THE REPUBLIC OF UGANDA

THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA

(Coram: Egonda-Ntende, Musoke, Madrama, Mugenyi & Gashirabake, JJCC)

CONSTITUTIONAL PETITION NO. 15 OF 2022

1. DR. BUSINGYE KABUMBA
2. ANDREW KARAMAGI ..... PETITIONERS

VERSUS

THE ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT OF MONICA K. MUGENYI, JCC

A. Introduction

1. This Petition was lodged by Dr. Busingye Kabumba and Mr. Andrew Karamagi, both Constitutional Law Lecturers at Makerere University Law School ('the Petitioners'). It is brought under Articles 137(1), (3) and (4) of the Constitution and the Constitutional Court (Petition and References) Rules, SI No. 91 of 2005, challenging the constitutionality of the appointment of sixteen (16) High Court Judges on acting basis and for a two-year term. The Petition is supported by the Petitioners' more or less identical affidavits lodged in this Court on 8th June 2022, as well as an affidavit in rejoinder deposed by Dr. Busingye Kabumba ('the First Petitioner').

2. It is opposed by the office of the Attorney General ('the Respondent'), which denies any infringement of the cited constitutional provisions by the appointment of acting judges of the High Court, and contends that the Petition does not raise any question for constitutional interpretation. The Answer to the Petition is supported by the affidavit of Mr. Julius Mwebembezi, a Registrar at the Judicial Service Commission, who attests to the appointment of the acting judges having been made in accordance with Articles 142(1), (2) and (3); 143(1)(e) and 147 of the Constitution.

3. At the hearing, the Petitioners were represented by Mr. Ivan Bwowe; while Mr. Jeffrey Atwine – Ag. Commissioner Civil Litigation at the Attorney General's Chambers and Ms. Maureen Ijang – Senior State Attorney in the same office, appeared for the Respondent.

B. Petitioners' Case

4. The Petitioners contend that on 25th May 2022, the Judicial Service Commission (JSC) published a press release that indicated that the President of the Republic of Uganda had appointed sixteen High Court Judges in acting capacity for a term of two years. In their view the said appointment contravenes the notion of security of tenure for judicial officers and undermines the provisions of Articles 2, 128, 138, 142, 144 and 147 of the Constitution. The appointment of judges in acting capacity is particularly opined to subject the appointees to the control of the appointing

authority contrary to the dictates of Article 128 of the Constitution; while the two-year appointment purportedly exceeds the powers granted by the Constitution and is thus in contravention of Articles 2(2), 138, 142 and 144 of the Constitution.

5. In their respective affidavits in support of the Petition, the Petitioners attest to conditional appointments of the kind before the Court presently being an infringement on the supremacy of the Constitution. The said appointments are further opined to undermine the security of tenure of judges and violate the independence of the judiciary given that the affected appointees are likely to execute their duties with fear of retribution, expectation of favour or both. In his affidavit in rejoinder, the First Petitioner further asserts that the appointment of judges in acting capacity was not envisaged under Articles 142 and 147 of the Constitution as read together. He proposes that such judges essentially serve at the mercy of the JSC and appointing authority, with absolutely no guarantee of re-appointment or confirmation (their supervision by the Chief Justice notwithstanding), and thus lack the security of tenure enjoyed by judicial officers that are appointed on permanent basis.

6. In the event, the Petitioners seek the following Declarations (reproduced verbatim):

   (a) That the advice of the Judicial Service Commission, in so far as it guided the President to make appointments of Judges of the High Court subject to an acting period of two (2) years, is unconstitutional and contravenes Articles 2, 128, 138, 142 and 144 of the Constitution.

   (b) That the act of the President in subjecting the appointment of Judges of the High Court to an acting period of two (2) years is unconstitutional and contravenes Articles 2, 138, 142 and 144 of the Constitution.

7. They additionally seek the following Orders:

   (a) The condition placed upon the appointment of sixteen (16) Judges of the High Court, that is to say, that they be required to act in those positions for two (2) years is unconstitutional.

   (b) The appointments of the sixteen (16) Judges of the High Court be deemed to be permanent appointments as contemplated under Article 144 of the Constitution.

(c) *Any other consequential orders that follow from and are necessary to give effect to the orders above.*

(d) *Costs of this petition be awarded to the petitioners.*

C. **Respondent's Case**

8. On its part, the Respondent faults the Petition for being devoid of merit, misconceived, premature and an abuse of court process insofar as it supposedly raises no question for constitutional interpretation. It is proposed that the appointment of judicial officers as acting judges neither subjects them to the control of the appointing authority nor violates Article 128 of the Constitution; rather, it is well within the constitutional mandate of the appointing authority and JSC, and in compliance with Articles 2, 138, 142 and 144 of the Constitution.

9. The affidavit evidence deposed on the Respondent's behalf attests to judges that are appointed in acting capacity under Article 147(1)(a) of the Constitution being full members of the Judiciary for the duration of their term; and are subject to the supervision of the Chief Justice assisted by the Principal Judge as provided under Articles 133(1)(a) and 141(1)(a) of the Constitution and section 18 of the *Administration of Justice Act, 2020*, and not the appointing authority as alleged. It is further averred that, far from being under the control of the appointing authority, judicial officers are by virtue of their appointment to a public office accountable to and hold office in trust for the people of Uganda. At any rate, the acting judges' employment terms are averred to be no different from those enjoyed by serving judicial officers in accordance with Article 128(7) of the Constitution.

D. **Issues for Determination**

10. The parties framed the following issues for determination:

I. Whether the Petition raises any questions for constitutional interpretation.

II. Whether the act of appointing High Court Judges in Acting Capacity for two (2) years contravenes Articles 2, 128, 13, 142 and 144 of the 1995 Constitution of the Republic of Uganda and is therefore unconstitutional.

III. Whether the Petitioners are entitled to the reliefs sought.

E. **Determination**

11. The question as to whether a Constitutional Petition raises any question for constitutional interpretation speaks to the jurisdiction of this Court and shall thus be determined as a preliminary matter.

Issue No. 1: *Whether the Petition raises any questions for constitutional interpretation.*

12. It is the Petitioners' contention that Article 137 of the Constitution vests the duty to interpret the Constitution in this Court, and thus clothes it with the unlimited and unfettered jurisdiction to determine any question as to the interpretation of any provision of the Constitution. Reference in that regard is made to **Paul K, Ssemwogerere & Others v Attorney General, Constitutional Appeal No. 1 of 2002**. Thus, insofar as the Petition challenges the appointment of acting judges for flouting specific constitutional provisions, the petition is opined to invoke this Court's constitutional interpretative jurisdiction. The Court is accordingly required to determine whether or not the impugned advice of the JSC and the attendant appointment of the acting judges by the President exceed the powers conferred upon either office under the Constitution in violation of Articles 2, 128, 138, 142 and 144 of the Constitution.

13. Conversely, the Respondent cites **Ismail Serugo v Kampala City Council & Another, Constitutional Appeal No. 2 of 1998** (Supreme Court) for the proposition that this Court's jurisdiction is specifically limited to the interpretation of the Constitution under Article 137(1) thereof. Learned Counsel for the Respondent lays particular emphasis on this Court's decision in **Mbabali Jude v Edward Ssekandi, Constitutional Petition No. 28 of 2012** where while adopting the position espoused in **Ismail Serugo v Kampala City Council & Another** (supra), it was further observed (per Kasule, JCC) that '**the dispute where the apparent conflict exists must be such that its resolution must be only when and after the Constitutional Court has interpreted the Constitution**.' On that premise, it is argued that there is no question for constitutional interpretation in the present

case as the provisions of Article 142 of the Constitution as invoked by the Petitioners are very clear and require no interpretation.

14. The Petitioners' brief rejoinder to these propositions simply reiterates their earlier opinions and need not be reproduced. For ease of reference, I reproduce Article 137(1) and (3) of the Constitution below.

> **(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.**
>
> **(2) .....**
>
> **(3) A person who alleges that –**
>
> **(a) An Act of Parliament or any other law or anything in or done under the authority of any law; or**
>
> **(b) Any act or omission by any person or authority,**
>
> **is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.**

15. In **Centre for Health, Human Rights and Development & 3 Others v Attorney General & Another, Constitutional Petition No. 22 of 2015**, this Court did clarify that both Article 137(1) and (3) relate to the its jurisdiction of this Court albeit in different respects. It was observed:

> The jurisdiction of a court or tribunal is defined by three elements: *ratione personae*, *ratione materiae* and *ratione temporis*. Whereas a court's *ratione marteriae* refers to its subject-matter jurisdiction, its *ratione personae* pertains to parties' *locus standi* to institute proceedings before it. *Ratione temporis*, on the other hand, pertains to the time frame within which proceedings may be instituted.[1] Against that background, Article 137(1) addresses this Court's *ratione materiae* while Article 137(3) addresses its *ratione personae*. (my emphasis)

16. It is therefore not entirely correct to suggest, as I understood learned State Counsel to propose, that this Court's interpretative jurisdiction is restricted to Article 137(1) of the Constitution. It seems to me that, in addition to delineating what would constitute a cause of action before this Court, Article 137(3) supplements clause

[1] **The Attorney General of the United Republic of Tanzania v Anthony Calist Komu, EACJ Appeal No. 2 of 2015** cited with approval.

(1) of the same Article by substantiating the nature of questions that would invoke the Court's interpretative jurisdiction.

17. Article 137(1) has been severally construed to restrict the Court's jurisdiction solely to the interpretation of the Constitution. *See* ***Attorney General v Major General David Tinyefuza*** *(supra),* ***Ismail Serugo v Kampala City Council & Another*** *(supra) and, more recently,* ***George William Alenyo v The Chief Registrar, Courts of Judicature & 2 Others, Constitutional Petition No. 32 of 2014*** *(Constitutional Court).* However, it is now fairly well settled law that a constitutional breach *per se* would not necessarily give rise to a matter for constitutional interpretation unless there is a discernible question on the face of the pleadings, the resolution of which is wholly dependent on the interpretation of a specific provision of the constitution. Thus, in **Attorney General v Maj. Gen. David Tinyefunza** (supra), it was held (per Wambuzi, CJ):

> 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 or construction of a provision of the Constitution, the Constitutional Court has no jurisdiction.

18. In the latter case of **Ismail Serugo v Kampala City Council & Another** (supra) the learned Chief Justice further observed:

> In my view for the constitutional court to have jurisdiction the petition must show, on the face of it, that interpretation of a provision of the Constitution is required. It is not enough to allege merely that a Constitutional provision has been violated.

