THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT KAMPALA

(CORAM: ODOKI, CJ; TSEKOOKO; KATUREEBE; KITUMBA; TUMWESIGYE; KISAAKYE; JJSC, MPAGI-BAHIGEINE; AG.JSC.)

CONSTITUTIONAL APPEAL NO. 02 OF 2007

BETWEEN

JOHN KEN-LUKYAMUZI:::::::::::::::::::::::::::::::: APPELLANT

AND

1. ATTORNEY GENERAL
2. ELECTORAL COMMISSION :::::::::::::::::: RESPONDENTS

[An Appeal from the decision of the Constitutional Court of Uganda at Kampala, Mukasa-Kikonyogo, DCJ, Okello, Engwau, Twinomujuni, Byamugisha, JJA) dated 26th March 2007 in Constitutional Petition No. 19 of 2006)

JUDGMENT OF TUMWESIGYE, JSC

INTRODUCTION

This is an appeal by John Ken-Lukyamuzi, herein referred to as "the appellant", from the decision of the Constitutional Court given on 26th March, 2007. The appellant had filed in that court a constitutional petition against the Attorney General and the Electoral Commission, referred to in this judgment as "1st respondent" and "2nd respondent" respectively, contesting firstly his removal from Parliament before the expiry of his term and secondly his being barred from nomination as a candidate in the parliamentary elections that were held in February 2006.

BACKGROUND AND PROCEDURAL HISTORY

The facts leading to this appeal are that on 23rd February, 2001 the appellant was elected as a member of Parliament for Lubaga South Constituency. His term as a member of Parliament fixed by the Constitution was five years. However, before the expiration of his term, the appellant was

informed by the Speaker of Parliament that he had ceased to be a Member of Parliament because of breaching the Leadership Code Act, 2002.

The Leadership Code Act is enforced by the Inspectorate of Government normally referred to as the Inspector General of Government (IGG). On 30th September 2005 the IGG submitted a report to the Speaker of Parliament containing her finding that the appellant had breached the Leadership Code Act by failing without reasonable cause to submit his declaration of income, assets and liabilities to the IGG as required by the Leadership Code Act. The only punishment for such a breach under the Leadership Code Act is dismissal or vacation of office. The implementing authority for the decision of the IGG with respect to members of Parliament is the Speaker of Parliament. The IGG, therefore, in her report asked the Speaker of Parliament to implement her decision by removing the appellant from Parliament. The Speaker of Parliament implemented her decision.

Soon after the appellant was informed by the Speaker of Parliament that he had lost his seat, the Clerk to Parliament notified the Electoral Commission that the seat for Lubaga South in Parliament had fallen vacant. On 12th January, 2006, the Chairman of the Electoral Commission wrote to the Returning Officer of Kampala District, in which Lubaga South Constituency is located, that since a person removed from office for a breach of the Leadership Code Act was barred by the same Act from holding any other public office for five years from the date of his or her removal, the appellant was not eligible to be nominated as a candidate in the Parliamentary elections to be held in February 2006. The appellant was, therefore, barred from standing in that election.

Believing that his constitutional rights were violated, the appellant filed a petition in the Constitutional Court challenging his removal from Parliament and also challenging his being barred from standing in the February 2006 parliamentary elections. He based his petition on several grounds. I will mention here only those grounds which are relevant to this appeal.

He complained in his petition that his removal from his seat as a member of Parliament for Lubaga South was a violation of Articles 2 and 83(1) (e) of the Constitution; that the Speaker of

Parliament acted contrary to Articles 2, 3(4) and 83 (1) (e) of the Constitution when he implemented the decision of the IGG to declare his seat vacant, and that the Chairperson of the 2nd respondent acted contrary to Articles 2, 3(4), 62, 80 and 83 (1) (e) of the Constitution when he barred him from being nominated as a candidate in the parliamentary elections of February 2006.

The petition was accompanied by the appellant's affidavit which had several attachments. It was also supported by the affidavit of Suzan Nampijja Lukyamuzi, his daughter, who had been elected as a member of Parliament for Lubaga South in the February 2006 elections.

The appellant in his petition prayed for a number of declarations. I will mention here declarations that I consider relevant to this appeal. These are:

(a) That the appellant's removal from his seat as a member of Parliament for Lubaga South Constituency was null and void for being inconsistent with Articles 2 and 83(1)(e) of the Constitution.
(b) That the appellant's disqualification by the Chairperson of the 2nd respondent from being nominated for election as a member of Parliament for alleged breach of the Leadership Code Act was inconsistent with Articles 2, 3 (4), 62, 80, 83(1) (e) of the Constitution.

The appellant also prayed for an order directing the 1st respondent to compute and pay all the emoluments the appellant would have earned as a member of Parliament from the time he was removed from his seat until the expiry of his term as a member of Parliament.

The appellant further prayed for the costs of the petition with a certificate for two counsel.

The 1st and 2nd respondents filed a joint answer to the petition denying that the appellant was unconstitutionally removed from his seat as a member of Parliament for Lubaga South and denying further that the appellant was unconstitutionally barred from being nominated as a candidate in the February 2006 parliamentary general elections. The answer to the petition was accompanied by the affidavit of Eng. Dr. Badru Kiggundu, Chairperson of the 2nd respondent,

and that of Justice Faith Mwondha who was then the IGG. There were several attachments to her affidavit. The respondents prayed for dismissal of the petition with costs.

The Constitutional Court heard the petition, resolved all the issues framed in the negative and dismissed the petition with costs. The appellant being aggrieved by the decision of the Constitutional Court filed this appeal. The memorandum of appeal which was jointly drawn by two counsel, Mr. Muzamiru Kibeedi and Mr. James Akampumuza, contained ten grounds. However, in their written submissions they abandoned three of the grounds and retained seven grounds. The grounds of appeal retained were:

"1. That the learned Justices of Appeal erred in law when they held that the IGG is indeed the "appropriate tribunal" under Article 83(1)(e) of the Constitution.

