THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, CJ; TSEKOOKO, MULENGA, KANYEIHAMBA AND KATUREEBE, JJ.S.C.)

CIVIL APPEAL No. 4 OF 2007

BETWEEN

CHARLES HARRY TWAGIRA :::::::::::::::::::::::: APPELLANT

VERSUS

1. **ATTORNEY GENERAL**
2. **DIRECTOR OF PUBLIC PROSECUTIONS :::: RESPONDENTS**
3. **KYOMUKAMA SAM**

[Appeal from a decision of the Court of Appeal at Kampala (Mpagi-Bahigeine, Twinomujuni and Kavuma, JJ.A.) dated 17th June 2005 in Civil Appeal No. 61 of 2002]

JUDGMENT OF TSEKOOKO, JSC.

This appeal arises from a decision of the Court of Appeal which upheld an order of the High Court (Katutsi, J.) dismissing an application by the appellant, Charles Harry Twagira, seeking diverse declarations and redress.

BACKGROUND

The background to this appeal puts the appeal in its proper perspective. The appellant was on 12th September, 2000, charged in the Buganda Road Chief Magistrate's Court in Criminal Case No. 1425/2000 with the offences of embezzlement, in the first count, and of stealing by an agent, in the second count. Subsequently, the prosecution led evidence and closed its case followed by a submission by appellant's counsel that there was no case to answer. On 24th/6/2002, the Chief Magistrate, Mr. Frank Nigel Othembi, ruled that the appellant had a case to answer on both counts and called upon the appellant to give his defence. Instead of giving his defence, the

appellant petitioned the High Court seeking to obtain an order revising the ruling of the Chief Magistrate. On 16th/9/2002, Bamwine, J., upheld the decision of the Chief Magistrate. The two decisions were subsequently upheld by the Court of Appeal and this Court.

Meantime the appellant sought to nip the prosecution by another court process. On 6th February, 2002, while the prosecution was proceeding in the Chief Magistrate's Court, he instituted High Court Miscellaneous Cause No. 13 of 2002, by Notice of Motion against the present three respondents praying for 13 declarations as remedies. The motion was instituted under Article 50(1) of the Constitution, Rule 3(1) of the **Fundamental Rights and Freedoms (Enforcement Procedure) Rules** (S.I No. 26 of 1992), and **Order** 2 **Rule** 7, and **Order 48 Rules** 1 and 3 of the **Civil Procedure Rules.** The notice of motion was supported by appellant's affidavit. The declarations sought in paragraphs 1 – 8 of the Notice of Motion relate directly to his prosecution under the said criminal case No. 1423 of 2000, which was still proceeding in the Chief Magistrates Court at the time.

In summary, in the motion, the appellant alleged that:

1. His prosecution was an abuse of the process and was an infringement of his constitutional right to a fair and speedy trial;
2. The freezing of his assets as a consequence of the prosecution was unlawful and was an infringement of his constitutional right to property;
3. His prosecution was an infringement of his constitutional right to liberty; to bring up children, to protection from torture, cruel, inhuman and degrading treatment or punishment and such prosecution was without reasonable and probable or any possibility of success and was brought maliciously and without proper investigation.
4. In the 7th and 8th paragraphs, he strangely asked for the criminal case (which was in a different court) to be dismissed with costs;
5. In paragraphs 9, 10, 11 and 12 the appellant prayed for setting aside certain orders of the Chief Magistrate, in the uncompleted criminal case, and for payment to him of general and exemplary damages by the respondents.

In the affidavit accompanying the notice, the appellant refers to the official positions and capacities of the 2nd and 3rd respondents. Thus he clearly knew these two performed official duties.

When the application came up for hearing before Katutsi, J., counsel for each of the three respondents raised several objections to the competence of the application. In effect the contentions were that the High Court had no jurisdiction to entertain the motion which was based on the same facts upon which the criminal trial was proceeding in another court. Further it was contended that the first respondent could not be held liable for the actions of the Chief Magistrate who enjoyed immunity when trying the appellant and therefore the application amounted to abuse of process. For the 1st and 2nd respondents it was further contended that the High Court could only have jurisdiction if the appellant appealed after the Chief Magistrate had concluded the criminal trial. For the 2nd respondent, it was also contended that he could not be dragged into court because of discharging his constitutional mandate. For the 3rd respondent, the objections were that the case against him was time-barred, that the application was res judicata because a similar application had been dismissed by the Principal Judge and that in any case the matter should have been instituted by petition. Mr. Karugaba, appellant's counsel replied asserting the contrary opinions.

In a lengthy and reasoned ruling, the learned Judge upheld most of the objections especially that he had no jurisdiction and dismissed the application. His dismissal order was upheld by the Court of Appeal. Hence this appeal which is based on seven grounds.