19. In the matter presently before the Court, the thrust of the Petitioner's case is encapsulated in paragraph 5(a) – (e) of the Petition as follows:

> *Your aforementioned Petitioners are strong advocates of the Rule of law, Due Process, Equality before the Law; and have an interest in the matters herein below which they believe are inconsistent with and/ or are in contravention of the Constitution of the Republic of Uganda as follows;*

(a) *That the Judicial Service Commission is a body established by Article 146 with functions under Article 147 which include advising the President in the exercise of presidential powers to appoint persons, Judges and Justices of the Courts of Judicature.*

(b) *That the Judicial Service Commission Press Release of 22nd May 2022 indicated that sixteen (16) persons were appointed as Acting Judges of the High Court for two (2) years.*

(c) *That the actions of the Judicial Service Commission and the President in advising and appointing Acting Judges of High Court contravenes the spirit of security of tenure for judicial officers and undermines the provisions in Articles 128, 144 and 147 of the Constitution.*

(d) *That appointing judges in an acting capacity effectively subjects the judicial officers to the control of the appointing authority which violates Article 128 of the Constitution.*

(e) *That the acts of the Judicial Service Commission and the President of subjecting the appointment of judges of the High Court to an acting period of two (2) years is out of the boundaries of the powers granted by the Constitution hence a violation of Articles 2, 138, 142 and 144 of the Constitution.*

20. Paragraphs 5(c), (d) and (e) of the Petition succinctly raise the question as to whether the appointment of acting judges, as well as the advice upon which that appointment was premised, contravene specific constitutional provisions. The invoked constitutional provisions are Articles 2, 128, 138, 142, 144 and 147 of the Constitution. To the extent that the Respondent denies any such contravention, the determination of the controversy between the parties hinges entirely on the interpretation of those constitutional provision and thus correctly invokes the jurisdiction of this Court.

21. On the authority of **Attorney General v Maj. Gen. David Tinyefunza** (supra) and **Ismail Serugo v Kampala City Council & Another** (supra), therefore, I am satisfied that the question as to the constitutionality of the appointment of acting judges is properly before this Court. In the result, I would resolve *Issue No. 1* in the affirmative.

Issue No. 2: *Whether the act of appointing High Court Judges in Acting Capacity for two (2) years contravenes Articles 2, 128, 138, 142 and 144 of the 1995 Constitution of the Republic of Uganda and is therefore unconstitutional.*

22. The Petitioners do not contest the presidential prerogative for the appointment of judges on the recommendation of the JSC, but question the constitutionality of the appointment of High Court judges in acting capacity for a two-year term. They rely upon the decision of the Supreme Court in **Attorney General v Wilson Musalu Musene & Others, Constitutional Appeal No. 7 of 2005**, which approbated the observation by Mpagi-Bahigeine, JCC (as she then was) that '**the underlying principle of the entire Article 128** (of the Constitution) **is the issue of judicial independence and security of tenure, the latter being among the traditional safeguards of the former**.'

23. The vitality of judges' security of tenure to the broader concept of judicial independence is further advanced on the basis of Principles 11 and 12 of the *UN Basic Principles on Judicial Independence, 1985*, which read as follows:

> **11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.**
>
> **12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.**

24. It is opined that the appointment of acting judges of the High Court for a two-year term runs afoul of this Court's decision in **Justice Asaph Ruhinda Ntegye & Another v Attorney General, Constitutional Petition No. 33 of 2016**, where the restriction by the *Labour Disputes (Arbitration and Settlement) Act, 2006*[2] of the term of Industrial Court judges to five years was adjudged to be unconstitutional insofar as it varied '**the cardinal terms of service put in the 1995 Constitution by establishing time-delineated tenure instead of age of tenure**.'

[2] Section 10 thereof.

25. Deference is further made to the *International Bar Association (IBA) Minimum Standards of Judicial Independence, 1982*, clause 23 of which provides as follows:

> **(a) Judges should not be appointed for probationary periods except for legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of the appointment.**
>
> **(b) The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.**

26. It is argued that to the extent that Article 143(1)(e) of the Constitution prescribes minimum professional experience for qualification for the office of a High Court judge, Uganda is not a country where the anomalous and extreme measure of probationary or acting appointments should be made. Seemingly equating acting judges to temporary judges, clause 23(b) of the *IBA Minimum Standards of Judicial Independence* is construed to similarly reserve the appointment of that cadre of judges to countries where there exists a '*long historical democratic tradition*. This is considered to be inapplicable to Uganda which, as pronounced in the Preamble to the Constitution, has had a history '**characterized by political and constitutional instability**.'

27. The Petitioners propose that the conditionality of serving in acting capacity for two years not only places the independence of the affected judicial officers and the institutional independence of the Judiciary in check by the appointing authority, it also modifies the judicial terms of service in contravention of Articles 128(7) and 144 of the Constitution. Additionally, in the absence of provision for acting judges under Article 138(1) of the Constitution, the introduction of acting judges is tantamount to an unconstitutional amendment of the Constitution by the appointing authority. It is further argued that the non-prescription of *acting judges* among the judicial officers that may under Articles 142(1) and 147(3)(a) of the Constitution be appointed by the President on the advice of the JSC, would render unconstitutional any such appointments.

28. The totality of the contraventions cited by the Petitioners are opined to speak to the supremacy of the Constitution, and therefore equally contravene Article 2 of the Constitution.

29. For the Respondent, on the other hand, it is argued that the appointment of High Court judges in acting capacity for a two-year term does not contravene Articles 2, 128, 138, 142 or 144 of the Constitution. It is proposed that Article 147(1)(a) bestows upon the JSC the duty to advise the President to appoint persons to serve in acting capacity in any of the offices designated under Article 147(3). The cited provisions are reproduced below:

> Article 147: Functions of the Judicial Service Commission
>
> **(1) The functions of the Judicial Service Commission are –**
>
> **(a) To advise the President in the exercise of the President's power to appoint persons to hold or act in any office specified in clause (3) of this article, which includes power to confirm appointments, to exercise disciplinary control over such persons and to remove them from office;**
>
> **(b) .....**
>
> **(c) .....**
>
> **(d) .....**
>
> **(e) .....**
>
> **(f) .....**
>
> **(2) .....**
>
> **(3) The offices referred to in clause 1(a) of this article are –**
>
> **(a) The office of the Chief Justice, the Deputy Chief Justice, the Principle Judge, a justice of the Supreme Court, a justice of Appeal and a judge of the High Court; and**
>
> **(b) The office of the Chief Registrar and a registrar.**

30. On that basis, it is argued that the JSC may advise the President to appoint persons to either *hold* the office of High Court judge or *act in* the said office. Regulation 19(1) of the *Judicial Service Commission Regulations, 2009* is opined to buffer that interpretation of Article 147(1)(a) insofar as it mandates the JSC to recommend the appointment of the designated judicial officers in substantive or acting capacity. It reads:

The Commission may advise the appointing authority on the nature of appointments to be made such as substantive, acting, contract, temporary or probation in respect of Judges and Registrars and shall have powers to appoint under any nature of appointment in respect of other judicial officers.

31. In addition, it is argued that Article 142(2) and (3) of the Constitution do also make provision for the appointment of acting judges in the following terms:

> Article 142: Appointment of Judicial Officers
>
> **(1) The Chief Justice, the Deputy Chief Justice, the Principal Judge, a justice of the Supreme Court, a justice of Appeal and a judge of the High Court shall be appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament.**
>
> **(2) Where –**
>
> **(a) The office of a justice of the Supreme Court or a justice of Appeal or a judge of the High Court is vacant;**
>
> **(b) A justice of the Supreme Court or a justice of Appeal or a judge of the High Court is for any reason unable to perform the functions of his or her office; or**
>
> **(c) The Chief Justice advises the Judicial Service Commission that the state of business in the Supreme Court, Court of Appeal or the High Court so requires,**
>
> **the President may, acting on the advice of the Judicial Service Commission, appoint a person qualified for appointment as a justice of the Supreme Court or a justice of Appeal or a judge of the High Court to act as such a justice or judge even though that person has attained the age prescribed for retirement in respect of that office.**
>
> **(3) A person appointed under clause (2) of this article to act as a justice of the Supreme Court or a justice of Appeal or a judge of the High Court shall continue to act for the period of appointment or, if no period is specified, until the appointment is revoked by the President acting on the advice of the Judicial Service Commission, whichever is earlier.**
>
> *(Respondent's emphasis)*

32. In a bid to distinguish the scenarios created under Article 142(2) above, it is argued that Article 142(2)(a) mandates the President (on the advice of the JSC) to appoint a person in acting capacity to fill vacancies in respect of justice of the Supreme Court and Appeal, and judges of the High Court. Article 142(2)(b), on the other

hand, is opined to relate to a situation where the substantive holder of a judicial office is unable to undertake his/ her duties; while Article 142(2)(c) envisages a situation where the state of court business necessitates additional judges, an example being proposed in the event of the need to clear back log.

33. It is proposed that the matter presently before the Court falls under Article 142(2)(a) insofar as the appointments in issue presently sought to address vacancies in the High Court by persons qualified for such appointment who are not serving judges thereof. It is the Respondent's contention that clauses (2) and (3) of Article 142 do permit the service of such judicial officers in acting capacity until the revocation of their appointment by the President acting on the JSC's advice. On that premise, it is opined that the President can appoint a judge in perpetuity or for a specified period. It is further suggested that an appointment for a specified period is as substantive a judicial appointment as any other, save that it is limited to the term specified in the instrument of appointment.

34. Emphasis in this regard is placed on Article 142(2)(a) purportedly permitting appointments in acting capacity of any person that qualifies for appointment to a judicial office, without unduly restricting such appointments to serving judicial officers. It is further contended that new judicial officers that are appointed in acting capacity would, for the duration of their term of office, be subject to the terms of service applicable to substantive judicial officers under Articles 128(7) and 142(3).

35. In the Respondent's estimation, the assertion in the First Petitioner's affidavit in support of the Petition that acting judges are likely to serve in fear of retribution, expectation of favour or both is speculative and devoid of factual basis. It is thus opined that there is no evidence on record that establishes how the appointment of acting judges would violate the independence of the judiciary as underscored in Article 128 of the Constitution. In the opinion of learned State Counsel, the independence of the judiciary cannot be compromised on account of the acting appointments *per se* given that acting judges' work is not confined to matters involving the State. In any event, as deposed in the affidavit in reply, the tenure of the acting judges is subject to the supervision of the Chief Justice as provided under Article 133(8) of the Constitution.

