean “*a hope or ambition of achieving something.*”

5 The two expressions in the context of the ITCL Act therefore mean that where the people in a community have the ambition of being under the cultural or traditional leadership of a commonly identified and appointed person, they may come together for that purpose and by consent identify that leader. However, for them to comply with the
10 provisions of Article 246 of the Constitution, the leader identified must fall within the definition given in clause 6 of Article 246. The leader identified must “*derive allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people.*”

It is also my view that the intention of the framers of the Constitution
15 was to give communities where traditional or cultural leaders had not been identified and recognised, or where they were not before the abolition of such institutions in 1967, the opportunity to identify such leaders, following the cultures and traditions that had not been brought to the fore before 1967.

20 In order to challenge the validity of section 4(1) (b) of the ITCL Act for purposes of instituting a cultural or traditional leader, in paragraph 3 (ii) of his petition, the petitioner asserts that to subject the determination of the wishes and aspirations of the people to a resolution of the district local councils and sub county local government councils,
25 for purposes of instituting a traditional or cultural leader in an area, is to subject the will of the people to political manipulation rather than the traditional or cultural will of the people.

In paragraph 4 of his affidavit he states that he knows as a fact that the district local councils and sub county local government councils are political organs of the state, easily susceptible to partisan manipulation and as such they do not reflect the traditional and cultural identity of the people in any area. The petitioner repeated what he stated in paragraph 3 (ii) of the petition in paragraph 5 of his affidavit.

The local government system is provided for in Chapter 11 of the 1995 Constitution. Article 176 thereunder provides that the system of local government in Uganda shall be based on the district as the unit under which there shall be such local governments and administrative units as Parliament may prescribe. Clause (1) thereof then provides for the principles that apply to the local government system as follows:

(2) The following principles shall apply to the local government system—

- 15 **(a) the system shall be such as to ensure that functions, powers and responsibilities are devolved and transferred from the Government to local government units in a coordinated manner;**
- 20 **(b) decentralisation shall be a principle applying to all levels of local government and, in particular, from higher to lower local government units to ensure peoples' participation and democratic control in decision making;**
- (c) the system shall be such as to ensure the full realisation of democratic governance at all local government levels;**
- 25 **(d) there shall be established for each local government unit a sound financial base with reliable sources of revenue;**
- (e) appropriate measures shall be taken to enable local government units to plan, initiate and execute policies in respect of all matters affecting the people within their jurisdictions;**
- 30 **(f) persons in the service of local government shall be employed by the local governments; and**

(g) the local governments shall oversee the performance of persons employed by the Government to provide services in their areas and to monitor the provision of Government services or the implementation of projects in their areas.

5 (3) The system of local government shall be based on democratically elected councils on the basis of universal adult suffrage in accordance with article 181(4) of this Constitution.

{Emphasis supplied}

10 Article 180 of the Constitution shows that it is not within the mandate of local governments to make decisions with regard to the leadership of traditional or cultural institutions. It also shows that local governments derive their powers from the central government. They are agencies through which the central government carries out its policy of
15 decentralisation of service delivery in every district of the country. The leaders of local government councils are elected through universal adult suffrage. Elections under the multi-party system of government are such that in most districts, the candidates from the strongest party will take the day and constitute the majority of the local government
20 councils.

Article 180 (1) of Constitution describes the source of authority of a local government as follows:

25 1) A local government shall be based on a council which shall be the highest political authority within its area of jurisdiction and which shall have legislative and executive powers to be exercised in accordance with this Constitution.

Article 257 (r) then defines a “local government council” as a council referred to in Article 180 of the Constitution. The local government council is therefore a political organ. The political dispensation that
30 obtains in Uganda under the Constitution is the multi-party system. The district local councils are therefore without a doubt politically

partisan and any decision made in the councils is contested or approved on party lines. It is therefore my well-considered opinion that such would be the fate of a decision to institute a cultural or traditional leader, even when based on customs and traditions of the area to be led by such a leader. An analysis of the local government councils in terms of their powers and functions, as well as their formation or establishment would lead to the same conclusion.

I would therefore conclude that the district local councils and sub county local government councils are ill suited to make resolutions as is provided for by section 4 (1) (c) of the ITCL Act in the manner that was envisaged by Article 246 of the Constitution.

As to whether section 4 (1) (b) of the ITCL Act is consistent with Article 246 of the Constitution, there is no doubt that according to the definition of a traditional or cultural leader in clause (6) of Article 246 of the Constitution such a leader *“derives allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people led by that traditional or cultural leader.”* The provision is clear and unambiguous. Allegiance to the cultural leader must be derived in accordance with the customs, traditions and usage of the people to be led. The consent of the people referred to in the same provision then must be about the customs, traditions and usage of the community to be led and not anything else.

In conclusion therefore, I find that section 4 (1) (b) of the Institution of Traditional or Cultural Leaders Act, 2011, is inconsistent with and contravenes Article 246 (1) and (6) of the Constitution to the extent that the district local councils and sub county local government councils do not have the legal mandate to administer the customs, traditions and usages relating to the institution of traditional or cultural leaders within

the meaning of the Constitution. The said local government councils are also by their political nature or character ill-suited to identify, appoint or institute such leaders.

Remedies

5 The declarations that are relevant to the interpretation of the petition which the petitioner prayed for were with respect to the inconsistency between Article 246 of the Constitution and section 4 (1) (b) of the ITCL Act. He also prayed that this court declares that people of any area are free to adopt their own method of determining their wishes and
10 aspirations on traditional or cultural matters in accordance with their customs, traditions, usage and consent, and that the costs of this petition be provided for.

While this court can issue the first declaration that he prayed for, it is not possible to issue the second one for it would contravene Article
15 246(2) of the Constitution which provides that Parliament will prescribe for the resolution of the issue of traditional or cultural leaders in areas where it has not yet been resolved. Parliament purported to resolve the issue in the ITCL Act as it was provided for in the Constitution, but the method that was prescribed offends Article 246 (1) and (6) of the
20 Constitution. Therefore, the only declaration that this court can make in that regard would be for the rectification of the provisions of section 4(1) (b) of the ITCL Act.

As to whether costs are due to the petitioner, I do not think so because the petition was brought in the public interest. I am of the view that
25 each party should bear their own advocates' costs.

But before I take leave of this matter, the petitioner who is a senior advocate and the proprietor of the firm of Ayena Odongo & Co.

Advocates, the firm that filed the petition now before court, though a litigant in this matter is subject to the jurisdiction of this court as an officer of court. It will be recalled that at page 20 of this judgment I observed that in his affidavit in rejoinder, the petitioner made
5 statements about the 4th respondent that were not only derogatory but almost abusive. He stated, among others, as follows:

- a) In paragraph 26 that the appointment of the 4th respondent as a cultural leader was the result of his *“wild and rapacious ambition;”*
- 10 b) In paragraph 28 that the 4th respondent had gotten accustomed to *“stardom as a giant among intellectual dwarfs;”*
- c) In paragraph 32 that, the 4th respondent would not be allowed to *“quench his insatiable thirst for power and exercise his infantile and egotistic buffoonery, flamboyance and outlandish mimicry of HE President Yoweri Museveni,”*

15 However, in his submissions, the petitioner complained that the 4th respondent insulted him when he stated in his affidavit in support of his answer to the petition that he had not seen the petitioner participate in some important processes of the people of Lango, save that he is said to have represented some in court. What annoyed the petitioner, as he
20 stated in his submissions, was that the 4th respondent referred to him as a *“busy body.”* The petitioner then filed a rejoinder on the 23rd May 2017, in which he deposed to the statements above by which he purported to describe the 4th respondent and his conduct.

Much as I find that some of the statements that the 4th respondent made
25 were indeed annoying and improper, this court has no jurisdiction to discipline him, save for the offence of contempt of court, but that was not made out by what he stated. On the other hand, according to section 4 of the Advocates Act, every advocate is an officer of court. This is their

paramount duty and it is first to the court then after that to their client. In this case the petitioner represented himself. He appears to have drafted his own pleadings in his firm as well as the submissions filed in this court.

5 The Advocates (Professional Conduct) Regulations SI-267-2 do not specifically prohibit the use of improper language in court proceedings or of advocates in their professional dealings. However, regulation 31 thereof provides as follows:

31. Offences under the Advocates Act, etc.

10 **(1) Any act or omission of the advocate, which is an offence under the Advocates Act, shall be professional misconduct for the purposes of these Regulations.**

15 **(2) Any conduct of an advocate, which in the opinion of the Disciplinary Committee, whether the conduct occurs in the practice of the advocate's profession or otherwise, is unbecoming of an advocate shall be a (sic) professional misconduct for the purposes of these Regulations.**

This court is not the Disciplinary Committee but it derives its powers to discipline Advocates under section 17 of the Advocates Act which
20 provides as follows:

17. Saving of disciplinary powers of courts.

**Nothing in this Act shall supersede, lessen or interfere with the jurisdiction of any court, inherent or otherwise, to deal with misconduct or offences by an advocate, or any person entitled to
25 act as such, committed during, or in the course of, or relating to, proceedings before the court.**

My understanding of this provision is that the courts have inherent powers to discipline advocates and therefore this court can and has the power to discipline advocates.