2. That the learned Justices of Appeal erred in law when they failed to apply a wholistic approach while interpreting the term "appropriate tribunal" under Article 83(1)(e) of the Constitution, and thereby came to the wrong conclusion that the IGG is the "appropriate tribunal" in glaring breach of Articles 28(1), 44(c), 20(2) and 225(d) of the Constitution.

3. That the learned Justices of Appeal erred in law and fact when they held that the Inspector General of Government (IGG), the Speaker of Parliament and Chairperson of the Electoral Commission never committed any breaches against Articles 2 and 3 (4) of the Constitution or any other Article of the Constitution.

4. That the learned Justices of Appeal failed to properly evaluate the evidence on record and to apply the law applicable to it and thereby erred in not holding that the IGG had breached Articles 2, 3(4) and 83(1)(e) of the Constitution when, by her report dated 30th September 2005, she required the Speaker of Parliament to take action against the petitioner to vacate his seat in Parliament on the ground of alleged breach of the Leadership Code Act, 2002.

5. That the learned Justices of Appeal failed to properly evaluate the evidence on record and to apply the law to it and thereby erred in not holding that the Speaker of the 7th Parliament, in the course of his duties as an official of the 1st Respondent, had acted contrary to Article 2, 3(4) and 83(1)(e) of the Constitution when he implemented the decision of the IGG contained in her report dated 30th September 2005 requiring the petitioner to vacate his seat in Parliament on the ground of alleged breach of the Leadership Code Act, 2002.

6. That the learned Justices of Appeal failed to properly evaluate the evidence on record and to apply the law applicable to it and thereby erred in not holding that the Chairperson of the 2nd respondent, while acting as an official and/or agent of and/or servant of the 2nd respondent had acted contrary to Articles 2, 3(4), 62, 80, 83(1)(e) of the Constitution when he declared that the Petitioner was not eligible for nomination as a candidate to contest for election as the member of Parliament representing Lubaga South Constituency in the 8th Parliament of Uganda on the sole ground of breach of the Leadership Code well aware that the procedure for removal from the 7th Parliament did not meet the standard set out in the Constitution.

7……

8……

9……

10. That the learned Justices of Appeal erred in not granting the reliefs sought by the appellant."

The respondents were represented by Mrs. Robinah Rwakoojo, Ag. Director for Civil Litigation, and Ms. Christine Kaahwa, Principal State Attorney, both from the Ministry of Justice and Constitutional Affairs. In their written submissions presented to this court, they raised a preliminary objection that grounds 4, 5 and 6 of the appellant's grounds of appeal offended Rule 82 (1) of the Rules of this court for being argumentative and narrative.

Rule 82(1) of the Supreme Court Rules, 1996, provides as follows:

> **"A memorandum of appeal shall set forth concisely and under separate heads without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the court to make."**

In their response to this preliminary objection, counsel for the appellant argued that the respondents were barred by Rule 98(b) to raise such an objection without the leave of the court; that the grounds do not breach the Rules of this court as claimed and that no injustice had been suffered by the respondents. They further argued that the respondent understood the substance of the contested grounds and had furnished appropriate answers.

I respectfully agree with counsel for the respondents that grounds 4, 5 and 6 of the memorandum of appeal lack conciseness, as in my view, they are unnecessarily wordy. They are also argumentative. Counsel for the appellant are expected to be familiar with this rule and to comply with it. I find that the arguments presented by counsel for the appellant in answer to this preliminary objection lack merit. However, it would not be just for the court to strike out the appellant's appeal for this reason as it would, in my view, be visiting the sins of the erring counsel on an innocent person. I will, therefore, only warn counsel for the appellant not to repeat it and proceed to consider the grounds of appeal since admittedly their substance can be understood.

In their written submissions learned counsel for the appellant argued ground 1 and 2 together, then ground 3, 4, 5 and 6 together, and lastly ground 10. I will follow the same order.

A Brief Background to the Leadership Code of Conduct.

Before proceeding to consider the appellant's grounds of appeal, I will give a brief background to the Leadership Code of Conduct for easy comprehension of the issues involved in this appeal.

In 1992 the National Resistance Council, the then interim Parliament of Uganda, enacted a Statute called the Leadership Code. It was to be enforced by a Leadership Code Committee. This

Leadership Code Committee was never constituted and so the Leadership Code was not enforced.

In 1995 a new national Constitution was enacted. The ideas of the Leadership Code 1992 greatly influenced the enactment of the provisions of the Constitution in Chapter 14 on the Leadership Code of Conduct. Article 233(1) of the Constitution provides that "Parliament shall by law establish a Leadership Code of Conduct for persons holding such offices as may be specified by Parliament", and Article 234 vests the powers of enforcing the Leadership Code of Conduct in the IGG "or such other authority as Parliament may by law prescribe". Section 1(2) of the Constitution (Consequential Provisions) Act, 1995, provides that until Parliament prescribes any other authority to be responsible for enforcing the Leadership Code of Conduct, the IGG shall be responsible for enforcing the Code.

In 2002 the Leadership Code, 1992, was repealed and the Leadership Code Act, 2002, was passed. Section 2(2) of the Leadership Code Act, 2002, provides that the provisions of the Code shall constitute the Leadership Code of Conduct under Chapter 14 of the Constitution.

Specified leaders who are bound by the provisions of the Code are listed in the Second Schedule to the Act. The list is long. It includes the President, Vice-President, Speaker of Parliament, Prime Minister, Ministers, members of Parliament, Judges and magistrates, permanent secretaries, directors, presidential advisors, ambassadors and high commissioners, Governor Bank of Uganda and heads of departments of the bank, constitutional commissioners, Auditor General, Inspector General of Government, Vice-Chancellors of Government controlled universities, chairpersons of districts and district councilors, top civil servants of local governments.