36. By way of reply, I understood the Petitioners to contend that given its specificity on the subject, Article 142 should take precedence over Article 147 of the Constitution on the issue of appointment of judges and clause (2) thereof is explicit on the circumstances under which the appointment of acting judges would ensue. It is nonetheless contended that the general rule on the appointment of judges is delineated in Article 142(1), while Article 142(2) addresses exceptional or special circumstances such as special expertise, emergencies, lack of coram and should be restricted to a limited time frame. It is alleged that no such circumstances were established by the Respondent.

37. The argument that the appointing authority may appoint judges for a perpetual period and determine when to terminate their tenure is opined to underscore the Petitioners' concern that acting judges would serve at the mercy of the appointing authority with no assurance of reappointment or their acting capacity being extended for 3, 5 or 10 years. It is argued that there is no guarantee that the current scenario where 22% of the High Court Bench is serving in acting capacity would neither increase in number nor extend to the Supreme Court and Court of Appeal.

38. Arguing that '*half an inch is not an inch and as such an acting judge of the High Court is not a judge of the High Court*,' section 20(7) of the *Administration of Justice Act, 2020* is considered to entrench differential terms for acting judges vis-à-vis their substantive colleagues both in service and upon retirement. That legal provision reads as follows:

> **Where a justice of the Supreme Court, justice of the Court of Appeal or a judge of the High Court is granted leave of absence without pay in accordance with this section, the President may, acting on the advice of the Judicial Service Commission, appoint in accordance with Article 142 of the Constitution, an acting justice of the Supreme Court, justice of the Court of Appeal or judge of the High Court as the case may be, to act in place of the judicial officer, but the person appointed shall not be entitled to retirement benefits which are granted under this Act.**

39. Deferring to the observation in **Gerald Kafureeka Karuhanga v Attorney General, Constitutional Petition No. 39 of 2013** (per Mwangusya, JCC, as he then was) that **'approval of parliament is only required when substantive**

appointments are made under Article 142(1)', it is argued that to the extent that the acting judges that are the subject of the present dispute responded to an advertisement for the recruitment of High Court judges (the acting appointment only emerging after the event) and were vetted by parliament, theirs were substantive appointments that were subjected to a 2-year term, which is unconstitutional. It is argued that it could not have been the intention of the framers of the Constitution to, on the one hand, underscore the independence of the judiciary with security of tenure and, on the other hand, take it away by permitting *en masse* acting appointments.

40. It is common ground in this Petition that on or about 16th May 2022, the President acting on the advice of the JSC did appoint sixteen judges of the High Court in acting capacity for a two-year term. That fact is conceded by the Respondent in paragraph 6(f) of the Answer to the Petition.

41. The Petitioners' contestation before this Court is two-fold. First, they contest the appointment of acting judges *per se* for purportedly undermining Articles 128, 144 and 147 of the Constitution.[3] They perceive the said appointment to subject the appointees to the control of the appointing authority contrary to the dictates of judicial independence espoused in Article 128 of the Constitution and, additionally, to violate the notion of security of tenure as encapsulated in Article 144. Secondly, they consider the prescription of a two-year term in acting capacity to exceed the constitutional mandate of the appointing authority and, to that extent, constitute a violation of Articles 2, 138, 142 and 144 of the Constitution.[4]

42. The invoked constitutional provisions are reproduced below, save for Articles 142 and 147 that are reproduced earlier in this judgment.

Article 2: Supremacy of the Constitution

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

[3] See para. 5(c) of the Petition.
[4] See para. 5(e) of the Petition.

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

Article 128: Independence of the Judiciary

(1) In the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.

(2) No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions.

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

(4) A person exercising judicial power shall not be liable to any action or suit for any act or omission by that person in the exercise of judicial power.

(5) The administrative expenses of the judiciary, including all salaries, allowances, gratuities and pensions payable to or in respect of persons serving in the judiciary, shall be charged on the Consolidated Fund.

(6) The judiciary shall be self-accounting and may deal directly with the Ministry responsible for finance in relation to its finances.

(7) The salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial power shall not be varied to his or her disadvantage.

(8) The office of the Chief Justice, Deputy Chief Justice, Principal Judge, a justice of the Supreme Court, a justice of Appeal or a judge of the High Court shall not be abolished when there is a substantive holder of that office.

Article 138: High Court of Uganda

(1) The High Court of Uganda shall consist of –

(a) The Principal Judge; and

(b) **Such number of judges of the High Court as may be prescribed by Parliament.**

(2) The High Court shall sit in such places as the Chief Justice may, in consultation with the Principal Judge, appoint; and in so doing, the Chief Justice shall, as far a practicable, ensure that the High Court is accessible to all the people.

Article 144: Tenure of office of judicial officers

(1) A judicial officer may retire at any time after attaining the age of sixty years, and shall vacate his or her office –

(a) In the case of the Chief Justice, the Deputy Chief Justice, a justice of the Supreme Court and a justice of Appeal, on attaining the age of seventy years; and

(b) In the case of the Principal Judge and a judge of the High Court, on attaining the age of sixty-five years; or

(c) In each case, subject to article 128(7) of this Constitution, on attaining such other age as may be prescribed by Parliament by law,

but a judicial officer may continue in office after attaining the age at which he or she is required by this clause to vacate office, for a period not exceeding three months to enable him or her to complete any work pending before him or her.

(2) A judicial officer may be removed from office only for –

(a) Inability to perform the functions of his or her office arising from infirmity of body or mind;

(b) Misbehaviour or misconduct, or

(c) Incompetence,

but only in accordance with the provisions of this article.

(3) The President shall remove a judicial officer if the question of his or her removal has been referred to a tribunal appointed under clause (4) of this article and the tribunal has recommended to the President that he or she ought to be removed from office on any ground described in clause (2) of this article.

(4) The question whether a judicial officer should be investigated shall be referred to the President by either the Judicial Service Commission or the Cabinet with advice that the President should appoint a tribunal; and the President shall then appoint a tribunal consisting of –

(a) In the case of the Chief Justice, the Deputy Chief Justice or the Principal Judge, five persons who are or have been justices of the Supreme Court or are or have been justices of a court having similar jurisdiction or who are advocates of at least twenty years' standing;

(b) In the case of a justice of the Supreme Court or a justice of Appeal, three persons who are or have been justices of the Supreme Court or who have been judges of a court of similar jurisdiction or who are advocates of at least fifteen years' standing; or

(c) In the case of a judge of the High Court, three persons who are or have held office as judges of a court having unlimited jurisdiction in civil and

criminal matters or a court having jurisdiction in appeals from such a court or who are advocates of at least ten years' standing.

(5) If the question of removing a judicial officer is referred to a tribunal under this article, the President shall suspend the judicial officer from performing the functions of his or her office.

(6) A suspension under clause (5) of this article shall cease to have effect if the tribunal advises the President that the judicial officer suspended should not be removed.

(7) For the purposes of this article, "judicial officer" means the Chief Justice, the Deputy Chief Justice, the Principal Judge, a justice of the Supreme Court, a justice of Appeal or a judge of the High Court.

43. Retracing the general rules of constitutional interpretation as severally laid down by the courts, I particularly defer to the case of **Uganda Law Society v Attorney General, Constitutional Petition No. 52 of 2017**, where the following rules of interpretation were *inter alia* espoused:

1. The Constitution is the supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of its inconsistencies.
2. The entire Constitution has to be read together as an integral whole with no particular provision destroying the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the Constitution.
3. .....
4. All provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument.
5. Where the words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense.
6. Where the language of the constitution or statute sought to be interpreted is imprecise or ambiguous a liberal, general or purposeful interpretation should be given to it.

44. The consideration of all constitutional provisions that have a bearing on the question of judicial appointments is particularly instructive to this case, where a number of seemingly inter-twined constitutional provisions have been invoked. Equally important is the emphasis on a literal interpretation of the Constitution where the words or phrases under scrutiny are clear and unambiguous; recourse

only being made to a liberal or purposive interpretation where the language of the Constitution is imprecise or ambiguous.

45. As far as this case is concerned, the definitive constitutional provisions for interrogation would be Articles 128, 142, 144 and 147, touching as they do on the specific issues in contention, to wit, judicial independence, the appointment and tenure of judicial officers, and the functions of the JSC. Articles 2 and 138 would only be construed within that context to deduce the intention of the framers of the Constitution and give effect and purpose to it.

46. In that regard, Article 2 of the Constitution is fairly straightforward, speaking clearly for itself in pronouncing the supremacy of the Constitution. I return to a determination of whether that constitutional supremacy has been impeded by the impugned actions herein after consideration of the totality of the dispute presently before the Court. Article 138(1) appears to be similarly categorical in delineating the constitution of the High Court to include the Principal Judge and the designated number of High Court judges. Invoked to demonstrate non-provision for acting judges of the High Court, a literal interpretation of that constitutional provision would indeed confirm that there is no such provision. However, given the related constitutional provisions on the appointment of judges, the import of Article 138(1) may only be conclusively deduced from a holistic consideration of all related constitutional provisions. It is, therefore, to the more definitive provisions that I now turn.

47. Article 128(1) of the Constitution succinctly affirms the institutional independence of the judiciary by explicitly prohibiting the subjugation of courts to the control or direction of any person or authority in their exercise of judicial power. It goes without saying that should the courts, the judiciary as an institution or an individual judicial officer step outside the purview of their constitutional duties and mandate they would, at the very least, inevitably invoke the intervention of disciplinary measures within the confines of the law.

48. That begets the question whether the subjugation of the judiciary to the control and/ or direction of any person or authority has in fact arisen or, conversely, whether the judiciary has stepped out of its constitutional mandate so as to warrant

the intervention in contention presently. I find no factual evidence of either scenario. I am nonetheless alive to the competing interests of judicial independence and judicial accountability that are indeed in contention in this case. Thus, whereas, on the one hand, the judicial independence and security of tenure attendant thereto are alleged to have been undermined by the appointment of acting judges; on the other hand, such appointees (as other judicial officers) are opined to be accountable to the people of Uganda in the execution of their duties, serving under the supervision of the Chief Justice and Principal Judge in accordance with Articles 133 and 141 of the Constitution, and not the control of the appointing authority as alleged.

49. In *Bulmer, Elliot, 'Judicial Appointments', International Institute for Democracy and Electoral Assistance (International IDEA) Constitution-Building Primer 4, 2017, 2nd Edition, pp. 5, 6*, judicial independence is defined as follows:

> Judicial independence can be understood as part of a scheme of separated powers that guarantees the rule of law. ... Judicial independence also can be conceived in terms of the freedom of the individual judge from fear, coercion, reward or any other undue influence that might distort the judge's actions.