ABSENCE OF 2ND AND 3RD RESPONDENTS IN COURT OF APPEAL

Before discussing the grounds of this appeal I would point out that in the Court of Appeal, the 2nd and 3rd respondents did not appear during the hearing of the appeal probably because they were not served with hearing notices. Only the first respondent appeared. In the lead judgment, Twinomujuni, J.A., alluded to this anomaly and opined that *"moreover as it will appear later in this judgment, some of the respondents should not have been parties to the application in the High Court in the first place. I believe no injustice will be occasioned by not being heard on appeal. The presence of the Attorney-General covered them."*

I think that the two respondents should have been served with hearing notices which does not appear to have been the case here. However, since the appeal was decided in their favour, I need not say more.

WITHDRAWAL OF APPELLANTS' COUNSEL

In this Court, the memorandum of appeal was lodged by a firm of advocates called **MMAKS,** Advocates. The firm subsequently filed a written statement of arguments on behalf of the appellant. However, after the appeal was fixed for hearing, for some unexplained reason, the advocates withdrew from the prosecution of the appeal and on the 5th/6/2007, they notified this court accordingly. The following day, the appellant wrote to court intimating that he will personally prosecute his appeal. He adopted the written statement filed by his erstwhile counsel and lodged rejoinders to the replies which had been filed by counsel for the three respondents. When the appeal came up for hearing on 4th July, 2007, the appellant appeared in person. On that day, court was informed that the criminal proceedings had been discontinued against him.

WRITTEN ARGUMENTS

In the written submissions the appellant argued each ground separately. In their responding statements the State Attorneys for the first and the second respondents argued grounds 1 and 6 together but argued the rest of the grounds separately. The third respondent is only affected by the 5th ground of appeal to which his counsel also responded in a written statement.

GROUNDS 6 AND 7

I note that the grounds of appeal overlap in many ways. However I consider it convenient to first consider grounds 6 and 7, followed by ground one. This is because the 6th and 7th grounds are related and imply that the Court of Appeal did not consider the merits of the appeal.

The two grounds are worded thus:

6. **The learned Justices of Appeal erred in determining issues not raised at the hearing and without giving counsel opportunity to address court on them.**
7. **The learned Justices of Appeal erred in failing to address the grounds of appeal argued and issues raised before them at the hearing of the Appeal.**

These grounds really refer to the same thing.

In relation to ground 6, it is contended that as neither the issue of jurisdiction of the High Court nor the propriety of the application against the 2nd and 3rd respondents were raised as grounds of appeal or affirmation, the Court of Appeal should not have considered the jurisdiction of the High Court nor the propriety of the notice of motion. **Odd Jobs Vs. Mubia** (1970) EA 476, was cited in support. The contention in ground 7 seems to be that the Court of Appeal did not make any finding on any of the grounds raised in the appeal before it.

The State Attorneys who filed arguments on behalf of the 1st and 2nd respondents chose to argue grounds 2 and 6 together, but were silent on ground 7. They relied on Order 13 Rules 1(5), 4 and 5 of Civil Procedure Rules and the case of **Odd Jobs** (Supra), among other authorities, for the view that a (trial) court has powers to amend, or to add, new issues before passing a decree. The learned State Attorneys contended that the Court of Appeal acted within its jurisdiction to frame and determine issues in the manner it did, adding that neither party suffered prejudice because of the course adopted by the Court of Appeal. The alternative argument was that the issues complained of were directly raised by the parties in their pleadings upon which the Court of Appeal ultimately based its decision.

In my opinion neither the decision in **Odd Job's** case (supra), relied on by both sides, nor the other authorities relied on by the respondents are relevant authorities for the proposition raised in ground 6. Those authorities relate to the framing and amending of issues by a trial court. That is where Order 13 of the Civil Procedure Rules is relevant. The rules of that Order would possibly be applied by the Court of Appeal if it was called upon to consider whether or not a trial judge considered and determined pertinent issues on the basis of evidence on the record: See **Insurance Co. Ltd. Vs. R. Hashen & sons** (1960) EA. 592 where the Court of Appeal allowed an amendment of pleadings and determined the appeal on the basis of evidence available on the record.

For the Court of Appeal the relevant authority on the points raised and implicit in grounds 6 and 7 seems to be **Rule 101** of the **Rules of that Court** (which corresponds with our Rule 97(1)(c). It states in so far as relevant –

"Rule 101- At the hearing of an appeal in the Court –

(a) – (b) ……

(c) the Court shall not allow an appeal or cross-appeal on any ground not set forth or implicit in the memorandum of appeal or notice of cross-appeal, without affording the respondent, or any person who in relation to that ground should have been made a respondent, or the appellant, as the case may be, an opportunity of being heard on that ground."

