THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KATUREEBE,CJ; TUMWESIGYE; KISAAKYE; MWANGUSYA; OPIO-AWERI; MWONDHA;

& TIBATEMWA-EKIRIKUBINZA; JJ.S.C.]

CONSTITUTIONAL APPEAL NO 03 OF 2011

BETWEEN

BUKENYA CHURCH AMBROSE ::::::::::::::::::::::::::::::::::::] APPELLANT

AND

THE ATTORNEY GENERAL ::] RESPONDENT

[Appeal from the Ruling of Justices of the Constitutional Court (Bahigeine, DCJ, Twinomujuni, Kavuma, Nshimye, Arach-Amoko, JJA) dated 21st March 2011 in Constitutional Reference No. 26 of 2010]

JUDGMENT OF DR. KISAAKYE, JSC

Bukenya Church Ambrose (hereinafter referred to as the appellant) filed this appeal against the Ruling of the Constitutional Court which held that the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules, 2008 were unconstitutional.

The Constitutional Court made the Ruling following a Constitutional Reference to it by the High Court on the following question:

> ***"Whether the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules, 2008 are unconstitutional for having been made by the Rules Committee instead of Parliament pursuant to Article 50(4) of the Constitution."***

The Appellant's appeal to this Court is based on the following grounds:

1. ***That the Constitutional Court erred to have held that Parliament had not made any law for the enforcement of fundamental rights and freedoms.***

2. ***That the Constitutional Court erred to have held that the Rules Committee was not empowered to make Rules for enforcement of fundamental rights and freedoms.***

He prayed that the Ruling of the Constitutional Court be reversed and this Court finds that the Rules Committee is empowered to make Rules for the enforcement of fundamental rights and freedoms.

Before I consider the submissions and the merits of this appeal, it is necessary to provide a brief background to the appeal.

On 29th January 2010, the appellant filed High Court Miscellaneous Cause No. 13 of 2010 against the Attorney General. The application was brought under Article 50(1) of the Constitution of Uganda (1995), and Rule 3(1) of the ***Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules, SI No.55 of 2008.***

In his application, the appellant challenged the constitutionality of the Government's ban of open air ex-studio radio broadcasts, commonly known as and hereinafter referred to as *'bimeeza.'* He prayed for a declaration from the High Court that the banning of *'bimeeza'* by the Government breached the freedom of speech, expression and the media, guaranteed under Article 29(1)(a) of the Constitution. He also prayed for an order lifting the ban on *'bimeeza'* as a way of enforcement of his fundamental freedoms of speech, expression and media.

When the application came up for hearing, the Attorney General raised a preliminary objection against the competency of the appellant's application. The Attorney General contended that the ***Judicature (Fundamental Rights and***

Freedoms) (Enforcement Procedure) Rules under which the appellant had filed his application, were unconstitutional because they were made by the Rules Committee and not by the Parliament of Uganda, as is required by Article 50(4) of the Constitution of Uganda. The Attorney General prayed for the appellant's application to be stayed and for a Reference to the Constitutional Court.

On 8th July 2010, Zehurikize, J., acting under the provisions of Article 137(5) of the Constitution of Uganda, referred the constitutional question quoted at the beginning of this Judgment to the Constitutional Court.

Instead of considering the referred question, the Constitutional Court considered the following question which was slightly different from the one that the High Court had referred to it.

> ***"Whether the Rules Committee in enacting the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure Rules) SI No. 55 of 2008, the Rules under which MC 118 2008 was brought, contravened Article 50 (4) of the Constitution."***

The Constitutional Court made its Ruling on 21st March 2011 and held that the Rules Committee acted contrary to Article 50(4) of the Constitution when it made the ***Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules***.

The appellant was dissatisfied with this decision and appealed to this Court. He was represented at the hearing of this appeal by Ladislaus Rwakafuzi while Richard Adrole, Senior State Attorney and Gerald Batanda, State Attorney, represented the Attorney General. Both parties made oral submissions.

The Law governing Constitutional Reference and Appeals therefrom Article 137(5) of the Constitution of Uganda provides for References to the Constitutional Court as follows:

"Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a field court martial, the court—

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

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

On the other hand, Article 137(6) of the Constitution guides the Constitutional Court when the question referred to in Article 137(5) above is brought before it. This Article provides as follows:

"Where any question is referred to the Constitutional Court under clauses (5) of this Article, the Constitutional Court shall give its decision on the question, and the Court in which the question arises shall dispose of the case in accordance with that decision."

Where a party is dissatisfied with the decision of the Constitutional Court, he or she may appeal to the Supreme Court under Article 132(3) of the Constitution.

Rule 21(3) of the ***Constitutional Court (Petition & References) Rules, S.I 91 of 2005*** also reiterates what is provided for in Article 137(6) above. Rule 21(3) specifically provides that after the Constitutional Court has made its decision on a Constitutional Reference, the decision of the Constitutional Court, together with a copy of its proceedings shall be remitted to the original court.

