IN THE SUPREME COURT OF UGANDA

HOLDEN AT MENGO

CORAM: WAMBUZI CJ, ODER, TSEKOOKO, KAROKORA,
MULENGA, KANYEIHAMBA & MUKASA-KIKONYOGO, JJSC.

CONSTITUTIONAL APPEAL NO. 2 OF 1998

BETWEEN

ISMAIL SERUGO……………………………………..APPELLANT

AND

KAMPALA CITY COUNCIL)
ATTORNEY GENERAL)……………………….RESPONDENTS

(Appeal From decision of the Constitutional Court (Manyindo DCJ, Kato, Berko, Engwau and Twinomujuni, JA)
At Kampala, dated 30th April, 1998 in Constitutional petition No.14/97)

JUDGMENT OF WAMBUZI, CJ

I had the benefit of reading in draft the judgment prepared by Mulenga, J.S.C. which sets out the facts. Both respondents raised preliminary objections in the Constitutional Court and asked the Court to strike out the petition without reference to any law applicable. Equally the constitutional court upheld the objections without reference to any law applicable.

The Learned Justice of the Supreme Court referred to a number of provisions of the Civil Procedure rules which could have been relevant and I agree that different considerations are taken into account depending on what law is applied. Counsel on both sides have put forward different provisions under which the Constitutional Court could have arrived at its conclusions.

In my view, it is important to note that both respondents asked the Constitutional Court to strike out the petition and that the remedy granted. The relevant provisions in this regard would appear to be Order 7 Rule 11 or Order 6 Rule 29.
Order 7 Rule 11 provides as follows in so far as is relevant:

> *"The plaint shall be rejected in the following cases-*
> *(a) where it does not disclose a cause of action….*
> *(b) Where the suit appears from the statement in the plaint to be barred by any law………"*

And in so far as is relevant order 6 Rule 29 provides as follows:

> "*The Court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action and, in such case, may order the suit to be stayed or dismissed or judgment to be entered accordingly……"*

I agree that in either case, that is whether or not there is a cause of action under Order 7 Rule 11 or a reasonable cause of action under order 6 Rule 29 only the plaint can be looked at. See ***Auto Garage v Motokov (No. 3) 1971 E.A 514***

In the instant case the Constitutional Court considered not only the petition but also the answers to the petition. It considered all the pleadings. The Learned justice of the Supreme Court did refer to provisions in the Civil procedure rules under which the Constitutional Court could have tried issues of law first, which in my view is what the Court did in effect,

although the end result should have been a dismissal of the suit and not a striking out of the petition. See O.6 Rules 27 and 28 and O.13 Rule 2 of the Civil Procedure Rules.

Although both counsel for the Respondents raised preliminary objections they asked the Court in effect to dispose of the petition on the legal issues raised. They supported their arguments by reference to the petition and answers and to the affidavits. There was no objection by the appellant to the course taken. The Constitutional court gave a well-reasoned ruling and I do not see that there was any miscarriage of justice in adopting this course.

I agree that although there may be a cause of action against the second respondent that action is not maintainable and irrespective of what declarations may issue the action was brought alleging specific acts by the second respondent. If action is not maintainable in respect of those acts I see no alternative but to dismiss the petition as against the second respondent.

I also agree that the appellant may have a cause of action or causes of action against the first respondent, but here I would like to refer to the specific acts complained of in respect of the first respondent. Paragraphs 1 (a), (b), (e) and (g) of the petition provided as follows:

> "(a) the act of the first respondent's officers in arresting the petitioner without a warrant or a court order issued to them is contrary to article 23 (i) of the Constitution.
>
> (c) the act of the first respondent's officer in preferring charges against the petition in respect of acts that did not constitute an offence and without telling him the nature of the offence resulting in the admission of facts did not constitute an offence is contrary to article 28 (3) of the Constitution……
>
> (e) the act of the respondents jointly and/or severally in arresting, charging, convicting, sentencing and detaining the petitioner on facts that did not constitute an offence denied the petitioner of the equal protection of the law, contrary to article 21 (1) of the Constitution……..
>
> (g) the act of the respondents in causing the arrest, conviction and subsequent detention of the petitioner hence denying him his rights to be with his family is inconsistent with the Constitution for being contrary to article 31 (4) and (5) of the Constitution……."

The constitutional court found, and I agree, that apart from causing the arrest of the appellant, the first respondent was not responsible for any of the acts referred to in paragraphs (b),(e) and (g) of the petition.

The only issue therefore appears to be in paragraph (a) of the petition which is that the appellant was arrested without a warrant contrary to article 23 (1) of the Constitution. This fact of arresting without a warrant is admitted. The appellant was arrested on suspicion of having committed or being about to commit an offence which is permitted under paragraph (c) of Article 23 (1) of the Constitution. Accordingly there is nothing put in issue which requires interpretation of those provisions of the Constitution.

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.

If therefore any rights have been violated as claimed, these are enforceable under Article 50 of the Constitution by another competent Court. The article provides in so far as is relevant.

> "(1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation…….."

Here the appellant alleges his rights were violated and claims compensation. One cannot rule out malicious prosecution, wrongful detention or false imprisonment. These are matters dealt with by specific laws. They can be enforced by a competent court and should a question of interpretation of a provision of the Constitution arise, that question can always be referred to the Constitutional Court. I am aware that the Constitutional court is also a competent court under Article 50 but this Court has already held that the Constitutional Court has no jurisdiction in any matter, which does not involve the interpretation of a Provision of the Constitution. See ***Attorney General v Tinyenfuza Const. App. No.1 of 1997.***

For the foregoing reasons, I would up-hold the finding of the Constitutional Court that the court has no jurisdiction in respect of the claim against the first respondent. For the foregoing reasons I would dismiss the appeal. I would set aside the order of the Constitutional court striking out the petition and the order for costs and would substitute therefore an order dismissing the petition. I would order each party to bear its own costs here and in the Court below.

The majority view and therefore the decision of this Court is that the appeal should be dismissed, each party to bear its own costs here and in the Court below and it is so ordered. The order for costs made by the Constitutional Court is accordingly set aside.

Dated at Mengo this 11th day of June 1999

S.W.W.WAMBUZI

CHIEF JUSTICE

JUDGMENT OF KANYEIHAMBA, J.S.C.

This is an appeal from the ruling and order of the Constitutional Court upholding the preliminary objections raised by the two respondents before that court.

The brief facts leading to this appeal are as follows: on 5/9/1997, the appellant, Ismail Serugo, was arrested by an official of Kampala City Council by the name of Steven Mungoma. On the same day, the appellant was taken to the Magistrate Grade II's Court at Kampala City hall where he was charged with the offence of obstructing a police Officer on duty, contrary to Section 106 of the Penal Code Act. The Appellant pleaded guilty to the charge. He was convicted and sentenced to four months imprisonment. He appealed to the Chief magistrate, Buganda Road Court, against conviction and sentence. His appeal was allowed on the ground that he had been convicted of a non-existent offence. On 22.10.1997 he was released from prison.

Thereafter, he filed a petition before the Constitutional Court seeking a declaration that the acts of the servants of the respondents were inconsistent with the Constitution and violated his fundamental human rights as contained in Articles 21(1), 23, (1), 28 (7) and (12), 25 (2) and 31 (4) and (5) of the Constitution. The appellant prayed for compensation of shs 5,000,000/=, per day for the 50 days he was in detention.

When the petition came up for hearing, counsel for the respondents raised three preliminary objections, namely,

1. That the petition had been brought against the wrong parties
2. That there was no Constitutional issue requiring the interpretation by the Court
3. That the petition is time barred.

After hearing the evidence and submission, of counsel for the parties, the Constitutional court upheld the objections on 20/2/1998, and reserved its reasons which it gave on 30th April, 1998, and ordered costs to be paid to the respondents. It is against the judgment and orders of that court that the appellant has now appealed to this court. the memorandum of Appeal contains 10 grounds of appeal framed as follows:-

1. The learned judges of the Constitutional Court erred in law and on the facts when they struck out the appellant's petition

before the constitutional Court on preliminary objections on points of law.

2. *The learned Judges of the Constitutional court erred in law and on the facts when in deciding the preliminary objections raised by the respondents they in effect decided the substantive merits of the appellant's petition.*

3. *The Learned judges of the Constitutional Court erred in law and contradicted themselves on the facts when they upheld the preliminary objections that:-*

   (a) *The appellant had no cause of action against the 2nd respondent.*

   (b) *The Constitutional court had no jurisdiction in the matter as there was no question requiring the interpretation of the Constitution under Article 137.*

   (c) *The petition was time barred.*

4. *The learned judges of the constitutional Court erred in law when they failed to give effect to the rights and freedom (sic) of the appellant guaranteed under the Constitution and instead relied on earlier statutes common law decisions or enacted or developed before the enactment of the 1995 Constitution.*

5. *The learned judges of the Constitutional Court erred in law and on the facts when they found and held that the petition of the appellant did not raise any matters for the interpretation of the Constitution.*

6. *The Learned Judges of the Constitutional Court erred in law and on the facts when they failed to find that the acts complained of by the appellant in his petition required the interpretation of the 1995 Constitution as to whether or not they were consistent or contravened the specified constitutional provisions as to require, a declaration and grant of an appropriate redress.*

7. *the learned Judges of the Constitutional court erred in law and on facts when they decided that the Constitutional Court was only for the interpretation of the Constitution and not enforcement and since the appellant's position did not involve*

matters of interpretation of the Constitution then the Constitutional Court had no jurisdiction.

