THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

[Coram: Kisaakye; Arach-Amoko; Opio-Aweri; Tibatemwa-Ekirikubinza; Mugamba; Buteera; Chibita JJ.S.C.]

CONSTITUTIONAL APPLICATION NO. 1 OF 2020

(ARISING FROM CONSTITUTIONAL PETITION NO. 20 OF 2018)

BETWEEN

ATTORNEY GENERAL:::::::::::::::::::::::::::::::::: APPLICANT

AND

EDDIE KWIZERA::RESPONDENT

CONSOLIDATED WITH

CONSTITUTIONAL APPLICATION NO. 3 OF 2020

(ARISING FROM CONSTITUTIONAL PETITION NO. 20 OF 2018)

BETWEEN

ELECTORAL COMMISSION :::::::::::::::::::::::: APPLICANT

AND

EDDIE KWIZERA::RESPONDENT

(Application for stay of execution arising from the judgment of the Constitutional Court at Kampala (Owiny-Dollo DCJ, Kakuru, Egonda-Ntende, Cheborion and Madrama JA /JJCC)

RULING OF COURT

The applicants, Attorney General and Electoral Commission, separately filed two Constitutional applications for stay of execution of the orders of the Constitutional Court in Constitutional Petition No. 20 of 2018. The applications were brought by Notice of Motion under **Rules 2(2), 6(2) (b), 42, 43(1), 50 and 51** of the Rules of this Court.

The Attorney General sought the following orders;

"1. That this Honorable Court issues a stay of execution of the decision of the Constitutional Court at Kampala (Owiny-Dollo, DCJ, Kakuru JA/JCC, Egonda-Ntende JA/JCC, Cheborion JA/JCC and Madrama JA/JCC) dated December 27, 2019 in Constitutional Petition No. 20 of 2018 until the final disposal of the appeal.

2. Costs of this Application be provided for."

The Electoral Commission sought the following orders;

"1. An order for stay of execution of the decision, decree and orders of the Constitutional Court in Constitutional Petition No.20 of 2018 delivered on 27th December, 2019 doth issue pending determination of an appeal which has now been instituted in this Court

2. An order that the costs of and incidental to this application abide the result of the appeal."

The applications are supported by affidavits sworn by Mr. Phillip Mwaka, a Principal State Attorney, for the 1st applicant deponed on the 9th January, 2020 and Mr. LugoloobiHamidu, a Legal Officer of the 2nd applicant, deponed on the 9th January, 2020. Mr. Mwaka swore an affidavit in rejoinder on the 5th February, 2020 to the respondents' affidavit in reply.

The applications are opposed by the respondent, Mr. Kwizera Eddie, who swore two affidavits in reply both dated 3rd February, 2020.

Background:

The background to the applications as can be discerned from the affidavits is as follows:

On 9th August, 2016, the Parliament of Uganda passed a resolution prescribing the number of constituencies to be 296. The impugned six (6) out of the 296 are Apac, Sheema, Ibanda, Nebbi, Bugiri and Kotido.

Following the said resolution, the Electoral Commission organized, supervised and conducted elections in the impugned constituencies in 2018. On 18th May, 2018, before the said elections, the respondent, petitioned the Constitutional Court under **Article 137 of the Constitution** challenging the constitutionality of the aforesaid resolution. He also challenged the legality of a number of constituencies that had been created prior to the 2016 general elections and the resultant conducting of elections in the impugned constituencies after the 2016 general elections. He sought for the following declarations:

(i) that the 9th August, 2016 resolution be declared null and void;

(ii) a permanent injunction restraining the 2nd applicant from holding elections in the impugned constituencies be issued; and

(iii) costs of the petition be granted.

The applicants opposed the petition.

The Constitutional Court by unanimous decision allowed the petition in part and made the following declarations and orders:

"1. In increasing the number of Parliamentary constituencies to 296, Parliament exercised its mandate provided for under Article 63(1) of

the Constitution, to prescribe the number of Parliamentary constituencies into which Uganda shall divided.

2 **The involvement of Parliament in the creation of the Municipalities of Apac, Bugiri, Ibanda, Kotido, Nebbi, and Sheema was lawful; as under the provisions of the Local Governments Act, Parliament has a duty to approve the creation of Municipalities.**

3 **On the evidence, the Electoral Commission never made any demarcation of boundaries for the holding of the impugned elections in the contested municipalities of Apac, Bugiri, Ibanda, Kotido, Nebbi and Sheema; against which an appeal could lie pursuant to the provision of Article 64(2) of the Constitution.**

4 **The Parliamentary Elections held in the municipalities of Apac, Bugiri, Ibanda, Kotido, Nebbi and Sheema in the middle of a Parliamentary term, and yet these were not by elections, were unlawful, null and void, as they contravened the provisions of article 63(6) of the Constitution.**

5 **In the event, the following orders are hereby made:**

(a) **The Parliamentary elections held in the municipalities of Apac, Bugiri, Ibanda, Kotido, Nebbi and Sheema are hereby nullified.**

(b) **The Electoral Commission shall, within one year hereof, file in the Constitutional Court evidence of the prescription by Parliament of the number of constituencies in Uganda for the next general elections, pursuant to the provisions of article 294 and 63(1) of the Constitution.**

(c) **The Electoral Commission shall, within ten months hereof file, in the Constitutional Court, evidence of its demarcation of the boundaries of constituencies in accordance with the prescription made by**

Parliament pursuant to the provisions of Article 63 of the Constitution.

(d) **The respondents shall pay to the petitioner, half of the taxed costs of the petition."** (sic)

The applicants being dissatisfied with part of the judgment of the Constitutional Court filed their respective Notices of Appeal on 30th December, 2019 as well as Constitutional Applications No. 1 and 3 of 2020 on the same day for stay of execution of the orders of the Constitutional Court.

The applicants also filed Miscellaneous Applications No. 2 and No. 4 of 2020 respectively for the grant of interim stay of execution pending the determination of the substantive applications for stay of execution. Miscellaneous Applications No. 2 and No. 4 of 2020 were however withdrawn when this Court having heard the substantive applications for stay of execution.

Grounds for the Applications.

The grounds for the applications were set out in the Notices of Motion and affidavits in support.

The 1st applicant's grounds in Constitutional Application No. 1 of 2020 read as follows:

"1. **That the applicant is dissatisfied with part of the judgment and orders of the Constitutional Court in Constitutional Petition No. 20 of 2018 delivered on 27th December, 2019 and has since filed Notice of Appeal and requested for certified copies of the record of proceedings from the lower Court;**

2. **That the applicant's appeal to the Supreme Court challenging part of the decision and orders of the Constitutional Court in Constitutional Petition No. 20 of 2018 raises several Constitutional and legal issues**

which warrant serious judicial consideration by the Supreme Court and have a high likelihood/ chances of success.