Furthermore, Rule 22 of the ***Constitutional Court (Petition & References) Rules*** provides that the original court shall dispose of the case in accordance with the decision of the Constitutional Court or the Supreme Court, if there was an appeal from the decision of the Constitutional Court.

I will now proceed to consider ground 2 of appeal first before I deal with ground 1 of the appeal.

Ground 2 of Appeal

This ground was framed as follows:

> ***"That the Constitutional Court erred to have held that the Rules Committee was not empowered to make Rules for enforcement of fundamental rights and freedoms."***

Arguing in support of this ground, the appellant's counsel contended that the Rules Committee had power under section 41 of the Judicature Act to make Rules providing for procedures before Courts. He submitted that when the Rules Committee made the ***Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules***, the Committee was exercising powers vested in it by section 41(2)(e) of the Judicature Act, Cap 13 Laws of Uganda.

The appellant's counsel also contended that the Constitution of Uganda had a Bill of Rights that was justiciable. Therefore, he argued that the Courts could not decline or refuse to enforce the guaranteed rights under the Constitution, on grounds that Parliament had not made the law for the enforcement of the rights and freedoms under Article 50(4) thereof.

In light of the above arguments, the appellant's counsel contended that it was wrong for the Attorney General to argue and for the Constitutional Court to hold that the Rules Committee did not have power to make the impugned Rules.

The appellant's counsel further submitted that the Attorney General did not come to Court in good faith because first, the Attorney General was a member of the Rules Committee and secondly, the Attorney General had participated in the making of the impugned Rules. It was therefore not proper for the same Attorney General to turn around and claim that the impugned Rules are now unconstitutional, without providing aggrieved persons with any alternative.

The Attorney General refuted the appellant's submissions. The Attorney General contended that whereas Article 50(4) mandated Parliament to make laws for the enforcement of rights, no law to that effect had been enacted since the promulgation of the Constitution.

The Attorney General conceded that the ***Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules***, were made under section 41 of the Judicature Act. He however submitted that what was envisaged under Article 50(4) of the Constitution was that it was only Parliament to make such laws for enforcement of fundamental rights and freedoms and not the Rules Committee, as had happened in this case.

In the course of making submissions, the Attorney General also conceded that (a)Parliament does not make Rules governing procedures in Court proceedings; (b) that the power of the Rules Committee to make Rules of Procedure for Courts stems out of section 41 of the Judicature Act; and (c) that the Rules Committee had power under the said section to make Rules governing procedure for enforcement of rights and freedoms by courts under Article 50(1) of the Constitution; (d) and that therefore the ***Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules*** are not unconstitutional.

Whereas the Attorney General conceded that the impugned Rules were constitutional, I have still found it necessary to briefly consider this ground to enable me to properly dispose of the question whether the Constitutional Court erred in law when it held that the said Rules were unconstitutional.

In holding that the Rules were unconstitutional, the Constitutional Court held as follows:

> ***"S.I. 55/08 was made by the Rules Committee…in exercise of the powers conferred upon the Committee by Section 41(1) of the Judicature Act …The Rules Committee therefore derives its powers to***

make rules from Article 150(1) of the Constitution. The Rules are for regulating the practice and procedure in the Judiciary.

However, applications from which this reference arose were made under Article 50 of the Constitution…It is common knowledge that Parliament has not made any law under Article 50(4) above. That being so, did the Rules Committee have the mandate to make S.I 55/08?

By the use of the word 'shall' in sub Article (4) above, the framers of the Constitution made it mandatory that it is only Parliament that is empowered by the Constitution to make laws for the enforcement of rights and freedoms under Chapter four of the Constitution. It is not the role of any other body to do it except under delegated authority under Article 79, which is not the case here.

We therefore agree with the submission by Mr. Adrole and answer the question in the affirmative."

The question that remains is whether the Rules Committee had powers to make Rules for enforcement of fundamental rights? This calls for an examination of the provisions that set up the Rules Committee.

The Rules Committee was established under section 40 of the Judicature Act. Section 41 (1) which was referred to by the Constitutional Court provides as follows:

"The Rules Committee may, by statutory instrument, make rules for regulating the practice and procedure of the Supreme Court, the Court of Appeal and the High Court of Uganda and for all other courts in Uganda subordinate to the High Court."

Furthermore, the notes to the said Rules specifically provide that the Rules were made in exercise of the powers vested in the Rules Committee by section 41(1) of the Judicature Act.

On the other hand, section 41(2) of the Judicature Act lays out the functions of the Rules Committee. Of particular relevance is section 41(2) (e) which provides as follows:

"Without prejudice to the general application of subsection (1), the Rules Committee may make rules of court under that subsection for—

(e) regulating and prescribing the method of pleading, practice and procedure of the court, including all matters connected with forms to be used and fees to be paid"

It is also necessary to consider the legal meaning of Rules of Court and 'Enforcement' and 'Procedure', which in my view, underlie the objection of the Attorney General and the holding of the Constitutional Court with respect to the constitutionality of the Rules.