It is my opinion that it is ill advised for an Advocate to represent himself/herself in litigation, especially in matters where their feelings may get the better of them, like they did this senior Advocate. In **Kay v. Ehrler, et al, 499 U.S. 432**, Justice J. P. Stevens of the United States Supreme Court in his opinion for the court observed that history has often proved that even a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness. He is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom. Like the learned judge observed in that case, this case goes to show that the old adage still rings true; *“an advocate who represents himself has a fool for a client.”*

It is one of the cardinal duties of an officer of the court to be courteous to others and to respect court process. The IBA Principles on the Conduct of the Legal Profession⁷ deconstructed the principles of honesty, integrity and fairness to include, among others, the following aspects:

Lawyers have an obligation to be professional with clients, other parties and counsel, the courts, court personnel, and the public. This obligation includes civility, professional integrity, personal dignity, candour, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution. Lawyers should be mindful that while their duties are often carried out in an adversarial forum, lawyers should not treat the court, other lawyers, or the public in a hostile manner.

⁷ Retrieved on 14th July 2022 from <https://www.icj.org/wp-content/uploads/2014/10/IBA>

The petitioner's statements are without a doubt inflammatory and hostile to the person of the 4th respondent; they amount to insults and are demeaning. The word "*rapacious*" in paragraph 26 of the petitioner's affidavit in rejoinder is synonymous with the words "*greedy, voracious, mercenary, and insatiable*," among others. The statement in paragraph 28 of the said affidavit implies that the 4th respondent is an "*intellectual dwarf*," his mental faculties are undeveloped and there is no hope that they will develop since dwarfs do not overcome their disability as such. Finally, the statement in paragraph 32 is clear and unambiguous; it means the 4th respondent behaves no better than a child, he is a *buffoon* a "*clown, fool or wag*." He has no style of his own except mimicking HE the President of Uganda, Yoweri Kaguta Museveni;⁸ no offence is meant to His Excellency the President.

This court would have meted out punishment to the petitioner for the conduct that he exhibited in this case but he was not asked to explain why he insulted the 4th respondent in the manner that he did. We would summon him to explain himself but this matter has been pending since 2017, a period of 5 years. It needs to be disposed of now that it has been heard.

Therefore, the petitioner is ordered to desist filing pleadings and other court process and conducting himself in a manner that puts the legal professions in disrepute. In the event that similar conduct is repeated, sterner action will be taken against him by court, as it is provided for in section 17 of the Advocates Act.

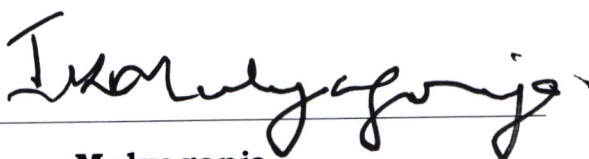
Conclusion

The petition therefore partially succeeds and I would make the following declarations and orders:

⁸ Definitions in this paragraph were drawn from <https://www.thesaurus.com>

- 5
- 10
- 15
- 20
- 25
- i) Section 4 (1) (b) of the Institution of Traditional and Cultural Leaders Act, 2011 is inconsistent with and contravenes the provisions of Article 246 (1) and (2) of the Constitution.
 - ii) The operation of section 4 (1) (b) of the Institution of Traditional or Cultural Leaders is hereby suspended until Parliament reviews it and enacts an appropriate provision prescribing a method for the resolution of the issue of traditional or cultural leaders in communities where it has not yet been resolved, pursuant to Article 246 (2) of the Constitution.
 - iii) The complaints about the legality or constitutionality of the institution of a traditional or cultural leader in this petition shall be resolved by the High Court, pursuant to Article 50 of the Constitution.
 - iv) The petitioner is ordered to desist from using abusive and/or derogatory language in proceedings before the courts.
 - v) Each party will bear their own costs in this petition.

Dated at Kampala this 2nd Day of Dec 2022.

20 

Irene Mulyagonja

JUSTICE OF THE CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
(Cheborion Barishaki, Musota, Kibeedi, Mulyagonja,
Mugenyi, JJCC)

5

CONSTITUTIONAL PETITION 14 of 2017

KRISPUS AYENA ODONGO :::::::::::::::::::::::::::::::::::PETITIONER

VERSUS

10 **1.THE ATTORNEY GENERAL**
 2.YOSAM ODUR
 3.LANGO CULTURAL FOUNDATION } **::::::::::::RESPONDENTS**
 4.ENG. DR MM ODONGO OKUNE

JUDGMENT OF STEPHEN MUSOTA JA/JCC

15 **Introduction and Background**

I have had the benefit of reading in draft the judgment of my learned sister Irene Mulyajongs JA/JCC and I adopt her introduction and background of the Petition. I need not reproduce them here.

20 **Preliminary Objections/Points of law**

In his answer to the petition, the 1st respondent raised a preliminary point of law in paragraph 4 that the petition does not raise any questions requiring the interpretation of the Constitution. The 2nd and 4th respondents also raised the same,
25 though the 4th respondent added that the petitioner has no cause

of action to bring him before this court. I adopt my learned sister Irene Mulyajongs JA/JCC's determination of the preliminary objections raised. Order 6 rule 28 of the Civil Procedure Rules (CPR) which is applicable in this court by virtue of rule 23 of the
5 Constitutional Court (Petitions and Reference) Rules, SI 91 of 2005 allows raising of preliminary points of law. In **Attorney General v Major General David Tinyefuza, Supreme Court Constitutional Appeal No 1 of 1997**, the supreme court made it clear that the discretion is on the trial court to decide when to rule on the
10 preliminary objections/points of law raised by parties to the case.

On whether the Petition raises any questions for constitutional interpretation I adopt my learned sister Mulyagonja JA/JCC's conclusion that there are questions for constitutional interpretation in the instant petition. The petitioner's main
15 complaint is that section 4 (1) (b) of the Institution of Traditional or Leaders Act (ITCL Act) which provides for the creation of the office of traditional leader by resolution of a district local council and sub county local government councils is inconsistent with Article 246 (2) and (6) of the Constitution. It is my view that this
20 requires this court to interpret Article 246 of the Constitution and render determination whether the provisions of the Act referred to are inconsistent with the Constitution. The complaint falls squarely under the provisions of Article 137 (3) (a) of the Constitution.

25 This automatically means that the petition discloses a cause of action. I would accordingly find that the instant petition before us discloses a cause of action.

A “*cause of action*” for purposes of interpretation of the Constitution was defined, among others, in **Attorney General v. Tinyefuza** (supra) in which Mulenga, JSC defined it as follows:

5 *A cause of action in simple language is a happening or circumstances which in law, give rise to a right to sue or take action in court for redress or remedy. Clause (3) of Article 137 sets out several happenings and circumstances which give rise to a right to petition the Constitutional Court for a declaration. The cause of action under that clause therefore is not*
10 *constituted by an “allegation” made by the petitioner ... Rather, it is constituted by the fact of such happening as for example under (3) (b) the commission of an act which contravenes a provision of the Constitution, or under clause (3) (a) the enactment or existence of an Act of Parliament whose*
15 *provisions are inconsistent with any provision of the Constitution. If a petition to the constitutional court contains an allegation of the existence of any such happening or circumstance, then it discloses a cause of action which should be tried and determine by the Court.”*

20 In view of the definition above, there is no doubt at all that the petition raises questions for constitutional interpretation and discloses a cause of action.

Principles for constitutional interpretation

I further adopt my learned sister’s summary of the Principles for
25 Constitutional interpretation stated in her draft. I need not reproduce them here.

Determination of the issues

Whether section 4 (1) (b) of the ITCL Act, 2011 is inconsistent with or in contravention of Article 246 of the Constitution.

I adopt my learned sister's summary of the submissions of Counsel
5 stated in resolution of this issue. I also find as she does that the
submissions of counsel demonstrate that the petitioner's
complaint has many facets and it relates to the whole of Article
246 of the Constitution. Further, it is apparent that the petition as
well as the submissions of the petitioner require this court to
10 consider more than the question whether section 4 (1) (b) of the
ITCL Act of 2011 is inconsistent with or in contravention of Article
246 of the Constitution. The manner in which the petition was
framed points to the need for this court to interpret the whole of
Article 246 of the Constitution, as well as to determine whether
15 section 4 (1) (b) of the ITCL Act is inconsistent with or contravenes
Article 246 of the Constitution of Uganda.

