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**THE REPUBLIC OF UGANDA  
IN THE SUPREME COURT OF UGANDA AT KAMPALA  
CONSTITUTIONAL APPEAL NO. 02 OF 2016.**

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**(CORAM: TUMWESIGYE, KISAAKYE, ARACH-AMOKO, NSHIMYE,  
MWANGUSYA, OPIO-AWERI, TIBATEMWA-EKIRIKUBINZA, JJSC.)**

**BETWEEN**

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**ATTORNEY GENERAL ::::::::::::::: APPELLANT**

**AND**

**GLADYS NAKIBUULE KISEKKA ::::::::::::::: RESPONDENT**

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*[Appeal from the decision of the Constitutional Court (Kavuma Ag.DCJ, Kasule, Mwondha, Bossa, Kakuru, JJA) Constitutional Petition No. 55 of 2013, dated 22<sup>nd</sup> October 2014]*

**Representation**

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Mr. Geoffrey Madete, State Attorney appeared for the appellant whereas Mr. Fred Muwema and Mr. Andrew Oluka appeared for the respondent.

## **JUDGMENT OF PROF. TIBATEMWA-EKIRIKUBINZA.**

### **BREIF FACTS**

The facts pertaining to this matter as contained in the respondent's affidavit in support of the petition filed at the Constitutional Court were that:

Sometime in 2009, the respondent who was a judicial officer at the rank of Deputy Registrar issued a decree pursuant to a default judgment in *HCCS No. 2006 of 2008, Asimwe Diana Jackline v. Dr. Aggrey Kiyingi*. On May 29, 2009, she issued a warrant of attachment in respect of the same matter. On August 27, 2009, the respondent received a letter from MMAKS Advocates protesting the attachment of some of the plots that had been included in the warrant of attachment. This letter indicated that the land comprised in the said plots of land did not belong to the judgment debtor but to their client, Muhammed Ssekatawa, who had, in 2006, obtained leases thereon and held duplicate titles to the said land.

The respondent responded to the complaint of the said advocates on the same day by recalling the warrant in respect of the property at issue, to avoid unnecessary objector proceedings. She copied the letter recalling the warrant to all the parties; including the Commissioner of Lands, and also gave a copy to the complainant who was also the judgment creditor.

On August 31, 2009, the said judgment creditor through her lawyer wrote to the respondent, protesting the recall of the warrant. The respondent advised the complainant

to file a formal application. On October 6, 2009, the complainant wrote another letter to the Registrar of the High Court protesting the recall of the warrant. This letter was copied to the Ministry of Lands, the  
5 Commissioner of Land Registration, the Honorable Principal Judge, and to the respondent. The respondent did not respond, since she was never called to do so by any superior officer of the Judiciary. The judgment creditor subsequently lodged a complaint against the  
10 respondent with the Judicial Service Commission (JSC) about the recall of the warrant. In the complaint, she alleged fraudulent frustration of the execution process by the respondent when she administratively vacated a warrant of attachment and sale of property that had been  
15 issued by her. She further alleged that the respondent, together with other persons mentioned in the complaint, were involved in a corrupt agreement to deny her, as the decree holder in the suit, her right to execute her judgment against Dr. Kiyingi who was resident outside  
20 Uganda and had no other known property

On June 25, 2013, the JSC notified the respondent about the complaint by the judgment creditor and required her to make a reply to the complaint within 14 days. On June 26, 2013, she responded to the allegations in the  
25 complaint denying any wrong doing; contending that the recall was a judicial administrative act exercised in her judicial discretion during the execution management process; for good cause.

On 13<sup>th</sup> September 2013, the JSC served the respondent with a plea taking notice scheduled for 3<sup>rd</sup> October 2013. The respondent had been charged with offences of abusing judicial authority contrary to Regulation 23(n) and contravention of the Code of Judicial Conduct contrary to Regulation 23(j) of the Judicial Service Commission Regulations.

On October 3, 2013, the respondent appeared before the JSC Disciplinary Committee and objected, through her lawyer, to the plea taking. The lawyer also raised preliminary objections to the effect that the charges and JSC Disciplinary Committee proceedings were time barred, unfounded in law and unconstitutional. The Disciplinary Committee reserved its Ruling on the preliminary objections for the 17<sup>th</sup> day of November 2013.

On November 17, 2013, the respondent appeared before the Disciplinary Committee. However, before the Committee could deliver its Ruling, the respondent informed the Committee that the complainant was a non-existent person. The Disciplinary Committee promised to investigate the matter and to inform her of their findings.

