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THE REPUBLIC OF UGANDA  
 IN THE HIGH COURT OF UGANDA AT KAMPALA  
 [CIVIL DIVISION]  
 MISCELLANEOUS APPLICATION NO. 109 OF 2021  
 (ARISING FROM MISC. CAUSE NO 264 OF 2020)

10 BAKU RAPHAEL OBUDRA:.....APPLICANT

VERSUS

ATTORNEY GENERAL:.....RESPONDENT

BEFORE: HON. JUSTICE ESTA NAMBAYO

RULING

15 The Applicant brought this application against the Respondent under **Section 33 of the Judicature Act and Order 10 Rules 12,14 and 24 of the Civil Procedure Rules** seeking for orders of this Court that: -

1. **The Judicial Service Commission makes discovery/production on oath of the following documents that are in the possession and/or control of the Commission and do avail them to the Applicant for inspection and photocopying within 5 days from the date of delivery of the ruling in this matter;**
  - a. **Communication from the Judicial Service Commission inviting nominations for the position of the High Court and Justice of Appeal/ Constitutional Court in 2017.**
  - b. **Nomination of candidates for judicial appointments from the Inspector General of Government and President of Uganda Law Society 2017.**
  - c. **Minutes of short listing meeting(s) for appointments to the position of judges of High Court and Justices of Court of Appeal/Constitutional Court for the recruitment done in 2017.**

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- d. Minutes of short listing meeting(s) for appointments to the position of Judges of the High Court and Justices of Court of Appeal/Constitutional Court for the recruitment done in 2019.
- e. Communication from the Judicial Service Commission to the Law Council about short listed candidates for the position of Judge of the High Court and Justices of Court of Appeal/Constitutional Court in 2019.
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- f. Response from the Law Council to the Judicial Service Commission concerning the candidature of the Applicant for appointment as Judge of the High Court and Justice of the Court of Appeal/Constitutional Court in 2019.
- g. Response from the Uganda Law Society to the Judicial Service Commission concerning the candidature of the Applicant for position of Justice of Court of Appeal/Constitutional Court in 2019.
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- h. Minutes of the meeting(s) at which the responses from the Law Council and Uganda Law Society concerning the candidature of the Applicant for the position of Justice of Court of Appeal/Constitutional Court was considered.
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- i. Minutes/record of the interview proceedings for the position of Justice of the Supreme Court for the recruitment done in 2019.
- j. Minutes of the interview proceedings for the position of Chairperson, Deputy Chairperson and member of Leadership Code Tribunal for the recruitment done in 2019.
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- k. Communication from the Judicial Service Commission to H.E the President concerning the appointment of Justices of the Supreme Court, Chairperson, Deputy Chairperson and members of the Leadership Code Tribunal for the recruitment done in 2019.

**2. Costs of this application be provided for by the Respondent.**

60 The grounds of this application are set out in the affidavit in support of the application, sworn by Baku Raphael Obudra, the Applicant, but briefly are that: -

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- i. **The Applicant has applied to this Court for enforcement of his Constitutional rights under Art. 50 of the 1995 Constitution of Uganda and the application is pending before this Court as Misc. Cause No.264 of 2020.**
  - ii. **The documents applied for are in the possession or under the control of the Judicial Service Commission.**
  - iii. **The documents the discovery of which is applied for are necessary for fair and just determination of the application in Misc. Cause No.264 of 70 2020.**
  - iv. **The documents applied for are necessary to be used in Misc. Cause No.264 of 2020 to ensure that the Applicant's non-derogable right to a fair hearing is upheld and respected.**
  - v. **It is in the interest of fairness, justice and constitutionalism that the 75 application is granted.**

Mr. Ronald Ssekagya, the Acting Secretary to the Respondent filed an affidavit in reply opposing this application.

