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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 1257 OF 2022

(ARISING OUT CIVIL SUIT NO. 105 OF 2019)

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KAZOOBA FRANCISAPPLICANT

VERSUS

1. M.K CREDITORS LTD

2. MALE H.K MABIRIZI KIWANUKA

3. SISYE BOGERE ROBERT RESPONDENTS

15

BEFORE: HON. LADY JUSTICE HARRIET GRACE MAGALA

**RULING ON REQUEST FOR MAKING A REFERENCE TO THE CONSTITUTIONAL
COURT**

Background

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The Applicant/Plaintiff borrowed a sum of **Ugx 500,000/- (Uganda Shillings Five Hundred Thousand only)**, 'borrowed sum' from the 1st and 2nd

Defendants/Respondents; which was secured by property comprised in **Kyadondo Block 206 Plot 2576 at Mpererwe** (hereinafter referred to as the suit property)

- 5 The Plaintiff/Applicant allegedly paid the borrowed sum in full but the 1st and 2nd Defendants/Respondents refused to return his certificate of title of the suit property. As a result, he sued the respondents vide *Civil Suit No. 105 of 2019* seeking an order to court to annul the transactions of the 1st, 2nd and 3rd Defendants/Respondents on the suit property amongst other orders.
- 10 The Plaintiff/Applicant later discovered that the 3rd Respondent had transferred the suit property to a one Gumisiriza Johnson Bosco in 2016 and which resulted in the filing of this to add the said Mr. Gumisiriza as a defendant to the main suit.

Representation

- The Applicant was represented by M/s Rwakafuuzi & Co. Advocates. The 3rd Respondent was served through his lawyers, M/s Wetaka, Bukenya & Kizito Advocates. The 2nd Respondent represented himself and the 1st Respondent. All the Respondents had at the time of hearing this Application not filed their Responses to the Application.
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Hearing

- 20 When this matter came up for hearing on the 10th October 2022, the 2nd Respondent appeared before this honorable court and prayed for this honorable court to make a constitutional reference to the Constitutional Court for determination of the question as to whether the appointment, deployment and sitting in high court cases by among others myself as an acting judge of the High Court not being a retired judge is inconsistent with and or in contravention of **Articles 28(1), 44(c) , 126(1), 128(1) & (2), 138 (1), 142, 147 (1) (a), 149 and 257 (1) (p) of the Constitution of Uganda.**
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Parties' submissions

The 1st and 2nd Respondents submitted that the right to fair hearing underpins the security of a presiding judicial officer and it is only under **Article 142 of the Constitution** that a person can be an acting judge and that is upon retirement, and such person being allowed to act for two more years. There is no situation in the Constitution where a person that has never served as a judge can adjudicate or can exercise judicial power as defined under **Article 257(1) (p) of the Constitution**.

The 2nd Respondent relied on the case of *Charles Onyango Obbo and another Versus Attorney General Constitutional Appeal No. 2 of 2002* to pray that these proceedings be stayed pending the constitutional reference.

In reply, counsel for the Applicant submitted that the issue raised by the 1st and 2nd respondents does not warrant constitutional interpretation and as such, the matter should not be referred to the Constitutional Court as prayed. The Learned Counsel submitted that acting judges had locus to hear cases as they were appointed by His Excellency the President of the Republic of Uganda on advice from the Judicial Service Commission and approval of the Parliament under **Article 147 (1) of the Constitution of Uganda**. That the acting judges are full members of the judiciary for the duration and tenure of their appointment, duly subject to administration and supervision of the Chief Justice assisted by the Principal Judge.

It was the opinion of Counsel for the Applicant that there was no evidence that the independence of the acting judge would be undermined if she heard the

5 matter. She further submitted that **Constitutional Petition No. 15 of 2022** was filed in the Constitutional Court and there was no injunction issued by the Constitutional Court stopping the acting judges from dispensing justice and hence nothing should stop this court from hearing this matter.

10 In rejoinder, the 1st and 2nd Respondents submitted that the question for interpretation was whether the composition of the High court should include acting judges, the arguments to justify the appointment of acting judges and the intention of the framers of the Constitution are best interpreted by the Constitutional Court.

15 The 2nd Respondent further submitted that the acting judges were aware that there were proceedings against them in Constitutional Petition Number 15 of 2022 and thus continuing to hear matters and act as if nothing was happening amounted to contempt of court. The 2nd Respondent cited and relied on the case of **Geraldine Busuulwa Ssali Versus NSSF and two others HCMA No. 116 of 2016**.