Ordinarily contravention of this rule would be a ground of appeal to this Court. Even then the rule applies where an appeal is allowed on a ground not presented to Court which is not the case here. Be that as it may, in the Court of Appeal, the appellant's memorandum of appeal contained eight grounds. In view of the contentions of the appellant in the two grounds of the present appeal–

- that the Court of Appeal determined issues not raised in that Court, and
- that the same court failed to determine the grounds of appeal and arguments raised in that court,

It is necessary to reproduce the eight grounds here. They were framed thus –

1. ***The learned judge erred in law in dismissing an application involving determination of fundamental human rights on preliminary objections;***
2. ***The learned judge erred in law when he found that article 50(3) gave the appellant a right of appeal in respect of the orders of the court freezing the appellant's account;***
3. ***The learned judge erred in law in drawing a distinction between "pleas in bar" and the orders sought in the application;***
4. ***The learned judge erred in law in the distinction she (Sic) made between the appellant's case and the decision in Oluishola Oyegbemi Vs. Attorney General and Others and in declining to follow the said decision;***
5. ***The learned judge erred in law in considering the merits of the appellant's case without having been addressed on it;***

6. ***The learned judge erred holding that the appellant's prayers regarding the freezing of his account were Res Judicata;***
7. ***The learned judge erred in law and fact when she (Sic) found that two courts are entertaining the same matter concurrently;***
8. ***The learned judge erred in law when she (Sic) found that the trial Chief Magistrate was seized with jurisdiction to make a reference to the Constitutional Court."***

Mr. Karugaba represented the appellant in the trial Court and in the Court of Appeal. In the latter Court, he argued the above grounds 3, 4, 7 and 8 together and the rest of the grounds individually. A perusal of the record of the proceedings of each of the three Justices of Appeal (Mpagi-Bahigeine, Twinomujuni and Kavuma, JJ.A.) (See pages 14, 25 and 35 of the record of Appeal) shows that before arguing the aforementioned four grounds, Mr. Karugaba prefaced his arguments with the following statement –

"the common thread in all these four grounds of appeal ***(3, 4, 7 and 8)*** *is that the Article 50 application was brought to circumvent the prosecution in the Buganda Road Court. The trial Judge thought this could not be done. (Sic)"*

Indeed, even in the High Court, that was the contention of the first respondent, which the trial judge accepted. It is true Twinomujuni, JA; did not consider individual grounds as argued by appellant's counsel. The approach of the learned Justice of Appeal was first to give the background of the appeal followed by reproduction of the declarations which the appellant had listed in his Notice of Motion before the learned Justice summarised the preliminary objections that each of the respondents had raised in the High Court.

Upon review of the record of Appeal, I am satisfied that the essence of the objections in the trial Court was whether the High Court had jurisdiction to entertain the application before it. This must have been the reason why in his judgment Twinomujuni JA., stated that–

"the main issue in this appeal is whether the High Court had jurisdiction to try Miscellaneous Cause No. 13 of 2002. Before I deal with the eight grounds of appeal, I will first dispose of this issue".

Thereafter, the learned Justice opined that the Constitution provides three ways in which suits can be taken to court. Two of the three were petitions under Article 137 for Constitutional interpretation and suits under Article 50 which according to him is the Constitutional basis for all suits that are filed in our courts. He further opined that the notice of motion raised questions of constitutional interpretation under Article 137. The learned Justice then stated–

"the Fundamental Rights and Freedoms (Enforcement Procedure) Rules **(otherwise known as Legal Notice No. 3 of 1996)** are only applicable in the Constitutional Court and not to the High Court. It should be noted that the word "Court" in those rules means "the Constitutional Court of Uganda established by *Article 137 of the Constitution of 1995"*. The word *"petition"* therein means the petition of ***"an aggrieved party seeking to institute proceedings for declaration or redress Under Clause (3) of Article 137 of the constitution"***

He went on to say,

"In my judgment, an action can only go to the High Court under article 50 on a plaint and purely for enforcement of Fundamental Rights and Freedoms and not declaration of their existence or interpretation of the Constitution. Such an action cannot be brought by notice on motion unless a substantive suit on plaint is pending. It follows that the suit was improperly before the High Court which had no jurisdiction to entertain it-"

This is the passage to which the appellant has directed criticism in this Court.

It is true that the practice in appeals is normally for an appellate court to consider and determine the grounds of appeal set out in a memorandum of appeal. In this case it is evident that the Court of Appeal did not say whether or not any of the 8 grounds of appeal were defective. However it is very clear to me that the issue framed by Twinomujuni JA. is in effect a summary of the four grounds which I mentioned earlier or indeed all the 8 grounds of that appeal. I think that Mr. Karugaba's preface to his arguments on grounds 3, 4, 7 and 8 in the Court of Appeal amounted to saying that the trial judge held that he had no jurisdiction to entertain the application. In my opinion, that was the conclusion of the trial Judge.

The record of proceedings in the Court of Appeal shows very clearly that during his submissions on the said grounds 3, 4, 7 and 8 in that Court, Mr. Karugaba relied on the authority of the cases

of **Onyango Obbo & Another Vs. Attorney General** (Supreme Court Constitutional Appeal No. 29 of 2002 (unreported) (especially the judgment of Mulenga, JSC.,) and the Nigerian case of **Olushola Oyegbemi Vs. Attorney General** (1982) Vol. 2 FNIR 192. Similarly Ms Kahwa, the State Attorney, who appeared for the respondents in the same Court, commented on the relevance of the two cases, among other authorities cited there.

