THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CORAM: HON JUSTICE L.E.M. MUKASA KIKONYOGO, DCJ

HON JUSTICE G.M. OKELLO, JA

HON JUSTICE A.E.N.MPAGI-BAHIGEINE, JA

HON JUSTICE C.N.B. KITUMBA, JA

HON JUSTICE C.K. BYAMUGISHA, JA

CONSTITUTIONAL PETITION NO. 14 OF 2005.

KWIZERA EDDIE:: PETITIONER.

VERSUS

ATTORNEY GENERAL:::::::::::::::::::::::::::::::::::::: RESPONDENT.

JUDGEMENT OF HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

Kwizera Eddie, hereinafter referred to as the petitioner, filed this petition against the Attorney General seeking the following declarations:

"(a) That article 80(4) of the Constitution as amended by Act No. 11 of 2005 is in contravention of and inconsistent with articles 1(4) and 38(1) of the same Constitution.

(b) That the said article 80(4) as amended by Act 11 of 2005, is discriminatory of the petitioner's rights enshrined in articles 21(1) and 38(1) of the Constitution and infringes on the petitioner's inherent rights guaranteed by the same Constitution.

(c) In the further alternative make an order or declaration defining the term "person employed in any Government department or agency of the Government" appearing in article 80(4) of the Constitution as amended by Act No. 11 of 2005.

(d) Make an order condemning the respondent in costs of this petition."

The petition is based on the following grounds:

"(a) That article 80(4) of the Constitution of the Republic of Uganda as amended by the Constitution Amendment Act 2005 (Act No. 11 of 2005) is in contravention of and inconsistent with articles 1(4) and 38(1) and discriminatory of the petitioner's rights enshrined in articles 21(1) of the Constitution of the Republic of Uganda.

(a) That whereas the Constitution of the Republic of Uganda, 1995 defines a "*Public officer*" there is no definition of "*a person employed in any government department or agency*" as it appears in article 80(4) thus making the article ambiguous and open to abuse and misinterpretation.

(c) Article 80(4) of the Constitution of the Republic of Uganda as amended by Act No. 11 of 2005 infringes on the petitioner's inherent rights guaranteed by the same Constitution."

It was filed under **Article 137 of the Constitution. The rules of the Constitutional Court (Petitions for Declarations under Article 137 of the Constitution) Directions, 1996; and The Interpretation of the Constitution (Procedure Rules, 1992** (Modification) Directions 1996. It was supported by his own affidavit dated 3-10-2005.

Mr. Paul Kiapi appeared for the petitioner while Mr. Joseph Matsiko, Ag Director Civil Litigation, represented the respondent Attorney General.

The agreed facts were that:

Parliament amended article 80 of the Constitution by introducing clause 4 to that Article, which provides:-

> ***"(a) Under the Multiparty System, a public officer or a person employed in any government department or agency of the government or an employee of a local government or any body in which the government has a controlling interest who wishes to stand in a general election as a Member of Parliament shall resign his or her office at least ninety days before the nomination day."***

The petitioner contends that article 80(4) of the Constitution contravenes articles 1(4), 21(1) and 38(1) of the same Constitution which contention the respondent denies.

The agreed issues were:

1. **Whether in so far as the petition seeks to have parts of the Constitution nullified, it is incompetent.**

2. **Whether article 80(4) of the Constitution is inconsistent with and in contravention of articles 1(4), 21(1) and 38(1) of the same Constitution.**

3. **Alternatively what is the proper interpretation of the term/phrase *"a person employed in any government department or agency of the government?"***

4. **Whether the petitioner is entitled to the remedies sought.**

Regarding issue No.1, Mr. Kiapi submitted that the petition was seeking to nullify certain provisions. It was competent and that this court had jurisdiction to hear and determine it. He argued that it is settled law that this court has jurisdiction to construe one provision against another, citing **P. K. Semwogerere and 2 others v Attorney General, Constitutional Petition No. 1 of 2002** which, with respect, he must have misconstrued. Learned counsel maintained that the court had jurisdiction to nullify any part of it as against another and that therefore, this petition was competent and not incompetent as contended by the respondent.

Mr. Matsiko opposed the petition and orders sought thereunder contending that the powers of this court did not involve nullifying any part of the Constitution but rather harmonising all parts concerning a subject matter. Referring to the different judgements in Constitutional Petition No.1/2001, learned counsel asserted that their Lordships did not at any time talk of *"nullifying"* the Constitution but rather of "*harmonising"* it so as to give effect to all its provisions. He submitted that this court has thus no power to nullify any part thereof and that Mr. Kiapi's argument rendered the petition incompetent. He prayed court to answer Issue No.1 in the affirmative.

