THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

[CORAM: ODOKI,CJ., ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND KATUREEBE, JJ.S.C].

CONSTITUTIONAL APPEAL No.1 OF 2005.

BETWEEN

1. BAKU RAPHAEL OBUDRA]
2. OBIGA KANIA]

…….
APPELLANTS

AND

ATTORNEY GENERAL] …….
RESPONDENT

[Appeal from the decision of the Constitutional Court at Kampala (Mpagi Bahigeine, Engwau, Twinomujuni, Byamugisha and Kavuma JJ.A) dated 11th March, 2005 in Constitutional Petitions No. 4/2002 and No.6 of 2002].

JUDGMENT OF TSEKOOKO, JSC.

This appeal is against the decision of the Constitutional Court arising from a petition by each of the two appellants. In their respective petitions, each appellant sought declarations that subsection (3) of S.67 of the Parliamentary Elections Act, 2001 is inconsistent with Articles 86 and 140 of the Constitution and that the subsection infringes on their rights of Appeal under the Constitution.

The appellants prayed the Constitutional Court to declare the subsection null and void.

The facts of this appeal are as follows: -

Each of the two appellants contested elections in separate

constituencies in the Parliamentary General Elections which took place throughout this country on 26th June, 2001. Each lost in those elections. As a consequence each filed a separate election petition in the High Court, Gulu circuit. Kania, J, dismissed the petition of the first appellant on 23rd January, 2002 and Aweri Opio, J, dismissed that of the second appellant on 24th January, 2002. Each appealed to the Court of Appeal against the dismissal. The latter court upheld the decisions of the High Court. The appellants wanted to lodge a second appeal to this Court. They could not do this because according to S.68 (3) of the Parliamentary Elections Acts, 2001, there is no appeal from the decision of the Court of Appeal. Each of the appellants construed S.68 (3) to be inconsistent with Articles 86 and 140 of the Constitution which the appellant thought permitted appeals arising from election petitions to reach this Court.

Each appellant instituted respective Constitutional Petitions No.4 of 2002 and No.6 of 2002 asking the Constitutional Court by order to declare that;

- **S.67 (3) of the Act is null and void for being inconsistent with Articles 86 and 140 of the Constitution;**
- **S.67 (3) infringes the petitioners' right under the Constitution.**
- **The appellants had a right of appeal to this Court.**

The principal issue framed for decision by the Constitutional Court, was whether S.67(3) of the Parliamentary Elections Act, 2001, is inconsistent with Articles 140, 86(1) (2), and 2 (2) of the Constitution.
By a majority of three to two, the Constitutional Court held that the subsection was not inconsistent with the Constitution and so the Court declined to grant the declarations sought and dismissed the two petitions. The appellants have now

come to this Court by way of this appeal. The appeal is based on three grounds. In substance, the three grounds are about the right of appeal. The grounds could have been conveniently argued together but counsel opted to argue them separately.

The complaint in the first ground is that the learned Justices of Appeal misdirected themselves in holding that Article 140 merely sets out standards and was not intended to confer appellate jurisdiction on the Supreme Court regarding Parliamentary election petitions. Mr. Rwaganika and Mr. Akampulira, from separate firms, represented the appellants. Both filed joint written submissions. Mr. Okello Oryem, a senior state Attorney, representing the respondent also filed written submissions.

In their written arguments Mr. Rwaganika and Mr. Akampulira contended:

- **That the majority in the Constitutional Court erred in holding that Article 140 sets standards to be applied in hearing election matters.**
- **That the court wrongly applied the case of** Attorney General Vs Shah **(1971) EA 50 to the facts of the petition.**
- **That the opinion of the minority that Article 86 of the Constitution on election petition appears to be hanging and this was cured by Article 140 (2) is the correct interpretation.**
- **That the Court should have applied the principle of harmonisation so as to conclude that Article 140 confers appellate jurisdiction on this Court.**

Mr. Okello Oryem, SSA, opposed the appeal. He argued that the appellants' arguments in support of the appeal are wrong. He relied on my opinion which I gave in Constitutional Appeal No. 1 of 2003 between the same parties and submitted that the decision of the majority that Article 140 does not confer jurisdiction on this Court is correct.

The substance of the arguments presented in this appeal on behalf of the appellants are similar if not the same as those which were presented in Constitutional Appeal No.1 of 2003 (supra). I have not been persuaded to change the opinion I gave in that Appeal. According to appellants counsel, Article 86 of the Constitution is inconclusive on whether or not the Supreme Court has appellate jurisdiction in election petitions. Learned counsel argued that it is Article 140 which is conclusive and which confers jurisdiction on this Court to hear such appeals expeditiously. Counsel argued that harmonising Articles 64(4), 86 and 140 (2) would show that the Court has appellate jurisdiction. I cannot appreciate how harmonising Articles 64(4), 86 and 140 can confer appellate jurisdiction on this Court as it has been argued by counsel for the appellants. I think that the scheme of the drafting of the Constitution supports the view that Art.86 is conclusive. A brief examination of the four Articles will illustrate this.

May I first point out an important aspect of the four articles which learned counsel and the minority in the constitutional do not appear to have appreciated and yet the matter is helpful.

In my opinion it is important properly appreciate the purpose and context of each of the four Articles. If the purpose and context of each of the four articles is properly appreciated, the argument that harmonization of these articles would show that Article 140 confers appellate jurisdiction on this Court can not be tenable nor sustained. Appellants learned counsel argued and minority decision (Mpagi-Bahigeine ,JA,) suggest that since clause (3) of Article 86 does not say that the decision of the Court of Appeal on election disputes shall be final as does clause (4) of Article 64 states in respect to appeals to the High Court from administrative decisions of the Electoral Commission, therefore, the point whether appeals on election matters to the Court of…….. are not final and so election appeals question is handing.

Article 64 is under that part of chapter five of the constitution which regulates the activities and functions of the Electoral Commission. Clause (4) of the Article refers to appeals against administrative decisions of the Electoral Commission regarding complaints raised before and during polling (Art.61(f) and demarcation of constituencies (Article 63).

Article 64 deals with ante election administrative matters whereas Article 86 is concerned consequences of elections.

Article 64 reads as follows:

(1) *Any person aggrieved by a decision of the Electoral Commission in respect of any of the complaints referred to in paragraph (f) of article 61 of this Constitution, may appeal to the High Court.*

(2) *A person aggrieved by a decision of the Commission in respect of a demarcation of a boundary may appeal to a tribunal consisting of three persons appointed by the Chief Justice; and the Commission shall give effect to the decision of the tribunal.*

(3) *A person aggrieved by a decision of the tribunal made under clause (2) of this article, may appeal to the High Court.*

(4) *A decision of the High Court on an appeal under clause (1) or clause (3) of this Article shall be final.*

(5) *Parliament shall make laws providing for procedure for the* expeditious disposal of appeals referred to in this article**. This article indicates that settlement of disputes or complaints from the administrative decisions of the Electoral Commission are determined finally by the High Court. This is reasonable.**

Learned Counsel for the appellants argued that clause (2) of Article 86 "gives special right to an aggrieved person to appeal to the Court (of Appeal) but does not in any way preclude appeals beyond the Court of Appeal."
In my view this argument is flowed it ignores the context of the article.
Article 86 is under chapter six of the constitution. That chapter contains a series of articles concerned with various matters regulating the post election matters, i.e, the establishment, the composition and functions of Parliament. Article 86 makes provision for the hearing and determination of questions of the membership of Parliament. Clause (1) of the Article confers on the High Court jurisdiction to hear and determine disputes arising from the election of the members

of Parliament, the Speaker and the Deputy Speaker of Parliament. Clause (2) which come immediately confers on the Court of Appeal jurisdiction to hear appeals arising from decisions made by the High Court. The article reads:

86. (1) The High Court shall have jurisdiction to hear and determine any question whether-

(a) **a person has been validly elected a member of Parliament or the seat of a member of Parliament has become vacant; or**

(b) **a person has been validly elected as Speaker or Deputy Speaker or having been so elected, has vacated that office.**

(2) A person aggrieve by the determination of the High Court under this article may appeal to the Court of Appeal.

(3) Parliament shall, by law make provision with respect to-

(a) **the persons eligible to apply to the High Court for determination of any question under this article; and**

(b) **the circumstances and manner in which and the conditions upon which any such application may be made."**

The marginal note to this Article "Determination of Questions of Membership." **In effect that note defines the role and purpose of the article which is to spell out how and where the disputes would go. If Parliament intended at the time that this Court should here election petition appeals from the decisions of the Court of Appeal. Parliament would have surely included it here and not make a passing reference in Article 140.**

There is no provision for further appeal. I do not appreciate the arguments of learned counsel's for appellants that if the majority justices applied the principle of harmonisation, they should have

concluded that Article 140 (2) creates appellate jurisdiction in Parliamentary Election matters.

Since the whole of Article 86 governs the hearing and determination of election petitions in Courts, it is my considered view that if the legislature had intended to provide for second appeals to continue into this Court, it would have enacted a provision to that effect under Art 86. There is none. That means Art.86 is definite and conclusive. It cannot be harmonised with clause (4) of Article 64 which is concerned with appeals from administrative decisions of the Electoral Commission. I can find no rational basis upon which harmonisation can be made so as to imply appellate jurisdiction in this Court.
The conclusiveness of Art.86 is emphasised in clause (3) which authorised Parliament to make a law which sets out the procedure and circumstances under which election petitions to the High Court and election appeals to the Court of Appeal are to be made.

As a consequence in March 1996, barely five months after the promulgation of the Constitution, the National Resistance Council (NRC) which was the Interim Parliament, enacted the Parliamentary Elections (Interim Provisions) Statute, 1996, (Statute 4 of 1996). In that statute, there is S.96 which is identical in every respect to section 67 of the Parliamentary Elections Act, 2001(PEA). When the NRC enacted S.96 of the statute, it complied with Art.86 (3) of the Constitution. In its wisdom, the NRC appears to have seen no need at the time to provide for second appeals to this Court which was in existence then. Parliament which succeeded the NRC and which must have been aware of the existence of the Court of Appeal and of this Court simply lifted the words of S.96 and re-enacted them as S.67 of the PEA, 2001.

It is clear to me that when in 2001 Parliament enacted the Parliamentary Elections Act, 2001 and included S.67 which provides that the decision of the Court of Appeal in election appeals is final, Parliament was also complying with the letter

and spirit of Art.86 (3). Therefore I do not, with respect, agree, as argued by appellants counsel that Article 86 is inconclusive. There is nothing inclusive about its provisions.

