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**THE REPUBLIC OF UGANDA**

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

**(CORAM: KISAAKYE; ARACH-AMOKO; NSHIMYE; MWANGUSYA; OPIO-  
AWERI; MWONDHA; TIBATEMWA; JJSC)**

**CONSTITUTIONAL APPEAL NO. 01 OF 2008**

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**(ARISING FROM CONSTITUTIONAL APPLICATION NO. 18 OF 2006)**

**(ARISING FROM CONSTITUTIONAL PETITION NO. 14 OF 2005)**

**BETWEEN**

**KWIZERA EDDIE:::APPELLANT**

**AND**

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**ATTORNEY GENERAL:::RESPONDENT**

**(Appeal from the Ruling of the Constitutional Court ( Mukasa Kikonyogo, DCJ ; Okello; Mpagi Bahigeine; Kitumba and Byamugisha JJ.A , dated 4<sup>th</sup> May, 2007, in Miscellaneous Application No. 18 of 2006, arising from Constitutional Petition No. 14 of 2005)**

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**JUDGMENT OF ARACH-AMOKO JSC**

This appeal is against the Ruling of the Constitutional Court dismissing an application requesting the Court to review its order that “*each party should bear its own costs*” in Constitutional Petition No. 14 of 2005 and replace it with an order awarding costs to the Appellant using the “*slip rule.*”

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The detailed facts of the Appellant’s case are set out in Constitutional Petition No. 14 of 2005 out of which the application arose. Here, it suffices to highlight only the facts pertinent to this appeal.

In 2005, Parliament amended the 1995 Constitution vide Act No. 11 of 2005, by introducing clause (4) to Article 80 which required Government employees who wished to participate in

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general elections as members of Parliament to resign from office within 90 days before nomination day.

Act No. 11 of 2005 was assented to by the President on the 26<sup>th</sup> September, 2005. On the 20<sup>th</sup> December 2005, the Electoral Commission appointed the 12<sup>th</sup> and 13<sup>th</sup> January, 2006 as the  
5 nomination days for Parliamentary elections. This gave less than 90 days to the nomination day.

According to the Appellant who was at the material time a Special Presidential Assistant in the office of the President, he intended to contest as a candidate in the Parliamentary elections but was caught up by the deadline imposed by the said amendment. Consequently, he challenged  
10 the constitutionality of the clause **vide Constitutional Petition No. 14 of 2005** in the Constitutional Court on the ground that it was inconsistent with Articles 1(4); 38(1) and 21(1) of the Constitution.

He also contended that the clause was ambiguous in that it did not clearly define the term “*a person employed in any government department or agency of government*”. He sought  
15 declaratory orders to that effect and an order nullifying the amendment by the Constitutional Court. He also prayed for the costs of the petition against the Respondent.

By a majority decision of 4-1, the Justices of the Constitutional Court allowed the petition in part and ordered “*each party to meet its own costs.*”

The Appellant was aggrieved by the order that “*each party should meet its own costs*” because  
20 he believed that since he had won the petition, he was entitled to costs. As a result, he filed **Constitutional Application No. 18 of 2006** under Rule 36 of the Court of Appeal Rules, seeking an order from the same Court to correct an error or mistake or slip in its judgment using the “*slip rule*” and award him the costs of the petition.

The learned Justices of the Constitutional Court (*Mukasa Kikonyogo, DJC, Okello, Mpagi-Bahigeine, Kitumba and Byamugisha JJA*) who heard the application held that the “*slip rule*”  
25 did not apply to the circumstances of the case since the Court had deliberately exercised its discretion under Section 27 of the Civil Procedure Act in making the order on costs.

The Court advised the Appellant that the solution lay in an appeal and proceeded to dismiss the application with costs to the Respondent, hence this appeal which was based on three grounds, namely that:

1: *The learned Justices of the Constitutional Court erred in law and in fact when they held that they had the discretion not to allow costs to the Appellant.*

2: *The learned Justices of the Constitutional Court erred in law and in fact when they dismissed Constitutional Application No. 18 of 2006 with cost to the Respondent.*

3: *The learned Justices of the Constitutional Court erred in law and in fact when they held that there was no slip, error or mistake or even omission made by them in Constitutional Petition No. 14 of 2005*

**Representation:**

The Appellant was unrepresented. Senior State Attorney George Kalemera represented the Respondent. Both of them filed written submissions. They argued ground 3 and then 1 and 2 together. I have adopted the same order in considering the grounds of appeal.

