

offered himself for nomination for election as NRM Party flag bearer for West Budama North Constituency. He was elected NRM flag bearer for the Constituency.

Feeling aggrieved, the respondent petitioned the Constitutional Court under article 137(3) of the Constitution of the Republic of Uganda for declaration, (1) that the acts of William Oketcho to seek nomination for election as NRM Party flag bearer when he was an independent Member of Parliament for West Budama North Constituency, and, (2) continuing to sit in Parliament and enjoying the privileges as such an MP when he has joined the NRM Party, were inconsistent with and or in contravention of the various named articles of the Constitution of the Republic of Uganda.

The Constitutional Court heard the petition and ordered that,

“-----the petitioner succeeds on all the four issues. He is entitled to all the prayers contained in paragraph 4 of the petition.”

The prayers in the said paragraph 4 of the petition are as follows:-

“(a) A declaration that the act of the 2nd respondent standing in the National Resistance Movement Party Primary Elections when he returned the National Resistance Movement Membership Card in 2006, stood as an independent and was elected Member of Parliament of West Budama North Constituency as an independent candidate is inconsistent with and, or in contravention of Articles 1(1)(2)(4), 2(1)(2), 3(1)(2),4(a)(b), 20(1)(2), 21(1), 43(1)2)(c), 45, 72(4)(5), 83(1)(g)(h),(3) and 81(4) of the Constitution of the Republic of Uganda, 1995.

(b) A declaration that the act of the 2nd respondent continuing to sit in Parliament as an independent Member of Parliament while having joined the National Resistance Movement, a Political party, and contested in the said National Resistance Movement party elections on 30/8/2010, is inconsistent with and/or in contravention of the

Constitution Articles 1(1)(2)(4), 2(1)(2), 3(1)(2), 4(a)(b), 20(1)(2), 21(1), 43(1)(2)(c), 45,72(4)(5), 83(i)(g)(h), (3) and 81(4) of the Republic of Uganda, 1995.

- (c) A declaration that the 2nd respondent ceased being a Member of Parliament and or vacated his seat in Parliament upon joining the National Resistance Movement Party in or around August 2010.**
- (d) A declaration that the 2nd respondent unconstitutionally continues to draw emoluments, salaries, privileges and or allowances since his vocation of Parliament and he should refund to the consolidated fund all such public funds.**
- (e) A declaration that the 2nd respondent's candidature in the National Resistance Movement Party primaries was unconstitutional ab initio for contravening Article 83 (1) (h).**
- (f) A declaration that the 2nd respondent is not qualified to stand as a candidate be it as an independent candidate or on political party ticket.**
- (g) An injunction restraining the respondent's unconstitutional actions.**
- (h) An injunction restraining the 2nd respondent from continuing to contravene the Constitution by purporting to stand in any election as Member of Parliament on dual identities.**
- (i) Costs of this Petition."**

The appellant appealed to this Court on the following grounds:-

GROUND OF APPEAL

“(1) The learned Justices of the Constitutional Court erred in Law and in fact in interpreting Article 83(1)(g) and (h) as nullifying the

nomination of Members of Parliament who failed to resign or vacate their seats under the said Article.

- 2) The learned Justices of the Constitutional Court erred in Law and in fact in holding that Article 83(1)(g) and (h) means that if one was elected to Parliament on a party ticket and joins another party or becomes independent he/she cannot be validly nominated for election to the next Parliament on the ticket of that latter party or as an independent unless he or she has , at the time of nomination, resigned or vacated the seat in Parliament, while at the same time holding that Mr. William Oketcho was deemed to have vacated his seat in Parliament upon participating in the NRM party primaries.***
- (3) The learned Justices of the Constitutional Court erred in Law and fact in holding that if an independent Member of Parliament fails to vacate or resign from Parliament under Article 83 (1) (h), he or she cannot be validly nominated on a political party ticket for election to the next Parliament, while at the same time declaring that Mr. William Oketcho ceased to be a Member of Parliament and vacated his seat in Parliament upon joining the NRM party in or around August 2010.”***

On these grounds, the appellant asked this Court to allow the appeal, and that costs of the appeal be borne by the respondent.

REPRESENTATION

At the hearing of this appeal, the appellant was represented by Ms. Patricia Mutesi, Principal State Attorney, while the respondent was represented by Dr. James Akampumuza.

PRESENTATION OF ARGUMENTS

At the Pre-hearing Conference, Mr. G. Kalemera who

represented the appellant requested to file written submissions which Court allowed, and directed both counsel to file written submissions within the stipulated timeframe.

When the appeal was called for hearing however, Ms. Mutesi who was not present at the Pre-hearing Conference, appeared for the appellant and requested to be allowed to present oral submissions. Upon being satisfied with the reasons for her failure to file written submissions as earlier directed, Court granted the request and both counsel made oral submissions.