This court sitting as a Constitutional Court is a creature of Article 137 from which it derives its powers. The scope of these powers has been highlighted by the Supreme Court and this court in various judgements, drawing from various common wealth and foreign authorities. It is unnecessary to reproduce all the pertinent excerpts to this issue from **Constitutional**

Petition No. 1/2001. P. K. Semwogerere And Others v Attorney General, as they all concur. Suffice it to cite only a few. In the judgement of Odoki CJ at page 4, his Lordship said:

> **"…The second question is one of harmonisation. The Constitutional Court was in error to hold that it did not have jurisdiction to construe one provision against another in the Constitution. It is not a question of construing one provision against another, but of giving effect to all the provisions of the Constitution. This is because each provision is an integral part of the Constitution and must be given meaning or effect in relation to others. Failure to do so will lead to an apparent conflict within the Constitution."**

The cause célèbre on the point is **Smith Dakota v North Carolina 192 1940 268** where the Supreme Court of USA pronounced:

> **"It is an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted so as to effectuate the great purpose of the instrument."**

It is thus clear that this court is not mandated to nullify any provision of the Constitution but rather to harmonise all the provisions on a subject as much as possible so as to bring out the spirit of the great document as a whole. As indicated in the judgement of Mulenga JSC at page 4, the learned Justice of the Supreme Court said:

> **"…There is no authority other than the Constitutional Court, charged with the responsibility to ensure that harmonisation. Even where it is not possible to harmonise the provisions brought before it, the court has the responsibility to construe them and pronounce itself on them, albeit to hold in the end that they are inconsistent with each other. Through the execution of that responsibility, rather than shunning it, the court is able to guide the appropriate authorities, on the need, if any, to cause harmonisation through amendment…"**

Thus where the various articles are irreconcilable thus rendering harmonisation impossible, this court would only recommend an appropriate course of action to the appropriate

authorities. This is, however, not to be confused with the correlated power under article 2 to declare null and void an Act of Parliament or parts thereof, be it a Constitution (Amendment) Act or ordinary Act which the court might find to be inconsistent with the Constitution since the Constitution is the Supreme Law. Article 2 states:

> ***"2(1) This Constitution is the Supreme Law of Uganda and shall have binding force on all authorities and persons throughout Uganda.***
>
> ***(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency be void."***

Thus to answer Mr. Kiapi's concerns, the two powers though correlated should not be interchanged. This court would not nullify any part of the Constitution. I would thus answer issue No. 1 in the negative.

Regarding issue No.2, as to whether article 80(4) of the Constitution is inconsistent with and in contravention of article 1(4), 21(1) and 38(1) of the same Constitution, Mr. Kiapi pointed out that in as far as article 1(4) provides for free and fair elections; article 80(4) whittles away free and fair elections. He relied on **Election Petition No.1 of 2001 Dr. Kiiza Besigye v Museveni Yoweri Kaguta** where the concept of free and fair elections was expansively examined by their Lordships and submitted that the resignation envisaged under the amendment discriminatively applied to some people and not to others. He was further concerned with the time factor involved, maintaining that the amendment was enacted too late to allow sufficient time for the targeted officers to tender in their resignations, whose procedure was too elaborate, before the prescribed time for nomination. The nomination days which were scheduled for 12th and 13th January 2006 were only gazetted on 21-11-2005. He pointed out that by enacting article 80(4) Parliament legislated inequality in the political arena by requiring a certain sector of citizens to resign their jobs 90 days before nomination. Furthermore, it left ambiguous the term *"a person employed in a Government Department or Agency"* thus rendering the article open to misinterpretation due to its ambiguity.

Regarding article 38(1) as to the right to participate in the affairs of Government, Mr. Kiapi submitted that article 80(4) is discriminatory in that it has the effect of unlevelling the playing field. It tends to close out many citizens from participating in elections and Government.

Mr. Matsiko, however, contended that article 1(4) only gives the people a right to determine how they wish to be governed. The requirement of public officers to resign does not divest

the public of their right to be governed as they wish. It does not infringe on the right to free and fair elections. Furthermore, it was not shown to court how unreasonable the 90 days period in article 80(4) was, which ground was never ever pleaded in the petition. Concerning article 21(1) Mr. Matsiko asserted that Article 80(4) is not based on any of the attributes of discrimination as defined in article 21(3). He submitted that article 80(4) only required one to resign if one intended to stand for election.