8. *The Learned Judges of the Constitutional Court erred in law and on facts in not finding that the enforcement of rights and freedoms guaranteed under the 1995 Constitution involved simultaneously the interpretation of the Constitution and vice versa.*

9. *The Learned Judges of the Constitutional court erred in law and in fact when determining whether the appellant's petition was time barred, they failed to first determine whether Rule 4 (1) of the legal Notice No.4 of 1996 contravened or was inconsistent with the Constitution in as far as its (sic) forecloses by setting time limitations on the enforcement of the fundamental rights and freedoms of individuals guaranteed under the 1995 Constitution.*

10. *the Learned Judges of the Constitutional court erred in law and on the facts when they failed to overrule and, relied on the judgment in Sepiriano Rukundo and Attorney General, Constitutional Case No: 3 of 1997 which judgment was made per incurium (sic) and was inconsistent with the 1995 Constitution of the Republic of Uganda*

First, I am constrained to make a comment on the long, and in my opinion, unnecessary numbers of grounds of appeal. They offend against the rules of this Court and, in particular , Rule 81 (1) in that they are narrative, argumentative and imprecise.

The tendency amongst some advocates to enumerate as many points from judgment with which they disagree , without caring whether those grounds constitute separate and concise grounds of appeal upon which the appellate court can found its judgment is mot unfortunate and should be discouraged. Subsequently, and as an afterthought, almost all the advocates who thrive on this tendency will be heard or discovered combining two or more of such grounds and stating that they will argue those grounds or points as if they had become one ground. Thus, in this particular appeal, Mr. Mbabazi, counsel for the appellant, submitted:

> "2 in arguing this appeal, the appellant shall argue the ten 91) 0 grounds of appeal stated in the memorandum of Appeal as hereunder:-

(a) Ground 1,2, and 3 shall be urged 9sic0 jointly are accordingly hereto consolidated

(b) Ground 4

(c) Ground 5 and 6 jointly and are consolidated

(d) Ground 7 and 8 jointly and are consolidated

(e) Ground 9

(f) Ground 10"

It is a mystery as to why the appellant did not frame six grounds of appeal only instead of the staggering 10 grounds.

In any event, further examination of the grounds of appeal shows that ground one is not a ground at all. Of course if the Constitutional Court has to strike out a petition, it must do so on points of law. There is a mix up between ground 2 and 4, a duplication in grounds 3 and 5and some confusion in ground 10 in that counsel refers to the decisions as as a decision per incuriam when this matter was not specifically raised in the courts below.

This appeal is against the judgment of the Constitution Court upholding submissions on preliminary points of law. it is not about the merits of the case. In my opinion, once preliminary objections are upheld, trial and findings on facts and law become irrelevant or premature. A person wishing to appeal against the decision of a court upholding a preliminary objection must confine himself to disposing of the preliminary objection. This is the essence of the decision referred to by counsel for the appellant in *Everett v Ribbands And Onor (1952) 2 Q.B. 198.* when referring to the judgment of Romer L.J. who said:

> *" For myself, I think it is a pity that this point was not set down as a preliminary point of law before the hearing. The point of law, if decided, as it has been against the plaintiff, would have been decisive of the case."*

This appeal has been conducted mainly by written submissions in accordance with the provisions of Rule 93 of the Rules of this Court and partly by oral submissions. In my opinion, the ruling and reasoning of the Constitutional Court together with the principles upon which this appeal is based indicate quite clearly that the only ground which is validity listed is ground three of the appeal. The others are either mere amplifications of that same ground or superfluous and irrelevant. It is possible that this tendency will only be discouraged if expeditions of advocates in futility, verbosity and wilderness are taken into account in the awards of costs regardless of the results in trials and appeals.

My judgment will be confined to the pertinent issues raised in ground three of appeal and as argued by counsel for the parties in the Constitutional Court and this court. ground 3 of the appeal contains the following:

> "3 the Learned judges of the Constitutional Court erred in law and contradicted themselves on the facts when they upheld the preliminary objections that:
>
> (a) the appellant had no cause of action against the 2nd respondent.
>
> (b) The Constitutional court had no jurisdiction in the matter as there was no question requiring the interpretation of the Constitution under Article 137.
>
> (c) The petition was time barred."

On paragraph (a) of ground three, which the appellant has joined and consolidated with grounds 1 and 2, Mr. Mbabazi, counsel for the appellant, contended that the procedure under which respondents sought to challenge the petition on preliminary objections was defective in law. The respondents should have but did not commence their submissions on preliminary objections by way of a formal application as required by the Civil procedure Act or Civil Procedure Rules. Neither the respondents nor the Constitutional Court stated any provisions of the law under which such preliminary objections were lodged and determined. Counsel pointed out that in all cases where a party has sought the plaint or poetition to be dismissed on preliminary objections, it has been necessary to move court formally under a specific rule of authority.

Counsel cited the following orders and Rules of the Civil procedure rules: Order 6 rules 27,28 and 29, Order 7 rile 11, Order 13 rule 2, and cases such as *Express Electrical Engineers v Contractors and Uganda Posts and Telecommunications Corporation, U.C.A , Civil Appeal No 8 of 1980. Aimer Singh v Michael Notlain (1952) 19 EACA 117 , Nurdin Dewji & others v G.M.M Meghji & Co. 91953) 20 EACA 132, AND Wycliff Kiggundu v Attorney general , SCCA BO 27 OF 1993 (unreported*), in support of the requirements for lodging an application to make preliminary objections. Counsel proceeded to state and review English law and cases on the subject of preliminary applications and objections such as *Habbuch and Sons ltd v Wilkinson, Heywood and Clark Ltd (1899) Q.B. 86, Everett v Ribbands and Anor (1952) 2 Q.B. 198, AND Drummond-Jackson v British medical association and others (1970) IWLR 689* and concluded that hitherto, the accepted traditional view is that the power to strike out a plaint should only be used in plain and obvious cases. He observed that it is only in the context of a plaint being scandalous, frivolous or vexatious or where it is likely to "prejudice, embarrass or delay the fair trial of the action "or it "otherwise an abuse of the process of the court," that it would be struck out.

Counsel argued that since in his petition the appellant had indicated that he was arrested, charged, convicted and sentenced in respect of a non-existent offence and was then seeking a declaration that his constitutional rights had been infringed, the Constitutional Court erred in holding that appellant had no arguable case or chances of success. Counsel further submitted that to hold that the acts of judicial officers were protected by law would render Article 28 (12) and the right guaranteed therein meaningless and without a remedy or relief. Counsel further submitted that by holding that the appellant had no cause of action for a Constitutional redress, it had, in turn, decided that the appellant was entitled to no relief even from the ordinary court.

Counsel further submitted that there was a difference between holding that a petition did not disclose a reasonable cause of action and that the petition did not disclose a cause of action at all Consequently , it was counsel's contention that there was an error committed by the Constitutional Court. He asked this court to allow the appeal on this ground.

Mr. Sendege, Counsel for the 1st Respondent, submitted that the petition of the Appellant was properly struck out by the Constitutional Court because it did not disclose a reasonable cause of action. He further submitted that the principles to be followed in cases where pleadings are sought to be struck out on the ground that they disclose no reasonable cause of action, are set out in a number of cases such as *Lubbock & Sons Ltd v. Wilkson, Heywood and Clerk Ltd, [7] [1899], 1. WB.86 and Sarwan Singh v. Notkin [1952] 19 EACA 117.* He also cited the case of *Republic of Peru v. Peruvian Guano Company [6] [1877], 36 CH 489*. He contended that these cases support the proposition that

> *"When the pleading discloses a case which the Court is satisfied will not succeed then it should strike it out and put a summary end to litigation"*

Learned Counsel further submitted that there is a wealth of authorities that the government is not liable for acts committed by judicial officers in their purported discharge of judicial duties. He further submitted that the Appellant had wrongly sued the 1st Respondent since Magistrates are recruited, deployed and paid by the Central Government under the Magistrates Court Act.

Mr. Sendege concluded on this ground by submitting that there was therefore no way the 1st Respondent could have been held liable for acts of judicial officers who are not its employees. On the Appellant's contention that the Respondents had not formally moved the Constitutional Court to strike out the petition, learned Counsel for the 1st Respondent argued that since it is in the Courts' discretion to decide whether or not to allow informal applications to strike out and save time, the argument by the Appellant that the Respondents should have filed formal motions on the matter is not relevant.

For the 2nd Respondent, Mr. Tumwesigye, the Director of Civil Affairs, also tendered written submissions. On paragraph (a) of ground three of appeal, learned Counsel for the 2nd

Respondent argued that for a plaint to disclose a cause of action it must have three elements, namely, an averment that the claimant enjoyed a right, that that right had been violated and the Defendant is liable. It was Counsel's contention that the last element was missing in the petition from which this appeal originated. He further submitted that the Constitutional Court has power to determine the petition on a point of law at the commencement of the proceedings. He observed that a court has a measure of discretion on how to regulate its procedure and how to hear preliminary objections, Mr. Tumwesigye cited order 7 r.11 of the Civil Procedure Rules and the case of *Auto Garage v Motov [1971] E.A 5141*, in support of his submissions. He further submitted that the law creates a bar to any proceedings against the Government for acts of judicial officers in the exercise of judicial functions. In support of this legal exemption, Counsel cited Article 128(4) of the Constitution and sections 4 and 5 of the Government Proceedings Act and the decision in *Attorney General v. Oluoch [1952]. E.A 392*.

I do not doubt that the Appellant's narration of the facts and circumstances under which he came to be arrested, detained, prosecuted, convicted and imprisoned is true. The only question is what are their consequences in light of the law applicable. The official of the Kampala City Council arrested the Appellant on what he sincerely believed to be an offence under the Ciyt's bye-laws. All his acts and behaviours during the arrest and detention of the Appellant were in apparent compliance with the provisions of Article 23 of the Constitution and in particular clauses 23(1)(c),(3), and (4) (b), that is to say, he believed the person arrested was wanted in connection with the commission of an offence, the Appellant was informed of the alleged offence in a language he understood, and was taken before a Magistrate within twenty four hours. It was still possible for the Appellant to sue Mr. Steven Mungoma for wrongful arrest and detention. This, the Appellant chose not to do.

Consequently, no blame cane be placed on Kampala City Council or indeed on the arresting official. The Appellant was wrong to join in the Kampala City Council as Defendant.