**Submissions**

**Ground 3:**

The gist of the Appellant's argument on this ground was that the learned Justices of the Constitutional Court erred in law and in fact when they ruled that the slip rule did not apply to the Appellant's application.

The first reason for his contention was that three of the Justices never gave any reason for depriving him of costs in their judgments. That one of them did not even make any finding as to costs at all. That even the only one who gave a reason for denying him costs stated that the petition was a public interest litigation, which was wrong, since his petition was not public interest litigation.

He submitted that the Court only gave the reason later on in its Ruling in **Constitutional Application No. 14 of 2005** where it stated that it did not award him costs because he had only partially succeeded in the petition. According to the Appellant, this was an afterthought which amounted to the Justices rationalizing their earlier decision why costs should not follow the event. He insisted that the reason for refusing him costs should have been given by the Justices in their judgment.

Secondly, the Appellant contended that the true intention of the Court denying him costs cannot be said to have been based on the partial outcome of the petition because Court never said so in its judgment. Having given no reason for depriving him of costs, the intention of the Court could only be inferred from its earlier decision where the Court had initially awarded him costs of the adjournment in any event on the 13<sup>th</sup> June, 2006. To him, this was an indicator that the Court intended to award costs to the successful party and since costs follow the event, this fell within the ambit of the “*slip rule*”.

Lastly, the Appellant submitted that during the course of proceedings, he had actually brought to the attention of the Court that it had previously awarded costs in similar cases where the outcome of the petition was partial, but the Court did not address this point in its Ruling. Had it done so, it would have applied the “*slip rule*”. He gave the example of the case of **Fox Oywelowo Odoi v AG, Constitutional Petition No. 8 of 2003** in support of his submission on this point.

The Appellant also contended that his case fell squarely within the authority of **Vallabhadas Karsandas Raniga vs Mansuklal Jivraj & Ors (1965) EA 700** which the learned Justices of the Constitutional Court had relied on in their Ruling complained of to arrive at their decision. Based on the foregoing arguments, the Appellant prayed that Court answers ground 3 of his appeal in the affirmative.

In his response, Counsel for the Respondent fully supported the decision of the Constitutional Court. The main thrust of his submission is that the Appellant had actually misunderstood the powers of the Constitutional Court in regard to awarding costs under Section 27 of the Civil Procedure Act. He contended that the Appellant had failed to appreciate that it was fully in the discretion of the Court to decide the issue of costs. That is why he had come to a wrong

conclusion that since he was awarded costs of the adjournment by Court, he should be awarded the costs of the petition as well.

Counsel for the Respondent maintained the argument that the matter did not fall under the category of cases where the “*slip rule*” could be applied at all. In support of his submissions on this ground, counsel relied on the cases of **Adam Vassiladis vs Libyan Arab (U) Bank For Foreign Trade and Development, SCCA No. 28 of 1992; Vallabhadas Karsandas Raniga vs Mansuklal Jivraj & Ors (1965) EA 700** which was cited with approval in the case of **Adam Vassiladis vs Libyan Arab (U)Bank For Foreign Trade and Development (supra) and Lakhamshi Brothers vs Raja And Sons [1966] E.A 313.**

Counsel’s prayer under this ground was that this Court upholds the Ruling of the Constitutional Court and answers this ground in the negative.

**Grounds 1 and 2:**

Regarding grounds 1 and 2, the Appellant submitted that the learned Justices incorrectly applied the rule regarding costs when they ordered each party to bear its own costs because the rule does not extend to partially successful litigants. He also faulted the learned Justices for awarding costs of dismissal of **Application No. 18 of 2006** to the Respondent. He prayed that this Court reverses the orders of the Constitutional Court accordingly.

Counsel for the Respondent disagreed with the Appellant and reiterated his earlier arguments that costs are within the discretion of the court and follow the event. Counsel relied on the case of **Iyamulemye David Vs Attorney General, SCCA No. 04 of 2013 at p.18**, in support of this submission, where Odoki CJ, as he then was, held that:

**“...It is trite law that the award of costs is in the discretion of the court, the award of costs must follow the event...”**

He contended that the Constitutional Court found that **Constitutional Application No. 18 of 2006** lacked merit and as a result, dismissed it with costs in favour of the Respondent. That the Court rightly exercised its discretion in awarding the costs of dismissal to the Respondent. The Court cannot, in the premises be faulted at all.

He prayed that the decision of the Constitutional Court on this issue be confirmed as well.