On December 3, 2013, the Disciplinary Committee delivered its Ruling dismissing the preliminary objections raised. Furthermore, the Committee stated that the charge sheet disclosed an offence and that it was fair and just to listen to the complainant's grievance even though it was time barred. The Disciplinary Committee also verbally informed the respondent that it had verified the existence of the complainant. The JSC Disciplinary

Committee determined that the complaint disclosed a prima facie case meriting full investigation as to the truth of the allegation and instituted disciplinary charges against the respondent under the *Judicial Service Commission Regulations*. The JSC then ordered the respondent to take plea on the charges and adjourned the matter to the 17<sup>th</sup> day of On December 2013 for plea taking.

However, on 10<sup>th</sup> December 2013, the respondent filed a petition in the Constitutional Court with eight (8) grounds. Of the eight (8), only two grounds were upheld by the Constitutional Court to wit:

i) that the act and/or conduct of the JSC of preferring charges against the respondent in respect of acts/or omissions involving the recall of a warrant, which are judicial acts is inconsistent with and in contravention of *Articles, 2, 20, 28, 42, and 44 of the Constitution of the Republic of Uganda*.

ii) that the act/or conduct of the JSC of lifting the judicial immunity accorded to the respondent and holding her personally liable for her judicial act of recalling the warrant in the discharge of her judicial work is inconsistent with and in contravention of *Articles, 2, 20, 28, 42, 44, 128(4) and 173 of the Constitution of the Republic of Uganda*.

The Court additionally awarded her the costs of the petition.

From this Ruling, the Attorney General of Uganda filed an appeal in this Court on the following grounds:

## **Grounds of Appeal**

5 **1. The Justices of the Constitutional Court erred in law and in fact in declaring that the act and/or conduct of the Commission of preferring charges against the petitioner in respect of acts/ or omissions involving the recall of a warrant, which are judicial acts, is inconsistent with and in contravention of Articles 2, 20, 28, 10 42 and 44 of the Constitution of the Republic of Uganda.**

15 **2. The Justices of the Constitutional Court erred in law and in fact in declaring that the act and or conduct of the Commission of lifting the judicial immunity accorded to the petitioner and holding her personally liable for her judicial act of recalling the warrant in the discharge of her judicial functions is inconsistent with and in contravention of 20 Articles 2, 20, 28, 42, 44, 128 (4) and 173 of the Constitution of the Republic of Uganda.**

## 25 **Appellant's submissions**

### **Ground 1**

The appellant's counsel submitted that the act of the JSC Disciplinary Committee of preferring charges against the respondent was not inconsistent with Articles 2,20,28,42, 44,128 (4) and 173 of the Constitution.

- 5 That in fact the act of preferring charges by the JSC was consistent with the functions of the Commission which it is enjoined to perform under **Articles 147 (d) and 148** of the **Constitution**.

10 Counsel conceded that Article 128(4) of the Constitution grants judicial immunity to the respondent. He however argued that the right inherent in Article 128(4) must be interpreted alongside the constitutional mandate of the Commission.

15 Counsel thus submitted that the two Constitutional provisions on which the present matter rotated viz **Article 128 (1)** providing for a judicial officer's immunity against suits and **Article 147 (d)** providing for the disciplinary mandate of the Commission cannot be read in isolation of each other. That this was in line with the  
20 renowned principle that the Constitution must be interpreted as an integral whole with no particular provision destroying the  
other. Counsel relied on the authorities of  
**P.K.Ssemwogerere & Anor vs. AG Supreme Court**  
25 **Constitutional Appeal No. 1 of 2002** and **AG of Tanzania vs. Rev. Christopher Mitikila [2010] E.A 13**.

In conclusion, the appellant's counsel prayed that this Court makes a finding that the learned Justices of the Constitutional Court erred in law and or in fact when they declared that the act of the JSC of preferring charges  
5 against the Respondent was inconsistent with the provisions of the Constitution and reverses the decision of the lower court.

### **Respondent's Submissions**

10 In reply to the above submission, the respondent's counsel argued that Article 147 (d) of the Constitution should not be invoked to undermine Article 128 of the Constitution which guarantees and protects the immunity of judicial officers for actions done in exercise of their  
15 judicial duty.

The respondent's counsel further contended that the Appellant had not demonstrated to this Court or in the court below the irregularity involved in recalling the warrant so as to subject the respondent to disciplinary  
20 action.

It was the view of the respondent's counsel that the act of recalling the warrant of attachment and sale was a judicial act and thus protected by Article 128 (1) of the Constitution.

25 In conclusion, the respondent prayed that this Court upholds and adopts the finding of the Constitutional Court.



## Ground 2

### Appellant's Submission

The appellant contended that the Justices of the Constitutional Court erred in law and fact in declaring that the act of lifting the judicial immunity accorded to the respondent by the JSC was in contravention of Articles 2, 20, 28, 42, 44, 128(4) and 173 of the Constitution. The appellant argued that the JSC was exercising its constitutional mandate and that as such its actions did not amount to lifting of the respondent's immunity.