With regard to proceedings against the Attorney-General, Article 128(2) of the Constitution provides that no person or authority shall interfere with the court of judicial officers in the exercise of their judicial functions. It follows that no person or authority can be held liable vicariously or otherwise for their acts or omissions as this would be tantamount to an indirect way of interfering with the independence and function of the Judiciary. In trying and imposing a sentence upon the Appellant, the Magistrate was exercising, *bona fide*, judicial functions and in accordance with Article 128(4), a person exercising judicial power shall not be liable to any act or omission by that person in the exercise of judicial power. The case of *Attorney-General v. Oluoch [1972] E.A 392*, disposed of a similar case summarily and in the course of his judgment, Spry Ag. P, said:

"I think this appeal can be disposed of very simply although out of courtesy I will deal with some of the arguments raised before us which are not, I think, necessary to the decision……… It seems to me clear that the plaint in the present suit alleges that the second and third Defendants were Magistrates and that in all relevant matters they were acting as such, and that the third and fourth Defendants were police officers and were acting as such in obedience to a warrant issued by a Magistrate. Assuming these facts to be true, this appears to me to be exactly covered by S.4(5) of the Government Proceedings Act and one in which, in law, no proceedings lie against the Government ………since the plaint contains no allegations that the Defendants, or any of them were acting otherwise than in good faith."

In dealing with this aspect of the appeal, the learned Justice of the Constitutional Court observed that the provisions of the Government Proceedings Act do exempt the government from liability for acts or omissions of a judicial officer while acting in his or her official capacity. Similarly, section 48(1) of the Judicature Statute 1996, and Article 128(4) of the Constitution do provide protection for judicial officers while carrying out their judicial functions. The learned justices did not agree with the submissions by Counsel for the Appellant that section 4(5) of the Government Proceedings Act does not apply to constitutional cases. I share the opinion of the learned justices. I can find no fault in their decisions or reasoning. Therefore ground 3(a) must fail. In my opinion, once a court finds that there is no cause of action or reasonable cause of action raised in a petition as a preliminary matter of inquiry, the proceedings and any disputed point of fact or of law end there. I would therefore dismiss this all.

However, I am constrained to comment very briefly on some other isses raised by the pleadings in this appeal. In my opinion, the question of cause of action must be distinguished from the matter of jurisdiction. A court may have jurisdiction while the plaint lacks a cause or a reasonable cause of action and vice –versa. In other words, a Plaintiff may have a perfectly legitimate and reasonable cause but the court before which the plaint is filed lack jurisdiction, just as the court may have jurisdiction but the litigant before it lack a cause of action. Counsel for the Appellant submitted a different opinion from that of the Respondent as far as the case of *General D. Tinyefunza v. Attorney-General Constitutional, Appeal No.1 of 1997 [Unreported]* is concerned. There is a number of facets to the decision of the Supreme Court in that case. Nevertheless, when it comes to that Court's view of the jurisdiction of the Court of Appeal as a Constitutional Court, its decision in that case is that the Constitutional Court has no original jurisdiction merely to enforce rights and freedoms enshrined in the Constitution in isolation to interpreting the Constitution and resolving any dispute as to the meaning of its provisions. The judgment of the majority in that case, [Wambuzi, C.J., Tsekooko J.S.C., Karokora J.S.C., and Kanyeihamba J.S.C], is that to be

clothed with jurisdiction at all, the Constitutional Court must be petitioned to determine the meaning of any part of the Constitution in addition to whatever remedies are sought from it in the same petition. It is therefore erroneous for any petition to rely solely on the provisions of Article 50 or any other Article of the Constitution without reference to the provisions of Article 137 which is the sole Article that breathes life in the jurisdiction of the Court of Appeal as a Constitutional Court. if it had been necessary for me to determine ground (3) (b) I would have upheld the decision of the Constitutional Court on that ground and, I agree with their opinion when they held that:

> *"In our view this court should normally be involved only in matters requiring interpretation of the Constitution under Article 137. In the instant case the question of interpretation of the Constitution does not arise. Therefore this Court has no jurisdiction in the matter*."

Rule 4(1) of Modifications to the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 Directions, 1996, provides that a petition alleging a breach of the Constitution must be lodged at the office of the Registrar within thirty days after the date of the breach complained of. The Directions were not the subject of the breach complained of, nor, were they presented as the subject in conflict with the Constitution. While not commenting on their limiting factor as against the liberalism of the Constitution regarding rights and freedoms, I am of the opinion that since the Directions have not been formally and successfully challenged, they remain valid and binding.

In passing, I am fully aware that in reality the Appellant was arrested, charged, convicted and sentenced to a term of imprisonment for what was apparently a non-existent offence. All these occurred at the hands of persons acting in good faith and who, more importantly, were protected by law or on whom and whose acts or omissions the law does not apportion blame or liability. Thus, in *Crofter Harris, etc, and Co. v. Veitch [1942] IWLR, 834*, Viscount Simon said,

> "*If A is damaged by the action of B, A nevertheless has no remedy against B if B's act is lawful in itself and is carried out without employing unlawful means."*

The concept of damage without liability is encapsulated in the Latin maxim "*Damnum absque injuria*" which, in short, means that no every harm done results in legal injury.

In my opinion, when the Chief Magistrate allowed the Appellant's appeal and quashed the conviction and sentence passed by Magistrate Grade II, Her Honour was enforcing the Constitution under Article 50 of the Constitution. In light of what I said earlier on in this judgment and the principle of "*Damnum absque injuria*," it would not have been possible for the Chief Magistrate or the Constitutional Court or, indeed, this Court, to consider and determine any measure of compensation for the suffering the Appellant endured.

Be that as it may, in some foreign jurisdictions such as in Britain, when a citizen has suffered actual loss or damage at the hands of those protected by law, as in this case, it is possible for the innocent victim to petition a relevant department of state and seek and "*exgratia*" payment as compensation., this may be worth trying on in our juridical system.

In the result I would dismiss this appeal with costs to the Respondents both here and in the courts below.

Dated at Mengo this 11th day of June 1999

G.W KANYEIHAMBA

JUSTICE OF SUPREME COURT

JUDGMENT OF MULENGA , J.S.C.

Ismail Serugo, to whom I shall refer as "the Appellant" filed a petition in the Constitutional Court on 24th November 1997. He cited Kampala City Council and the Attorney General, whom I shall respectively refer to as "1st respondent" and "2nd respondent," as the respondents to the petition. In the petition he listed several acts committed by officers of the respondents, which he alleged, were inconsistent with and contrary to constitutional provisions set out in the petition. He then prayed for grant of the following reliefs:

(a) a declaration that those acts are inconsistent with the Constitution and are violations of his fundamental human rights guaranteed in the Constitution;
(b) an order of redress in damages as compensation for the said violations; and
(c) costs of the petition.

The Constitutional court decided, on preliminary objection raised by the Respondents, to strike out the petition. This appeal is against that decision.

The acts complained of, were the acts of arresting, charging, convicting, sentencing and imprisoning the Appellant in respect of facts that did not constitute a criminal offence under the law. The following is a brief account of what led to the petition. On 5th September,1997, the Appellant was arrested by a City law Assistant, an official of the 1st respondent and was taken to a court located in the City hall and presided over by a magistrate Grade II. There, he was charged on two counts. To the first count of "being a rogue and vagabond" he pleaded not guilty. Apparently that charge still awaits trial, and is not subject of the petition or this appeal. To the second count, of "obstructing officers on duty contrary to S. 106 of the penal Code," however, he pleaded guilty and was convicted on his own plea, and sentenced to 4 months' imprisonment. Thereafter he appealed to the Chief magistrate's Court against both conviction and sentence. The contention on appeal was that, whereas S. 106 of the Penal Code makes it a criminal offence to obstruct or resist a person "lawfully charged with execution of an order or warrant of any Court," the facts on which the Appellant had been convicted, namely obstructing a City law Assistant on "duties of checking stickers of taxi motor vehicles" did not constitute a criminal offence under that section. Notwithstanding the provisions of s.216 (3) of the Magistrates' Courts Act, 1970, that " no appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea,: the chief magistrate, (instead of remitting the case to the high court for possible revision) heard and allowed the appeal, holding both the conviction and sentence, to be

illegal. She quashed the conviction, set aside the sentence and ordered that the Appellant be set at liberty immediately. That was on 22.10.1997. The Appellant was released from Luzi9ra prison two days later, on 24/10/1997. It is with that background that the Appellant filed his petition in the Constitutional Court.

In his defence the 2nd respondent who filed his answer in time, on 2.12.1997, pleaded that:

(a) he is not answerable for such of the acts as were acts and decisions of judicial officers;

(b) he is not accountable for acts done in executing of a subsisting order of court; and

(c) the petition raises no question requiring interpretation of the Constitution and "therefore the petition is bad in law and is time barred."

The 1st Respondent filed its answer, barely three days before the hearing, but with counsel for the Appellant's consent to late filing. In the answer the 1st respondent pleaded, so far as relates to itself, that:

(a) the petition was incompetent;

(b) the 1st respondent was non-existent (sic)

(c) the claim relating to (the arrest) was time barred' and

(d) the arrest of the Appellant was justifiable under the Constitution.

Both respondents prayed, in their respective written answers, that the petition be dismissed with costs. However, when the petition came up for hearing on 20th February 1998, the respondents opted for a short-cut by raising preliminary objections and praying that the petition be struck out. in support of his objection, learned counsel for the 2nd respondent relied on two grounds. First, he submitted that the 2nd respondent "Was a wrong party to the petition.". He maintained that by virtue of S. 4 (5) of the Government Proceedings Act, Cap 69, and on authority of *Attorney General vs Oluoch (1972) E.A 392* the 2nd respondent was not answerable for acts done in exercise of judicial functions or in execution of judicial process. Secondly, he submitted that the petition disclosed no cause of action as it did not call for interpretation of the Constitution. He was supported by Learned Counsel for the 1st respondent who also prayed that the petition be struck out as against his client, on the grounds, first, that the claim for unlawful arrest was time barred; and secondly, that the

prosecution and conviction of the Appellant were not acts by the 1st respondent or its officers. Neither Counsel cited the law under which his objection or prayer made. After hearing submissions from all parties the constitutional Court, summarily, upheld the objection and struck out the petition with costs to the respondents. The reasons for that decision were delivered on 30/4/1998. In a nutshell, the decision to strike out the petition was based on the court's holdings that:

1. The petitioner had no cause of action.
   (a) as against the 1st Respondent because the arrest was lawful and the 1st respondent was not responsible for what happened after the arrest; and
   (b) as against the 2nd respondent, because provisions of S. 4 95) of government proceedings Act "clearly exempt the Government from liability for acts or omissions of a judicial officer while acting in his or her official capacity."