## Consideration of the grounds of appeal

### Ground 3

The main issue under this ground and indeed in this whole appeal is whether the “slip rule” is applicable to this case and if so, whether the Constitutional Court erred when they ruled that it did not apply to the applicant’s case.

The law governing the “*slip rule*” is set out under Rule 36(1) of the Court of Appeal Rules which reads thus:

“36. (1) *clerical or arithmetical mistake in any judgment of the court or any error arising in it from an accidental slip or omission may at any time, whether before or after the judgment has been embodied in a decree, be corrected by the court concerned, either of its own motion or on the application of any interested person so as to give effect to what was the intention of the court when the judgment was given.*” (Emphasis is added).

Similar powers exist under Rule 35 of the Supreme Court Rules and Section 99 of the Civil Procedure Act (Cap 71).

As for the applicability of the slip rule, the former Court of Appeal for East Africa set out the principles applicable in the case of **Vallabhadas Karsandas Raniga vs Mansuklal Jivraj & Ors** as follows:

“(iii) ‘*slip orders*’ may be made to rectify omissions resulting from the failure of counsel to make some particular application.

(iv) *a slip order will only be made where the court is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given, or in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter been brought to its attention.*”

In that case a decree for possession, arrears of rent and mesne profits was passed against the Appellant by the then Supreme Court of Kenya. Before lodging the record of appeal, the Appellant had successfully applied to the Court of Appeal for East Africa for a stay of execution pending the hearing of the appeal. On the terms and under that order, the Appellant made certain payments to the Respondent. The appeal was subsequently heard and allowed but

counsel for the Appellant failed to apply to vacate the order for stay of execution and for the refund of the moneys paid under that order. Counsel for the Appellant applied for amendment of the order so as to provide for refund of moneys that had been paid by the Appellant.

5 The court was satisfied that if the facts had been before the court when the judgment was given on appeal, the court would on application, or indeed on its own motion, have made the order for refund sought, which was consequential to the decision. It therefore ordered accordingly.

The dictum in the **Raniga vs Jivraj** case has been cited with approval in a multitude of cases in this jurisdiction including, **Fang Min vs Dr. Kaijuka Mutabaazi Emmanuel, Civil Appeal No. 06 of 2009 (SC)**; **Zaituna Kawuma vs George Mwalurum, Civil Application No. 3 of 10 1992 (SC)**; **Adam Vassiadis vs Libyan Arab (U) Bank (supra)**; and **Orient Bank vs Frederick Zaabwe & Anor, Civil Application No. 17 OF 2007**, to name but a few.

In the **Orient Bank vs Frederick Zaabwe & Anor, (supra)**, this Court stated the scope of the application of the ‘*slip rule*’ even more clearly when it said the following:

15 “*The above position still holds good. It is therefore, now fairly well settled that there are two circumstances in which the slip rule can be applied namely:*

*(1)Where the court is satisfied that it is giving effect to the intention of the court at the time when the judgment was given; or*

20 *(2)In the case of a matter which was overlooked, where it was satisfied beyond doubt, as to the order which it would have made had the matter been brought to its attention.”*

In that case, Court established that the intention of the court at the time of giving judgment was to restore the judgment and orders of the High Court, particularly of specific performance and to ensure that justice was done in the event that specific performance could not be performed. The slip rule was used to amend the orders accordingly.

25 In the Appellant’s application, the Justices of the Constitutional Court after quoting at length and relying on the **Raniga vs Jivraj** case, declined to apply the “*slip rule*” and gave the following reasons for its decision:

“In the instant case, after hearing the applicant’s Constitutional Petition No.14 of 2006, this Court allowed in part and ordered each party bears its own costs. In making that order for costs, the Court exercised its discretion and made a deliberate decision based on the outcome of the petition that was partial. There was no slip, error, or mistake or even an omission. We have also not been shown to have overlooked any matter.” (emphasis added).

The Court held that:

“If the Court erred in its deliberate exercise of its discretion under section 27(1) and (2) of the Civil Procedure Act to make the order it made, the slip rule is not the answer. The solution lies in an appeal to a higher Court.”

Regarding the Court’s intention, this is what the learned Justices of the Constitutional Court said:

“The order of 31-3-06 granting the Appellant costs for that day’s adjournment ‘in any event’ is no indicator of the Court’s ultimate intention regarding costs at the end of the hearing. That order awarded the applicant costs for that day irrespective of the ultimate result of the case. He is therefore entitled to the costs for that day.” (Emphasis was added).

In conclusion, the Court found no merit in the application and went ahead to dismiss it with costs to the Respondent.