Messrs Rwaganika and Akampulira referred to the reasoning of the dissenting opinions in the Constitutional Court to the effect that appellate jurisdiction for this Court can be inferred. I do not agree. The jurisdiction of this Court is clearly set out in Article 132.

> (1) The Supreme Court shall be the final court of appeal.
>
> (2) An appeal shall led to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law.
>
> (3) Any party aggrieved by a decision of the Court of Appeal sitting as a Constitutional Court is entitled to appeal to the Supreme Court against the decision; and accordingly, an appeal shall lie to the Supreme Court under clause (2) of this article."
>
> Apart from S.7 of the Judicature Act which created the criminal appellate jurisdiction, all the essential appellate jurisdiction of this Court is emboched here.

Jurisdiction cannot be prescribed by mere inference. Therefore learned counsel's attempt to distinguish the decision in the Shah case **(supra) is unhelpful.**

I reiterate my opinion that Article 140 of the Constitution is about procedure and standards which must be applied in hearing election disputes. Clause (2) thereof does not confer any jurisdiction on any Court. Let me further reiterate my earlier opinion that jurisdiction of the High Court to hear cases and appeals not related to petitions, is conferred by a separate Article (139) and not Article 140. Similarly, jurisdictions of the Court of Appeal and of the Supreme Court to hear

and determine non- election cases and appeals are conferred by Articles 134 (2), 137 and 132 respectively.

This puts in sharp contrast the point that in matters to do with election, the jurisdiction is conferred on the High Court and the Court of Appeal only by Art.86 and of course S.67 of the Parliamentary Election Acts. If this obvious distinction is understood, the argument to the effect that Art 140 (2) prescribes appellate jurisdiction would not be tenable or sustainable.

May I also add if I may that when Parliament enacted the Parliamentary Elections Act, 2001 and included the provisions of Section 67 (3), Parliament must have been aware of the above mentioned existing rights of appeal conferred by the Constitution. Sub section (3) reproduced the intention of Art 86 (2). Therefore, after promulgation of the Constitution, in my view, the limiting of the right of appeal by section 96 (3) of statute 4 and subsequently by S.67 (3) of the Act of 2001 must have been deliberate. I therefore agree with majority opinion that Article 140 of the Constitution merely urges Courts to expedite the hearing of election disputes but does not create a substantive right of appeal. Nor does it confer jurisdiction on this Court. If the latter were the case, I do not see any sound reason why that jurisdiction was not included or provided for in Article 132 which created appellate jurisdiction of the Supreme Court.
Ground one must therefore fail.
Grounds two and three were formulated in these words:

2. The Honourable Justices erred in law in failing to declare S.67 (3) of the Parliamentary Elections Act inconsistent with Articles 86 and 140 of the Constitution and therefore null and void under Article 2 (2) of the Constitution.

3. The learned Justices misdirected themselves in Law when they failed to declare that the petitioners had a right of appeal to the Supreme Court.

Counsel for appellant arguments on these two grounds revolve

around the effects of Articles 86, 132 and 140 of the constitution, sections 4 and 7 of the Judicature Act and S.67 (3) of the Parliamentary Elections Act, 2001. Counsel argued that the Constitutional Court should have held that the appellants had a right of appeal to this Court. Counsel for the respondent is of a contrary view and he supports the majority decision of the Court below. In discussing ground one, I covered the arguments raised under the two grounds (two and three). I see no merit in either ground. In my opinion both should fail.

I may observe in passing that although the appellants have not benefited by way of succeeding in these proceedings, their effort would seem to have influenced the creation of appellate jurisdiction for this Court in the shape of section 66 of the new Parliamentary Elections Act, 2005. Parliamentary Election disputes to be determined under this new Act will not doubt be heard and determined this Court accordance with the standards set by Art 140 (2).

I would dismiss this appeal. I would make no order as to costs.

Delivered at Mengo this 15th day of March 2003.

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J.W.N Tsekooko
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

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(CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA, AND KATUREEBE JJ.S.C.)

CONSTITUTIONAL APPEAL NO. 1 OF 2005

BETWEEN

1. **BAKU RAPHAEL OBUDRA}**
2. **OBIGA KANIA} :::::::::::::::::::::::::::::: APPELLANTS**

AND

ATTORNEY GENERAL} :::::::::::::::::: RESPONDENT

[Appeal from the decision of the Constitutional Court at Kampala (Mpagi-Bahigeine, Engwau, Twinomujuni, Byamugisha and Kavuma JJ.A) dated 11th March 2005 in Constitutional Petitions NO. 4 of 2004 and No. 6 of 2002]

JUDGMENT OF ODOKI, CJ

I have had the advantage of reading in draft the judgments prepared by my learned brothers, and I agree with the majority that this appeal should be dismissed.

I find it pertinent to briefly set out the reasons for the conclusion I have reached.

The facts and background of this case have been set out in the judgment of my brother Tsekooko, JSC, and I shall, therefore, not repeat them.
The main issue in this appeal is whether Section 67(3) of the Parliamentary Elections Act which denied the appellants a right of appeal in an election petition from the Court of Appeal to the Supreme Court was inconsistent with Articles 140 and 86 of the Constitution. The Constitutional Court answered the issue in the negative holding that, Articles 140 and 86 read together did not confer jurisdiction to the Supreme Court to entertain appeals in

election petitions from the Court of Appeal and that, therefore, Section 67(3) of the Parliamentary Elections Act, which stated that the decision of the Court of Appeal was final in such petitions, was not inconsistent with the two Articles.

Original jurisdiction to determine Parliamentary election petitions is conferred on the High Court by Article 86 of the Constitution, which provides as follows:

> ***"(1) The High Court shall have jurisdiction to hear and determine any question whether***
>
> > (a) ***a person has been validly elected a Member of Parliament or the seat of a member of Parliament is vacant; or***
> > (b) ***a person has been validly elected Speaker or Deputy Speaker or having been so elected, has vacated that office.***
>
> (2) ***A person aggrieved by the determination of the High Court under this Article may appeal to the Court of Appeal.***
>
> (3) ***Parliament shall by law making provision with respect to -***
>
> > (a) ***the persons eligible to apply to the High Court for determination of any question under this Article; and***
> >
> > (b) ***the circumstances and manner in which and conditions upon which any such application may be made."***

Pursuant to the powers conferred upon Parliament by Article 76 of the Constitution, the Parliamentary Elections act 2001 (No.8/2001) was enacted which provided in Sections 61 and 68 provisions relating to hearing and determining election petitions and appeals. Section 67 provided for appeals from the High Court to the Court

of Appeal, and provided in Subsection (3):

> ***"The decision of the Court of Appeal under this Section is final."***

It will be recalled that Section 67 was similar to Section 96 of the Parliamentary Elections (Interim Provisions) Statute 1996 made soon after the adoption of the Constitution.

It was argued that Section 67(3) of the Parliamentary Elections Act was inconsistent with Articles 86 and 140 of the Constitution. I have already quoted Article 86. Article 140 provides:

> ***"1. When any question is before the High Court for determination under clause (1) of Article 86 of this Constitution, the High Court shall proceed to hear and determine the question expeditiously and may for that purpose suspend any other matter pending before it.***
>
> (2) ***This Article shall apply in a similar manner to the Court of Appeal and the Supreme Court when hearing and determining appeals on questions referred to in clause (1) of this Article."***

In her lead judgment, Byamugisha J.A., while considering Article 140 stated,

> ***"My understanding of this Article is that it enjoins the courts mentioned therein to determine questions referred to them under Article 86 expeditiously. The Article sets standards to be followed. It does not confer jurisdiction to any of the courts mentioned therein. On the other hand Article 86 confers jurisdiction to the High Court and the Court of Appeal. It does not confer any jurisdiction on the Supreme Court to hear and determine appeals from the Court of Appeal in the exercise of its appellate jurisdiction."***

I entirely agree with the observations of Byamugisha J.A. Article 140 does not expressly confer any jurisdiction at all on the High Court, the Court of Appeal or the Supreme Court. As regards the High Court and the Court of Appeal, jurisdiction is conferred by Article 86(1) and (2). Article 86 is silent on the jurisdiction of the Supreme Court. If the Constitution intended to confer expressly the right of appeal to the Supreme Court, nothing could have prevented the framers from providing that right of appeal under Article 86. The intention of the framers may have been to leave it for Parliament to prescribe the right of appeal to the Supreme Court in accordance with Article 132(1) which provides,

> ***"(2) An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law."***

Indeed, Parliament did prescribe the general jurisdiction of the Supreme Court by the Judicature Act and more specifically by the Parliamentary Elections Act. In Section 67(3), Parliament clarified that the decision of the Court of Appeal was final. The Act was silent about appeals to the Supreme Court in election petitions.

In his dissenting judgment, Twinomujuni J.A. held that Article 86 read together with Article 140 of the Constitution, conferred appellate jurisdiction in election petitions in the Supreme Court. He stated,

> ***"The draftsperson of the Constitution and the Constituent Assembly were aware that Article 86 left the issue of the appellate jurisdiction unresolved. The Article was not conclusive on***

> ***that matter. The Article had not authorised any other authority to resolve it. After all that Article dealt with resolution of disputes arising from election of Members of Parliament and the Speaker. It was never intended therefore to resolve or confer appellate jurisdiction on the Supreme Court. It was deemed it would be better dealt with under the provisions falling under the Judiciary Chapter, such as Article 140 of the Constitution. That is why the Article makes a cross-reference to Article 86(1). A close reading of Article 140(2) shows clearly that the Court of Appeal and the Supreme Court were enjoined to hear and determine elections petitions as expeditiously as the High Court was required to do under Article 140(1) of the Constitution. This clause (2) answered the question, which was left hanging by Article 86 of the Constitution. By reading the two Articles together, the logical and inescapable conclusion is that the Constitution of Uganda settled once and for all the question of appellate jurisdiction in election petition."***

The learned Justice of Appeal observed that he was fortified in his belief by the provisions of Article 132 of the Constitution and Section 7 of the Judicature Act. But Article 132(2) provided only general appellate jurisdiction of the Supreme Court. The specific jurisdiction was to be prescribed by law. See **Mansukhala Ramji Karia & Crane Finance Co Ltd Vs. Attorney General, Makerere Properties Ltd & Amin Mohamed Pirani**, Civil Appeal No. 20 of 2002 [SC) (2005] 1 ULSR 157, at p. 165.

