IN THE SUPREME COURT OF UGANDA

HOLDEN AT MENGO

Coram: Odoki C.J., Oder, Tsekooko, Karokora, Mulenga, Kanyeihamba and Kato JJ.S.C.

CONSTITUTIONAL APPEAL NO.1 OF 2003

BETWEEN

1. **BAKU RAPHAEL OBUDRA]**
2. **OBIGA KANIA] APPELLANTS**

AND

ATTORNEY GENERAL RESPONDENT

(Appeal from the decision of the Constitutional Court (Mukasa-Kikonyogo DCJ, Okello, Engwau, Kitumba, and Byamugisha JJA) dated at Kampala 8th Nov. '02 in Constitutional Petitions No. 4/2002 and No.6/2002).

JUDGMENT OF MULENGA, J.S.C.

I have read in draft, the judgment of my learned brother, Kanyeihamba JSC I agree that the appeal ought to succeed, and I concur in the proposed order to remit the case to the Constitutional Court for determination on merit.

The background to this appeal is well set out in the said judgment. It will suffice here to mention that the appellants wish to appeal to the Supreme Court in respect of their election petitions, which the High Court dismissed, and on appeal, the Court of Appeal confirmed the dismissals. They are unable to appeal to the Supreme Court because S.

67(3) of the Parliamentary Elections Act provides that the decision of the Court of Appeal is final. They petitioned the Constitutional Court to declare that provision unconstitutional, but their petitions were struck out for failure to disclose any cause of action; hence this appeal. I should add and highlight three features of the appeal.

The first feature is that this single appeal emanates from two constitutional petitions filed separately by Baku Raphael Obudra and Obiga Kania, now the appellants. There is no indication in the record of appeal, however, if the two petitions were formally consolidated. Indeed, the record of appeal compounds the uncertainty because, apart from the ruling, the rest of its contents reflect only Baku Raphael Obudra, the 1st appellant. Much of what I am to say in this judgment therefore, relates to his petition. Nevertheless, it appears to be common ground that the decision in this appeal, will apply to both petitions as if they were formally consolidated in the Constitutional Court. The second feature is that the ruling that is the subject of this appeal is on preliminary points of objection raised by the original respondents in the Constitutional Court, who however are no longer parties in the case. Briefly, the proceedings were as follows:

The parties who were cited as respondents in the constitutional petitions, were the successful respondents in the election petitions. When the constitutional petition(s) came up for hearing in the Constitutional Court, those respondents through their respective counsel, raised and argued three preliminary points of objection, namely-

- **That they were wrongly joined as respondents to the constitutional petition;**
- **That the petition does not disclose a cause of action because it presents no question requiring interpretation of the Constitution;**
- **That the petition was filed out of time.**

Counsel for the petitioner made submissions in reply on each of the three points. He virtually conceded the first point and proposed that the Attorney General be substituted as the respondent. He opposed the other two points of objection. In its ruling, the Constitutional Court did not make any decision on the third point of objection, which is therefore, not in issue in this appeal. It upheld the first objection, and struck out the

respondents with costs. On the proposal by counsel for the petitioner, to substitute the Attorney General as respondent, the court said -***"...in exercise of the powers conferred on this court by Order 10(2), the Attorney General would have been added or substituted as a party to the petition."***

The court did not order the substitution, however, because in the end it struck out the petition. Consequently, like in respect of the third point of objection, there is no appeal against the decision on the first point of objection. This appeal therefore, arises out of the court's decision on the second point of objection only. The third feature is that although the Attorney General appears in the title of this appeal as the respondent, he successfully applied to be struck out at the beginning of the hearing and so the appeal proceeded without a respondent.

Before considering the grounds of appeal, it is useful to put the remaining point of objection in the proper legal perspective. First, I should reiterate here, what I said in **Ismail Serugo vs. Kampala City Council,** Constitutional Appeal No.2/98 (SC) (unreported), that when dealing with preliminary points of objection, it is always important and useful, to have regard to the procedural law under which they are raised. Distinction must be made between points of objection as to the form of a pleading and those as to the substance of the case. It is one thing to object that a plaint does not disclose a cause of action, and quite another to object that the claim in the suit is not maintainable in law. That is because the outcome is different. In the latter category, the court decides on the merits of the case on basis of law only. The procedural rules applicable to this category are O.6 rr.27 and 28, and O13 r.2 of the Civil Procedure Rules. On the face of it, the point of objection in the instant case falls in the former category, where, subject to one exception that I will revert to later in this judgment, the court decides on only the fate of the impugned pleading, without going into the merits of the case. The relevant procedural law for that category is O.6 r.29 and O.7 r.11 of the Civil Procedure Rules.

The point of objection in the instant case was raised informally at the commencement of the hearing. Neither counsel for the respondents stated the law under which they raised

the objection. In the ruling, however, the Constitutional Court rightly pointed out that in determining whether the petition discloses a cause of action, regard must be had to the following Civil Procedure Rules -

"Order 7 rule 1 provides that 'The plaint shall contain the following particulars: ...

(e) the facts constituting the cause of action and when it arose' And Order 11(1)... provides for the rejection of a plaint if it does not disclose a cause of action."