50. Conversely, the same literature[5] depicts judicial accountability as follows:

> While being independent of external influences and politically neutral in their approach to the application of the constitution and the law, judges must nevertheless be accountable for the conduct of their duties. While protecting judges from arbitrary removal or censure, robust mechanisms must exist for the dismissal of judges who are corrupt, who abuse the privileges of office or who neglect their duties of independence, impartiality and legal professionalism.

51. It seems to me that these are ideological matters that tilt more towards questions of law and principle, than fact. They require due consideration of established constitutional and international law obligations to which I revert in more detail later in this judgment. It will suffice to observe here that the pursuit of a judiciary that is neutral, but at the same time accountable and held to high standards of competence and integrity would necessitate some measure of balance between

[5] Ibid. at p. 7

judicial accountability and the preservation of judges' security of tenure. As proposed in *Bulmer, Elliot, 'Judicial Appointments'* (supra):

> An insistence on the removal of judges could incite fear of loss of livelihood and prestige, increase divisions and stir up old resentments. .... The removal of judges sets a precedent that new political leaders can change judges to their own liking. This undermines the development of the judiciary as an independent institution with its own professional ethos that protects it from partisan manipulation. The long-term effect could be corrosive of public trust in the judiciary.[6]

52. In my considered view, the corrosion of public trust in the judiciary could very well lend itself to an increase in criminality, anarchy and the breakdown of public order that cannot be overstated.

53. Turning to the case of Uganda, the appointment of judicial officers serving in the courts of record[7] ensues under Article 142 of the Constitution and is made by '**the President acting on the advice of the Judicial Service Commission and with the approval of Parliament**.' *See Article 142(1)*. That is the tripartite appointment mechanism that pertains to those judicial appointments. It has been posited by the Respondent that Article 142(2) additionally permits the appointment of acting Judges by the President acting on the advice of the JSC, and the JSC is constitutionally empowered to recommend appointments in acting capacity under Article 147(1)(a) of the Constitution.

54. A literal interpretation of Article 142(2) of the Constitution would suggest that it does indeed mandate the President, acting on the advice of the JSC, to appoint a person that meets the qualifications for appointment as a judge of the courts of record to act as such. The circumstances under which such appointments may arise are outlined in that constitutional provision as follows:

    (1) Where the office to which the appointment pertains is or has fallen vacant.

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[6] At pp. 21, 22.

[7] The courts of record in Uganda are the Supreme Court, Court of Appeal and High Court.

(2) Where a substantive holder of that office is for any reason unable to perform the functions attendant thereto.

(3) Where the Chief Justice advises the JSC that the state of business in any of those courts so requires.

55. The additional provision in that clause that such appointment of acting judges can be made even where the proposed appointee has reached retirement age simply extends that nature of appointments to persons that would otherwise have been disqualified from holding the judicial office in question on account of having attained the retirement age.

56. In the instant case, the second and third scenarios above do not arise. Additionally, there is no contestation about the existence of vacancies for High Court judges at the time the now impugned appointments were made. However, the question is whether the authority enshrined in Article 142(2)(a) to appoint persons to *act as* judges of the courts of record translates into justification for the appointment of new judicial officers as acting judges as is under challenge before this Court. Secondly, would such appointment of acting judges entrench or undermine judges' security of tenure that is so inherently intertwined with the notion of judicial independence?

57. Turning to the first question, Article 147(1)(a) of the Constitution does mandate the JSC to advise the President in the exercise of his powers (of appointment) '**to appoint persons to *hold or act in* any office specified in clause (3).**' The concept of *holding an office* within the context of the judiciary echoes the provisions of Article 128(8) of the Constitution. That provision reads as follows:

> **The office of the Chief Justice, Deputy Chief Justice, Principal Judge, a justice of the Supreme Court, a justice of Appeal or a judge of the High Court shall not be abolished when there is *a substantive holder of that office*.** *(my emphasis)*

58. Not only is this Court enjoined in **Uganda Law Society v Attorney General** (supra) to consider all provisions bearing on a particular issue together, it is also a cardinal rule of literal interpretation that words that are reasonably capable of only one

meaning must be given that meaning, so that, the same or similar words should, as much as possible, generate the same meaning.[8]

59. In the matter before us, on the one hand, the words '***holder***' or '***hold***' are to be found in Articles 128(8) and 147(1)(a) while, on the other hand, the terms '***act as***' and '***act in***' are used in Articles 142(2)(a) and 147(1)(a) of the Constitution. Insofar as the usage of the word *holder* in Article 128(8) refers to a substantive holder of an office, it would be reasonable to conclude that the subsequent reference in Article 147(1)(a) to the appointment of suitable persons to *hold* an office similarly denotes the appointment of a substantive holder of such office.

60. On the other hand, the literal meaning of the phrase '*act as*' that is found in Article 142(2)(a) is '**to do a particular job, especially one that you do not normally do.**'[9] It follows, therefore, that the related usage of the phrase '*act in*' later in Article 147(1)(a) would denote the temporary or short-term undertaking of a job or assignment that one does not normally do. The fact that the option to '*act in*' an office is preceded by the alternative option of being a substantive holder of an office would, in my view, support the inference that I do draw that the phrase '*act in*' in Article 147(1)(a) alludes to the appointment of a serving judge to temporarily serve in the place of a substantive judge. Given the provision in Article 142(2)(a) for such service to ensue notwithstanding that an appointee has attained the retirement age, it follows that a retired judge would similarly be eligible to serve in that capacity under that constitutional provision.

61. The foregoing construction of Articles 142(2)(a) and 147(1)(a) yields the view that the provision for acting judges in those constitutional provisions is only available to serving or retired judges. Such judges may serve in all the three scenarios envisaged under Article 142(2) of the Constitution. So that, a judge appointed to act in a designated office would either act in the place of an incapacitated judge as provided under sub-clause (b); or where the circumstances pertaining to the courts are such that an acting judge is required, for instance where a case on appeal pertains to a matter in which appellate judges sat while on a lower bench, as

[8] See Statutory Rules of Interpretation in the *Oxford Dictionary of Law, 2009, 7th Edition, p. 295*.
[9] See the *Cambridge Online Dictionary*.

articulated under sub-clause (c), or in the absence of a substantive holder, for instance where vacancies may not be substantively filled in the short term, as envisaged under sub-clause (a).

62. That construction of Articles 142(2) and 147(1)(a) neither negates the JSC's advisory duty to the President on appointments in acting capacity nor does it obviate the Commission's function under Regulation 19(1) of the *Judicial Service Commission Regulations*; provided in either event that such appointments in respect of the offices designated under Article 147(3) are restricted to persons that are serving or retired judges. This is in stark contrast to the situation before the Court presently where persons are, at their point of entry into the judiciary, appointed as acting judges.

63. It is inconceivable, in my view, that the framers of the Constitution contemplated having two parallel pathways for the first-time appointment of judges, one under Article 142(1) and subject to parliamentary approval and the other under Article 142(2) and not subject to such approval. The more purposive interpretation of those constitutional provisions would be that the option of appointment as acting judges under Article 142(2) would be exclusive to serving or retired judges that would have already been subjected to parliamentary approval under Article 142(1) on initial appointment; but the fresh recruitment or appointment of judges would be subject to parliamentary approval under Article 142(1) of the Constitution and thus confer substantive appointment upon the appointees.

64. With utmost respect, therefore, I am disinclined to accept learned State Counsel's proposition that the appointment of new judges as acting judges is in conformity with the Constitution.

65. With regard to the second question above, a brief jurisprudential background is pertinent. The Constitution itself requires that all organs and agencies of the State, as well as other bodies and persons mandated to interpret and apply it shall be guided (in such interpretation or application) by the National Objectives and Directive Principles of State Policy ('the National Objectives and Directive Principles). *See Principle I(i) of the National Objectives and Directive Principles.* Principle XXVIII(i)(b) of those National Objectives and Directive Principles

specifically recognizes that the foreign policy of Uganda shall *inter alia* be based on the principle of '**respect for international law and treaty obligations**.'

66. Against that background, at the universal level, Article 10 of the *Universal Declaration of Human Rights* does provide for the right to a fair and public hearing by an **'independent and impartial tribunal'**. Article 14(1) of the *International Convention on Civil and Political Rights* subsequently stretched that right to include competence, in addition to the dictates of independence and impartiality. At the regional level, Article 26 of the *African Charter on Human and Peoples Rights* specifically delineates the duty upon states parties '**to guarantee the independence of courts**', while Articles 6(d) and 7(2) of the *Treaty for the Establishment of the East African Community* spells out the same pre-requisite under the broader principles of good governance and the rule of law. These are all international obligations to which Uganda is constitutionally beholden under Principle XXVIII(i)(b) of the National Objectives and Directive Principles enshrined in the Constitution, and which are indeed justiciable before both the country's domestic courts and the relevant international courts.

67. Thus, in the case of **Raphael Baranzira & Another v The Attorney General of Burundi (2015 – 2017) EACJLR 109 at 124**, citing with approval the *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioner's Guide No. 1, International Commission of Jurists, 2004, p. 19*, it was observed:

> Under international law, nation states are obliged to organize their state apparatus in such a manner as would be compatible with their international obligations. It is incumbent upon them to ensure that the structure and operation of state power is (*inter alia*) founded on ... the existence of an independent and impartial judiciary.

68. In that case, citing the *Report on Terrorism and Human Rights, OAS document OVA/Ser.LV/11.116, Doc. 5, 2002, para. 229*, judicial independence was defined to entail '**freedom of the courts from influence, threats or interference from the other branches** (of government), **as well as appropriate provision for security of tenure and professional training of judges**.' The emphasis on security of tenure was similarly reflected in **Incal v Turkey, 41/1997/825/1031.**

Para. 65 (cited with approval in the **Raphael Baranzira** case), where the European Court of Human Rights adjudged judges' security of tenure and the existence of safeguards against external pressure to be critical parameters to the determination of their judicial independence.

69. As observed earlier in this judgment, the Supreme Court did in **Attorney General v Wilson Musalu Musene & Others** (supra) acknowledge that security of tenure was indeed one of the traditional safeguards of judicial independence as espoused in Article 128 of the Constitution. Needless to say, I am respectfully bound by that pronouncement.