Rules of Court or Court Rules have been defined by Black's Law Dictionary 9th Edition at page 418 as, ***"Regulations having the force of law and governing practice and procedure in the various courts, ... as well as any local rules that a Court promulgates."***

On the other hand, Black's Law Dictionary 9th Edition at pages 1323-1324 defines the term procedure as follows:

"1. …

2. The judicial rule or manner for carrying on a civil lawsuit or criminal prosecution."

The same Black's Law Dictionary 9th Edition at page 608 defines the term 'Enforcement" as:

"The act or process of compelling compliance with a law, mandate, command, decree, or agreement."

Turning to the present case, the title of the Rules is indicated thus: ***'The Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules.'*** It is evident from the title of these Rules that the Rules Committee made them to provide for the procedure for the applicants seeking enforcement of fundamental rights and freedoms which provided under Articles 20-45 of the Constitution, to bring these applications to Courts of law.

The Rules defined the form such an application could take, that is by Notice of Motion and further that a single Judge would be competent to hear such an application (See Rule 3(1)). It should be noted that the Rules limited themselves to matters of procedure and did not attempt to elaborate on the fundamental rights and freedoms laid out in Articles 20-45 of the Constitution.

Secondly, it should also be noted that the Rules Committee did not attempt to define what a competent Court is. It however recognized that such applications filed under Article 50(1) and the Rules in question would be made to a competent Court.

It is not in dispute that the Judicature Act was enacted by Parliament. Both the Attorney General and the Constitutional Court acknowledged that it is the same Judicature Act which established the Rules Committee and gave the Committee wide ranging powers under section 41(2) (a)-(y) of the Judicature Act to make Rules regulating, among others, procedures before Courts of law.

It should be noted that the Judicature Act did not grant any powers to the responsible Minister to make Regulations under it. Rather, the Act vested these powers in the Rules Committee which is chaired by the Chief Justice.

It is therefore my view, that had the Constitutional Court properly addressed itself to the provisions of Articles 79 and 150 of the Constitution; section 41(2) (e) and 41(5) of the ***Judicature Act***; and the provisions of the ***Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules***, it would not have declared the Rules unconstitutional for having been made by the Rules Committee.

In light of the preceding discussion, I find that the Constitutional Court erred in law when it held that the Rules Committee did not have the mandate to

make Rules of procedure for enforcement of fundamental rights and freedoms provided for under Chapter 4 of the Constitution.

Beside the discussion above, I further note that neither the Attorney General nor the Constitutional Court addressed themselves to the provisions of section 41(5) of the Judicature Act, which is instructive in this matter. This section provides as follows:

> ***"An instrument made under this section shall be laid before Parliament and be subject to annulment by Parliament and shall cease to have effect when so annulled but without prejudice to anything done under it or the making of a further instrument."***

I am aware that the appellant's counsel did not bring to the Constitutional Court's attention this section of the law and that he did not therefore canvass this argument. Nevertheless, the Constitutional Court, like all other Courts in Uganda, is under a legal duty to be or to make itself aware of all laws and provisions on our Statute Books. In the same vein, the Court is also duty bound to apply them where they are applicable, even if the parties did not cite or rely on them.

I am further aware that section 41(5) of the Judicature Act requires an instrument made under section 41 to be laid before Parliament. In my view, tabling the statutory instrument before Parliament was not intended to validate the said Rules, but to notify Parliament that the Rules Committee had exercised its delegated power under section 41 of the Judicature Act to make the Rules. Furthermore, such tabling would, in my view enable Parliament to play its oversight role and ensure that the powers it delegated to the Rules Committee had been exercised in accordance with the provisions of the Judicature Act.

However while the section created this duty, the section is silent on who has the responsibility to do so and the timeframe within which these Rules should

be laid before Parliament. In this case, the ***Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules*** are also silent in both aspects.

Be that as it may, I am of the view that looking at the composition of the Rules Committee under section 40 of the Judicature Act, the Attorney General is the proper person to lay such Rules before Parliament. This is because he is the representative of the Executive and he also has direct audience in Parliament than the Chief Justice. Thus if there was any failure to lay the Rules before Parliament, the blame should squarely fall on the Attorney General or the Minister of Justice who is the line Minister responsible for the Judiciary Affairs. At the end of the day, it is the Executive that was at fault.

I also find section 34 (2) of the ***Interpretation Act, Cap 3 Laws of Uganda*** relevant to this issue. It provides as follows:

> ***"(2) Where no time is prescribed or allowed within which anything shall be done, that thing shall be done without unreasonable delay and as often as due occasion arises."***

It is also worth noting that the ***Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules*** did not provide for a commencement date. However, section 17(1)(a) of the ***Interpretation Act***, provides as follows:

> ***"the commencement of a statutory instrument shall be such date as is provided in or under the instrument or, where no date is so provided, the date of its publication as notified in the Gazette"***

The Rules were gazetted on the 12th December 2008 and therefore came into force on the same day.

Given my analysis above, I maintain my finding that the ***Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules*** were properly made by the Rules Committee. In the event that these Rules were not laid before Parliament, I still hold that this did not make the ***Judicature***

(Fundamental Rights and Freedoms) (Enforcement Procedure) Rules
unconstitutional.