Was this an error on the part of the Constitutional Court? Section 27 of the Civil Procedure Act which the Appellant himself cited in support of his arguments provides that:

“(1) Subject to such condition and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid.

(2) The fact that the Court or judge has no jurisdiction to try the suit shall be no bar to the exercise of the powers in subsection (1); but the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”



There is a dearth of authorities including the case of **Iyamulemye David Vs Attorney General, (supra)** to the effect that the law in this area appears well settled. The award of costs is in the discretion of the Court, and it usually follows the event unless the Court for good reason orders otherwise.

5 Just like any other discretion, it must of course, be exercised judicially and not arbitrarily, otherwise an aggrieved party is free to challenge the court’s decision by way of an appeal. [See: **SDV Transami vs. Nsibambi Enterprises [2008] HCB 94.**

10 From the record reproduced above, the learned Justices of the Constitutional Court stated explicitly in their Ruling that the Court had in making the order for costs, exercised its discretion and made a deliberate decision based on the partial outcome of the petition.

The Court stated further that the slip rule was not the answer. If it had erred in its deliberate exercise of its discretion under section 27 of the Civil Procedure Act, the solution lay in an appeal.

15 The Court further pointed out that the Appellant had not shown to the Court any matter or information that the Court could have overlooked in arriving at its decision, since the Appellant had actually prayed for costs in his petition.

20 Obviously, the grounds set forth in the said application and the arguments put forward by the Appellant were challenging the decision of the Constitutional Court on costs. In other words, the Court was being asked to sit on appeal in its own judgment and actually change the original order that “*each party should bear his own costs*”, to the opposite order awarding the costs to the Appellant. This would tantamount to asking the Court to alter its decision which could only be done on an appeal and not under the “*slip rule*” because the Constitutional Court was at that point *functus officio*.

25 The slip rule cannot not be used to correct errors of substance or attempt to add or detract from the original order made. In **Ahmed Kawooya Kaugu vs Bangu Aggrey Fred CACA NO. 03 OF 2007** the applicant filed an application seeking an order that the Court of Appeal correct its judgment under the slip rule by citing what the applicant called the right laws. The court held that:

“Rule 36(1) & (2) of the CAR entitles the court to correct its judgment where there are found clerical or mathematical mistakes or accidental slips. The error or omission must be an error in expressing the manifest intention of the court. Court cannot correct a mistake of its own in law or otherwise even where apparent on the face of the record. Under the slip rule court cannot correct a mistake arising from its own misunderstanding of the law. The present application deals with what is alleged to be the misunderstanding by court of the law and its alleged misapplication or misconstruction. The application is not tenable under the slip rule.”

The Court further stated that:

“We would point out that the judgment /order on record correctly manifests our intention. We would not have ruled otherwise. Should any court be persuaded to correct its misunderstanding of the law or applying old laws, it would open a very wide door to chaos.”

The Court of Appeal dismissed that application with costs to the Respondent.

In my view, the learned Justices of the Constitutional Court were right therefore, when they decided that the matter did not fall within the scope of the application of the “slip rule” and advised an appeal to a higher court if the Appellant was aggrieved by their decision.

For these reasons, the Justices of the Constitutional Court cannot be faulted for arriving at their decision. I would accordingly answer ground 3 of the appeal in the negative.

### **Grounds 1 and 2:**

The complaint in Ground 1 of this appeal is that the learned Justices of the Constitutional Court erred in law and in fact when they held that they had the discretion not to allow costs. With much due respect to the Appellant, this is an attempt to smuggle an appeal against the decision of the Constitutional Court regarding the issue of costs. In the case of **Ahmed Kawooya Kaugu vs Bangu Aggrey Fred (supra)**, the Court of Appeal cautioned that:

“The slip rule has to be applied with extreme caution-(see: *Bently v O’ Sullivan (1962) A.E.R Rep. 546*).”

The Court found that the application was clearly and designedly an appeal camouflaged as an application for a slip order. As stated earlier, it was dismissed with costs.

I share the same view with the Justices of the Court of Appeal in that case and rule that this is clearly a camouflaged appeal against the order on costs by the learned Justices of the Court of Appeal. That issue cannot be dealt with in this appeal since the appeal before this Court is against the refusal by that Court to apply the “*slip rule*”. As I have already stated above, the learned Justices of the Constitutional Court were right when they held that the slip rule did not apply to the circumstances of the application before them.