3. **That unless a stay of execution is granted by this Honorable Court against the orders issued by the Constitutional Court in Constitutional Petition No. 20 of 2018, the appeal shall be rendered nugatory.**

4. **That the balance of convenience in maintaining the status quo is in favour of the applicant until the substantive pending Constitutional Appeal is heard and disposed of by the Supreme Court.**

5. **That this application has been brought without undue delay.**

6. **That it is just and equitable to grant a stay of execution against the orders issued by the Constitutional Court in Constitutional Petition No. 20 of 2018 and in favour of the applicants"** (sic)

The 2nd applicant's grounds in Constitutional Application No. 3 of 2020 stated as follows:

"1. That the Constitutional Court delivered its judgment in Constitutional Petition No. 20 of 2018 on the 27th December, 2019;

2. **That the applicant being dissatisfied with part of the judgment and orders of the Constitutional Court filed a Notice of Appeal and requested for certified copies of the record of proceedings;**
3. **That the applicant's intended appeal to the Supreme Court challenging the decision and orders of the Constitutional Court raises several Constitutional and legal issues that warrant serious judicial consideration by the Supreme Court to wit:**

(a) The Constitutional Court exercised the jurisdiction vested in it with material irregularity and or injustice.

(b) The effect of the decision of the Constitutional Court contravened the fundamental right to a fair hearing as enshrined under Article 28 of the Constitution.

(c) The result of the decision of the Constitutional Court impeached and / or infringed other elections envisaged under the Constitution."

(d) The Hon. Justices of the Constitutional Court misapplied the considerations for demarcation of constituencies enshrined in the Constitution and arrived at an erroneous conclusion.

(e) 4. Unless a stay of execution is granted, the appeal will be rendered nugatory

5. The application has been brought without undue delay

6. it is just and equitable that an order for stay of execution of the decision and orders in Constitutional Petition No.20 0f 2018 issue pending determination of the appeal which is yet to be filed in this appeal."

Representation:

At the hearing, the parties were represented as follows:

The Attorney General was represented by Messrs Wanyama Kodoli, Principal State Attorney; Kallemera George, Principal State Attorney; and Kirunda Solomon, Principal Legal Counsel, Parliament.

The Electoral Commission was represented by Messrs Eric Sabiti, Jude Mwasa, Enock Kugonza and Godfrey Musinguzi.

The Respondent who was personally in court, was represented by Messrs Ben Wacha and Dan Wandera Ogalo.

The hearing of both applications was consolidated as they related to the same subject matter. Counsel for the parties made oral submissions.

Applicants' case

Presenting the 1st applicant's case in Constitutional Application No. 1 of 2020, Mr. Kallemera, submitted that the applicant sought an order for stay of execution pending the disposal of the appeal. He submitted that the considerations for the grant of an order of stay of execution are:

1. The lodgment of a Notice of Appeal and request for certified copies of the record of proceedings to file the appeal;
2. That the appeal has a high likelihood of success
3. That the applicant's appeal will be rendered nugatory if the stay of execution is not granted.
4. If 2 and 3 above have not been established, the Court must establish where the balance of convenience lies; and
5. That the application was lodged without undue delay.

Counsel relied on **Rule 6(2) (b)** of the Rules of this Court, and the court's decisions in **National Housing Construction Corporation vs. Kampala District Land Board, S.C.C.A No.06 of 2002, Akankwasa Damian vs. Uganda, S.C.C.A No. 7& 9 of 2011** and **Theodore Sekikuubo & Others vs. Attorney General & Others, S.C.C.A No.06 of 2013** to support his submission.

He submitted that the applicant had demonstrated seriousness to pursue the appeal by filing a Notice of Appeal and requested for certified copies of the record of proceedings on 30th December, 2019, only 3 days after the decision of the Constitutional Court was delivered.

On the likelihood of success of the appeal, Mr. Kallemera contended that the intended appeal raised serious points of law that warrant consideration by this Court. It was his contention that in the intended appeal the applicants would illustrate to the Court that the right to a fair hearing as provided for under **Article 28 of the Constitution** which is a fundamental and non-derogable right, was infringed when the six Members of Parliament (MPs) were condemned by the Constitutional Court unheard.

Counsel submitted that the balance of convenience lay in favor of the applicant. He argued that the respondent is a known public interest litigant whose main interest is promotion of Constitutionalism and the rule of law. He further argued that the respondent would not be inconvenienced by an order for stay of execution of the orders of the Constitutional Court. Counsel for the 1st applicant also contended that the applicant stood to be highly inconvenienced if the orders of the Constitutional Court especially those regarding the ejectment of the six affected MPs were to be implemented since they would have to leave Parliament before the appeal is determined on its merits. He argued that this would render the appeal nugatory.

Counsel submitted further that this application had been brought without undue delay and that it was just and equitable that the order for stay of execution be granted pending the disposal of the appeal.

He thus prayed this Court to allow the application.

Mr. Sabiti, learned counsel for the 2nd applicant, submitted that the applicant had satisfied all the requirements necessary for the grant of the order sought for. He relied on the case of **Gashumba Maniraguha vs. Sam Nkudiye, S.C.C.A No. 24 of 2015** where this Court reiterated the preconditions for the grant of an application for stay of execution. He submitted that the applicant in this case had lodged a Notice of Appeal and requested for certified copies of the record of proceedings on the 30th December, 2019 without undue delay.

On the likelihood of success, counsel contended that the appeal raised very important points of law. He raised the following issues:

1. The need for this Court to pronounce itself on the condemnation of the six MPs unheard contrary to **Article 28** of the Constitution;
2. The mandate of Parliament in the creation of new constituencies as provided for under **Articles 63 and 294**, and;
3. The Constitutional Court's exercise of jurisdiction not vested in it contrary to **Article 86 (1) (a)** of the Constitution. He relied on the case of **Theodore Ssekikubo vs. Attorney General** (supra) to support his argument.

Counsel further contended that the balance of convenience lay in favor of the applicant because the MPs stood the risk of being thrown out of parliament before the determination of the appeal. He argued that the application was brought without undue delay and that it is just and equitable that the order for stay of execution be granted.

He thus submitted that the applicants had presented a fit and proper case for the grant of the order sought.

Respondent's case

Mr. Wacha, learned counsel for the respondent, opposed both applications. He submitted that the applications had no merit and ought to fail because the applicants had failed to present sufficient reasons to justify the grant of the order sought. He referred to the principles for grant of stay of execution set out by this Court in **Theodore Ssekikuubo** (supra) case such as likelihood of success and irreparable loss.

He conceded that the applicants had filed Notices of Appeal and had requested for certified copies of the record of proceedings in a timely manner, but argued that they had failed to show Court that the appeal had any likelihood of success.