### **Background to the application.**

80 The brief background to this application is that the Applicant applied to the Respondent for the position of Judge of the High Court and Justice of the Court of Appeal/Constitutional Court in 2017 but was neither shortlisted nor invited for interviews yet he was qualifying. In 2019, the Applicant applied for the position of Justice of the Supreme Court, Chairperson, Deputy Chairperson and Member of the Leadership Code Tribunal, 2019 and appeared for interviews. Justice Benjamin 85 Kabiito, Chairperson of the Judicial Service Commission, chaired the panel when the Applicant appeared for interviews for Justice of the Supreme Court while Justice Faith Mwendha, Deputy Chairperson of Judicial Service Commission, was chair of the

panel when the Applicant appeared for interviews for Chairperson and Deputy  
Chairperson of the Leadership Code Tribunal. Hon. Mwesigwa Rukutana, then  
90 Deputy Attorney General joined the panel while the Applicant was appearing before  
Justice Mwendha. The Applicant contends that all the above officers were biased  
against him and that when he appeared before the panel for assessment for  
appointment as member of the Leadership Code Tribunal, Ms. Ruth Ssebatindira  
who chaired the panel, was an unauthorized person and that there was no quorum.  
95 That the Applicant requested for proceedings when he appeared for the above  
interviews and an explanation for not being shortlisted for the 2017 interviews for  
Judge of the High Court and Justice of the Court of Appeal/ Constitutional Court,  
but the Chairperson of Judicial Service Commission, Justice Kabiito, has failed to  
avail to him the same. That is why he filed Misc. Cause No. 264 of 2020, for breach  
100 of his fundamental rights and MA No. 109 of 2021 for discovery of the interview  
proceedings, documents used to shortlist candidates for the 2017 interviews and the  
recommendation of successful candidates for appointment as Justices of the  
Supreme Court to the appointing authority.

### **Representation**

105 Learned Counsel Bateyo Kenneth represents the Applicant while Mr. Hillary Ebila  
Nathan, State Attorney, is for the Respondent. Parties were directed to file written  
submissions which they did. The following are the issues for trial: -

1. **Whether the Respondent should deliver the required documents to the Applicant.**
- 110 2. **Remedies available to the parties**

## Submissions

### 115 **Issue 1: Whether the Respondent should deliver the required documents to the Applicant.**

Counsel for the Applicant submitted that the pleadings of the Respondent which seek to restrict access to information on the basis of confidentiality are untenable in law. He relied on Sections 26(1), 28, 33 and 34 of the Access to Information Act, 2005 and Article 41(1) of the 1995 Constitution of Uganda. He explained that the law cannot be interpreted and applied to overrun the clear and unambiguous provisions of the Constitution. He relied on the case of *Spear Motors Ltd -v- Attorney General & 2 Ors HCCS No. 692 of 2007* where Justice Mulyagonja, (as she then was) noted that there cannot be a fair hearing if the minutes in dispute were left out of the evidence because they are relevant. Counsel went on to rely on the holding of Justice Mulyagonja in the same case at page 37 where the Judge made observations on S. 122 of the Evidence Act and the case of *Attorney General -v- David Tinyefuza CA No.1 of 1991* on fair hearing. He further cited Arts. 20 and 2(1) of the Constitutional and submitted that the Respondent is under obligation to give the Applicant access to the required information. Counsel prayed basing on the above provisions of the law and the findings of Justice Mulyagonja, that this application be granted.

In reply, Counsel for the Respondent submitted that this application seeks for evidence in a disguised manner through this discovery and inspection of the documents. He relied on S. 28(1) (b) (i) and (ii) of the Access to Information Act, 2005 which is to the effect that the Respondent may refuse to disclose information or documentation obtained from 3rd parties if disclosure of such information is likely to jeopardize the future supply of such information by the said 3rd party and yet it is in public interest that the 3rd party continues to supply information to the

Respondent. Counsel referred this Court to paragraphs b, f and g of the Applicant's  
140 Chamber Summons and explained that in this case, the Uganda Law society and the  
Law Council are integral in the recommendation of members of the Bar for  
appointment to the Bench and that any disclosure of information from those  
institutions would jeopardize the future supply of information to the Judicial Service  
Commission. He relied on the case of *Patricia Mutesi -v- Attorney General MA No.*  
145 *912 of 2016* where Musota, J, (as he then was) held that: -

*“a court is responsible for protecting against unreasonable investigation into a  
party’s affairs and must deny discovery if it is intended to annoy, embarrass,  
oppress or injure the parties or witnesses who will be subjected to it. A court  
will stop this discovery when used in bad faith and if the information to be  
150 produced is privileged.”*

In regard to paragraph a of the Chamber Summons, Counsel submitted that the  
information sought by the Applicant is already in the public domain. He prayed that  
this application be dismissed for lack of merit.