Although the ultimate decision on the point of objection was to strike out the petition implicitly under O.7 r.ll, the reasoning in the ruling, leading to the decision, comprises two independent aspects that need to be considered separately. The first aspect is the holding that the petition does not allege any matter that calls for interpretation of the Constitution under Article 137 (3) (a). The second aspect is the holding that the appellant does not allege facts to show that the impugned statute violates a right guaranteed by the Constitution. The former is subject of the third ground of appeal, while the latter is partly subject of the same ground and partly subject of the first ground. I find it more appropriate to dispose of the former aspect, and therefore the third ground of appeal, first.

In the third ground of appeal, the appellants contend that it was an error to hold that the petition does not disclose a cause of action. With the greatest respect to the Constitutional Court, I unhesitatingly agree with the appellants' contention. Clearly, Baku Raphael Obudra's petition (which is the only one reproduced in the record of appeal), discloses not only one, but two constitutional causes of action, where he -

pleads in paragraph 2 (d) that

"S.67 (3) of The Parliamentary Elections Act, 2001 is inconsistent with Art. 140 of the Constitution of the Republic of Uganda, 1995 and is therefore unconstitutional and null and void pursuant to Article 2 (2) of the Constitution ";

and prays in paragraph 3 for

(a) declarations that the said section -

(i) ***is inconsistent with*** **(the said Article 140 and therefore null and void) and**

(ii) ***infringes on the petitioner's right*** **(under the Constitution); and**

(b) ***an order declaring*** **(his)** ***right of appeal to the Supreme Court.***

In a nutshell, the petition complains that S.67 (3) of the Parliamentary Elections Act, 2001, is inconsistent with Article 140 of the Constitution, and infringes on the petitioner's constitutional right to appeal to the Supreme Court; and it prays for, ***inter alia,*** declarations to that effect. These are two causes of action, the one under Article 137(3)(a), and the other under Article 50(1) of the Constitution. The Constitutional Court rightly sought guidance from decisions of this Court in **Major-General Tinyefuza vs Attorney General,** Constitutional Appeal No. 1/97 (SC)(unreported), and **Ismail Serugo vs Kampala City Council** (supra), on the test for determining if a cause of action is disclosed in a constitutional petition.[1] However, with the greatest respect to the learned Justices, I think that they erred in the application of the test. This is evident from the ruling of the court. After reproducing several paragraphs from the petition, the learned Justices said -

"According to the above pleadings the petitioner is alleging that an Act of Parliament is inconsistent with the provisions of the 1995 Constitution. This means that the petition is based on the first limb of Article 137...."

In my view, that was a correct identification of the cause of action. However, after reproducing the provision in Article 137(3)(a) and counsel's arguments, the court inexplicably went on to say -

"The petitioner is alleging that on 17th May 2002 he lost an appeal in the Court of Appeal and could not proceed to the Supreme Court because of section 67(3) (supra). In order to succeed he had to show by his pleadings that the act of losing an appeal 17.5.02 raises a matter for constitutional interpretation. We are saying so, because the petitioner claims that the cause of action accrued to him on that day, and not on the 20th April 2001 when the Act came into force. In our view, the act of losing an appeal per se does not call for interpretation of the Constitution."

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[1] **There is a distortion by omission in the quotation from my judgment in Ismail Serugo's case. In full it should read: "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." See Certified Constitutional Appeal Judgments, 1999-2000, at p.186.**

I must confess that I am unable to comprehend the court's deduction that in order to succeed, the appellant *"had to show by his pleadings that the act of losing **an** appeal on 17.5.02 raises a matter for constitutional interpretation".* The details about filing and losing the appeal, like those about filing and losing the election petition, and finally about the wish to appeal further, were included in the petition, not for any interpretation, but to provide the background and framework of the petition. What obviously required constitutional interpretation, and which the court had just highlighted, was the provision in Article 140 of the Constitution, and in particular the effect thereof, if any, on section 67(3) of the Parliamentary Elections Act. That, for purposes of a petition under Article 137(3)(a), is a sufficient cause of action.

When the court averted to what constituted the second cause of action, it again appears to have wrongly digressed to the loss of the appeal. The court first observed -

> ***"Admittedly, the petitioner is an aggrieved party because* (he) *lost an appeal. This alone is insufficient. In the case of SERUGO (supra), it was held that it is not an essential element for the petitioner to be aggrieved by an act or omission before bringing a petition."***

Needless to say, for purposes of the constitutional petition in issue, there was a grievance in respect of the second cause of action. However, the grievance was not the loss of the appeal. It was the failure to appeal to the Supreme Court. Be that as it may, the court examined excerpts from Article 132 of the Constitution, and section 67(3) of the Parliamentary Elections Act, and concluded that the petition did not show that the section violated the petitioner's guaranteed right. In my view, however, as I said earlier in this judgment, the particulars and allegations in the petition sufficiently disclose a second cause of action. In the petition, it is alleged that under Article 140 of the Constitution the petitioner has a right of appeal to the Supreme Court, but that he *"cannot appeal as the right of appeal to the Supreme Court has been barred by section 67(3).***"** It is then prayed, *inter alia,* that the court should declare that the said section *"infringes on the (petitioner's) rights under the Constitution"* and specifically declare that he has the right to appeal to the Supreme Court. These are the averments that disclose a cause of action under Article 50(1) of the Constitution. In my view therefore, the third ground of appeal ought to succeed.