Regarding article 38(1) Mr. Matsiko stated that it is about giving the public a right to participate in the affairs of Government individually or through representatives. The requirement to resign does not in any way divest Ugandans of their right to participate in governance. On the contrary Article 80(4) allows everybody in governance to resign public office and be able to participate unhindered. Mr. Matsiko prayed court to answer Issue No.2 in the negative.

I will start off with article 80(4) and 1(4) which read as follows:

> ***"80 (4) under the Multiparty System, a public officer or a person employed in any government department or agency of the government or an employee of a local government or anybody in which the government has a controlling interest who wishes to stand in a general election as a member of Parliament shall resign his or her office at least ninety days before the nomination day."***
>
> ***"1(4). The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda."***

Whether or not article 80(4) whittles away free and fair elections, it is necessary to look at **Election Petition No.1 of 2001, Dr. Kiiza Besigye v Museveni Yoweri Kaguta** in which article 1(4) was expansively examined. In his judgement, the Chief Justice Ben Odoki commenting on article 1(4) said, inter alia:

> **"… the concept of free and fair elections is not defined in the Constitution or in any Act of Parliament…**
>
> **To ensure that elections are free and fair there should be sufficient time given for all stages of the elections, nominations, campaigns, voting and counting of votes… Candidates should not be deprived of their right to**

stand for elections, and the citizens to vote for candidates of their choice through unfair manipulation of the electoral process by electoral officials. There must be a levelling of the ground so that the incumbents or government ministers and officials do not have an unfair advantage.

… Election Law and guidelines for those participating in elections should be made and published in good time. Fairness and transparency must be adhered to in all stages of electoral process…"

His Lordship Oder JSC (RIP) on the same point concurred:

"Neither our Constitution nor the electoral laws applicable to this case, define the meaning of '*free and fair* elections. In my view, for a conclusion that an election has been free and fair, it requires an assessment of the entire process of the election. It begins with the electoral laws that govern all the aspects of the election. In the instant case, the court is not concerned with validity of the laws but with the need for a level playing field for all participants… observance of the fundamental rights and freedom of the individual during the electoral process, as at all times, is also an important aspect of free and fair elections."

His Lordship Mulenga JSC similarly observed:

"… It also entails equal opportunity among candidates to access the electorate, as well as, among the electorate to choose between the competing candidates."

Article 80(4) was enacted under the Constitution (Amendment) (No.3) Act, 2005 Section 18(d). It came into effect on 26th September 2005. The nomination days scheduled for 12th and 13th January 2006 were gazetted on 23rd December 2005. The aspiring candidates had to resign 90 days before nomination. Though article 252 prescribes the procedure for resignation from an office under the Constitution, to be simply by letter addressed to the appointing or electing authority, it becomes clear that there was no sufficient time to make the 90 days prescribed prior to January 12th and 13th. This was the first hurdle the Electoral Commission had to resolve. Could the aspirants resign or could they not? This remained unresolved by the legislators and responsible authorities. Time was of essence. The law was late and therefore ineffective. It should have been enacted well in time. Thus, the would be

free and fair elections hit an insurmountable hurdle right from the start. This was, however, one aspect of the matter.

The second aspect is the formulation of the entire amendment (article 80(4)). In this respect, one of the principles of constitutional interpretation provides that all the articles bearing upon or pertinent to a subject under discussion must be brought within purview when discussing a related article. Thus when considering the term 'public officer' articles 80(4), 175 and 257(1) and (2) (b) must all be considered together.

These others read as follows:

> **"175. In this chapter, unless the context otherwise requires-**
>
> **"*Public officer*" means any person holding or acting in an office in the public service;**
>
> **"*public service*" means service in any civil capacity of the Government the emoluments for which are payable directly from the consolidated fund or directly out of moneys provided by Parliament."**

Similarly article 257(1) defines

> ***'public officer'* to mean an office in the public office, *'public officer'* means a person holding or acting in any public office and *'public service'* means service in a civil capacity of the government or of a local government.**

The foregoing must, nonetheless, be read with article 257(2) (b) which states:

> **"(b) a reference to an office in the public service does not include a reference to the office of the President, the Vice – President, the Speaker or Deputy Speaker, a Minister, the Attorney General, a Member of Parliament or a Member of any commission, authority, council or committee established by this Constitution."**