While I agree that the term ***"law"*** generally includes the Constitution, I am unable to agree that ***"prescribed by law"*** under Article 132(2) included the same Constitution. I think, the framers of the Constitution meant ***"prescribed by law by Parliament"***.

Indeed Parliament subsequently prescribed the right of appeal in elections petitions under the Parliamentary Elections Act. The Parliamentary Elections Act which is a special legislation about elections would take precedence over the Judicature Act in matters of jurisdiction relating to election petitions. The existence of appeal provisions in the Judicature Act and the Parliamentary Elections Act tends to show that the right of appeal to the Supreme Court was not resolved long ago by Articles 86 and 140 of the Constitution, as Twinomujuni J.A., observed.

In my view, if the framers of the Constitution had intended to provide in the Constitution a right of appeal to the Supreme Court, in Parliamentary election petitions, they could have done so expressly as they did with appeals in Constitutional matters under Article 132(3) as follows:

> ***"Any party aggrieved by a decision of the Court of Appeal sitting as a Constitutional Court is entitled to appeal to the Supreme Court against the decision and accordingly an appeal shall be to the Supreme Court under Clause (2) of this Article."***

It is therefore, my considered opinion that Article 140 is only a procedural directive on the manner of exercising jurisdiction when it exists. The provision enjoins the courts to give election petitions priority over other cases so as to hear and determine them expeditiously. The assumption is that necessary jurisdiction to determine election petitions will be conferred to the courts by law. The provision cannot by any principle of interpretation, be it liberal, broad, purposeful or expansive, or reading the Constitution as a whole, be said to confer appellate jurisdiction to the Supreme Court.

It is trite law that there is no such a thing as inherent appellate jurisdiction. Appellate jurisdiction must be specifically created by law. It cannot be inferred or implied. In my view, Article 140 of the Constitution is too vague to confer appellate jurisdiction on the Supreme Court in election petitions.

It appears to me that Article 140 was intended to be triggered off where jurisdiction was conferred by law. The Article is not superfluous but it is procedural. It demonstrates that the Constitution envisaged that Parliament might at some future point decide as a matter of public policy to allow second appeals to the Supreme Court in election petitions.

It will be recalled that under Section 51 of the 1967 Constitution, there was no right of appeal against a decision of the High Court determining election petitions. The decision of the High Court was final. The overriding policy seems to have been to expedite the determination of election petitions so as to settle as soon as possible the question of peoples representation in Parliament. This position was changed in the 1995 Constitution to provide for a right of appeal to the Court of Appeal.

Recently there seems to have been a change in public policy and Parliament in its wisdom enacted a law to confer appellate jurisdiction to the Supreme Court in election petitions. Now Section 66(3) of the Parliamentary Elections Act 2005, allows second appeals in Parliamentary election petitions from the Court of Appeal to the Supreme Court. In effect, therefore, this appeal has been overtaken by events since the issue under consideration has been resolved in favour of the appellants by the legislature.

I agree with Byamugisha J.A. when she said,

> ***"On the authority of <u>Attorney General Vs. Shah</u> (supra) jurisdiction being a creature of Statute and the Constitution being the Statute that confers jurisdiction, it cannot be said in my view that jurisdiction can be inferred by cross-reference. If the framers of the Constitution had wanted election matters to proceed to the highest appellate court in the land they would have stated so in no uncertain terms under Article 86. The omission to mention Supreme Court in Article 86, as one of the appellate courts was, in my view deliberate. I think they intended the Court of Appeal to be the last and final court of appeal in election matters."***

In the case of **<u>Attorney General Vs. Shah</u>** (4) (Supra), the High Court made an order of mandamus against two officers of the Government. The Attorney General filed an appeal to the Court of Appeal and the respondent objected that the court had no jurisdiction to hear the appeal. The Court of Appeal held that appellate jurisdiction is sorely created by Statute and there is no inherent appellate jurisdiction. It was also held that Section 82 of the Civil Procedure Act does not give any right of appeal, it merely sets out the procedure for appeal under other laws. Section 82 provided as follows:

> ***"The provisions of this part relating to appeals from original decrees shall as far as may be, apply to appeals-***
>
> (a) ***from appellate decrees; and***
>
> (b) ***from orders made under this Act or under any other law in which a different procedure is not provided."***

Spry Ag. P. said at pages 50 - 51,

> ***"In any case, the position is now regulated by Art 89 of the Constitution of Uganda and Part IV of the Judicature Act, which made it clear that this court has only such jurisdiction as is conferred by Parliament. The power of the High Court to issue orders of mandamus is conferred by S.34 of the Judicature Act 1967, and no right of appeal is contained in that or any other Section of the Act.***
>
> ***It is true, as Mr. Mugerwa has pointed out that Sub-section (3) of that Section contains the words "subject to any right of appeal the order shall be final". For my part, I do not consider that those words can properly be interpreted as conferring any right of appeal.***
>
> ***Mr. Mugerwa has also argued that S.82 of the Civil Procedure Act read with S.68 has the effect of creating a right of appeal from any order made under any other law. With respect I cannot agree. In my opinion, S.82 only provides for procedure where a right of appeal exists."***

I find the reasoning in **Attorney General Vs. Shah** (supra) quite persuasive. In that case the Court of Appeal was interpreting provisions of Statutes which referred to a situation where there might be a right of appeal. Those provisions did not confer a right of appeal as in the present case. It was argued that the Court of Appeal in the **Shah's case** was dealing mainly with Statutes and not the Constitution which had to be given a broad and purposive interpretation, looking at the Constitution as a whole.

I am unable to accept this argument. The case of **Shah** is not distinguishable from the current case on the main issue as to when

a right of appeal exists to an appellate court. In **Shah's** case there was no express provision and the Court of Appeal was being called upon to interpret Sections 34 of the Judicature Act and Sections 82 and 68 of the Civil Procedure Act against Article 89 of the Constitution which provided: ***"An Appeal shall lie to the Court of Appeal from any such final decision of the High Court as may be prescribed by law."*** This Article was similar to Article 132(2) of the current Constitution.

I am satisfied that the Constitutional Court in this case adopted the right approach in interpreting the Constitution and came to the correct conclusion that no right of appeal to the Supreme Court existed in election petitions.

For the reasons I have given, I find no merit in this appeal and I would, accordingly, dismiss it with no order as to costs.

By a majority of five to two of the members of the Court, this appeal is dismissed, with no order as costs.

Dated at Mengo this 15th day of March 2006

B J Odoki
CHIEF JUSTICE

THE REPUBLIC OF UGANDA

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(CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA, AND KATUREEBE, JJSC).

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1. **BAKU RAPHAEL OBUDRA :::::::::: APPELLANTS**
2. **OBUGA KANIA**

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

(Appeal from the decision of the Constitutional Court Kampala (Mpagi Bahigeine, Engwau, Twinomujuni, Byamugisha, and Kavuma, (JJ.A) dated 11th March , 2005 in Constitutional Petition No.4/2002 and No 6/2002).

JUDGMENT OF ODER, JSC.

This is an appeal against a decision of the Constitutional Court, dismissing, by a majority of three to two, the appellants' Constitutional petitions. In their respective petition, each appellant sought declarations that:

1. Section 67 (3) of the Parliamentary Elections Act (hereinafter referred to as "the Act") is inconsistent with Articles 140 and 86 of the Constitution and therefore null and void.
2. The section infringes the appellants' right under the constitution.
3. Make an order declaring the appellants' right of appeal to the Supreme Court.
4. Costs of the petition be awarded to them

The facts of the appeal are as follows: The appellants were candidates who contested in the Parliamentary Elections that were held throughout the country on 26.6.2001, standing in separate Constituencies. They lost the elections. Being dissatisfied with the outcome of the elections, they filed separate election petitions in the High Court Registry at Gulu High Court circuit. On 23.1.2001 the High Court Judge (Kania, J), dismissed the petition of Baku Raphael Obudra and the following day, the same court (Aweri Opio,J) dismissed the petition of Obiga Kania. Consequently, they both filed appeals to the Court of Appeal, which were dismissed with costs. The failure of those appeals gave rise to the petitions in the Constitutional Court The petitions were consolidated and heard together, and were dismissed by the Constitutional court. Hence this appeal.

As set out in the memorandum of appeal the three grounds of appeal are as follows:

1. The learned Justices of the Constitutional Court misdirected themselves when they held that article 140 merely sets standards and was not intended to confer appellate jurisdiction on the Supreme Court regarding Parliamentary election petitions.

2. The Hon. Justices erred in law in failing to declare S.67(3) of the Parliamentary Election Act inconsistent with Articles 86 and 140 of the Constitution and therefore null and void under article 2(2) of the constitution.

3. The learned Justices misdirected themselves in law when they failed to declare that the petitioners had a right of appeal

The parties to the appeal filed written submissions. Those of the appellants were filed by M/S Rwaganika & Co. Advocates, and the respondent's were filed by Attorney General's Chambers.

Arguing ground 1 first the appellant's learned counsel submitted that the learned Justices of Appeal contradicted themselves when Byamugisha J.A said that Article 140(1) enjoins the Court of Appeal and the Supreme Court to determine questions referred to them under article 86 expeditiously and at the same time said that Article 140 does not confer jurisdiction on any of the said courts. According to **Longman Dictionary of Contemporary English "enjoin"** means to order someone to do something. Learned Counsel contended that having thus recognized that the courts were ordered to determine questions referred to them, the learned Justices of Appeal should have proceeded to make a finding that the courts could not be commanded or ordered to hear election petitions and appeals expeditiously without jurisdiction to do so. Accordingly they should have come to the conclusion that the Supreme Court had jurisdiction to hear election petition appeals. Learned counsel contended that standards could not be set for the courts unless they have a right to exercise them. That right is the jurisdiction to hear and determine election petitions and appeals.

Learned Counsel contended that the learned Justices of Appeal wrongly applied the decision in **Attorney General -Vs- Shah (1971) E.A 50,** and came to the conclusion that only the constitution, not a statute, confers jurisdiction and that jurisdiction cannot be inferred by cross-reference. Learned counsel

contended that **Attorney General Vs Shah** (supra) is distinguishable from the instant case. In the former, the court was involved in hearing an application for mandamus and that case is distinguishable from the instant case, where the Constitutional Court was required to interpret the constitution.. Secondly, in **Shah,** (supra) the appeal sought was against a provision of the Judicature Act, a statute which did not provide for the right of appeal, while in the present case, the petitioners wanted to appeal to the Supreme Court and that right is provided for in Articles 132 and 140 of the Constitution. Had the learned Justices of Appeal directed themselves properly, they would have come to the same conclusion as the dissenting learned Justices of Appeal did. They would have looked at Articles 86 and 132 and applied the principle of harmonization and come to the only conclusion that article 140, confers appellate jurisdiction on the Supreme Court on election matters.