20 The 2nd Respondent submitted that **Article 137(5) of the Uganda Constitution, 1995 as amended** provides that where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a field court martial, the court may, if it is of the opinion that the question involves a substantial question of law and shall, if any party to the proceedings requests it to do so, refer the question to the constitutional court for decision. That when a question of reference to the constitutional court arises from the proceedings, this court or any court is tasked to ascertain if the question suffices to be referred to the Constitutional Court. That question should relate to the powers and jurisdiction of the constitutional court i.e. constitutional interpretation. He cited

5 the case of **Ntare Adens Rutaro Versus Joel Ssenyonyi and others Constitutional Petition No. 16 of 2019** where **Hon. Christopher Izama Madrama JCC (as he then was)** observed that a question as to interpretation is a controversy about interpretation and therefore is concerned with a dispute about the meaning of statutory words even if it is related to the scope or application thereof.

10 The issue raised by the 1st and 2nd Respondents is whether the appointment, deployment and sitting in high court cases by among others myself as an acting judge of the High Court, I, not being a retired judge is inconsistent with and or in contravention of **Articles 28(1), 44(c), 126(1), 128(1) & (2), 138 (1), 142, 147 (1) (a), 149 and 257 (1) (p) of the Constitution of Uganda.**

15 **Determination**

It is judicial notice that **Constitutional Petition No. 015 of 2022-Dr. Kabumba Busingye and another Versus Attorney General** challenging the constitutionality of appointing the sixteen persons as acting judges of the High Court was filed in the Court of Appeal sitting as the Constitutional Court. The Petitioners sought the
20 following orders and declarations from the Constitutional Court:

- (a) That the advice of the Judicial Service Commission, in so far as it guided the President to make appointment 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;
- 25 (b) That the act of the President in subjecting the appointment of the 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;



- 5 (c) That the condition placed upon the appointment of the sixteen judges of the High Court to act for two years is unconstitutional; and
- (d) That the appointment of the sixteen Judges of the High Court be deemed to be permanent appointments as contemplated under Article 144 of the Constitution.

10 In the lead judgment of **Hon. Lady Justice Monica K. Mugenyi JCC (as she then was)** she found that the designation of the sixteen appointed Judges of the High Court as acting judges and for a term of two years was inconsistent with Articles 2,128,138,142 and 144 of the Constitutional and to that extent unconstitutional. Further, at page 29 of her decision in determining the issue as to whether the

15 Petitioners were entitled to the reliefs sought, she observed and held that:

“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,

20 *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 vs Attorney General & Anor., Constitutional Petition No. 10 of 2009** and **Bob Kasango vs Attorney General & Anor., Constitutional Petition No. 16 of 2016**, this judgment does not render void the*

25 *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 to conformity with the Constitution, and forestall appointments in acting capacity for freshly recruited judges”. (emphasis is mine)*

5 To this end, the Constitutional Court directed the Judicial Service Commission to take the necessary steps to regularize the appointment of the sixteen judges into substantive appointments within six months from the 7th December 2022 (the date of judgment).

This court takes judicial notice that the Attorney General has vide **Constitutional Appeal No. 007 of 2023: Attorney General vs Dr. Busingye Kabumba & Anor** lodged on the 27th September 2023 in the Supreme Court appealed against the decision of the Constitutional Court in **Constitutional Petition No. 015 of 2022-Dr. Kabumba Busingye and another Versus Attorney General**. The said appeal is yet to be heard and determined. The Appeal and an order staying the execution of Constitutional Court findings notwithstanding, this court under the principle of *stare decisis* is bound to honor the decision and opinions of the Constitutional Court.

The Court therefore finds that questions or objections raised by the 1st and 2nd Respondents in this application are substantially similar to the questions in **Constitutional Petition No. 15 of 2022 (supra)**; which was determined by the Constitutional Court. To make reference of the same question to the same court would be in contravention of the doctrine of *res judicata*.

This court therefore finds that there is no need to refer the question of my appointment and designation as an acting judge to the Constitutional Court for interpretation.