Counsel for the respondent, argued that the applicants' intended appeal has no likelihood of success because the six Members of Parliament's alleged right to a fair hearing at the Constitutional Court did not arise since the MPs were not parties to the petition. He argued that the six Members of Parliament willfully excluded themselves from the proceedings when they failed to apply to the Constitutional Court under Order 1 rule 10 of the Civil Procedure Rules to be joined as parties to the petition. He submitted that they cannot therefore come to this Court and claim to be party to the intended appeal. He relied on the case of **Theodore Sekikubo vs. Attorney General** (supra) to support this argument. He contended that the judgment was based on two issues namely: the creation of municipalities and constituencies and the 2nd applicant's act of holding elections in the impugned constituencies. He argued that these issues had nothing to do with the MPs who stood for elections in those constituencies.

He further contended that the very elections that brought the affected MPs into office were *void ab initio*.

He submitted that the Constitution recognizes only two types of elections namely General Elections as provided for under **Article 61(2)** of the Constitution and by–elections as provided for under **Article 81(2)** of the Constitution. Counsel argued that the elections which took place in the impugned municipalities were neither general parliamentary elections nor by elections He added that the applicants could not establish the likelihood of success of an appeal based on an election that was not recognized under the Constitution.

Counsel submitted that the applicants' argument that the Constitutional Court did not follow the laid down process of demarcation of constituencies is misconceived because the mere creation of municipalities did not necessarily give rise to new constituencies. He relied on **Articles 61(c)** and **63(2)** of the Constitution.

He contended that since the learned Justices of the Constitutional Court had directed their minds to the issue of fair hearing and found that the office of the Member of Parliament in the impugned constituencies did not exist, the right of the said MPs to be heard on whether they were validly elected into office did not arise.

On the issue of irreparable loss, Mr. Wandera Ogalo, learned counsel for the respondent, submitted that although the possibility of suffering irreparable loss is one of the considerations for Court to grant an order for stay of execution, none of the applicants pleaded this fact either in their Notices of Motion or in their affidavits in support of the application. He referred Court to the cases of **Dr. Ahmed Muhammed Kisuule vs. Greenland Bank (in Liquidation), S.C.C.A No.07 of 2010** and **Akankwasa Damian vs. Uganda** (supra) where the applications for stay of execution had failed because the applicants had failed to demonstrate to Court that they would suffer irreparable loss if the stay of execution was not granted. He urged that these applications should suffer the same fate.

Regarding the appeal being rendered nugatory if the application for stay of execution is not granted, counsel contended that the applicants had failed to demonstrate to Court how their appeals would be rendered nugatory. He contended that in paragraph 3 of the grounds in the Electoral Commission's Notice of Motion and paragraph 8 of the affidavit of Mr. Mwaka, the 2nd applicant merely stated that the appeal would be rendered nugatory without going further to illustrate how. He contended also that the question of the appeal being rendered nugatory did not arise because the subject matter of the appeal was Constitutional and that the Constitutional issues would not go out of existence.

On the balance of convenience, counsel for the respondent submitted that the balance of convenience lay with the respondent, Constitutionalism and the rule of law. He referred Court to paragraphs 4, 5 and 6 of the respondent's affidavit in reply which referred to the orders (b) and (c) of the Constitutional Court by which the Electoral

Commission was required to file in Court evidence of the prescription of Parliament dividing Uganda into the number of constituencies as required under **Articles 294** and **63(1)** of the Constitution and demarcated boundaries of the constituencies in accordance with the prescription of Parliament under **Article 63** of the Constitution within 10 months.

He contended that the balance of convenience lay in favor of the country and tax payers who stood the risk of losing large sums of money that would be spent on elections in 82 constituencies in the 2021 general elections, which could be declared null and void if the orders of the Constitutional Court are not complied with. He relied on the case **of J. W.R. Kazzoora vs. M.L.S Rukuba, SCCA No. 4 of** 1991 to support this argument.

In the course of his submissions, Mr. Ogalo, questioned the competence of these applications in the Supreme Court contending that the Rules provide that where applications that can be filed in the Constitutional Court as well as in this Court such applications should be filed in the Constitutional Court first. He relied on **Rule 41(1), (2)** of the Rules of this Court for the argument that the applicants were required to justify their failure to have these applications filed in the Constitutional Court before this Court could entertain the said applications.

Counsel for the respondent thus prayed that the applications for stay of execution be dismissed. He prayed also for the costs of the applications.

Rejoinder

Mr. Sabiti, counsel for the 2nd applicant submitted that this Court is competent to entertain this matter under **Rules 2(2), 6(2) (b), 41 (1), (2)** of the Rules of this Court. He contended that **Rule 41(2)** gives this Court the discretion to entertain applications of this nature even if they were not made to the Constitutional Court first. He added

that the rules do not require an applicant to justify why they opted to come to the Supreme Court first.

He contended that each case should be considered based on its peculiarities and that the present case is a Constitutional matter of great public importance which required the expeditious disposal of all the matters arising in order to determine the fate of the six (6) affected Members of Parliament.

He cited the case of **Hassan Basajjabalaba and Anor vs. Attorney General,** (**Miscellaneous Application No. 4 of 2018**) and **Akankwasa Damian vs. Uganda** (supra) to support his arguments.

Mr. Kallemera, in his response to the objection submitted that the rules do not require an applicant to justify the omission to apply to lower the Court but rather it is optional for the applicant to either go to the Constitutional Court or to come directly to this Court.

On whether the appeal will be rendered nugatory if the application for stay is not granted Mr. Kodoli submitted that the applicant had demonstrated to Court that they would suffer irreparable loss or that the appeal would be rendered nugatory if the application is not granted. It was his contention that the affected MPs' right to a fair hearing as provided for under **Article 28** of the Constitution was a non-derogable right that could not be taken away without justification. He added that the applicants have an automatic right of appeal that this Court is obligated to protect and that if that right is not protected and the orders of the Constitutional Court are implemented, the appeal would only serve academic purposes.

The applicants thus prayed Court to allow the applications and grant the orders for stay of execution of the orders of the Constitutional Court pending the determination of the appeal.

Consideration by the Court

We shall first deal with the point of law that was raised by counsel for the respondent about the competence of the applications.

The respondent's contention was that the applications were incompetent because they had not been lodged in the Constitutional Court first as required by **Rule 41(1)** of the Rules of this Court. He argued that whereas this Court could entertain such applications under **Rule 41(2),** the applicants were obliged in such a case to justify their failure to lodge the applications in the Constitutional Court first.