After setting out the summary of the relevant facts and the issues in the appeal and after expressing his opinion on the applicability of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, Twinomujuni JA. stated that–

> *"In proceedings before this court, Mr. Karugaba placed heavy reliance on the judgment of Mulenga, JSC. in the Supreme Court decision of* ***Onyango Obbo & Another Vs. Attorney General*** *(Constitutional Appeal No. 2 of 2000). With respect, I think Mr. Karugaba misunderstood the relevant holding in the case, which is infact against his position".*

The learned Justice of Appeal reproduced in extenso a passage from the judgment of Mulenga, JSC., where the latter pointed out that *"where the constitutional validity of any law or action awaits determination by the Constitutional Court, it is important to expedite the determination in order to avoid applying a law or taking action whose validity is questionable."*

Justice Twinomujuni, JA., then opined that that decision illustrated that if the appellant had filed a petition in the Constitutional Court under Article 137, he would have had a better chance of obtaining the remedy he sought using the provisions of Article 50.

Whilst I agree that ordinarily it is proper that an appellate Court should consider grounds framed for its decision, I do not accept the appellant's contention that the Court of Appeal considered and determined his appeal on grounds which were not raised in his memorandum of appeal or which were not argued or raised by parties for determination by that court. As I have already observed in this judgment, the essence of the arguments in the High Court was whether the High Court had jurisdiction to entertain the application before it. The High Court held that it had no such jurisdiction. This conclusion was challenged in the Court of Appeal both in the Memorandum of Appeal (especially grounds 4, 7 and 8) and in arguments. The Court of Appeal upheld the opinion that the High Court had no jurisdiction. This conclusion applied in respect of

the the 2nd Respondent, and even the 3rd Respondent. Although these two did not appear in the Court of Appeal, the court briefly considered their absence and found that – **"a civil suit against the 2nd and 3rd respondents cannot be sustained and it is incompetent."**

Surely this demonstrates that Twinomujuni, JA., considered, though implicitly, the matters raised by the appeal and argued before the Court. The other two Justices concurred. Consequently I think that grounds 6 and 7 have no merit and the same must fail.

GROUND ONE

This ground is framed thus –

The learned Justices of Appeal erred in law in applying the "Fundamental Rights and Freedoms (Enforcement Procedure) Rules (Legal Notice No. 3 of 1996) to determine the jurisdictional validity of High Court Misc. Application No. 3 of 2002".

The appellant criticised the Court of Appeal because of a passage from the judgment of Twinomujuni, JA., to which I have already alluded. For clarity I will reproduce the following portion –

> *"**An action can only go to the High Court under Article 50 of the Constitution on a plaint** and purely for enforcement of fundamental rights and freedoms and not declaration of their existence or interpretation of the constitution. Such an action cannot be brought by Notice of Motion unless a substantive suit on a plaint is pending. **It also cannot be brought under Legal Notice No. 3 of 1996** or a combination of the above".*

I have underlined the portions which are criticised.

The appellant contended that the Court of Appeal erred on the question of jurisdiction because it mistakenly referred to Legal Notice No. 3 of 1996 in as much as the Legal Notice had not been cited by the appellant in his motion. He also contended that the Justices of Appeal erred when they concluded that the High Court had no jurisdiction to hear the application asserting that the High Court is the proper forum for proceeding under Article 50 by virtue of the **Fundamental Rights and Freedoms (Enforcement Procedure) Rules** (S.I. 26 of 1992). It was contended

that the correct position is that the High Court is the correct forum for proceedings under Article 50 by virtue of those rules.

In response, the State Attorneys appearing for the 1st and the 2nd respondents supported the decisions of the two courts below, arguing, in effect, that the Constitution of Uganda prescribes three ways in which civil suits can be instituted in our court system. Of the three, two relevant to our consideration are –

- Institution of proceedings under Article 137 of the Constitution and;
- Institution of proceedings under Article 50 in any court of competent jurisdiction as provided under Article 129 of the Constitution.

The State attorneys supported the conclusions of the Court of Appeal that –

- An action can only go to the High Court on a plaint and;
- Purely for enforcement of Fundamental Rights and Freedoms and not for declaration of their existence or interpretation of the Constitution.

May I first observe that in the context of these proceedings, I think that instituting the notice on the authority of Order 2 Rule 7 of the Civil Procedure Rules does not appear helpful since the notice of motion sought damages and other remedies. The Rule states –

"No suit shall be open to objection on the ground that a merely declaratory judgment or Order is sought thereby, and the court may make binding declarations of rights ……."