2. The Constitutional Court had no jurisdiction over the petition because " the question of interpretation of the Constitution under Article 137 does not arise in the petition;"

3. The cause of action in respect of unlawful detention arose " on or by 22.10.1997 when the petitioner was released from prison" (sic) and, therefore, the petition, which was filed on 24/11/1997, was clearly out of time.

Like counsel in their submissions, the Constitutional Court did not, in its order or in the reasons for its decision, cite the law under which it considered the preliminary objection or made the order to strike out the petition. Although it is not always necessary to cite the law, in matters like the instant case, where alternative provisions involving different principles may be applicable, it is very useful to do so.

The appellant framed ten grounds of appeal to this Court. I think, however, that the appeal can be decided on the first three grounds. The rest appear to me to be more of arguments for one or the other of those three. In the circumstances, I do not find it necessary to reproduce the grounds of appeal numbered 4 to 10 in this judgment. The first three grounds read as follows:

1. The Learned Judges of the Constitutional Court erred in law and on the
2. facts when they struck out the appellant's petition before the Constitutional Court on preliminary objections on points of law.

3. The Learned Judges of the Constitutional court erred in law and on the facts, when in deciding the preliminary objections raised by the respondents they in effect decided the substantive merits of the appellant's petition.

4. The Learned Judges of the Constitutional Court erred in law and contradicted themselves on the facts when they upheld the preliminary objections that:

   (a) The Appellant had no cause of action against the 2nd respondent.

   (b) The constitutional court had no jurisdiction in the matter as there was no question requiring the interpretation of the Constitution under Article 137.

   (c) The petition was time-barred.=

I will deal with grounds 1,2, and 3 (a) together as they are inter-related. I will then consider separately grounds 3 (b) and 3 (c).

As I understand the submissions for the Appellant there are two criticisms underlying grounds 1,2 and 3 (a). The first criticism is that the Constitutional court did not have due regard to the procedural law, with the result that the petition was wrongly disposed of substantively, without it being heard on merits. The second criticism is that the learned Justices of Appeal did not direct themselves on the law correctly when determining whether the petition disclosed a reasonable cause of action.

Procedure for striking out suit

As the law under which the Constitutional court proceeded was not stated, Counsel for the Appellant, take off time, in the written submissions, to refer to, and consider different provisions of the Civil procedure rules that could or might have been applied. Through elimination, Counsel discount O. 6 rr 27 and 28,O. .7. r. 11 (a) and 0. 13 r. 2, and conclude that "it would seem O.6 r. 29 was applied." They contend that under that provision, only the issue of disclosure of a reasonable cause of action should have been considered. In their respective written submissions in reply, counsel for the 1st respondent appear to share the view that the court proceeded under O. 6 r. 29, but Counsel for the 2nd Respondent contend that it was O.7. r. 11 that was applied.

The Civil Procedure Rules apply to proceedings in the Constitutional Court by virtue of the Fundamental Rights and freedoms (Enforcement Procedure) rules, 1992, as modified by the Rules of the Constitutional Court (Petitions for Declarations under Article 137 of the Constitution) Directions, 1996, (hereinafter for brevity referred to as "the rules under Legal Notice No.4 of 1996"). For clarity, I find I t useful to group those provisions of the Civil Procedure Rules referred to, into two categories. In one category are O. 6 rr 27 and 28, and O. 13 r. 2, which empower the court, in given circumstances, to decide suits on points of law only. In the other category are O.6. r. 29 and O. 7 r. 11 which are concerned with defective pleadings. It is appropriate at this juncture to reproduce the provisions here. O.6 rr 27 and 28 provide:

> "*27. Any party shall be entitled to raise by his pleading any point of law, and any point of law raised shall be disposed of by the court at or after the hearing:*
>
> *Provided that by consent of the parties, or by order of the court on the application of either party, the same may be set down for hearing and disposed of at any time before the hearing.*
>
> *28. if in the opinion of the court, the decision of such point of law substantially disposes of the whole suit, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the court may thereupon dismiss the suit or make such other order therein as may be just."*

And 0.13 r. 2 provides:-

> *"2. Where issues both of law and facts arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until the issues of law have been determined."*

Evidently an application under any of these provisions is intended to dispose of the suit or part thereof, on merit albeit on a point or points of law only. In such application all pleadings, (plaint, defence and reply, if any,) have to be taken into consideration. The facts to which the point of law relates must be agreed or be not in dispute; see *express Electrical Engineers & Contractors v Uganda Posts & Telecommunications Corporation,* Civil Appeal No.

8/1980 (C.A) (unreported). In my view the instant case cannot be said to have been tried and determined under any of these rules, as, clearly, the procedure envisaged was not followed.

The points or issues of law were not set down for a full and separate hearing and determination. Instead the objection was raised but "ambush" even though the grounds had been pleaded by way of defence.

On the other hand O.6. r. 29 provides:

> "*29. The Court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment to be entered accordingly as may be just. All orders made in pursuance of this rule shall be appealable as of right.*"

And o.7 r. 11, which refers to plaints only, provides , in so far as is relevant to this case, as follows:-

> *" 11. The plaint shall be rejected in the following cases:-*
>
> *(a) where it does not disclose a cause of action*
>
> *(b) …………………………………………………….*
>
> *(c) …………………………………………………….*
>
> *(d) where the suit appears from the statement in the plaint to be barred by any law.*
>
> *(e) ……………………………………………………."*

Can it be inferred that the petition was struck out under either of these rules? It is well settled that a distinction must be made between an application under the former category and one made under the latter. *Nurdin Ali Dewji & ors vs G.M.M.Meghji & Co., and others (1953) 20 EACA 13*2, was an appeal against an order of the high Court of Tanganyika rejecting a plaint on the ground that it disclosed no cause of action. The Court of Appeal for eastern Africa, however, found that it was :abundantly clear" that the ration decided was that the suit was not maintainable in law, and criticized the trial judge for:

"*over looking the distinction between the rejection of a plaint under order 7 rule 11 of the Civil procedure rules and dismissal of a suit on an issue of law under order 14 rule 2.*"

The High Court order was set aside and the suit was remitted back for trial. The Tanganyika rules referred to in that case were identical to our present provisions Respectively in O.7 r. 11 and O. 13 r. 2 of the Civil Procedure rules, reproduced above. The decision in NURDINS' case was therefore cited with approval in the decision of this court in *Wycliffe Kigundu kato vs Attorney General Civil Appeal No 27 of 1993* (SC) (unreported. This court, there, said:

> *"A distinction must be drawn between an application to reject a plaint and one when a matter of law is set down for argument as a preliminary point. That distinction was very clearly explained in Nurdin Ali Dewji & ors vs Meghji & ors (1953) 20 EACA 132. The distinction is that under order 7 Rule 11 (a) of the rules an inherent defect in the plaint must be shown rather than that the suit was not maintainable in law. In the latter case a preliminary point should be set down for hearing on a matter of law……..if the state insists that as a matter of law no suit can be brought, the state should not try to have the plaint rejected under order 7 Rule 11, but should apply to have the suit dismissed on a preliminary matter of law."*

In my view, the same distinction has to be drawn as between an application to strike out a plaint, under O.6 r. 29, and the one for determination of a suit on a point of law. in the instant case, as in NURDIN's case, it is quite evident also, that the basis for the holding the Constitutional Court, that the petition disclosed no cause of action against the respondents was not any defect inherent in the petition. The basis was rather that the petition was not maintainable in law by reason of the defence each respondent pleaded. I shall consider each separately. As against the 1st respondent, the Appellant had alleged, inter alia, that:

(a) his arrest by the employee of the 1st respondent without warrant or court order was contrary to Article 23 (i) (sic) of the Constitution, and that,

(b) by that arrest, the respondent set in motion the subsequent acts which also violated his human rights contrary to the enumerated provisions of the Constitution.

In its reasoned ruling the Constitutional court said:

" Mr. Sendege who appeared for the first respondent submitted that the wrongs complained of were not committed by an employee of Kampala City Council since the case was prosecuted by an officer from the office of the DPP and the conviction was pronounced by a Court established under the magistrates' Courts Act. He pointed out that all the officers are employed and paid by the central Government and not the City Council; therefore, he contended, there was no cause of action against Kampala City Council……………………….there is no doubt that the only role played by the first respondent's employee (Steven Mungoma) was to arrest the petitioner.

…………………….. Although in paragraph 2(g) of his petition the Petitioner says that it was the first Respondent who set in motion the acts which culminated in violation of his human rights, we are of the view that the first Respondent or its agents were not responsible for whatever happened to the Petitioner after his arrest, which arrest was lawful in our view, and in any case, Counsel for the Petitioner conceded, quite rightly in our view, that any action arising from arrest was time barred. In the circumstances we agree that the Petitioner had no cause of action against the first Respondent."

Needless to say that in the foregoing passage, the court does not hold that the two allegations do not amount to adequate description of any cause of action. The holding is evidently based on the pleading in the 1st Respondent's answer that the arrest was on "reasonable suspicion that (the Appellant) had committed an offence and he was about to commit other criminal offences"; and that the claim relating to acts of the court which tried and convicted him "was unsustainable and misconceived"; and secondly on learned Counsel's submission, in court, that the acts of prosecuting and convicting were not committed by employees of the 1st Respondent.