On the other hand, counsel for the applicants opposed the respondent's contentionand submitted that the applications were properly before the Court, as **Rules 2(2), 6(2) (b) and 41(2)** of this Court's Rules give this Court wide discretion to entertain such applications if the circumstances of the case permit. They relied on the cases of **Akankwasa Damian vs. Uganda** (supra), **Theodore Ssekikubo vs Attorney General** (supra) and **Hassan Basajjabalaba vs. Attorney General** (supra) to support the application. The applicants further argued that the peculiarities of the instant case are that this is a Constitutional matter of great sensitivity and public interest involving the stay or ejectment of Members of Parliament from Parliament. They contended that there was need to expedite the hearing of the applications in order to protect the applicant's right of appeal.

Rule 41 of the Rules of this Court under which the objection was raised states as follows:

(1). "Where an application may be made orally either to the court or to the Court of Appeal, *it shall be made to the Court of Appeal first*.

(2). *Notwithstanding sub rule (1) of this rule*, in any civil or criminal matter, the court may, in its discretion on application or on its own motion give

leave to appeal and make any consequential order to extend the time for the doing of any act, as the justice of the case requires, or entertain an application under rule 6(2)(b) of these Rules to safeguard the right of appeal, notwithstanding the fact that no application has first been made to the Court of Appeal." (Emphasis Ours).

Rule 41 (1) above provides for the general rule in instances where there is concurrent jurisdiction of the Court of Appeal and the Supreme Court. It is couched in mandatory terms and requires that an applicant files such application in the lower Court first.

The reasoning behind **Rule 41(1)** is that it is not only convenient for an applicant to make the application for stay of execution orally at the time of delivery of the decision sought to be stayed but also that the Court that heard the case and made the decision is better appraised with the facts of the case and would therefore be better placed to determine the application for stay of execution promptly.(See **Lawrence Musiitwa Kyazze Vs Eunice Busingye, Supreme Court Civil Application No. 18 of 1990 @ 4)**

Rule **41(2)** states, among other things, that *notwithstanding* (the existence of) sub **rule (1)** the Supreme court may, *in its discretion*, entertain an application under **rule 6(2)(b)** of the Rules to safeguard the right of appeal in circumstances where *no application has first been made to the Court of Appeal*." The effect of the phrase *"notwithstanding"* is that there are *exceptions* to the general rule.

It can be said that when a clause begins with the word "Notwithstanding" – as is the case with Rule 41 (2), the object is to give it overriding effect over another provision – Rule 41 (1). And indeed according to **Thornton's Legislative Drafting** 5th Ed,

page 113, where it is intended that a provision which is "inconsistent" with another provision in the same law is to prevail, this intention can be put beyond doubt with an explicit reference such as: "*Notwithstanding subsection (x) ...*"

Rule 41(2) is not intended to negate or render **Rule 41(1)** redundant and thus cannot be read in isolation of rule (1). The sub rule, while acknowledging the general position of the law as envisaged in sub **rule (1)**, takes cognizance of the fact that there are circumstances where the interests of justice would not be served through strict adherence to sub **rule (1)**. Both provisions of this rule should therefore be read in totality in order to derive the intention of the drafters.

Consequently, an applicant who proceeds under **Rule 41(2)** – an exception to the general rule - must establish that they were aware of the general rule but had good cause for coming straight to the Supreme Court.

Furthermore, where a court has been given discretion to make decisions, it follows that it has the authority to determine what would guide it in exercising its discretion. And in line with the trite principle that judicial discretion must be exercised judiciously and not capriciously, in line with the renowned norm that judicial discretion must be based on sound principles, this Court has in several authorities established guidelines within which it will exercise its discretion.

In the case of **Lawrence Musiitwa Kyazze Vs Eunice Busingye, (supra)** which this court considers the *locus classicus* in applications under **Rule 41**, Mr. Kyazze lost a legal battle over property, in the High Court, and was ordered to vacate the property in 30 days. He appealed and applied to the Supreme Court for a stay of execution pending determination of his appeal.

A preliminary objection was raised regarding the competence of the application based on the ground that no proper application had been made to the High Court first. The Supreme Court overruled the objection after finding that the application in

the lower court had been erroneously struck out and proceeded to hear the application.

The Court held inter alia that:

1."…This Court would prefer the High Court to deal with the application for stay on its merits first, before the application is made to the Supreme Court. However, if the High Court refuses to accept jurisdiction, or refuses jurisdiction for manifestly wrong reasons, or there is great delay, this Court may intervene and accept jurisdiction in the interest of justice.

2.This Court may in special and probably rare cases entertain an application for stay before the High Court has refused a stay, in the interests of justice to the parties. But before the Court can so act, it must be appraised of all the facts." (Emphasis Ours).

This Court reiterated this position in the case of **Akankwasa Damian vs. Uganda, Supreme Court Constitutional Application. No. 7 and 9 of 2011** where a preliminary objection was raised about the competence of the applications for stay of execution in this Court before they were lodged in the Constitutional Court first.

The Court while overruling the preliminary objection had this to say:

"***Clearly, this Court has wide discretion to entertain an application which is required by the Rules to be brought to the Court of Appeal first, in order to safeguard the right of appeal. However, this discretion must be exercised only in exceptional circumstances which will depend on each individual case. One of those circumstances could be the need to expedite the hearing of the application so that the substantive matter can be resolved expeditiously. In the present case, the applicant was facing criminal charges which needed to be determined expeditiously."***

In a more recent case, **Basajjabalaba and Another vs. Attorney General, Supreme Court Miscellaneous Application No. 04 of 2018,** this Court dealt with the issue of competence of an application for stay of execution which had been lodged in this Court before lodging it in the Court of Appeal. In rejoinder, Counsel for the applicant submitted that this Court could entertain the application under **Rules 2(2)** and **41(2)** of the Rules of the Court and that the applicants had been denied the opportunity to informally apply for an interim order of stay of execution at the time of delivery of the Court of Appeal judgment because the judgment was delivered by Justice Kakuru who was not part of the panel.

The Court while overruling the respondent's objection relied on **Rules 2(2), 6(2)(b), 41(1) & (2)** and stated inter alia:

"The granting of interim orders is meant to help the parties to preserve the status quo and then have the main issues between them determined by the full court as per the Rules…"

The Court further stated:

"Counsel for the respondent solely relied on Rule 41(2) for his position that the application is improperly before the Court. Counsel for the applicants, on the other hand submitted that while giving judgment, the applicants were deprived of an opportunity to informally apply for stay of execution since the Hon. Justice Kakuru, JA who read the judgment was not part of the Coram that heard and determined the case. This Court finds that the above is sufficient reason to entertain this application. This application is therefore properly before this Honourable Court."

From the foregoing cases it is clear that an applicant must establish exceptional circumstances to warrant the court to exercise its discretion under **Rule 41(2)**.

In this case, the exceptional circumstances mentioned are the following:

(i) The road map for the 2021 elections is already out and this application has a bearing on the 2021 General Elections

(ii) If the parties were sent back to the Constitutional Court that process would cause further delay.

(iii) The application raises peculiar constitutional matters which concern the rights of the electorate and their representatives in Parliament which call for expeditious hearing by this Court.