Be that as it may, I think that within the context of the judgment of Twinomujuni, JA., his citation of Legal Notice No. 3 of 1996 in his judgment was through inadvertence or what is commonly referred to as a slip of the pen. From the context in which the clause "otherwise known as Legal Notice No. 3 of 1996", and his reference to the definitions of the words "Court" and "Petition", it is patently clear that the proper Legal Notice is No. 4 of 1996 and not No. 3 of 1996. This is because, firstly, it is Legal Notice No. 4 of 1996 whose schedule sets out the Rules under the title **Fundamental Rights and Freedoms (Enforcement Procedure) Rules**. The Rules govern the institution and the trial of Petitions. That Legal Notice modified S.I No. 26 of 1992 which the notice of motion cited as the enabling law for instituting the motion. Secondly

the Rules in Legal Notice No. 3 of 1996 bear a different heading and they govern the mode of reference to the Constitutional Court by other courts. With respect I think that it was disingenuous on the part of the appellant first to rely on Statutory Instrument No. 26 of 1992 in instituting the motion and hang on the inadvertent citation by the Court of Appeal of Legal Notice No. 3 of 1996 to argue that the Court erred in deciding the appeal on the basis of the provisions of Legal Notice No. 3 of 1996, whereas it is very clear that the Court in fact relied on the Rules set out in S I. 26 of 1992 and on the related Legal Notice No. 4 of 1996. Under the latter provisions, court actions are instituted by a petition. The petition is instituted in the Constitutional Court praying for a declaration, for instance, that an Act of Parliament or any other law or anything in or done under the authority of any law is inconsistent with the Constitution. Upon hearing a petition, the Constitutional Court may grant a declaration or a redress but, or may refer the matter to the High Court for the latter to investigate and determine the appropriate redress. I may mention that before 1996, because of the provisions of S I. No. 26 of 1992, a person seeking to enforce his or her right had to apply to a single judge of the High Court for redress.

Where a claim of redress for violation of a right or freedom is subject to interpretation of provisions of the Constitution, the claim should be via the Constitutional Court under Article 137 by petition. Where the claim is in respect of a right or freedom that is clearly protected, it should be by a plaint in any other competent court.

In view of the existence of Legal Notice No. 4 of 1996, which provides rules to be followed by aggrieved persons seeking declarations by petitioning the Constitutional Court, there can be no doubt in my mind that the application by motion seeking declarations and impliedly the interpretation of the Constitution, from the High Court was improper. In my view, the rules set out in S.I No. 26 of 1992 can only apply in limited cases such as bail and Habeous Corpus applications.

It appears to me that the enforcement of constitutionally protected Fundamental Rights and Freedoms in the High Court by use of the rules set out in S.I 1992 No. 26 are limited. I say so because in addition to the Judicature Act, 1996, the Civil Procedure Act and the Civil Procedure Rules (in regard to the High Court) and Magistrate's Court Act and CP Rules (in regard to the

Magistrates Court) provide procedure of how to enforce rights in those courts. I am not persuaded that the Court of Appeal erred when it upheld the decision of the trial Judge. Declaration sought as No. 12 is, for example, seeking for redress in form of general and exemplary damages. I cannot appreciate how the High Court could have awarded such damages in a cause instituted by a notice of motion instead of a plaint. Ground one must fail.

GROUND TWO

Ground two is framed as follows:

> *"The learned Justices of Appeal erred in law in holding that an action under Article 50 could only be brought by plaint".*

ARGUMENTS

The appellant asserted that the procedure under Article 50 of the Constitution was raised neither in the High Court nor in the Court of Appeal and that the latter Court erred when it considered procedures under that article without the benefit of counsel's arguments. The appellant further argued that he was condemned unheard and that this is contrary to the requirements of natural justice, namely, that a party must be heard on each point upon which his case depends to be decided. The appellant was critical of a passage from the judgment of the Court of Appeal particularly the portion which states that *"an action can only go to the High Court under Article 50 on a plaint and purely for enforcement of Fundamental Rights and Freedoms and not declaration of their existence or interpretation of the Constitution."* The appellant asserted that this is not correct. According to him, Article 50 gives special standing to a party alleging violation of Fundamental Rights and Freedoms enshrined in Chapter 4 of the Constitution to seek enforcement of those rights. He referred to a number of authorities including S.I No. 26 of 1992, Legal Notice 4 of 1996 and Article 137 of the Constitution as well as to several decided cases and asked this Court to hold that the procedure under Article 50 is by Notice of Motion. **Casino Grande Vs. Attorney General** (High Court Misc. Application No. 191 of 2004) (unreported), **TEAN Vs. BAT** (High Court Misc. Application No. 23 of 2003) (unreported), among others were cited in support.

The appellant contended that actions such as for trespass to land or for damages for defamation or negligence or breach of a contract do not necessarily seek to enforce rights under Chapter four of the Constitution, but seek to enforce a party's rights under the Common Law and are instituted by a plaint as prescribed in the Civil Procedure Rules.

In their written reply on behalf of the first and the second respondents, the State Attorneys supported the decisions of the courts below although their reasoning to my mind, is, as I said earlier, faulty and wrong because they rely on the provisions of Order 13 Rules 1(5), 4 and 5 of the Civil Procedure Rules and the case of **JOVELIN BARUGAHARE Vs. ATTORNEY-GENERAL** (Supreme Court Civil Appeal No. 28 of 1993) (unreported), in which Manyindo, Deputy Chief Justice, as he then was, considered the provisions of *O.13 Rules 1(5)* and 4. In that case, the learned Deputy Chief Justice opined that a trial court may frame issues on matters not raised in the pleadings but which arise from matters stated by the parties or their advocates on which a decision is necessary in order to properly determine the disputes before the court. In this Court it was argued that the matters complained of by the appellant were directly raised by the **pleadings** of the parties.