### **Analysis**

155 **S. 28(1) of the Access to Information Act provides that subject to subsection (2),  
an information officer—**

(a) \_\_\_\_\_

(b) **may refuse a request for access to a record of the body if the record consists  
of information that was supplied in confidence by a third party—**

160 (i) **the disclosure of which could reasonably be expected to prejudice  
the future supply of similar information, or information from the  
same source; and**

**(ii) if it is in the public interest that similar information, or information from the same source, should continue to be supplied.**

165 In this case, under paragraph b of the application, the Applicant seeks access to documents of nomination of candidates for judicial appointments from the Inspector General of Government and President of Uganda Law Society for 2017. Under paragraph f and g of the application, the Applicant seeks for information from the Law Council and the Uganda Law Society to the Judicial Service Commission about  
170 his candidature for appointment as Judge of the High Court and Justice of the Court of Appeal/ Constitutional Court. The record sought consists of information that was supplied in confidence to the Judicial Service Commission from his former place of work, the Law Council and the Uganda Law Society. The Law Council and the Uganda Law Society are bodies which recommend Advocates in private practice for  
175 interviews and nominations to the Bench. They are 3<sup>rd</sup> parties to this application and the Applicant has presented no evidence before this Court to confirm that they have given consent to release the information required by the Applicant. Disclosure of the information required by the Applicant from the said Institutions would prejudice future supply of such information and yet Judicial Service Commission needs such  
180 information in order to execute its mandate under Art. 147 and 148 of the Constitution. Therefore, an order to the Respondent to release the information required by the Applicant from the Uganda Law Society, the Law Council and the Office of the Inspectorate of Government (the Applicant's former employer) without their consent when they are third parties to this application may prejudice the future  
185 supply of similar information, or information from the said institutions.

I also find it not proper to direct the Respondent to avail the required minutes of the meetings requested by the Applicant because issues regarding the confidential information supplied on candidates applying to join the Bench are discussed and

reflected in the minutes of those meetings. Therefore, by so releasing the minutes of  
190 the meetings, this Court would in effect release the confidential information supplied  
by the Uganda Law Society, the Law Council and the Office of the Inspectorate of  
Government against the Applicant to the Judicial Service Commission.

Under paragraph k of his application, the Applicant seeks for access to information  
from the Judicial Service Commission to HE the President concerning the  
195 appointment of Justices of the Supreme Court, Chairperson, Deputy Chairperson and  
Members of the Leadership Code Tribunal for the recruitment done in 2019.  
***S.16 of the Judicial Service Act, Cap 14 provides that unless  
the chairperson consents in writing to the production or disclosure, no person  
shall in any legal proceedings be permitted or compelled to produce or disclose  
200 any communication, written or oral, which has taken place between —***

***(a) the commission or any member or officer of the commission and the  
President, Vice President, a Minister, the Public Service Commission or any  
member or officer of it or a public officer;***

***(b) any member or officer of the commission and the chairperson; or***

205 ***(c) any members or officers of the commission, in the exercise of or in  
connection with the exercise of the functions of the commission.***

The above provision of the law means that the Chairperson of Judicial Service  
Commission must give his consent in writing for Communication between the  
Commission and HE the President. This Court cannot compel the Respondent (JSC)  
210 or any officer from JSC to produce or disclose information communicated by the  
Respondent (Judicial Service Commission) and HE the President without written  
consent from the Chairperson of JSC. Therefore, this Court declines to grant the  
request made by the Applicant in paragraph k of this application.

In the result, I find no merit in this application which I do hereby dismiss with costs.



215 I so order.

**Dated, signed and delivered on line this 1st day of the July, 2021.**

**Esta Nambayo**

**JUDGE**

220 **1<sup>st</sup> /07/2021.**