70. The exigencies of judicial independence and security of tenure are expounded in various UN and other Resolutions, as well as related international behavioral principles and guidelines that, though not necessarily binding in themselves, do nonetheless amount to soft law in international law.[10] Thus, Principle 11 of the *UN Basic Principles on the Independence of the Judiciary* (reproduced earlier in this judgment) provides for judges' term of office to be secured by law, while Principle 12 categorically enjoins UN member states to guarantee judges' tenure of office either '**until a mandatory retirement age or the expiry of their term of office, where such exists**.' Construed together, those principles call for judges' tenure of office (whether by retirement age or term) to be explicitly reduced into law. This is certainly in tandem with the renowned principle of legal certainty.

71. In like vein, with regard to the terms of judicial appointments, clause 23(a) of the *IBA Minimum Standards of Judicial Independence* considers with disdain the appointment of judges for probationary periods, save in legal systems where **'appointments of judges do not depend on having practical experience in the profession as a condition of the appointment**.'

72. Fully in stride with those international standards, the term of office of judges in Uganda is unequivocally articulated in Article 144 of the Constitution. Article 144(1)(b) sets the voluntary retirement age of High Court judges at sixty years and the mandatory retirement age at sixty-five years. Clause (2) of that provision then

[10] See the definition of soft law in the *Oxford Dictionary of Law, 2009, 7th Edition, p. 515*.

delineates the circumstances under which a judicial officer (which term is defined to include a High Court judge) may be removed from office before the expiration of his/ her term of office. These include inability to perform the functions of that office owing to infirmity of body or mind; misbehavior or misconduct, or incompetence. The question then is whether circumstances exist in Uganda as would justify a deviation from the highlighted international obligations (hard law) and aspirational standards (soft law) which, at any rate, are astutely espoused in Article 144 of the Constitution.

73. It seems to me that the impugned appointments are akin to probationary appointments that are tagged to satisfactory performance within the designated two-year period before a substantive appointment can be made. I find no provision whatsoever in the Constitution for the appointment of judges on such probationary terms. That would presuppose, therefore, that the '*power to confirm appointments*' referred to in Article 147(1)(a) would pertain to the offices of Chief Registrar, registrar and, I might add, other lower cadre judicial officers as respectively delineated in Articles 147(3)(b) and 148 of the Constitution, but not to judges.

74. Even if perchance such probationary appointments were to be considered under Article 147(1)(a), they would run afoul of the international law norm that is articulated in clause 23(a) of the *IBA Minimum Standards of Judicial Independence* that discourages such appointments save in legal systems where **'appointments of judges do not depend on having practical experience in the profession as a condition of the appointment**.' In the case of Uganda, Article 143(1)(e) and (2) of the Constitution clearly include practical professional experience in the qualifications for appointment to the office of judge of the High Court. There would, therefore, be no justification for probationary appointments.

75. Furthermore, Article 142(1) of the Constitution makes no reference whatsoever to the appointment of acting judges, neither does Article 138(1) provide for the High Court to be constituted of acting judges. The tripartite appointment mechanism described in Article 142(1) pertains to the appointment of substantive holders of the offices designated therein, while Article 138(1) similarly relates to substantive holders of the office of judge of the High Court. The sum effect of those

constitutional provisions, therefore, is to restrict the appointment of High Court judges by the President, acting on the advice of the JSC and with the approval of Parliament, to the appointment of substantive holders of that office. That indeed is the import of the observation in **Gerald Kafureeka Karuhanga v Attorney General** (supra) (per Mwangusya, JCC, as he then was), in which I do find fortitude, that the '**approval of Parliament is only required when substantive appointments are made under Article 142(1)**.'

76. In the instant case, I do take judicial notice of the fact that all sixteen judges whose appointment is in issue presently were subjected to parliamentary approval in accordance with Article 142(1), rather than being limited to presidential appointment on the advice of the JSC as envisaged under Article 142(2). The Respondent's affidavit evidence[11] bears this out, and additionally demonstrates that the supposedly acting judges are full members of the judiciary whose terms and conditions of service are identical to those of substantive holders of the office of judge of the High Court (save for the tenure thereof). It thus seems to me that they were appointed as substantive judges of the High Court but designated as acting judges.

77. As stated earlier in this judgment, as newly appointed judges their designation as acting judges was unconstitutional. Furthermore, with tremendous respect, I am unable to agree with the Respondent that Article 147(1)(a) of the Constitution mandates the JSC to advise the President to appoint acting judges within the precincts of Article 142(2) but subject to the appointment processes encapsulated in Article 142(1), as transpired in this case. To my mind, the provisions of Article 142(1) and (2) demarcate two distinct appointment processes that serve distinct purposes as highlighted earlier herein, and should be implemented as such.

78. Aside from that, Uganda's international law obligations do additionally forestall the appointment of judges to a term of office that is not secured by law or explicitly stated in a written law. Having held as I have that appointments under Article 142(2) are not available to the fresh recruitment of judges, it follows that the two-year term of office extended to the sixteen judges neither conforms to the tenure

[11] See paragraphs 7 and 11 of the affidavit in support of the Answer to the Petition.

of office for High Court judges that is prescribed under Article 144(1)(b) nor is it otherwise stated anywhere in the Constitution. I would defer to this Court's decision in **Justice Asaph Ruhinda Ntegye & Another v Attorney General** (supra), where the restriction by the *Labour Disputes (Arbitration and Settlement) Act* of the term of Industrial Court judges to five years was adjudged to be unconstitutional insofar as it varied the tenure of service placed in the Constitution. With respect, therefore, I do similarly find the two-year term to which the sixteen judges have been subjected to be unconstitutional.

79. In the result, I find that the appointment of High Court Judges in acting capacity for two years contravenes Articles 128, 138, 142 and 144 of the Constitution and is therefore unconstitutional. To that extent, it does undermine the supremacy of the Constitution and thus, similarly flouts Article 2(1) thereof. I would, accordingly, resolve *Issue No. 2* in the affirmative.

Issue No. 3: *Whether the Petitioners are entitled to the reliefs sought.*

80. The declarations and orders sought in this matter are, in my view, quite repetitive but broadly speak to the unconstitutionality of the recent appointment of sixteen judges of Court as acting judges. Having resolved the preceding *Issue* in the affirmative, I would grant the declaration sought.

81. However, considering that the appointment of the sixteen judges that are affected by this decision did wholly comply with the tripartite appointments mechanism outlined in Article 142(1) of the Constitution, my findings herein would not apply retrospectively to nullify those appointments. In the same vein, given that the judges have since taken judicial oath and assumed office; in accordance with the doctrine of prospective annulment as was applied by this Court in **Jim Muhwezi & Others v Attorney General & Another, Constitutional Petition No. 10 of 2009** and **Bob Kasango v Attorney General & Another, Constitutional Petition No. 16 of 2016**, this judgment does not render void the judicial services they have rendered to date. It simply illuminates the need by the JSC to regularize their appointments as a matter of urgency to bring them in conformity with the Constitution, and forestalls appointments in acting capacity for freshly recruited judges.

82. On the question of costs, it is trite law that costs should follow the event unless a court for good reason decides otherwise. *See section 27(2) of the Civil Procedure Act, Cap. 71.* Insofar as the issues raised in this Petition sought to and did clarify fundamental questions with regard to the administration of justice in this country, I do find this a befitting case for a departure from that general rule and consider it unjust to condemn either party in costs.

F. **Conclusion**

83. The upshot of my consideration hereof is that I would allow the Petition in the following terms:

I. The appointment of sixteen (16) judges of the High Court subject to an acting term of two (2) years is inconsistent with Articles 2, 128, 138, 142 and 144 of the Constitution and is, to that extent, unconstitutional.

II. The Judicial Service Commission is directed to take the necessary steps to regularise the appointment of the affected sixteen judges into substantive appointments within six (6) months from the date of this judgment.

III. Each party shall bear its own costs.

Dated and delivered at Kampala this 7th **day of** Dec **, 2022.**

Monica K. Mugenyi
Justice of the Constitutional Court

THE REPUBLIC OF UGANDA

THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

(Coram: Egonda-Ntende, Musoke, Madrama, Mugenyi & Gashirabake, JJCC)

CONSTITUTIONAL PETITION NO. 15 OF 2022

BETWEEN

DR. BUSINGYE KABUMBA==========PETITIONER NO.1
ANDREW KARAMAGI==========PETITIONER NO.2

AND

THE ATTORNEY GENERAL========== RESPONDENT

JUDGMENT OF FREDRICK EGONDA-NTENDE, JCC

[1] I have had the opportunity of reading in draft the judgment of my sister, Mugenyi, JCC. I agree with it.

[2] I will though take the liberty to make a few remarks to provide a historical context for the decision that this court has made today. The facts that I shall set out below are so notorious that I take judicial notice of them, where that may be necessary.

[3] Prior to the promulgation of the 1995 Constitution it was the norm in making appointments of Ugandan citizens to the High Court to appoint them as acting judges and then after 6 or so months appoint them substantively with tenure up to the retirement age provided by the Constitution or revoke their

appointments. The 1967 Constitution was in force. And the relevant article was article 84, which stated in part,

> '84.
> (1) The Chief Justice shall be appointed by the President.
> (2) The puisne judges shall be appointed by the President, acting in accordance with the advice of the Judicial Service Commission.
> (3)
> (4)
> (5)
> (6) If the office of any puisne judge is vacant or if any such judge is appointed to act as Chief Justice or is for any reason unable to perform the. functions of hi office, or if the Chief Justice advises the President tha the state of business in the High Court so requires, the Prsident, acting in accordance with the advice of the Judicial Service Commission, may appoint a person qualified for appointment as a judge of the High Court to act as a puisne judge of that court: Provided that a person may act as a judge notwithstanding that he has attained the age prescribed for the purposes of clause **(1)** of article **85.**
> (7) Any person appointed under clause **(6)** of this article to act as a puisne judge shall continue to act for the period of his appointment or, if no such period is specified, until his appointment is revoked **by** the President, acting in accordance with the advice of the Judicial Service Commission: Provided that, notwithstanding the expiration of the period of his appointment or the revocation of his appointment, he may thereafter continue to act as a puisne judge for **so** long as may be necessary to enable him to deliver judgment or to do any, other thing in relation to proceedings that were commenced before him previously thereto.'

[4] As is clear from sub article (6) of article 84, on the recommendation of the Judicial Service Commission the President could appoint, a person qualified to be a judge of the High Court, to act as a judge of the High Court, in the event of any of the enumerated situations in the said provision. These acting appointments, were in effect probationary.

