

THE REPUBLIC OF UGANDA

**IN THE SUPREME COURT OF UGANDA
AT MENGO**

**(CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA,
MULENGA, KANYEIHAMBA AND KATUREEBE, JJ.SC.)**

CONSTITUTIONAL APPEAL NO. 1 OF 2004

BETWEEN

PHILLIP KARUGABA :::::::::::::::::::: APPELLANTS

AND

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

*{Appeal from the decision of the Constitutional Court (Okello, Mpagi-Bahigeine, Engwau,
Kitumba and Byamugisha JJ.A) dated 4th April 2003 in Constitutional Appeal No. 11 of
2002}*

JUDGMENT OF ODOKI, CJ

I have had the advantage of reading in draft the judgment prepared by my learned brother, Kanyeihamba JSC, and I agree with him that this appeal has no merit and should be dismissed. I concur in the order he has proposed as to costs.

As the other members of the Court also agree, this appeal is dismissed with no order as to costs.

Dated at Mengo this1st day of ...August..... 2006

B J Odoki
CHIEF JUSTICE

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, C.J., ODER, TSEKOOKO, KAROKORA,
 MULENGA, KANYEIHAMBA AND
 KATUREEBE. J.J.S.C).

CONSTITUTIONAL APPEAL No.No.1 OF
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PHILLIP KARUGABA] APPELLANT

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*[Appeal from the decision of the Constitutional Court at
 Kampala,
 (Okello, Mpagi-Bahigeine, Engwau, Kitumba and Byamugisha,
 JJ.A),
 dated 4th April, 2003 in Constitutional Petition No.11 of
 2002]*

JUDGMENT OF TSEKOOKO, JSC

I have had the benefit of reading in draft the judgment prepared by my learned brother, Kanyeihamba, JSC, and I agree that this appeal ought to fail. I agree with the proposal that there should be no order as to

order as to costs.

*Delivered at Mengo this: day:
... , 2006.*

**A. N. KAROKORA.
JUSTICE OF THE SUPREME COURT**

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**(CORAM: ODOKI, C.J., ODER, TSEKOOKO,
KAROKORA, MULENGA,
KANYEIHAMBA, KATUREEBE, J.J.S.C.)**

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BETWEEN

PHILIP KARUGABA ::::::::::::::::::::::::::::::

APPELLANT

AND

THE ATTORNEY GENERAL ::::::::::::::::::::::

RESPONDENT

*(Appeal arising from the decision of the
Constitutional Court (Okello, Mpagi-Bahigeine,
Engwau, Kitumba, Byamugisha, J.J.A.) dated 4th April,*

2003 in Constitutional Petition No. 11/2002).

JUDGMENT OF KANYEIHAMBA, J.S.C.

The appellant who is a practising advocate filed a petition in the Constitutional Court seeking a declaration that *“Rule 15 of the Rules of the Constitutional Court (Petition for Declarations under Article 137 of the Constitution Directions 1996, is inconsistent with Article 26(2) of the Constitution.”* The Constitutional Court unanimously dismissed the petition as devoid of merit.

The appellant who appeared in person and represented himself has appealed to this court and filed a Memorandum of Appeal containing seven grounds framed as follows:

1. ***The Learned Judges erred in law in holding that a right to petition the Constitutional Court under Article 137 of the Constitution did not constitute property of such a petitioner under Article 26(2) of the Constitution.***
2. ***The Learned Judges erred in law in holding that the existence of an alternative remedy to the deceased petitioner, Joyce Nakachwa, precluded the rights of her estate to pursue the constitutional petition.***
3. ***The Learned Judges erred in law in failing to recognize that by reason of limitation, the***

deceased petitioner's action under the Law of Torts was time-barred.

4. ***The Learned Judges erred in law in invoking the Law Reform (Miscellaneous Provisions) Act without giving the Appellant an opportunity to address the Court on it.***
5. ***The Learned Judges erred in law in holding that the Appellant should have filed an appeal against the ruling of the Court in Constitutional Petition No. 2 of 2001 JOYCE NAKACHWA VS. ATTORNEY GENERAL.***
6. ***The Learned Judges erred in law in holding that the action of Constitutional Petition No. 2 of 2001 JOYCE NAKACHWA VS. ATTORNEY GENERAL should have proceeded in the High Court as an action for the enforcement of fundamental human rights under article 50 of the Constitution.***
7. ***The Learned Judges erred in law in holding that the Appellant had no interest in the matters complained of in CONSTITUTIONAL PETITION NO.2 OF 2002 JOYCE NAKACHWA VS. ATTORNEY GENERAL as to entitle him to bring the current petition under appeal.***

The Attorney General was represented by Miss. Margaret Apiny who was and assisted by Mrs. Nabukizza, both

Senior State Attorneys.