I further adopt the sub issues identified by my learned sister Irene
Mulyagonja in her draft which are;

- 20 i) Whether Article 246 of the Constitution limited the institution
of traditional or cultural leaders to only areas in Uganda that
had such leaders before 1966 when such institutions were
abolished.
- 25 ii) Whether all traditional and cultural leaders must derive
allegiance from the fact of their birth or descent in accordance
with the customs, traditions, usage, or the consent of the
people led.

- iii) Whether the appointment and installation of a traditional or cultural leader who does not derive his/her allegiance from the fact of birth or descent contravenes Article 246 of the Constitution.
- 5 iv) Whether prescription by Parliament was the only mode of resolving the question of traditional or cultural leaders in areas where they did not already exist before the coming into force of the 1995 Constitution?
- v) Whether Parliament resolved the question of a traditional or
10 cultural leader for Lango.
- vi) Whether section 4 (1) (b) of the Institution of Traditional or Cultural Leaders Act is *ultra vires* and therefore inconsistent with Article 246 of the Constitution, in as far as it purports to ascribe the duty to identify such leaders by resolutions of
15 local government and sub county councils.

Sub Issue 1: Whether Article 246 of the Constitution limited the institution of traditional or cultural leaders to only areas in Uganda that had such leaders before 1996 when such institutions were abolished?

20 The petitioner contends that Article 246 of the Constitution limited the institution of traditional or cultural leader to areas where they already existed before 1966 when they were abolished. The Article in issue provides as follows:

246. Institution of traditional or cultural leaders.

25 **(1) Subject to the provisions of this Constitution, the institution of traditional leader or cultural leader may**

exist in any area of Uganda in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies.

5 (2) In any community, where the issue of traditional or cultural leader has not been resolved, the issue shall be resolved by the community concerned using a method prescribed by Parliament.

(3) The following provisions shall apply in relation to traditional leaders or cultural leaders—

10 (a) the institution of traditional leader or a cultural leader shall be a corporation sole with perpetual succession and with capacity to sue and be sued and to hold assets or properties in trust for itself and the people concerned;

15 (b) nothing in paragraph (a) shall be taken to prohibit a traditional leader or cultural leader from holding any asset or property acquired in a personal capacity;

20 (c) a traditional leader or cultural leader shall enjoy such privileges and benefits as may be conferred by the Government and local government or as that leader may be entitled to under culture, custom and tradition;

25 (d) subject to paragraph (c) of this clause, no person shall be compelled to pay allegiance or contribute to the cost of maintaining a traditional leader or cultural leader;

(e) a person shall not, while remaining a traditional leader or cultural leader, join or participate in partisan politics;

5 (f) a traditional leader or cultural leader shall not have or exercise any administrative, legislative or executive powers of Government or local government.

10 (4) The allegiance and privileges accorded to a traditional leader or a cultural leader by virtue of that office shall not be regarded as a discriminatory practice prohibited under article 21 of this Constitution; but any custom, practice, usage or tradition relating to a traditional leader or cultural leader which detracts from the rights of any person as guaranteed by this
15 Constitution, shall be taken to be prohibited under that article.

20 (5) For the avoidance of doubt, the institution of traditional leader or cultural leader existing immediately before the coming into force of this Constitution shall be taken to exist in accordance with the provisions of this Constitution.

25 (6) For the purposes of this article, "traditional leader or cultural leader" means a king or similar traditional leader or cultural leader by whatever name called, who derives allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or

consent of the people led by that traditional or cultural leader.

It is a cardinal rule of constitutional interpretation, and general statutory interpretation that while interpreting the constitution or
5 any statute, the court must adhere to the words mentioned in it. Under this rule, *the literal rule*, the court focuses on the literal meaning of the constitutional provision; the words, phrases and sentences of the statute are ordinarily understood in their literal or grammatical meaning.

10 Clause (5) of Article 246 provides as follows:

(5) For the avoidance of doubt, the institution of traditional leader or cultural leader existing immediately before the coming into force of this Constitution shall be taken to exist in accordance with
15 **the provisions of this Constitution.**

The petitioner's contention is that by virtue of Article 246 (5) of the 1995 Constitution, only the traditional and cultural institutions of Buganda, Bunyoro, Ankole, Toro and the territory of Busoga were provided for by Article 246 of the Constitution, since it was these
20 that existed immediately before the coming into force of the 1995 Constitution.

However, it has been held in several decisions of this court and the Supreme Court in **Paul K Semogerere & 2 Others v Attorney General, constitutional Appeal No. 1 of 2002**, following the
25 decision of the U.S. Supreme Court in **South Dakota v. North Carolina, 192 U.S. 268 (1940) L. Ed, that:**

5 “(The) Elementary rule of Constitutional Construction is that no one provision of the Constitution is to be segregated from all others to be considered alone, but that all provisions bearing on a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument.”

10 Clause 1 of Article 246 provides that the institution of traditional leader or cultural leader “*may exist in any area of Uganda*” in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies. The provisions of clause 5 of the same Article therefore cannot override or contradict this paramount intention of the framers of the Constitution. Their intention was to open up the possibility of establishing such institutions in areas where they were not. However, it is important to note that this finding is not meant to answer the question whether or not the institution of a traditional or cultural leader existed in Lango prior to the enactment of the 1995 Constitution because there is insufficient evidence before us to do so in this petition.

20 My learned sister Irene Mulyagonja in her draft referred to Chapter 1 of the repealed 1962 Constitution of Uganda to determine whether or not the traditional/cultural institution of lango existed prior to 1966. In my view this is not a proper reference for determining which cultural institutions existed before 1966 and in which districts or regions or areas.

 To my understanding existence or non-existence of a cultural institution is a question of fact which we cannot infer from an old

constitution. The provisions of the 1962 Constitution are not an appropriate method of deciding whether or not a kingdom existed and I believe it is not advisable to use it to make that conclusion. Especially considering the History of the Constitution well outlined
5 in the Preamble to the 1995 Constitution of the Republic of Uganda, where Uganda is clearly trying to distance itself from that toxic history.

We should try as much as possible to avoid associating the current constitution with the old ones especially in performing this noble
10 duty of interpreting the current constitution. I would therefore not refer to the old 1962 constitution. My learned sister's conclusion that there is no evidence that in Lango there existed or did not exist an institution of a traditional or cultural leader supports the view that we need not cite the old constitution or use it to
15 determine or answer the factual question of existence or non-existence of a kingdom.

The petitioner submits that the only recognised cultural institutions are only the five (5) areas of Uganda that were provided for by Article 2 of the 1962 Constitution of Uganda who were
20 restored by virtue of Article 246 of the 1995 Constitution. My view on this is that this cannot be correct considering that existence or non-existence is not a question of law but of fact.

I also hold the well-considered opinion that we cannot allocate a restricted meaning to the word existence as used in Article 246 of
25 the 1995 Constitution to mean as recognised in the 1962 Constitution. Existence is the actual or present occurrence of something. It is the state or fact of being real or living or of being

present. Exist means to be real; to be present in a place or situation. Therefore, whatever can be proved to have been real or present in a place or situation is said to exist or have been in existence. This ordinary meaning is what should be assigned to the meaning of the word existence in Article 246 clause 5 of the Constitution of the Republic of Uganda 1995.

But I also observe that when read as a whole Article 246(5) of the 1995 Constitution of the Republic of Uganda is only for clarity and is not intended to exclude any other institution of traditional leader. It is like this court saying that;

1. A lawyer may address this constitutional court in any hearing of a matter

2. For avoidance of doubt the respondent's lawyer may also address this court.

These two sentences are not mutually exclusive. Statement 1 is a general statement for all lawyers but statement 2 clarifies that a respondent's lawyer will also have a chance to address court. Saying that the respondent's lawyer will have a chance to address court does not mean the Petitioner is barred from addressing the court as long as he is a lawyer.

The same applies to Article 246(1) and (5). The cultural leader in clause (1) means "all cultural leaders" and includes "the cultural leader" in clause (5) who existed before the coming into force of the constitution. This is further made clear by the definition of Traditional/cultural leader in the same Article.

In conclusion I do however adopt my learned sister's interpretation that the provisions of clause 5 of the same Article, therefore, cannot override or contradict the paramount intention of the framers of the Constitution which intention was to open up the possibility of establishing such institutions in areas where they were not.