The complaint in the first ground of appeal is that the Constitutional Court decided a substantive issue in the petition, before hearing the appellants' case on that issue. They contend that the preliminary hearing did not involve a trial of the issue on the right to appeal to the Supreme Court, and yet in the ruling the court virtually decided that the appellants did not have that right. This is clearly implicit in the part of the ruling where, before concluding that the petition does not disclose a cause of action, the court observed -

- **that the right of appeal to the Supreme Court is governed by Article 132 of the Constitution, which provides,** *inter alia,* **that it shall be the final court of appeal, and that appeals shall lie to it from *"such decisions of the Court of Appeal as may be prescribed by law* ", and**
- **that s.67(3) of the Parliamentary Elections Act does provide that: *"The decision of the Court of Appeal under that section is final."***

It is immediately after those observations that the court went on to hold -

> ***"According to the principles stated in Serugo (supra), the petitioner had to show that the provisions of the section, he is complaining about, violated a right guaranteed by the Constitution. The instant petition does not allege those facts, which allegedly contravene the provisions of the Constitution or those that are inconsistent with its provision. For those reasons we think the petition does not disclose a cause of action."***

It seems obvious to me that this holding was not based on a finding that the petition lacked averments showing a cause of action. Rather, it was based on the learned Justices' conclusion from the observations I have just summarised, that the petitioner had no right of appeal to the Supreme Court. That conclusion, however, was premature. Whether he has such right or not, and if he has, whether the said section 67(3) violates the right or not, are issues to be determined after due trial.

Earlier in this judgment, I alluded to an exception to the general rule that upon an application to strike out a plaint for not disclosing a cause of action, the court ought to restrict its ruling on the defect of the plaint and not to decide on the merits of the case. The exception is where the court is satisfied that "the cause of action" disclosed is

clearly not maintainable in law. *[See* the dicta in **Nurdin Ali Dewji & Others vs G.M.M.Meghji & Others (1953) 20 EACA 132,** and in **Ismail Serugo's case.(supra)]**. I am not satisfied that this case falls within that exception. First, the cause of action under Article 137(3)(a) i.e. the allegation that section 67(3) is inconsistent with Article 140, is clearly maintainable irrespective of whether or not it would be upheld. The appellants ought to be allowed to present their case first. Secondly, I would not hold that the cause of action under Article 50(1) is not maintainable in law, before the issue in the first cause of action is answered in the negative. In the circumstances, the first ground of appeal also ought to succeed.

I think the second ground of appeal is misconceived. The complaint there, that the Constitutional Court failed to address Article 140, is the antithesis of the first ground of appeal. The import of that article is the substantive issue to be decided upon the hearing of the merits of the case. The ground therefore, ought to fail. Before leaving this case, I am constrained to observe that in my opinion, no advantage is derived from taking on preliminary points of law, in cases such as this, which by their very nature, are to be decided on points of law only. What is intended to be a short cut, invariably leads to mixing up issues, and ultimately to delaying justice and increasing costs. I hope the instant case will serve to illustrate the point. A trial court should not hesitate to reject or postpone such objections to avoid confusing issues. It seems to me for example, that the points of objection in the instant case ought to have been separated. The first point of objection, which the appellants did not seriously contest, and which in any case, was the only one that concerned those respondents, could have been disposed of alone. Strictly those respondents had no locus standi to raise the rest of the objections. Those should have been left to be more conveniently disposed of with the substantive issues.

JUDGMENT OF ODER. JSC

I have had the benefit of reading in draft the judgment of Kanyeihamba, JSC. I agree with him that appellant's petition in the Constitutional Court disclosed a cause of action. Article 140 of the Constitution appears to presuppose that the right of appeal in a parliamentary election petition exists not only in the Court of Appeal but also in the Supreme Court. In so far as section 67(3) of the Parliamentary Elections Act 2001 limits that right to the Court of Appeal only, S. 67(3) appears to be in consistent with article 140 of the Constitution. That is what the appellants alleged in their petitions. A person aggrieved by the provisions of section 67(3) is entitled, in my view, to petition the Constitutional Court under article 137(3) of the Constitution for a declaration that section 67(3) of the Parliamentary Election Act is inconsistent with the Constitution. Whether there is merit or not in such a petition, it is for the Constitutional Court to decide. The appellant's appeal to this Court, therefore, succeeds. Their Constitutional Petition to the Constitutional Court should be heard on merit.

As there was no respondent in the appeal. I would make no order as to costs.

JUDGMENT OF ODOKI, CJ

I have had the advantage of reading in draft the judgment of Kanyeihamba JSC and I agree with it and the reasons he has given for allowing the application by the Attorney General. I concur in the order he has proposed as to costs. The background to this appeal has been summarised by Kanyeihamba, JSC and I need not repeat it.