Section 4(1)(b) of the Act requires every leader to submit a written declaration of his or her income, assets and liabilities once every two years during the month of March to the IGG.

Section 4(8) of the Act provides that a leader who fails without reasonable cause to submit a declaration of his or her income, assets and liabilities to the IGG commits a breach of the Code

and the penalty for this breach under section 35(b) of the Act is dismissal from or vacation of office.

The enforcement of the Leadership Code Act, 2002, had run into controversy before this appeal. In 2002 a Presidential Advisor called Major Roland Kakooza Mutale was dismissed by the President on the order of the IGG for failure to declare his income, assets and liabilities to the IGG.

Following his dismissal a Constitutional petition was lodged contesting the powers of the IGG to dismiss Presidential appointees. In that case of ***Fox Odoi-Oywelowo and James Akampumuza Versus Attorney General, Constitutional Court, Constitutional Petition No. 8 of 2003*** (unreported) the Constitutional Court held that sections 19(1), 20(1), and 35(b) and (d) of the Act were null and void in respect of Presidential appointees because they were inconsistent with laid down procedures in the Constitution for disciplining such appointees and the same sections fettered the discretion vested in the President by the Constitution in the disciplining of his or her appointees.

The decision in that case crippled the enforcement of the Leadership Code because Presidential appointees are the main leaders in this country. In 2005 Parliament made an amendment to the Constitution under Chapter 14 – Article 235A - establishing a Leadership Code Tribunal "whose composition, jurisdiction and functions shall be prescribed by Parliament" although Article 234 of the Constitution vesting powers of enforcement in the IGG was not changed.

To date the Leadership Code Tribunal under Article 235A of the Constitution has not been established and Government and Parliament have surprisingly not taken any steps to amend the Leadership Code Act in view of the crippling effect of the decision in the case of **Fox Odoi Oywelowo** (supra) on its enforceability.

CONSIDERATION OF GROUNDS 1 & 2 OF APPEAL

In this appeal, the substantial issue which is at the heart of the dispute is whether the IGG is the appropriate tribunal mentioned in Article 83(1) (e) of the Constitution. The other grounds of appeal are only peripheral to this issue.

Article 83(1)(e) of the Constitution provides:

> **"(1) A member of Parliament shall vacate his or her seat in Parliament…..**
>
> **(e) if that person is found guilty by the appropriate tribunal of violation of the Leadership Code of conduct and the punishment imposed is or includes the vacation of the office of a member of Parliament."**

In a unanimous decision, the Justices of the Constitutional Court held that the IGG was the appropriate tribunal. In their judgment they said: -

> "**The relevant provisions of the Leadership Code and those of the Inspectorate of Government Act have to be taken into account. We have already quoted above the provisions of Article 83(1) (e) of the Constitution. To this we must add the provisions of Article 234 of the Constitution. From these constitutional provisions it appears plain to us that the power to enforce the Leadership Code of Conduct is vested in the office of the IGG**."

The Constitutional Court addressed itself to Article 235A which was introduced to Chapter 14 of the Constitution as an amendment and which establishes a Leadership Code Tribunal. The court said: *"As we write this judgment, we are not aware that such a tribunal has been set up and constituted… This amendment was passed on 30th September 2005 by which time this petition had already been filed in this court. The amendment does not affect the subject matter of this petition*."

I should make a simple correction on the above-quoted statement by the Justices of the Court of Appeal before I go any further. The appellant lost his seat as a member of Parliament with effect from 5th December 2005. He filed his petition in the Constitutional Court on 12th July, 2006 as the judgment of the Constitutional Court itself acknowledges. Clearly, several months had passed from the time the amendment was introduced in the Constitution to the time when the appellant

filed his petition. The tribunal was, therefore, already established by the Constitution before the appellant lodged his petition.

Counsel's submissions in brief.

Mr. Muzamiru Kibeedi and Mr. James Akampumuza, learned counsel for the appellant disagreed with the decision of the Constitutional Court. They contended that the Constitutional Court did not apply a wholistic approach in interpreting the term "appropriate tribunal"; that if it had considered Articles 225(1)(a) and (d), 230(1) and (4), 234, 28(1), 44(c), 20(2) and 79(3) of the Constitution, it would have come to a different decision.

They argued that the cardinal role of the tribunal under Article 83(1) (e) of the Constitution was to try a member of Parliament and make a finding whether he or she was guilty of violation of the Leadership Code of Conduct. They linked this role to the interpretation of the term "tribunal". They contended that for the tribunal to be able to adjudicate, there must be an accuser and an accused and the authority most appropriate to be the accuser was the IGG. They further argued that a tribunal must have minimum standards which must include independence and impartiality in order to satisfy Article 28(1) and 44(c) of the Constitution which guarantee the right to a fair hearing.

In their written submissions to this court Mrs. Robinah Rwakoojo,
Ag. Director Civil Litigation, and Ms. Christine Kaahwa, Principal State Attorney, supported the Constitutional Court in its holding that the IGG was the appropriate tribunal and that the appellant was not unconstitutionally barred from being nominated as a candidate in the parliamentary elections of February, 2006. They further argued that the appellant's constitutional right to a fair hearing was not compromised.

CONSIDERATION OF THE ISSUES

There is no dispute that the IGG is given power by the Constitution and other laws to enforce the Leadership Code. See for example Articles 230(4) and 234 of the Constitution; section (1)(2) of the Constitution (Consequential Provisions) Act; section 8(1)(d) of the Inspectorate of Government Act and section 3(1) of the Leadership Code. The issue, however, is whether this

undisputed power of the IGG to enforce the Code translates into making the IGG a tribunal under Article 83(1)(e) of the Constitution.

Binding Powers of the IGG under the Code

Sections 19(1), 20(1) and 21 of the Leadership Code Act give the IGG power to make binding decisions. According to section 34(2)(b) of the Act, such decisions cannot even be reviewed by a court of law. They can only be appealed.