Similarly in respect of the 2nd Respondent, the Constitutional Court, in holding that the Appellant had no cause of action against the 2nd Respondent did not do so on the premises that the petition was defective for failure to disclose a cause of action, but on strength of the defence pleading and submission that the 2nd Respondent is not answerable for acts of judicial officers not accountable for executing orders of court. Although ultimately this holding in respect of the 2nd Respondent may be supported for the reason I will indicate later in this judgment, it was evidently made without regard to the distinction would most probably have been avoided, if the law under which the objection was taken and the order was made, had been identified and the principles or conditions therein applied.

Disclosure of cause of action.

In *Nurdin Ali Dewji's case* (supra at P.133) the court said that notwithstanding the error (of overlooking that distinction), it would have upheld the High Court judgment if it had itself been:

> *"Satisfied:*
>
> *a) that the plaint……..does not in fact disclose a cause of action, or*
>
> b) *that, if it does, the suit is still in law unmaintainable*."

The Court however held that it was not satisfied on either and, therefore, set aside the High Court order. I will follow the same approach, with which I respectfully agree, and consider whether the Appellant's petition in fact does not disclose a cause of action; and even if it does, consider if it is nevertheless unmaintainable in law. To arrive at the correct answer, it is imperative to be clear on what is meant by disclosing a cause of action.

A cause of action in a plaint is said to be disclosed if three essential elements, are pleaded; namely, pleadings (i) of existence of the Plaintiff's right, (ii) of violation of that right, and (iii) of the Defendant's liability for that violation. In *Auto Garage vs. Motokov (No.3) (1971) E.A 514 at page 519D*, after reviewing a line of precedents SPRY V.P. put it thus:

> *" I would summarise the position as I see (it) by saying that if a plaint shows that the Plaintiff enjoyed a right, that the right has been violated and that the Defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be amended. If on the other hand, any of those essentials is missing, no cause of action has been shown and no amendment is permissible*."

A reasonable cause of action on the other hand, has been described as a cause of action which, in light of the pleadings, has some chance of success: (See *Drummond-Jackson vs. British Medical Association (1970)IWLR 668).*

In order to determine if the petition in the instant case discloses a cause or causes of action, it has to be viewed in the proper perspective. In my view the proper perspective is that the right to petition the Constitutional Court, so far as is relevant to this appeal, is derived from Article 137 of the Constitution where it provides, in clause (3) as follows:

> *"(3) A person who alleges that-*
>
> > *(a) …………………………*
> >
> > *(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."

A petition brought under this provision, in my opinion, sufficiently discloses a cause of action, if it describes the act or omission complained of, and shows the provision of the Constitution with which the act or omission is alleged to be inconsistent or which is alleged to have been contravened by the act or omission, and prays for a declaration to that effect. It seems to me, therefore, that a cause of action under Art.137 (3) is not on all fours with the ordinary cause of action in tort or contract as described in *Auto Garage vs. Motokov* (supra). Thus, apart from the drafting requirement, introduced through the Rules under legal Notice No.4 of 1996, that the Petition be described as "*aggrieved*," it is not an essential element for the petitioner's right to have been violated by the alleged inconsistency or contravention. If the framers of the Constitution had intended to vest the cause of action in only persons aggrieved by such act or omission which is inconsistent with, or in contravention of any provision of the Constitution, they would have expressly stated so in Art. 137 (3). The provision, as it is, gives the right to petition not only to a person aggrieved by, but also to any other person who alleges, the inconsistency with, or contravention of the Constitution. Similarly, it seems to me that it is not an essential element to the disclosure of a cause of action under that article to plead liability of a Respondent, save that where redress is to be granted against any person, that person would have to be made party. Although the Rules under Legal Notice No.4 of 1996, and the Form specified in the Schedule thereto, do not expressly provide for it, there seems to be nothing that would prohibit a person from petitioning the Constitutional Court "*ex-parte*" for a declaration under Art.137(3) of the Constitution.

In the instant case, the petition describes the acts complained of in paragraph 1(a)-(g). It indicates the provisions of the Constitution allegedly contravened by those acts. And asks for a declaration to the effect that those provisions of the Constitution were contravened and secondly for redress. In my view these averments constitute several causes of action under Art. 137(3) (b) with a chance of success, at least in respect of the prayer for the declaration. If the Appellant had been allowed to proceed and had proved those averments or any of them to be true and correct, he would, on the fact of it, be entitled to the remedy of a declaration. I find considerable support for this view in the judgment of this Court in *Wycliffe Kiggundu Kato vs. Attorney-General* (supra) which was an appeal against an order of the High Court rejecting a plaint under O.7 r.11 (a) on the ground that it did not disclose a cause of action. In the plaint, after making diverse averments regarding interdiction, and subsequent retirement from his government employment, the Plaintiff had prayed for (a) a

declaration that the interdiction and the retirement were unlawful (b) general damages (c) costs and interest. In allowing the appeal, this Court said at P.10 of the judgment:

> "*A good deals of argument in the trial Court concerned the effect of the decision in Opolot vs Attorney General [1969]E.Aa 631. It does not appear to us that (that) decision is relevant to the precise issues on this appeal. Whether or not the Appellant can be retired in the public interest at the will of the President, he is asking for declarations of another kind. He alleges that prior to the decision to retire him he was unlawful interdicted and then unlawful advice was given to the President……… the defence merely says that whatever was done was lawful. What is the position then, if the Appellant accepts his retirement as a fact, but alleges that the steps taken to cause his retirement were unlawful? Prima facie a subject has the right to expect procedures to be lawfully carried out, and the remedy of a declaration, at least, is apt to vindicate the subject's rights. Whether or not that is a pyrrhic victory in the end is not in point in this appeal."*

(Emphasis added).

Turning back to the instant case I would observe that the petition having disclosed reasonable causes of action in respect of which the Petitioner, if successful upon trial, would be entitled to the remedy of a declaration, it does not matter if such success turned out to be a "a *pyrrhic victory*", as for instance if he were to fail to recover redress in form of the damages he prayed for. But I hasten to say, without expressing any firm conclusion on the matter, that even those other remedies cannot be ruled out of question.

Lastly, I have to consider, in line with the approach followed in *Nurdin's case* (supra), whether despite the disclosure of causes of action, the petition is unmaintainable in law, having regard to the pleadings. I think it is necessary to consider the cases made against each Respondent separately. I will start with that against the 2nd Respondent. In that connection, the Constitutional Court was influenced by the decision of the Court of Appeal for East Africa in *Attorney-General vs Oluoch [1972] E.A 193*, in which a plaint was struck out and the suit was dismissed on the ground that by virtue of S.4 (5) of the Government Proceedings Act, no suit lies against the Government in respect of acts done in the discharge or purported discharge of judicial functions or judicial process. The Government proceedings Act provides in S.4 (5):

> *"(5) No proceedings shall lie against the Government by virtue of this section in respect of anything done or omitted to be done by any person while discharging or*

purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process."

The facts in the instant case are almost identical to those in *Attorney General vs. Oluoch* (supra). In the petition itself it is disclosed that the acts complained of were acts done by persons discharging or purporting to discharge judicial functions and executing judicial process. Needless to say, because the petition cites the Attorney General as a Respondent thereto, it instituted "proceedings against the Government." If therefore the instant case was an ordinary suit, I would, on authority of the precedent in *Attorney General vs. Oluoch* (supra), not hesitate to strike it out on the ground that it is not maintainable in law by virtue of S.4 (5) of the Government Proceedings Act. However, in my opinion, there is a significant difference between the precedent and the instant case. In the former, the suit could not proceed without a Defendant. In the latter, however, being a petition under Article 137(3), the case could, as I have opined earlier in this judgment, proceed ex-parte for the declaration sought. It seems to me, therefore, that the more appropriate course would have been to make an order under O.1 r.10 (2) that the name of the 2nd Respondent be struck out, which would appear to have been the original request when it was submitted that the 2nd Respondent was a wrong party. Such order could have been made by the Court even without application by any party. O.1 r.10 (2), so far as it relates to this point reads:

> "(2) *The Court may at any stage of the proceedings* either upon *or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant be struck out…………….*"

In my view, therefore, while the issue may have been considered under O.6 r.29 of the Civil Procedure Rules, this was not a proper case for striking out the petition, on the ground that it did not disclose a reasonable cause of action. I would reiterate that a litigant must not be turned away from the seat of justice before his case is heard on merit, except in plaint and obvious cases.,

I now turn to the 1st Respondent. The Constitutional Court held that the act for which the 1st Respondent was responsible, i.e arresting the Appellant, was lawful. This is a holding that was made without the issue being tried first, and yet it is the holding, which was substantially the basis for the conclusion that the Appellant had no cause of action against the 1st Respondent. There is no explanation in its judgment why this holding was made summarily nor is there explanation why the Court appears to have brushed aside the pleading in

paragraph 2(g) of the petition that the 1st Respondent by the arrest, *SET INTO MOTION* the other acts complained of thus making it consequentially liable for them. (See *Sekaddu vs. Ssebadduka [1968] E.A 213*). In my view the petition does not disclose causes of action but is in law maintainable against the 1st Respondent. Whether or not the petition would succeed depends on the merits which can be determined only after a full trial taking into consideration, all issues of fact and law.

In my opinion the Constitutional Court erred in striking out the petition on the ground of non-disclosure of cases of action against the Respondent, but did not err to the extent that is decision is that the petition is not maintainable in law against the 2nd Respondent. I would therefore hold that grounds 1 and 2 succeed and ground 3(a) succeeds in part.

Jurisdiction.

On the issue of its jurisdiction, the Constitutional Court, after summarizing Counsel's submissions on the same had only this to say:-

> "*In our view this Court should normally be involved only in matters requiring interpretation of the Constitution under Article 137. In the instant case the question of interpretation of the Constitution does not arise, therefore this Court has no jurisdiction in the matter*."