The appellant further contended that the Honourable Justices of the Constitutional Court did not address their minds to the Constitutional mandate of the JSC and thereby came to a wrong conclusion. That had the learned Justices addressed **Article 128 (4)** together with **Articles 147 (d)** and **148** of the **Constitution**, they would have been alive to the principle that judicial immunity is not absolute. Counsel submitted that although judicial officers enjoy protection under **Article 128 (4)**, disciplinary proceedings of the JSC are a special procedure during which immunity can be lifted so that complaints against a judicial officer can be examined by the Commission in line with provisions of the Constitution. That nevertheless in the instant case, the respondent's immunity was not lifted by the JSC since the JSC was at the time only investigating the veracity of the complaint it had received. Counsel submitted that the defence of immunity was still available to the respondent.

The appellant therefore prayed that this Court overturns the findings of the Constitutional Court on this ground and that the declarations and orders of the Constitutional Court be set aside. Furthermore, counsel prayed that  
5 costs of the appeal be provided for.

### **Respondent's Submissions**

In reply to the submissions of the appellant on ground 2, the respondent's counsel argued that judicial immunity is an absolute right enjoyed by judicial officers for anything  
10 done, whether wrong or right, spiteful or envious, malicious or done with hatred provided it is done in exercise of judicial authority. That charging the respondent with the offences of abuse of judicial authority and contravention of the Judicial Code of  
15 Conduct would deny her judicial immunity which is guaranteed under **Article 128** of the **Constitution**.

In respect to the two overriding Articles viz Article 128 and Article 147 (d), the respondent's counsel argued that  
20 **Article 128 (3)** of the **Constitution** enjoins every government organ/agency such as the JSC to accord courts such assistance as may be required to ensure the effectiveness of the Courts.

Counsel further submitted that the use of the word 'shall' in Article 128 implies that the Article is couched in  
25 mandatory terms unlike Article 147. It was therefore the view of counsel that since Article 147 - delimiting immunity - is not couched in mandatory language, it cannot prevail over Article 128. That it was the intention

of the framers of the Constitution to allow judicial immunity to prevail.

The respondent's counsel thus prayed that the appeal fails, the decision of the Constitutional Court be upheld and that this Court rejects any suggestion that a judicial officer be punished for doing their work. Furthermore, that costs for the appeal and in the lower court be awarded to the respondent.

## 10 **Analysis of Court**

Although the appellant presented two grounds of appeal, I will analyse them jointly. This is because it is the decision of preferring charges against the respondent that is in essence being challenged as constituting lifting of the immunity accorded to a judicial officer.

I must also make mention of the fact that several constitutional provisions were cited in the grounds of appeal presented before this Court. The grounds of appeal were derived from the holdings of the Constitutional Court which declared that the actions of the JSC had contravened the said Constitutional Articles. The Articles in issue were: Article 2 on the supremacy of the Constitution; Article 20 providing for fundamental and other human rights and freedoms; Article 28 on the right to a fair hearing; Article 42 on an individual's right to just and fair treatment in administrative decisions; Article 44 which prohibits derogation from particular human rights and freedoms and Article 173 which protects Public

Officers from victimization or discrimination for having performed their duties. I have, however, not found these provisions of relevance in determining the matter before Court. I will therefore limit my analysis to Article 128(4) which deals with judicial immunity on the one hand and Articles 147 and 148 which deal with the mandate of the JSC on the other hand.

In resolving this appeal, I have found it pertinent to answer a question which inherently arises from the facts of the matter before Court: *Is judicial immunity absolute or do we acknowledge the possibility of abuse of judicial authority/discretion?*

An answer to this question is critical because of the submission of counsel for the respondent that “judicial immunity is an absolute right enjoyed by judicial officers for anything done, whether wrong or right, *spiteful or envious, malicious or done with hatred* provided it is done in the exercise of judicial authority/power and the only remedy available to a party aggrieved is to appeal against such decision.” In support of his arguments, counsel relied on the English case of **Sirros vs. Moore [1974] 3 All ER 776**.

The answer to the above question is also pertinent if we are to exhaustively deal with 4 concepts which are at the heart of the administration of justice: judicial independence and the related principles of judicial discretion and judicial immunity on the one hand, juxtaposed with the principle of judicial accountability on the other hand. Dealing with this question will enable me

answer the question; what is the essence of Article 148 of the Constitution - an Article which deals with the mandate of the Judicial Service Commission. And under what circumstances can it be said that the Commission  
5 has overstepped its power and authority? What is the effect of juxtaposing Article 148 with Article 128 of the Constitution which deals with the Independence of the Judiciary?