In His submission, under ground 2, the appellant's learned counsel referred to what Engwau, JA. said, to the effect that the cross-reference in article 140 to article 86 does not confer jurisdiction on the Supreme Court on election matters and that if that was the intention of the framers of the constitution they would have said so explicitly and that the omission was deliberate; and that the Court of Appeal was intended to be the final appellate court in election petitions. Therefore S.67(3) of the Act is not in consistent with articles 140, 86(1),(2) and 2(2) of the Constitution. The learned counsel contended that the learned Justice of Appeal misdirected himself on the law when he adopted the said reasoning. Had he directed his mind to the proper law, he would have decided as Twonomujuni, J.A, did in his dissenting judgment to the effect that Section 67(3) was not only made under the authority of article 86(3), but that Article 86 as a whole left the issue of appellate jurisdiction

unresolved. The article was not conclusive on the matter, nor did it authorise Parliament to resolve it, and that therefore Parliament was not authorised to enact Section 67(3) to bar appeals in election matters to the Supreme Court. Learned Counsel also contended that the majority learned Justices of Appeal should have applied Section 7 of the Judicature Act which provides for appeals to the Supreme Court in civil matters.

Regarding ground 3 of appeal the appellant's learned counsel submitted that the decision to declare the petitioners right of appeal to the Supreme Court depended on how the Justices of Appeal individually interpreted the relevant statutory provisions discussed above by counsel. It depended on the line of reasoning each Justice of Appeal took of the pertinent provisions. It so happened that the majority of them misdirected themselves and failed to declare the appellants' right; while the dissenting Justices of Appeal followed the right line and correctly came to the right conclusions and declared the right. The learned counsel urged us to find as Twinomujuni and Mpagi-Bahigeine JJ.A. did, that the appellants were entitled to appeal to the Supreme Court against the dismissal of their respective petition in the High Court.

In opposition to the appeal the respondent’s learned counsel supported the majority decision of the Constitutional Court. They reiterated their submission in the Constitutional Court which Correctly found that Article 140 does not confer jurisdiction to any of the courts mentioned therein. This is so because Article 86 does not refer any matter to the Supreme Court. Therefore the reference to the Supreme Court in Article 140 (2) is no more than superfluous. It certainly does not confer a right of appeal in election matters from the Court of Appeal to the Supreme Court.

Learned Counsel relied on the judgment of Tsekooko, JSC in Constitutional Appeal **No. 1 of 2003. Baku R. Obudra & Obiga Kania Vs The Attorney General**, in support of his submission. In his judgment in that constitutional appeal, Tsekooko, JSC concluded that article 140 of the Constitution does not confer appellate jurisdiction in election matters on the Supreme Court. Consequently, the appellants did not have a right of appeal to the Supreme Court.

The respondent's learned counsel does not agree with the appellant's counsel that **Attorney General -Vs- Shah** (supra) is distinguishable from the instant case. On the contrary, the respondent's counsel contended that Shah (supra) was on all fours l forms with the instant case. Both cases concerned the right of appeal where none is expressly created by statute.

Learned counsel contended that contrary to the submission of the appellants' counsel the majority learned Justices of Appeal properly applied the decision in Attorney General vs. Shah **(supra) to the instant case. They agreed with and applied the decision by considering whether articles 86 and 140 of the Constitution confer appellate jurisdiction on the Supreme Court in election matters and whether the appellant had a right of appeal to the Supreme Court from the judgment of the Court of Appeal in their Election Petitions. Learned counsel contended that the attack by the appellant's learned counsel on the Constitutional Court for following** Attorney General -Vs- Shah **(supra) was misconceived. The respondent's learned counsel disagreed with the submission by the appellant's learned counsel that it was wrong of the majority of the Hon. Justices of Appeal not to find for the appellants as the minority did. Counsel contended that the implication is gross misconception and represents an unholy attack or the independence of the Judiciary, which is guaranteed by Article 128 (1) and (2) of the Constitution. Learned Counsel also invited us to disregard the insinuation of the appellant's counsel as the Constitution does not envisage a situation where a Justice of Appeal of the Constitutional Court can be compelled to concur with a decision of another. Learned Counsel contended that the minority decision of the Hon. Justices of Appeal and the submissions of the appellants' counsel in support thereof are misconceived for the following reasons:**

Firstly it is more conceivable than not that the framers of the

Constitution were conclusive on election petition appeals in article 86 and maintained that conclusiveness in Article 104 regarding election of the President.

Secondly, in view of clause 2 of Article 86, it is an inescapable conclusion that the framers of the Constitution were aware that they needed to legislate on the right of appeal in election matters. If they wanted to create the right of a second appeal they would have done so in article 86 or article 140. It is inconceivable that they were express on the right of the first appeal in article 86 and 104 and then decided to be vague about it in article 140.

Thirdly, the right of appeal cannot be inferred either from the constitution itself or the Judicature Act, Cap 13.

The respondent's learned counsel argued grounds 2 and 3 of appeal together. In essence, the learned Counsel's submission under these grounds is that section 67 (3) of the Act merely echoes the intention of the framers of articles 86 (2) and 140 and 2(2) of the constitution, which is that there will be no 2nd appeals in election matters; that the Supreme Court has no appellate jurisdiction in election matters. This means, therefore that the appellants have no right of appeal to the Supreme Court from the judgment of the Court of Appeal in their election petition appeals. The learned Counsel submitted, therefore, that in so doing section 67(3) does not run contrary to but in conformity with, the Constitution, the same having been properly legislated pursuant to Article 79 of the Constitution. It is therefore not inconsistent with articles 86(1) and (2), 140, (2) and of any other article of the Constitution. The minority of the learned Justices of Appeal

therefore, misdirected themselves. Learned Counsel prayed that all the grounds of appeal should be rejected and the appeal dismissed.

I shall consider all the three grounds of appeal together

In my opinion the main issue in this appeal is whether the Supreme Court has appellate Jurisdiction in election petitions. The appellants would be entitled to or have a right of, appeal to it if the Court has such a jurisdiction and if section 67(3) of the Act is not inconsistent with articles 86 and 140 of the constitution. Section 67 provides:

(1) ***"A person aggrieved by an election petition may appeal to the Court of Appeal against the decision***
.

(2) ***The Court of Appeal shall proceed to hear and determined an appeal under this section expeditiously and may for that purpose suspend any other matter before it***

(3) ***The decision of the Court of Appeal in an appeal under this section is final."***

Article 132 of the Constitution provides:

> ***"132(1) The Supreme Court shall be the final court of appeal. (2) An appeal shall lie to the Supreme Court from such decision of the Court of Appeal as may be prescribed by Law"***

This section, in my view, provides a general appellate jurisdiction of the Supreme Court only as prescribed by law. As far as I know, no law had prescribed for the Supreme Court an appellate jurisdiction in election matters at the time the petitions in this instant case were filed in the Constitutional Court.

In my opinion, clause (2) of Article 132 recognized the long standing legal principle that appellate jurisdiction is a creature of statue. There is no such thing as an inherent appellate jurisdiction. Section 4 of the Judicature Act, makes similar provisions:-

> ***"An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by Law".***

The decision in the case of the **Attorney General vs. Shah** (supra) was consistent with that principle. The brief facts in that case were that the High Court of Uganda made orders of mandamus against two officers of the government under section 34 of the Judicature Act 1967. Sub-section (3) of that section provided as followers: -

> "***Subject to any right of appeal the order shall be final."*** The Attorney General filed an appeal against the orders of mandamus basing himself on that sub-section. The respondent objected to the appeal on the ground that the Court of Appeal had no jurisdiction to hear the appeal. Upholding the objection spry, Ag. P(as he then was) in the lead judgment with which other members of the Court agreed, said:
>
> ***"It has long been established and we think there is ample authority for saying that appellate jurisdiction springs only from statute. There is no such thing as inherent appellate jurisdiction".***

I agree with that statement of the law.

The following articles of the Constitution provide for determination of election disputes:

> "86(1) The High Court shall have jurisdiction to hear and determine any question whether:-
> (a) a person has been validly elected a member of Parliament or the seat of a member of Parliament has become vacant

(b) …….

(2) A person aggrieved by the determination of the High Court under this article may appeal to the Court of Appeal.

(3) Parliament shall by law make provision with respect to: –
(a) a person eligible to apply to the High Court for determination of any question under this article; and
(b) the circumstances and manner in which any suction application may be made."

In my opinion article 86 confers appellate jurisdiction in election matters on the Court of Appeal only. If the framers of the Constitution intended to confer a second appellate jurisdiction on the Supreme Court, they would have done so under this Article, since they were legislating under that Article on determination of questions of membership of Parliament. I think that the omission to provide for Appeal on election matters from the Court of Appeal to the Supreme Court was deliberate. The reference to the Supreme Court in Article 140(2) was superfluous. It did not create an appellate jurisdiction in election matters on the Supreme Court.

It is evident, in my opinion, that according to the decision in **Attorney-General vs. Shah** (supra) which is still good law, and the provisions of the Constitution and the Judicature Act to which I have referred in this judgment the appellate jurisdiction of the Supreme Court in election matters can only be created by the Constitution or Statute.

With respect, I am unable, therefore to accept the contention of the appellants' learned counsel that article 140 of the Constitution confers appellate jurisdiction in election matters on The Supreme Court, not even by cross-reference to article 86. The article

provides:

> ***"140 (1) where any question is before the High Court for determination under clause (1) of article 86 of this Constitution, the High Court shall proceed to hear and determine the question expeditiously and may, for the purpose, suspend any other matter pending before it.***
>
> ***(2) This article shall apply in a similar manner to the Court of Appeal and the Supreme Court when hearing and determination appeals on question referred to in clause (1) of this article".***

In considering whether article 140 gives the Supreme Court appellate jurisdiction in election petitions, Byamugisha, JA said:

> ***"On the authority of Attorney General vs. Shah (supra) jurisdiction being a creature of statute and the Constitution being the statute that confers jurisdiction it cannot be said in my view that jurisdiction can be inferred by cross- reference. If the framers of the Constitution had wanted a election matters to proceed to the highest appellate Court in the land they would have stated so in no uncertain terms under article 86. The omission to mention the Supreme Court in article 86 as one of the appellate courts was, in my view, deliberate. I think they intended the Court of Appeal to be the last and final court of appeal in election matters. I am not persuaded by the submissions of learned counsel for the petitioners that article 86 is incomplete. I do not consider that the words of article 140(2) on their proper interpretation can be said to confer to the Supreme Court to hear and determine such appeals.***
>
> ***It is therefore my considered opinion that section 67(3) is not inconsistent with articles 86 and 140 of the constitution".***

I agree with what the learned Justice of Appeal said in this passage.