Section 19 (1) of the Act provides that upon completion of an inquiry under section 18, the IGG shall communicate his or her decision in his or her report to the "authorized person" that is, a person or body authorized to discipline a leader, and require the authorized person to implement his or her decision.

Section 20(1) of the Act provides that upon receipt of a report containing a finding of a breach of the Code, the authorized person shall effect the decision of the IGG in writing within 60 days after receipt of the report.

Section 21 (1) of the Act provides that where according to the report submitted by the IGG under section 19 a leader is proved to have obtained any property through a breach of the Code, the leader shall, subject to any appeal, forfeit the property to the Government.

Section 21(2) provides that the IGG may order a leader referred to in subsection (1) to pay to Government compensation in respect of any loss the government may have suffered and such order shall be deemed to be a decree under section 25 of the Civil Procedure Act and shall be executed in the manner provided under section 39 of the said Act.

The word "Tribunal" Defined

The definition of the word "tribunal" was called in aid by counsel for the appellant, counsel for the respondents and the Constitutional Court itself. Counsel for the appellant quoted Black's Law Dictionary which defines a tribunal as "*a court or other adjudicatory body*". Counsel for the respondents quoted the online Dictionary at http./dictionary.Ip.findlaw.com where a tribunal is

defined as "*1. The seat of a Judge or one acting as a judge. 2. A court or forum for Justice, a person or body of persons having power to hear and decide disputes so as to bind the parties"*.

The Constitutional Court itself quoted Oxford Advanced Learners' Dictionary of current English, Sixth Edition, which defines the word "tribunal" to mean "*a type of court with the authority to deal with a particular problem or disagreement*". The Court also cited "Words and Phrases Legally Defined" which defines a statutory tribunal as "*any government department, authority or person entrusted with the judicial determination as arbitrator or otherwise of questions arising under an Act of Parliament*".

Few people would quarrel with the above-quoted definitions of "tribunal". There are key words or phrases in the above-quoted definitions which should be noted and which I consider significant to the understanding of the word "tribunal". They include "a court or other adjudicatory body", "the seat of a judge"; "a person or body of persons having power to hear and decide disputes so as to bind the parties" and "a person entrusted with the judicial determination as arbitrator".

The question, therefore, is whether the IGG fits in any of the above-quoted definitions of "tribunal".

IGG'S DIFFERENT ROLES

In answer to Mr. Muzamiru Kibeedi, learned counsel for the appellant's contention that the IGG is made an investigator, prosecutor and judge in the same cause contrary to the rules of natural justice, the Constitutional Court had this to say:

> "**With respect, we do not agree with learned counsel. We do not accept that the powers of the IGG under the Constitution are contrary to rules of natural justice. It is true that the IGG has power to investigate, prosecute and make judgments but these are not necessarily exercised simultaneously. The Constitution and the Leadership Code Act contain safeguards to ensure that the powers conferred on the IGG are not abused. For example, section 26 of the Leadership Code Act provides**

that when inquiring into an allegation under the Code, the IGG shall observe the rules of natural justice. Section 33 of the Code also provides that any person aggrieved by the decision of the IGG has a right to appeal against the decision to the High Court of Uganda. The Constitution guarantees the independence of the office of the IGG but through periodic reports, the IGG is accountable to Parliament. These provisions are designed to ensure that the IGG does not become a sole actor in the performance of his duties."

In the above-quoted excerpt from the judgment of the Constitutional Court, the Court seems to be saying that safeguards such as the independence of the IGG, the legal requirement that the IGG when inquiring into an allegation must observe the rules of natural justice, the fact that an appeal can be lodged against the decision of the IGG to the High Court and through periodic reports the IGG is accountable to Parliament – all this ensures that the IGG does not abuse his or her powers. This may be true, but does it make the IGG a tribunal under Article 83(1)(e) of the Constitution or under any other law?

Functions and Powers of the IGG

Article 225 of the Constitution prescribes the functions of the IGG. They include promotion of the rule of law and principles of natural justice in administration; elimination of corruption and abuse of public office, supervision of the enforcement of the Leadership Code of conduct and promotion of good governance in public offices.

Article 225(1)(e) gives the IGG a general power of investigation. Article 230(1) gives the IGG "power to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or of public office". Article 230(3) gives the IGG power to enter and inspect premises of any government department or person and to call for any document in connection with the case being investigated. Article 230(4) provides that the IGG, when enforcing the Leadership Code of Conduct shall have all the powers conferred on it in Chapter 13 of the Constitution or any other law.

Section 14 of the Inspectorate of Government Act gives the IGG power to investigate bank accounts. Section 13 of the same Act gives the IGG power to use reasonable force in the exercise of his or her powers.

Section 30 of the Leadership Code Act gives the IGG power to inspect any bank account and other accounts such as share account, purchase account, expense account or any safe or deposit account or any safe or deposit book in a bank.

Usually written procedures of a public institution may indicate whether the institution has judicial functions and powers or not in performing its functions. The only procedures written in the Inspectorate of Government Act under Part IV of the Act are procedures for conducting investigations although the IGG is given power to prescribe rules of procedures generally. Section 25(3) of the Inspectorate of Government Act provides that "no matter that is adverse to any person, or public office shall be included in a report of the Inspectorate unless the person or head of that office has been given prior hearing".

Section 23 of the Leadership Code Act gives the IGG power of the High Court with regard to attendance, swearing and examination of witnesses, the production and inspection of documents and enforcement of its orders. Section 26 of the same Act provides that when inquiring into an allegation, the IGG shall observe rules of natural justice. The above-mentioned powers are, however, common to bodies which conduct public inquiries. See, for example, Section 9 of the Commissions of Inquiry Act. On their own, therefore, these powers do not turn the IGG into a court or a tribunal.

Section 25 of the Leadership Code Act provides that the Inspectorate may, after consultation with the Minister of Ethics and Integrity and the Attorney General, make rules regulating the procedure under this Code. It should be noted that this provision is discretionary. Furthermore, there is no evidence on record that such rules of procedure have been made.