10 I now proceed to discuss the concepts relevant to determination of the matter.

## **JUDICIAL INDEPENDENCE**

Counsel for the appellant submitted that the personal independence of the judicial officer is one of the two main aspects of judicial independence. He relied on the  
15 Canadian authority of **Valente vs. The Queen [1985] 2 S.C.R. 673**, wherein Le Dain J observed that the constitutional principle of judicial independence has two major elements, the individual element and institutional element. The appellant however contended that judicial  
20 independence has the potential to act as a shield behind which judges have the opportunity to conceal possible unethical behavior. And that therefore, judicial officers who violate the code of conduct and the principles entrenched in the Bangalore Principles of Judicial  
25 conduct, 2002 are liable to judicial accountability for their conduct.

The respondent on the other hand submitted that Article 147 should not be invoked to undermine Article 128

which guarantees independence of the judiciary and protects the right of immunity of judicial officer for actions done in the exercise of their judicial duty because Judicial Independence/ immunity is the substratum upon which any judicial system is built. Further that Judicial independence will not be obtained where there is a threat of disciplinary action when a judicial officer makes a wrong decision.

**Article 128 (1) of the Constitution** states that, “**in the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.**” And Article 128 (2) provides that, “**No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions.**”

I am aware that judicial independence is now universally recognized as one of the hallmarks of constitutional democracy and rule of law. It is accepted that an independent judiciary is the key to upholding the rule of law in a democratic society. Judicial independence requires that an individual judge be unconstrained by collegial and institutional pressures when deciding a question of fact and law.

The purpose of judicial independence is the complete liberty of the judicial officer to impartially and independently decide cases that come before the court and no outsider be it government, individual or other judicial officer should interfere with the manner in which an officer makes a decision. [Per Chief Justice Dickson in

## **The Queen vs. Beauregard, Supreme Court of Canada, (1987) LRC (Const) 180 at 188].**

The principle of judicial independence aims at protecting judicial decision-making from intimidation and outside  
5 interference. [See: **Pullman vs. Allen, 466 U.S. 522 (Supreme Court of the United States, 1984).**

Judicial independence is a critical feature of the Judiciary, requiring the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are  
10 equitably observed - **Nakibuule vs. Attorney General, Constitutional Court Petition No. 55 of 2013.**

## **JUDICIAL DISCRETION**

15 Because the judiciary is designed to be independent, judicial officers must have discretion in order for the legal system to function properly.

Discretion refers to the power or right given to an individual to make decisions or act according to her/his  
20 own judgment. Judicial discretion is therefore the power of a judicial officer to make legal decisions based on her opinion - but I hasten to add - *but within general legal guidelines*. In Black's Law Dictionary 5<sup>nd</sup> Edition, "judicial and legal discretion" is defined as "*discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained.*" (My emphasis). Judicial  
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discretion does not therefore provide a license for a judge to merely act as he or she chooses.

Ideally, judicial decisions will involve minimal discretion as judges apply proven facts to the established law, and a case could be given to any judge and the results would be the same. However, legal issues are not always clearly defined as black and white, right and wrong. It is not possible to create laws for every possible issue that could come up in a given case. Therefore, judicial officers must make many discretionary decisions within each case that influence the outcome of the case or the legal recourse of the parties. [See: **Natayi vs. Barclays Bank of Uganda Ltd (MA No. 263 of 2013) UGHCLD 60 (14 June 2013); Kaweesa vs. Mugisha (CIVIL APPEAL NO. 28 OF 2013) [2014] UGHCLD 21 (22 April 2014)**].

Under the doctrine of the separation of powers, the ability of judges to exercise **discretion** is an aspect of judicial independence.

Nevertheless, while a judicial officer may have the discretion to decide the issues and outcomes within a case, this does not mean he or she will always make the right decision. Sometimes, judges misunderstand the law or pertinent facts and make an unfair decision. Therefore, while much deference is given to the judge's decision, an erroneous judicial decision may be overturned through the appeals process in order to maintain the integrity of the legal system. **A question however remains: if a judicial officer intentionally misuses this discretion**



**to reach their own purposes, is the officer in any way liable/accountable or are they immune to questioning?**

## **JUDICIAL IMMUNITY**

5 The concept of judicial immunity originated in early seventeenth-century England. In two English decisions, **Floyd & Barker, 77 Eng. Rep. 1305 (1607)** and **The Case of the Marshalsea, 77 Eng. Rep. 1027 (1612)** Lord Edward Coke laid the foundation for the doctrine of  
10 judicial immunity based on four public policy grounds. One of the grounds was maintenance of judicial independence. Another was respect and confidence in the judiciary.