What I have said in this judgment disposes of all the grounds of appeal. I would therefore dismiss the appeal. I would make no

order for costs.

In view of the provisions of section 66 of the Parliamentary Election Act, 2005, jurisdiction to entertain second appeals in Parliamentary election petitions has been conferred on the Supreme Court.

Dated at Mengo this 15th day of March 2006.

……..
A.H.O Oder
JUSTICE OF THE SUPREME COURT.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA,

AT MENGO

(CORAM ODOKI, CJ, ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND KATUREEBE, JJ.SC)

CONSTITUTIONAL APPEAL NO. 01 OF 2005

B E T W E E N

1. BAKU RAPHAEL OBUDRA:
2. OBIGA KANIA: :::::::: ::::::PETITIONERS

A N D

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

{Appeal from the decision of the Constitutional Court at Kampala (Mpagi Bahigeine, Engwau, Twinomujuni and Kavuma, JJA) dated 11th March 2005, in Constitutional Petition No. 4 of 2002 and No. 6 of 2002}

JUDGMENT OF KAROKORA, JSC:

I have had the advantage of reading in draft the judgment prepared by my learned brother Justice Tsekooko, JSC, and with all my due respect I feel a little bit un-easy with the declaration sought and his conclusion. In their respective petitions each appellant sought declaration that section 67(3) of the Parliamentary Elections Act 2001 is inconsistent with Article 140 and 86 of the Constitution and that sub section 3 of section 67 infringes on their rights of appeal under the Constitution. They prayed the Constitutional Court to declare the sub-section null and void.

In the elections held on 26th June 2001, each of the petitioners lost elections in their separate Constituencies. As a result, each petitioned in the High Court sitting at Gulu. Kania, J, dismissed

the petition of 1st petitioner on 23rd January 2002, and Aweri Opio J, dismissed the petition of the 2nd petitioner on 24th January, 2002. Each of them appealed to the Court of Appeal against the dismissal of their appeals which upheld the decisions of the High Court. They wanted to appeal to the Supreme Court, but could not do so because according to Section 67(3) of the Parliamentary Elections, Act, 2001, there was no right of appeal from the decision of the Court of Appeal. Each of the appellants felt aggrieved, because they considered that Section 67(3) of the Act was inconsistent with Articles 86 and 140 of the Constitution which they contend permit appeals in election matters to the Supreme Court.

The appellants instituted respective Constitutional Petitions Nos. 4 and 6 of 2002, praying the Constitutional Court to declare:

1) ***That section 67(3) of the Act is null and void for being inconsistent with Articles 86 and 140 of the Constitution.***

2) ***That section 67(3) of the Act infringes the Petitioners' right under the Constitution.***

3) ***That the appellants had a right of appeal to the Supreme Court.***

The principle issue before the Constitutional Court was whether section 67(3) of the Parliamentary Elections Act, 2001, is inconsistent with Articles 140, 86(1)(2) and 2(2) of the Constitution.

By majority of 3 Justices to 2, the Constitutional Court held that the Act was not inconsistent with the Constitution and therefore, declined to grant the relief prayed and consequently dismissed the petitions. The appellants have appealed to this court on three grounds.

The complaint in ground one is that the learned Justices of the Court of Appeal misdirected themselves when they held that Article 140 of the Constitution merely set out standards and was not intended to confer appellate jurisdiction on the Supreme Court regarding Parliamentary election Petitions.

Mr. Rwaganika and Mr. Akampurira from separate firms, represented the appellants. They filed joint written submission. Mr. Okello Oryem S.S.A. represented the respondent. He also filed written submission.

In their written submission counsel for the appellants contended that the majority of Justices of Appeal in the Constitutional Court erred when they held that Article 140 sets standards to be applied in hearing election petitions.

- That the Constitutional Court wrongly applied the case of the Attorney General - vs - Shah [1971] E.A. 50 to the facts of the Petition.

- That the opinion of the minority Justices of the Constitutional Court to the effect that article 86 of the Constitution on election Petition appears to be hanging and this was cured by Article 140(2) is the correct interpretation.

- That the Court should have applied the principle of harmonisation so as to conclude that Article 140 confers appellate jurisdiction.

On the other hand, Mr. Okello Oryem, SSA opposed the appeal. He argued that the appellants' arguments in support of the appeal were wrong. He relied on the decision of Tsekooko, JSC, in Constitutional Appeal No. 01 of 2003 between the same parties and submitted that the decision of the majority Justices of the Constitutional Court is correct.

With due respect, I am unable to understand why the majority in the Constitutional Court came to hold that Article 140 merely sets standards to be followed but does not confer jurisdiction, when the article enjoins the courts mentioned therein to proceed expeditiously in determining questions referred to them under article 86. In my opinion, the courts' decision on this question must turn on interpretation of section 67 of the Parliamentary Elections Act, 2001 together with Articles 86 and 140 of the Constitution of Uganda, 1995.
Section 67 of the Act states:

"67(1) A person aggrieved by the determination of the High Court on hearing an election Petition may appeal to the

Court of Appeal against the decision.

(2) ***The Court of Appeal shall proceed to hear and determine an appeal under this section expeditiously and may for that purpose suspend any other matter pending before it.***

(3) ***The decision of the Court of Appeal in an appeal under this section shall be final."***

On the other hand, article 86 of the Constitution provides:

"86(1) The High Court shall have jurisdiction to hear and determine any question whether:-

(a) ***a person has been validly elected a member of Parliament or the seat of a member of Parliament has become vacant; or***

(b) ***a person has been validly elected a Speaker or Deputy Speaker or having been so elected, has vacated that office.***

(2) ***A person aggrieved by the determination by the High Court under this article may appeal to the Court of Appeal.***

(3) ***Parliament shall by law make provisions with respect to:-***

(a) ***the persons eligible to apply to the High Court for determination of any question under this article; and***

(b) ***the circumstances and manner in which and conditions upon which any such applications may be made."***

The article is silent about what happens when any of the parties is aggrieved with the decision of the Court of Appeal.

Article 140(1) provides that:

"(1) where any question is before the High Court for determination under clause (1) of article 86 of this Constitution, the High Court shall proceed to hear and determine the question expeditiously and may for that purpose suspend any other matter pending before it.

(2) This article shall apply in a similar manner to the Court of Appeal and the Supreme Court hearing and determining appeals on questions referred to in clause (1) of this article."

I find submissions of counsel for the appellants tenable because articles 86 read together with 140 confer a right of appeal in election petitions from the decisions of the Court of Appeal to the Supreme Court. Counsel submitted that Article 140(1) makes a cross-reference to article 86 where it is spelt out that appeals in the Supreme Court and the Court of Appeal must be handled expeditiously as in the High Court. For emphasis, the article states that for that purpose, the High Court may suspend any other matter pending before it. Then under clause 2 of article 140, it is clearly stated that:

"***(2) This article shall apply in a similar manner to the Court of Appeal and the Supreme Court when hearing and determining appeals on questions referred to in clause (1) of this article."*** (Emphasis is added).

Therefore, since articles 86 and 140 of the Constitution give a right of appeal from the Court of Appeal to the Supreme Court an attempt by Section 67(3) to limit that right of appeal provided by articles 86 and 140 cannot stand and must be unconstitutional and hence null and void by virtue of article 2(1)(2) of the Constitution, which provides that:

"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 inconsistency, be void." (Emphasis is added).

Clearly, if the framers of the Constitution had intended to limit the right of appeal to the Court of Appeal in election matters, they would have expressly stated so in article 86 to the effect that the decision of the Court of Appeal shall be final like they did under article 64(4) when they were dealing with appeals from decisions of the Electoral Commission when they expressly stated in clause 4 that:

"A decision of the High Court on an appeal under clause (1) or clause (3) of this article shall be final."

In the instant case, the framers of the Constitution never ruled out any right appeal by any candidate under article 86 who would feel aggrieved with the decision of the Court of Appeal. They inserted article 140 in the Constitution which commands the Court of Appeal and the Supreme Court to deal with election petition expeditiously as the High Court was required to do so under article 140(1) of the Constitution. Therefore, clause (2) of article 140 provides the answer to the question which had been left hanging by article 86 on the question of what should happen if the unsuccessful party was dissatisfied with the decision of the Court of Appeal.

In my view, since article 132 of the Constitution provides for an appeal to the Supreme Court if one is dissatisfied with the decision of the Court of Appeal, when there is no provision in the Constitution precluding such appeal I think that the appellants were perfectly entitled to appeal to the final Court of Appeal in the land. Article 132(1) provides as follows:

"132(1) The Supreme Court shall be the final Court of Appeal.

(2) An appeal shall lie to the Supreme Court from such

decision of the Court of Appeal as may be prescribed by law."

The law which may prescribe such right may be the Constitution such as articles 86 and 140 which prescribed the appellate jurisdiction of the Supreme Court in election Petition and the manner in which it should handle such appeal. Another law which prescribes right of appeal to the Supreme Court is the Judicature Act, 1996 sections 4 and 7.

Section 4 provides that:

"An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as are prescribed by the Constitution, this Act or any other law."

Section 7(1) provides that:

"An appeal shall lie as of right to the Supreme Court where the Court of Appeal confirms, varies or reverses a judgment or order including interlocutory order given by the High Court in the exercise of its original jurisdiction and either confirmed, varied or reverse by the Court of Appeal.

Therefore, in view of the provisions of articles 86, 140 of the Constitutions, sections 4 and 7 of the Judicature Act, 1996, there is an apparent conflict between the provisions of Section 67(3) of the Parliamentary Elections Act 2001 which limits the right of appeal to the Court of Appal in election matters and the provisions of articles 86 and 140(2) of the Constitution which command the Court of

Appeal and the Supreme Court to deal with election matters.