[5] The practice of appointing High Court Judges as acting judges, initially before appointing them substantively, was abandoned for more than the last 25 years, (1995 to 2022), until these impugned appointments. The appointments that were made were on acting basis, prior to the impugned appointments before us, were essentially of 2 categories. Where a justice of the Supreme Court, Court of Appeal or High Court had retired but was given a contract after his retirement. Secondly where the Supreme Court failed to raise a quorum and judges of the Court of Appeal or High Court were appointed as acting justices of the Supreme Court. This was under article 142 (2) of the Constitution. Parliamentary approval was not necessary and it was not sought. Examples of this situation can be noticed in the reported cases of the Supreme Court. See Attorney General v Susan Kigula and Others [2009] UGSC 6 where the court that heard and decided that matter included Kitumba, JA, and Egonda-Ntende, J, as Acting Justices of the Supreme Court, when substantively they were a Justice of the Court of Appeal and a Judge of the High Court respectively.

[6] Unlike under the 1967 Constitution where the provisions related to appointment of High Court judges provided for either appointment, that is whether to act in the office of puisne judge or as a puisne judge, were rolled up in one paragraph, the 1995 Constitution adopted a more nuanced approach. The relevant provision is article 142, already set out in the judgment of my sister, Mugenyi, JCC, with whom I agree in relation to its reach and effect.

[7] Appointments under article 142 of the Constitution could either be under sub article (1) or (2). Under article 142 (1) the appointment is to the substantive office of a Justice of the Supreme Court, a Justice of the Court of Appeal or a Judge of the High Court. Under article 142 (2) an acting appointment could be made to the said offices. To assert as the respondent did in its answer to the petition that the impugned appointments were made under, inter alia, articles 142 (1), (2) and (3) of the Constitution is not to appreciate that sub articles (1) and (2) refer to different modes of appointment. One is to hold the office while the other is to act in that office with very different consequences, especially as to tenure of the holder.

[8] As we were hearing this petition the Judicial Service Commission issued an advert for, *inter alia*, 11 positions for High Court Judges. This was widely circulated both in the daily newspapers and over the internet. It was referred to as External Advert No. 2 of 2022. It stated in part as under,

> 'Applications are invited from suitable and eligible citizens of Uganda to fill the following vacant posts available in the Judiciary Service as specified below. **Applicants will be subject to all the Terms and Conditions set out herein.'** (This last sentence was both underlined and bolded in the advert.).....'

[9] After setting out the Post as High Court Judges and eleven in number being the positions available and other matters the advert provided, in part, under the sub heading 'Minimum Qualifications & Experience' as follows:

> 'Applicants appointed to this position shall act for a period of two years before they are appointed in a substantive capacity upon performance evaluation being conducted.'

[10] This term had very little to do with the sub heading of 'Minimum Qualifications & Experience' under which it was rendered. It neither relates to qualifications of the applicant nor to his or her experience prior to making the application. It is a term to apply to successful applicants on acceptance of the appointment.

[11] The applicants to the above 11 posts of High Court judges and presumably the whole world, have been told by the aforesaid advert firstly that they are to be bound by the terms and conditions set out in the advert. And those terms and conditions are to include probationary service for 2 years upon which they would be evaluated before being appointed substantively. It appears to me that the Judicial Service Commission is setting out terms and conditions of their employment that are not available in the Constitution or any Act of Parliament. It is seeking to do so by agreement. Does the Judicial Service Commission have such constitutional authority? I would think not.

[12] The second question that would arise is whether these 11 positions now being processed are any different from the positions of the last 16 acting judges appointed to the High Court? Obviously with regard to this latter question, we have not been supplied with this information by either party in this case. In my view it was the duty of the respondent to supply all information in relation to the appointments of the 16 judges of the High Court that would show that such appointment complied with the Constitution once the question of the constitutionality of their appointment was made out. It is only the respondent that had such information in its records and possession.

[13] It is important to note that under section 16 of the Judicial Service Commission Act information relating to the proceedings of the commission and its communication with the President, Vice President, a Minister, the Public Service Commission or any member or officer of it or a public officer is privileged information that is prohibited from being communicated without the permission of the Chairperson. A member of the public such as the Petitioner has no access to the Commission records in relation to its decision making. The duty must then lie on the Commission and in this case the respondent to make such information as relates to the impugned decision to the court. It is not enough to say the Petitioner has not proved his case. It is the Commission with the relevant information. The respondent cannot rely on its own failure to make a full disclosure to court as to what happened and thus assist the court to come to a full understanding as to the basis for its decisions and actions complained of. The Commission is obliged under article 128 (3) of the Constitution to accord the courts 'such assistance as may be required to ensure the effectiveness of the courts.'

[14] In the present position the respondent admitted to the appointment of the 16 judges of the High Court on acting basis but provided no further information other than pointing to, *inter alia*, article 142 that the appointments are proper in law. What could be the purpose of appointment of acting judges? We can by analogy from the current 11 positions being processed infer that the purpose of these acting appointments is to be able to evaluate the acting judges before they can be appointed substantively. We can also infer that the same purpose holds true for the impugned 16 judges. Is this purpose envisaged by article 142 of the Constitution? I would think not. And that is

why the advert provides that applicants are to be bound by the terms and conditions set out in the advert.

[15] Was external advert no.2 of 2022 partly a response to this petition or does it simply reflect the view of the Judicial Service Commission that it can make probationary appointments in respect of High Court Judges or any other judges in the future? It could be both but the latter view certainly represents its current position on this subject.

[16] When Counsel for the respondent was asked at the hearing whether it would be constitutional for the Supreme Court to be composed of the Chief and 10 Acting Justices of the Supreme Court as its full establishment, he responded that it would be perfectly constitutional. In my view that could hardly have been the intention of the constituent assembly! Neither would it be in accord with the independence of the judiciary or that court as envisioned under article 128 (1) of the Constitution.

[17] In reality the effect of such acting appointments is to create probationary appointments for 2 years. Such appointments are neither envisioned by article 142 (1) nor article 142 (2) of the Constitution. The Judicial Service Commission in creating terms and conditions set out in the advert referred to above and implicit in the acting appointments beyond those provided in the Constitution or other written law and outside its functions under article 147 of the Constitution, has done so contrary to the Constitution. With regard to the terms and conditions of judges the role of the Judicial Service Commission is only advisory pursuant to article 147 (1) (b) of the Constitution.

[18] It would appear to me that the purpose and effect of these acting appointments is the creation of acting judges on probation, for a period of 2 years, prior to their evaluation for substantive appointments. Both purpose and effect are in my view unconstitutional. I would find, in agreement with Mugenyi, JCC, that the Judicial Service Commission in recommending acting appointments for the 16 High Court Judges to the President did so contrary to the Constitution.

Decision

[19] As Musoke, Gashirabake, and the undersigned, JJCC, agree with Mugenyi, JCC, this petition is allowed in the terms and with the orders proposed by Mugenyi, JCC.

Dated, signed and delivered at Kampala this 7th day of Dec 2022.

Fredrick Egonda-Ntende
Justice of Constitutional Court

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 015 OF 2022

1. DR. BUSINGYE KABUMBA
2. ANDREW KARAMAGI::::::::::::::::::::::::::::::::::::PETITIONERS

VERSUS

ATTORNEY GENERAL::RESPONDENT

CORAM: HON. MR. JUSTICE FREDRICK EGONDA-NTENDE, JCC
HON. LADY JUSTICE ELIZABETH MUSOKE, JCC
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JCC
HON. LADY JUSTICE MONICA K. MUGENYI, JCC
HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JCC

JUDGMENT OF ELIZABETH MUSOKE, JCC

I have had the advantage of reading in draft the judgment prepared by my learned sister Mugenyi, JCC, and I agree with it. For the reasons which she gives I, too, would allow the Petition and make the declaration and orders which she proposes.

Dated at Kampala this ....7th.....day of .....Dec..... 2022.

.....

Elizabeth Musoke

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA,

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(CORAM; EGONDA NTENDE, MUSOKE, MADRAMA, MUGENYI, GASHIRABAKE, JJCC/JJCA)

CONSTITUTIONAL PETITION NO 15 OF 2022

1. DR. BUSINGYE KABUMBA}
2. ANDREW KARAMAGI} ..... PETITIONERS

VERSUS

ATTORNEY GENERAL} ..... RESPONDENT

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JCC

I have read in draft the judgment of my learned sister Hon. Lady Justice Monica Mugenyi, JCC and I generally agree that there are some issues where the Constitution was not complied with as envisaged. I am however unable to accept the orders proposed based on the interpretation of Article 142 of the Constitution and I have very respectfully arrived at a different conclusion dismissing the petition for the reasons I set out below.

I accept the facts and principles of interpretation and law set out by my learned sister and I need not repeat except as is relevant to my decision. The primary question is what is the petition is about? Paragraph 5 of the petition and particularly Paragraph 5 (b), (c), (d) and (e) disclose the crux of the Petitioners petition in that it is averred that:

(b) That the Judicial Service Commission Press Release of 22nd May 2022 indicated that sixteen (16) persons were appointed as Acting Judges of the High Court for two (2) years.

(c) That the actions of the Judicial Service Commission and the President in advising and appointing Acting Judges of High Court

contravenes the spirit of security of tenure for judicial officers and undermines the provisions in Articles 128, 144 and 147 of the Constitution.

(d) That appointing judges in an acting capacity effectively subjects the judicial officers to the control of the appointing authority which violates Article 128 of the Constitution.

(e) That the acts of the Judicial Service Commission and the President of subjecting the appointment of judges of the High Court to an acting period of two (2) years is out of the boundaries of the powers granted by the Constitution hence a violation of Articles 2, 138, 142 and 144 of the Constitution.

The main averment of fact in the pleadings is that the Judicial Service Commission in a press release dated 22nd May 2022 indicated that 16 persons were appointed as Acting Judges of the High Court for a period of two years. Other facts such as the advertisement of the Judicial Service Commission for the position of Acting Judges of the High Court was not averred in the petition or adduced in evidence. What follows in the subsequent paragraphs is the grievance or complaint of the petitioners that the actions of the Judicial Service Commission and the action of the President in advising and appointing Acting Judges of the High Court (respectively) contravene the spirit of security of tenure for judicial officers and undermines the provisions of articles 128, 144 and 147 of the Constitution. Secondly, that the appointing of judges in acting capacity, subjects judicial officers, to the control of the appointing authority which violates article 128 of the Constitution. Further, the petitioners assert that the acts of the Judicial Service Commission and the president of subjecting the appointment of judges of the High Court when acting period of two years is without jurisdiction granted by the Constitution and in violation of the articles 138, 142 and 144 of the Constitution.

