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

CIVIL APPLICATION NO. 05 OF 2019
(ARISING OUT OF PRESIDENTIAL ELECTION PETITION NO.1 OF 2016)

CORAM: ARACH-AMOKO, MWANGUSYA, OPIO-AWERI, MWONDHA, MUGAMBA, BUTEERA, JSC
NSHIMYE, AG. JSC

IN THE MATTER OF AN APPLICATION FOR A DECLARATION THAT THE ATTORNEY GENERAL IS OFFICIALLY AND PERSONALLY IN CONTEMPT OF COURT ORDERS

AND

IN THE MATTER OF PRESIDENTIAL ELECTION PETITION NO.1 OF 2016
AMAMA MBABAZI VS YOWERI KAGUTA MUSEVENI & OTHERS

1. **PROF. FREDERICK E. SSEMPEBWA, SC**
2. **PROF. FREDERICK W. JJUKO .....APPLICANTS**
3. **KITUO CHA KATIBA**

VERSUS

ATTORNEY GENERAL.....RESPONDENT

THE RULING OF COURT

INTRODUCTION

This is an application by Notice of Motion brought under Article 128(3) of the Constitution of the Republic of Uganda (as amended), Objective No.VIII and XXIX (a), (f) and (g) of the National Objectives and Directive Principles of State Policy, section 98 of the Civil Procedure Act, Rule 2(2), 42(1) and 43 of the Judicature (Supreme Court) Rules.

The application was supported by the accompanying affidavits of Prof. Frederick E. Ssempebwa, SC, Prof. Frederick W. Jjuko and Edith Kibalama and an affidavit in response by Professor Frederick. E. Ssempebwa.

The grounds for the application according to the Notice of Motion are the following:

1. **That in Presidential Election Petition No.1 of 2016 Court made Orders on electoral reforms to be implemented by other organs of State, namely Parliament and the Executive, and directed the respondent to follow up the implementation.**

2. **That Court set a two year time frame from the date of the aforementioned Judgment within which the respondent was to report to this Court the measures taken to implement the orders.**

3. **That ever since the date of judgment the said orders have not been implemented, and the respondent has not reported back to this Honourable Court.**

4. **That the respondent has acted in contempt of the said Court orders.**

The application is opposed by the respondent. The Attorney General, Honourable William Byaruhanga, filed an affidavit in reply and a supplementary affidavit.

BACKGROUND

General elections were held in this Country on 18th February 2016 with eight presidential candidates. The Electoral Commission declared Y. K. Museveni as the successful candidate on the 20th February 2016. One of the candidates, Amama Mbabazi, was dissatisfied with the results.

He petitioned this court vide Presidential Election Petition No. 01 0f 2016 for nullification of the election results based on various grounds and complaints.

The Court heard the petition and delivered its Judgment with detailed reasons on 26th day of August 2016.

In its Judgment, the Court pointed out a number of areas of concern. It noted that in the previous two Presidential Petitions, the Court had made important observations with regard to the need for reform in the area of elections generally and Presidential elections in particular which have remained unanswered by the Executive and the Legislature.

The Court identified the following ten key areas in which it made recommendations for reform:-

1. **<u>"The Time for filing and determination of the petition.</u>**

   In the course of hearing this petition, the issue of the inadequacy of the time provided in Article 104(2) and (3) of the Constitution for filing and determining of presidential election petitions came up. The same issue was also pointed out by this Court in the two previous presidential elections petitions and to gather evidence and the 30 days within which the Court must analyze the evidence and make a decision as provided under Article 104(2) and (3) of the Constitution and section 59 (2) and (3) of the PEA is inadequate. We recommend that the period be reviewed and necessary

amendments be made to the law to increase it to at least 60 days to give the parties and the Court sufficient time to prepare, present, hear and determine the petition, while at the same time being mindful of the time within which the new President must be sworn in.

2. The nature of evidence:

Whilst the use of affidavit evidence in presidential election petitions is necessary due to the limited time within which the petition must be determined, it nevertheless has serious drawbacks mainly because the veracity of affidavit evidence cannot be tested through examination by the Court or cross-examination by the other party. Affidavit evidence on its own may be unreliable as many witnesses tend to be partisan. We recommend that the Rules be amended to provide for the use of oral evidence in addition to affidavit evidence, with leave of Court.

3. The time for holding fresh elections:

Article 104(7) provides that where a presidential election is annulled, a fresh election must be held within 20 days. We believe this is unrealistic, given the problems that have come to light in the course of hearing all the three petitions that this Court has dealt with to-date. In all these petitions, the Commission has been found wanting in some areas. Importation of election materials has sometimes been a problem. Securing funds has also often provided challenges. Therefore, to require the Commission to hold a free and fair election within 20 days after another has been nullified is being overly optimistic. A longer and more realistic time frame should be put in place.

4. **The use of technology:**

While the introduction of technology in the election process should be encouraged, we nevertheless recommend that a law to regulate the use of technology in the conduct and management of elections should be enacted. It should be introduced well within time to train the officials and sensitize voters and other stakeholders.

5. **Unequal use of State owned media:**

Both the Constitution in Article 67(3) and the PEA in section 24 (1), provide that all presidential candidates shall be given equal time and space on State owned media to present their programmes to the people. We found that UBC had failed in this duty. We recommend that the electoral law should be amended to provide for sanctions against any State organ or officer who violates this Constitutional duty.