Clearly the Constitution commands the Court of Appeal and Supreme Court expeditiously to suspend any other business and dispose of election matters. Therefore, the Constitution confers jurisdiction to Supreme Court to deal with election matters.

Consequently, therefore, this conflict between the provisions of Section 67(3) of the Parliamentary Elections Act, 2001 and articles 86 and 140 of the Constitution calls for interpretation of the Constitution under article 137(3) of the Constitution. See: ***Attorney General - vs - Major General Tinyefuza Constitutional Appeal No. 1.of 1997 (SC) and Serugo - vs - KCC, Constitutional Appeal No. 2 of 1998 (SC).***

In conclusion, since under Article 2(1) of the Uganda Constitution, the Constitution is the Supreme law of Uganda, any other law in conflict with the Constitution is null and void under clause (2) of Article 2 of the Constitution. Therefore, sub-section 3 of section 67 of the Parliamentary Elections Act, 2001 does not take away jurisdiction of the Supreme Court from hearing appeals emanating from election petition, as it is null and void.

I would therefore, allow this appeal by upholding the decisions of minority Justices of Appeal.

I would award costs to the appellants in this court and in the courts below.

Dated at Mengo this 15th day of March 2006.

A. ***N. KAROKORA***
JUSTICE OF THE SUPREME COURT

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODOKI CJ, ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND KATUREEBE, JJ.S.C.

CONSTITUTIONAL APPEAL NO.1 OF 2005
BETWEEN

1. **BAKU RAPHAEL OBUDRA**
2. **OBIGA KANIA :::::::::::::::::::::::::: APPELLANTS**

AND

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

(*Appeal from the decision of the Court of Appeal (Mpagi-Bahigeine, Engwau, Twinomujuni, Byamugisha and Kavuma JJ.A) at Kampala in Constitutional Petitions Nos.4 & 6 of 2002 dated 11th March 2005)*

JUDGMENT OF MULENGA JSC

I had the advantage of reading in draft, all the judgments prepared by my learned brothers in this appeal. I agree with the majority decision that this appeal be dismissed for want of merit, and would make no order as to costs. I will now outline my reasons for finding that the appeal is without merit.

The appeal originates from the parliamentary elections held on 26th June 2001. The two appellants were candidates in separate constituencies. They both lost the election and separately petitioned the High Court against the results. Their petitions were severally dismissed as were their appeals to the Court of Appeal. They could not appeal further to this Court because the

Parliamentary Elections Act 2001 provided in section 67(3) that the decision of the Court of Appeal was final. Each petitioned the Constitutional Court for, *inter alia,* a declaration that Section 67(3) of the Parliamentary Elections Act 2001 was inconsistent with Articles 86 and 140 of the Constitution and infringed his right of appeal. Their petitions were initially struck out for failure to disclose any cause of action, but on appeal, this Court held that the petitions disclosed sufficient cause of action and ordered that they be reinstated and heard on merit. Later, after hearing the consolidated petitions on merit, the Constitutional Court held by majority of 3 to 2 that the impugned statutory provision was not inconsistent with any provision of the Constitution and dismissed the petitions. The appellants are back to this Court on appeal against that dismissal.

I should mention at this juncture that in November 2005, subsequent to the hearing of this appeal, Parliament repealed the Parliamentary Elections Act 2001, including the impugned provision, and substituted for it the Parliamentary Elections Act 2005, which expressly provides in section 66(3), for a second appeal to the Supreme Court from a decision of the Court of Appeal in a parliamentary election petition. However, since the new law is not retrospective it did not affect the appellants' petitions. Besides, the Parliamentary term for which the election was held has expired. Nevertheless, it is imperative to determine, not only whether the appellants had the right of appeal, but more importantly, whether in its decision the Constitutional Court erred in the interpretation of the Constitution.

In this appeal, the appellants complain that the Constitutional Court erred in –

- holding that Article 140 does not confer jurisdiction on the Supreme Court;
- failing to declare that appellants had a right of appeal to the

Supreme Court;

- failing to declare the impugned statutory provision null and void.

Although the complaints were framed as three grounds of appeal, however, in my view they all revolve around one issue arising from their contention that they were entitled to appeal to the Supreme Court and were unconstitutionally impeded by the impugned statutory provision. The issue is: whether the Constitution confers on the Supreme Court jurisdiction to hear and determine second appeals in election petitions. The answer to that issue determines the answers to the other two issues, namely whether at the material time the appellants had a right of appeal to the Supreme Court and whether the impugned statutory provision contravened or was inconsistent with any provision of the Constitution. I will consider if the appellants' contention is sustainable from the provisions of the Articles allegedly contravened by the impugned statutory provision or if it can be sustained having regard to the provisions of the Constitution as a whole.

The appellants base their contention primarily on Article 140, which provides as follows –

"***140. (1) Where any question is before the High Court for determination under clause (1) of article 86 of this Constitution, the High Court shall proceed to hear and determine the question expeditiously and may, for that purpose, suspend any other matter pending before it.***

(2) <u>This article shall apply in a similar manner to the Court of Appeal and</u>

<u>the Supreme Court when hearing and determining</u>

appeals on questions referred

to in clause (1) of this article." (Emphasis is added).

It is not in dispute that the phrase: *'determining appeals on questions referred to in clause (1) of this article'* means determining appeals on election petitions brought to the High Court under Article 86(1). The appellants' counsel argued in the Constitutional Court, and have repeated in this appeal, that because this provision has the effect of enjoining the Supreme Court to expeditiously hear and determine appeals in election petitions, it follows that the Court has jurisdiction over such appeals. They stress that the Supreme Court could not be so enjoined if it did not have the jurisdiction to hear and determine such appeals. They maintain that a reading of Articles 86 and 140 together translates into the conclusion that the Supreme Court has appellate jurisdiction in election cases. That argument was accepted in the judgments of two of the Justices in the Constitutional Court. In their joint written submissions, Mr. Rwaganika and Mr. Akampumuza, counsel for the appellants urge this Court to uphold the reasoning and conclusions of the minority judgments. In one of the judgments, Twinomujuni J.A. rightly observed that Article 86 neither provides for second appeals to the Supreme Court nor for the decisions of the Court of Appeal to be final. According to the learned Justice of Appeal, that raises an issue that needs to be resolved. In an effort to resolve the issue, the learned Justice of Appeal went on –

"The draftsperson of the Constitution and the Constituent Assembly were aware that article 86 had left the issue of appellate jurisdiction

unresolved. The article

was not conclusive on that matter. The article had not authorized any other
authority to resolve it. After all, that article dealt with resolution of disputes arising
from election of Members of Parliament and the Speaker. It was never intended

there to resolve or confer jurisdiction on the Supreme Court. It was deemed it
would be better dealt with under provisions falling under the Judiciary Chapter,
such as article 140… That is why the article makes a cross reference to article
86(1). A close reading of article 140(2) shows clearly that the Court of Appeal and
the Supreme Court were enjoined to hear and determine election petitions as
expeditiously as the High Court was required to do under article 140(1)… This
clause (2) answered the question which was left hanging by article 86… By
reading the two articles together, the logical and inescapable conclusion is that the

Constitution of Uganda settled once for all the question of appellate jurisdiction in
election petitions." (Emphasis is added)

With the greatest respect to the learned Justice of Appeal, I find that his conclusion is premised on erroneous assumptions, namely (a) that Article 86 leaves an "unresolved" issue hanging and (b) that the Constitution provides no authority or mechanism for determining if the Supreme Court has jurisdiction over election disputes. The clear objective in Article 86 is to vest jurisdiction by stating the fora by which disputes arising from parliamentary elections are to be resolved. The Article clearly states it is to be by the High Court, and in case a party is aggrieved by its decision, by the Court of Appeal on appeal. That way the framers of the Constitution vested jurisdiction over election disputes in the two courts. I think it is unsustainable speculation to assert that the

Article leaves a jurisdiction question hanging to be "better dealt with under provisions" in the Chapter on the Judiciary. Whether the Supreme Court has jurisdiction is not a question raised by or intrinsic in Article 86. It is extrinsic and I will presently illustrate that the answer to it is not to be found in Article 140.

As I stated earlier in this judgment, by majority of 3 to 2, the Constitutional Court held that in Article 140 the Constitution does not confer jurisdiction on any of the courts mentioned therein. I agree with that holding. The provisions of Article 140 are only procedural guidelines directing the courts mentioned therein to give priority to the hearing and disposal of election petitions and appeals arising from them. Although it is evident that the provisions envisage that each of the three courts mentioned would exercise jurisdiction over election cases, they do not purport to confer jurisdiction on any of them. One has to look elsewhere for the source of the jurisdiction to be exercised in the manner directed. In the case of the High Court and the Court of Appeal, the source is not far to seek. It is pointed out through the cross reference in Article 140 that the learned Justice of Appeal mentions. The source is Article 86. It expressly confers jurisdiction on them thus –

"***86. (1) <u>The High Court shall have jurisdiction</u> to hear and determine any***

question whether –

(a) a person has been validly elected a member of Parliament or the seat

of a member of Parliament has become vacant; or

(b) a person has been validly elected as Speaker or Deputy Speaker or ….

(2) <u>A person aggrieved</u> by the determination of the High Court under this

Article <u>may appeal to the Court of Appeal</u>."

There is no provision either in the two Articles or elsewhere in the Constitution, expressly conferring on the Supreme Court

jurisdiction to hear and determine an appeal, or giving an aggrieved party the right to appeal to the Supreme Court, in an election case.

That leads me to consider whether such jurisdiction or right may be inferred having regard to the Constitution as a whole. It is trite that the courts are established directly by the Constitution or indirectly under it, and that their respective jurisdictions are accordingly derived from the Constitution or other law made under authority of the Constitution. In Article 129 the Constitution ordains that the judicial power of Uganda shall be exercised by the courts of judicature. It specifically establishes three superior courts, namely High Court, Court of Appeal and Supreme Court, and empowers Parliament to establish other subordinate courts. In different articles, the Constitution confers on each of the three superior courts two categories of jurisdictions, namely general and particular or special jurisdiction. Provisions conferring jurisdiction are all explicit. They are not necessarily uniform as they convey the conferment interchangeably in such phrases as:*' the court has (or shall have) jurisdiction'* or *'an aggrieved party may appeal to (or petition) the court'* or *'an appeal shall lie to the court'.* I think it is useful to briefly examine those categories. Under Article 139, general jurisdiction (both original and appellate) is conferred on the High Court thus –

"(1) <u>The High Court shall,</u> subject to the provisions of this Constitution, <u>have</u>

<u>unlimited original jurisdiction</u> in all matters <u>and such appellate and other</u>

<u>jurisdiction</u> as may be <u>conferred on it by this Constitution or other law.</u>

(2) Subject to the provisions of this Constitution and any other law, the decisions

of any court lower than the High Court shall be appealable to the High Court."