In Ground 3 of the memorandum of appeal, the petitioners complained that the learned trial judges erred when they held that the petition did not disclose a cause of action. In their conclusion, the learned Justices of Appeal stated,

> ***"According to the principles in Serugo (supra) the petitioner had to show that the provisions of the section he is complaining about violated a right guaranteed by the Constitution. The instant petition does not allege those facts, which alleged contravene the provisions of the Constitution or those that are inconsistent with its provision. For those reasons we think the petition does not disclose* a cause of *action. There would be nothing to interpret. The petition would be dismissed with costs.***

In **Serugo vs Kampala City Council,** Constitutional Appeal No.2 of 1998, this Court pronounced itself on the meaning of cause of action as regards Constitutional petitions. Generally, the main elements required to establish a cause of action in a plaint apply to a Constitutional petition. But specifically, I agree with the opinion of Mulenga, JSC in that case that a petition brought under Article 137 (3) of the Constitution ***"sufficiently disclose 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 pray for a declaration to that effect."***

In my opinion, where a petition challenges the constitutionality of an Act of Parliament, it sufficiently discloses a cause of action if it specifies the Act or its provision complained of and identifies the provision of the Constitution with which the Act or its provision is inconsistent or in contravention, and seeks a declaration to that effect. A liberal and broader interpretation should in my view be given to a Constitutional petition than a plaint when determining whether a cause of action has been established.

In paragraph 2 of his petition, the 1st appellant stated, ***inter alia,***

> ***"(c) The Petitioner is aggrieved and dissatisfied with the judgment and decision of the Court of Appeal and wishes to appeal against the said decision and judgment on issues involving points of law of great, general and public importance requiring to be heard and decided upon by the Supreme Court has been barred by S. 67(3) of the Parliamentary Elections Act 2001.***
>
> ***(d) S. 67(3) of the Parliamentary Elections Act 2001 is inconsistent with Article 140 of the Constitution of the Republic of Uganda 1995 and is therefore unconstitutional and null and void pursuant to Article 2(2) of the Constitution."***

In the prayer, the 1st appellant requested the court to make a declaration, among other things, that Section 67(3) of the Parliamentary Elections Act infringes on his rights under the Constitution. The petition in respect of the 2nd Appellant was in similar terms.

From the pleaded facts, it is clear that the appellants specified the provisions of the Act of Parliament which they alleged were inconsistent with the particular provisions of the Constitution. Article 140 of the Constitution provides,

> ***"(1) Where any question is before the High Court for determination under Clause 1 of Article 86 of this***

Constitution, the High Court shall proceed to hear and determine the question expeditiously and may for that purpose suspend any other matter pending before it.

(2) This Article shall apply in a similar manner to the Court of Appeal and the Supreme Court when hearing and determining appeals on questions referred to in Clause (1) of the Article."

Article 86 of the Constitution confers jurisdiction on the High Court to hear election petitions in respect of members of Parliament or election of Speaker or Deputy Speaker of Parliament. Clause (2) of Article 86 allows a person aggrieved by the decision of the High Court to appeal to the Court of Appeal. On the other hand Section 67 (3) of the Parliamentary Elections Act 2001 provides that ***"the decision of the Court of Appeal under this Section shall be final."*** In view of the apparent conflict between Article 140 of the Constitution and Section 67(3) of the Parliamentary Elections Act, the matter called for judicial interpretation to establish whether Section 67(3) of the Parliamentary Elections Act was inconsistent with Article 140 of the Constitution and therefore null and void in accordance with Article 2(2) of the Constitution. The petitioners were entitled to obtain a decision of the Constitutional Court on the merits of their petitions, but they did not. The consequence was that the Constitutional Court failed to determine the issue whether the appellants had a right of appeal to the Supreme Court. It is for this reason, in my view, that the second ground of appeal ought to fail because the court did not rule on the substantive matter of jurisdiction.

As the majority of the members of the Court agree with the judgment and orders proposed by Kanyeihamba, JSC, this appeal is allowed in part. It is ordered that the petition be remitted back to the Constitutional Court for determination on the merits.

There will be no order as to costs.

JUDGMENT OF KATO, *J*SC.

I have had the benefit of reading draft judgment of my learned brother Kanyeihamba, JSC,. I agree with his conclusions and reasons for the same.

With due respect to the learned Justices of the Constitutional Court, it is not true to say, as their Lordships did, that the petitions did not disclose a cause of action. There is no doubt that paragraph 2(d) of the petitions clearly shows that there is a cause of action. The matter raised in that paragraph complaining that section 67(3) of the Parliamentary Elections Act 2001 is inconsistent with the provisions of article 140 of the constitution posed an issue, which the Constitutional Court had to decide. The court did not resolve that issue. I would allow the appeal with no order as to the costs of the appeal.

JUDGMENT OF KAROKORA, *JSC.*

I have read in draft the judgment prepared by my learned brother, the Hon. Justice Kanyeihamba, JSC, and I agree with the facts as set out in his judgment. 1 also agree with him that in a Constitutional Petition brought under Article 137(3) of the constitution, a cause of action is disclosed if the Petitioner alleges that an Act of Parliament or any other law or anything in or done under the authority of any law , is inconsistent with or contravenes any provisions of the constitution and then prays that the provisions of the Act be declared null and void. See the majority views of Justices of the Supreme Court in ***Attorney General vs Major General David Tinyefuza,*** Constitutional Appeal No. 1 of 1997 (S.C) and ***Serugo vs KCC.*** Constitutional Appeal No. 2 of 1998 (S.C).