I accept the analysis of facts and the submissions of counsel set out in the lead Judgment of my learned sister. My learned sister Hon. Lady Justice Monica Mugenyi, JCC found that the position of acting Judge under article 142 of the Constitution is only open to a serving judge or a previously serving judge and not to fresh appointments to the Judiciary. In other words, that the provision for acting judges in those constitutional provisions is only available to serving or retired judges. This proposition is supported by the further argument that it was not envisaged in the Constitution that there would be two paths for the appointment of Judges namely judges appointed with the approval of Parliament in the substantive position and acting judges who are appointed without the approval of Parliament for a temporary period of time. The conclusion is therefore that the appointment of new judges as acting judges is not in conformity with the Constitution. I have taken a different view and with utmost respect to the judgment of my learned sister as acting judges are appointed on the basis of the express provisions of article 142 of the Constitution of the Republic of Uganda. Secondly, I am not satisfied with the evidence adduced in support of the petition and in opposition on the questions that need to be resolved in this petition before making far reaching declarations as prayed for in the petition.

The crux of the petition is that the actions of the Judicial Service Commission and the President in advising and appointing Acting Judges of the High Court contravenes the spirit of security of tenure for judicial officers and undermines the provisions in Articles 128, 144 and 147 of the Constitution. Following this averment, it can be concluded that what is being attacked or impugned is the action of the Judicial Service Commission to advise the President to appoint acting judges of the High Court. This is supported by the question of fact in which the press release annexure "A" to the affidavit in support of the petition attests that indeed 16 judges were appointed in acting capacity for a period of two years.

In that press release dated 25th of May 2022, the Judicial Service Commission under the heading of **"Appointment of 16 High Court judges in**

acting capacity for two years", notified the public that the appointments are an outcome of the Commission's ongoing recruitment exercise of Judicial Officers at various levels into the judiciary service. Further they wrote that the appointments will enhance the capacity of the High Court to expeditiously dispose of cases and tackle backlog. The press release does not indicate whether the Judicial Service Commission intended to have judges appointed in acting capacity but only that the President appointed 16 judges as acting Judges. Clearly, the petitioners do not have this information disclosed in their pleadings. It would therefore be presumptuous to find that the Judicial Service Commission intended to have the judges appointed in acting capacity or otherwise. There is no letter of appointment to that effect that was adduced in evidence and there is no notice to the public inviting applications for a particular acting capacity as the judicial officers. It would be presumptuous if we deduce from the scanty facts the intention of the Judicial Service Commission or the President on the basis of such scanty information before proceeding to deal with the questions as to interpretation of the Constitution. It is sufficient to consider the petition as it is and establish whether the facts were sufficient to support averments of the petitioners.

In the answer to the petition, the respondent merely denied the assertion of the petitioners that the actions of the Judicial Service Commission in advising the President to appoint acting judges of the High Court contravened articles 128, 144 and 147 of the Constitution. The respondent also opposed the assertions of the petitioners that the actions of the President in appointing acting judges of the High Court contravenes articles 128, 144 and 147 of the Constitution. They assert without giving the material facts that article 142 of the Constitution of the Republic of Uganda confers authority upon the President acting on the advice of the Judicial Service Commission and with the approval of Parliament to appoint persons to the position of judge of High Court. Further the respondent averred that article 147 (1) (a) of the Constitution of the Republic of Uganda confers authority on the Judicial Service Commission to advise the President in the exercise of

his mandate to appoint persons who hold or act in any office including that of a judge of the High Court.

When considered together with the affidavit in support of the answer to the petition, Mwembembezi Julius, the Registrar at the Judicial Service Commission stated that the appointment of the 16 acting judges of the High Court for a period of two years on the 22nd of May 2022 was in accordance with the provisions of articles 142 (1), (2), (3), inter alia of the Constitution. He does not specify under which clause of article 142 of the Constitution, the Judicial Service Commission moved to advise the President.

A constitution should firstly be construed on the basis of its own language. The effort in interpretation should be to ascertain the natural or ordinary meaning of a word or phrase that may be in issue. This was the preferred approach of the Privy Council in **Minister of Home Affairs and another v Fisher and another [1979] 2 All E.R. 21** at 26 where Lord Wilberforce said about approaches to interpretation that:

> ... The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.
>
> It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second.

Amissah JP of the Court of Appeal of Botswana in **Dow v Attorney General (of Botswana) [1992] LRC (Const.) 623** at page 632 underscored the importance of paying attention to the words and content of the constitution in light of its importance inter alia in defining powers, limits of powers and rights of citizens when he stated that:

> A written constitution is the legislation or compact which establishes the state itself. It paints in broad strokes on a large canvas the institutions of that state; allocating powers, defining relationships between such institutions and between the institutions and the people within the jurisdiction of the state, and between the people themselves. The Constitution often provides for the protection of the rights and freedoms of the people, which rights and freedoms have thus to be

respected in all future state action. The existence and powers of the institutions of state, therefore, depend on its terms. The rights and freedoms, where given by it, also depend on it. No institution can claim to be above the Constitution; no person can make any such claim. The Constitution contains not only the design and disposition of powers of the state which is established but embodies the hopes and aspirations of the people. It is a document of immense dimensions, portraying, as it does, the vision of the people's future. The makers of the Constitution do not intend that it be amended as often as other legislation; indeed, it is not unusual for provisions of the Constitution to be made amendable only by special procedure imposing more difficult forms and heavier majorities of the members of the legislature. By nature, and definition, even when using ordinary prescriptions of statutory construction, it is impossible to consider a Constitution of this nature on the same footing as any other legislation passed by a legislature which is self-established, with powers circumscribed, by the constitution. The object it is designed to achieve evolves with the evolving development and aspiration of its people.

In **Re: Constitution of Vanuatu [1993] 1 LRC 141** at 151 D'IMECOURT CJ said that:

> in considering the operation of a law which is said to be inconsistent with the Constitution, an attempt should be made to reconcile the law with the Constitution, and any opposition between the two should be resolved by adopting an interpretation of the provision that is fairly open and which would remove the contradiction and maintain the validity of the law...
>
> In cases of inconsistencies between state legislation (the law) and the Constitution, the latter should prevail and the former should, to the extent of inconsistency, be invalid.

Having some of the principles in mind, I would consider the wording of Article 142 of the Constitution in context of other articles and particularly article 143. Article 142 of the Constitution is the primary article that allows the appointment of judges in acting capacity and provides that;

> 142. Appointment of judicial officers.
>
> (1) The Chief Justice, the Deputy Chief Justice, the Principal Judge, a justice of the Supreme Court, a justice of Appeal and a judge of the High Court shall be

appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament.

(2) Where—

(a) the office of a justice of the Supreme Court or a justice of Appeal or a judge of the High Court is vacant;

(b) a justice of the Supreme Court or a justice of Appeal or a judge of the High Court is for any reason unable to perform the functions of his or her office; or

(c) the Chief Justice advises the Judicial Service Commission that the state of business in the Supreme Court, Court of Appeal or the High Court so requires, the President may, acting on the advice of the Judicial Service Commission, appoint a person qualified for appointment as a justice of the Supreme Court or a Justice of Appeal or a judge of the High Court to act as such a justice or judge even though that person has attained the age prescribed for retirement in respect of that office.

(3) A person appointed under clause (2) of this article to act as a justice of the Supreme Court, a justice of Appeal or a judge of the High Court shall continue to act for the period of the appointment or, if no period is specified, until the appointment is revoked by the President acting on the advice of the Judicial Service Commission, whichever is the earlier.

In my judgment, article 142 as discussed in the lead judgment envisages different case scenarios for appointment of judges in the category of substantive judges on permanent and pensionable terms and in the category of acting judges or justices. The first case scenario is the appointment of a Justice of the Supreme Court, Justice of Appeal or Judge of the High Court on the advice of the Judicial Service Commission and with the approval of Parliament. Generally, article 142 of the Constitution deals with the appointment of judicial officers. With specific reference to the appointment of a judge of the High Court, provided for under article 143 of the Constitution and particularly article 143 (1) (e) which provides that a person shall be qualified for appointment as:

a judge of the High Court, if he or she is or has been a judge of a court having unlimited jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from any such court or has practiced as an advocate for a period not

less than ten years before a court having unlimited jurisdiction in civil and criminal matters.

All the above categories of persons qualify for appointment as a judge of the High Court. It is not restricted persons who have served as a judge in a court having unlimited jurisdiction in civil and criminal matters but includes an advocate who has practiced in such a court for a period not less than ten years. Therefore, where any person qualifies for appointment as a judge of the High Court, he or she may be appointed on that basis on the advice of Judicial Service Commission by the President and the appointment must be approved by Parliament as stipulated by article 142 (1) of the Constitution. Such persons are appointed on permanent terms. On the other hand, the other case scenarios provided for under article 142 (2) of the Constitution include scenarios where a qualified person, which includes in terms of article 143 (1) (e) of the Constitution, any person if he or she is has been a judge of a court having unlimited jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from any such court or has practiced as an advocate for a period of not less than ten years before such a court having unlimited jurisdiction in civil and criminal matters. In other words, an advocate can be appointed in an acting capacity as a judge if he or she qualifies for appointment as a judge of the High Court.

Article 142 (2) of the Constitution gives three case scenarios where a person may be appointed a judge of the High Court. The first case scenario is where the office of a Judge of the High Court is vacant. Of course a vacant seat can occur for any reason such as incapacity or infirmity of any kind which permanently makes the position vacant and I do not need to discuss the circumstances save that it includes vacancy by virtue of retirement or death. A vacancy by its nature, presupposes that there is an existing office whose previous occupant is unavailable dues to any fact such as death or retirement and cannot on that account perform the functions of a judge of the High Court in the context of this petition. There are no facts to support such a case scenario and the press release of the Judicial Service Commission (JSC) only suggests that it was a fresh recruitment exercise

and I find that the press release is inconclusive on matters of facts. The press release of the JSC provides inter alia that:

> **H.E. The President of Uganda Appoints 16 High Court Judges in acting capacity for 2 years.**
>
> H.E. the President of Ugandan has appointed in acting capacity 16 Judges of the High Court into the Judicial Service. Of the 16 Judges appointed, 7 are male and 9 are female.
>
> These appointments are an outcome of the commission's ongoing recruitment exercise of Judicial Officers at Various levels into the judiciary service.
>
> This is the largest ever appointment of Judges of the High Court at that level by the President.
>
> This appointment will enhance the capacity of the High Court to expeditiously dispose of cases and tackled backlog.
>
> The appointments are as follows; ...