For the Appellant this holding is criticized as misconstruing the pleadings. It is argued that since the Respondents admitted the commission, by their respective officers, of the acts complained of, but pleaded protection of statutory law, the court was required to determine whether such exempting law was consistent with the Constitutional provision that prohibited the acts in issue. Counsel submits, in that regard, that inevitably that determination would involve interpretation of the Constitution. Both Counsel for the 1st Respondent and the 2nd Respondent contend that the Court had no jurisdiction over this case because the petition did not raise any question of interpretation of the Constitution. They contend that the petition seeks enforcement of the Appellant's human rights. For the 2nd Respondent, in particular, it is stressed that unlawful arrest and illegal detention are actionable torts and that the Chief Magistrate's Court had, prior to the petition, declared the conviction and sentence to be illegal, and that therefore in the circumstances there was no more need to seek from the Constitutional Court another declaration that the acts were inconsistent with, or in contravention of, the Constitution. When Counsel appeared before this Court on 3/3/99 Mr. Cheborion for the 2nd Respondent asked for, and was given leave to address Court on the issue of jurisdiction. In effect he did not substantially add to what was already in the written

submissions, save to stress that in *Attorney General vs David Tinyefuza Constitutional Appeal No. 1 of 1997*, this Court, by majority, held that the jurisdiction of the Constitutional Court is limited by Article 137, to interpretation of the Constitution. Mr. Mutyaba for the 1st Respondent associated himself with that submission. Mr. Mbabazi for the Appellant, however, disputed that contention and submitted that the majority decision of this Court in the said case was that the Constitutional Court had jurisdiction not only to interprete provisions of the Constitutions, as stipulated in Article 137, but also to enforce rights and freedoms under Article 50.

I shall by clearing the apparent dispute on the import of the decision of this Court in *Attorney General vs David Tinyefuza* (supra). Although there are a number of issues in that case decided on basis of majority view, it is evidence from a proper reading of the seven judgments in that case, that it was the unanimous holding of the Court that the jurisdiction of the Constitutional Court was exclusively derived from Article 137 of the Constitution. It was not a holding in any of the judgments that Article 50 of the Constitution confers, on the Constitutional Court, any additional and/or separate jurisdiction to enforce the rights and freedoms guaranteed under the Constitution. It seems to me that what Mr. Mbabazi may have misconstrued is the holding, variously expressed in several of the judgments, that the Constitutional Court was "*a competent Court*" for purposes of Article 50 to which an application (for redress) may be made when such right or freedom is infringed or threatened. It must be noted however that this holding is subject to a rider, again variously expressed in the several judgments, to the effect that such application for redress can be made to the Constitutional Court, only in the context of a petition under Article 137 brought principally for interpretation of the Constitution. It is the provisions in clauses (3) and (4) of Article 137 that empower the Constitutional Court, when adjudicating on a petition for interpretation of the Constitution, to grant redress where appropriate. Clause (3) provides in effect, that when a person petitions for a declaration on interpretation of the Constitution, he may also petition for redress where appropriate. Clause (4) then provides:

> *"(4) where upon determination of the petition under clause (3) of this article the Constitutional Court considers that there is need for redress in addition to the declaration sought, the Constitutional Court may-*
>
> *(a) grant an order of redress; or*
>
> (b) *refer the matter to the High Court………….*"

It follows that a person who seeks to enforce a right or freedom guaranteed under the Constitution, by claiming redress for its infringement or threatened infringement, but whose claim does not call for an interpretation of the Constitution, has to apply to any other

competent Court. The Constitutional Court is incompetent for that purpose only upon determination of a petition under Article 137(3).

Notwithstanding the incorrect contention by Mr. Mbabazi noted above, however, the position in the instant case is that the Appellant petitions not simply for compensation, but first for a declaration that the acts in issue are inconsistent with or in contravention of the Constitution. I would agree with learned Counsel for the Appellant, that to determine whether or not to grant the declaration the Court would inevitably have to interprete the Constitution. As the law stands now, there is not requirement by either the Constitution or the Rule under Legal Notice No.4/96, for "the question for interpretation" to be framed in the petition. It seems to me that it can be framed from the pleadings. A petition therefore cannot be faulted, nor can the Court be devoid of jurisdiction merely because the question for interpretation is not expressly framed in the petition, so long as it is discernable from the alleged inconsistency or contravention. Without attempting to frame issues for the Constitutional Court, I would say that having regard to the pleadings in the instant case, it is obvious that one of the issues would have to be whether an act violating a right guaranteed by the Constitution is inconsistent with or in contravention of the Constitution, if it is committed by a judicial officer in the exercise or purported exercise of a judicial function. I would hold that the Constitutional Court had jurisdiction over the instant case because it involves interpretation of the Constitution, a fact which is also the basis for the earlier holding that the petition discloses reasonable causes of action under Article 137. With respect to Counsel for the 2nd Respondent, the Court's jurisdiction cannot be affected by the holding of Chief Magistrate, that the acts in issue were illegal, even if it be assumed that she had the competence to so hold. The import of the Chief Magistrate's decision is that the Magistrate Grade II erred in law in convicting the Appellant under S.106 of the Penal Code on facts which did not constitute a criminal offence there under. That in my view, is different from what is required of the Constitutional Court to determine, namely whether the act of convicting the Appellant was inconsistent with, or in contravention of the Constitution.

I am constrained to caution against what appears to be a trend in making access to the Constitutional Court difficult for fear of opening a floodgate. In my view that trend will defeat the intention of the framers of Article 137 (3) of the Constitution. I would hold that ground 3(b) ought to succeed.

Time limit

Lastly, I turn to the issue of time limit. As noted earlier in this judgment, one of the grounds relied on by learned Counsel for the 1st Respondent in support of the preliminary objection

was that the claim for "*unlawful arrest*" was time-barred. Needless to say that if this submission be correct it would be sufficient ground to reject the petition under O.7 r.11(a). In holding that submission the Constitutional Court applied Rule 4(1) of the Rules under Legal Notice No.4 of 1996 which stipulates that a petition for a declaration or redress under clause (3) of Article 137 of the Constitution shall be lodged "*within thirty days after the date of the breach of the Constitution complained of in the petition*." The Court held.

> "*We agree with Mr. Mbabazi that detention is a continuing wrong. In this case the cause of action in respect of unlawful detention would have arisen on or by 22/10/1997 when the Petitioner was released from Prison. It follows that this petition should have been filed on 22/11/97. However it was filed on 24/11/97 which was clearly out of time."*

In the written submissions, Counsel for the Appellant attacked this holding as they did before the Constitutional Court, from its basis, namely that the said Rule 4(1) is unconstitutional "as it forecloses the rights of an individual to seek redress." It is further argued that the rule is ultra vires the enabling statutory provision, namely S.51(2) of the Judicature Statute 1996. Learned Counsel for the Respondent put up a spirited reply principally based on the failure by the Appellant to plead that the rule was unconstitutional. I did not find it necessary to resolve those arguments in the instant case, because the holding appears to have been premised on a factual error. As stated earlier in this judgment the Appellant was not released on 22/10/97 as held by the Constitutional Court. That was the date on which the Chief Magistrate delivered judgment. The evidence before the Constitutional Court, shows that the Appellant was actually released from Prison on 24/10/97, in his affidavit accompanying the petition, the Appellant averred in paragraphs 8 and 9 as follows:

> "*8. That on the 22nd October, 1997 the said appeal was allowed and the Court ordered my immediate release upon the ground that my conviction had bee illegal and unlawful…………*
> *9. That I was subsequently released on the 24th October, 1997. A copy of the release order is hereto annexed and marked "G"*."

Annexture "G" is a photocopy of a carbon copy of some typing-in, on what must be a standard release form, and therefore does not contain the complete text. However, from the particulars and information typed-in, and the authentication by the signature of the Chief Magistrate under official seal, I am left in no doubt that it is copy of the formal order of release addressed by the Chief Magistrate to the authorities at M/Bay Prison, Luzira. It is dated 24th October 1997. It supports the Appellant's aforementioned averment by affidavit that he was released on 24/10/97. I have no doubt in my mind that if the Constitutional Court

had adverted to this piece of evidence, it would have held that the day of 24/11/97, on which the petition was filed, was the 30th day after the detention and therefore within the time prescribed by Rule 4(1) of the Rules under Legal Notice No.4 of 1996. I would refrain from expressing myself on the other acts in this regard since they were apparently not addressed in the Constitutional Court. In my view ground 3(e) also ought to succeed.

In the result I would allow the appeal in part and set aside the order of the Constitutional Court striking out the petition., I would substitute an order dismissing the preliminary objection but striking out the Attorney General from the petition as Respondent and remit the petition to the Constitutional Court to hear the residue of the petition. I would allow to the Respondent, three quarters of the costs of this appeal and order that costs in the Constitutional Court be costs in the cause.

Before leaving this case I am constrained to express concern about the rule on limitation of time for the lodging of petitions for declarations under Article 137 of the Constitution. In its judgment the Constitutional Court in an effect to explain the rationale for the rule, cites, with approval, from its earlier decision in *Serapio Rukundo vs Attorney General Constitutional case No.3/97*. Their Lordships said:

> *"We considered this matter in Rukundo (supra) and stated thus:*
>
>> *"The above rule provides that a petition shall be lodged within thirty days after breach of the Constitution complained of. The purpose of this rule is not hard to find. It takes into account among others the importance of Constitutional cases, which must be attended to expeditiously and seeks to cut out stale cases. We do not therefore agree with Mr. Kayondo SC that in Constitutional matters there is no time limit. He did not give us any authority for that proposition. We think that this petition offended against the said Rule 4(1). We therefore, uphold the first objection."*
>
> *"We still hold the same view."*

I do appreciate that any constitutional case is very important and once it is filed it must be attended to expeditiously so that a constitutional issue is not left in abeyance for unduly long. The Constitution expressly commands the courts concerned to give that priority to such cases. However, to extend that reasoning to the period prior to the filing of a petition, can lead to unintended difficulties. The most conspicuous difficulty is in respect of petitions alleging that on Act of Parliament or other law, is unconstitutional. Apart from the question of the starting day for computing the thirty days, there is the high probability of the

inconsistency of such law being realized long after the expiry of the thirty days after enactment. In my view the problem should not be left to be resolved through applications for extension of time, as and when need arises. The appropriate authority should review that rule to make more workable, and to encourage rather than appear to constrain, the culture of Constitutionalism.