Further, upon perusal of the record, I find that the grounds are the same as those that the Appellant had raised before the Constitutional Court in **Constitutional Application No.18 of 2006**, and the Court rightly advised him to appeal.

In ground 2, the Appellant complained that the learned Justices of the Constitutional Court erred in law and in fact when they dismissed **Constitutional Application No.18 of 2006** with costs to the Respondent.

The answer to ground 2 is straight forward. As stated earlier, Section 27 of the Civil Procedure Act gives courts wide discretion to award costs which usually follow the event unless the Court, for good reasons orders otherwise.

The Appellant was unsuccessful in **Constitutional Application No. 18 of 2006** that is why costs were awarded against him in favour of the Respondent. In other words, since he is the one who had dragged the Respondent to Court, he had to foot the bill when his application had failed. He has not given this Court any reason as to why the Constitutional Court should have ordered otherwise.

In the premises, I find no merit in grounds 1 and 2 and would accordingly disallow them.

### **Conclusion**

In the result, I would dismiss this appeal. I however make no order as to costs since the appeal arose out of the Appellant’s petition which raised very important matters of constitutionalism in this country.

Dated at Kampala this 14<sup>th</sup> day of February 2017

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**M.S.ARACH-AMOKO**

**JUSTICE OF THE SUPREME COURT**

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**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA**  
**CONSTITUTIONAL APPEAL NO. 1 OF 2008**

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**ARISING FROM CONSTITUTIONAL APPEAL NO. 18 OF 2006**

**ARISING FROM CONSTITUTIONAL PETITION NO. 14 OF 2005**

**(CORAM: DR. ESTHER KISAAKYE, ARACH-AMOKO, AUGUSTINE  
NSHIMYE, ELDAD MWANGUSYA,OPIO-AWERI,FAITH  
10 MWONDHA,LILLIAN TIBATEMWA-EKIRIKUBINZA, JJ.SC.)**

**BETWEEN**

**KWIZERA EDDIE :::::::::::::::::::::::::::::::APPELLANT**

**AND**

**15 ATTORNEY GENERAL ::::::::::::::::::::::::::::::: RESPONDENT**

**JUDGMENT OF PROF.DR. LILLIAN TIBATEMWA-EKIRIKUBINZA.**

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I had the benefit of reading in advance the draft judgment prepared by my learned sister, Arach-Amoko, JSC. I agree with her analysis and conclusions regarding the applicability of the slip rule. I further agree that ground 1 is an attempt to smuggle an appeal against the decision of the Constitutional Court regarding the issue of costs and would therefore dismiss this appeal. I am  
25 also in agreement with the learned Justice’s finding that the award of costs is within the discretion of the court.

I however wish to lay a little more emphasis on the law regarding the exercise of this judicial discretion. Furthermore, I also wish to express my views regarding the concept and meaning of Public Interest Litigation as well as the law on award of costs in matters brought to court in public interest.

5 Regarding the court's exercise of judicial discretion, the appellant faults the Court of Appeal as follows:

**The learned Justices of Appeal of the Court erred in law and fact when they held that they had the discretion not to allow costs to the appellant.**

10 In dealing with the issue of costs, Courts are guided by **Section 27** of the **Civil Procedure Act** which provides that:

15 **(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of an incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid;**

20 **(2) The fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of the powers in subsection 1; but the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.** (Emphasis mine)

The principles which can be deduced from the Section are that:

1. The award of costs is left to the discretion of the court.
2. Costs normally follow the event.
3. The Court may for good reason depart from the general rule and decline to award  
25 cost to a successful party.

According to **Duhaime's Law Dictionary**, ([www.duhaime.org](http://www.duhaime.org), accessed on 19.12.2016), the phrase '*costs follow the event*' means that: "an award of costs will generally flow with the result

of litigation; the successful party being entitled to an order for costs against the unsuccessful party.”In other words, the general rule is that a successful party will be awarded costs. This was emphasized by Odoki Ag. JSC in the case of **Iyamuleme David vs. AG SCCA NO.4 of 2013**. He held *inter alia* that:

5           **While it is trite law that the award of costs is on the discretion of the Court, the award of costs must follow the event unless the Court, for good reasons orders otherwise, according to Section 27 of the Civil Procedure Act.**

10 Just as it is in other areas of the law where the court is empowered to make decisions, the court’s discretion in the area of costs must be exercised judicially.