I am fortified in my position by the fact that (a) the Rules were made by a body legally established and mandated to do so and (b) the failure by the Executive to table these Rules did not make them unconstitutional especially in light of the fact that there is no rule providing that failure to lay these rules before Parliament will render them unconstitutional. The Attorney General never made any argument on this ground. Court cannot therefore on its own volition make a case for the Attorney General which will have the effect of prohibiting the enforcement of fundamental rights and freedoms by citizens before Courts of law.

The import of section 41(5) of the Judicature Act is that in its wisdom, Parliament gave full authority to the Rules Committee to make the Rules for regulating procedures in Courts. Once such Rules are made by the Rules Committee, such Rules remain in force until Parliament nullifies them. The section however saves anything done under the Rules prior to their annulment.

I would therefore allow ground 2 of appeal to succeed.

Ground 1 of Appeal

I will now turn to consider Ground 1 of appeal which was framed as follows:

> ***"That the Constitutional Court erred to have held that Parliament had not made any law for the enforcement of fundamental rights and freedoms."***

The appellant's counsel contended that whereas there were existing laws for enforcement of rights and freedoms, there was still need for a specific law on enforcement of fundamental rights and freedoms. Counsel prayed for Court to issue a directive to the Attorney General to carry out his duty under Article

50(4) of the Constitution by introducing a Bill to Parliament aimed at operationalizing Article 50 of the Constitution.

On the other hand, the Attorney General submitted that Article 50 (4) of the Constitution mandates Parliament to enact a law for the enforcement of fundamental rights and freedoms. He further contended that no such law for enforcement of rights and freedoms had been enacted by Parliament.

While conceding that the Rules Committee has powers to make Rules of Procedure for Courts like it did with the impugned Rules, the Attorney General contended that no Act of Parliament was in existence in as far as enforcement of rights and freedoms was concerned.

The Constitutional Court concurred with the submissions of the Attorney General on this point and held that no special law had been enacted under Article 50 (4) of the Constitution. The Constitutional Court observed as follows:

> ***"Applications from which this reference arose were made under Article 50 of the Constitution. The relevant part read as follows: 50 Enforcement of rights and freedoms.***
>
> ***(1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been***

infringed or threatened, is entitled to apply to a competent Court for redress which may include compensation.

(2) …

(3) …

(4) Parliament shall make laws for the enforcement of the rights and freedoms under this chapter.

It is common knowledge that Parliament has not made any law under Article 50(4) above."

The learned Justices however disagreed with the second part of the Attorney General's submission that no law was in existence in Uganda for the

30 enforcement of fundamental rights and freedoms because there was no specific law enacted to date. The Constitutional Court held as follows:

"… However, we are not in agreement with him that in the absence of such a law, until Parliament makes law under Article 50(4), Article 50(1) is in abeyance.

The argument that the enforcement of rights and freedoms would be in abeyance in the absence of the laws envisaged under Article 50(4) is in our view, unfounded. When the Constitution was promulgated and came into force, it came into force as a whole document and not in parts.

From their submissions, both sides are alive to the fact that other existing procedural laws such as the Civil Procedure Act and the Rules thereunder, the Law Reform Miscellaneous Provisions Act and the Government Proceedings Act were saved by the provisions of Article 274 of the Constitution which saved all existing laws before the coming into force of the Constitution."

As can be noted from the above quote, it is not true, as the appellant's counsel had argued, that the learned Justices of the Constitutional Court held that Parliament had not made any law for the enforcement of fundamental rights and freedoms. The Constitutional Court rightly held that there was no specific law envisaged under Article 50(4) of the Constitution. However, the Constitutional Court acknowledged the existence of other laws which existed prior to the promulgation of the Constitution and which were still applicable by virtue of Article 274 of the Constitution. This Article saved laws existing as at the coming into force of the 1995 Constitution but required that such laws be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution.

Having considered the submissions of the parties and the Constitutional Court's holding on this matter, I have found no basis for upholding ground 1 of appeal. I would therefore find that the Constitutional Court did not err when it held that no special law had been enacted by Parliament under Article 50(4) of the Constitution.

While the appellant's counsel conceded that other laws existed under which the appellant could have moved to enforce his fundamental rights and freedoms, he contended that these laws were (a) insufficient; (b) used ordinary pleadings which would take long. In counsel's view, this absence of a speedy enforcement procedure would defeat the purpose of enforcement of fundamental rights and freedoms which required immediate redress. According to the appellant's counsel, this required a specific law on enforcement of fundamental rights and freedoms providing for a quick and specific procedure for enforcement of fundamental rights and freedoms.

On the other hand, the Attorney General contended that even in the absence of a specific law enacted by Parliament for enforcement of fundamental rights and freedoms, an aggrieved party could still enforce his or her fundamental rights under Article 50(1) of the Constitution. He relied on Article 274 which preserved existing law such as the Civil Procedure Act, the Magistrates Courts Act, the Government Proceedings Act and the Law Reform Miscellaneous Provisions Act among others, under which an aggrieved party could move Court to enforce his or her rights.

