

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 915 OF 2021

[ARISING OUT OF MISC. APPLICATION NO. 843 OF 2021]

[ARISING OUT OF MISC. CAUSE NO. 287 OF 2021]

MALE H. MABIRIZI K. KIWANUKA:::::::::::::::::::::::::::::::::APPLICANT

VERSUS

ATTORNEY GENERAL::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This is an application brought under Art. 28(1), 44(c), 126(1) and 137(5) of the Constitution, S. 33 and 39 of the Judicature Act. The applicant seeks the following orders. That;

1. The question ***“Whether the action of judge Ssekaana Musa under investigation by Judicial Service Commission to sit in a case of his complainant without requesting the complainant’s opinion is inconsistent with and/or in contravention of Articles 28(1), 44(c), 144(2) and 147(1)(d) of the Constitution”*** be referred to the Constitutional court.
2. The proceedings in and arising out of **M.A No. 848 and 846 of 2021** be stayed pending determination of the reference.
3. The costs of this application be personally and individually paid to the applicant by Ms. Patricia Mutesi, Assistant Commissioner and Mr. Jimmy Oburu Odoi, Principal State Attorney in Ministry of Justice and Constitutional Affairs.

The grounds for the application are, that;

1. The question raises a serious matter for constitutional interpretation Court is obliged to refer once a party has applied.
2. It is fair to stay proceedings pending determination of the reference.
3. Its fair and equitable that the application is allowed.

The application is supported by the affidavit of **MALE H. MABIRIZI K. KIWANUKA**, the applicant. In summary; the applicant is under a belief that by him requesting the Judicial Service Commission to remove Judge Ssekaana Musa from office as a judge for misconduct and incompetence, the investigation into the allegations by the commission that ensued, coupled with the judge's directive to the court registry staff to stop receiving the applicant's new cases; animosity has bred between the judge and himself. That the judge's impartiality in cases involving the applicant will reasonably be called into question.

The Respondent, in opposition to this application filed an affidavit by Oburu Odoi Jimmy, a Principal State Attorney in the respondent's chambers. The response of the Respondent is that; the proposed question for reference to the Constitutional court does not require the interpretation of the cited articles of the Constitution, but rather its resolution would only require the application of the said articles and/ or the enforcement of the applicant's rights. Further, that it is not in the interest of justice to stay proceedings in M.A 843 of 2021.

The applicant did not appear in court on the day fixed for hearing but the respondent was represented by *Patricia Mutesi-Assistant Commissioner*.

### **Analysis**

The law on Constitutional references to the Constitutional court is provided for under *Art. 137(1), (5) (a) and (b)* of the Constitution which provide that;

#### ***137. Questions as to the interpretation of the Constitution.***

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

.....

**(5) 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—**

**(a) may, if it is of the opinion that the question involves a substantial question of law; and**

**(b) shall, if any party to the proceedings requests it to do so, refer the question to the constitutional court for decision in accordance with clause (1) of this article.**

The provisions have been a subject of court interpretation. In ***Emmanuel Nagoli – v-Attorney General and another Constitutional Reference No. 7 of 2006***; Okello, JA with the concurrence with the rest of the court succinctly stated that;

*“It will be seen from Article 137(5) (a) of the Constitution that the High Court may, if it is of the opinion that the question (as to the interpretation of the Constitution) involves a substantial question of law, refer the question to the Constitutional court for interpretation and the High Court must consider,*

- 1. Whether there is a constitutional question requiring interpretation of the Constitution under Art. 137(1)*
- 2. Whether the question involves a substantial point of law*

*If the answer to both questions is in the negative, then the question of references does not arise at all. If the answer to both is in the affirmative, then the judge may refer the question to the Constitutional Court and must refer the question if requested by a party or parties to the proceedings. If the answer to (1) above is in the negative, then the question (2) does not arise and therefore no reference can be made.*

*The sum total of all this is that the decision to make a reference to the Constitutional court is entirely in the discretion of the trial judge guided by Art. 137(5) (a). Compliance with article 137(5) (b) will follow only if:*

- There is a question for interpretation*
- The question involves a substantial question of law*

Guided by these principles, the main issue for determination therefore is;

### ***Whether there is a question for interpretation of the Constitution?***

This issue springs from the jurisdiction of the Constitutional court.