6. **The late enactment of relevant legislation:**

We observed that the ECA and the PEA were amended as late as November, 2015. Indeed the Chairman of the Commission gave the late amendment of the law as the reason for extending the nomination date. We recommend that any election related law reform be undertaken within two years of the establishment of the new Parliament in order to avoid last minute hastily enacted legislation on elections.

7. **Donations during election period:**

Section 64 of the PEA deals with bribery. We note that Section 64 (7) forbids candidates or their agents from carrying out fundraising or giving donations during the period of campaigns. Under Section 64 (8), it is an offence to violate Section 64 (7). However, we note that under Section 64 (9) a candidate may solicit for funds to organize for elections during the campaign period. Furthermore, a President may in the ordinary course of his/her duties give donations even during the campaign period. This section in the law should be amended to prohibit the giving of donations by all candidates including a President who is also a candidate, in order to create a level playing field for all.

8. **<u>Involvement of public officers in political campaigns:</u>**
   The law should make it explicit that public servants are prohibited from involvement in political campaigns.

9. **<u>The role of the Attorney General in election petitions:</u>**
   The Attorney General is the principal legal advisor of Government as per Article 119 of the Constitution. Rule 5 of the PEA Rules also requires the Attorney General to be served with the petition. We found that several complaints were raised against some public officers and security personnel during the election process. However, the definition of "respondent" in Rule 3 of the PEA Rules as it currently is, does not include the Attorney General as a possible respondent. Further, Rule 20(6) of the PEA Rules, provides that even when a Petitioner wants to withdraw a petition, the Attorney General can object to the withdrawal. The law should be amended to make it permissible for the Attorney General to be made respondent where necessary.

10. <u>Implementation of recommendations by the Supreme Court:</u>

We note that most of the recommendations for reform made by this Court in the previous presidential election petitions have remained largely unimplemented. It may well be that no authority was identified to follow up their implementation. We have nevertheless observed in this petition that the Rules require that the Attorney General be served with all the documents in the petition. We have further noted that the Attorney General may object to withdrawal of proceedings. Therefore the Attorney General is the authority that must be served with the recommendations of this Court for necessary follow up."

The Court proceeded to order as follows:-

"1) The Attorney General must follow up the recommendations made by this Court with the other organs of State, namely Parliament and the Executive.

2) The Attorney General shall report to the Court within two years from the date of this Judgment the measures that have been taken to implement these recommendations.

3) The Court may thereafter make further orders and recommendations as it deems fit."

<u>REPRESENTATION</u>

The Attorney General was represented by Hon. Mwesigwa Rukutana - Deputy Attorney General, assisted by Mr. Francis Atoke - Solicitor General, Ms Christine Kaahwa - Ag. Commissioner Civil Litigation, Mr. Martin Mwambusya - Commissioner Civil Litigation, Mr. George Karemera - Principal State Attorney, Mr. Richard Adrole - Senior State Attorney and Ms. Jackline Amusugut - State Attorney.

The applicants were represented by Mr. Ladislous Rwakafuuzi, Mr. Benson Tusasirwe, Mr. Robert Kirunda and Mr. Luyimbazi Nalukola.

Professor Frederick W. Jjuko, the 2nd applicant and Ms. Edith Kibalama, the 3rd applicant were present in court.

SUBMISSION BY THE APPLICANTS

Counsel for the applicants submitted that there were five issues for the court to adjudicate upon, namely:-

(1) Whether there were orders made by the Supreme Court.

(2) Whether the orders were brought to the attention of the respondent.

(3) Whether the respondent disobeyed the orders of this Court.

(4) If so, Whether that disobedience was wilful or *mala fide*

(5) What remedies are available to the applicants.

The respondent conceded to the first and second issues in that this Court made the orders and in the respondent's presence in court. The first and second issues are thus answered in the affirmative

Issue No. 3. Whether the respondent disobeyed the orders of this court.

Counsel relied on the affidavits of Professors Ssempebwa, Jjuko, and m/s Kibalama and submitted that the respondent was required to report to the court within 2 years the manner and the extent to which he had taken action to ensure that the orders of this Court had been complied with. It was the applicants'

contention that no such reporting was done and that the respondent did not implement the Court orders.

Counsel submitted that the orders were given in open court and any reporting should have been done following the formal Court structure, by the Attorney General moving Court for a hearing with notice to all parties within the 2 years. The appellants contended that the Attorney General failed to do that but that instead the Attorney General wrote a letter to the Registrar of the Court. Counsel noted that the letter was a response to the Registrar's letter reminding the Attorney General of his duty to Court. Counsel asserted that the letter to the Registrar was not adequate as a report to Court.

Counsel submitted further that the respondent had failed to implement any of the recommendations and court orders. Counsel went further to illustrate to court how there was no implementation of all the orders of Court as follows:

RECOMMENDATION NO.4

Counsel submitted that the Supreme Court recommended that a law to regulate the use of technology in the conduct and management of elections should be enacted in time to allow the training of officials and sensitization of voters and other stakeholders. He noted that the above had not been done. He added that the Attorney General was out of time since no such law had yet been enacted.