By way of illustration, the Attorney General contended that a party who goes to Court because of breach of contract or a land dispute was in essence enforcing his right to property. This, according to the Attorney General, illustrated the fact that these rights can be enforced under numerous legislation enacted by Parliament.

The Attorney General also contested the appellant's submission that as a Member of the Rules Committee, the Attorney General had done nothing to move Parliament to enact a law on enforcement of human rights and freedoms. He argued that this was unnecessary since there was existing law under which fundamental rights and freedoms could be enforced.

The question that arose from the parties' respective submissions to the Constitutional Court and the Court's respective holding was whether the appellant could then proceed under Article 50(1) of the Constitution in the absence of a specific law enacted by Parliament under Article 50(4) of the Constitution.

I have studied the Ruling of the Constitutional Court on this matter. With due respect to the learned Justices of the Constitutional Court, I find that they made some errors in the question they addressed themselves to. Secondly, the learned Justices also made contradictory holdings in the same Ruling, which resulted in their failure to resolve the question put to them. I will proceed to discuss these matters in the following section.

As I noted earlier in this Judgment, the learned Justices of the Constitutional Court set out the Reference question at the beginning of their Ruling as follows:

> ***"Whether the Rules Committee in enacting the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure Rules) S1 No. 55 of 2008, the Rules under which MC 118 2008 was brought, contravened Article 50 (4) of the Constitution."***

The above question set out by the Court, though somehow similar to the question set out by the High Court, was a wrong one. The right question which Zehurikize, J. referred to the Constitutional Court and appears at page 8 of the Record of Appeal, was reproduced earlier in this Judgment and read as follows:

> ***"Whether the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules, 2008 are unconstitutional for having been made by the Rules Committee instead of Parliament pursuant to Article 50(4) of the Constitution."***

The question that the Constitutional Court interpreted was whether the Rules Committee had acted in contravention of Article 50(4) of the Constitution

when it made the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules. On the other hand, the right question referred to the Court was whether the Rules were unconstitutional for having been made by the Rules Committee and not Parliament, pursuant to Article 50(4) of the Constitution.

I note that the mix up of questions by the Constitutional Court was partially fatal to the decision the Court eventually rendered because it changed the focus of the Court during its consideration of the Reference. The question referred to the Constitutional Court required an examination of the constitutionality of the ***Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules***, whereas the question that the Court ended up answering required the Court to examine whether the Rules Committee had contravened Article 50 (4) when it made the impugned Rules.

The error of the Court resulted in the Constitutional Court taking a narrower approach by focusing its inquiry and decision on Article 50(4) of the Constitution, whereas it was not required to do so. This error of the Court is evident in the following holding:

> ***"Our duty in this reference is to interpret Article 50 (4) of the Constitution to answer the above questions one way or the other. In so doing, we must bear in mind the guiding Constitutional interpretation principles which are to the effect that the Constitution is to be looked at as a whole. It has to be read as an integrated whole with no one particular provision destroying another but supporting each other. All provisions concerning an issue should be considered together to give effect to the purpose of the Instrument. See Dr. James Rwanyarare & Others Vs Attorney General Constitution Petition No. 7 of 2002.***
>
> ***S.I 55/08 was made by the Rules Committee on the 26th day of February, 2008, in exercise of the powers conferred upon the Committee by Section 41(1) of the Judicature Act which … The***
>
> ***Long title of the Judicature Act, Cap 13 states that it is:***

'An Act to consolidate and revise the Judicature Act to take account of the provisions of the Constitution relating to the Judiciary.'

The provisions of the Constitution relating to the Judiciary are found in Chapter eight of the Constitution. …

The Rules Committee therefore derives its powers to make rules from Article 150(1) of the Constitution. The Rules are for regulating the practice and procedure in the Judiciary."

The Constitutional Court having observed that the application from which the Reference arose was made under Article 50 of the Constitution, then outlined the provisions of Article 50(1) and 50(4) and concluded as follows:

"It is common knowledge that Parliament has not made any law under Article 50 (4) above. That being so, did the Rules Committee have the mandate to make S.I 55/08?

By the use of the word "shall" in Sub Article (4) above, the framers of the Constitution made it mandatory that it is only Parliament that is empowered by the Constitution to make laws for the enforcement of rights and freedoms under Chapter four of the Constitution. It is not the role of any other body to do it except under delegated authority under Article 79, which is not the case here.

We therefore agree with the submission by Mr. Adrole and answer the question in the affirmative."

The Constitutional Court did not spell out what question it was answering in the affirmative. But from the analysis made earlier in this Judgment and the reading of the Ruling of the Constitutional Court, I can safely conclude that the Court's ruling was that in enacting the ***Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules*** , the Rules Committee had contravened Articles 50(4) of the Constitution. It was on that basis that the Constitutional Court found the ***Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules***, by necessary implication, to be unconstitutional.

In so holding, the Constitutional Court therefore made two erroneous holdings in its decision which had a direct impact on the Court's decision.