CONSIDERATION

In general and with the greatest respect to the Court of Appeal, I agree with the contention of appellant that that court erred when it held that an action under Article 50 of the Constitution can only be instituted by a plaint. In my considered opinion a person who claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened, can institute an action in a competent court by plaint, or can seek declarations by Notice of Motion depending on the facts of the complaint within the meaning of Article 50. The Article envisaged that Parliament would enact laws for the enforcement of the freedoms and rights under Chapter four. Acts such as the Judicature Act and indeed the Civil Procedure Act and the CP Rules could be described as such laws. In the case of the CPA and CP Rules, Article 273 would make them applicable laws.

There are many decided cases which show that persons who claim that their human rights or freedoms guaranteed by the Constitution have been or are threatened or violated can commence action by petition. Examples are Constitutional Petitions No. 2 of 2002 **(Uganda Women**

Lawyers Vs. Attorney-General) (Unreported); and under Articles 21, 31, 33, etc., Constitutional Petition No. 6 of 2004 (Tumushabe Vs. Attorney-General, **to enforce rights under Article 23),** Supreme Court Constitutional Appeal No. 2 of 1998 **(Ismail Serugo Vs. Kampala City Council and Attorney-General)** – enforcing rights under Article 21, 23, 28, 31. These and many other Constitutional Petitions and Constitutional Appeals show that a person claiming that his or her human rights or freedoms have been infringed or threatened would seek redress through petitioning the Constitutional Court.

I do not accept the appellant's argument implying that enforcement of protected rights where Article 50 applies is only by way of notice of motion.

Looking at the Notice of Motion, there can be no doubt that the declarations sought as Nos. 1 to 5 would involve interpretation of the Articles cited therein. That is within the jurisdiction of the Constitutional Court as correctly observed by the learned Justices of Appeal. Prayer 12 sought for an Order that the respondents should pay to the appellant *"general and exemplary damages for gross violation of (his) constitutional rights."* In my experience at the bar and on the bench, I cannot understand how by his notice of motion the appellant would be able to call evidence to establish such damages without filing an ordinary suit. The appellant relied on **CASINO GRANDE Vs. ATTORNEY-GENERAL** (High Court Misc. Application No. 191 of 2004) (unreported) for the view that the provisions of Legal Notice No. 4 of 1996 only apply to Article 137 petitions in Constitutional Court and S. I. 1992 No. 26 apply to Article 50 proceedings. He urged us to decide that point in this appeal. It was contended for the respondents in effect that the decision is not applicable since it is from the High Court, presumably, an inferior court.
In that ruling, Muhanguzi, J., considered enforcement of the rights set out in Articles 21, 40(2) and 42 of the Constitution and held that Court was enjoined by Article 20(2) to promote those rights by enforcing them under Article 50. I have not perused the record of the proceedings in that case. I have only read the ruling. I do not find any where in the ruling where the learned judge held ***"that Legal Notice No. 4 of 1996 only applied to Article 137 petition in the Constitutional Court and that S. I. 26 of 1992 applied to Article 50 proceedings in the High Court and the procedure was by Notice of Motion"*** as asserted by the appellant. Therefore, whereas it can be said that the decision is evidence of part of the practice of the institution of proceedings under Article 50 by notice of motion, it is not authority for the view that that is the

only mode to be employed. In any case there is nothing in the ruling indicating that there was objection to the manner in which the motion was instituted and the consequential ruling made thereon.

Appellant also referred to several other rulings listed by him as authorities Nos. 18 to 24. Rulings in Nos. 19 (Okumu Vs. Attorney General) and No. 23 (Team Vs Bat High Court Misc. Application No. 23 of 2003) were not provided and I was unable to trace them. Authority No. 18 is a ruling in the case of **Dr. J. W. Rwanyarare and 2 Others Vs. Attorney-General** (High Court Misc. Application No. 85 of 1993). This was instituted under Article 22 of the 1967 Constitution before Legal Notice No. 4 of 1996 came into existence. More importantly, the ruling was a ruling on a preliminary point of objection to the competence of the application. The same is in the position with the other rulings which I have read. So none is persuasive authority for the contention that Article 50 is the only basis for the enforcement of Freedoms and Rights in High Court by Notice of Motion only. The appellant urged this Court to "hold unequivocally that the procedure under Article 50 is by Notice of Motion." I am unable to read in Article 50 that assertion. Procedure under Article 50 can be by plaint or by motion depending on the facts and nature of each case.

I hold that ground two only partially succeeds.