RECOMMENDATION NO.5

The Court required the Attorney General to amend the electoral laws to provide for sanctions against any State organ or officer who violates the constitutional duty to give all candidates equal time in the media. According to counsel, the Attorney General only wrote a directive to the Uganda Communications Commission to comply with the existing law which was a different thing from

the Court's recommendation. This according to counsel, was in total disregard of the court's recommendation.

RECOMMENDATION NO.2 AND 9.

Recommendation 2 related to the nature of evidence in Presidential Petitions while recommendation No.9 related to the role of the Attorney General in the adjudication of the petitions. According to counsel, the Attorney General wrote a letter forwarding the draft rules to the Chief Justice on the 8th April 2019 and filed that letter in Court on 12th April 2019, which was 16 days after the filing of this application. The Attorney General has since forwarded to Court the regulations signed by the Chief Justice on 25th April, 2019. According to counsel, the Attorney General was only prompted by this application which indicates that the Attorney General is intransigent and disrespects the Court. He would not have done anything if this application had not been filed. The Attorney General should therefore be held as being in contempt of the Court.

RECOMMENDATION NO.6, 7 AND 8.

Counsel dealt with the three recommendations jointly.

Recommendation 6 related to early enactment of elections related law within 2 years to avoid last minute hastily enacted legislation on elections.

Recommendation 7 related to donations during the election period.

Recommendation 8 related to involvement of Public Officers in political campaigns.

Counsel submitted that the requirement was for the laws to be enacted within 2 years of the establishment of the new Parliament but they were not enacted by the time this application was filed. The Attorney General only filed draft bills in Court on the morning of the hearing of the application. Counsel submitted that the Attorney General was already non-compliant and Court should make that finding.

RECOMMENDATIONS NO.1 AND 3.

The two recommendations relate to the time of filing Presidential Petitions and the holding of elections.

Counsel submitted that the Attorney General is required under Article 128(3) of the Constitution to aid the Courts in ensuring their effectiveness. This Court has observed in 3 Presidential Election Petitions that there was need to amend the law in respect of time for filing Presidential Elections Petitions and the holding of fresh Presidential elections. The Attorney General was ordered in Presidential Election Petition No.1 of 2016 to follow up on amendment of the law. According to counsel, the Attorney General did not comply. The law has been amended by Constitutional Amendment No.1 of 2018 at a private member's initiative. Counsel submitted that the Attorney General wilfully delegated his responsibility to amend the law on a matter that touches the very legitimacy of the Government to a private citizen. Counsel contended that this negates his duty to Court and the Attorney General should be held in contempt for failure to implement the Court orders.

Issue No. 4: Whether the disobedience was wilful and *mala fide.*

Counsel submitted that the Attorney General is obliged by **Article 128(3)** of the Constitution as officer of Government to aid the courts in ensuring their effectiveness. This court has on three occasions when it gave Judgments in election petitions stated that there are challenges around the time of filing Presidential petitions and the holding of fresh elections and there is need for legal reform. The Attorney General was ordered in election petition No. 01 of 2016 to follow up the reforms recommended by court with other government agencies but he deliberately relegated this important duty to a private member of Parliament. According to Counsel, this was wilful delegation of the Attorney General's responsibility to amend the laws on a matter that touches on the very legitimacy

of government to a private citizen. Counsel contended that this was wilful non-compliance on the part of the Attorney General. Learned counsel submitted further that the wilfulness is presumed because the Attorney General knew of the Court orders but did not comply. That it was the Attorney General with the burden to adduce evidence and show that his non- compliance was not wilful.

Issue No. 5 : REMEDIES.

Counsel submitted that it had been illustrated by the applicants to this Court that the respondent who was a party to the proceedings and was therefore fully aware of the court orders deliberately failed to comply with the court orders. He prayed that the court grants to the applicants all their prayers.

The applicants had sought to move court for the following orders:-

(a) A declaration that the respondent is acting in contempt of Court by neglecting, refusing and or failing to implement the orders of this Honourable Court contained in the Judgment of the Court made on 26th day of August, 2016 in Presidential Election Petition No.1 of 2016, requiring him to follow up, with the other organs of State namely Parliament and the Executive, the Electoral Reform Orders made by this Court, and to report to this Court within two years from the date of the Judgment the measures taken to implement the orders.

(b) A declaration that the sitting Attorney General is personally in contempt of the Court orders, and should be sanctioned accordingly.

(c) A declaration that as an advocate who has failed to implement the decision of this Honourable Court the sitting Attorney General is not fit to occupy the office of the Attorney General.

(d) An order that the respondent henceforth implements the orders as directed by this Honourable Court.

(e) Appropriate measures be put in place to compel the respondent to comply with (d) above, including an order that the executive shall not present any other legislative business until the orders aforesaid shall have been fully complied with.

(f) An order that the costs of this application be met by the respondent.

According to counsel, the applicants had demonstrated to Court that the respondent did not comply with the Court orders in the following ways:

(1) failure to cause the necessary reforms to be effected in time, and

(2) failure to report to this Court the content of the reforms.