Where the law gives an authority power to exercise judicial junctions, it is usually a requirement that such an authority should have written rules prescribing the rights and obligations of persons that appear before it or fall under its jurisdiction to avoid prejudicial and unequal treatment.

Examining the constitutional provisions and the provisions of related laws indicated above, it is clear that the IGG was established as an institution for carrying out investigations and prosecutions, and conducting inquiries but not to be a court or a tribunal. There are no provisions in the Constitution or any law indicating that the IGG is, in addition, a judicial institution apart from perhaps sections 19, 20 and 25(3) of the Leadership Code Act mentioned earlier which only make the IGG's decisions binding on authorized persons". However, there is no judicial procedure shown that leads to such binding decisions.

These same sections were declared null and void in the case of ***Fox Odoi Oywelowo*** (supra) although that decision did not go into the consideration of whether the said sections conferred judicial powers on the IGG or not. In my view, if the makers of the Constitution had intended to make the IGG a tribunal, by giving him or her power to make judicial decisions, they would have expressly stated it in plain words.

In their judgment the Justices of the Constitutional Court seem to say that since power to enforce the Leadership Code is given to the IGG, the IGG must be the tribunal under Article 83(1)(e) of the Constitution. Counsel for the respondents said the same thing in their submissions to this court. However, enforcement of a law or laws alone cannot transform the enforcement authority of that law or laws into a tribunal, otherwise authorities such as the police, the Director of Public Prosecutions, the Uganda Revenue Authorities and the Board of National citizenship and Immigration which enforce laws in their respective fields would be tribunals. Clearly, more than mere enforcement of laws is needed to make an authority a tribunal.

The Constitutional Court further says in its judgment that "the IGG has power to investigate, prosecute and make judgments but these powers are not necessarily exercised simultaneously". There is no provision in the Constitution or in the Acts of Parliament mentioned above which says that the powers of the IGG shall not be exercised simultaneously. Rather what we see is

Article 230(4) of the Constitution which provides that when the IGG is enforcing the Leadership Code he or she shall have all the powers conferred on the IGG by the Constitution in addition to any other powers conferred by law.

Therefore, in my view, when the IGG is conducting an investigation or any inquiry concerning suspected breach of the Leadership Code, and he or she discovers evidence of corruption or abuse of office, there is nothing to stop him or her from conducting a prosecution in respect of the case being investigated if he or she chooses to do so.

I would go further to say that even if the holding of the Constitutional Court that the IGG exercises powers of investigation, prosecution and judgment but does not do so simultaneously were to be true, which it is not, I would still say that it would not be in the interest of promoting proper administration of justice in this country to allow a situation where power of investigation, prosecution and adjudication are combined in one institution.

If an institution such as the IGG is big enough, it can have divisions within it, one among them for carrying out the function of investigation and another for carrying out the function of prosecution. However, in my view, it would not be proper to have a division conducting adjudication in respect of the cases investigated by the same institution. For proper administration of justice, a court or tribunal should be independent of agencies which investigate or prosecute cases before it. This is necessary to give persons brought before such a court or tribunal confidence that they will get a fair hearing and justice in the end. This, as I understand it, is the context in which counsel for the appellant used the term “independence” and “impartiality” in the adjudication of disputes or trial of cases and it is consistent with Article 28 of the Constitution which provides: “In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial tribunal established by law.”

I respectfully agree with learned counsel for the appellant that the operational set up of the IGG as an institution makes breach of the principle of *nemo judex in causa sua* (no person shall be a judge in his or her own cause) unavoidable. For example, in the appellant’s case if you read the

report or “judgment” of the IGG to the Speaker of Parliament, the IGG is the complainant, the investigator and the judge, all rolled into one.

Learned counsel for the respondents submitted that the appellant stubbornly refused to submit his declaration forms in time. This may well be true. But this was not an issue for determination by the Constitutional Court, although attempts were made to make it one, and so it is not relevant to this appeal. This notwithstanding, the information relating to the appellant’s alleged failure to declare his income, assets and liabilities was gathered by the IGG as an investigator. She subsequently incorporated it in her report to the Speaker of Parliament.

In my view, whereas the IGG may have properly found during her investigations that the appellant had violated the Leadership Code Act contrary to its provisions she was not the tribunal provided under Article 8391)(e) of the Constitution. I reach this conclusion with regret and much sympathy with the IGG given the irrefutable evidence contained in the affidavit of Justice Faith Mwondha, the then IGG that the appellant defied the order of the IGG and refused to co-operate with her in the course of her investigations. Such behavior should be censured especially in a member of Parliament, as the appellant was at that time, who is expected to be a good example to the citizens of this country by showing respect to the law.

Be that as it may, I respectfully agree with counsel for the appellant that for a body or a person to be called a tribunal there must be an accuser and an accused person or parties with a dispute to resolve. The tribunal will then conduct a hearing and come to a decision which will then be binding on the parties. This in my view, is what the Leadership Code Tribunal under Article 235A was established in the Constitution to do.

I do not, with respect, agree that the constitutional amendment referred to above does not affect the subject matter of this petition. It does. Breaches of the Leadership Code are punished with severe penalties. These include confiscation and forfeiture of property; payment of compensation for loss suffered by the Government on account of a leader’s breach of the Leadership Code Act; dismissal from or vacation of office, and imposition of other severe penalties provided under Section 35 of the Leadership Code. In my view such penalties should be imposed by a court of

law or a tribunal established by law which observes due process. The right to a fair hearing guaranteed by Articles 28(1) and 44(c) of the Constitution is about due process which must be observed by all courts of law or tribunals for justice not only to be done but also to be seen to be done.