Notwithstanding the general unlimited jurisdiction so conferred on the High Court, Article 86, which I have already reproduced, confers on the same court special jurisdiction over questions arising from parliamentary elections. Furthermore, Article 64(1) and (3) confers on it special appellate jurisdiction by giving to aggrieved persons the right to appeal the High Court against decisions of the Electoral Commission. It noteworthy clause (4) of that Article provides –

"(4) A decision of the High Court on an appeal under clause (1) or (3) of this

article shall be final.

The Constitution also directly confers the following special jurisdictions –

- on the Court of Appeal, to determine *appeals* from High Court *in election petitions*;
- on the Court of Appeal as the Constitutional Court *to determine constitutional petitions and references under Article 137;*
- on the Supreme Court to determine *appeals from the Constitutional Court*; and
- on the Supreme Court to *inquire into a petition challenging presidential election results under Article 104.*

The provisions conferring the category of general jurisdiction on the Court of Appeal and the Supreme Court are similar and subject to a uniform circumscription. In respect of the Court of Appeal, clause (2) of Article 134 provides -

"An appeal shall lie to the Court of Appeal from such decisions of the High Court as may be prescribed by law." (Emphasis is added)

Similarly, in respect of the Supreme Court, clause (2) of Article 132 provides –

"An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law." (Emphasis is added)

It is clear from these two provisions that not all decisions of the High Court are appealable to the Court of Appeal and not all decisions of the latter are appealable to the Supreme Court. By these provisions, the Constitution authorizes the making of law prescribing the decisions of the High Court that are appealable to the Court of Appeal and the Court of Appeal decisions that are appealable to the Supreme Court. Only decisions *"prescribed by law"* are so appealable.

In the second minority judgment, Mpagi-Bahigeine J.A. notes provisions of Article 132 conferring the general appellate jurisdiction of the Supreme Court and those under Articles 86 and 140 that "specifically deal with electoral matters", and contrasts them with Article 64(4), which provides that the decision of the High Court on an appeal against a decision of the Commission shall be final. The learned Justice of Appeal then continues to say that in her view –

"a provision like clause 4 of article 64 would have been the likely sequel to article

86(2). In its absence I am constrained to agree with Mr. Akampumuza that article

140(2) logically fills the vacuum and is clearly meant to confer jurisdiction to the

Supreme Court to hear and determine appeals in electoral appeals from the Court

of Appeal.

In constitutional interpretation it is trite that constitutional rights conferred

without express limitation are not to be whittled down by reading implicit

restrictions into them. It will be sacrilege, therefore, to put a restriction on the

petitioners' right of access to the highest appellate court in the land when this

right is clearly guaranteed under articles 132 and 140(2)."

Again with the greatest respect to the learned Justice of Appeal, I must say that her conclusion is based on erroneous premises. First, as I said earlier in this judgment, Article 140 does not purport to confer jurisdiction on any court and consequently does not confer on anyone a right of appeal. Secondly, the absence in Article 86 of a provision that the Court of Appeal decision shall be final is no more a basis for holding that a second appeal shall lie to the Supreme Court than for saying that no second appeal shall so lie. Interestingly, both sides to this appeal used the argument with equal force: one contending that if the intention was to make the Court of Appeal the final court in election cases it would have been stated expressly, and the other contending that if the intention was to confer jurisdiction on the Supreme Court it would have been so stated expressly. Lastly, Article 132 alone or with Article 140(2), far from guaranteeing an unrestricted right of appeal to the Supreme Court it creates a circumscribed right. The right of appeal and the jurisdiction conferred by Article 132(2) can only be activated by an enactment of a law prescribing what decisions of the Court of Appeal are appealable to the Supreme Court.

In my view, it is unnecessary, or at the very least unhelpful in the circumstances, to attempt to read the intention of the framers of the Constitution from the absence of an express provision that the Supreme Court has or has no jurisdiction in election cases. This is particularly so because the litmus test is in Article 132(2), which in effect provides that appeals to the Supreme Court shall only be against those decisions of the Court of Appeal that are prescribed by law. In this connection, I would not construe Article 86 as having the effect of permanently barring second appeals in election cases. Under authority of Article 132(2), Parliament has an option to enact a law prescribing that the Court of Appeal decisions in election cases are appealable to the Supreme Court, thereby guaranteeing to an aggrieved party *"the right of access to the highest appellate court in the land"*. Equally, Parliament has the option to enact a law restricting appeals in election cases to the Court of Appeal. In enacting the impugned statutory provision, Parliament opted for the second alternative, and in enacting the new law it opted for the first.

For the reasons I have set out in this judgment, I find that neither Article 140(2), nor any other constitutional provision confers on the Supreme Court jurisdiction over election questions set out in Article 86(1), and that at the time material to this appeal the appellants had no right of appeal to the Supreme Court against the dismissal of their respective Election Petitions and appeals. Accordingly I would uphold the majority decision of the Constitutional Court and dismiss this appeal.

DATED at Mengo this 15th day of March

2006.

J. N. Mulenga,
Justice of the Supreme Court

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, C.J., ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA, KATUREEBE, J.J.S.C.)

CONSTITUTIONAL APPEAL NO. 1 OF 2005

BETWEEN

BAKU RAPHAEL OBUDRA :::::::::::::::::::::: APPELLANTS

OBIGA KANIA ::::::::::::::::::::::::::::::::::::::

AND

THE ATTORNEY GENERAL :::::::::::::::::::: RESPONDENT

(Appeal from the decision of the Constitutional Court (Mpagi-Bahigeine, Engwau, Twinomujuni, Byamugisha and Kavuma, J.J.A.) dated 11th March, 2005 in Constitutional Petitions No. 4/2002 and6/2002).

JUDGMENT OF KANYEIHAMBA, J.S.C.

I have had the benefit of reading in draft the judgments of my brothers, Karokora and Tsekooko, J.J.S.C, and I find myself in total

agreement with Karokora, J.S.C, in his findings on the construction of the constitutional and statutory provisions applicable to this appeal.

Hon. Justice Karokora, J.S.C has adequately dealt with the legal implications and consequences of this appeal, I will only add a few remarks of my own by way of emphasis in support of his judgment.

This appeal is against the decision of the Constitutional Court in petitions Nos. 4 and 6 of 2002, following a directive from this court that those petitions be heard to resolve ground 2 of the original petition after this court had unanimously resolved ground 1 in favour of the appellants in **Constitutional Appeal No. 1 of 2003**.

In our respective judgments in that appeal, we held that the appellants had rightly alleged that there was a cause of action. Ground 2 raised the issue of whether or not there was a further appeal to this court from the decisions of the Court of Appeal involving Parliamentary election petitions.

In our respective remarks during the hearing of Constitutional Appeal No. 1 of 2003, we had observed that there appeared to be a conflict between Section 67 of the Parliamentary Elections Act, 2001 (herein after referred to as the Act) and Articles 140 and 86 of the Constitution, 1995 (herein after referred to as Provisions of the Constitution).

The conflicting provisions of both the Act and the Constitution are reproduced in the judgments of the Court of Appeal and of my learned brother, Karokora, J.S.C. I note that since these petitions were filed and heard, Parliament has resolved, rightly in my opinion, the apparent conflict that we had identified in 2003. This resolution was effected by the enactment of **section 66 of the Parliamentary Elections Act, 2005** which allows appeals on Parliamentary Elections from the Court of Appeal to the Supreme

Court.

Be that as it may, this appeal needs to be resolved on the ground that Articles 132 and 140 of the Constitution give jurisdiction to the Supreme Court to expeditiously hear and determine Parliamentary Election Petitions and an Act of Parliament, in this case section 67(3) of the Parliamentary Act, 2001cannot oust that jurisdiction unconstitutionally.

In my view, an Act of Parliament may only create and confer jurisdiction where the Constitution is completely silent on the matter. I agree with Twinomujuni, J.A when in his dissenting judgment in the Constitutional Court he observes that the expression by "Law" found in Article 132 of the Constitution includes the provisions of the Constitution themselves. My brother, Karokora, J.S.C whose judgment I concur with expresses the same opinion.

In my opinion and with the greatest respect, the view expressed by the majority learned Justices of Appeal that the omission to mention the Supreme Court in Article 68(2) was deliberate and that if Parliamentary Election Petition appeals were to be permitted to go to the Supreme Court, there would be unnecessary delays and congestion in the two courts is purely speculative and I can find no basis for it both in fact and law.

The reading together of Articles 86, 132 and 140 leaves no doubt that the Supreme Court is vested with jurisdiction to hear appeals from the decisions of the Court of Appeal on Parliamentary Election Petitions. To hold otherwise would render Article 140(2) redundant, a consequence clearly not intended by the framers of the 1995 Constitution.

Where, as is alleged in this case, Parliament intends to abolish or restrict a citizen's right which is apparently granted or implied by the provisions of the Constitution which is a superior law, Parliament must do so expressly and its will must be clearly manifested in the words used in the Act. Such intentions or will cannot be breathed into the Act by mere judicial reasoning. In any event, it is a well known rule of construction that where a

Parliamentary measure which is intended to adversely affect the right of an individual is framed in vague or unclear terms, it must be construed liberally and in such a way as to sustain rather than restrict that right. Thus, in the Canadian case of **R v. Big M. Drug Mart Ltd,** [1985] I.S.C.R. 295 at 344, Dickson J, while expounding this rule of construction said:

"In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the 'Charter' itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated with or the text of the 'Charter'. The interpretation should be, as the judgment in Hunter v. Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the 'Charter's' protection. At the same time, it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the 'Charter' was not enacted in a vacuum and must therefore, as this Courts' decision in Law Society of Upper Canada v. Skapinker, [1985] I.S.C.R, illustrates, be placed in its proper linguistic, philosophic and historical contexts."

In this regard, the original draft Constitution which was the main working document in the Constituent Assembly that debated and made the 1995 Constitution had deliberately omitted to create a second appellate court. The Constituent Assembly rejected that idea, and the proceedings of the Assembly show that the second appellate court which is now the Supreme Court, was created because supportive delegates desired that a citizen should always have the right to appeal to the highest court of the land on any vital measure of interest.