Counsel submitted that the Attorney General has by supplementary affidavit brought to Court amendment Bills but these are dated 25th April 2019 which is a date after the 2 years set by Court and the bills are not laws up to now. Counsel stated that the orders have not been implemented by the Attorney General and that the Attorney General did not cause the necessary reforms, let alone report in two years as ordered. Counsel was emphatic that the bills that the respondent has filed are belated and have come after prompting by this application. The Attorney General had not given any excuse in his pleadings for non-compliance and therefore the contempt was proved.

Counsel submitted that this Court should declare that having failed to implement the orders of this Court the person currently occupying the office of the Attorney General is in contempt personally and is therefore not a fit and proper person to be the Attorney General and that accordingly he should cease to hold that office.

Counsel called upon this Court to order that henceforth the respondent should implement the orders as directed by this Court.

Counsel submitted further that in respect of the bills that the Attorney General has now presented in Court, a shorter new timeline should be given within which the Bills should be passed to become laws. Counsel proposed that the Court orders that Government should not present any other business to Parliament until the bills on elections are dealt with and the reforms made. He concluded that the bills should be given priority over other Parliamentary business and proposed that a new date be given by Court for the respondent to report to Court.

COSTS.

Counsel for the applicants prayed for costs. Counsel submitted that it was not correct to hold that costs should not be paid in cases of public interest. According to counsel, when citizens take up cases in public interest litigation they do research and it costs money. He reasoned that the applicants should therefore be paid costs when they are successful.

Counsel contended that where on the other hand Court finds the public interest litigants in such cases not successful no costs should be awarded unless the case taken up was frivolous, reckless and baseless. Counsel added that applicants who take up such cases in good faith should not be punished with costs.

SUBMISSIONS BY THE DEPUTY ATTORNEY GENERAL WHO REPRESENTED THE RESPONDENT

The Deputy Attorney General relied on the Attorney General's affidavit in reply and his supplementary affidavit and submitted that the Attorney General was ordered by Court to follow up on the implementation of the Court's

recommendations with other State organs like Parliament and the Executive. He went on to state that the Attorney General has duly and in a timely manner followed up on the implementation of the Court's recommendations with the relevant authorities. He stated further that the Attorney General had reported back to Court 10 days before the expiry of the two year period given by Court.

The Deputy Attorney General contended that when Court gave the orders it did not specify the modality of reporting back. He stated that the Attorney General reported back by a letter to the Registrar because it is trite knowledge that correspondence to and from Court is usually through the Registrar of the Court. He submitted that it was the communication mode the applicants had themselves adopted when they wanted a record of the courts' proceedings. He said that the applicants would therefore be stopped from questioning communication to Court through the Registrar. It was contended for the respondent that the Attorney General followed up the Court's recommendations with other organs of State and that by the time the Registrar of the Court wrote a reminder to the Attorney General, the Attorney General was ready to make his report. It was further contended by the Deputy Attorney General that the Attorney General made his report by a reply to the Registrar's letter and the report was made within the period of 2 years set by Court.

The Deputy Attorney General made a response in respect of each of the ten recommendations as follows:-

RECOMMENDATION NO.1

The Deputy Attorney General submitted that the 1st recommendation regarding time for filing and determining Presidential Election Petitions was addressed by Section 4 of the Constitution (Amendment) Act, No.1 of 2018. This section extended the time for lodging a Presidential Election Petition from 10 days to 15

days and the time for Supreme Court to determine the petition and declare its findings and reasons was increased from 30 days to 45 days. This is now reflected in the Constitution (Amendment) Act, 2018, Article 104(3).

The Deputy Attorney General submitted that a Private Member of Parliament initiated the Bill when the Attorney General was still consulting and following up on the recommendations of Court with other State organs. He went on to say that when the Private Member brought his Bill to Parliament, the Attorney General worked with the Private Member as provided for by the Constitution and the Rules of Parliament. He submitted that the bill was passed by Parliament with inputs from the Executive and the Private Member, and that in the process the Attorney General fulfilled recommendation No.1 of this Court since he followed up with the Executive and Parliament in the enactment process of the resulting law.

RECOMMENDATION NO.2 AND 9.

The two recommendations are in regard to the nature of evidence in a Presidential Election Petition and the role of the Attorney General. According to the Deputy Attorney General, the Attorney General and the Chief Justice had consultations. The Attorney General, after the consultations, drafted amendments to the Rules of Procedure and forwarded them to the Chief Justice on 16th August 2018 for consent and signing. On 25th April 2019, the Attorney General received a signed copy of the Presidential (Elections Petition) (Amendment) Rules from the Chief Justice and the same has been transmitted for publication as a Statutory Instrument.

According to the Deputy Attorney General, the recommendations No.2 and 9 have been complied with as the Attorney General followed up with the Chief Justice on the enactment of the rules as ordered by Court.

RECOMMENDATION NO.3

According to the Deputy Attorney General, the third recommendation of this Court regarding time for holding fresh election has been implemented by Section 4 of the Constitution (Amendment) Act No.1 of 2018. The time for holding a fresh election from the date of annulment under Article 104(6) has been increased from twenty days (20) to sixty (60) days.

RECOMMENDATION 4.