On jurisdiction, the words of the late Justice V.F. Musoke-Kibuuka, J(RIP). in ***Kasibante Moses v Katongole Singh Marwaha & Anor (Kampala Election Petition 23 of 2011)*** are instructive. He stated thus;

*“The term jurisdiction is not a term of art. It is a term of law. It is a term of very extensive legal import. It embraces every kind of judicial action. It confers upon the court, the power to decide any matter in controversy. It pre-supposes the existence of a duly, constituted court with full control over the subject matter under adjudication. It also presupposes full control by the court of the parties to the subject matter under investigation by it. Jurisdiction defines the power of a court to inquire into facts, to apply the relevant law, to make decisions and to declare the final outcome of the subject matter under its inquiry.”*

In other words, for this court to invoke the mandate of the Constitutional court under Article 137(5) (b), it must be a matter in which the constitutional court has power to exercise its jurisdiction as restricted under Article 137(1). The question for referral must, prima facie be one that *“requires constitutional interpretation”*.

On jurisdiction of the Constitutional court, in ***Attorney General v Major General David Tinyenfuzza, Supreme Court Constitutional Appeal No. 1 of 1997***, Wambuzi, C.J. stated thus: -

*“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.” (Emphasis added).*

He further stated that;

*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.”*

*A constitutional question requiring interpretation of the constitution must be one that raises a controversy as to whether or not the said 'acts' and 'omissions' are constitutionally permissible or not. See: **Alenyo v The Chief Registrar Courts of Judicature and 2 others Constitutional Petition 32 of 2014.***

Therefore, the questions before this court are these;

1. Does the question proposed by the applicant depend, for its determination, on the interpretation or construction of a provision of the Constitution namely; **Articles 28(1), 44(c), 144(2) and 147(1) (d)**?
2. Does the application show, on the face of it, that interpretation of a provision of the Constitution is required?

The short answer is, no.

I have read the Notice of Motion and the affidavit in support of the motion. I find that the application falls far short.

There is nothing in the Notice of motion and affidavit in support showing that the question proposed or that a question which arose in the proceedings of **HCMA No. 843 of 2021** depends, for its determination, on the interpretation or construction of the cited provisions of the Constitution.

The applicant has not demonstrated to this court either by Notice of Motion, affidavit in support or otherwise, that there is anything unclear, confusing or controversial about Articles 28(1), 44(c), 144(2) and 147(1) of the Constitution.

This explains the misguided nature of ground 2 in the Notice of motion by which the applicant attempts to oust the duty of this court to inquire into whether the question is one that calls for interpretation of the constitution before referring it to the Constitutional court.

In ***Re: Sheik Abdul Karim Sentamu and Another ((Constitutional Reference No. 7 of 1998))***, court was faced with almost similar circumstances. The trial judge had, at the invitation of a party to the case, made a reference to the Constitutional court without investigating whether, the question actually required interpretation of the Constitution. Court stated thus;

*“It seems to us that the trial Judge thought that if any party to the proceeding requests a reference to the Constitutional Court, then the Court was bound to accede to his request. In our view the duty to refer the question if a party so requests, is subject to a question as to the interpretation of the Constitution arising in the proceedings before the court. This is clear from the provisions of Art. 137 (5) which provides.....*

*However much a party may request, he cannot have referred a matter that does not involve interpretation of the Constitution. Nor can the party give the court jurisdiction which the court does not have by law.....”*

What I discern from the applicant’s Notice of motion and affidavit in support is this. He believes his complaint to the Judicial Service Commission and the investigations by the Commission into the judge’s alleged misconduct have bred animosity between the judge and himself to the extent that the judge directed the court registry staff not to receive the applicant’s new cases. That the same judge is on a mission to send him to Luzira and is therefore unlikely to accord him a fair hearing in HCMA No. 843 of 2021 from which the present application arises.

On the face of it, the applicant anticipates an abuse of his right to a fair hearing. He however does not show, by his notice of motion or affidavit in support how, any of the actions or omissions complained of poses, in relation to the Articles of the Constitution cited, a controversy or uncertainty so as to elicit information of an interpretive nature from the Constitutional court.

The applicant’s sentiments cannot be the basis of making a reference to the Constitutional court. This court is alive to the fact the applicant is bent at frustrating the trial of the main application for contempt which is pending before this court by filing endless applications and this is an abuse of court process. The applicant’s ‘legal gymnastics’ and mind games being brought to court shall not deter the court from exercising its jurisdiction or executing its constitutional mandate.

In the result, I am inclined to concur with the respondent that the proposed question for reference to the constitutional court does not require the interpretation of the cited articles of the constitution but rather its resolution

would only require the application of the said articles or rather the enforcement of the applicant's rights.

All courts are empowered and mandated to apply the provisions of the Constitution. Not every breach of the constitution requires interpretation of the constitution. See ***Ismail Serugo v Kampala City Council & Another, Constitutional Appeal No. 2 of 1998.***

I accordingly dismiss this application with costs to the respondent.

I so order.

**SSEKAANA MUSA**  
**JUDGE**  
**27<sup>th</sup> January 2022**