Thus in **Besigye Kizza vs. Museveni Yoweri Kaguta and Electoral Commission, Presidential Election Petition No. 1 of 2001** Odoki (CJ) stated:

15           **It is well settled that costs follow the event unless the court orders otherwise for good reason. The discretion accorded to the court to deny a successful party costs of litigation must be exercised judicially and for good cause. Costs are an indemnity to compensate the successful litigant the expenses incurred during the litigation. Costs are not intended to be punitive but a successful litigant may be deprived of his costs only in exceptional circumstances.**

20 It therefore follows that if a court decides to depart from the general rule, the court is obliged to give reason for not awarding costs to a successful litigant. It is only then that it would be evident on record that in reaching its decision, the court has complied with the statutory requirement that its departure from the general rule has been for *good reason*.

25 In Constitutional Petition No.14 of 2005, the appellant was successful on 1 out of the 3 grounds raised in his petition and on the second and third grounds, he was partially successful. Therefore, the court should have awarded the appellant at least 2/3 of the costs of the petition unless the court’s departure from the general rule that a successful party is entitled to costs was for ‘good reason’.

It is on record that four out of the five Justices gave no reason for their departure from the general rule. I have already stated that a judicial officer is obliged to give reasons for declining to award costs to a successful party. I therefore fault the 4 Justices of the Constitutional Court for not giving reasons for their departure from general rule that costs follow the event.

On the other hand, Justice Kitumba, JA was the only justice who gave reason for not awarding costs. She stated: “*I would dismiss the petition and order that each party bears its own costs, as this was public interest petition*”. (Emphasis mine)

I now move on to discuss Justice Kitumba’s reason for declining to award costs.

Public Interest in our jurisdiction is not defined by any Statute. The concept is however introduced into our law by **Article 50 (2)** of the **Constitution** which provides that:

**Any person or organization may bring an action against the violation of another person's or group's human rights.**

The **Advanced Law Lexicon-The Encyclopaedic Law Dictionary with Legal Maxims, Latin Terms, Words & Phrases, 4<sup>th</sup> edition** defines Public Interest Litigation as:

**A legal action initiated in a Court of Law for the enforcement of Public Interest or general interest in which the public or a class of the community has pecuniary interest or some interest by which their legal rights or liabilities are affected.**

Justice P.N. Bhagwati the herald of Public Interest Litigation (PIL) in India’s jurisprudence articulated the concept of PIL in **S.P. Gupta vs. Union of India AIR 1982 Supreme Court 149** as follows:

**It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal**



**burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ ... seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons ...**

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I conclude that Public Interest Litigation is litigation for the protection of Public Interest and it is not required that for the exercise of the court's jurisdiction it is the person whose rights have been violated that brings the complaint to court. The salient ingredient of Public Interest Litigation is that the suit is brought for and in the interest of the Public. Such litigation is initiated only for redress of a public injury, enforcement of a public duty or vindicating interest of a public nature.

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However, there are instances where private interest litigation touches matters that are in the public interest: should such litigation qualify as Public Interest Litigation?

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The answer to the foregoing question is in the negative. The mere fact that a court ruling in a case brought by an individual will benefit the public does not place the lawsuit in the category of Public Interest Litigation. The potential of a court decision in a privately pursued lawsuit to benefit a larger community or the public does not in itself situate the claim under the rubric of Public Interest Litigation.

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Whereas Public Interest Litigation is brought before the court to vindicate violations of constitutional or legal rights of large numbers of people, private litigation on the other hand is for the purpose of enforcing the right of the individual who has brought the matter before court as happens in the case of ordinary litigation.[See for example the persuasive authority of **People's Union for Democratic Rights vs. Union of India (1983) 1 SCR**

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**456].**

In Public Interest Litigation, the applicant has not his or her own interest and does not struggle for himself or herself whereas in Private Litigation an individual struggles for their own benefit.

Public Interest Litigation can be presented by anybody whether they have suffered or not while in private litigation, the litigation is filed by the aggrieved party only.

Having discussed the salient differences between the two types of litigation, I now turn to the circumstances of the case to determine under which category the suit falls.

- 5 The appellant instituted the petition under **Article 137 of the Constitution** challenging **Article 80(4) of the Constitution** that had been introduced by the **Constitution (Amendment Act) No.11 of 2005**. Article 80 (4) provided that, “*under the Multiparty system, a public officer or a person employed in any government or an employee of a local government or anybody in which the government has a controlling interest who*
- 10 *wishes to stand in a general election as a member of parliament shall resign his or her office at least ninety days before the nomination day.*”

The appellant at the time of instituting the said petition was a Special Presidential Assistant in the President’s office aspiring to be a Member of Parliament in the 2006 parliamentary elections.