Dated at Mengo this 11th day of June 1999

J.N. MULENGA
JUSTICE OF THE SUPREME COURT

JUDGMENT OF ODER, J.S.C.

I have had the benefit of reading the judgment of Mulenga, J.S.C. and I agree with him that the appeal should succeed in part.

The facts of the case are well stated in that judgment. I would not like to repeat them here.

When the petition came for hearing, both counsel for the respondents raised three preliminary objections and prayed that the petition should be struck out. The grounds of the objection were that:

1 The petition had been brought against the wrong parties.
2 There was no Constitutional issue requiring the interpretation by the Constitutional Court.
3 The petition was time barred.

Ten grounds of appeal were set out in the memorandum of Appeal. The last seven grounds, to me, appear to be repetitions of one or other of the first three grounds. The three grounds are:-

1. the learned Judges of the Constitutional Court erred in law and on the facts when they struck out the petitioner's petition on preliminary objections on points of law.
2. The learned Judges of the Constitutional Court erred in law and on the facts when in deciding the preliminary objections raised by the respondents they in effect decided the substantive merit of the petitioners' petition.
3. The Learned Judges of the Constitutional Court erred in law and contradicted themselves on the facts when upheld the preliminary objections that:
    (a) the petitioner had no cause of action against the respondents.
    (b) The constitutional Court had no jurisdiction in the matter, as there was no question requiring the interpretation of the Constitution under Article 137.
    (c) The petition was time barred.

It is convenient to consider grounds 1,2 and 3 (a) together as they relate to cause of action and whether the petition was maintainable in law. The appellant made a written submission of his arguments of the grounds of appeal, filed by M//S Nyanzi, Kiboneka and Mbabazi, Advocates. At the hearing of the appeal, the appellant who was represented by Mr. Mohamed Mbabazi relied on the written submission. The learned counsel did not wish to be heard by the Court.

It is submitted for the appellant that as neither the respondents nor the Constitutional Court indicated under what rules of the Civil procedure rules the petition was objected to and was struck out, it was necessary to consider which rules of the Civil procedure Rules were applicable to the objections to the petition whether Order 6 rules 27,28 and 29; or Order 7 rule 11 or order 13 rule 2.

It was submitted that the Constitutional Court could not have acted under Order 6 rule 27 and 28 because the objections were not made by formal applications, as it is required under those rules; and the Constitutional Court did not dismiss the petition under O. 6 r. 28 instead it struck out the petition.

Clearly , with respect , my view is that the Constitutional Court erred to have rejected the preliminary objections to the petition without indicating under which rule of the Civil procedure Rules it acted.

The procedure under O.6 rule 27 was clearly stated in the case of *Express Electrical Engineers and Contractors vs Uganda Posts and Telecommunications Corporation Civil Appeal No.8 of 1989 (CAU) (unreported)*. In the case at the close of pleadings the defendant corporation applied to the court by Notice of Motion under o.6 rule 27 of the Civil Procedure rules to have determined a point of law that the defendant did not admit statutory or other representative capacity of the defunct East African posts and Telecommunications Corporation as pleaded in the Plaint. The point of law to be determined was stated by the Defendant Corporation to be:

> "*Whether Decree of 1977 vests upon the Uganda posts and Telecommunications Corporation any liabilities of the East African Telecommunications upon which it can be sued.*"

The Court of Appeal for Uganda held that in proceeding under O.6 rule 27 the point of law to be decided must be stated precisely. The parties must agree before hand what the point of law to be decided is, and the facts on which such point is to be decided. The object of O.6 rule 27 is expedition, but to achieve that end the point of law must be one which can be decided fairly and squarely, one way or the other, on facts agreed or not in issue on the pleadings and not one which will arise if some fact or facts in issue should be proved. In another case, that of western *Steamship Co., Ltd vs Amaral Sutherland Co. (1914) 2 KB 55* it was held that the order for the trial of a preliminary point of law should not be made

where there are facts in dispute and if made may be set aside. What I have said about O.6 rule 27 equally applies to O. 13 rule 2.

In the instant case the points of law to be decided were not stated precisely; the parties did not agree before hand what points lf law were to be decided. They were not set down for a full and separate hearing and determination. It was upon objection on points of law that the Constitutional Court rejected the petition:-

It said:-

> *" Mr. Sendege who papered for the first respondent submitted that the wrongs complained of were not committed by an employee of Kampala City Council since the case was prosecuted by an officer from the office of the D.P.P. and the conviction was pronounced by a Court established under the Magistrates' Court Act. He pointed out that all the officers are employed and paid by the central Government and not the City council; therefore he contended, there was no cause of action against Kampala City Council……..there is no doubt that the only role played by the first, respondent's employee (Steven Mungoma) was to arrest the petitioner…….Although in paragraph 2 (g) of his petition the petitioner says that it was the first respondent who set in motion the acts which culminated in violation of his rights. We are of the view that the first respondents or its agents were not responsible for whatever happened to the petitioner after his arrest, which arrest was lawful in our view, and in any case, counsel for the petitioner conceded, quite rightly in our view, that any action arising from the arrest was time barred. In the circumstances, we agree that the petitioner had no cause of action against the first respondent."*

Quite obviously , the Constitutional Court did not act under o.6 rr 27 and 28 or O. 13 r. 2 as the procedures under those rules were not followed.

The other rules of the Civil Procedure Rules which could apply to the preliminary objections to the petition in the instant case are O.6 r. 29 or O.7 r 11 (a). the procedures under these rules are quite different from those under O.6 r. 27 and 28 and O.13 r.2 . Under O.6 r29 and o.7 r. 11 (a0 the court may on application order any pleading to be struck out or any plaint to be rejected on the ground that it does not disclose a cause of action or a reasonable cause of action. It would appear that the petition was struck out under these rules. Authorities indicate that a distinction should be made between an application to reject a plaint on the ground that it is not maintainable in law which issue should be set down, as a preliminary

point for decision and an objection that it discloses no cause of action. In *Wycliffe Kigundu v Attorney General, Civil Appeal No 27 of 1993 (SCU) (*unreported) the court said:

> "*A distinction must be drawn between an application to reject a plaint and one when a matter of law is set down for argument on a preliminary point. That distinction was very clearly explained in Nurdin Ali Dewji & ors vs Meghi & ors 919530 20, EACA 132. The distinction is that under order 7,Rule 11 (a) of the rules an inherent defect in the plaint must be shown rather than that the suit was not maintainable in law. in the latter case a preliminary point should be set down for hearing on a matter of law….if the State insists that as a matter of law no suit can be brought, the State should try to have the plaint rejected under o 7 rule 11 but should apply to have the suit dismissed on a preliminary matter of law."*

In the instant case it would appear that the Constitutional Court rejected the petition not because of any inherent defects in the petition, but rather that the petition was not maintainable in law because of the points of law pleaded by the respondents in their defences.

According to the authorities where a plaint discloses no cause of action it is mandatory for a court to strike it out under o.7 r. 11 (a). But where a plaint does not disclose a "reasonable cause of action" Under Order 6 rule 29 the court's power id discretionary and must be exercised only plain and obvious cases. *See Auto Garage v Motokov (No. 3) (1971) E.A 514 AND Sarwan Singh v Notkin (1952) 19 EACA 117; Nubbock & Sons Ltd. Vs Wilkin Heywood and Clark ltd 91899) 19 QB 198, and Durummond Jackson vs British medical association (1970) I W.R 668.* In considering whether a plaint discloses a cause of action or a reasonable cause of action the Court must consider only the Plaint without other pleadings.

The petition in the instant case described in paragraph 1 (a) to (g) of the Petition various acts allegedly contravening various provisions of the Constitution. If those allegations are true on the face of the petition without taking into account the defences in the answers to the petition, then the petition, in my view, disclosed causes of action under Article 137 (3) (b).

These causes of action would be maintainable certainly against the 1st respondent. As against the 2nd respondent section 4 (5) of the Government Proceedings Act appears to be a complete answer to the petition against the respondent. It would not be maintainable. See *Attorney general v Oluoch (1972) E.A 192*. However, as I have already, said for purposes of the allegations in respect of the 2nd respondent, the 2nd respondent does not have to be a party. In the instant case my view is that the petition disclosed reasonable causes of action under

Article 137 because, where a petitioner seeks a declaration under that Article, his right does not have to be violated for him to seek a declaration. The Article provides:-

"137 (3) A person who alleges that:-

(a)………………………………………….

(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."

Where a petitioner only seeks a declaration, without redress, his or her petition may, in my view, be ex parte, for redress can only be sought against a party. It is not necessary for a petitioner's right to have been violated for him or her to bring a petition under article 137 (3) (b). The declarations sought cannot be given against the 2nd respondent. In my view, that would dispose of grounds 1,2 and 3 (a) of the appeal.

I shall comment briefly on grounds 3(b) and (c) of the appeal. With regard to jurisdiction, I think that the Constitutional Court had jurisdiction since the petition sought declarations under Article 137 of the Constitution. Declaration in my view cannot be made without interpretation of the Constitutional provisions which the act or statute complained of allegedly contravenes.

As regards limitation of time, the complaint in respect of the act of arrest in contravention of the Constitution, the cause of action was not time barred. I also think that the period of limitation of 30 days will have the effect of shifting the Constitutional right to go to the Constitutional Court rather than encouraging the enjoyment of that right. For breach of contract or for bodily injury in a running down case has far more time to bring his action than the one who wants to seek a declaration or redress under Article 137 of the Constitution. What needs to be done by the authorities concerned is obvious.

For the reasons given, I would also allow the appeal in part and set aside the orders of the Constitutional Court and substitute in its place an order that the appellant's petition should be heard on merit against the first respondent and the name of the second respondent be struck out under Order 1 rule 10 (2) of the Civil procedure rules. I would also order that each party should bear its own costs.

Dated at Mengo this 11th day of June, 1999.

A.H.O.Oder

Justice of the Supreme Court.

JUDGMENT OF TSEKOOKO, J.S.C.