The Deputy Attorney General submitted that this recommendation on the use of technology in the election process will be addressed by the enactment of the Presidential Election (Amendment) Bill 2019, the Parliamentary Election (Amendment) Bill 2019, and the Electoral Commission Amendment Bill 2019 for which bills Attorney General has prepared a waiver in accordance with paragraph 2(b) of Section (q-b) of the Uganda Public Service Standing Orders duly authorizing the drafting of the Electoral laws without prior reference to cabinet for approval in order to ensure the timely enactment of Electoral laws. According to the respondent this was after consultations and follow up with the relevant institutions of Government. Parliament will soon debate and pass the Laws. The respondent, it was submitted was only ordered to follow on the recommendations of Court and he did that, resulting into the draft Bills.

RECOMMENDATION NO.5

The Deputy Attorney General submitted for the respondent that the law requiring all candidates to be given equal campaign time by the state media was in place but regretted some incidental non-compliance. He hastened to add that the Attorney General had already Communicated to the Minister of ICT and National guidance to inform all the Uganda Broadcasting Council staff to comply with the law. Court directed the Deputy Attorney to read Recommendation No. 5 in open court which he did. It is then that he realised that the recommendation was for

enactment of a law providing for sanctions in case of default. The Deputy Attorney General then undertook to ensure that sanctions are provided for in the proposed Electoral laws against any State organ that fails to comply with the Constitutional duty of providing equal time and space on State owned media for Presidential candidates.

RECOMMENDATION NO.6

The Deputy Attorney General submitted that enactment of Laws and formulation of Bills is a business that requires a lot of consultations and that requires ample time. He submitted that since this Court's Judgment was delivered, consultations have been going on. These are now concluded and draft Bills have been produced. Because of the urgency of the matter, the Attorney General has sought leave to table the Bills without going through Cabinet and the Bills will be in Parliament within a month, and the Attorney General would be able to report back to Court within 4 months but in any case the Bills would be enacted and become Laws within 6 months.

The Attorney General undertook to process the Amendments in consultation with relevant Government Agencies and to appeal to other organs of State to make the enactment of the Laws a matter of priority.

It was submitted that the Attorney General had demonstrated that he did not act in contempt of Court either as an individual or as an institution. The Court recommendations were followed up although there were delays in the process. There was no wilful refusal to comply with the orders of Court. He prayed for the application to be dismissed with costs.

CONSIDERATION AND RESOLUTION BY COURT

We have had sufficient time to peruse and carefully consider all the pleadings and authorities supplied by counsel for the parties together with other materials that Court found relevant. We have also carefully studied the submissions of all counsel and we have given all the above due consideration in the resolution of this application.

Contempt of Court is in two categories.

There is a criminal offence known as contempt of Court.

Criminal contempt is defined by Black's Law Dictionary 10th edition at page385 as **"An act that obstructs justice or attacks the integrity of the court the criminal contempt proceedings are punitive in nature."**

The offence is recognized by **Article 28(12)** of the Constitution. Which states; **"Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law."**

This offence has its origins in Common Law and according to Lord Denning, in **Re Bramblevales Ltd [1969] 3 All.E.R 1062,** for one to be convicted of contempt of Court the case has to be proved beyond reasonable doubt just like in other criminal offences.

The application before us is not in respect of a criminal case. It is a civil application for civil contempt.

Civil contempt is defined by Black's law dictionary 10th edition on page 385 as follows:

"The failure to obey a court order that was issued for another party's benefit. A civil contempt proceeding is coercive or remedial in nature. The usual sanction is to confine the contemnor until he complies with the court order."

The Constitutional Court of South Africa had occasion to define contempt of Court and state the object of both criminal and civil contempt of Court in the case of **Pheko and Others v Ekurhuleni Metropolitan Municipality (No.2) [2015] ZACC10** as follows:-

> **"[28] Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. This includes acts of contumacy in both senses: wilful disobedience and resistance to**

lawful court orders. This case deals with the latter, a failure or refusal to comply with an order of court. Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.

[29] The court's treatment of contempt has been developed over the years. Under the common law, there are different classifications of contempt: civil and criminal, *in facie curiae* (before a court) or *ex facie curiae* (outside of a court). The forms of contempt that concern us here, namely those occurring outside of the court, could be brought before court in proceedings initiated by parties, public prosecutors or the court acting of its own accord (*mero motu*).

[30] The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings *mero motu*.

[31]Coercive contempt orders call for compliance with the original order that has been breached as well as the terms of the subsequent contempt order. A contemnor may avoid the imposition of a sentence by complying with the coercive order. By contrast, punitive orders aim to punish the contemnor by imposing a sentence which is unavoidable. At its origin the crime being denounced is the crime of disrespecting the court, and ultimately the rule of law."

We accept the Court's definition and explanation of the objective in the above authorities.

We find it appropriate to further clarify the purpose of civil contempt since it is the main issue of this application. The Constitution in **Article 126(1)** states:-

"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 law and with the values, norms and aspirations of the people."

It is of great importance that when Courts give orders in exercise of their Judicial power, the orders are respected, implemented and take effect. Nobody should interfere with Court orders and state agencies are obliged to assist the courts to ensure that they are effective.

This is stated in **Article 128(2)** of the Constitution:-

"No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions."

The Constitution goes further in **Article 128(3)** and states:-

"All organs and agencies of the state shall accord to the courts such assistance as may be required to the effectiveness of the courts."