The Constitutional Court says that the IGG will remain the enforcement authority of the Leadership Code until another authority, perhaps the Leadership Code Tribunal mentioned in Article 235A, is appointed by Parliament. The Justices of the Court of Appeal are apparently implying here that both authorities cannot enforce the Leadership Code together. I think both authorities can enforce the Leadership Code at the same time, the IGG bringing cases of violations of the Leadership Code as the accuser and the other authority trying the cases and pronouncing a verdict on it as a tribunal. The fact that those who amended the Constitution put the Leadership Code Tribunal in Chapter 14 together with the IGG shows, in my view, that the two institutions were intended to be complementary to each other and not to be alternatives.

This complementary arrangement exists in South Africa under its Act of Parliament called **"The Special Investigating Units and Special Tribunals Act, Act 74 of 1996**, where an investigating body and a tribunal have been established to combat malpractices such as corruption and abuse of public office in South African state institutions.

CONCLUSION ON GROUNDS 1 & 2

For the reasons stated above, it is my opinion that the IGG is not the appropriate tribunal mentioned in Article 83(1)(e) of the Constitution. Therefore, the appellant's grounds 1 and 2 of this appeal should, in my view, succeed.

Before I proceed to consider the next grounds of appeal, let me say that I am mindful of the fact that the decision in this appeal, together with the decision in ***Fox Odoi-Oywelowo*** (supra) have dealt a fatal blow to the enforcement of the Leadership Code Act in its present form.

This is regrettable. It is, of course, not the fault of the two courts which have made these decisions but rather of those who drafted the Leadership Code Act the way they did. Parliament

should also share the blame because if the Leadership Code Act had immediately been amended in light of the decision in ***Fox Odoi-Oywelowo*** (supra) and the Leadership Code Tribunal under Article 235A of the Constitution had been established, the problem relating to the enforcement of the Code which this case has brought to the fore would not have arisen.

In the interest of enforcing values of integrity and proper conduct in the leadership of this country, values which I consider to be critical in the pursuit of development, democracy, good governance and the promotion of the rule of law, it is important that an amendment to the Leadership Code which includes the establishment of the Leadership Code Tribunal be urgently enacted by Parliament so that the Leadership Code of Conduct can be effectively enforced against the specified leaders.

CONSIDERATION OF GROUNDS 3, 4, 5 & 6

Counsel's submissions

Learned counsel for the appellant addressed these grounds briefly. They contended in their written submissions that the IGG, the Speaker of Parliament and the Chairperson of the 2nd respondent in their respective capacities failed to defend the Constitution contrary to Article 3(4) of the Constitution.

Their argument was that the IGG unconstitutionally made herself a tribunal, found the appellant guilty of breaching the Leadership Code and directed the Speaker to implement her unconstitutional decision, and that the Speaker and the Chairperson of the 2nd respondent unquestioningly implemented the IGG's decision.

They cited objective No. 29(g) of the National Objectives and Directive principles of State Policy which says that every citizen has a duty to acquaint himself or herself with the provisions of the Constitution and to uphold and defend it when faced with its actual or threatened violation.

Learned counsel for the appellant, therefore, argued that the Constitutional Court was wrong to hold that the IGG, the Speaker of Parliament and the Chairperson of the 2nd respondent never committed any breaches against Articles 2 and 3 (4) of the Constitution.

Learned counsel for the respondents submitted that the appellant had failed to show how the authorities mentioned above had contravened Articles 2 and 3(4) of the Constitution. They further submitted that after receiving the IGG's report the Speaker of Parliament was bound to implement the IGG's decision and that the 2nd respondent having been notified of a vacancy by the Clerk to Parliament was bound to take action in accordance with the provisions of the Constitution.

Defence of the Constitution

Article 3(4) of the Constitution provides as follows:

> **"All citizens of Uganda shall have the right and duty at all times-**
>
> **(a) to defend the Constitution and, in particular, to resist any person seeking to overthrow the established Constitutional order; and**
>
> **(b) to do all in their power to restore this constitution after it has been overthrown, abrogated or amended contrary to its provisions."**

The above cited constitutional provision was invoked by the Constitutional Court in the case of **Uganda Association of Women Lawyers & Others Versus Attorney General, Constitutional Court, Constitutional Petition No. 2 of 2003** (unreported). In that case, however, the issue concerned the restrictions created by rule 4(1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992, (Legal Notice No. 4 of 1996) in filing Constitutional petitions in the Constitutional Court.

The Constitutional Court held in that case that the said rule 4(1) of Legal Notice No. 4 was null and void because the people of Uganda had a right and a duty at all times to defend the Constitution without undue restrictions.

Defence of the Constitution under Article 3(4) of the Constitution, however, is now being invoked by learned counsel for the appellant for a different reason. Their argument is that the decision of the IGG was unconstitutional and, therefore, the Speaker of Parliament and the Chairperson of the 2nd respondent should have refused to implement it.

I am surprised that counsel for the appellant persisted in raising this issue even after the Constitutional Court held that the decision of the IGG was constitutional. Who, in the view of the appellant's counsel, is the authority with power to determine the constitutionality of decisions of legally established authorities or laws enacted by Parliament? They did not address this question in their submissions.

In my view, it is a very dangerous proposition for anybody to say that people or authorities should refuse to implement orders based on law in the name of defending the Constitution. Such a stance would doubtlessly result in the undermining of the rule of law and can lead to arbitrariness in governance and lawlessness in the society.

The Leadership Code Act, 2002, was enacted by Parliament in the normal way following laid down procedures. Therefore, in my view, until the Code or any of its provisions is declared to be null and void by competent courts, that is the Constitutional Court or the Supreme Court, it remains binding on all persons and authorities that fall under its ambit.

Section 19(1) of the Leadership Code Act gives the IGG power upon completion of an inquiry to communicate his or her decision in his or her report to the authorized person and "require" the authorized person to implement it. This is what the IGG did in this case.

Section 20(1) of the Act provides that upon receipt of a report from the IGG containing a finding of a breach of this code the authorized person "shall" effect the decision of the IGG. This is what the Speaker of Parliament did after he received the IGG's report.