The first error was the Constitutional Court's holding that the Rules Committee derives its powers to make rules from Article 150(1) of the Constitution. As I noted before, the Rules Committee derives its power from the Judicature Act. Although the head note to the Judicature Act provides that it is an Act to consolidate laws relating to the Judiciary and take into account the provisions of the Constitution, there is no specific provision in the Judicature Act to the effect that it was enacted under Article 150 of the Constitution.

The second error was the Constitutional Court's finding that the Rules Committee had made Rules for the enforcement of fundamental rights and freedoms under Article 50(4) of the Constitution, thereby contravening that Article.

With due respect to the learned Justices of the Constitutional Court, this holding was also erroneous in law as there was no evidence on the record indicating that the Rules Committee had purported to act under Article 50(4) of the Constitution. Contrary to the Constitutional Court's finding, the Preamble to the Rules clearly shows that the Rules Committee acted under section 41(1) of the Judicature Act which I had reproduced earlier in this Judgment.

Having reached the decision that it did, the Constitutional Court then held that the enforcement of Article 50(1) and indeed all the rights and freedoms guaranteed under Chapter Four of the Constitution were not in abeyance. While this holding of the Constitutional Court was correct and not erroneous, the net effect of its earlier holding invalidating the ***Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules***, was to put the

fundamental rights and freedoms guaranteed under Chapter Four in abeyance. This is because the Constitutional Court had struck out the procedure which was laid out in the said Rules, for persons proceeding under Article 50(1) to bring their claims before the High Court. In my view, this

5 error was not remedied by the Court's holding that the fundamental rights and freedoms could be enforced through other existing laws which were saved by Article 274 of the Constitution.

Furthermore, Article 137(6) of the Constitution provides as follows:

> ***"Where any question is referred to the Constitutional Court under***
> **10** ***clauses (5) of this Article, the Constitutional Court shall give its decision on the question, and the Court in which the question arises shall dispose of the case in accordance with that decision."***

Similarly, Rules 21 (3) and 22 of the ***Constitutional Court (Petition & References) Rules, S.I 91 of 2005*** already referred to in this Judgment, also

15 reiterate the same duty imposed on the Constitutional Court.

The inference from Article 137(6) and Rules 21 and 22 referred to above is that the decision of the Constitutional Court on the question which has been referred to it by a lower Court must be a clear decision which should guide and enable the referring Court to hear and dispose of the application or the

20 case in accordance with the decision of the Constitutional Court.

By way of contrast, the Constitutional Court, while disposing of other Constitutional References, has given clear guidance and directions to lower Courts. For instance in ***Uganda v. Atugonza Francis, Constitutional Reference No. 31 of 2010***, the Constitutional Court answered in the negative the

25 question, "*Whether the charging of the accused under the Anti- Corruption Act, 2009 which commenced on the 25th August 2009, for the offence committed between December 2007 and December 2008 is consistent with articles 28(7) and (12) of the Constitution."* The Court then directed the trial Judge to proceed with the hearing of the case, without any further delay.

Similarly, in ***Uganda v. Oneg Obel, Constitutional Petition No. 0024 of 2011***, the Constitutional Court after dismissing a Reference on three questions directed its Registrar to return the record to the lower Court for the respondent's trial to proceed forthwith. Examples of similar clear decisions were made by the Constitutional Court, in among others, ***Justice Julia Sebutinde v. The Attorney General, Constitutional Reference No. 05 of 2005*** and ***Nestor Gasasira v. Uganda, Constitutional Reference No. 17 of 2011.***

Similarly, in ***Thomas Kowyelo alias Latoni v. Uganda, Constitutional Reference No. 036 of 2011***, the Constitutional Court answered in the affirmative the question *"Whether the failure by the Director of Public Prosecutions (DPP) and the Amnesty Commission to act on the application by the accused person for grant of a Certificate of Amnesty, whereas such certificates were granted to other persons in circumstances similar to that of the accused person, is discriminatory, in contravention of, and inconsistent with Articles 1, 2, 20(2), 21(1) and (3) of the Constitution of the Republic of Uganda."* Having done so, the Constitutional Court then directed that the file be returned to the Court which sent it, with a direction that it must cease the trial of the applicant forthwith.

Although this Court later set aside the Judgment of the Constitutional Court in the ***Kowyelo case*** (supra), I have used the Constitutional Reference in the Kwoyelo case and in other References as an example to illustrate the point that when it comes to Constitutional References, the practice has been for the Constitutional Court to give its clear decision and clear directives to the trial Court in accordance with its decision.

Turning to the Reference from which this appeal arose, it is clearly evident that the Constitutional Court did not give any specific direction in as far as hearing the application from which the Reference arose was concerned. Yet the Constitutional Court had made three holdings, namely that, (i) the

Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules were unconstitutional; (ii) no specific law had been enacted by Parliament under Article 50(4) of the Constitution, and (iii) there are other existing laws that could be used to enforce fundamental rights and freedoms.