(iv) Time in this case is of the essence.

For instance, in the case of **Akankwasa Damian vs. Uganda (supra),** this Court stated, inter alia:

> "***Clearly, this Court has wide discretion to entertain an application which is required by the rules to be brought to the Court of Appeal first, in order to safeguard the right of appeal. <u>However, this discretion must be exercised only in exceptional circumstances which will depend on each individual case. One of the circumstances could be the need to expedite the hearing of the application so that the substantive matter can be resolved expeditiously.</u> In the present case, the applicant was facing criminal charges which needed to be determined expeditiously.***"(Underlining for emphasis)

We find the reasons advanced by the applicants persuasive, hence necessitating this Court to exercise its discretion to entertain the application under **Rule 41(2)** of the Rules of this Court. Consequently, this application is properly before this Court.

We shall now proceed to handle the merits of the application.

The Jurisdiction of this Court to grant a stay of execution is set out in **Rule 6(2) (b)** of the Rules of this Court provides as follows:

"(2) Subject to sub rule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may-

(b) In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 72 of these rules, order a stay of execution, an injunction of proceedings as the Court may consider just."

The Rule gives discretion to this Court, where a Notice of Appeal has been lodged in accordance with **Rule 72** of the Rules of this Court, to order stay of execution in circumstances where it deems fit.

This Court has in a number of cases laid down the principles governing grant of stay of execution notably in **Dr. Ahmed Muhammed Kisuule vs. Greenland Bank (in Liquidation) (supra) and Hon. Theodore Ssekikubo& Others vs. The Attorney General and Another,** (supra), where the Court found that the basic conditions that must be satisfied by an applicant for grant of an order for stay of execution have been held to be:

1. The lodgment of a Notice of Appeal and request for certified copies of the record of proceedings to enable him or her file a memorandum of appeal;
2. That the appeal has a high likelihood of success/ prima facie case has been made out
3. That the applicant shall suffer irreparable loss if the stay of execution is not granted or that the appeal will be rendered nugatory if the stay is not granted.
4. If 2 and 3 above have not been established, the Court must consider where the balance of convenience lies;
5. That the application has been lodged without undue delay.

We have carefully considered the affidavit evidence, submissions and authorities cited by counsel bearing in mind the aforementioned conditions.

The record shows that the judgment of the Constitutional Court was delivered on 27th December, 2019. The applicants filed their Notices of Appeal on 30th December, 2019. The first applicant filed their application for stay of execution on 9th January, 2020whereas the second applicant filed on the 10th day of January 2020.Counsel for the respondent conceded to this fact.

We find that the applicants have demonstrated seriousness to pursue the appeal and the application was lodged without undue delay. Requirements 1 and 5 therefore have been fulfilled.

In determining the likelihood of success of the appeal, the Court need not determine the constitutionality of the violations complained about at this stage as those are to be determined during the hearing of the appeal. See **J.W.R Kazzoora vs. M.L.S Rukuba(supra)** and **Davis Wesley Tusingwire vs. Attorney General, (Supreme Court Constitutional Application No. 1 of 2014).** In the case of **Davis Wesley Tusingwire vs. Attorney General** (supra) this is what the court stated:

"**We are also of the view that at this stage we cannot go into the Constitutionality of the Directions issued by the Chief Justice. Those arguments will be considered at the appeal stage.**"

We have carefully considered the affidavit evidence and submissions by counsel for both parties on both points and find that the applicants have demonstrated that the intended appeals raise serious points of law that warrant consideration by this court.

On whether the appeal will be rendered nugatory if the stay of execution is not granted, the applicants argued that if the execution of the orders of the Constitutional Court are not stayed, the Members of Parliament would be removed from Parliament before the determination of the appeal which would render the appeal nugatory. On the other hand, Counsel for the respondent contended that the applicants had failed to demonstrate how these appeals would be rendered nugatory.

The main purpose of this application is to preserve the status quo that the applicants' right of appeal are safeguarded pending the disposal of the appeals. See **Hon. Theodore Ssekikubo& Others vs. The Attorney General and Another,** (supra). It was argued by the applicants that the tenure of the Members of Parliament is being threatened by the possible implementation of order (a) of the Constitutional Court decision in Constitutional Petition No. 20 of 2018 where the Court nullified their election. They further contended that the said order if implemented would result in the ejectment of the Members of Parliament before the determination of the appeal which would render it nugatory. Counsel for the respondent, opposed the applicant's contention.

We find that the intended appeal involves matters of significant public importance and raises serious constitutional and legal matters which warrant determination by this Court. It is the duty of this court to ensure that the intended appeals if successful are not rendered nugatory. On the contention by the respondent that the elections were null and void we find that this is a matter which would be determined after hearing the appeal.

Having found that the applicants have fulfilled requirements No.2 and 3 for grant of this application, we do not find it necessary to consider where the balance of

convenience lies. Such consideration is relevant only where the Court is in doubt. See: **Robert Kavuma vs. Hotel International Ltd SCCA No. 8 of 1990.**

In the result, we find that the applicants satisfy the conditions necessary for grant of a stay of execution. We accordingly grant this application with the following orders:

a) The decision, decree and orders of the Constitutional Court in Constitutional Petition No. 20 of 2018 delivered on 27th December, 2019 are hereby stayed pending the determination of the applicants' intended appeals or until further orders of this Court.
b) The Registrar of the Constitutional Court is hereby directed to expeditiously produce the record of proceedings to enable the applicants file their appeal.
c) The costs of this application shall abide the outcome of the intended appeals.

Dated at Kampala this .....day of 2020

Stella Arach-Amoko

JUSTICE OF THE SUPREME COURT

Rubby Opio-Aweri

JUSTICE OF THE SUPREME COURT

Prof. Lillian Tibatemwa-Ekirikubinza

JUSTICE OF THE SUPREME COURT

Paul Mugamba

JUSTICE OF THE SUPREME COURT

Richard Buteera

JUSTICE OF THE SUPREME COURT

Mike J. Chibita

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMAPALA

[Coram: Kisaakye; Arach-Amoko; Opio-Aweri; Tibatemwa-Ekirikubinza; Mugamba; Buteera; Chibita JJ.S.C.]

CONSTITUTIONAL APPLICATION NO. 1 OF 2020

(ARISING FROM CONSTITUTIONAL PETITION NO. 20 OF 2018)

ATTORNEY GENERAL.....APPLICANT

v

EDDIE KWIZERA.....RESPONDENT

CONSOLIDATED WITH

CONSTITUTIONAL APPLICATION NO.3 OF 2020

(ARISING FROM CONSTITUTIONAL PETITION NO. 3 OF 2018)

ELECTORAL COMMISSION.....APPLICANT

v

EDDIE KWIZERA.....RESPONDENT

PARTIAL DISSENTING RULING OF DR. KISAAKYE, JSC

I have had the benefit of reading in draft, the majority Ruling in the Consolidated Applications No. 1 and No. 3 for Stay of Execution of the Orders of the Constitutional Court rendered in Constitutional Petition No. 3 of 2018.