The Constitution has vested Judicial power in the Courts. The public expects Court orders to be obeyed. Court orders should never be given in vain.
Civil contempt of Court serves the purpose of empowering Courts to enforce Court orders and punish those that wilfully and unlawfully disobey Court orders.

The procedure for civil contempt of Court serves the objective of ensuring compliance with Court orders as was extensively stated by the Supreme Court of Appeal of South Africa in the persuasive authority of **Fakie V CC11 Systems (pty) Ltd [2006] SCA54 (RSA)** when the Court held:-

"(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.

(d) But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

(e) A declaratory and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."

Applying the principles discussed above to the facts of this case we have to establish that the following have been proved.

(1) That an order was issued by Court.

(2) That the order was served or brought to the notice of the alleged contemnor (the respondent).

(3) That there was non-compliance with the order by the respondent.

(4) That the non-compliance was wilful or mala fide.

The first and the second elements were conceded to by the respondent and we therefore find that they have been proved.

The next question is whether there was non-compliance with the orders by the respondent.

This Court gave the following two orders:

"(1) The Attorney General must follow up the recommendations made by this Court with the other organs of State, namely Parliament and the Executive.

(2) The Attorney General shall report to the Court within 2 years from the date of this Judgment the measures that have been taken to implement these recommendations."

Both parties submitted on recommendation No.2 first and that is the order we shall adopt in discussing the issues.

Court order No.2

It was contended by counsel for the appellants that reporting to Court would only be proper if the respondent moved Court for an open Court hearing with notice to the parties for the report to be made in open Court and that given that this did not happen there was non-compliance with the Court orders.

The Deputy Attorney General for the respondent on the other hand in response asserted that by his letter to the Supreme Court Registrar dated 16th August 2016, the Attorney General reported to Court on the measures that had been taken to implement the recommendations and that as such there was compliance with the Court orders.

We take Judicial notice of the fact that communication with Court is normally conducted through the office of the Court Registrar.

When the Court gave its orders it did not state the reporting mode for the respondent. We do not find therefore that reporting to Court by letter to the Registrar of the Court was unreasonable conduct since court users normally communicate with this Court through its Court Registrar.

The Court after receiving the report could have notified the other parties or even fixed and called the parties for hearing if it deemed that to be the proper thing to do. The Attorney General attached his report to the letter of 16th August 2018.

We note that the fact that the letter was in reply to a letter from the Registrar does not change the fact that a report was made to the Court. Consequently we answer the issue of the respondent reporting to Court in the affirmative.

Court Order No.1

The first order was for the Attorney General to follow up the recommendations with other organs of State, namely Parliament and the Executive. Did the Attorney General comply with this Court order by following up the recommendations with other organs of the State, namely the executive and Parliament ?

The contention of the applicants is that there was no follow up by the Attorney General. The respondent disputed the allegation and explained activities that the respondent had taken as follow up of the recommendations of this Court with the other organs of the State, namely, the Executive and Parliament.

RECOMMENDATIONS NO.1 AND 3.

Recommendations No.1 related to the time of filing and determination of petitions while recommendation No.3 related to the holding of fresh elections.

The applicants contended that the Attorney General wilfully delegated the responsibility of amending the law on these matters to a private member. Constitutional (Amendment) Act, 2018 which the Attorney General submitted had implemented the two recommendations was initiated by a Private Member and not the Attorney General or Government and that its enactment cannot therefore be taken to have been followed up by the Attorney General.

We have read Constitution (Amendment) Act No.1 of 2018. The relevant provisions are Section 4 and Section 6 of the Act.

Section 4 of the Act extends the time for lodging a Presidential Election Petition from 10 days to 15 days after the declaration of the election results. The time for the Supreme Court to inquire into and determine the petition and declare its

findings and reasons was increased by **Article 104(3)** from thirty days to forty-five days from the date of filing of the petition.

The Deputy Attorney General explained that whilst he was still following up this Court recommendation for amendment of the law, the private member initiated the amendment. He submitted that this is permitted under the Constitution, the law and Rules of Parliament. He added that the Attorney General worked with the private member and Parliament to get the amendment passed into law. This was not contested by the appellants whose only complaint was that this was delegation of the Attorney General's responsibility and thus not a follow up of the Court's recommendations. We find that the two recommendations of this Court were implemented. It would not have been necessary or even fruitful for the Attorney General to obstruct the private member's initiative when the same objective would still be achieved by law initiated by a Private Member. It is worth noting that when the law is passed it does not indicate whether it was initiated by a private member of parliament or by government. We accept the Attorney General's explanation that he followed up with the Executive and Parliament for the amendment to be passed. We hold that the Attorney General complied with recommendation No.1 and 2.

RECOMMENDATION NOS.2 AND 9.

Recommendation 2 was for the Rules of Procedure to be amended to provide for use of oral evidence in addition to affidavit evidence with the leave of Court. Recommendation 9 was for the law to be amended to make it permissible for the Attorney General to be made a respondent where necessary.

The Attorney General after their consultations wrote to The Chief Justice on 8th April 2019 and submitted a draft Presidential Election (Election Petition Rules 2001 by the Chief Justice) for the Chief Justice to consider and if he found

appropriate return for publication in the Gazette. The Chief Justice signed the Rules on 25th April 2019 and returned the draft Rules to the Attorney General for publication.