Considered together, the three holdings of the Constitutional Court left the appellant and the High Court at cross-roads, because the Court did not make specific orders directing the High Court on how to proceed with the appellant's application and indeed other similar applications that had been pending at the High Court. For instance, did the invalidation of the ***Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules*** mean that all applications brought under the unconstitutional Rules were to be dismissed? Or did it mean that the High Court would not dismiss them, but rather give an opportunity to the parties to amend their pleadings and proceed under the ordinary Civil Procedure Rules, by way of plaint. This uncertainty demonstrates the point that the Constitutional Court only partially executed its task and left many questions unanswered.

In my view, under Article 137(5) of the Constitution, the duty of the Constitutional Court when it is considering a Constitutional Reference is similar to when the Court is hearing a Constitutional Petition. Article 137(5) clearly provides that the Constitutional Court shall make a decision in accordance ~~with~~ clause 1 of this Article: that is the Court shall consider the Reference as a question for interpretation. But in addition to interpretation, it has to give guidance to the trial Court on that Constitutional Reference.

Having held that the Constitution came into force as a whole document and that the enforcement of rights and freedoms enshrined in it would not be in abeyance in the absence of the law envisaged under Article 50(4), it was incumbent on the Constitutional Court, to invoke its interpretation powers under Article 137 of the Constitution to give guidance to the High Court, and

even other intending litigants as to what was the correct procedure to enforce fundamental human rights under Article 50 of the Constitution.

I therefore find that the Constitutional Court erred in law when it failed to make specific orders for the High Court's guidance. By failing to guide the High Court on how to proceed with the matter that led to the Reference, the Constitutional Court, failed in its duty and therefore, in my view, erred in law.

The net effect of the Constitutional Court's failure to give clear direction was that Misc. Cause No. 13 of 2010 could not proceed because the Preliminary Objection had been upheld by the Constitutional Court. This in turn had the effect of leaving the appellant and any other person who wished to seek redress under Article 50(1) for human rights violations with no recourse to Courts, until Parliament enacted a law under 50(4). This created a scenario for growth of a culture of impunity on the part of both State and non-State actors who violate the rights of others.

While some existing laws provided for avenues for the enforcement of some rights provided for under Chapter 4 of the Constitution, these existing laws which were cited by the Constitutional Court predated the Constitution and did not provide for a similar procedure to that which had been laid down by the ***Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules***. Taking the case that the appellant filed as an example, his application before the High Court sought for orders that the banning of *bimeeza* [open air ex-studio public live radio broadcasts] by Government breached his freedoms of speech, expression and media guaranteed under Article 29(1)(a) of the Constitution and for lifting of the ban on *bimeeza* by way of enforcement of the applicant's fundamental freedoms of speech, expression and media. It is clearly evident from the orders sought that existing laws are

not suited to dealing with claims of violations of fundamental rights and freedoms under the Constitution.

The Constitution reaffirms the fact that fundamental and other Human Rights and freedoms are inherent and not granted by the State. Similarly, Article 20(1) of the Constitution directs that these rights and freedoms must be respected, upheld and promoted by all organs and agencies of Government and by all persons. Indeed, States have an obligation under International Law to put in place mechanisms to ensure that these rights are realized and enjoyed by all citizens. It is therefore a matter of great concern that no law has been enacted in accordance with Article 50(4) of the Constitution.

Although it cannot have been the intention of the makers of the Constitution to 'freeze' the enjoyment and operationalization of the fundamental rights and freedoms enshrined in Chapter Four of our Constitution, it cannot at the same time be argued that such a law was not necessary. Article 50(4) is a constitutional directive to Parliament. It is not optional. While no timeframe was given in the Constitution for such a law to be enacted, there is at the same time no justification for a 22 year delay or failure to act on this important constitutional directive.

It should be noted that Article 50(4) is but one of the many provisions in the Constitution were the makers of the Constitution directed for laws to be made. Whereas Parliament has gone ahead to enact laws under various Articles like Articles 30(5), 35(2), 40(1), 41(2), 58, 59(4), 64(5), 72(3), 104(9), 152(3), 155(6), and 188(3), which are couched in similar terms to Article 50(4) no action has been taken under Article 50(4). Action on Article 50(4) is long overdue.

It is indeed a matter of great concern that the Reference from which this appeal arose, emanated from a preliminary objection made by the Attorney

General about the constitutionality of the ***Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules of 2008***.

It is worth noting that the application in question which gave rise to this Reference was filed in 2010 (15 years), after the promulgation of the Constitution. In my view, the Attorney General (representing the Executive), who in the first place had either neglected or failed to table the law envisaged under Article 50(4), should not have been allowed by the Court to successfully carry the day-by putting roadblocks in the way of those seeking to enforce fundamental rights and freedoms entrenched in our Constitution under Article 50(1), in the absence of a specific law passed by Parliament under Article 50(4).