I agree with the majority decision to allow these applications and to grant the applicants an Order for Stay of Execution. I also agree with the other Orders made in the majority Ruling of this Court.

Although I agree with the majority Ruling to allow these applications, I disagree with the reasoning of the majority Justices holding that an applicant who has not first complied with Rule 41(1) of the Judicature (Supreme Court) Rules. must prove that there are exceptional circumstances to warrant the Court to find an application brought under Rule 41(2) of the same Rules competent.

Rule 41 of the Judicature (Supreme Court) Rules provides as follows:

> *"41. Order of application to the Court and to Court of Appeal*
>
> *(1) Where an application may be made either to the Court or to the Court of Appeal, it shall be made to the Court of Appeal first.*
>
> *(2) Notwithstanding sub rule (1) of this rule, in any civil or criminal matter, the Court may, in its discretion, on application or of its own motion, give leave to appeal and make consequential order to extend the time for doing any act, as the justice of the case requires, or entertain an application under rule 6(2)(b) of these Rules to safeguard the right of appeal, notwithstanding the fact that no application has first been made to the Court of Appeal."*

Before I delve into my reasons for writing this partial dissent, a brief background to this issue is necessary. During the course of the hearing of this application, counsel for the respondent raised an objection about the competency of the two consolidated applications. Counsel for the respondent submitted that the applicants were required under Rule 41(1) of the Rules of this Court to make their applications to the Constitutional Court first, but they had not done so.

Secondly, counsel contended that although this Court is vested with discretion to hear these applications even though an applicant has not applied to the Constitutional Court first, the applicants were required to place material before

this Court that would warrant this court to hear the applications, despite the applicant's failure to comply with Rule 41(1). Counsel contended that the applicants had not placed any material justifying the filing of these applications to this Court without complying with Rule 41(1). He prayed that the applications be dismissed.

The Attorney General refuted the respondent's objection and contended that Rule 41 of the Supreme Court Rules gives this Court concurrent jurisdiction with the Court of Appeal. Relying on Rules 41(2) of the Supreme Court Rules, the Attorney General contended that the authority relied on by the respondent was delivered before the 1995 Constitution came into force. Counsel contended that this Court had already settled the issue of whether applications lodged in this Court under Rule 41(2) can be entertained. He relied on *Basajjabalaba & Anor v Attorney General, Supreme Court Miscellaneous Application No. 4 of 2018*

Furthermore, counsel submitted that the Rules do not require an applicant to justify the omission to apply to lower Court but rather made it optional for the applicant to either apply to the Constitutional Court or to this Court.

Both applicants thus prayed that we allow the applications and grant the orders for Stay of Execution of the Orders of the Constitutional Court, pending the determination of the Appeal.

The issue of how this Court should interpret and apply Rule 41(2) in light of Rule 41(1) is not new to this Court. As I will show later in my Ruling, the issue has arisen in several Constitutional and Civil applications seeking for a Stay of Execution and other orders, which have already been handled and disposed of by this Court.

What is however troubling to me is that this Court has issued three different interpretations and taken three different approaches which are in conflict with each other. These different interpretations have either already caused or will cause confusion and uncertainty among those whom we are mandated to serve – the people of Uganda. This confusion and uncertainty arises from the fact that given the differing interpretations, it will not always be obvious which direction the Court will take to determine a similar application brought before it.

In allowing these consolidated applications, the majority Justices have held as follows:

> "... *From the foregoing cases, it is clear that an applicant must establish exceptional circumstances to warrant the Court to exercise its discretion under Rule 41(2). In this case, the exceptional circumstances mentioned are the following:*
>
> *i) The road map for the 2021 elections is already out and this application has a bearing on the 2021 General Elections.*
>
> *ii) If the parties were sent back to the Constitutional Court, that would cause a delay.*
>
> *iii) The application raises peculiar constitutional matters which concern the rights of the electorate and their representatives in Parliament which call for expeditious hearing by this Court.*
>
> *iv) Time in this case is of the essence."*

I agree with the reasons advanced by the majority as warranting a grant of stay of execution to the applicants by this Court under Rule 6(2)(b) of the Rules of this Court. However, with all due respect to my learned colleagues, I disagree with this part of the Ruling requiring that exceptional circumstances be shown by an applicant before an application filed directly to this Court under Rule 41(2) of the Supreme Court Rules can be properly before this Court. It is my view that the

reasons advanced by the majority go to the merits of these applications and not to their competency. The Court should therefore have de-linked the issue of competency of the applications from the merits of the applications.

In arriving at the requirement that an applicant must prove exceptional circumstances, the majority have cited several decisions of this Court, namely *Lawrence Musiitwa Kyazze v Eunice Busingye, Supreme Court Civil Application No. 18 of 1990; Akankwasa Damian v Uganda, Constitutional Applications No. 7 & 9 of 2011* and *Basajjabalaba & Anor v Attorney General, Supreme Court Miscellaneous Application No. 4 of 2018.*

In the present applications, the majority Justices have followed the reasoning we gave for dismissing the *Akankwasa* applications, where we observed as follows:

> *" ... Clearly, this Court has wide discretion to entertain an application which is required by the Rules to be brought to the Court of Appeal first, in order to safeguard the right of appeal. However, this discretion must be exercised only in exceptional circumstances which will depend on each individual case. One of those circumstances could be the need to expedite the hearing of the application so that the substantive matter can be resolved expeditiously. In the present case, the applicant was facing criminal charges which needed to be determined expeditiously."*

In *Akankwasa (supra)*, the applicant had filed two Constitutional applications for stay of execution. We heard the applications and dismissed them instantly in Court immediately after the hearing and reserved our reasons for the dismissal. Subsequently, we gave our reasons, where the above quote is drawn from. What is important to note is that the exceptional circumstances standard the court set was in reference to when the court should exercise its discretion to allow or dismiss an application for stay of execution. The exceptional circumstances

standard was not intended to apply to determining whether an application filed under Rule 41(2) by an applicant who has not complied with Rule 41(1) is a competent application before this Court. This is because the Court had already heard the merits of the two applications and dismissed them, by the time it released its reasons for dismissing the application

In my view, we were wrong when we introduced the exceptional circumstances standard in ***Akankwasa,*** where incidentally I was part of the Coram and when we held that exceptional circumstances must be proved before we can exercise our discretion under Rule 41(2), whereas this is not required by our Rules. This is because Rule 41(2) is written in very clear terms. The Rule permits this Court in our *discretion, on application or of our own motion, ... to entertain an application made under rule 6(2)(b) of the Supreme Court Rules to safeguard the right of appeal, notwithstanding the fact that no application has first been made to the Court of Appeal.* The underlined text is language drawn from Rule 41(2).