25 That said, **Article 137(6) of the Constitution states that:**



5 *“Where any question is referred to the Constitutional Court under clause (5) of this article, the Constitutional Court shall give its decision on the question, and the court in which the question arises shall dispose of the case in accordance with that decision”.*

10 It was the submission of the 2nd Respondent that his request for a reference was made under Article 137(5) of the Constitution. The Court has already determined that this request has since been overtaken by events. Secondly, a reading of Article 137(6) of the Constitution means that questions of interpretation of the Constitution that may be referred to the Constitutional Court must relate to the matter or case before that court. The Application before Court seeks to add
15 another party to the main suit as a defendant. The Applicant filed this application to add Gumisiriza Johnson Bosco as a defendant to the main suit after establishing through a search at the Ministry of Lands Registry that the suit property was transferred into his name in 2016. This Court does not need the interpretation of the Constitutional Court to determine this matter. The main suit has been in court
20 since 2019 and now falls under the case backlog docket. This court finds it in the interest of justice to proceed with the hearing of the matter to resolve all controversies involved in the suit. The facts and law relating to this Application do not in my view call for the interpretation of the Constitution. The reasoning of court is buttressed by the observation of Hon. Justice Remmy Kasule, JCC (as he
25 then was) in the case of **Ismail Serugo vs Kampala City Council & Anor., Constitutional Appeal No.2 of 1998** where he observed that:



5 “The dispute where the apparent conflict exists must be such that its resolution must be only where and after the Constitutional Court has interpreted the Constitution”.

This court has the jurisdiction to handle this matter. In the case of **Center for Health Human Rights and Development & 3 Others –vs- Attorney General & Anor, Constitutional Petition No. 22 of 2015** it was observed that:

10 *“The jurisdiction of a court or tribunal is defined by three elements: ratione personae, ratione marteriaie and ratione temporis. Whereas a court’s ratione marteriaie 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*

15 *which proceedings may be instituted”.* (emphasis is mine)

In reference of the above cited case, this court finds that it is clothed with jurisdiction to entertain this application notwithstanding that the constitutionality of my appointment and designation as an acting judge of the High Court for a period of two years in now the subject of a constitutional appeal in the Supreme Court.

20 Lastly, this court is now aware that the applicant has since filed **Miscellaneous Application No. 2322 of 2023: Kazooba Francis vs M.K Creditors Limited and 2 Others** seeking the same orders of court as in this application. The only difference being that the person he wants to add to the main suit as a defendant is Katende Frank to whom the suit property was transferred in 2020.



5 This now begs the question as to whether the two applications should not be consolidated.

Order 11 rule 1 of the Civil Procedure Rules as amended states that:

10 *“Where two or more suits are pending in the same court in which the same or similar questions of law or fact are involved, the court may, either upon the application of one of the parties or of its own motion, at its discretion, and upon such terms as it may seem fit:*

(a) Order a consolidation of those suit; and

(b) Direct that further proceedings in any of the suits be stayed until further order”.

15 In the case of **Louis Herbert Stumberg & Henry Edward Stumberg Versus Theodore Wynand Potgeiter (1970) EA 323** it was observed that consolidation of suits should be ordered where there are common questions of law or fact but should not be ordered where there are deep differences between the claims and differences in each action. Further, in the case of **Fountain Publishers Ltd & others Versus Prime**
20 **Finance Co. Ltd HCMA No. 1066 of 2020, Hon. Justice Gaswaga Duncan** observed that consolidation of suits would save courts time and other resources and ensure parties get a speedy hearing.

In the instant case, the question for determination in both Misc. No. 1257 of 2022 and Misc. Application No. 2322 of 2023 is amendment of the plaint to add
25 Gumusiriza Johnson Bosco and Katende Frank as defendants; and as persons who dealt with the suit property.



5 With the powers vested in this Court under section 33 of the Judicature Act and,
section 98 of the Civil Procedure Act; and Order 11 rule 1 of the Civil Procedure
Rules, this court this finds it befitting to consolidate both Miscellaneous
Application No. 1257 of 2022 and Miscellaneous Application No. 2322 of 2023 for
purposes of saving court's time, avoiding multiplicity of suits and in the interest of
10 a speedy hearing of the main suit. The consolidated applications shall therefore be
heard on the 28th day of March 2024 at 9:30am.

Dated and signed at Kampala this 4th day of March 2024.



Harriet Grace MAGALA

15 **Judge**

Delivered online (ECCMIS) this 7th day of March 2024.