I have had the benefit of reading in draft judgments prepared by my learned brothers Mulenga J.S.C. and Kanyeihamba J.S.C. I am in general agreement with the conclusions of Mulenga J.S.C on the issues raised in this appeal. I would like to make one or two observations.

This is an interlocutory appeal against the order of the Constitutional Court striking out the petition of the appellant.

The facts of this appeal have been set out in the two judgments which I have just mentioned. I need not repeat them here. There is the question raised by this appeal of whether the Constitutional Court acted properly when it upheld the objections to the competence of the petition. By way of preliminary objections the two respondents contended in the Constitution Court that:-

(a) the petition had been brought against wrong parties (the respondents);
(b) there was no constitutional issue which needed to be interpreted by the Constitutional Court, and
(c) the petition was time barred.

I will deal with the last point (c) briefly. There has been confusion about when the appellant should have filed his petition.

It is accepted that the Chief Magistrate allowed the appeal in the Criminal Case on 22nd October, 1997. From the contents of paragraph 9 and 10 of his affidavit which contents were not challenged, the appellant was actually released on 24th October, 1997. In this particular matter the period of 30 days would not run out on 22nd November, 1997. As a matter of law it would run out later. This law is Section 34 of the interpretation Decree, 1976 (Decree No. 18 of 1976). By Section 34 (1) "in computing time for the purpose of any Act or decree,

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happened or the act or thing is done;;
(b) if the last day of the period is Sunday or a public holiday (which days are in this section referred to as "excluded days"), the period shall include the next following day, not being an excluded day."

This means that the period of 30 days within which appellant could have filed the petition ran from 25th October 1997 to 23rd November, 1997. From a number of diaries which I have looked at , 23rd November, 1997 was a Sunday which is an excluded day.

By operation of the law quoted above, section 34 (1) (b), the appellant was entitled to discount Sunday 23rd November 1997. So the last day upon which he was entitled to file his petition is 24th November 1997. Thus even though the appellant argued this point on the basis that Rule 4 (1) of Legal notice No.4 of 1996 contravened was inconsistent with the Constitution, the approach I have adopted shows that by instituting the petition on 24th November, 1997, the appellant was within time. Thus even if it can be argued that the Attorney General can not be held liable for the detention of the appellant before 22nd October, 1997 because by then the appellant was detained in pursuance of a lawful order of the Court, the detention after 22nd October 1997, after the conviction was quashed by the Chief Magistrate, is open to question by the appellant in Court however few the days may be. He has a valid grievance.

In my view grounds 3 (c) and 9 ought to succeed.
I think that the appellant had a cause of action at any rate in respect of the Attorney-General.

As I have indicated above, I agree with the conclusions and orders proposed by Mulenga J.S.C., I would allow this appeal in part. I would order that each party bears his own costs both here and in the Constitutional Court.

Dated at Mengo this 11th day of June 1999

J.W.N. Tsekooko
Justice of the Supreme Court

JUDGMENT OF KAROKORA, J.S.C

I have had the advantage of reading the judgment prepared by my learned brothers, Justice Mulenga, J.S.C., and Justice Kanyeihamba, J.S.C., and I do agree that this appeal should be dismissed. I only wish to add that this appeal raises an important legal issue, which if decided in favour of the appellant, we would be opening gates of the Constitutional Court, and thus setting up a precedent for every person whose conviction is quashed on appeal, to petition the Constitutional Court. There is no doubt that if we open the gates, the Constitutional Court would be flooded with insurmountable constitutional petitions which, I am sure, the framers of the Constitution never intended.

Needless to say, the Constitutional Court was created by the framers of the Constitution solely for interpretation of the Constitution vis-à-vis any Act of Parliament or any other law…………………….as spelt out by Article 137 (3) of the Constitution, which provides in part as follows:

> *"(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."*

It must be observed that in the instant case, the appellant was claiming that his fundamental rights guaranteed under the Constitution were violated when he was arrested, charged with a non-existent offence, convicted and sentenced to a term of imprisonment. Needless to say that the controversy in th instant case did not revolve around the interpretation of the Constitution vis-à-vis any Act of Parliament or any other law e.t.c. but rather the enforcement of appellant's fundamental rights and freedoms guaranteed under the Constitution, the remedies of which can be by way of tortuous action filed in any of the Courts of competent jurisdiction, seeking general damages for breach of those rights and freedoms. Article 50 (1) of the Constitution is relevant to such claims. Clause 1 of that article provides as follows:-

"*Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent Court for redress which may include compensation.*"

Clearly the petition of the appellant was seeking declaration that his fundamental rights and freedoms were violated when the 1st respondent's official arrested him. Against the 2nd respondent, the appellant was claiming that the acts of charging prosecuting, convicting and sentencing him to a term of imprisonment contravened and were inconsistent with Articles 21 (1) , 23 (1), 28 (3), (7) (12),. 25 (2), 31(2) and (5) of the Constitution. Consequently the appellant sought for an order of redress by way of compensation for the unconstitutional acts of the respondent. He specifically sought for shs 5,000,000/= compensation for each day he spent in detention plus costs.

It must be noted that the same Constitution, which guarantees personal liberty and other freedoms, contains limitations on those rights and freedoms. For instance, whereas Article 23 of the Constitution provides for protection of personal liberty, the same Article contains limitations upon that personal liberty. Claus (1) (c) of that article provides as follows:-

" 23 (1) No person shall be deprived of personal liberty except in any of the following cases:
(c) for purpose of bringing that person before a Court in execution of the order of a Court or upon reasonable suspicion that that person has committed or is about to commit a criminal offence under the laws of Uganda."

Clearly when the above provisions of the Constitution is read in light of the appellant's petition, it is apparent that the complaint against the 1st respondent was for unlawful arrest. However, when the complaint is considered in light of the 1st respondent's official's affidavit sworn in reply, which affidavit was not controverted, it becomes apparent that the appellant was arrested by the official of the 1st respondent after the appellant had threatened to box him and prevented him from arresting the driver of a taxi vehicle who had parked the vehicle on a pavement of Kampala City Council Taxi Park in contravention of the KCC Taxi Park Bye-laws Statute 77/75. As a result of the appellant's conduct, the driver of that vehicle escaped and ran away. The official of the 1st respondent was able to arrest the appellant as a result of which he was charged with obstructing him and of being a rogue and vagabond. The appellant was thereafter charged convicted and sentenced to a term of imprisonment for the purported offence. On appeal the conviction was quashed and sentence set aside.

Clearly the 1st respondent had no hand in the other complaints contained in the petition although he was the one who set the process in motion when he arrested the appellant. However, in my view, considering the provisions of clause (1) (c) of Article 23 of the Constitution, the conduct of the appellant as disclosed by Mr. Mungoma's affidavit justified appellant's arrest. In the circumstances, I think that the 1st respondent ought not to have been joined in the petition on account of having effected the arrest as the Constitution permits arrests of any person upon reasonable suspicion that that person has committed or is about to commit a criminal offence.

Turning to the 2nd respondent, it is clear that the appellant joined the Attorney General on the ground that the trial Magistrate had tried, convicted and sentenced him to a term of imprisonment. It is strange and surprising that the appellant who was represented by a firm of Advocates could file such petition against the 2nd respondent when the advocates are supposed to be fully aware of the judicial immunity and the decision of the East African Court of Appeal in the *Attorney General v Oluoch (1972) E.A 392 where the court held at page 395* as follows:-

> " I *think that public policy does require that a person acting judiciously or who is executing the lawful warrants or process of the court should not be sued for any act done or ordered by him in the lawful discharge of his duties. It seems to me that this is necessary if such a person is to perform his duties without fear of harassment by those who may fee aggrieved by his acts."*

There is no doubt in mind that section 4 (5) of the Government proceedings Act protects the Government against actions founded on judicial decision. Further, there is no doubt that section 48 (1) (2) of the Judicature Act protects Judicial officers and those executing Judicial orders from being sued for acts or omission of Judicial offices in the exercise of their judicial functions.

Finally, the 1995 Constitution has come up clearly in Article 128 (4) to protect judicial office from being liable for acts or omission by those persons in the exercise of their judicial power. Needless to say that if the judicial officers enjoy immunity from being sued for their acts or omission, it is unimaginable that government could be vicariously sued for the acts or omission of the judicial officers. Such suit or petition could not stand and should not have been filed at all against the 2nd respondents for the acts of the Judicial Officer.

I would, in view of the above, agree with my brother, Justice Kanyihamba, J.S.C, that the appeal should fail. Each party should bear its own costs here and in the Court below.

Dated at Mengo this 11th day of June 1999

A.N. Karokora,
Justice of the Supreme Court

JUDGMENT OF MUKASA-KIKONYOGO , JSC.

The facts of this appeal are set out in the judgments of Kanyeihamba, JSC and Mulenga, JSC. I need not repeat them.

I have had the benefit of reading the draft the judgment prepared by Wambuzi, C.J., Oder, JSC., Tsekooko, JSC., Karokora, JSC., Kanyeihamba, JSC., and Mulenga, JSC.

I am in complete agreement with Wambuzi, C.J., Karokora, JSC., and Kanyeihamba, JSC. That this appeal should be dismissed in toto.

Whilst it is conceded that the action was not time barred, the petitioner had cause of action and in agreement with Mulenga, JSC, that a litigant must not be turned away, from the seat of justice, the present petition was an obvious case where the petition was not maintainable law. Although the petitioner may have had a cause of action against the 1st respondent, for violation of his human rights he did not have to file it in the Constitutional court. The lower Courts had competent jurisdiction under Article 50 (1) of the Constitution of Uganda 1995 to give him redress.

With regard to the 2nd respondent, the Attorney general is given Judicial immunity under S.4 (5) of The Government proceedings Act which is intended to protect the government against action based on judicial decision. See: Also *Attorney General vs Oluuch 1972 E.A 392*.

In agreement with the reasons and conclusions of Kanyeihamba ,JSC., the appeal against both respondents should be dismissed. Each party should bear its own costs.

Dated at Mengo this 11th day of June 1999

Laetitia E.M. Mukasa-Kikonyogo
Justice of the Supreme Court