The appellant stated that he had been counsel for one Joyce Nakachwa, now deceased who was a sole petitioner in Constitutional Petition No.2 of 2001 before she died. When her death came to the knowledge of the Constitutional Court, which was then hearing the said petition, the court ruled that *“Rule 15(1) of Legal Notice No.4 of 1966 is crystal clear. The petition abates by the death of a sole petitioner.”*

Mr. Karugaba abandoned ground 3 of the appeal. The substance of Mr. Karugaba’s submissions in this appeal amounts to the proposition that a petition which is a chose in action is also property which is inheritable. He contended therefore that where a petitioner is seeking a declaration of his or her right and dies, that right should be inherited by his or her successors in title and since what the deceased wanted was the protection of a right enforceable by any individual, Mr. Karugaba as the deceased’s counsel in Petition No. 11 of 2002, had a constitutional right to continue prosecuting the petitioner’s case. He further contended that the Constitutional Court erred in distinguishing between the right to petition as a chose in action which abates with the death of the petitioner and the right to compensation which survives the deceased and may be inherited by his or her successors in title.

Mr. Karugaba cited a number of authorities including provisions of the Constitution of Uganda, Supreme Court Rules of 1996. the Law Reform (Miscellaneous Provisions) Act, Cap. 79 and the cases of **Joyce Nakachwa v. Attorney General & Others**, Constitutional Petition No. 2 of 2001 (C.C), **Alenyo v. Attorney General & others**, Constitutional petition No.5 of 2002, **Sarah Longwe v. Intercontinental Hotels** (1999) 4 LRC.221, **Ismail Serugo v. Kampala City Council**, Constitutional Appeal No. 2 of 1998, and **Halsbury’s Laws of England**, 4th edition vol. 6 Paragraphs 3 & 8, in support of his submissions.

Miss. Apiny opposed the appeal and supported the judgment and decision of the Constitutional Court as

having been legally and correctly reached. She contended that the Constitutional Court was correct to hold that the right to petition for a declaration was a mere chose in action which did not confer any property within the meaning of Article 26 of the Constitution. She further contended that Rule 15 which the appellant complains of is not inconsistent with the provisions of the Constitution. Counsel for the state cited the **Law Reform (Miscellaneous Provisions Act)** and the case of **Shah v. Attorney General** (No.2) 1970 EA.523, in support of her submissions.

In my view, the appeal succeeds or fails on the determination of the meaning of property for, it is only property which may survive a deceased person who owned it. The deceased from whom the appellant wishes to inherit a right was petitioning the Constitutional Court for a declaration of a right. The question that arises is whether a right to petition amounts to property. Articles 137(3) provides that:

“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 is clear that the right to petition the Constitutional Court is vested in every person in their own individual capacity. In my opinion, this is a clear case where this right expires with the deceased person and such death does not affect the rights or obligations of any other person nor does the death confer any residual rights to any other person let alone the deceased's counsel.

For any right or interest to survive a deceased person, that right or interest must conform to the meaning given

to property as stated in Article 26 of the Constitution. The Article provides as follows:

1. ***Every person has a right to own property either individually or in association with others.***
2. ***No person shall be compulsorily deprived of property or any interest or right over property of any description except where the following conditions are satisfied.***

The Article proceeds to enumerate those conditions to include reasons for deprivation, the necessity for making a law to justify the deprivation and to give reasons thereof and then to compensate the person or persons who have been deprived of their property.

Black's Law Dictionary describes the kind of property that can be owned, inherited and willed away. It is property *"that is peculiar or proper to any person: that which belongs exclusively to one who has dominion of a thing or personal, corporeal or incorporeal, which he has a right to enjoy and do with what he pleases, even to spoil or destroy it as far as the law permits. The exclusive right of possessing, enjoying and disposing of a thing. The highest right of a man can have over anything being used to refer to that right which one has to lands or tenements, goods or chattels, which no way depends on another man's courtesy."*

In a book entitled *"Words And Phrases Legally Defined, Vol. 4;"* property is defined in these terms:

"Property is that which belongs to a person exclusively of others, and can be the subject of bargain and sale. It includes good will, trademark, licences to use a patent, books, debts, options to purchase, life policies and other

rights under contract.”

In my view, the right to petition which is a chose in action is not one of the property rights enumerated and described in various sources both legal and non-legal. The right to petition is optional to the holder and is not inheritable. This possible chose in action cannot, by the stretch of the imagination, be perceived as inheritable property either by those who at one time or another represented the deceased before death or his or her successors in title after death.

For the foregoing reasons, it is my view that Rule 15 which is the subject of this appeal is not, in any way or form; in conflict with the provisions of Article 26 of the Constitution. I would therefore dismiss all the grounds of appeal and this appeal. I would not make any orders as to costs of this appeal in this Court or in the Constitutional Court.

Dated at Mengo, thisday of,
2006.

G.W. KANYEIHAMBA

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

CONSTITUTIONAL APPEAL NO. 1 OF 2004

**(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA,
KANYEHIAMBA, AND KATUREEBE, JJ.SC).**

**PHILLIP KARUGABA :::::::::::::::::::::
APPELLANT**

AND**ATTORNEY GENERAL :::::::::::::::::::::::::::::::
RESPONDENT**

(Appeal from decision of the Consitutional Court (S.T. Manyindo, DCJ; C.M. Kato, Berko, Engwau, and Twinomujuni, JJ.A, at Kampala dated 30th April 1998 in Constitutional Petition No. 14/97).