In Uganda judicial immunity is enshrined in **Article 128 (4) of the Constitution** which provides: **“A person exercising judicial power shall not be liable to any action or suit for any act or omission by that person in the exercise of judicial power.”**  
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In **H/W Aggrey Bwire vs. AG & Judicial Service Commission, SCCA No. 8 of 2010**, Kitumba JSC agreed with the Court of Appeal statement that:  
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**Judicial independence or immunity is not a privilege of the individual judicial officer. It is the responsibility imposed on each officer to enable him or her to adjudicate a dispute honestly and impartially on basis of the law and the evidence, without external pressure or influence and without**  
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**fear of interference from anyone.** (My emphasis)

It is clear that the court acknowledged that immunity and independence are interlinked. But what is perhaps even  
5 more critical to note is that these privileges come with responsibility - the liberty is to be used honestly and impartially.

Counsel for the appellant conceded that Article 128 (4) of the Constitution provides immunity to a judicial officer.  
10 He however argued that immunity did not mean that the judicial officer could not be subjected to disciplinary proceedings. In support of this argument, counsel relied on the Bangalore Principles of Judicial conduct, 2002, which state that:

15 **Judges are accountable for their conduct to their appropriate institutions to maintain judicial standards which are themselves independent and impartial and are intended to supplement and not to**  
20 **derogate from the existing rules of law and conduct which bind the judge.**

The appellant also contended that had the learned Justices of the Constitutional Court read Article 128 of the Constitution together with Articles 147 (d) and 148, they  
25 would have come to the conclusion that judicial immunity is not absolute.

On the other hand, counsel for the respondent argued that the provisions of Article 128 (4) are couched in

mandatory terms and that as long as a judicial officer is performing their duty under a judicial oath, they are immune and such immunity is absolute. Counsel further argued that had the legislature intended to limit this immunity it would have clearly stated so in Article 147 of the Constitution that details the functions of the Judicial Service Commission. Counsel concluded that as long as a judicial officer was doing a judicial act, then he or she should not appear before the Judicial Service Commission for disciplinary action.

I therefore conclude that whereas counsel for the respondent opined that judicial immunity is absolute, counsel for the appellant argued that in exercising discretion a judicial officer is accountable to the JSC.

I am aware that judicial independence and judicial accountability have long been viewed as being in tension with each other. The assumption is that any effort to strengthen judicial independence makes it difficult to hold judges accountable, and that any accountability initiative undermines judicial independence.

In my view, the starting point is to understand that independence and the related principle of immunity on the one hand and accountability on the other are not ends in themselves. These principles are for purposes of ensuring fair, impartial and effective justice. Whereas independence can bolster judicial courage exercised by judges called upon to rule in difficult cases, accountability can bolster the integrity judges demonstrate in their

performance on the bench. [Per David Pimentel, *Balancing Judicial Independence and Accountability in a Transnational State: The case of Thailand.*]<sup>1</sup>

5 There is also no doubt that respect and confidence in the judiciary, which is one of the four public policy grounds for independence of the judiciary is rooted in the integrity of judicial officers. It is therefore important that one sees judicial accountability as crucial to judicial integrity.

10 In answering the question whether as contended by counsel for the respondent, judicial immunity is absolute, despite the existence of Articles 147 and 148 of the Constitution, I must be guided by the well-known rule of constitutional interpretation which is articulated in the judgment of this Court in **Tinyefuza vs. the Attorney**  
15 **General, Constitutional Appeal No.1 of 1997.** In line with the said authority I cannot look at the essence of Article 128 in isolation of Article 147 since:

20 **... the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.**

25 I must ensure that both purpose and effect are relevant in interpreting the provisions. [See: **Ssemwogerere & others vs. Attorney General, EALR [2004] 2 EA 276**

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<sup>1</sup> 33 Pacific Basin Law Journal 155 (2016).

**at p.319); Attorney General vs. Salvatori Abuki, Supreme Court of Uganda Constitutional Appeal No.1 of 1998.]**

I opine that whereas the purpose of Article 128 on judicial immunity is to bolster judicial courage, Articles 147 and 148 on accountability bolster judicial integrity. Each of these principles is a means to the same end - ensuring a fair, impartial and effective judicial system. Whereas I am in no doubt that judicial immunity is the substratum upon which any judicial system is built, I am also in no doubt that immunity is not an end in itself.

I further opine that the concept of judicial immunity is only applicable to judicial acts properly so called. The concept cannot extend to acts not qualified as judicial although performed by a judicial officer. Even if so qualified, judicial immunity is not applicable where a body constitutionally mandated to investigate the propriety of a judicial act appropriately exercises the said mandate and in effect invokes the principle of judicial accountability. This is because judicial independence and immunity are not intended to be a shield from public scrutiny. Judicial independence and immunity do not shield a judicial officer from accountability. I must emphasize that in a democratic polity, it is inconceivable, that any person, whether an individual or an authority, exercises power without being answerable for the exercise. Judicial accountability like judicial independence has thus come to be recognized as a bulwark of the Rule of Law.