GROUND THREE

The complaint in ground three which is that the Justices of Appeal erred in law in holding that a declaration of right could not be sought by an application under Article 50 has been answered when I discussed ground two.

GROUND FOUR

The complaint in ground four is that the Justices of Appeal erred in law in holding in their interim ruling in Civil Application No. 40 of 2005 that the Supreme Court decision in Constitutional Appeal No. 29 of 2002 could not be applied to proceedings relating to an application under Article 50.

I have not found anywhere on the record before us anything to do with the ruling in Civil Application No. 40 of 2005. There is no way I can discuss this ground of appeal meaningfully without knowing the contents of the said ruling, let alone its relevancy to this appeal.

Be that as it may, the appellant appears to argue that because in the **Onyango Obbo** appeal, we held that the Constitutional Court should not have stayed the hearing of the reference before it pending the determination of a criminal case against the same parties in the Magistrate's Court, therefore, the appellant, in this appeal, was entitled to have the criminal case before the Chief Magistrate stayed pending the disposal of the notice of motion giving rise to this appeal. I think that the appellant has failed to distinguish the difference between a stay of proceedings in a criminal case from which a reference is made to the Constitutional Court, as was the **Onyango Obbo** case, and the mounting of an independent action by use of which, as in this appeal, a criminal prosecution is sought to be stayed or indeed dismissed. The two scenarios are distinguishable. The trial judge in this case correctly pointed this out. Ground four is bad and I would strike it out.

GROUND FIVE

The complaint in ground five is that the Justices of Appeal erred in ruling that the 2nd and 3rd respondents could not be sued before hearing the case on the merits.

The appellant contended that the Court of Appeal was wrong in its conclusion that the 2nd and 3rd respondents should not have been included as respondents in the Notice of Motion. He was particularly critical of the following passage.

"Regarding whether the appellant was or is pursuing the right parties in the High Court or this court, I hold the view that assuming that the High Court had jurisdiction, the appellant should have proceeded only against the Attorney General and the third respondent. The Director of Public Prosecutions is a government department but it is not a body corporate with powers to sue or be sued. Article 250(2) of the Constitution provides:-

> **Civil proceedings by or against the Government shall be instituted by or against the Attorney General; and all documents required to be served on the Government for**

the purpose of or in connection with those proceedings, shall be served on the Attorney General.

Therefore a civil suit against the Director of Public Prosecution cannot be sustained and it is incompetent. The same equally applies to the case against the 3rd respondent. He is the police officer who was sent to London to re-arrest the appellant and escort him to Uganda. He is the one who made the investigations and applications under the law that led to the detention and freezing of the appellant's accounts. He was at all times acting as an employee of the government. Not only is he protected against personal lawsuits arising from his official functions by the laws of Uganda but he is also covered by section 48 of the Judicature Act. I am of course aware that he could be sued in his personal capacity if there is a possibility that he acted beyond the scope of his duties or maliciously, but that does not arise in this case. Nevertheless the appellant could, at his own risk, maintain an action against the 3rd appellant.

The State Attorneys support these conclusions by the Court of Appeal.

Messrs. Bashasha & Co. Advocates, counsel for the 3rd respondent first argued that there was no proper ground of Appeal and then in effect supported the decision of the Court of Appeal arguing that the 2nd and 3rd respondents enjoy immunity under S. 46 of the Judicature Act.

While discussing grounds 6 and 7 I referred to paragraph (c) of the old Rule 101 of the Rules of the Court of Appeal, which Rule is relevant here. Ordinarily the Court of Appeal cannot allow an appeal on a ground not set forth in a memorandum of appeal or not argued before it. Here the court dismissed the appeal. Therefore the appellant's arguments are baseless and irrelevant.

To my mind, Twinomujuni, JA., in the passage which is under attack, made observations about the competence of the proceedings against the 2nd and 3rd respondents. I see no sound reason to fault him. I would dismiss ground 5.

In conclusion, and although ground two technically succeeded partially this appeal fails, and I would dismiss it. I would award the first respondent his costs here and in the two courts below. As the second and third respondents did not appear in the Court of Appeal, I would award them only costs here and in the High Court.

Delivered at Mengo this 9th day of July 2008.

J. W. N. TSEKOOKO
JUSTICE OF THE SUPREME COURT.

JUDGMENT OF ODOKI, CJ

I have had the advantage of reading in draft the judgment of my learned brother, Tsekooko, JSC. I agree with him that this appeal should be dismissed for reasons he has given, with orders proposed by him.

I also agree with the comments made by Mulenga, JSC in his supporting judgment.
In view of the apparent uncertainty regarding the proper procedure to be followed in making applications under Article 50 of the Constitution, I would direct that copies of this judgment in this appeal be forwarded to the Rules Committee for the purposes of reviewing the Judicature (Fundamental Rights and Freedoms) Enforcement Procedure Rules SI 13-14 (previously SI 26 of 1992) and making appropriate amendments to clarify the procedure applicable.

As the other members of the Court agree with the judgment and orders proposed by Tsekooko JSC, this appeal is dismissed with orders proposed by him.