Clearly, the press release suggests that the appointments were to enhance the capacity of the High Court and therefore it is not per se intended to fill a vacancy but to increase the capacity of the High Court and therefore article 142 (2) (a) of the Constitution is not the case scenario for the impugned appointments in this petition.

The second case scenario is where a Justice of the Supreme Court, or a Justice of Appeal or a Judge of the High Court is for any reason unable to perform the functions of his or her office. This falls under article 142 (2) (b) of the Constitution. Again, the question of inability to perform the functions of his or her office is clearly related to the first question in that there is an existing vacuum in terms of posts which are temporarily not occupied on account of inability of the judges to perform their functions. However, it clearly envisages a situation where a judge is unable to perform the functions of his or her office for any reason whatsoever and not that the office is vacant. That seems not to be the case in the current case scenario where the press release of the JSC demonstrates that the judges were

appointed to enhance the capacity of the High Court to clear among other things to dispose of cases and tackle case backlog.

That takes me to the third case scenario provided for under article 142 (3) (c) of the Constitution which provides that in cases where the Chief Justice advises the Judicial Service Commission that the state of business in the Supreme Court, Court of Appeal or the High Court so requires the Judicial Service Commission may advise the President to appoint judges in acting capacity to fill the needs gaps for purposes of enhancing the capacity of the courts. The issue of this case or petition by deduction only falls in the third case scenario but there is no specific fact in the petition or the answer to the petition for the court to conclude that any of the three case scenarios is the basis for recommendation of the JSC for appointment of judges in acting capacity.

Because no concrete facts are available for the court to consider under which part of article 142 (2) the Judicial Service Commission proceeded, the petition lacks sufficient facts and I would dismiss it on that ground alone. This is primarily because this petition falls under article 137 (3) (b) of the Constitution which provides that any person who alleges that any act or omission by any person or authority is inconsistent with or in contravention of a provision of the Constitution may petition the constitutional court for a declaration to that effect and for redress where appropriate.

The petitioners assert that the act of appointing of judges in acting capacity for a period of two years contravenes certain provisions of the Constitution and therefore the act or omission needed to be proved by the material facts for the court to even established under which case scenario the judges were appointed in terms of the different case scenarios under article 142 of the Constitution. In the absence of such concrete facts such as the appointment letters, the advertisement of the Judicial Service Commission, the terms of reference of the officers concerned, the petition is prematurely filed without adequate facts and I would dismiss it.

The above notwithstanding, I have considered other situations.

The second averment in the petition is that appointing judges in an acting capacity effectively subjects the judicial officers to the control of the appointing authority which violates article 128 of the Constitution. The averment cannot be left unchallenged because article 142 expressly allows the President acting on the advice of the Judicial Service Commission to appoint judges in acting capacity. The petitioners are not saying that article 142 (2) of the Constitution is inconsistent with other provisions of the Constitution. The Constitution is the supreme law of Uganda and reflects the will of the people as to how they are to be governed.

Article 142 expressly allows the appointing of judges in acting capacity and our mandate under article 137 (1) is to determine any question as to interpretation of the Constitution and particularly to establish whether the appointment violates any provision of the Constitution. Because article 142 of the Ugandan Constitution allows the appointment of judges in acting capacity, then we have to consider the facts to establish whether the circumstances of the appointment falls within the three case scenarios referred to in article 142. In the absence of such an analysis based on concrete facts, conclusion is impossible without assuming certain facts.

The question of fact which is something that may be presumed is whether the Hon. the Chief Justice moved under article 132 (2) (c) of the Constitution and advised the Judicial Service Commission on the needs of the High Court so that acting justices could be appointed to handle the existing business needs of the court. In my judgment, this is the only possible case scenario that is possible in the circumstances and in light of the appointment of 16 judges of the High Court as the other two case scenarios do not arise. That notwithstanding, to say that the Judicial Service Commission moved under article 142 (2) (c) of the Constitution would be speculative. There is no evidence to that effect. There is no evidence that the Hon. the Chief Justice advised the Judicial Service Commission of the needs of the judiciary for more judges. I would not presume such facts. Secondly there is no evidence that the Judicial Service Commission acted on that presumptive advice and in turn advised the President to appoint judges of the High Court to handle

the need of the state of business of the High Court which required such personnel.

In the premises, the petition cannot be concluded on the basis of the scanty facts.

Regarding the third averment of the petitioners that the acts of the Judicial Service Commission and the President of subjecting the appointment of judges of the High Court to an acting period of two years is out of the boundaries of the powers granted by the Constitution and is a violation of articles 2, 138, 142, and 144 of the Constitution, I would still find that there are no facts to support such an assertion.

The third averment stated above relates back to the question of the scarcity of facts on the basis of the appointment of the 16 judges of the High Court which facts are lacking in this petition. Further, the press release of the Judicial Service Commission, which is the sole fact proved was issued after the event of appointment. There was no advertisement for the post of acting Judges of the High Court that was produced. Did the Judicial Service Commission advertise, as a question of fact, the position of Acting Judge of the High Court for a temporary period of about two years? Did the appointing authority intend to appoint only acting judges?

In conclusion, what is envisaged under article 142 (1) of the Constitution of the Republic of Uganda is the appointment of a judge of the High Court in substantive terms which appointment is only valid when it is approved by Parliament. The approval of Parliament is a requirement. The Judicial Service Commission vets qualified persons and forwards their names to the President for consideration for appointment. Upon the President appointing the persons who have been forwarded by the Judicial Service Commission, such persons are further forwarded to Parliament for approval. It is only upon the action by the three authorities that a person may be appointed a substantive judge.

It follows that article 142 (2) of the Constitution deals with other situations where the President acting on the advice of the Judicial Service

Commission, appoints any person qualified for appointment as a justice of the Supreme Court or a justice of Appeal or a judge of the High Court to act as such a justice or judge even though that person has attained the age prescribed for retirement in respect of that office. As noted above, the persons qualified for appointment include persons qualified for appointment in terms of article 143 of the Constitution. As noted above, such persons include advocates who have practiced in the court with unlimited original jurisdiction for a period of not less than ten years as far as qualification for appointment as High Court judge is concerned.

Further article 142 (3) provides that such a person appointed to act as a judge, shall serve or act for the period of appointment and if no period is specified, until the appointment is revoked by the President acting on the advice of the Judicial Service Commission. The conclusion of my learned sister in the lead judgment is supported by the fact that in this case scenario, there is no requirement for the approval of Parliament (where a judge is appointed in acting capacity). Because of the fact that there is no provision for approval of Parliament with regard to the appointment of judges, or justices of the appellate courts in acting capacity, the petition can rightly be confined to this aspect based on the evidence that the 16 justices were approved by Parliament and therefore the appointment could not have fallen under article 142 (2) of the Constitution but under article 142 (1) of the Constitution.

In such as situation, the Petitioners ought to have moved for rectification of the appointment and not sought annulment of the appointments altogether.

Clearly it is article 142 (3) of the Constitution that affects the question of the security of tenure and independence. However, where a judge of the High Court is appointed to handle case backlog for a period of six months for instance, can there be a constitutional challenge as in this case? Is it not expressly allowed by article 142 (2) (c) of the Constitution?

The question of fact that we need to establish remains. The particular appointments in this petition was for a period of two years and a question

as to what would happen thereafter is speculative. Were the judges appointed because the stated business of the judiciary required personnel to clear case backlog? A conclusion can therefore be based on the fact that no Judge of the High Court can be appointed with the approval of Parliament unless such a judge is appointed to hold the office of the Judge, or a Justice of the Supreme Court, or Justice of the Court of Appeal with the constitutional security of tenure. But where such a justice has been appointed in an acting capacity, there is no need for Parliamentary approval. It is either one or the other.

Had the facts been proved, the conclusion would be that the appointment of the 16 judges were meant to be substantive appointments and not in acting capacity but the press release of the Judicial Service Commission relates the fact of appointment by the President and not what the JSC advised.

The final question is whether any judge of the High Court has been appointed in an acting capacity with the approval of Parliament if so whether such judges can continue in that acting capacity.

I would find that it is an acceptable to conclude the petition on the basis of scanty facts which would affect the appointment of 16 judges none of whom have been heard. I have no facts from any of them as to the terms on which they were engaged and whether they intended to be appointed only on temporary terms or on permanent terms.

What did any of the judges so appointed accept when he or she took up the appointment and what did they envisage or intend to accept? Did any of them intend to go back to their previous employment after the two-year period elapses? Failure to hear the judges violates their right to hearing as persons directly by the petition. Further in **Sullivan Vs AliMohammed Osman [1959] E.A 239** at 244 Windham J.A of the East African Court of Appeal held that;

> That a plaint must allege all the facts necessary to establish the cause of action. This fundamental rule of pleading would be nullified if it were to be held that a

necessary fact not pleaded must be implied because otherwise another necessary fact that was pleaded could not be true.

A plaint is a pleading and is equivalent to a Petition which is also a pleading. The petition must allege all the necessary facts that are necessary to establish the cause of action. The petition ought to show under which part of article 142 (2) of the Constitution the JSC advised and the President appointed the judges whose appointments are being challenged. In any case where the facts are alleged, they need to be proved by the facts adduced in the affidavit in support. The burden remained on the petitioners to prove their facts in support of the questions as to interpretation of the Constitution raised in this petition.

The premises, I would find that the petition discloses insufficient material facts to disclose a cause of action under article 137 (3) (b) of the Constitution for purposes of determining the questions put before the court for interpretation and I would reject the petition under Order 7 rules 1 (e) and 11 of the Civil Procedure Rules with no order as to costs.

Dated at Kampala the 7th day of December 2022

Christopher Madrama Izama

Justice Constitutional Court

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Constitutional Petition No. 0015 of 2022.

1. **DR. BUSINGYE KABUMBA**
2. **ANDREW KARAMAGI:: PETITIONERS**

VERSUS

ATTORNEY GENERAL:: RESPONDENT

Coram: **Hon. Justice F. Egonda-Ntende, JCC.**

Hon. Lady Justice Elizabeth Musoke, JCC.

Hon. Justice Christopher Madrama, JCC.

Hon. Lady Justice Monica K. Mugenyi, JCC.

Hon. Justice Christopher Gashirabake, JCC.

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JCC.

I have had the benefit of reading in draft the lead Judgment of Hon. Lady Justice Monica K. Mugenyi, JCC.

I agree with her findings and conclusion and have nothing more useful to add.

Dated at Kampala this ...7th... day of ...Dec.....2022.

Christopher Gashirabake

JUSTICE OF THE CONSTITUTIONAL COURT.