It is our finding that the Attorney General followed up recommendations No.2 and No.9. There was compliance with the Court order.

RECOMMENDATION NO.4

The recommendation was that a law to regulate the use of technology in the conduct and management of elections be enacted well within time to allow for training of officials and sensitization of voters and other stakeholders.

The applicants contend that no law has been enacted in time as recommended and therefore the respondent was in contempt. The Attorney General in response stated in his affidavit that engagements have been ongoing between his office, the Electoral Commission and other stakeholders to enact the law as recommended. He specifically stated in paragraph 4 of his supplementary affidavit that he has authorized the drafting of the requisite electoral laws without prior reference to Cabinet for approval to hasten the process of enactment of the laws.

The recommended law on the issue has not yet been enacted up today. A draft Bill is now in place. The Court order was for the Attorney General to follow up and his explanation is that he did follow up with other State agencies and organs although he does not have the final product yet. We do not find that the Attorney General's disobeyed the orders of this court and did not following up on the Court's recommendations with other State organs and agencies.

RECOMMENDATION NO.5.

The Court's recommendation was for the electoral law to be amended to provide for sanctions against any State organ or officer who violates the constitutional duty to give equal time and space on State owned Media and Programmes.

This law has not been enacted and the applicants assert that the respondent was non-compliant on the recommendation. The respondent conceded that although there was in place a law (Section 24(1) of the Presidential Elections Act and Article 67 of the Constitution) providing for equal coverage, there was no law yet providing for sanctions in case of default. The Deputy Attorney General stated that the electoral draft laws will be amended within the next six months to provide for sanctions but admitted that that had not yet been done.

Civil contempt is constituted by conduct or statements that display disrespect or wilful disobedience or resistance to a court order. The breach will have been committed deliberately and *mala fide.*

In the instant case we do not find that the Attorney General deliberately disobeyed the court order. We consider his undertaking to include the recommendation of this court for sanctions in the pending bills plausible and do not find reason to reject it. We would therefore not hold the Attorney General in contempt in respect of this recommendation.

RECOMMENDATIONS 6, 7 AND 8.

Recommendation No.6 was for election related law reforms to be undertaken within 2 years of establishment of the new Parliament.

In Recommendation No.7 the Court recommended that the law be amended to prohibit the giving of donations by all presidential candidates including the sitting President in order to create a level playing field for all.

Recommendation No.8 was for a law to explicitly prohibit public servants from involvement in political campaigns.

The appellants' contention was that the Attorney General was in contempt in respect of all the 3 recommendations since the recommended amendments were not effected within 2 years as recommended by Court. They argued that the Attorney General's filing of draft Bills does not cure the defect of failure to act within 2 years.

The Attorney General in response concedes to the failure to bring the amendments within the period of two years. He submitted that enactment of Bills is a process that requires consultations which require ample time. He contended that the Attorney General used the time between the Judgment date and the period this application was being heard to complete the processes of consultation.

He submitted that the bills were already in place. The Deputy Attorney General undertook that the bills will be tabled in Parliament and should be passed within 4 months but certainly not beyond 6 months.

We note that the bills are now in place after the necessary consultations. We, therefore, find that the Attorney General did follow up on the courts' recommendations as ordered by court.

Issue No. 4. Whether the non-compliance was wilful and *mala fide.*

This element must be proved to establish civil contempt of Court. The test for proof of this element was stated in **Fakie case (supra)**

> **[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide.' A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a**

refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could be evidence lack of good faith).

[10] These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.

Applying the principles stated in the **Fakie case** (supra) the Supreme Court of South Africa in **Lourens v Premier of the Free State Province and Another 95260 [2017] ZASCA 60** held:

"[12] It is now settled that an applicant must prove the requisites of contempt (the order, service or notice, non-compliance, wilfulness and mala fides) beyond reasonable doubt. But once these requisites have been proved, the respondent bears an evidential burden of showing that non-compliance was not wilful and mala fide. Disobedience of a civil order will constitute contempt only if the breach of the order was committed deliberately and mala fide. Unreasonable non-compliance, provided that it is a bona fide does not constitute contempt. And where, as in this case, an applicant approaches a court on notice of motion, a dispute of fact as to whether non-compliance was wilful and mala fide falls to be determined on the respondent's version; unless the court considers that the respondent's allegations do not raise a real, genuine or bona fide dispute of fact, or are so far-fetched or

clearly untenable that the court is justified in rejecting them merely on the papers."

Needless to say, we find both the **Fakie** (supra) case and the case of **Lourens** (supra) persuasive.

In the instant application the Attorney General was given orders to follow up the recommendations of this Court with other organs of the State.

We have already made a finding that Section 4 of the Constitution (Amendment) Act No.1 of 2018 implemented the Recommendations No.1 and 3 of this Court.

We have also made the finding that the Attorney General followed up the Court's two recommendations with other organs of the State in the enactment of the Law that had been initiated by a Private Member.

In respect of Court's Recommendation No. 2 and 9, the Chief Justice signed and returned draft Rules to the Attorney General for gazetting.

We hold that the two recommendations have been implemented after the Attorney General's follow up with the Chief Justice on the two recommendations.

Recommendations No.4, 5, 6, 7 and 8 are all in respect of the Attorney General following up the Court's recommendations for enactment of Laws with the Executive and Parliament.