## JUDICIAL ACCOUNTABILITY

But what constitutes accountability? Judicial Accountability can be defined as the cost that a judge expects to incur in case his/her behavior and/or decisions deviate too much from a generally recognized standard.

The *Law Reform Commission of Western Australia, Complaints Against Judiciary Report*<sup>2</sup>, states that, judicial accountability refers to judges being answerable for their actions and decisions to the community to whom they owe their allegiance.

The need for judicial accountability has now been recognized in most democracies. And judicial accountability has today become a catch word all over the world. Judges can no longer oppose calls for greater accountability on the ground that it will impinge upon their independence. P D Finn, in *The Abuse of Public Power in Australia: Making our Governors our Servants*<sup>3</sup> states that the accountability of the judiciary cannot be seen in isolation. It must be viewed in the context of a general trend to render governors answerable to the people in ways that are transparent, accessible and effective.

As noted by Uganda's Chief Justice Bart Katureebe in his address at the 18<sup>th</sup> Annual Judges Conference<sup>4</sup> in Uganda:

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<sup>2</sup> Project No.102 at <http://www.lrc.justice.wa.gov.au>, accessed on 22/12/17.

<sup>3</sup> (1994) 5 (1) Public Law Review, 43.

<sup>4</sup> 19<sup>th</sup> January, 2016.

**The rule of law is not a self-effecting concept and therefore requires a strong, independent and accountable Judiciary to uphold ... As Judges, we can only do our job well in promoting the rule of law by, among other things, ... accepting restraints imposed on us by the doctrine of accountability in Article 126 of the Constitution. Article 126 (1) provides that: **Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with the values, norms and aspirations of the people.****

Katureebe CJ referred to the Commonwealth (Latimer House) Principles on the Three Branches of Government which provide that: “Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity.” (My emphasis)

Recognizing the perceived tension between judicial independence and judicial accountability, Justice Michael Kirby of the High Court of Australia rightly stated that the important question should be: “How can accountability be improved but in a way that does not weaken the adherence of the judge, and society, to the principles of judicial independence?”<sup>5</sup>

<sup>5</sup> A text for a lecture delivered in Brisbane on 6th October 2001 at the University of Queensland and the Commonwealth Legal Education Association.

Griffith G, *Judicial Accountability, Background paper No.1*<sup>6</sup> defines the concept of accountability as a person or class of persons being answerable for their actions and decisions to some clearly identified individual/body. (My emphasis).  
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I opine that the answer to Kirby's critical question lies in the establishment of institutions such as the Judicial Service Commission, institutions which as envisaged by the Bangalore Principles are themselves independent and impartial. It is this principle that is captured in Article 147 (2) of the Constitution thus: **"In the performance of its functions, the Judicial Service Commission shall be independent and shall not be subject to the direction or control of any person or authority"**.  
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In my view, the JSC is a clearly identified body to which judicial officers are accountable.  
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Indeed Justice Michael Kirby (infra) argues that a judge is, by law, accountable to the public through the disciplinary process. I subscribe to the same view.

This then takes me to an exposition of the mandate of the Judicial Service Commission. It also takes me back to the question: under what circumstances can it be said that the commission has overstepped its authority?  
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### **The Mandate of the Judicial Service Commission.**

According to **Article 147 (1)**:  
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<sup>6</sup> New South Wales Parliamentary Library Research Service, 1998, 14.



**The functions of the Judicial Service Commission are-**

5 **(d) to receive and process people's recommendations and complaints concerning the Judiciary and the administration of justice and, generally, to act as a link between the people and the Judiciary.**

**Article 148** provides *inter alia* that:

10 **Subject to the provisions of this Constitution, the Judicial Service Commission may ... exercise disciplinary control over persons holding [judicial office].**

15 Following the above constitutional mandate of the Judicial Service Commission and Section 5 the Judicial Service Act, the Judicial Service Commission Regulations, 2005 were promulgated. Regulation 23 stipulates the offences which warrant disciplinary action by the Judicial Service  
20 Commission. Examples of such offences are: abuse of judicial authority and contravention of the Code of Judicial Conduct, the offences that the respondent in the present matter was charged with.