Sub Issues 2 and 3: Whether all traditional and cultural leaders must derive allegiance from the fact of their birth or descent in accordance with the customs, traditions, usage, or the consent of the people led. AND Whether the appointment and installation of a traditional or cultural leader who does not derive his/her allegiance from the fact of birth or descent contravenes Article 246 of the Constitution.

On these two sub issues I adopt my learned sister Mulyagonja's finding that pursuant to Article 246 (1) of the Constitution, a traditional or cultural leader may be identified and installed by agreement, acquiescence, concurrence or assent between the people in an area, or a tribe in Uganda. This need not be in accordance with customs, traditions, or usage of the people in that area. However, that leader must emerge from persons born in that area, or having descendants among the indigenous people in that area. There need not be a designated group of people, that is family, clan or lineage from which such a leader is identified by the people to be led.

Further I also find that the conclusion above resolves the 3rd sub issue, because the installation of a traditional or cultural leader

who does not derive allegiance from “*birth or descent*” would be in contravention of and inconsistent with Article 246 of the Constitution most especially clause 6 thereof. The Article states as follows;

5 **“(6) For the purposes of this article, “traditional leader or cultural leader” means a king or similar traditional leader or cultural leader by whatever name called, who derives allegiance from the fact of birth or descent in accordance with the customs,**
10 **traditions, usage or consent of the people led by that traditional or cultural leader.”**

Sub Issues 4 and 5 Whether prescription by Parliament was the only mode of resolving the question of traditional or cultural leaders in areas where they did not already exist before the coming into force of the 1995 Constitution? AND Whether Parliament resolved the question of a traditional or cultural leader for Lango?

On this sub issue, I substantially adopt my learned sister Mulyagonja’s analysis on these sub issues.

20 The question is where is the constitutional question and what is its answer. In my view the constitutional question is whether Article 246 clause 2 of the Constitution of the Republic of Uganda 1995 means that parliament is the only institution which can resolve the issue of cultural or traditional leader. My answer is that
25 far from it. It is not the only institution!

My understanding and interpretation of the provision is that whereas all communities can resolve their own issue of cultural or institutional leader, where they fail then the method prescribed by parliament must be applied in resolving that issue. Therefore, 5 clause 2 of Article 246 is additional and not exclusionary. It provides a solution where the Community fails to resolve their issue of a cultural leader.

Further still this solution is in my well-considered view intended to protect the country against the possible chaos that can arise 10 from disputes over cultural institutional leadership. The constitution did not limit the mode of solution.

I would however, adopt my learned sister Mulyagonja's conclusion that by virtue of the ITCL Act, Parliament did prescribe a method, or methods for resolving the question of traditional or cultural 15 leaders both in areas where they already existed and in areas where they did not and this includes Lango.

Sub Issue 6 *Whether section 4 (1) (b) of the Institution of Traditional or Cultural Leaders Act is ultra vires and therefore inconsistent with Article 246 of the Constitution, in 20 as far as it purports to ascribe the duty to identify such leaders by resolutions of local government and sub county councils.*

On this sub issue I substantially adopt my learned sister's analysis and findings. However, I would conclude differently.

25 I am unable to adopt the conclusion of my Learned sister that district local councils and sub county local government councils

are ill-suited to make resolutions as is provided for by section 4 (1) (c) of the ITCL Act in the manner that was envisaged by Article 246 of the Constitution. In my considered view, this conclusion is not accurate. Local governments are for the local people in that locality. It cannot therefore be assumed that those forming the local government are completely alien to that society its culture and cultural leadership/institutions.

My view is that this conclusion is not supported by the meaning of the provisions of Article 246. Clause 1 provides for culture, customs and traditions or wishes and aspirations of the people to whom it applies. A local government council is by its nature local and deals with the day-to-day issues of that locality. I cannot find that such a local council is not suited to deal with the issue of cultural or traditional leader. Doing so would thereby be trying to suggest that traditional leaders do not lead the local councils and that Local Councils are completely removed from matters of cultural leadership which is not the case.

I would hold that for the reasons I have given, Section 4(1)(b) of the ITCL Act, 2011 is consistent with Article 246(1) of the Constitution. The local government council by its composition is of people within the community concerned. To interpret otherwise would leave the unresolved issues of cultural leaders to be without a solution yet this method is only used where the Community fails to resolve the issue through their own unrestricted and unlimited mechanisms.

The constitution did not expressly prohibit local councils from participating in dispute resolution processes over the leadership of cultural institutions and the selection of cultural leaders. It would

therefore be reading too much into the constitution to prohibit it by interpretation of a court.

I therefore cannot adopt the conclusion that the district local councils and sub county local government councils are ill suited
5 to make resolutions as is provided for by section 4 (1) (c) of the ITCL Act in the manner that was envisaged by Article 246 of the Constitution.

I would hold that for the reasons I have given, Section 4(1)(b) of the ITCL Act, 2011 is consistent with Article 246(1) of the Constitution.

10 **Remedies**

I would for the reasons of departure from my learned sister Mulyagonja's judgment not agree with any of the remedies proposed. In my view the petitioner is not entitled to any of the remedies proposed therein. I would not grant any of the orders as
15 prayed for.

Conclusion

In conclusion having failed to find any inconsistencies with the constitution as alleged by the petitioner, I would find no merit in the petition and would accordingly dismiss it with each party
20 bearing its own costs of the petition.

Dated at Kampala this 2nd Day of Dec 2022.



Stephen Musota

**JUSTICE OF APPEAL/ JUSTICE OF THE CONSTITUTIONAL
COURT**

5

The issues framed for determination by the court are the following:

- 1) **Whether section 4 (1) (b) of the ITCL Act, 2011 is inconsistent with or in contravention of Article 246 of the Constitution.**
- 2) **Whether the appointment and installation of the 2nd and 4th respondents as traditional or cultural leaders of Lango before the enactment of the Traditional or Cultural Leaders Act, 2011 contravened the provisions of Article 246 of the Constitution.**
- 3) **Whether the parties are entitled to the remedies claimed.**

However, six sub-issues were raised out of issue 1 namely:

- i) Whether Article 246 of the Constitution limited the institution of traditional or cultural leaders to only areas in Uganda that had such leaders before 1966 when such institutions were abolished.
- ii) Whether all traditional and cultural leaders must derive allegiance from the fact of their birth or descent in accordance with the customs, traditions, usage, or the consent of the people led.
- iii) Whether the appointment and installation of a traditional or cultural leader who does not derive his/her allegiance from the fact of birth or descent contravenes Article 246 of the Constitution.
- iv) Whether prescription by Parliament was the only mode of resolving the question of traditional or cultural leaders in areas where they did not already exist before the coming into force of the 1995 Constitution?
- v) Whether Parliament resolved the question of a traditional or cultural leader for Lango.
- vi) Whether section 4 (1) (b) of the Institution of Traditional or Cultural Leaders Act is *ultra vires* and therefore inconsistent with Article 246 of the Constitution, in as far as it purports to

50 ascribe the duty to identify such leaders by resolutions of local government and sub county councils.

I agree with the reasoning and conclusions reached by Her Lordship Mulyagonja, JCC in relation to sub-issues ii, iii, and iv and I have nothing useful to add. As for sub-issue (i), I will state my position in my own words hereinafter. But with greatest respect, I would differ from Her Lordship's reasoning and conclusions on sub-issues (v) and (vi) for the reasons which I will set out in this judgment.

Sub-issue (i)

As already stated, sub-issue (i) was couched thus:

Whether Article 246 of the Constitution limited the institution of traditional or cultural leaders to only areas in Uganda that had such leaders before 1966 when such institutions were abolished.

60 While interpreting the scope of operation of Article 246 of the Constitution, it is important to consider the other provisions of the Constitution which deal with the same subject of cultural or traditional institutions. This is in accordance with the rule of harmony or completeness and exhaustiveness in constitutional interpretation which is to the effect that in interpreting the Constitution the entire Constitution must be read as an integrated whole with no particular provision destroying the other but each sustaining the other so as to promote harmony of the Constitution - see Dr. Paul K. Semogerere and 2 others Vs. A.G, Constitutional Appeal No. 1 of 2002.

Article 37 of the Constitution of the Republic of Uganda recognizes and guarantees culture as a human right in the following terms:

70 ***“37. Right to culture and similar rights***

Every person has a right as applicable to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others."