Appellant's Case:-

Ground 1

Arguing this ground, Ms. Mutesi submitted that while she concedes that Article 83(1)(g)(h) of the Constitution of the Republic of Uganda compels a Member of Parliament to vacate his or her seat in Parliament:-

- (1) Where he or she was elected on a party ticket, if he or she leaves the party on whose ticket he or she was elected to join another party or to remain as an independent member, and,
- (2) Where he or she was elected as an independent, he or she joins a political party.

She contended, however, that the article did not prescribe sanction for its violation beyond loss by the offending Member of Parliament (MP) of his or her seat in Parliament in any of those scenarios. She argued that the article is silent on what such an MP does after vacating his or her seat in Parliament. She submitted that the article does not provide for nullifying nomination of the offending MP if he or she failed to vacate his or her seat in Parliament.

Learned Counsel agrees that the rationale behind that article was to prevent MPs from changing their political party allegiance after elections without regard to the wishes of the electorate, and to instill in the Members of Parliament respect for the wishes of the electorate; but not to deny the offending MPs the right to contest elections after vacating his or her seat in Parliament. She submitted that it was,

therefore, wrong for the Constitutional Court to read into the article nullification of nomination of an MP who failed to resign or vacate his or her seat in Parliament.

On grounds 2 and 3, Ms. Mutesi criticized the decision of the Constitutional Court for holding that under Article 83(1)(g)(h), one who was elected to Parliament on a party's ticket cannot be validly nominated for election to the next Parliament on another party's ticket or as an independent member unless that person had, at the time of nomination, resigned or vacated his or her seat in Parliament, yet it also stated in the instant case, that Mr. William Oketcho was deemed to have vacated his seat in Parliament upon offering himself for election in the NRM Party primary elections.

Further, that if an independent MP failed to resign or vacate his or her seat in Parliament, he or she could not be validly nominated on a political party's ticket for election to the next Parliament; yet it also held, in this particular case that Mr. William Oketcho, who was an independent MP, had ceased to be an MP upon joining the NRM Party in or around August, 2010. She argued that an MP who failed to resign or vacate his or her seat in Parliament could still offer himself or herself for election to the next Parliament either on another party's ticket or as independent. In her view, failure to resign or vacate one's seat in Parliament *per se* was no bar to the validity of the offending MP's nomination for election to the next Parliament as it is not one of the factors that invalidate nomination under section 4 of the Parliamentary Elections Act.

She submitted that it was an error for the Constitutional Court to read into article 83(1) (g) (h) change of political party allegiance as a ground to invalidate nomination. She prayed that the appeal be allowed.

The respondent's case

Dr. Akampumuza opposed the appeal and supported the decision of the Constitutional Court. He contended that the Constitutional Court applied the generous principle of Constitutional Interpretation to article 83(1)(g)(h) as shown in

paragraph (iv) and (v) of the judgment at page 98 of the Record of Appeal. He submitted that that article provides for loss by the offending MP of his or her seat in Parliament and the right to be nominated for election to the next Parliament as a sanction for its violation. He argued that Mr. William Oketcho violated that article and had to suffer the consequences. He contended that the right to freedom of association was a matter of choice by an individual and therefore derogable. In his view, the remedies awarded by the Constitutional Court were the natural consequences of Mr. Oketcho's act.

He prayed that the appeal be dismissed and the remedies awarded upheld. He left the issue of costs to the discretion of this Court.

Ms Mutesi's Reply

In reply, Ms. Mutesi reiterated that the decision of the Constitutional Court declaring nomination of the 2nd respondent (William Oketcho) on NRM Party ticket for election to the next Parliament as null and void was without legal support. She reiterated her prayer for the appeal to be allowed.

CONSIDERATION OF ARGUMENTS OF COUNSEL

Before I consider the arguments of counsel, it is important to bear in mind the powers and duties of this Court in this matter as a first Appellate Court. It is an established principle of the law that a first appellate Court has powers to consider all questions of Law, mixed Law and fact and of facts. It also has the duty to subject the evidence on record as a whole to a fresh and exhaustive scrutiny and to make its own findings of facts giving allowance to the fact that it had no opportunity to see and observe the witnesses as they testified. See ***Pandya - Vs - R (1957) EA 336.*** Though that case is a Criminal Case, the principle laid therein applies with equal force to civil cases as well. See ***Selle & Anor- vs. Associated Motor Boat Co Ltd (1968) EA.128***

This appeal is about interpretation of the Constitution of the Republic of Uganda 1995. It is, therefore, necessary to also bear in mind the principles that govern Constitutional interpretation to guide me in dealing with the issues at hand. One of these principles is the generous and purposive rule. This entails a broad, liberal and purposive interpretive approach which aims at giving effect to the purpose of the article or provision under construction.

In ***Attorney General of Gambia Vs. Momdou Joe (1984)*** AC 689 at 700, Lord Diplock said,

“A Constitution and in particular that part of it which protects the entrenched fundamental rights and freedoms to which all persons in the state are entitled, is to be given a generous and purposive Constitution”.