25 In his submissions, counsel for the appellant argued that the learned Justices of the Constitutional Court erred when they held that the lifting of judicial immunity accorded to the respondent in Article 128 of the Constitution, by the Judicial Service Commission and

inviting her to respond to the complaint lodged against her was unconstitutional. He further argued that the actions of the Judicial Service Commission were based in the Constitution. He therefore faulted the learned Justices  
5 of the Constitutional Court for not addressing their minds to the constitutional mandate of the Commission.

On the other hand, counsel for the respondent argued that recalling of a warrant was a judicial act and not subject to disciplinary action before the Commission.

## 10 **ABUSE OF JUDICIAL AUTHORITY**

It was submitted for the appellant that where a judicial officer's conduct is *ultravires* the Uganda Code of Judicial Conduct and the Bangalore Principles on Judicial Conduct, then such a judicial officer has to account for the  
15 misconduct.

On the other hand, counsel for the respondent argued that there was no misconduct by recalling a warrant for attachment and sale. That the practice of recalling a warrant was an acceptable judicial practice worldwide  
20 and therefore there was no need for the Commission to charge the respondent with abuse of judicial authority.

The Judicial Service Commission Regulations do not define what constitutes abuse of judicial authority. **Black's Law Dictionary**<sup>7</sup> defines "judicial authority" as  
25 the power and authority appertaining to the office of a judge. On the other hand, "abuse" is defined as everything which is contrary to good order established by

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<sup>7</sup> 5<sup>th</sup> edition at page 760.

usage; departure from reasonable use; immoderate or improper use.<sup>8</sup>

From the above definitions, I conclude that what constitutes abuse of judicial authority is improper/  
5 inappropriate use of the power of a judicial office. This must be differentiated from a judicial officer's error in law which can only be the subject of appeal. Thus in the United States persuasive authority of **Oberholzer vs. Commission on Judicial Performance**<sup>9</sup>, the Tennessee  
10 Supreme Court stated that a judge's legal error is not ordinarily misconduct warranting disciplinary action. Furthermore, in the same case, Hon. Adolpho A. Birch CJ, as he was then held that: "Judicial independence is the judge's right to do the right thing or, believing it to be the  
15 right thing, to do the wrong thing." (My emphasis)

And Jeffrey M. Shaman et al in their book, Judicial Conduct and Ethics, (1995) state:

**The preservation of an independent judiciary requires that judges not be exposed to personal discipline on the basis of case outcomes or particular rulings, other than in extreme or compelling circumstances. An independent judge is one who is able to rule as he or she determines appropriate, without fear of jeopardy or sanction. So long as the rulings are made in good faith, and in an effort to follow the law as the judge understands it, the usual safeguard**

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<sup>8</sup> Page 10, *infra*.

<sup>9</sup> No. 5064923 May 13, 1999.

**against error or overreaching lies in the adversary system and appellate review. As the courts have often said, the disciplinary process should not be used as a substitute for appeal.**  
5 **Due to the possible threat to judicial independence, it has been suggested that legal error should be dealt with only in the appellate process and never should be considered judicial misconduct."** (Emphasis mine).

10 Counsel for the respondent cited the authority of **Sirros vs. Moore (supra)** to support his argument that the Judicial Service Commission erred in summoning the respondent to answer complaints brought against her for recalling a warrant of attachment. Counsel's argument  
15 was that this contravened the respondent's right to absolute immunity in the exercise of judicial duties. In **Sirros v Moore (supra)**, Denning LJ held that:

20 **... no action is maintainable against a Judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives ... cannot be made the subject of civil proceedings against him. No matter that the judge was ... actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action ...**<sup>10</sup>

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<sup>10</sup> Pages 781-782.

Whereas I agree with Lord Denning's statement that a judicial officer cannot be subjected to a civil suit for anything done in the exercise of his or her judicial discretion, the very principle articulated in **Oberholzer** 5 (Supra) and by **Shaman et al** (supra), the pronouncements are not applicable to the work of a body legally mandated to investigate the conduct of a judicial officer. The JSC is such a body. The absolute immunity that Lord Denning was referring to is immunity from civil 10 action. **Black's Law Dictionary**,<sup>11</sup> defines a civil action or suit as;

**An ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or 15 protection of a right, the redress or prevention of a wrong, or the punishment of a public offence ... More accurately, it is defined to be any judicial proceeding, which, if conducted to a determination, will 20 result in a judgment or decree.**

Proceedings before the Judicial Service Commission are not in the nature of and do not culminate into a civil suit. The JSC is not a court of law. Therefore, the authority of **Sirros vs. Moore (Supra)** is not applicable to the 25 present matter.

Lord Denning held that no action is maintainable against a judge in the exercise of judicial power even when the decision arrived at was "**actuated by envy, hatred and**

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<sup>11</sup> 9<sup>th</sup> edition at page 32.