The Attorney General after consultations prepared the following draft laws:-

(1) The Presidential Elections (Amendment) Bill, 2019,

(2) The Parliamentary Elections (Amendment) Bill, 2019,

(3) The Electoral Commission (Amendment) Bill, 2019,

(4) The Local Government (Amendment) Bill, 2019.

The proposed amendment Bills, according to the affidavit of the Attorney General, will be debated by Parliament and it was his undertaking that they would become laws within 4 months. The laws once enacted will implement the recommendations of this Court.

The Attorney General conceded that the process of enacting the laws took longer than the two years timeline set by Court. He explained that the consultations commenced immediately after the Judgment but had only recently been concluded. The Attorney General undertook to appeal to the Executive and Parliament to give priority to enactment of the laws.

The Court's order was for the Attorney General to follow up with other organs of State and thus get the enactment of the laws effected. The respondent asserted that he followed up the recommendations of court as ordered but that there were delays caused by consultations.

His explanations on the delayed legislations are not far-fetched in light of the explanation given. Indeed the explanation shows steps that were taken to effect the court orders, albeit slow.

We find that the Attorney General has discharged the evidential burden of showing that he did not act wilfully or mala fide in disobedience of the Court order.

We have already held that the report that was made to the Court Registrar was a proper report to Court on the measures undertaken to implement the Court's recommendations.

We do not find that the respondent acted in contempt of this Court.

This Court made orders in Presidential Election Petition No.1 of 2016 for the Attorney General to follow up on its 10 recommendations for the purpose of ensuring that the recommendations are implemented and the recommended amendments to the election laws are enacted in a reasonable time of 2 years.

The objective of the Court's orders was to foster fair play, democracy, law and order in the politics of this country.

The Court set a time line for the follow up because the enacted laws should be passed and effected in time for all stakeholders to implement and comply with the laws in subsequent elections.

We find that the Attorney General has made efforts to follow up the recommendations but is as yet to achieve the desired objective of the Court. He was not expected to be the sole participant as an institution of Government in getting the laws enacted. The Court recommendations could only be implemented in time if and when all organs of the State played their various roles in the process of enacting the recommended laws.

It is in that vein that we urge the Attorney General to impress it upon all the relevant organs and agencies of the State to take the Court's recommendations seriously. There is need also for all organs and agencies of the State to understand the importance of respect for the rule of law and the orders given by Courts.

It is in that light that the Attorney General and all other State agencies and organs should appreciate the gravity of civil contempt of Court which is available principally for enforcement of Court orders.

We cite the Supreme Court of Appeal of South Africa in **Meadow Glen Home Owners Association vs. City of Tshwane Metropolitan Municipality (767/2013 [2014] ZASCA 209** to illustrate the point. The Court held :-

> **"Contempt of court is not an issue *inter partes*; it is an issue between the court and the party who has not complied with a mandatory order of court." [*Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education Gauteng 2002 (1) SA 660 at* Elaborating this, Plasket J pointed out in the Victoria Ratepayers case [(511/03) [2003] ZAECHC 19 (11 April 2003)] that contempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the legal arm of government: There is thus a public interest element in every contempt committal. He went on to explain that when viewed in the constitutional contest**
>
> > **'it is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the Superior Courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system... That, in turn, means that the Court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.'**
>
> We are persuaded by the dicta in the case above.

When this Court delivered its Judgment it stated that it may make further orders and recommendations as it deems it. We now find it appropriate to make further orders for the purpose of ensuring compliance with this Court's recommendations. We do this confident that the implementation of the orders we are now making will not require other civil contempt of Court proceedings.

We make the following orders:

(1) The Attorney General must in consultation with other organs of State, the Executive and the Legislature, ensure that priority is given to the implementation of all the Court's recommendations.

(2) The proposed Legislation for implementation of the Court's recommendations should be laid before Parliament within one month from the date of this ruling.

(3) The Attorney General shall report to this Court on the progress of the proposed Legislation within three months from the date of this ruling.

(4) The Attorney General shall in any case make a final report on the progress of the proposed Legislation within six months from the date of this ruling.

In regard to costs we find that the applicants were acting in public interest when they brought this application. It is in public interest that the recommendations of this Court and the orders the court made are implemented. It is clear to us that that was the interest of the applicants when they brought up this application.

It is trite that generally costs follow the event and the successful party is awarded costs. It is also trite, however, that Courts have a wide discretion in the award of Costs but the discretion must be exercised Judiciously.

Given the circumstances of this petition we order each party to bear their own costs.

Dated at Kampala this 25th day of June 2019.

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Hon. Justice Arach-Amoko
JUSTICE OF THE SUPREME COURT

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Hon. Justice Mwangusya
JUSTICE OF THE SUPREME COURT.

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Hon. Justice Opio-Aweri
JUSTICE OF THE SUPREME COURT.

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Hon. Justice Mwondha
JUSTICE OF THE SUPREME COURT.

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Hon. Justice Mugamba
JUSTICE OF THE SUPREME COURT.

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Hon. Justice Buteera
JUSTICE OF THE SUPREME COURT

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Hon. Justice Nshimye
AG. JUSTICE OF THE SUPREME COURT

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