The complaint in this petition was that because Section 67 of the Parliamentary Elections Act, 2001 bars appeals by any aggrieved party in an election petition to the Supreme Court, the petitioners decided to move the Constitutional Court to challenge the provision of Section 67 of the Parliamentary Elections Act, 2001, under Article 137(3) of the constitution as being inconsistent with Article 140 of the constitution and therefore prayed that it be declared null and void.

I also agree with him that when the pleadings in this appeal are read together with Articles 140 and 86(1) of the constitution, it becomes apparent that the petitioners had laid a foundation for the cause of action in their petitions to justify being allowed to proceed and prove whether or not a right of appeal exists.

In the result, ground 3 must succeed. The disposal of ground 3 would dispose off the entire appeal.

Dated at Mengo this 26th day of November 2003

JUDGMENT OF TSEKOOKO, JSC.

I have had the benefit of reading in draft the judgment prepared by my learned brother, the Hon. Dr.Justice Kanyeihamba, JSC. The facts of the appeal have been set out in his judgment. Having considered the relevant facts and the law, I agree with the conclusions of the Constitutional Court. I shall first allude to the application.

Before the appeal was cause-listed for hearing, the Attorney General filed a notice of motion under Rules 77 and 41, of the Rules of this Court, praying that the appeal be struck out on grounds that he was wrongly cited as a respondent to the appeal. We heard Mr. Bireije, Commissioner for Civil Litigation, who contended that because the Attorney General was not a party to the petition in Constitutional Court, it was wrong for the appellant to cite him as respondent in the Appeal and therefore the appeal should be struck out. In the course of his submissions, Mr. Bireije also raised an alternative point that if we can not strike out the appeal, we should strike out the Attorney General as respondent, since he was not a party at the trial. Mr. Rwaganika, counsel for the appellants, initially opposed striking out the Attorney General but alternatively conceded that the Attorney General could be struck off as a respondent leaving the appeal to be prosecuted ex parte. We struck out the Attorney General, mainly because he was not a party to the proceedings in the court below and also because we were not persuaded why the Attorney General should be a respondent to this appeal.

Regarding the argument that because there is no respondent to the appeal, the appeal must be struck out, Mr. Bireije did not cite any authority. We have not seen any. So we heard the appeal ex-parte. We awarded the Attorney General the costs occasioned by filing the notice of motion. I now turn to the appeal.

I will first consider grounds 1 and 2 which are framed as follows: -

1. **The learned trial Judges misdirected themselves when they ruled on the substantive matter of the jurisdiction of the Supreme Court before they were addressed on the matter.**

2. **The trial Judges erred when they failed to address themselves to Art.140 of the Constitution which is a specific provision relating to the jurisdiction of the Supreme Court in election cases and on which the petition was founded.**

I think that these two grounds in away contradict each other. They should have been argued in the alternative. Be that as it may, I noticed from the record that in his address to the Court below, Mr. Rwaganika referred to section 67 (3) of the Parliamentary Elections Act, 2001 (the Act) and to Art.140 of the Constitution. In that regard the reference to the jurisdiction of this Court by the Justices of the Constitutional Court in their ruling was inevitable. I do not, with respect, agree that the Constitutional Court failed to address Article 140.

According to Mr. Rwaganika, Article 86 of the Constitution is inconclusive on whether or not the Supreme Court has appellate jurisdiction in election petitions. In his view it is Art.140 which is conclusive because it provides procedure for this Court to hear such appeals expeditiously. I am not persuaded by these arguments and I think that the scheme of the drafting of the Constitution supports my view that Art.86 is conclusive. The Article is under chapter six of the Constitution. Under the chapter are listed various articles concerned with the various aspects of the legislature. The article makes provisions for the hearing and determination of questions of membership of Parliament. Clause (1) of Article 86 confers on the High Court jurisdiction to hear and determine disputes arising from the election of the members, the Speaker and the Deputy Speaker of Parliament. Clause (2) confers on the Court of Appeal jurisdiction to hear appeals arising from decisions made by the High Court under clause (1). The former clause reads: ***"(2) A persons aggrieved by the determination of the High Court under this Article may appeal to the Court of Appeal"***

Since the whole Article is concerned with hearing and determination of election petitions in Courts, it is my considered view that if the Constituency Assembly had intended to provide for second appeals to continue into this Court, the Assembly would have enacted a provision to that effect here. There is none. That means Art.86 is definite and conclusive. The conclusiveness is emphasised in clause (3) which authorised Parliament to make a

law which sets out the procedure and circumstances under which election petitions to the High Court and election appeals to the Court of Appeal are to be made.

Accordingly in March 1996, barely five months after the promulgation of the Constitution, the National Resistance Council (NRC) which was the Interim Parliament, enacted the Parliamentary Elections (Interim Provisions) Statute, 1996, (Statute 4 of 1996). In that statute, there is S.96 which is identical in every respect to section 67 of the Parliamentary Elections Act, 2001 (PEA). When the NRC enacted S.96 of the statute, it complied with Art.86 (3) of the Constitution. In its wisdom, the NRC appears to have seen no need to provide for second appeals to this Court. Parliament which followed the NRC simply lifted the words of S.96 and re-enacted them in S.67 of the PEA, 2001.