It is thus clear that while article 80(4) targets public officers as defined above in an attempt to level the playing field, which would in itself be commendable, nonetheless, it excludes the political class as specified under article 257(2)(b). It cannot be disputed that it is the political class who are the main players in the electoral playing field. They are better equipped or facilitated by the state than any ordinary aspirant or public officer specified under articles 175 and 257(1). This, therefore, gives them leverage in every way over these other contenders. I

can do no better than refer to the holding in the judgement of the Chief Justice, Ben Odoki, in Election Petition No.1 of 2001 (supra) where his Lordship states:

> **"…there must be a levelling of the ground so that the incumbents or government Ministers and officials do not have unfair advantage."**

I think it does not augur well with the principle of fair play for the legislature to omit or to remain silent about the main political players in the same field, under article 257(2) (b), when attempting to level the playing field by enacting article 80(4). This renders it incontestably inconsistent with article 1(4). I would therefore agree with Mr. Kiapi's grievances and answer this in the affirmative.

As regards article 21(1), which reads:

> ***"21(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law."***

The entire article 21 safeguards equality and freedom from discrimination. *'Discrimination'* under the article is defined under clause (3) to mean *'give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standings, political opinion or disability.'*

It is noteworthy that for the present purpose, a big percentage of the political class, exonerated under article 257(2) (b) subscribes to the same political opinion. Impliedly, this political leaning would benefit immensely over the other political groupings and individuals. The relevance of article 21 to the electoral process, in my view, is simply to bar anyone from giving different treatment to different persons, by employing the state machinery to favour certain classes of candidates. Article 80(4) has such effect. The exonerated political class would still enjoy the social and financial muscle and protection denied to other contenders while electioneering. Clearly, this treatment would be discriminative. Article 80(4) is thus irreconcilable and inconsistent with article 21(1).

Concerning article 38(1), which reads:

> ***"38(1) Every Ugandan citizen has the right to participate in the affairs of government, individually or through his or her representatives in accordance with law."***

I have difficulty in appreciating Mr. Kiapi's contention that article 38(1) is discriminatory in that it has the effect of unlevelling the playing field by closing out many citizens from participating in elections and government. Article 38(1) neither expressly nor by implication bars any citizen from participating in the affairs of government. All it does is to allow anybody who wishes to participate in the affairs of government to do so in any of the ways prescribed under the law. I thus find no merit in this complaint.

Regarding issue No.3, Mr. Kiapi sought this court's interpretation of the phrases *"a person employed in any Government department or agency of the Government"* as it is ambiguous and apt to mislead. Mr. Matsiko on the other hand contended that interpreting words and phrases was not within the powers granted to this court under **article 137(3) which states –**

(3) ***A person who alleges that –***

(a) ***an Act of Parliament or any other law or anything in or done under the authority of any law; or***

(b) ***any act or omission by any person or authority is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.***

My view is that the duty of this court under article 137 basically involves and embraces giving meaning to words and expressions of provisions of the Constitution. The court's powers under article 137(3) are very wide. The court's duty is to review Acts of Parliament and other laws so as to determine any issue or question on the inconsistence of any provision and/or on the contravention of the Constitution by anything, act or omission by any person/authority. This cannot be done without giving meanings to words/phrases. The words and phrases Mr. Kiapi seeks this court to give meaning to are contextually the gist of the amendment article 80(4) which is the subject of this petition. Therefore to hold that this court's role does not involve interpretation of words and/or phrases would in my view, be tantamount to misunderstanding or shunning our duty.

I would thus hold that this court can entertain issue No. 3, and interpret the words and phrases in question.

That being the case, according to the literal rule of interpretation, the context of the phrases complained of, to wit *"a person employed in any government department or agency of the government"* permit of no other definition than that of an officer employed in any government department or in any of those bodies controlled by the government and whose

emoluments are payable directly from the consolidated fund or directly out of moneys provided by Parliament.

I would therefore make the following declarations:

Issue No. 1 – The petition is competent.

Issue No. ii – Article 80(4) of the Constitution is inconsistent with and in contravention of Articles 1(4) and 21(1).
Article 80(4) is not inconsistent with Article 38(1).

Issue No. iii – The petition therefore succeeds in part.

I would order each party to bear its own costs.

Dated at Kampala this ……**25th** ……day of ……**August**…**2006.**

A.E.N. MPAGI-BAHIGEINE

JUSTICE OF APPEAL