Article 233(1)(c) of the Constitution provides that the Leadership Code of Conduct established by Parliament shall prescribe the penalties to be imposed for breach of the Code and Article 235

provides that a person who has been dismissed shall be disqualified from holding any other public office for a prescribed period.

Section 20(3) of the Leadership Code Act provides that a person removed from office for a breach of the Leadership Code shall not hold any other public office for five years effective from the date of removal. The Chairperson of the 2nd respondent was informed by the Clerk to Parliament acting under Article 81(2) of the Constitution that the appellant was removed from Parliament for breaching the Leadership Code and that the seat in Parliament for Lubaga South had fallen vacant.

In my view, therefore, the Chairperson of the 2nd respondent was following the law, as it then was, when he barred the appellant from being nominated as a candidate in the Parliamentary elections of February 2006.

The IGG and the Speaker of Parliament had each addressed themselves to the question of whether the IGG was the "appropriate tribunal" under Article 83(1)(e) of the Constitution and each was of the view that the IGG was indeed the tribunal mentioned in that Article of the Constitution. In its interpretation of the term "appropriate tribunal" referred to in the mentioned Article of the Constitution, the Constitutional Court agreed with the IGG and the Speaker of Parliament that the "appropriate tribunal" was the IGG.

I have shown in my consideration of grounds 1 and 2 that this interpretation, with respect, is not right. However, because the above-mentioned authorities were of a different view from mine about the interpretation of the term "appropriate tribunal" it does not mean, as learned counsel for the appellant have argued, that they thereby failed to defend the Constitution.

Article 132(4) of the Constitution gives power to this court to depart from its previous decisions. By the same reasoning, if this court changed its decision on the interpretation of some provision in the Constitution in future, would it be reasonable to argue that by giving its earlier interpretation which it has changed, it had thereby failed to defend the Constitution? Such an

argument would, in my view, be taking "defence of the Constitution" under Article 3(4) of the Constitution to absurd levels.

It is my view that honest implementation by any person or authority of a law passed by Parliament or any other law-making authority should not lead to or attract accusations of failure to defend the Constitution contrary to Article 3(4) of the Constitution against that person or authority even if the courts with the requisite jurisdiction to interpret the Constitution were to later declare that law to be null and void for being inconsistent with the Constitution.

CONCLUSION

I find no merit in the appellant's grounds 3, 4, 5 and 6 of appeal. The IGG, the Speaker of Parliament and the Chairperson of the 2nd respondent did not breach any provision of the Constitution in acting the way they did in relation to the IGG's report. Therefore, these grounds ought to fail.

GROUND 10: DECLARATIONS AND ORDERS

For the reasons stated above I would hold that this appeal substantially succeeds and I would set aside the judgment and orders of the Constitutional Court. I would consequently give the following declarations and orders:

1. The removal of the appellant from his seat as a member of Parliament for Lubaga South was null and void for being contrary to Articles 2 and 83(1)(e) of the Constitution.

2. The disqualification of the appellant by the 2nd respondent from being nominated as a candidate in the parliamentary elections that were held in February 2006 was null and void for being contrary to Articles 2 and 83(1)(e) of the Constitution.

3. The appellant was unconstitutionally removed from his seat in Parliament. Therefore, it is ordered that he be paid all the emoluments he should have earned as a member of Parliament

from the date he was unlawfully removed from his seat until the expiry of his tenure in the 7th Parliament as prescribed by Articles 77(3), 96 and 289 of the Constitution. The Clerk to Parliament should calculate the amount payable on the basis of the rules of Parliament which were in force by the time he was removed from the 7th Parliament. It is ordered that the amount so established be lodged in the registry and that amount becomes the decree of the Court.

4. I make no order regarding compensation for political embarrassment and inconvenience following the appellant's disqualification to stand in the February 2006 parliamentary elections for reasons mentioned earlier in this judgment relating to the appellant's conduct by his refusal to comply with the investigation orders of the IGG.

I would award half of the costs in this appeal and in the Constitutional Court to the appellant with a certificate for two counsel.

Dated at Kampala this **31st** day of **March 2010**.

JOTHAM TUMWESIGYE

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT KAMPALA

(CORAM: ODOKI, CJ; TSEKOOKO; KATUREEBE; KITUMBA; TUMWESIGYE; KISAAKYE; JJSC, MPAGI-BAHIGEINE; AG.JSC.)

CONSTITUTIONAL APPEAL NO. 02 OF 2007

BETWEEN

JOHN KEN-LUKYAMUZI:::::::::::::::::::::::::::::::::: APPELLANT
AND

1. ATTORNEY GENERAL
2. ELECTORAL COMMISSION :::::::::::::::::: RESPONDENTS

[An Appeal from the decision of the Constitutional Court of Uganda at Kampala, (Mukasa-Kikonyogo, D.C.J., Engwau, Twinomujuni, and Byamugisha, JJA) dated 26th March 2007 in Constitutional Petition No. 19 of 2006)

JUDGMENT OF ODOKI, CJ

I have had the benefit of reading in draft the judgment prepared by my learned brother, Tumwesigye, JSC, and I agree with him that this appeal should substantially succeed. I concur in the orders he has proposed.

As the other members of the Court also agree, this appeal is allowed with the declarations and orders as proposed by the learned Justice of the Supreme Court.

Dated at Kampala this **31st** day of **March 2010**

B J Odoki
CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT KAMPALA

(CORAM: ODOKI, CJ; TSEKOOKO; KATUREEBE; KITUMBA; TUMWESIGYE; KISAAKYE; JJSC, MPAGI-BAHIGEINE; AG.JSC.)