As is the case with the other provisions of the Constitution which deal with fundamental and
75 other human rights issues, this court when dealing with the right to culture raised by the current
Petition should adopt a dynamic, progressive, liberal and flexible interpretation keeping in view
the ideals of the people, their social economic and political cultural values so as to extend the
benefit of the same to the maximum possible. See: David Welsely Tusingwire v Attorney
General [2017] UGSC 11

80 Bearing in mind the above two principles of interpretation of the Constitution, I have no doubt in
my mind that Article 246 of the 1995 Constitution was intended to cater for those communities in
Uganda where the issue of traditional or cultural leader had, at the time of promulgation of the
Constitution in 1995, been resolved and those communities where the issue was, at the time,
not resolved. The communities where the issue was resolved were not specified in the
85 Constitution itself. In my view, whether the issue was resolved or not at the time of the
promulgation of the Constitution in 1995 is a question of fact, save for the communities covered
by article 246(5) of the constitution which provides thus:

90 *"For the avoidance of doubt, the institution of traditional leader or cultural leader existing
immediately before the coming into force of this Constitution shall be taken to exist in
accordance with the provisions of this Constitution."*

Reading article 246 alongside article 37 which guarantees the right of individuals and
communities to culture in order to give the constitution a wholistic interpretation, I would hold
that where the culture and traditions of a particular community had a clearly defined mechanism
for the establishment, existence or institution of their cultural or traditional leader, then such
95 communities would likewise qualify to be categorized under those communities in Uganda where
the issue of traditional or cultural leader had, at the time of promulgation of the Constitution in
1995, been resolved. And this is irrespective of whether or not, as a matter of fact, a cultural

leader was in place or not at the time of the promulgation of the Constitution in 1995. In my view, such communities are entitled to institute their cultural leader in accordance with their culture or
100 custom.

When it came to those communities where the issue of cultural leaders was unresolved, provision was made in article 246(2) of the Constitution for the resolution of the issue in the following terms:

105 *“In any community, where the issue of traditional or cultural leader has not been resolved, the issue shall be resolved by the community concerned using a method prescribed by Parliament.”*

I agree with Her Lordship Mulyagonja, JCC that intention of the Constituent Assembly as expressed in article 246 (1) read together with article 246(5) of the Constitution was to open up the possibility of establishing cultural leaders and cultural institutions in areas where they were
110 not in existence immediately before the coming into force of the Constitution of Uganda of 1995. Such establishment had to be done in accordance with the culture, customs and traditions of the people to whom it applies, or in accordance with or wishes and aspirations of the people to whom it applies.

Needless to add, culture being dynamic, it would not be far-fetched to expect the institutions of
115 cultural leaders to likewise undergo metamorphosis. A good example is the British Monarch. It is currently a constitutional monarch but did not start as such.

From the aforesaid, I would answer sub-issue (i) in the negative. And in addition, I agree with the conclusion by Her Lordship Mulyagonja, JCC that this finding is not meant to answer the question whether or not the institution of a traditional or cultural leader existed in Lango prior to
120 the enactment of the 1995 Constitution because there is insufficient evidence before us to do so in this Petition. The specifics applicable to the cultural institution of the Lango Community can only be resolved by the High Court, after taking the evidence of the parties specific to that institution.

125 And this takes me to the mode of resolution of the issue of traditional or cultural leader prescribed by Parliament in Section 4 of the Institution of Traditional or Cultural Leaders Act, 2011 (ITCL Act).

Resolution of sub-issues (v) and (vi)

130 I agree with the observation of Her Lordship Mulyagonja, JCC that Section 4 of the ITCL Act sets out the two modes of procedure for instituting traditional or cultural leaders, pursuant to Article 246 of the Constitution. These are:

- 1) According to the customs and the traditions of the people to be led (**See: Section 4 (1)(a) of the ITCL Act**); or
- 2) According to "*the wishes and aspirations of the people to whom it applies, through a resolution of not less than two thirds of all members of the district local councils and sub*
135 *county local government councils respectively in the area*". **See: Section 4 (1)(b) of the ITCL Act.**

The Petitioner's complaint in sub-issues (v) and (vi) is about the constitutionality of the Local Government Councils in resolving the questions as to the institution of Cultural Leaders as provided in Section 4(1)(b) of ITCL Act. The concern of the Petitioner appears to be that the said
140 local government Councils being fundamentally political organs of the state, are easily susceptible to partisan manipulation and, as such, not capable of making a decision reflecting the traditional and cultural identity of the people in any area.

The petitioner has valid observations in light of our electoral history. However, manipulation, if established as a fact, only forms a valid ground for nullification of the particular traditional leader
145 or institution who/which has emerged from the particular flawed process on the ground that he/it does not reflect the wishes and aspiration of the concerned people. The key consideration in

resolving this Petition is whether the method prescribed by parliament is one of the recognized methods for establishing the “wishes and aspirations of the people”.

150 My understanding of Section 4 (1)(b) of the ITCL Act is that it is the members of the combined district local government councils and sub county local government councils in the area of concern who constitute the electoral college for purposes of determining the wishes and aspirations of their people. These members take office as a result a free and fair election in expression of the will and consent of their electorate in accordance with Article 1(4) of the Constitution of the republic of Uganda. In their individual and collective capacity and rights as
155 leaders, they are competent to identify, recognize and express the wishes and aspirations of their voters on the issue of culture. They are also aware that a failure on their part to act in accordance with the wishes and aspirations of their electorate is tantamount to committing political suicide and loss of their seat in the Local Government Council during the next election. This inherent threat is bound to keep them in check.

160 I am aware that there exist other different ways of establishing “the wishes and aspirations of the people” in a democratic society. These include referendum and universal adult suffrage. Each method has its own advantages and inherent limitations. But the mere existence of alternative ways of establishing the “wishes and aspirations of the people” cannot by itself be a ground to discount the appropriateness of any particular method which Parliament, in its wisdom, deemed
165 most appropriate in resolution of the issue in the given circumstances.

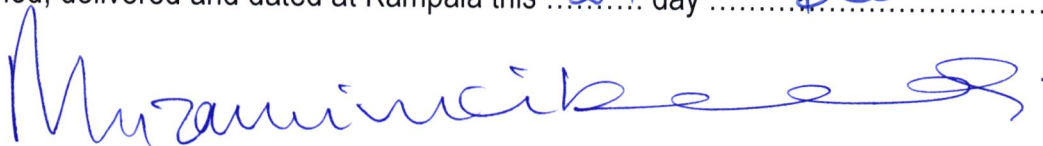
I am also alive to the functions of local government organs and their composition during a multiparty political system as detailed in the judgment of Her Lordship, Mulyagonja, JCC. My understanding of the mandate conferred upon the members of the combined local government councils by Section 4 (1)(b) of the ITCL Act is not to discharge the traditional local government
170 functions as set out in the Constitution and the Local Government Act, but a specific task of confirming and expressing the wishes and aspirations of the people they represent pursuant to Article 246(1) of the Constitution and Section 4 (1)(b) of the ITCL Act.

Conclusion:

I would make the following declarations and orders:

- 175 1) Section 4 (1) (b) of the Institution of Traditional and Cultural Leaders Act, 2011 is NOT
inconsistent with and does NOT contravene the provisions of Article 246 (1) and (2) of the
Constitution. However, the section does not oust the right of those communities which had,
at the time of promulgation of the 1995 Constitution, customs and traditions with clearly
180 inbuilt and/or defined mechanisms for selection or institution of their cultural or traditional
leaders.
- 2) The complaints about the legality of the institution of a traditional or cultural leader for the
Lango Community, the subject matter of this Petition, ought to be resolved by the High Court,
after a full trial as there is insufficient evidence before this court to enable a fair and just
resolution of the issue by this court.
- 185 3) Subject to the above declarations, I would dismiss the petition and order each party to bear
one's costs in this petition on account of the subject matter being a public interest matter.

Signed, delivered and dated at Kampala this 2nd day Dec 2022



Muzamiru Mutangula Kibeedi

JUSTICE OF THE CONSTITUTIONAL COURT



THE REPUBLIC OF UGANDA

**THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA**

CORAM: CHEBORION, MUSOTA, KIBEEDI, MULYAGONJA & MUGENYI, JJCC

CONSTITUTIONAL PETITION NO. 14 OF 2017

KRISPUS AYENA ODONGO PETITIONER

VERSUS

- 1. ATTORNEY GENERAL**
- 2. YOSAM ODUR**
- 3. LANGO CULTURAL FOUNDATION**
- 4. ENG. DR. MM ODONGO OKUNE RESPONDENTS**

JUDGMENT OF MONICA K. MUGENYI, JCC

1. I have had the benefit of reading in draft the lead judgment of my sister, Hon. Lady Justice Irene Mulyagonja, as well as the partially dissenting draft judgment of my brother, Hon. Justice Stephen Musota. I do defer to the position taken in both judgments that the complaints in this Petition about the legality of the Second and Fourth Respondents' claim to Lango traditional leadership (which are apparently pending before the High Court and/ or Court of Appeal) be resolved by those courts pursuant to Article 50 of the Constitution. I nonetheless deem it necessary to highlight my opinion on the residual matters raised in the Petition.
2. I would adopt the factual background to the Petition in the lead judgment, and need not regurgitate it herein. However, for clarity, I reproduce below the issues as framed by the parties and sub-divided in the lead judgment and, for parity, shall abide them in my brief opinion on the case.