It is clear to me that when in 2001 Parliament enacted the Parliamentary Elections Act, 2001 and included S.67 (3) which makes the decision of the Court of Appeal final, Parliament was also complying with the letter and spirit of Art.86 (3). I do not, with respect, agree, as argued by Mr. Rwaganika, that Article 86 is inconclusive. There is nothing inclusive about its provisions.

Further, Art.132 (2) (3) shows clearly that appellate jurisdiction of this Court can only be created by law. The article reads: -

> ***"An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law"***

Jurisdiction cannot be created by mere inference. Moreover, in my opinion Article 140 of the Constitution merely refers to the procedure and standards which must be adopted in hearing election disputes. Clause (2) thereof does not confer any jurisdiction on any Court. In this connection, it should be noted that jurisdiction of the High Court to hear cases and appeals not related to petitions, is conferred by Article 139 and not Article 140. Similarly, jurisdictions of the Court of Appeal and of the Supreme Court to hear and determine non-election cases and appeals are conferred by Articles 134 (2), 137 and 132 respectively. Clearly therefore in election matters, the jurisdiction is conferred on the High Court and the Court of Appeal only by Art.86 and of course S.67.

When Parliament enacted the Parliamentary Elections Act, 2001 and included the provisions of Section 67 (3), Parliament must have been aware of the above mentioned existing rights of appeal conferred by the Constitution. Sub section (3) reproduced the intention of Art 86 (2). Therefore, after promulgation of the Constitution, in my view, the limiting of the right of appeal by section 96 (3) of statute 4 of 96 and subsequently by S.67 (3) of the Act of 2001 must have been deliberate. I think therefore that Article 140 of the Constitution merely urges Courts to expedite hearing of election petitions disputes but does not create a substantive right of appeal. Nor does it confer jurisdiction on this Court. If the latter were the case, I do not see any sound reason why that jurisdiction could not have been provided in Article 132 where the appellate jurisdiction of the Court is set out. Or better stills the jurisdiction could have been provided under Art.86. It is also instructive to note that Art.140 of the Constitution enacts part of Clause 169 of the Odoki Draft Constitution. At the time the Draft Constitution was produced, the current Court of Appeal was not anticipated. Appeals from High Court were expected to go to the Supreme Court of the time, not the present one. Constituency Assembly delegates who created the Court of Appeal must have been satisfied that it should be the last court of appeal in election matters. I am of the considered opinion that the inclusion of the words ***"Supreme Court"*** in Art 140 (2) must have been left in the constitution by inadvertence and I think it is superfluous and does not confer a right of an election appeal. Grounds one and two must therefore fail.

Although the view I express in this paragraph is not material in deciding this appeal, I think that creating a number of appeals in election petitions would be imprudent and can create unnecessary suspense both to the parties in the dispute and the Constituents. If there is real need for election appeals to be decided by this Court, the law can be amended so that appeal in election petitions come straight to this Court after trial. In that way speed in resolution of election matters would be achieved.

I think this conclusion would dispose of this appeal and I would dismiss the appeal with costs.

I will briefly comment on ground three.

The complaint is that the Constitutional Court erred in holding that no cause action was disclosed. I agree that in a number of cases decided by this Court, the Court has held the view that normally in constitutional petitions brought under Art.137 (3) of the Constitution, a cause of action is disclosed if the petitioner alleges the act or omission complained of and cites a provision of the Constitution which is alleged to have been contravened by the act or the omission complained of and then prays for a declaration: See **Attorney General Vs Major General.D.Tinyefunza** Constitutional Appeal 1 of 1997 (S.C) and **Serugo Vs Kampala City Council,** Constitutional Appeal No. 2 of 1998 (S.C) (unreported). But I do not think that in these cases we have laid down a binding principle that will apply to all constitutional petitions. Every petition will have to be decided on its own facts.

In the proceedings before us, the petitioners alleged in their constitutional petitions that S. **67 (3)** of the **Parliamentary Elections Act,** 2001 was inconsistent with **Art. 140** of the **Constitution,** in that whereas the latter appears to allow losers of election petitions in the High Court to appeal up to the Supreme Court, the Act does not allow Election Petition Appeals to proceed up to the latter Court. On the face of it, the appellants would appear to have, by their pleadings in the Constitutional Petitions, raised and laid the foundation of the necessary components of a constitutional cause of action. However my discussions of grounds 1 and 2 shows that on the examination of the law, the appellants did not have a right of appeal under Art. 140 which could be violated and, therefore, they had no cause of action. So the decision of the Constitutional Court is correct. Ground three must therefore fail.

I would dismiss this appeal. I would make no order as to costs.

JUDGMENT OF KANYEIHAMBA. J.S.C.