It is my view that Rule 41(2) already lays out the parameters when this Court can exercise its discretion to entertain an application for stay of execution filed under rule 6(2)(b) of the Supreme Court Rules. This can be in either of two instances, namely when a party who has not complied with Rule 41(1) makes an application before us seeking for a stay of execution or when the Court acts on its own motion. But in either event, the discretion must be exercised "*to safeguard the right of appeal.*"

It is therefore my view that the Court in ***Akankwasa*** (supra) inadvertently re-wrote Rule 41(2) of the Rules of this Court when it introduced the "exceptional circumstances" requirement. Section 41(1) of the Judicature Act, Cap 13 of the Laws of Uganda, vests the power to make Rules of procedure for this Court in

the Rules Committee. This Court has no such powers to do so and therefore a decision of this Court that attempts to do so is wrong and should not be followed.

In the present case, the majority have now adopted and extended the "exceptional circumstances" requirement, which was wrongly introduced by *Akankwasa* (supra), this time around to determine whether an application for stay of execution brought before this court under Rules 6(2)(b) and 41(2), without first complying with Rule 41(1), can be entertained by this Court. With due respect to my colleagues, I respectfully disagree with this holding.

The majority have further argued that our decisions in *Musiitwa* (supra), *Akankwasa* (supra) and *Basajjabalaba* (supra), all provide the established guidelines that this Court has set over the course of time within which the Court exercises its discretion granted under Rule 41(2) of the Rules of this Court and which all provide a basis for the requirement that an applicant proceeding under Rule 41(2) must prove exceptional circumstances.

However, a review of the decisions of this Court the majority have relied on as well as others not cited in the majority Ruling does not bare out the position presented above. Rather, a review of several decisions of this Court shows that we have adopted different approaches and interpretations in our previous decisions as to when an application lodged under Rule 41(2) by an applicant without first complying with Rule 41(1) of the Rules of this Court, is competently before this Court. I will consider some of the decisions of this Court that bring out these contradictory approaches to the relationship between Rule 41(1) and 41(2).

In *Lawrence Musiitwa Kyazze v Eunice Busingye, Supreme Court Civil Application No. 18 of 1990*, which was rendered before the current Constitution came into force, we held as follows:

> *"... This Court would prefer the High Court to deal with the application for a stay on its merits first, before the application is made to the Supreme Court. However, if the High Court refuses to accept jurisdiction, or refuses jurisdiction for manifestly wrong reasons, or there is a great delay, this Court may intervene and accept jurisdiction in the interest of justice."*

The Court continued as follows:

> *"This Court may in special and probably rare cases entertain an application for stay before the High Court has refused a stay, in the interests of justice to the parties. But before the Court can so act, it must be appraised of all the facts."*

This decision was decided prior to the coming into force of the Constitution which established the Court of Appeal/Constitutional Court. It is however still relevant because the Supreme Court Rules it discusses are still applicable to the present day.

This standard was applied in *Joel and Margaret Kato v Nuulu Nalwoga, Civil Application No. 12 of 2011*, Kitumba, JSC, sitting as a single Justice where it held as follows:

> *"Counsel for the applicants filed the present application in this Court and not the Court of Appeal which heard the appeal and as well acquainted with the facts. When counsel was asked by Court why he did not file the application in the Court of Appeal, his reply was that he had the choice to file this application in either Court... I am aware that this Court has been*

hearing and granting such applications but that is discretional according to the circumstances of each application. In my view, that is what is meant by the provision in sub rule (2) that I have underlined. I am fortified in this view by the authority of Lawrence Musiitwa Kyazze v Eunice Busingye"

This standard was most recently restated and applied in *Wasswa David v Ssebiragala Ronald Lule, Supreme Court Civil Application No. 17 of 2018.* In this application, a full bench of this Court dismissed an application seeking for leave to file a third appeal where the applicant who incidentally had complied with Rule 41(1), filed another application to this Court under Rule 41(2) citing delay.

Refering to our earlier decisions of *Musiitwa* and *Nalwoga* (supra) the Court held as follows:

"Unlike in the instant application, in the above cases, the Court was dealing with a situation where the applicant had not lodged an application in the Court of Appeal first as required by rule 41(1) of the Rules of this Court, However, the Court also pointed out that where there is great delay in hearing/determining the application before the Court of Appeal, this Court may intervene and accept jurisdiction in the interests of justice. In the present case, Miscellaneous Application No. 45 of 2017 was lodged in the Court of Appeal on the first day of March 2017. On that same day, the applicants' lawyers wrote a letter to the Deputy Chief Justice requesting him to urgently fix the above application. This was followed by another letter on the 6th day of June 2017 still requesting that the application is fixed and heard. The application has to this date not been fixed. Since then, the applicant has not taken any further step to have the application fixed. Instead, on the 4th day of May 2018, the applicant filed the present application. The period between filing the Miscellaneous Application No.

45 of 2017 in the Court of Appeal and the present application is one year and two months. In the premises, we do not accept the applicant's counsel submission that this qualifies as unreasonable delay by the Court of Appeal to hear and determine the matter. The Court cannot simply take over the role of the Court of Appeal."

Secondly, the interpretation in ***Akankwasa*** also differs from the one that the Court took in two other Constitutional Applications, namely ***Sekikubo & Others v Attorney General & Others, Constitutional Applications No. 4 of 2014*** and ***Basajjabalaba*** (supra). These were also Constitutional Applications which this Court heard on their merits and granted, even though the respective applicants had not complied with Rule 41(1) of the Rules of this Court. Although the respondent did not raise the issue of competency of the application in the ***Sekikubo*** application, the issue was raised in the ***Basajjabalaba*** application. Interestingly, we did not apply the "exceptional circumstances" standard we had earlier imposed in the ***Akankwasa*** application in disposing of either of the two named applications.

In the ***Basajjabalaba*** application, we considered Rule 41(1), 41(2) in conjunction with Rule 6(2)(b) of our Rules and held as follows:

> "***The above provisions read together give this Court discretion to entertain an application that should have been made to the Court of Appeal at first instance.***"

We relied on our earlier decision ***Sekikubo (supra)*** and ***Yakobo Senkungu & Others v Cresensio Mukasa, Supreme Court Civil Application No. 5 of 2013.***

Worth noting is the fact that while the ***Akankwasa*** applications previously discussed were constitutional applications seeking stay of execution, ***Wasswa (supra)*** was a civil application which was seeking for this Court's leave to file a

third appeal. But while this may be so, the Court did not give this as the reason for reaching a different interpretation and standard. The Ruling is nevertheless discussed here because this Court also pronounced itself on the applicability of Rule 41(1) and (2).