Dated at Mengo this 9th day of July 2008

B J Odoki
CHIEF JUSTICE

JUDGMENT OF MULENGA JSC.

I agree with the judgment of my learned brother Tsekooko J.S.C., which I had opportunity to read in draft. This appeal is without merit and it ought to be dismissed with costs to the respondents. In my opinion, since the appeal in the Court of Appeal proceeded in absence of the 2nd and 3rd respondents they are entitled to only costs here and in the High Court, while the 1st respondent is entitled to costs here and in both courts below.

For emphasis I wish to briefly add my views on the invalidity of the applicant's application from which this appeal arose. I do not need to set out the background to this appeal in detail as my learned brother ably did so in his judgment. I am only constrained to reiterate for emphasis that this appeal was the last step by the appellant in a two pronged litigations he initiated with a view to avoid or defeat an unconcluded criminal prosecution against him in the Chief Magistrates Court. The trial of the criminal case proceeded to the stage of closing the prosecution case, and the trial Chief Magistrate making an order, on 24th June 2002, that the appellant had a case to answer on the two counts of embezzlement and stealing by agent.

Meanwhile the appellant first applied to the High Court for an order in revision of the criminal proceedings but his application was dismissed as were his subsequent appeals to the Court of Appeal and to this Court. While the High Court decision in the first litigation was still pending, he initiated the second suit, also in the High Court, by way of Notice of Motion, from which this appeal eventually arose. The Notice of Motion was under Article 50(1) of the Constitution, and in it, the appellant claimed that the on-going criminal prosecution and consequent freezing of his assets amounted to infringement of several of his constitutional rights and that the prosecution was malicious without reasonable and probable cause and had no possibility of success. He prayed for several declarations to that effect, for orders setting aside several orders of the Chief Magistrate and dismissing the criminal case with costs and for general and exemplary damages.

At the commencement of hearing, the respondents raised several preliminary objections to the effect that the Notice of Motion was incompetent and an abuse of process. The learned trial judge upheld the objections and the Court of Appeal in turn upheld his decision, whereupon the

appellant brought this appeal on seven grounds of appeal. I agree with the judgment of my learned brother that all the grounds of appeal are without merit.

Article 50 of the Constitution proclaims the infringement of the rights and freedoms guaranteed under the Constitution to be justitiable. However, the right to apply to a competent court for redress on the ground of such infringement must be construed in the context of the whole Constitution generally and in the context of Chapter 4 in particular. In the instant case, the appellant's right to bring such an application must be construed together with the right and indeed obligation that the State has to prosecute the appellant in a competent court, for any offence he was reasonably suspected to have committed. Neither right could be exercised to defeat the other. In alleging that his prosecution *per se* was an infringement of his rights and praying *inter alia* that the criminal case be dismissed by the High Court which was not seized of it, the appellant in effect sought to defeat the right and obligation of the State to prosecute him. That was not sustainable under any law. Besides, in my view, the suit was premature as no cause of action had arisen. I should stress that while under the law the appellant is entitled to sue for wrongful and malicious prosecution, he has no protection against or freedom from prosecution. It follows that the time for taking out such suit is after conclusion of the prosecution, when a decision could be taken whether the prosecution was wrongful or malicious.

Lastly, I should emphasise that the decision of this Court in ***Onyango Obo & another vs. Attorney General,*** Constitutional Appeal No.29/02 is not authority for the proposition that an application under Article 50 of the Constitution is ground for staying, let alone for dismissing a criminal case from which it does not arise by way of reference. In ***Onyango Obo's case*** (supra), the appellants petitioned the Constitutional Court for a declaration *inter alia* that a provision of the Penal Code creating the offence with which they were charged was unconstitutional. This Court held that it was erroneous for the Constitutional Court to order that the prosecution should proceed to conclusion before the petition could be entertained. It held that the Constitutional Court ought to have decided on the validity of the impugned section of the Penal Code first to enable the trial court to dispose of the criminal case in accordance with that decision, instead of the prosecution proceeding under a law that might later be declared unconstitutional, as happened in that case. The instant case is distinguishable in that there was no challenge of the

constitutional validity of the law under which the prosecution was instituted, or of the act of prosecuting the appellant.

DATED at Mengo this 9th day of July 2008

J.N. Mulenga,
Justice of Supreme Court.

JUDGMENT OF KANYEIHAMBA, JSC.

I have had the benefit of reading in draft The Judgment of my learned brother Justice Tsekooko, J.S.C, and I agree with him that this appeal substantially fails and ought to be dismissed, I also agree with the orders he has proposed .

Dated at Mengo this day 9th of July 2008

G.W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT

JUDGMENT OF KATUREEBE, JSC.

I have had the benefit of reading in draft the judgments of my learned brothers Tsekooko, JSC and Mulenga, JSC. I fully agree with them that this appeal has no merit and must be dismissed with costs.

Dated at Mengo this 9th day of July 2008.

BART M. KATUREEBE
JSUTICE OF THE SUPREME COURT