CONSTITUTIONAL APPEAL NO. 02 OF 2007

BETWEEN

JOHN KEN-LUKYAMUZI:::::::::::::::::::::::::::::::::: APPELLANT
AND

1. ATTORNEY GENERAL
2. ELECTORAL COMMISSION :::::::::::::::::: RESPONDENTS

[An Appeal from the decision of the Constitutional Court of Uganda at Kampala, (Mukasa-Kikonyogo, D.C.J., Okello, Engwau, Twinomujuni, and Byamugisha, JJA) dated 26th March 2007 in Constitutional Petition No. 19 of 2006)

JUDGMENT OF J.W.N. TSEKOOKO, JSC.

I have had the benefit of reading in draft in advance the judgment of my learned brother, Tumwesigye, JSC. I agree with his reasoning and conclusions and the orders he has proposed.

Delivered at Kampala this **31st** day of **March, 2010**.

J.W.N TSEKOOKO
JUSTICE OF THE SUPREME COURT

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

(CORAM: ODOKI, CJ; TSEKOOKO; KATUREEBE; KITUMBA; TUMWESIGYE; KISAAKYE; JJSC, MPAGI-BAHIGEINE; AG.JSC.)

CONSTITUTIONAL APPEAL NO. 02 OF 2007

BETWEEN

JOHN KEN-LUKYAMUZI:::::::::::::::::::::::::::::::::: APPELLANT
AND

1. ATTORNEY GENERAL
2. ELECTORAL COMMISSION :::::::::::::::::: RESPONDENTS

[An Appeal from the decision of the Constitutional Court of Uganda at Kampala, (Mukasa-Kikonyogo, D.C.J., Okello, Engwau, Twinomujuni, and Byamugisha, JJA) dated 26th March 2007 in Constitutional Petition No. 19 of 2006)

JUDGMENT OF KATUREEBE, JSC.

I have had the benefit of reading in draft the judgment of my learned brother, Tumwesigye, JSC, and I fully concur with his conclusions and orders he has proposed.

I only wish to add that there is urgent need for the legislature to pass the necessary law establishing a Tribunal as envisaged by Article 235A of the Constitution. That Article states:-

> ***'There shall be a leadership code Tribunal whose composition, jurisdiction and functions shall be prescribed by Parliament by law'***.

I have no doubt that it is this tribunal that is envisaged under Article 83(1)(e) of the Constitution.

Delivered at **Kampala** this **31st day** of **March 2010**

Bart M. Katureebe

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT KAMPALA

(CORAM: ODOKI, CJ; TSEKOOKO; KATUREEBE; KITUMBA; TUMWESIGYE; KISAAKYE; JJSC, MPAGI-BAHIGEINE; AG.JSC.)

CONSTITUTIONAL APPEAL NO. 02 OF 2007

BETWEEN

JOHN KEN-LUKYAMUZI:::::::::::::::::::::::::::::::::: APPELLANT
AND

1. ATTORNEY GENERAL
2. ELECTORAL COMMISSION :::::::::::::::::: RESPONDENTS

[An Appeal from the decision of the Constitutional Court of Uganda at Kampala, (L.E.M Mukasa-Kikonyogo, DCJ, G.M Okello, S.G. Engwau, A. Twinomujuni, and Byamugisha, JJA) dated 26th March 2007 in Constitutional Petition No. 19 of 2006)

JUDGMENT OF KITUMBA, JSC.

I have had the advantage of reading in draft the judgment prepared by my learned brother Tumwesigye, JSC.

I entirely agree with his judgment and the orders proposed therein. I have nothing more useful to add.

Dated at **Kampala** this **31st day** of **March 2010**.

C.N.B KITUMBA

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT KAMPALA

(CORAM: ODOKI, CJ; TSEKOOKO; KATUREEBE; KITUMBA; TUMWESIGYE; KISAAKYE; JJSC, MPAGI-BAHIGEINE; AG.JSC.)

CONSTITUTIONAL APPEAL NO. 02 OF 2007

BETWEEN

JOHN KEN-LUKYAMUZI:::::::::::::::::::::::::::::::::: APPELLANT
AND

1. ATTORNEY GENERAL
2. ELECTORAL COMMISSION :::::::::::::::::: RESPONDENTS

[An Appeal from the decision of the Constitutional Court of Uganda at Kampala, (L.E.M Mukasa-Kikonyogo, DCJ, G.M Okello, S.G. Engwau, A. Twinomujuni, and Byamugisha, JJA) dated 26th March 2007 in Constitutional Petition No. 19 of 2006)

JUDGMENT OF DR. ESTHER M. KISAAKYE, JSC.

I have had the advantage of reading in draft the judgment prepared by my learned brother, Tumwesigye, JSC.

I entirely agree with his judgment and the orders proposed therein. I have nothing useful to add.

Dated at **Kampala** this **31st** day of **March 2010.**

…….
DR. ESTHER M. KISAAKYE
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT KAMPALA

(CORAM: ODOKI, CJ; TSEKOOKO; KATUREEBE; KITUMBA; TUMWESIGYE; KISAAKYE; JJSC, MPAGI-BAHIGEINE; AG.JSC.)

CONSTITUTIONAL APPEAL NO. 02 OF 2007

BETWEEN

JOHN KEN-LUKYAMUZI:::::::::::::::::::::::::::::::::: APPELLANT
AND

1. ATTORNEY GENERAL
2. ELECTORAL COMMISSION :::::::::::::::::: RESPONDENTS

[An Appeal from the decision of the Constitutional Court of Uganda at Kampala, (L.E.M Mukasa-Kikonyogo, DCJ, G.M Okello, S.G. Engwau, A. Twinomujuni, and Byamugisha, JJA) dated 26th March 2007 in Constitutional Petition No. 19 of 2006]

JUDGMENT OF A.E.N. MPAGI-BAHIGEINE, AG J.SC.

I agree with what has been said by my senior brother Tumwesigye, JSC in the lead judgment.

I have nothing more to add.

Dated at **Kampala** this **31st** day of **March 2010.**

Hon. Justice A. E. N. Mpagi-Bahigeine

AG. JSC