The two Rulings of *Sekikubo* and *Basajjabalaba* show a third approach this Court has taken to interpreting and applying Rule 41(2) *vis a vis* 41(1) of the Rules of this Court. The essence of this approach is that although Rule 41(1) requires a party to make his or her application to the Court of Appeal first, Rule 41(2) grants this Court concurrent jurisdiction with the Court of Appeal and permits this Court either on its own motion or on an application to hear and to dispose on its merits an application for stay of execution even where the applicant has not first complied with Rule 41(1).

In *Nyakaana & Sons Ltd v Kobusingye & 16 Others Civil Application No.13 of 2017* where I sat a single Justice of this Court, I followed this approach and summarised this position as I understand it as follows:

> *"...there is a matter that I have deemed proper to dispose of by way of a preliminary point. This relates to matters over which this Court and the Court of Appeal have concurrent jurisdiction ... Rule 41(1) of the Rules of this Court provides as follows:*
>
> > *"Where an application may be made to either the Court or to the Court of Appeal, it shall be made to the Court of Appeal first."*
>
> *It therefore follows that since this Court and the Court of Appeal have concurrent jurisdiction over this application, the applicant was enjoined to file its application in the Court of Appeal first. ...*
> *However, I note that Rule 41(2) of the Rules of this Court, permits this Court to entertain an application under Rule 6(2)(b) (that is an application*

for stay of execution) to safeguard the right to appeal, even though the applicant has not first made his or her application to the Court of Appeal. Given that the present application arises from an application for stay of execution, I will in the interest of justice, proceed to determine the merits of this application vis a vis the requirements the applicant must first satisfy, in order for the Court to grant it an interim order of stay of execution."

It is still my view that Rule 41(2) together with 41(1) of the Rules of this Court confer concurrent jurisdiction on the Court of Appeal as well as on this Court. But as I noted before, this interpretation of concurrent jurisdiction, is only but one of the different interpretations we have given to the application of Rule 41(2). Beyond my own interpretation, there are several other single Judge applications which have followed the ***Sekikubo*** precedent and proceeded to hear and allow applications either for interim stay or for stay of Execution where the applicants did not and were not required by the Court to meet the ***Akankwasa*** standard of proving exceptional circumstances. See for example ***Drake Lubega v Attorney General & Others, Misc. Application No. 13 of 2015*** and ***Lweza Clays Ltd & Anor v Tropical Bank Limited & Another, Misc, Civil Application No. 31 of 2018.***

Recently, this Court applied the concurrent jurisdiction interpretation in ***Katayira Francis vs Rogers Bosco Bugembe, Civil Application No. 22 of 2016***, which is another full bench Ruling. So, the concurrent jurisdiction interpretation without requiring a party to first comply with Rule 41(1) or to show that there are exceptional circumstances is also still being applied by this Court when dealing with applications brought to this Court under Rule 41(2).

I have highlighted the different interpretations and standards reached by this Court. There is the ***Musiitwa*** interpretation and standard which holds that if the

applicant does not comply with Rule 41(1), this Court will only interfere in *"special and probably rare cases"* where the Court of Appeal "*refuses to accept jurisdiction, or refuses jurisdiction for manifestly wrong reasons, or there is a great delay,"* Under that standard, *"this Court may intervene and accept jurisdiction in the interest of justice."*

Secondly, there is the *"comply with Rule 41(1) first or show that exceptional circumstances exist before your application can be competently before this Court"* interpretation/standard, which has been adopted in the present applications.

Thirdly, there is the *"concurrent jurisdiction standard"* which recognizes that while Rule 41(1) requires applicants to make their applications to the Court of Appeal first, Rule 41(2) permits this Court at its discretion to entertain an application for stay of execution to safeguard the right of appeal and that therefore, such an application is competent. This standard does not require proof of exceptional circumstances or strict require compliance with Rule 41(1).

I am aware that I have not exhausted highlighting full bench and single Justice Rulings where this Court has taken one of the three different interpretations/approaches discussed above. But, in my view, it is not the exhaustiveness of the existing conflicting precedents of this Court that is important. What is most important is that we have rendered three different interpretations regarding the applicability of Rule 41(2) of the Rules of this Court, which we alternate in applying when we are dealing with applications for stay of execution and others falling under this Rule. In my view, this should stop.

It should be evident that the interpretations and standards we have adopted in dealing with either competency or merits of applications for stay of execution and

other applications failing under Rule 41(2) are somehow conflicting with each other and also confusing. These Rulings I have referred to underscore the point I am making in this Ruling. Applicants seeking stay of execution should not be coming to the Supreme Court with the fate of their applications dependent on which interpretation either a Single Justice or a given Coram of the Court subscribes to. There should be consistency in how we apply our Rules.

The people of Uganda foresaw the possibility of this final Court of the land to make mistakes. They therefore made provision for correction of our mistakes in Article 132(4) of the Constitution of Uganda, which provides as follows:

> *"The Supreme Court may, while treating its own previous decisions as normally binding, depart from previous decisions when it appears to it right to do so; and all other Courts shall be bound to follow the decisions of the Supreme Court on questions of law"*

It is evident that the above Article gives this Court a right to depart from its previous decisions when it appears right to do so. Being constituted as a Coram of seven members of this Court in the present consolidated applications, we have had an opportunity in disposing of these applications, to utilize the powers vested in this Court by Article 132(4) of the Constitution. The missed opportunity was to remove the inconsistencies I have highlighted in this Ruling in our interpretation of the application of Rule 41(2) in cases where an applicant has not complied with sub rule 41(1) of the Rules of this Court. The inconsistencies and confusion are therefore likely to continue.

The Constitution of Uganda from which we derive our powers obliges us to accord all litigants who come before the Court the equal protection of the law and equal treatment under the law. Inherent in this Constitutional obligation is a

requirement that we, the last Court of the land, must lead by example by being consistent in our interpretation of the laws and rules and by correcting ourselves at the earliest opportunity whenever it becomes apparent that we are sending mixed signals to the lower courts or to the litigating public.

The inconsistencies I have highlighted in this Ruling are clearly evident. It is only by adhering to the dictates of the Constitution that we will be able to play our rightful role in this country.

Before I take leave of this matter, I wish to point out that the inconsistent interpretations have arisen from the way Rules 41(1) and 41(2) were written. In my view, Rule 41(2) was written to immediately negate what Rule 41(1) requires of an applicant.

In my view, the situation could be rectified by amending Rule 41(2) of the Judicature (Supreme Court) Rules so that we have a clear rule that lays out a clear criteria when an applicant can file an application for stay of execution of the orders of the Constitutional Court or the Court of Appeal, in this Court. The ball now remains in the hands of the Rules Committee.

Dated at Kampala this.....4th..... day of June..... 2020

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HON. DR. ESTHER KISAAKYE JSC