The Constitution of Uganda in Article 119(3) clearly provides that the Attorney General is the principal legal advisor to Government. As a member of the Executive, the Attorney General should have advised Government to enact the law as required by Article 50(4) of the Constitution, soon after the promulgation of the 1995 Constitution. This non-action on the part of the Executive and Parliament to pass the law 22 years after the Constitution was promulgated, runs contrary to the letter and spirit of the Constitution of Uganda which was intended and indeed came into effect on the date of its promulgation on 8th October, 1995.

Secondly, the Rules the Attorney General objected to, were made in 2008, which was 13 years after the Constitution had come into force. The Attorney General missed yet another opportunity, as a member of the Rules Committee to guide the Committee about the alleged inconsistency of the said Rules with Article 50(4). Thirdly, section 41(5) of the Judicature Act requires the rules to be laid before Parliament as a Statutory Instrument. Again, it is not very clear if the Attorney General complied with these provisions.

Fourthly, since raising the preliminary objection in the appellant's Misc. Application No. 13 of 2010, there has still been no action on the Attorney General's part, the Parliament's part or Executive's part to comply with Article 50(4) of the Constitution. It is indeed unfortunate that it took the Government's chief legal advisor 7 years to finally concede before this Court that the Rules Committee actually had power to make the Rules for laying out procedure for enforcement of fundamental rights and freedoms in question and that the said Rules were not unconstitutional.

I take note that a Human Rights (Enforcement) Bill, 2015 was tabled in Parliament as a Private Member's Bill but was withdrawn for further consultations with the Executive. The Attorney General should rise up to his duty and advise the Government to comply with the clear provisions of Article 50(4) of the Constitution, by tabling a law before Parliament for its action, without any further delay. On the other hand, since the Article 50(4) of the Constitution specifically vests the responsibility to pass the law in Parliament, law makers should also move to comply with the Constitution, without waiting for the Executive to act.

In the meantime, Courts should remain mindful of the fact that the Constitution did not provide for fundamental rights and freedoms to remain in abeyance. Courts have a role to enforce fundamental rights and freedoms and to uphold the Constitution. Therefore, Courts should not condone the violation of fundamental rights and freedoms, by turning away litigants from their doors. Such an outcome would also relegate the application and enforcement of the Bill of Rights in our Constitution, which has been in force since October 1995.

Orders

I would therefore allow this appeal to succeed in part with the following orders.

(i) That the ***Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules*** are constitutional.

(ii) That the Rules Committee acted within its powers when it made Rules providing for the procedure to seek redress for violations of fundamental rights and freedoms under Article 50(1) of the Constitution.

(iii) That the High Court should proceed to hear ***Misc. Cause No. 13 of 2010: Bukenya Church Ambrose v. Attorney General*** and dispose of it on its merits.

(iv) That the appellant be paid the costs incurred for preparation and pursuing the Reference in the Constitutional Court and also in this Court.

Dated at Kampala this ...**22nd**.. day of .. **May**..... 2017.

.....

JUSTICE DR.ESTHER KISAAKYE
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KATUREEBE,CJ; TUMWESIGYE; KISAAKYE; MWANGUSYA; OPIO-AWERI; MWONDHA; & TIBATEMWA-EKIRIKUBINZA; JJ.S.C.]

CONSTITUTIONAL APPEAL NO 03 OF 2011

BETWEEN

BUKENYA CHURCH AMBROSE ::::::::::::::::::::::::] APPELLANT

AND

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

[Appeal from the Ruling of Justices of the Constitutional Court (Bahigeine, DCJ, Twinomujuni, Kavuma, Nshimye, Arach-Amoko, JJA) dated 21st March 2011 in Constitutional Reference No. 26 of 2010]

JUDGMENT OF TIBATEMWA-EKIRIKUBINZA, JSC.

I have had the benefit of reading in draft the Judgment of my learned sister Kisaakye, JSC. I agree with her that this Appeal should succeed. I also agree with the Orders she has proposed.

Dated at Kampala this **22nd**.. day of .. **May**. 2017.

.....

JUSTICE PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KATUREEBE,CJ; TUMWESIGYE; KISAAKYE; MWANGUSYA; OPIO-AWERI; MWONDHA; & TIBATEMWA-EKIRIKUBINZA; JJ.S.C.]

CONSTITUTIONAL APPEAL NO 03 OF 2011

BETWEEN

BUKENYA CHURCH AMBROSE ::::::::::::::::::::::::] APPELLANT

AND

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

[Appeal from the Ruling of Justices of the Constitutional Court (Bahigeine, DCJ, Twinomujuni, Kavuma, Nshimye, Arach-Amoko, JJA) dated 21st March 2011 in Constitutional Reference No. 26 of 2010]

JUDGMENT OF KATUREEBE, CJ.

I have had the benefit of reading in draft the Judgment of my learned sister Kisaakye, JSC. I agree with her that this Appeal should succeed. I also agree with the Orders she has proposed.

As the rest of the members on the Coram agree, this Appeal is hereby allowed on the terms as proposed by the learned Justice. The decision of the Constitutional Court is set aside.

Dated at Kampala this **22nd**.. day of .. **May**. 2017.

.....

JUSTICE BART M. KATUREEBE

CHIEF JUSTICE