(I) *Whether section 4 (1) (b) of the ITCL Act, 2011 is inconsistent with or in contravention of Article 246 of the Constitution.*

- (i) *Whether Article 246 of the Constitution limited the institution of traditional or cultural leaders to only areas in Uganda that had such leaders before 1966 when such institutions were abolished.*
- (ii) *Whether all traditional and cultural leaders must derive allegiance from the fact of their birth or descent in accordance with the customs, traditions, usage, or the consent of the people led.*
- (iii) *Whether the appointment and installation of a traditional or cultural leader who does not derive his/her allegiance from the fact of birth or descent contravenes Article 246 of the Constitution.*
- (iv) *Whether prescription by Parliament was the only mode of resolving the question of traditional or cultural leaders in areas where they did not already exist before the coming into force of the 1995 Constitution?*
- (v) *Whether Parliament resolved the question of a traditional or cultural leader for Lango.*
- (vi) *Whether section 4 (1) (b) of the Institution of Traditional or Cultural Leaders Act is ultra vires and therefore inconsistent with Article 246 of the Constitution, in as far as it purports to ascribe the duty to identify such leaders by resolutions of local government and sub county councils.*

(II) ***Whether the appointment and installation of the 2nd and 4th respondents as traditional or cultural leaders of Lango before the enactment of the Traditional or Cultural Leaders Act, 2011 contravened the provisions of Article 246 of the Constitution.***

3. With regard to sub-issue (i), I do agree with both Lady Justice Mulyagonja and Justice Musota that the import of clauses (1) and (5) of Article 246 of the Constitution read together is to make provision for the establishment of traditional or cultural leaders in areas where they did not exist before the 1995 Constitution. Their lordships' point of divergence is in the lead judgment's treatment of the Constitutions preceding the 1995 Constitution.
4. The relevance of historical material to constitutional interpretation was addressed as follows in Wofford, John G., 'The Blinding Light: The Uses of History in Constitutional Interpretation', *The University of Chicago Law Review*, 1964, p. 502¹:

There is no acceptable theory demonstrating why and how historical materials are relevant to the present resolution of present constitutional problems. Sometimes the Court indicates that historical materials are helpful, suggestive or illuminating-but not binding. Yet at other times the Court states flatly that history has conclusively resolved the problem. The past can be said to bind the present when a judge considers his own role to be that of discovering the intent of those who "framed" the document, of discovering the meaning which the words had at the time they were inserted in the document or of discovering the purpose for which particular propositions were designed.

5. However, in the matter before us presently there was passage of time between the 1962 Constitution that recognized the kingdoms of Buganda, Ankole, Bunyoro and Toro and designated Lango as a district; and the 1967 Constitution that abolished the institution of 'kingship' in Article 118(1) in the following terms:

The institution of King or Ruler of a Kingdom or Constitutional Head of a District, by whatever name called, existing immediately before the commencement of this Constitution under the law then in force, is hereby abolished.

¹ Also reported at <https://chicagounbound.uchicago.edu>

Handwritten signature

6. In so far as the 1967 Constitution did not name the kingdoms it was abolishing it cannot be presumed that they remained as mentioned in the 1962 Constitution. Therefore, reference in Article 246(5) of the 1995 Constitution to institutions of traditional or cultural leaders '**immediately before the coming into force of this Constitution**' would of necessity be a question of fact and not of law as it has been addressed in the lead judgment.
7. On the question in sub-issues (ii) and (iii) as to whether a claim to traditional or cultural leadership would derive from the claimant's birth or descent, the Petitioner supports traditional or cultural leadership that is premised on birth or descent from a royal lineage, while the Fourth Respondent advances the notion that proof of Langi birth or descent is sufficient for purposes of Article 246(6) of the Constitution. Article 246(6) reads as follows:

For the purposes of this article, "traditional leader or cultural leader" means a king or similar traditional leader or cultural leader by whatever name called, who derives allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people led by that traditional or cultural leader.

8. It seems to me that a traditional or cultural leader under Article 246(6) would arise in two instances: either as a hereditary descendant of royal lineage in accordance with custom, tradition or usage, or purely by consent of the people s/he leads without recourse to their customs, traditions or usage. That would be the literal interpretation of that constitutional provision. However, to propose that a traditional or cultural leader could emerge purely by the consent of the people without being by birth or descent a member of their community would, in my view, be to peddle an absurdity. Consequently, applying the golden rule of interpretation that seeks to avert such bizarre interpretations, I am in complete agreement with my esteemed sister and brother that even where a people consent to a traditional leader, that leader should be born of or descended from their community. That would appear to be the import of section 5(2) of the Institution of Traditional or Cultural Leaders Act, 2011 that restricts the installation of traditional or cultural leaders to persons that derive allegiance from birth or descent.

9. I now turn to sub-issues (iv), (v) and (vi), which I consider to be inter-related. Sub-issues (iv) and (v) raise the question as to whether Parliamentary prescription is the only legal avenue available for the resolution of traditional or cultural leaders in areas where they previously did not exist, and whether such prescription is in place. I would agree with my brother, Justice Musota that the framers of the 1995 Constitution cannot have intended parliamentary prescription to be the sole avenue for resolving a community's traditional or cultural leadership.
10. Without in anyway delving into the merits of his claim to Lango traditional leadership (which is pending before the Court of Appeal), the matter presently before us is a classic case in point. It is the Fourth Respondent's contention that he was elected to the Lango traditional leadership by the Council of Lango Clan Leaders under the Constitution of Lango Cultural Foundation that had been formulated in 2016, well after the Institution of Traditional or Cultural Leaders Act came in to force. However, the mode of his acclaimed accension to Lango traditional leadership was not prescribed under that Act but, rather, under the Lango Cultural Foundation's Constitution (*Tek Kwaro Lango* 2016). Would that *ipso facto* render it unconstitutional? I would think not.
11. In my view, clauses (2) and (6) of Article 246 should be construed together in order to deduce the intention of the framers of the Constitution. Thus, for as long as a traditional leader has been installed in accordance with customs, traditions, usage or consent of the people s/he leads, such a community need not necessarily abide parliamentary prescriptions for traditional leadership. Stated differently, a community can resolve the issue of its traditional or cultural leadership either in a manner prescribed by Parliament under the Institution of Traditional or Cultural Leaders Act or in any other manner that demonstrably represents its customs, traditions, usage or the consent of its people. I would thus answer sub-issue (iv) in the negative.
12. Accordingly, Parliament would not specifically resolve the question of Lango's traditional leadership, as seemingly proposed by the Petitioner, but has made provision therefor in section 4(1) of the Institution of Traditional or Cultural Leaders Act as follows:

Handwritten signature

A traditional or cultural leader may be instituted in the following ways—

(a) in accordance with the culture, customs and traditions of the people to whom it applies; or

(b) in accordance with the wishes and aspirations of the people to whom it applies, through a resolution of not less than two thirds of all members of the district local councils and sub county local government councils respectively in the area.

13. With regard to sub-issue (vi), I am in agreement with the findings and conclusions of my sister, Lady Justice Mulyagonja. With tremendous respect, I take the view that district local councils and local government councils that would under section 4(1)(b) determine the traditional or cultural leadership of a community are not necessarily elected on the basis of their cultural prowess or expertise in cultural matters, but largely on partisan political considerations. It is not even inconceivable that persons elected to those councils would belong to a different cultural community from that in respect of which a decision on traditional leadership should be made. To that extent, in my view, local government councils at district and sub-county level are not necessarily equipped to either determine or represent the cultural wishes and aspirations of a community as required under Article 246(1) of the Constitution.

14. To compound matters, there is the absurd possibility of each round of political contestations yielding a new set of local council officials who could deliver a new traditional or cultural head with the resultant upheavals and instability within affected communities. I do not believe that the cultural wishes and aspirations of a community would or should be either that thrifty or so unduly interwoven with political inclinations as are characteristic of local government councils.

15. Whereas I do recognize the duty upon Parliament under Article 246(2) to provide a solution to communities that are unable to resolve their traditional leadership, it seems to me that the proposed solution should be such as takes into account the spirit and letter of Article 246 that (read in totality) hinges a community's wishes and aspirations to their socio-cultural heritage rather than civic/ political inclinations. If anything, such partisan political connotations are expressly

forbidden of a traditional or cultural leader under Article 246(3)(e) of the Constitution. How then would a traditional or cultural leader that is elected by politically partisan local government councils be insulated from such unconstitutional political leanings?