- 15 The Constitutional Court found that Article 80 (4) in itself was not unconstitutional but the amendment Act that was enacted late was unconstitutional as all government employees who sought to stand for electoral positions in the 2006 election could not resign within the prescribed 90 days in Article 80 and that the amendment violated the appellant’s constitutional right in Article 21.

- 20 The detailed acts of violation complained of by the appellant are included in the affidavit in support of the Petition that he filed in the Constitutional Court and are as follows:

*I am a Member of Parliament for Bufumbira East Constituency in the 6<sup>th</sup> Parliament but serving as a Special Presidential Assistant in the office of the President.*

- 25 *That I have intentions of contesting in the next Parliamentary Elections as a candidate for Bufumbira East Constituency.*

*That as soon as I became aware that Parliament had passed “The Constitution (Amendment) (No.3) Act, 2005”, I sought the advice of the Solicitor General as to whether Article 80 (4) was applicable to him as a Special Presidential Assistant.*

*That I am aggrieved by the enactment of Article 80 (4) of the Constitution because it*  
5 *contravenes and/ or is inconsistent with other provisions of the same Constitution.*

*That I am also aggrieved by the enactment of the said Article 80 (4) because nowhere in the Constitution is the term ‘a person employed in any government department or agency of the government’ appearing in that article defined which makes it ambiguous and open to misinterpretation and abuse.*

10 The appellant thus prayed that the Court declares Article 80 (4) as being in contravention and inconsistent with Articles 1 (4) and 38 (1) of the Constitution, a declaration that Article 80 (4) is discriminatory of the petitioner’s rights enshrined in Articles 21 (1) and 38 (1) and an order defining the term “person employed in any Government department or agency of the government appearing in Article 80 (4).

15 I observe that an aggrieved party can come to Court under **Article 137 (3) (b)** seeking a declaration that an act by any person or authority is inconsistent or in contravention of the Constitution. The party may seek for a declaration from the Constitutional Court that the act complained of is unconstitutional and in addition also seek for redress.

The appellant came to court under **Article 137 (3) of the Constitution** because as a  
20 government employee his right to offer himself as a candidate for a parliamentary seat was being violated by the late passing of an amendment to the Constitution which would disqualify him from the race.

From the above, it is clear that coming to court under **Article 137** (as opposed to **Article 50**) does not in itself translate the complaint into a Public Interest Litigation case.

25 The mere fact that a case brought to the court by an individual leads to a decision of the court which would benefit other individuals does not transform the case into one of Public Interest Litigation.

Although the Constitutional Court’s decision extended benefit to the whole public by it declaring the amendment Act unconstitutional, I find that the suit was not under the rubric of Public Interest Litigation.

I therefore respectfully find that Justice Kitumba erred in her finding that the matter had  
5 been brought under the rubric of Public Interest Litigation.

An attendant question that suffices to be answered from the foregoing analysis is: *Whether costs should never be awarded in Public Interest Litigation cases.*

In **Besigye Kizza vs. Museveni Yoweri Kaguta and Electoral Commission**, (supra) Odoki (CJ) stated:

10 **It is well settled that costs follow the event unless the court orders otherwise for good reason. The discretion accorded to the court to deny a successful party costs of litigation must be exercised judicially and for good cause. Costs are an indemnity to compensate the successful litigant the expenses incurred during the litigation. Costs are not intended to be**  
15 **punitive but a successful litigant may be deprived of his costs only in exceptional circumstances. (See Wambugu vs. Public Service Commission [1972] E.A. 296).**

**In awarding costs, the courts must balance the principle that justice must take its course by compensating the successful litigant against the principle**  
20 **of not raging poor litigants from accessing justice through award of exorbitant costs.**

**In the present petition, I am of the considered opinion that the interest of justice requires that the Court exercise its discretion not to award the costs to the Respondents. I agree with Mr. Balikuddembe that this was a**  
25 **historic and unprecedented case in which a presidential candidate who is a serving President was taken to court to challenge his election. The petition raises important legal issues, which are crucial to the political and constitutional development of the country. In a sense, it can be looked at as**

public interest litigation. It promotes culture of peaceful resolution of disputes ...

In several cases of significant political and constitutional nature, this Court has ordered each party to bear its own costs. This was done in the case of Prince J. MpugaRukidi v Prince Solomon Iguru and others – C.A. 18/94 (SC) where right of the King of Bunyoro to succeed to the throne was unsuccessfully challenged. In the case of Attorney General vs. Major Gen. David Tinyefuza, 51. App. No. 1 of 1997 (SC) the court agreed that each party bears their costs.