For the foregoing reasons, I would allow this appeal. I would award costs to the appellants in this court and in the courts below.

Dated at Mengo, this 15th day of March 2006.

G.W. KANYEIHAMBA

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA, MULENGA KANYEIHAMBA, AND KATUREEBE, JJSC).

CONSTIUTIONAL APPEAL NO. 1 OF 2005

BETWEEN

1. **BAKU RAPHAEL OBUDRA]**
2. **OBIGA KANIA] :::::::::::: APPELLANTS**

AND

THE ATTORNEY GENERAL :::::::::::::::::::: RESPONDENT

[Appeal from the decision of the Constitutional Court, Kampala (Mpagi-Bahigeine, Engwau, Twinomujuni, Byamugisha, and Kavuma, JJ.A) dated 11th March, 2005 in Constitutional Petition No. 4/2002 and No. 6/2002].

JUDGMENT OF KATUREEBE, JSC.

I have had the advantage of reading in draft the Judgments prepared by my learned brothers Justices Tsekooko, Kanyeihamba and Karokora, JJS.C. I agree with Tsekooko, JSC, that this appeal be dismissed.

The facts of the appeal are well set out in the said draft Judgments and I do not intend to repeat them here. The main question in this appeal appears to me to be whether the Constitution provides for and guarantees a right of appeal to the Supreme Court in Election matters, and whether, a fortiori, Section 67(3) of the Parliamentary Elections Act, 2001 is inconsistent with Articles 86(1) (2) and 140(2) of the Constitution. To determine whether the Constitution guarantees a right of appeal to the Supreme Court in election matters, it is necessary to look at the express provisions of the Constitution and any relevant laws. It is trite, as held by the majority Justices of Appeal, that jurisdiction is conferred by the Constitution or other law made by Parliament. There is no such thing as an inherent automatic right of appeal to the Supreme Court.

The starting point, in my view is Article 86 of the Constitution which is under chapter six of the Constitution on the Legislature. This chapter is concerned with "Establishment, Composition and Functions of Parliament.". It is important to put it in its proper context. It is in that context that the framers of the Constitution decided to provide for how questions arising from a Parliamentary election are to be handled and who handles them. The article states:

86(1)" <u>The High Court shall have jurisdiction</u> to hear and determine any question whether: -

(a) ***a person has been validly elected a member of Parliament or the seat of a member of Parliament has become vacant; or***

(b) ***a person has been validly elected as speaker or Deputy speaker or having been so elected has vacated that office***

(2) a person aggrieved by the determination of the High Court under this <u>article may appeal to the Court of Appeal</u>". (emphasis mine<u></u>)

Clearly, the Constitution has determined which court has original jurisdiction in election matters, and which court has appellate jurisdiction in these matters. By no stretch of the imagination can one interprete this as conferring jurisdiction by non exclusion on the Supreme Court. Clearly it does not, and the framers of the

Constitution must have meant it to be so. If any further appeal is to be anticipated then the jurisdiction of that court must be found in other provisions of the Constitution. This, to me, means that one must then go to Article 132 of the Constitution which provides for the jurisdiction of the Supreme Court. That article states:

> ***132 (1)" The Supreme Court shall be the final court of appeal.***
>
> ***(2) An appeal shall lie to the Supreme Court <u>from such decisions of the Court of Appeal as may be prescribed by law."</u>*** (emphasis mine).

At this point there is no single express provision of the Constitution that has conferred jurisdiction on the Supreme Court in election petitions. But it can be deduced that by Article 132(2) the Constitution has itself settled the question of where the Supreme Court will derive its jurisdiction where the constitution itself has not already conferred the jurisdiction, i.e., the Legislature has been authorised to determine which decisions of the Court of Appeal will go to the Supreme Court. Since the Constitution has already provided in Article 86(2) that in election matters an appeal shall lie from the High Court to the Court of Appeal, and has not therein provided for a further appeal, the decision of the Court of Appeal must be one of those which the Legislature, under Article 132(2) may by law prescribe as one that may or <u>may not</u> be appellable to the Supreme Court. It is my view that if the law may prescribe which decision of the of appeal may go to the Supreme Court,

there is an implied power to prescribe those that may not.

It is noteworthy that Article 132 is under Chapter 8 of the Constitution on the part specifically dealing with the Supreme Court. The marginal note to article 132 is: ***"Jurisdiction of the Supreme Court."*** The Legislature could, using Article 132(2) prescribe that appeals in election petition shall lie to the Supreme Court from decisions of the Court of Appeal, as indeed I must note, it has now done by enacting section 66 of the Parliamentary Election Act, 2005. The Legislature could also prescribe that decisions of the Court of Appeal in election matters may not be appealed to the Supreme Court, as it did under section 67(3) of the Parliamentary Elections act, 2001. Try as I might, I have this far not been able to see a guaranteed right to appeal to the supreme Court in election matters. Article 86 which prescribed the Courts that may handle election petitions conferred no such right. Article 132 which spells out the jurisdiction of the Supreme Court has also not conferred such right.

This takes me to the argument so strenuously argued by learned counsel for the appellants in their written submissions. That argument is that Article 140(2) does confer that right to appeal to the Supreme Court, apparently because that article states that

when hearing appeals in election matters, the Supreme Court must do so expeditiously.

This is the Article in full:

> ***140(1) "where any question is before the High Court for determination under clause (1) of article 86 of this Constitution, the High Court shall proceed to hear and determine the question expeditiously and may, for that purpose, suspend any other matter pending before it.***
>
> (2) ***This article shall apply in similar manner to the Court of Appeal and the Supreme Court when hearing and determining appeals on questions referred to in close (1) of this article."***

It is important to note here that the High Court had already had jurisdiction conferred on it by Article 86(1). The Court of Appeal already had jurisdiction specifically conferred on it by article 86(2) of the Constitution. The appellants would now wish to skip Article 132 on the jurisdiction of the Supreme Court and find that jurisdiction in article 140(2). In my view that would be over stretching the principle of harmonisation. Article 140 spells out how the courts must handle election petitions. It is also noteworthy that it comes under the part of the Constitution dealing with the High Court, which already had jurisdiction conferred on it by article 86. I do not see why one would have to go to the part of the Constitution dealing with the High Court to find jurisdiction for the Supreme Court. In my view, Article 140 presupposes that the courts have already been conferred with jurisdiction or that

jurisdiction will be conferred by law. The courts must, if need be, put aside all other work and hear and determine the election petitions expeditiously. By analogy, article 104(3) enjoins the Supreme Court to determine a Presidential Petition expeditiously. I entirely agree with their Lordships the majority Justices of Appeal, that this Article, i.e.,140(2) does not confer jurisdiction. It spells out the manner of doing a duty. Jurisdiction has to be found in Articles 86 and 132 and any laws made thereunder.

If Article 140 (2) had not made a reference to the Supreme Court, and yet the Legislature made a law conferring jurisdiction on the Supreme Court in election matters, as it has now done under Section 66 of the Parliamentary Elections Act, 2005, then there would have been a lacuna. It would have appeared that the Constitution did not intend that the Supreme Court, when conferred with jurisdiction, would not be bound to hear election petitions expeditiously. Yet clearly the intention of the makers of the Constitution was that election petitions must be disposed of expeditiously by the courts. That to me is the import of Article 140 whose marginal note itself is clear. ***"Hearing of election case."***

I fully accept the argument by counsel for the Appellant that the Constitution must be read together for harmony and completeness. But in my view, before one proceeds to harmonise the various

provisions, it is necessary to understand each provision in its proper context. Words must first be given their full and proper meaning. One cannot jump from one Article of the constitution to another without referring to other intervening provisions and claim to be doing so for purposes of harmonising the constitution.

In my view Article 86 of the Constitution is complete and it was intended to be so by the framers of the Constitution. It is not hanging as suggested by Twinomujuni, JA, in his dissenting judgment. Had the framers of the Constitution wanted to confer jurisdiction on the Supreme Court, they would have expressly done so. It is noteworthy that when it come to Presidential Election Petition, the framers of the Constitution specifically conferred original jurisdiction on the Supreme Court (Article 104). It would appear that their concern was that protracted election cases should be avoided hence the specific provisions in Articles 86 with regard to which courts should hear these cases. But the framers of the Constitution clothed Parliament with the authority to determine whether the Supreme Court should also be brought in. But once brought in, the framers of the constitution also wanted it to hear and determine such cases expeditiously, putting aside other cases if need be: Hence Article 140. In my view, therefore Article 140 (2) is not superfluous. Now that the Legislature has prescribed that decisions of the Court of Appeal may go on appeal to the Supreme Court that court must proceed as directed in Article 140(2).

In the result, I am of the considered opinion that there was no right of appeal to the Supreme Court in election matters at the material time, and no such right was violated. Parliament, by enacting Section 67(3) of the Parliamentary Elections Act, 2001 did not exceed its Constitutional mandate and that section was not inconsistent with Articles 86 and 140 or any other provisions of the Constitution.

Before I take leave of this matter, I wish to comment on one aspect. Their Lordships, the minority in the Court of Appeal sought to fortify their opinion by invoking section 7 of the Judicature Act, 1996. Twinomujuni, JA states in his judgment at page 10 after citing section 7 of the Act.

> ***"In my judgment, this provision means that once the Court of Appeal, disposes of an appeal from the***

exercise of the original jurisdiction of the High Court, an appeal as of right, lies to the Supreme Court. The Judicature Act, 1996 was enacted long before section 67(3) of the Act was enacted. If Parliament genuinely thought that the Constitution had not resolved the issue of appeals in election petitions to the Supreme Court, it would have provided in section 67(3) as follows:-

"Notwithstanding the provision of section 7 of the Judicature Act, 1996, the decision of the Court of Appeal under this section is final."

With great respect to the learned Justice, he has confused election matters and civil matters. The said Section 7 is appropriately headed**"** ***"APPEALS TO THE SUPREME COURT IN CIVIL MATTERS"*** (emphasis mine). What was before the court was election matters which even the Constitution has sought to deal with separately. The Parliamentary Elections Act was in that vein dealing with election matters, and its section 67(3) must be seen in that context. I think therefore it was a misdirection on the part of the learned Justice to attempt to mix up the two.

In the result, I would confirm the decision of the court of Appeal and dismiss this appeal. But given the public interest nature of the subject, I would make no order as to costs.

Dated at Mengo this 15th day of March, 2006.

Bart M. Katureebe
Justice of The Supreme Court