Disposition

16. Having held as I have on the six sub-issues as framed, I do abide the position taken in the lead judgment that this Petition does partially succeed with the following orders.

- (a) The installation of a traditional or cultural leader outside those areas where a traditional or cultural leader existed before the coming into force of the 1995 Constitution is not inconsistent with Article 246 of the Constitution.
- (b) Section 4(1)(b) of the Institution of Traditional or Cultural Leaders Act, 2011 is inconsistent with Article 246(1) and 3(e) of the Constitution in so far as it subjects the existence of the institution of traditional or cultural leaders to partisan, political district local government and sub-county councils.
- (c) In addition to any prescription that the Parliament of Uganda may re-enact under Article 246(2) of the Constitution, the people of any community in Uganda may under section 4(1)(a) of the Institution of Traditional or Cultural Leaders Act adopt such method for the determination of their wishes and aspirations on their traditional or cultural leadership as is consistent with their culture, customs or traditions.
- (d) Each party to bear its own costs.

17. I would so order.

Dated and delivered at Kampala this 2nd day of Dec, 2022.



Monica K. Mugenyi

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 14 OF 2017

KRISPUS AYENA ODONGO:.....PETITIONER

VERSUS

1. ATTORNEY GENERAL

2. YOSAM ODUR

3. LANGO CULTURAL FOUNDATION

4. ENG. DR. MM ODONGO OKUNE:.....RESPONDENTS

***CORAM: HON. JUSTICE CHEBORION BARISHAKI, STEPHEN MUSOTA, MUZAMIRU
KIBEDI, IRENE MULYAGONJA, MONICA K. MUGENYI, JJCC.***

JUDGMENT OF CHEBORION BARISHAKI, JCC

I had the benefit of reading in draft the judgment prepared by my learned sister Mulyagonja, JCC which sets out the facts in the Petition. I gratefully adopt the account of those facts and the parties cases set out by her.

The 1st and 2nd respondents raised preliminary objections to the Petition and asked court to dismiss it on that account. First they stated that the Petition did not raise any issues requiring interpretation of the Constitution and secondly that the petitioner had no cause of action. My learned sister Irene Mulyagonja made an analysis and reached a valid conclusion that the Petition raises among

others a pertinent complaint that section 4 (1) (b) of the Institution of Traditional or Cultural Leaders (ITCL) Act contravenes and therefore inconsistent with Article 246 of the constitution . Further following the supreme court decision in **Attorney General Vs. Major General David Tinyefunza** she found and rightly so in my view that the Petition disclosed a cause of action. The preliminary objections are therefore devoid of merit.

Arising from the pleadings, the parties framed the following 3 issues for determination;

1. Whether section 4(1)(b) of the ITCL Act, 2011 is inconsistent with or in contravention of Article 246 of the Constitution
2. Whether the appointment and installation of the 2nd and 4th respondents as traditional or cultural leaders of Lango before the enactment of the Traditional or Cultural leaders Act ,2011 contravened the provisions of Article 246 of the Constitution.
3. Whether the parties are entitled to the remedies claimed.

From issue No 1 the Petitioner raised the following 6 sub- issues;

1. Whether Article 246 of the Constitution limited the institution of traditional or cultural leaders to only areas in Uganda that had such leaders before 1966 when such institutions were abolished.
2. Whether traditional and cultural leaders must derive allegiance from the fact of the fact of their birth in accordance with the customs , traditions , usage or the consent of the people lead

3. Whether the appointment and installation of a traditional or cultural leader who does not derive his /her allegiance from the fact of birth or decent contravenes Article 246 of the Constitution
4. Whether prescription by Parliament was the only mode of resolving the question of traditional or cultural leaders in areas where they did not already exist before the coming into force of the 1995 Constitution
5. Whether Parliament resolved the question of a traditional or cultural leader for Lango
6. Whether section 4(1)(b) of the Institution of Traditional or Cultural Leaders Act is Ultra Vires and therefore inconsistent with article 246 of the constitution, in as far as it purports to ascribe the duty to identify such leaders by resolutions of local government and sub county councils.

In executing its mandate of interpreting provisions of the constitution, the constitutional court has often called to its aid principles for constitutional interpretation that have been developed and tested by the courts over time in numerous authorities. I consider the following relevant to the issues in the present Petition;

- 1.** In determining the constitutionality of any legislation its purpose and effect must be taken into account.
- 2.** In interpreting the Constitution, the rule of harmony or completeness requires that constitutional provisions should not be looked at in

insolation but as a whole with no provision destroying another but supporting each other.

3. Where several provisions of the constitution have a bearing on the same subject, they should be read and considered together so as to bring out the full meaning and effect of their intent.
4. A constitutional provision containing a fundamental right is a permanent provision intended to carter for all times and must be given an interpretation for the full benefit of the guaranteed right (see ***Attorney General Vs. Uganda Law Society Supreme Court Constitutional Appeal No. 1 of 2006***)
5. The National objectives and Directive Principles of State Policy are a guide in the interpretation of the constitution see ***Constitutional Appeal No. 4 of 2016 David Welsey Tusigwire Vs Attorney General.***

I find it necessary to give a brief background of the genesis of the Constitutional and statutory provisions relating to cultural institutions and leaders in Uganda which in my view would help shed some light on the controversy that gave rise to this petition.

According to the report of the Constitutional Review Commission 1994, the issue of traditional leaders was extensively debated in the country during the collection of peoples' views at the making of the constitution. The relevance and importance of traditional rulers is based on the fact that they were the basis of government of African societies from time immemorial up to when the colonialists came.

The institution of traditional rulers is essentially an issue of the fundamental right to culture. Since the people of Uganda wanted the new constitution to be based on fundamental human rights, the institution had to be viewed from that perspective.

In areas where Kingdoms existed such as Buganda, Bunyoro, Ankole , Toro and Busoga, the traditional institutions were based on the royal class from which kings emerged with clan systems in the administrative structure. In the none kingdom areas of the country which comprised the rest of the Uganda outside the kingdom areas, cultural arrangements were based on clan leadership. The clan leaders had both cultural and political significance. Over time these cultural leaders were incorporated into the colonial local government structure as chiefs. The commission accepted the principle that the people of a particular ethnic group were the ones to decide on the issue of cultural leadership using democratic means.

The preamble to the Constitution spells out the commitment of the people of Uganda to establishing a social, economic and political order through the promulgation of a popular and durable national constitution based on the principles of unity ,peace , equality , democracy , freedom , social justice and progress. This was achieved by the coming of the 1995 constitution.

Coming to the issues in the Petition, I adopt the reasoning and conclusions reached by her Lordship Mulyagonja JCC in relation to sub-issues 2, 3, and 4 but would however take a different path in the other issues more so differ with

her Lordship's reasoning and conclusions on sub-issues 6 and I will address the three sub issues together. Sub issue 6 reads; Whether section 4(1)(b) of the Institution of Traditional or Cultural Leaders Act is Ultra Vires and therefore inconsistent with article 246 of the constitution, in as far as it purports to ascribe the duty to identify such leaders by resolutions of local government and sub county councils. Sub issue 5 is whether Parliament resolved the question of a traditional or cultural leader for Lango and No. 1 is whether Article 246 of the Constitution limited the institution of traditional or cultural leaders to only areas in Uganda that had such leaders before 1966 when such institutions were abolished.

The beginning point in resolving these sub issues is consideration of the import of the relevant sub articles of Article 246 of the Constitution. They state that;

(1) Subject to the provisions of this Constitution, the institution of traditional leader or cultural leader may exist in any area of Uganda in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies.

(2) In any community, where the issue of traditional or cultural leader has not been resolved, the issue shall be resolved by the community concerned using a method prescribed by Parliament.

(5) For avoidance of doubt, the institution of traditional leader or cultural leader existing immediately before the coming into force of this constitution shall be taken to exist in accordance with the provisions of this constitution

and clause (6) gives the following definition of a traditional or cultural leader:

“(6) For the purposes of this article, “traditional leader or cultural leader” means a king or similar traditional leader or cultural leader by whatever name called, who derives allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people led by that traditional or cultural leader.”

In view of the above provisions, a traditional or cultural leader is a person who is considered a leader in a certain area by virtue of certain applicable customs, traditions and usage or because the people living in the relevant area consented to his/her being a traditional or cultural leader. In accordance with Article 246 (1), a traditional or cultural leader may head an institution in his/her area. It will be noted that in areas such as Buganda, Tooro and Bunyoro, where traditional or cultural leaders existed before 1900, the customs and traditions by which those leaders are selected are well documented. That could be the reason why such traditional or cultural leaders were easily provided for under Article 246 (5) of the Constitution.