The background to this appeal may be summarised as follows:

The petitioners, Baku Raphael Obudra and Obiga Kania were candidates who contested in separate constituencies in the Parliamentary Elections which were held throughout the country on the 26th day of June, 2001. Each lost in his constituency. Being dissatisfied with the results, each filed an election petition in the High Court at Gulu. Each petition was heard by a different judge. On 23/01/2002, the High Court (Kania, J.) dismissed the petition

of Baku Raphael Obudra and on the 24/01/2002, Aweri Opio, J. dismissed the petition of Obiga Kania. They both filed separate appeals to the Court of Appeal which were dismissed with costs.

Wishing to appeal to the Supreme Court which is the highest appellate court in this land, the petitioners were advised that the law did not permit them to appeal beyond the Court of Appeal. They therefore decided to challenge this legal restriction on what they considered to be their right. They subsequently filed Constitutional Petitions Numbers 4 and 6 of 2002 in the Constitutional Court under Article 137 of the Constitution. The petitions were dismissed. Hence this appeal.

The Memorandum of Appeal in this court contains three grounds framed as follows:

1. ***The learned Justices of Appeal misdirected themselves when they ruled on the substantive matter of the Jurisdiction of the Supreme Court before they were addressed on the matter.***

2. ***The learned Justices of Appeal erred when they failed to address themselves to Article 140 of the Constitution which is a specific provision relating to the jurisdiction of the Supreme Court in election cases and on which the petitions were founded.***

3. ***The learned Justices of Appeal erred when they held that the petition does not disclose a cause of action.***

Prior to the causelisting of the appeal for hearing, the Attorney General who was then listed as a respondent to the appeal filed Miscellaneous Application No. 1 of 2003 under Rules 41 and 77 of the Rules of this Court seeking an order to strike out the appeal on the ground that the Attorney General was wrongly joined as a party as he had not been a party to Constitutional Petitions Nos. 4 and 6 of 2002. We heard counsel for the parties and granted the application and ordered that the Attorney General be struck out as a respondent. We thereafter heard the appeal *ex parte,* that is to say without a respondent. We reserved our reasons for striking out the Attorney General as respondent.

We do so now. In the petitions in the High Court, the Attorney General was not cited by either petitioner as a party. In the petitions before the Constitutional Court, Petitions Nos. 4 and 6, the appellants sought leave to join the Attorney General as a respondent and the learned Justices of the Constitutional Court observed, obita *dicta,* that had the appeal proceeded before them they would have ordered that the Attorney General be joined in the proceedings as a party.

Consequently, in the appeal to this court, the Attorney General was added to the parties as a respondent. We agreed with the submissions of Mr. Bireije, Commissioner for Civil Litigation for the Attorney General that since the learned Attorney General had not been enjoined as a party in the High Court petitions, it would be unfair to join him at later stages, unless with his consent. It is for this reason that we allowed the application to strike out the learned Attorney General as a respondent.

Mr. Rwaganika, counsel for the appellant argued grounds 1 and 3 together and ground 2 separately. On grounds 1 and 3, counsel contended that the Justices of Appeal erred in holding that there was no cause of action. Counsel submitted that according to the decisions of this Court in such cases as the **Attorney General v. Major General Tinyefuza, Const. App. No. 1 of 1997 (S.C.)** and **Serugo v. Kampala City Council, Const. App. No. 2 of 1998 (S.C),** all that a petitioner has to show is that the provisions of the law of which he or she is complaining, violates a right guaranteed by the Constitution. According to learned counsel, if Article 140 of the Constitution is read together with Article 86(1), a right of appeal to the Supreme Court in election petitions is guaranteed by the Constitution. On the other hand, s.67 of the Parliamentary Elections Act limits

the right of appeal to the Court of Appeal. Mr. Rwaganika therefore contended that there was an apparent conflict between Articles 86(1) and 140 of the Constitution and section 67 of the Act. The conflict needed to be interpreted by the Constitutional Court. Therefore, the learned Justices of the Constitutional Court erred in law when they held that the petitions of the appellants did not disclose a cause of action. Counsel further contended that the learned Justices further erred when they first determined the substantive issue of whether

the appellants had a right of appeal to the Supreme Court before deciding on the preliminary question of whether or not there was a cause of action.

Article 86(1) of the Constitution vests in the High Court the power to hear Parliamentary Elections Petitions. Clause (2) of the same Article provides for appeals against the decision of the High Court. Article 86 does not preclude an aggrieved party from appealing to the Supreme Court. Therefore there seems to be an apparent right of appeal to the Supreme Court. That apparent right is reinforced by the provisions of Articles 132 and 140 of the Constitution. Article 132 stipulates that the Supreme Court shall be the final court of appeal. Article 140 which prescribes expeditious procedure to be followed by the High Court when hearing election petitions, provides, *inter alia,* that the same procedure will apply to both the Court of Appeal and the Supreme Court. It thus appears from the reading of the provisions of these Articles that any Act of Parliament which conflicts with the said apparent right *prima facie,* raises a question of interpretation for which the provisions of Article 137can be invoked. Article 137 provides in Clause (3) that:

"(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 this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate."***

The appellants assert in ground 3 that the learned Justices of Appeal erred when they held that the petition does not disclose a cause of action. In the case of **Major General Tinyefuza v. Attorney General, Const. Appeal No. 1 of 1997 (S.C), (unreported),** this court considered what is a cause of action in cases involving the interpretation of constitutional instruments. It was said that:

> ***"A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment in court*****....." (Per Oder, J.S.C).**

In the case of **Serugo v. Kampala City Council, Const. Appeal No. 2/98 (S.C), certified edition, 1999-2000,** it was observed that generally,

> ***"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 plaintiffs right,***
>
> ***ii) violation of that right and***
>
> ***iii) of the defendant's liability for that violation"***

As for constitutional petitions, Mulenga, J.S.C. put it this way,

> ***"A petition brought under this provision (Article 137(3) 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 have been contravened by the act or omission, and pray for a declaration to that effect."***

In their petitions before the Constitutional Court, the appellants averred that:

> **"(a) .....**
>
> ***(b) .....***
>
> ***(c) The petitioner is aggrieved and dissatisfied with the judgment and decision of the Court of Appeal and wishes to appeal against the said decision and judgment on issues involving points of law of great public importance requiring to be heard and decided upon by the Supreme Court but cannot appeal as the right of appeal to the Supreme Court has been barred by s.67(3) of the Parliamentary Elections Act, 2001.***

(d) s.67(3) of the Parliamentary Elections Act, 2001 is inconsistent with Article 140 of the Constitution of the Republic of Uganda, 1995, and is therefore unconstitutional and null and void pursuant to Article 2(2) of the Constitution."

In their ruling, the learned Justices of the Constitutional Court made the following observations:

> ***"In order for the petitioner to succeed, he has to show by his pleadings that the act of losing an appeal on 17th May raises a matter for constitutional interpretation. We are saying so, because the petitioner claims that the cause of action accrued to him on that day, and not on the 20th April, 2001 when the Act came into force. In our view, the act of losing an appeal per se does not call for the interpretation of the Constitution. Admittedly, the petitioner is an aggrieved party because he lost the appeal. This is not sufficient."***

The learned Justices then concluded,

> ***"Section 67(3) of the Parliamentary Elections Act provides that, "The decision of Court of Appeal under this section is final". According to the principles stated in Serugo (supra), the petitioner had to show that the provisions of the sections he is complaining about violated a right guaranteed by the Constitution. The instant petition does not allege those facts which allegedly contravene the provisions of the Constitution or those that are inconsistent with its provision. For these reasons we think the petition does not disclose a cause of action."***

With the greatest respect, the learned Justices of the Constitutional Court misdirected themselves on the pertinent constitutional issues raised in the petition. In my opinion, the issues were not whether the petitioners had lost the appeal but whether they have a right of appeal to Constitution. The petitioners' prayer for a declaration that they had a right to appeal all the way to the Supreme Court was not answered by the learned Justices of Appeal. In my view, the constitutional provisions I have examined and their relationship with s.67(3) of the Parliamentary Elections Act, 2001, were pertinently raised by the petitioners and brought their complaint within the meaning of Article 137(3) as to require

interpretation. In my opinion, the petitions raised a sufficient cause of action which the Constitutional Court ought to have considered and resolved but did not do so.

In a number of cases such as **Attorney General v. Major General Tinyefuza**, Constitutional Appeal No. 1 of 1997 (S.C.) and **Serugo v. Kampala City Council**, Constitutional Appeal No. 2 of 1998 (S.C.) this court has expressed the view that in constitutional petitions brought under Article 137(3) of the Constitution, a cause of action is disclosed if the petitioner alleges the act or omission complained of and cites the provision of the Constitution which has been contravened and prays for a declaration. In my opinion therefore, ground 3 of the appeal ought to succeed.

Ground 1 complains that the learned Justices of appeal misdirected themselves when they ruled on the substantive matter of the jurisdiction of the Supreme Court before they were addressed on the matter. In arguing this ground, counsel for the petitioners did not cite any authorities. In my opinion however, a court is entitled to consider and determine any issues before it without having to place them in any order of preference provided it subsequently gives its reasons for deciding each of the issues. In my view[r] therefore there is no merit in ground 1 of the appeal and it ought to fail.

Finally, I turn to ground 2 of the appeal. Firstly, I am constrained to observe that where a tribunal is asked specifically to rule on any matter before it and fails to do so or rules on entirely different proposition of its own volition its decision cannot be said to be final on the matter it was asked to rule on in the first instance.

In their petitions, the appellants asked the Constitutional Court to declare that they had a right of appeal from the Court of Appeal to the Supreme Court. The Constitutional Court, having decided that there was no cause of action failed to consider the matter raised by the petitioners. Mr. Rwaganika, learned counsel for the appellants submitted that Article 140 of the Constitution read together with Article 86(1) provide the procedure to be followed when courts are dealing with petitions and Article 140(1)(c) in so far as it provides a similar procedure to be followed in the Supreme Court implies that there is a direct right of appeal

to that court. The Constitutional Court ought to have made a decision on the apparent conflict between the Constitutional provisions and those of the Parliamentary Elections Petitions Act, 2001. This, the Constitutional Court failed to do. Consequently, ground 2 of the appeal ought to succeed.

I would therefore allow this appeal. I would order that the petitions be remitted to the Constitutional Court for determination on merit.

As there was no respondent in this appeal, I would make no order as to costs.

Dated at Mengo, this 26th day of November 2003.