**malice, and all uncharitableness.”** It is this statement that counsel for the respondent was emphatic about.

However, it must be noted that in the same case, after stating that a judge who performs a judicial act is

5 immune from civil liability, Buckley LJ further held:

**It is perhaps arguable that a judge, though acting within his powers, might be shown to have acted so perversely or so irrationally that what he did should not be treated as a judicial act at all. In such a case the remedy of his removal from office would be available. I doubt whether it would be in the public interest that his conduct should be open to debate in a private action.**

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It is conduct such as that referred to by Buckley LJ that the JSC would unearth in its investigations. It is therefore not the correctness/merit of the judicial decision that would be a subject of investigation by the commission - since such would be ultra vires the mandate of the commission - but rather whether the decision resulted from improper exercise of judicial power.

20

On the other hand, an appellate court has no mandate to discipline a judicial Officer and indeed a party who appeals against a decision of a Judicial Officer is not alleging abuse of judicial authority.

25

What therefore must be emphasized is that in a bid to protect judicial independence and judicial officers from

uncalled for disciplinary action for judicial decisions, judicial accountability should not be undermined. I am of the view that it can never be said that a judicial officer should never be investigated for abuse of judicial discretion.

However, I must quickly add that this should be backed with extrinsic evidence and not mere speculation.

What is critical is that a right balance between the principles of judicial independence and accountability needs to be maintained. For as stated by Gibson L. James in his article, Balancing Independence and Accountability of State Court Judges,<sup>12</sup> **“only the thoughtless and lazy prefer total independence or total accountability.”** Judicial officers should be accountable to the people from whom power is derived through appropriately established institutions. In Uganda’s context, this is the Judicial Service Commission. Judicial Independence has an important corollary – judicial accountability. Indeed, whereas **Article 128 (4)** of the **Constitution** provides that a judicial officer shall not be liable for any action in exercise of judicial power, abuse of judicial power cannot qualify as exercise of judicial authority deserving protection.

The tough question therefore is: **how can we balance judicial independence and judicial accountability?** And which institutional structures can contribute to maintaining the desirable balance? It is in recognition of

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<sup>12</sup> 7<sup>th</sup> July 2013 at <http://www.libertylawsite.org> accessed on 22/12/17.

the need to balance independence and accountability that the Constitution carries Article 128 which clothes judicial officers with independence and immunity on the one hand and **also** Articles 147 and 148 which empower  
5 the Judicial Service Commission to exercise disciplinary control over judicial officers.

Judicial officers cannot oppose calls for accountability on the ground that it will impinge upon their independence.  
10 Independence and accountability must be sufficiently balanced so as to strengthen judicial integrity. Whereas independence bolsters judicial courage, accountability bolsters the integrity a judge demonstrates in the exercise of judicial discretion.

15 Institutions such as the Judicial Service Commission, which are legally mandated to discipline judicial officers, cannot be prevented from doing their work by a judicial officer citing judicial immunity. This is because  
20 proceedings before the JSC do not constitute an action or “suit” envisaged under **Article 128 (4)** of the **Constitution** from which a judicial officer is protected.

Consequently, I respectfully differ with the decision of the  
25 Constitutional Court that preferring charges against a judicial officer by the JSC for purposes of effecting Articles 147 and 148, is in and of itself, a contravention of the constitutional protection accorded to a judicial officer by **Article 128 (4) (supra)**.

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## **Ground 1 of the Appeal therefore succeeds.**

Furthermore, the respondent's counsel contended that the appellant had not demonstrated the irregularity involved in recalling the warrant so as to subject the respondent to disciplinary action. It is however a fact that the respondent's action of going to the Constitutional Court prevented the JSC from carrying out investigations into the complaint brought against her. In the circumstances, the Commission could not arrive at a decision as to whether or not the respondent's conduct had been irregular and whether she had abused her authority. It may as well be that the JSC would have concluded not only that the act complained of fell within the realm of judicial conduct but also that the officer appropriately exercised judicial discretion in arriving at her decision. But it is only if the officer answers the charges preferred against her that the Commission is able to arrive at such a conclusion.

Since no decision was reached, I respectfully disagree with the conclusion of the Constitutional Court that the JSC had held the respondent personally liable for a judicial act.

I therefore conclude that a judicial officer once notified of a complaint lodged against them before the JSC for abuse of judicial authority cannot answer that call with the shield of judicial immunity.

## **Ground 2 of the Appeal succeeds.**

**Orders**

5 I would reverse the decision of the Constitutional Court,  
set aside its declarations and substitute an order  
dismissing the petition.

10 Since the appeal raises matters of public importance, I  
would order that each party bears their own costs.

**Dated at Kampala this ...11<sup>TH</sup>... day of ...JULY....  
2018.**

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

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***11/7/18(delivered)***