The Constitution in Article 246 (2) recognized communities which desired to have cultural leaders but which did not have a recognized cultural leader at the time of coming into force of the 1995 Constitution and which had not resolved as to how to identify and institute such a leader legislated for such cases to be resolved by the community concerned using a method prescribed by Parliament.

In my view the main issue in this petition simply put is whether the provisions of clause 5 of Article 246 which in effect recognize the institution of traditional or cultural leader as existing only in Buganda, Ankole , Buyoro , Toro and Busoga

override those of clause 246(1) which recognize traditional or cultural leaders to exist in any other area of Uganda. The two clauses should be read together and harmonized so as to realize the wish of the people of Uganda which wish is discernable from reading the Constitution as a whole.

In interpreting the Constitution, the rule of harmony or completeness requires that constitutional provisions should not be looked at in isolation but together with no provision destroying another but supporting each other. This was the holding of the supreme court in ***Paul Semogerere Vs Attorney General Supreme Court Constitutional Appeal No. 1 of 2002.***

Where several provisions of the constitution have a bearing on the same subject such as the present subject concerning cultural or traditional leaders, they should be read and considered together so as to bring out the full meaning and effect of their intent. None should be ignored or preferred to the other see ***Twinobusigye Severino Vs. Attorney General see Constitutional Petition No. 47 of 2011.***

The relevance and importance of traditional rulers is based on the historical fact that they were the basis of government in African societies from time immemorial up to the time when the colonialists came.

The petitioner contends that Article 246 (5) limited the institution of cultural leaders to only areas where they existed before they were abolished in 1966. As earlier stated herein the institution of traditional rulers is essentially an issue of the fundamental right to culture. According to the Constitutional Review

Commission report, since the people of Uganda wanted the new constitution to be based on fundamental human rights, the institution of traditional rulers has to be viewed from this perspective. A liberal, generous and purposeful interpretation ought therefore to be applied to both clauses (1) and (5) of Article 246 of the constitution so as to meet this intent.

Cultural rights are an integral part of human rights and like other rights are universal. The full promotion, realization of and respect for cultural rights is necessary for the maintenance of human dignity and positive social interaction of the people in a particular community.

It is the responsibility of the courts to interpret and enforce the Bill of Rights and ought to do so in a way that will promote a just, free and democratic society in the country.

Article 37 of the constitution provides for the right to culture. It states that every person has a right to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.

Article 27 of the Universal Declaration of Human Rights provides that everyone has the right freely to participate in the cultural rights of the community. Article 15(1)(a) of the Covenant on Economic, Social and Cultural Rights provides the right for everyone to take part in cultural life. Other instruments provide for the right to take part on an equal basis with others in cultural life. A restrictive and preferential interpretation of Article 246(5) over Article 246(1) will in my view

• result in a two class society in Uganda bordering discrimination against those who did not have kingdoms before 1966 for they would be denied their right to the cultural practice of having cultural leaders. The provisions of Clause (5) of Article 246 cannot therefore be interpreted to limit the people from practicing and enjoying their customary norms and values including choosing their cultural leaders.

In the case of Lango which was the subject area of the Petition, its position is same as what pertained in other non- kingdom parts of Uganda. The 2nd and 4th respondents did not however provide conclusive evidence for court to reach a conclusion that either of them had been properly appointed as the cultural leader of Lango.

In my view, the enactment of section 4 (1)(b) of the ICTL Act was intended among others to meet the requirements of Directive Principle No. xxiv of the National Objectives and Directive Principles of State Policy which Directives are justiciable by operation of Article 8A of the Constitution that cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the constitution may be developed and incorporated in aspects of Ugandan life.

Article 176 (3) of the constitution require that the system of local government shall be based on democratically elected councils on the basis of universal adult suffrage. My understanding then is that by Article 246 Clauses (1), (2) and (6) of the constitution, Parliament was empowered by the cited provisions of the

constitution to legislate for a democratic method to aid communities to choose traditional or cultural leaders from persons qualified to be such leaders by birth or descent. It is on this basis that under section 4 (1) (b) of the Institution of Traditional of Cultural Leaders Act, 2011, Parliament prescribed the following method to aid in choosing traditional or cultural leaders:

“4. Institution of traditional or cultural leader.

(1) A traditional or cultural leader may be instituted in the following ways—

(a) ...

(b) in accordance with the wishes and aspirations of the people to whom it applies, through a resolution of not less than two thirds of all members of the district local councils and sub county local government councils respectively in the area.

(2) The institution under sub section (1) shall be communicated in writing to the Minister.”

Under the above provision, Parliament prescribed that the wishes of the community be ascertained through their leaders at District and Sub County level. This must have been in recognition that local leaders who were democratically elected to represent the people from amongst the community were best placed to interact with the community for purposes of ascertaining whether the community consents to a certain person being their cultural leader or not.

This was in conformity with the constitution and the legislative enactment cannot then be said to be in contravention of the constitution.

I therefore with the greatest of respect do not agree with the opinion that local leaders are always agents for advancing the partisan interests of their political parties. I consider that it is within the general mandate of local leaders to offer leadership for purposes such as those under Section 4 (1) (b) considering their position as leaders of their communities, which puts them in the best position to facilitate the ascertainment of the interests of their communities for purposes of Article 246 (2). In my view, rather than adopt an attitude that local leaders are incapable of facilitating non-partisan purposes, I would offer guidelines to guide local leaders for purposes effectively executing their duty under Article 246 of the Constitution.

I would therefore, conclude that the method prescribed by Parliament under Section 4 (1) (b) of the Institution of Traditional or Cultural Leaders Act, 2011, that the selection of cultural leaders be done by the affected communities acting through their local leaders in the District and Sub-County Councils, is not unconstitutional. The intention of clause 1 of Article 246 was to open up the establishment of cultural institutions in areas where they were they did not exist using the democratically elected local council members in each community and the impugned section 4(1)(b) was to implement this objective. In resolving the issue of participation of local councilors in choosing traditional leaders, it is

worth noting that the constitution does not expressly prohibit local councils from selection of cultural leaders.

I would therefore, find that Article 246 of the constitution did not limit the institution of traditional or cultural leaders to only areas in Uganda that had such leaders before 1966 when such institutions were abolished.

As to whether prescription by Parliament was the only mode of resolving the question of traditional or cultural leaders in areas where they did not already exist before the coming into force of the 1995 constitution, my view is that Parliament is not the only mode of resolving the question of cultural leaders in Uganda . Before the promulgation of the 1995 Constitution the people of Uganda had clan and other traditional leaders from time immemorial. These leaders were chosen by their communities according to their customs. The Constitution did not do away with these customs and the enactment of Section 4(1)(d) of the ITCL Act was merely an additional mode of selection of traditional leaders but not the exclusive mode. I therefore find that District and sub county councils are best suited to make resolutions for selection of traditional leaders as provided in section 4(1)(b) of the ITCL Act. In the result section 4(1)(b) of the ITCL Act 2011 does not contravene Art 246 of the Constitution.

Having found that the installation of a traditional or cultural leader outside those areas where traditional or cultural leaders existed before the coming in force of

the 1995 Constitution is not in contravention of Article 246 of the constitution and that section 4(1)(b) of the Institution of Traditional or Cultural leaders Act 2011 does not contravene Article 246(1) , (2) and 3(e) of the Constitution and further that the people in any community in Uganda are free to adopt such method consistent with their custom, culture or tradition in determining their traditional or cultural leaders the Petition fails and ought to be dismissed. The issues raised in the Petition were matters of public interest and for that reason each party shall bear their own costs.

Since Justice Musota JCC and Kibeedi JCC agree and my sisters Justice Irene Mulyagonja and Justice Monica Mugenyi JJCC dissent in part, this Petition is dismissed with the following declarations and orders;

1. Section 4(1) (b) of the Institution of Traditional and Cultural Leaders Act 2011 is not inconsistent with and does not contravene Article 246(1) and (2) of the Constitution.
2. The installation of a traditional or cultural leader outside those areas where traditional or cultural leaders existed before the coming into force of the 1995 Constitution is neither inconsistent nor in contravention of Article 246 of the Constitution.
3. In addition to any method that Parliament of Uganda may re-enact under Article 246(2) of the Constitution, the people of any community in Uganda may adopt such method for the determination of their wishes

and aspirations on their traditional or cultural leadership as is consistent with their culture , customs or traditions.

4. The complaints about the legality of the institution of a traditional or cultural leader for Lango community, the subject matter of the Petition, ought to be resolved by the High Court pursuant to Article 50 of the Constitution.

5. Each party shall bear its own costs.

It is so ordered

Dated at Kampala this 2nd day of Dec 2022.



Cheborion Barishaki

Justice of the Constitutional Court