**NOTES BY JUSTICE BART KATUREEBE FOR POSSIBLE
INCLUSION IN THE JUDGMENT**

In my view, this Appeal depends on whether the right to petition the Constitutional Court under Article 137 is "**property**" within the context and meaning of Article 26 of the Constitution.

Article 137(3) states:

"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 would appear to me that any person in Uganda can make the allegations mentioned in that article and may then Petition the Court. Does that right to Petition amount to "property" which the individual can then claim to own. Mr. Karugaba, The Appellant/Petitioner went to great length to argue that that right is a chose-in-action and therefore property that is protected by Article 26 of the Constitution. In that regard he cited a concise Dictionary of Law for the definition of chose-in-action. He also cited the case of **SHAH - VS- ATTORNEY GENERAL (1970) E.A 523.**

In my view the starting point ought to be an examination of Article 26 as a whole to be able to understand its purpose and import.

Article 26 states as follows:-

1. **"Every person has a right to own property either individually or in association with others"**
2. **"No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied.**
 - (a) **the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and**
 - (b) **the compulsory taking of property is made under a law which makes provision for**
 - (i) **prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and**
 - (ii) **a right of access to a court of law by any person who has an interest or right over the property." (Emphasis is mine).**

The key words in that article appear to be "own" and "property" the property envisaged by that Article must be that which is capable of being owned, which is capable of being given a compensable value.

The term "own" is defined in **BLACK'S LAW DICTIONARY, 6TH** Edition to mean:

"To have a good legal title; to hold as property; to have a legal or rightful Article to; to have; to possess."

The learned authors then go on to define "owner" inter alia, as "He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right.....The term is,

however, a nomen generalissimum, and its meaning as to be gathered from the connection in which it is used, and the subject matter to which it is applied....."

We have to answer the question whether the right to petition granted by Article 137(2) can be said to be "owned" property within the Context of Article 26. I have further examined the meaning of the word "property." The Constitution does not define that word. In the Shah case (above) it was decided that "The word property in that section has not a limited connotation..... but applies to "personal" as well as "tangible" property." (per Jones J at page 531) I agree with that, bearing in mind that in that case the court was considering the issue of a judgment debt, and the court rightly held that a Judgment debt is property. But under Article 137 there is no Judgment debt. It is a grant of a right to Petition, which grant is to every one at large, not to any one particular individual as would be the case with a Judgment debt.

In my view it would be overstretching the issue to argue that every right granted by The Constitution amounts to "property" to be protected under Article 26. I am fortified in that view, once again, by Black's Law Dictionary, in its fairly detailed definition of the word "property" at Page 1216 "Property."

"That which is peculiar or proper to any person: that which belongs exclusively to one that dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects. The exclusive right of possessing, enjoying, and disposing of a thing. The highest right a man can have to anything; being used to refer to that right which one has to lands or tenements, goods or chattels, which no way depends on another man's courtesy....."

"Property, within, Constitutional Protection, denotes group of rights inhering in citizen's

relation to physical thing, as right to possess use and dispose of it"

(Emphasis added).

Furthermore, in Words & Phrases Legally Defined, Vol. 4 at Page 200.

"property" is defined thus:-

"Property is that which belongs to a person exclusively of others, and can be the subject of bargain and sale. It includes goodwill, trade marks, licences to use a patent, book debts, options to purchase, life policies, and other rights under contract."

Likewise in **STROUDS JUDICIAL DICTIONARY Vol.4** at Page 2151. The term property is defined as:-

- 1) **"Property" is the generic term for all that a person has dominion over. Its two leading divisions are (1) real, and (2) personal"**
- 2) **"But care must be taken to distinguish between "property" and "power"**
- 3) **"Property" is the most comprehensive of all terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have."**

I am of the firm view that the framers of the constitution had in mind the sort of property as defined above for purposes of the protection accorded under Article 26. It is far fetched that they could have intended that a right given to anyone at large to challenge an Act of Parliament or acts or omissions of others under Article 37 amounted to property that could even be inherited by the estate of a deceased Petitioner. It is not a right exclusively granted to any one individual. Indeed a deceased person may be interested in petitioning The Court under Article 137(2), but his successors may be of a contrary view. It cannot be said, by any stretch of imagination, be said to be a right that attaches to one's

estate. Indeed, in this particular case Mr. Karugaba, although not the administrator of the deceased Petitioner, has been able to bring this petition in his own right.

The Rule was therefore not inconsistent with or violation of Article 26(2) of the constitution.

On this basis, ground 1 of the Petition fails. I would dismiss this appeal.

I do not think it necessary to consider the other grounds.

Dated at Mengo this ...1st day of ...August..... 2006