10 In the same Presidential Petition, Hon. Justice A. Karokora (JSC) stated:

In order to encourage people like the petitioner to come to court and help in the development of our legal, historical and Constitutional development in Uganda such people should be encouraged. Costs should not be awarded by way of penalizing them so that they should get scared from coming to Court.

Similarly, Justice Mulenga (JSC) held:

In the case of Major Gen. D. Tinyefuza Constitutional Appeal No. 1 of 1997 (SCU) (unreported) this court ordered each party to bear its costs although the appeal was dismissed. The court's reasons for doing so, were that in order to encourage constitutional litigation parties who go to court should not be saddled with the opposite party's costs if they lose. If potential litigants know that they would face prohibitive costs of litigation, they would think twice before taking constitutional issues to court. Such discouragement would have adverse effect on development of the exercise of the court's jurisdiction of judicial-review of the conduct of authorities or individuals, which are unconstitutional. It would also stifle the growth of our Constitutional jurisprudence. The culture of constitutionalism should be nurtured, not stunted in this Country, which prohibitive litigation costs would do if left to grow unchecked. I agree with the

**principles in the decision. In my view they should equally apply to the instant Petition.**

In **Advocates for Natural Resources Governance and Development and two others vs. Attorney General Constitutional Petition No.40 of 2013**, the Constitutional Court referred to **Kizza Besigye vs. Yoweri Museveni (Supra)**; **Prince J Mpuga Rukidi vs. Prince Solomon Iguru (Supra)** and **Attorney General vs. Major Gen. David Tinyefuza (Supra)**.

The brief facts in **Advocates for Natural Resources Governance and Development (supra)** were that a Public Interest Litigation petition was brought under Article 137 of the Constitution. The petitioner(s) contended that the respondents' act of taking over and acquiring land prior to payment of compensation was in contravention of the right to property enshrined in **Article 26 of the Constitution**.

The court held *inter alia*:

**As to costs, a practice has evolved in this and other courts that parties who seek to enforce in courts of law fundamental human rights enshrined in the bill of rights in this country's Constitution should not seek legal costs. This is a good practice that was adopted in this very petition.**

**The rationale for this is that no one should be seen to be profiting from a matter in which he or she has no interest beyond that of other members of the public. Secondly, in every constitutional petition or reference, the Attorney General is a statutory respondent, representing a Government elected by the people. Whenever costs are awarded against the Attorney General they are paid out of public funds. A person who brings a public interest action would then be requiring the same public to pay him or her costs. In the event that a public interest petitioner or litigant is unsuccessful and is condemned to pay costs, that too would be unfair. One individual would have to pay costs in a matter that he or she has no interest beyond that of the other members of the public. This would create**

**a chilling effect and stifle the enforcement of rights and the growth of constitutionalism.**

The court concluded that where in Public Interest cases, costs are awarded, the actual amounts taxed and allowed should be **nominal** in respect of professional fees, and the rest  
5 should simply be awarded only in respect of disbursements.

It is clear that while accepting that the principles inherent in Section 27 of the Civil Procedure Act apply to Public Interest Litigation cases, the above authorities emphasized that costs in Public Interest Litigation cases should only be awarded in rare cases; that a court must balance the need to compensate the successful litigant and the value (s)  
10 underlying Public Interest Litigation such as growth of constitutional jurisprudence which would be stifled if potential litigants know that there is a possibility of being saddled with costs in the event of the case being dismissed.

In other words, in Public Interest Litigation, a court should exercise its discretion to award exorbitant costs infrequently. Thus, where costs are awarded in Public Interest  
15 Litigation cases, the award should be nominal.

In finding that not every case in which a public interest aspect arises should lead to a departure by the court from the general rule that costs follow the event, I am in agreement with the persuasive unanimous decision of the 5 Panel High Court Bench of Australia in **Oshlack vs. Richmond River Council (1998) 193 CLR 72** wherein McHugh. J in his  
20 lead judgment held:

**The fact that proceedings involve some public interest aspect does not, of itself, warrant departure from the general rule that costs follow the event.**

### **Orders of Court**

Having come to the conclusion that the procedure which the appellant adopted in coming  
25 to court was misguided, I am in agreement with the order given by Hon. Justice Arach-Amoko that the appeal be dismissed. I also agree with her order as to costs.

Dated at Kampala this 14<sup>th</sup> day of *February* 2017.

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