The second principle is the rule of harmonization which entails reading the entire Constitution as an integrated whole with no one provision destroying the other but each sustaining the other. See ***Major General Tinyefuza -Vs. AG, Constitutional Petition No. 1 of 1996.***

The third principle is that which requires all provisions concerning an issue to be considered together to give effect to the purpose of the instrument under construction. ***(See South Dakota VS. North Carolina, 192, US 268 (1940) LED 448).***

With these principles in mind, I now proceed to consider the arguments of Counsel on the grounds as presented.

Ground 1

The complaint of the appellant in this ground was that the Constitutional Court erred in interpreting Article 83(1) (g) (h) of the Constitution of the Republic of Uganda, 1995 to nullify nomination of a Member of Parliament for election to the next Parliament, if he or she failed to vacate his or her seat in Parliament in terms of that Article. The learned Principal State Attorney argued that

the punishment prescribed by that article for its violation is loss by the offending MP of his or her seat in Parliament but does not include nullifying nomination of such an MP for election to the next Parliament.

For ease of reference, I reproduced here below the text of the relevant Clauses of Article 83:-

“(I) A member of Parliament shall vacate his or her seat in Parliament:-

(g) if that person leaves the political party for which he or she stood as candidate for election to Parliament to join another party, or to remain in Parliament as an independent member;

(h) if, having been elected to Parliament as an independent candidate, that person joins a political party -----.”

The Constitutional Court in its “Judgment of the Court” at page 98 of the Record of Appeal,said,

“(IV) Common sense dictates that if one was elected to Parliament on a political party ticket and joins another party, he/she cannot be validly nominated for election on the ticket of that latter party unless he/she has at the time of nomination resigned or vacated the seat in Parliament.

(V) If one was elected to Parliament on a party ticket and he/she leaves that party to become independent, he/she cannot validly be nominated as an independent unless he/she has ceased to be or has vacated the seat in Parliament.”

Dr.Akampunguza submitted that the learned Justices of the Constitutional Court applied generous interpretative principle to arrive at the above decision.

Indeed, the generous and purposive interpretative principle enjoins Court to give a Constitutional provision a broad, generous and purposive interpretation to give effect to the article. This entails reading into the article, if necessary, where literal interpretation produces absurdity or unfair situation, words so as to do what the framers would have done, had they had the situation in mind, to give effect to the spirit and intention of the article. See **Northmanvs. Barnett Council (1979) 1 HLR 220.**

In the instant case, the spirit of the article and the intention of its framers as to the sanction or punishment for its violation are clear. It was automatic loss of seat in Parliament by the offending MP. The reason for this is not difficult to find. It is to instill in the MPs integrity and respect for the wishes of the electorate by subjecting the offending MP to facing the electorate in a by - election, if he or she wishes to regain his or her seat in Parliament on that other party's ticket or as an independent, as the case may be, or to seek election to the next Parliament. The spirit of the article and the intention of its framers were not to deny such an offending MP the right to seek re-election to regain his or her seat or election to the next Parliament after loss of his or her seat in Parliament under this article. This is very clear from the article. There is no absurdity or unfair situation whatsoever. There was, therefore, neither sense nor justification for the Constitutional Court to read into Article 83(1) (g) (h) the words nullifying nomination of the offending MP for election to the next Parliament.

Where such an offending MP resists vacating or disputes vacation of his or her seat in Parliament, then Article 86 (1)(a) of the Constitution and Section 86(3) of the Parliamentary Elections Act could be invoked for determination by a competent Court of the question whether the seat of the offending MP in Parliament has fallen vacant. Article 86(1) (a) reads:

"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;”

Section 86(3) of the Parliamentary Election Act 2005 as amended reads thus:

“Subject to the provisions of this Act in relation to election petitions, and to the provision of article 137 of the Constitution, the Attorney General may petition the High Court under article 86 of the Constitution for the determination of the questions referred in the article.”

I, therefore, agree with Ms. Mutesi that the Constitutional Court, with respect, erred to hold in paragraph (IV) and (V) of its judgment that an MP offending article 83 (1) (g) (h) cannot validly be nominated for election for the next Parliament unless he or she had vacated or resigned his or her seat in Parliament at the time of nomination.

Grounds 2 and 3

These grounds complained against the decision of the Constitutional Court which held that under Article 83(1)(g)(h), a person who was elected to Parliament on a party ticket and joins another party or becomes an independent or having been elected as an independent, joins a political party, cannot validly be nominated for election to the next Parliament on the ticket of that latter party or as independent before he or she resigned or vacated his or her seat in Parliament when at the same time it also held that Mr. William Oketcho, had ceased to be or deemed to have vacated his seat in Parliament at the time he joined the NRM party in or around August, 2010. She argued that Mr. William Oketcho had the right of association guaranteed under article 29(c) and freedom to stand for elective position under article 72(4) as an independent candidate or on the ticket of political party of his choice. She denied that Article 83 is a derogation of those rights as it is silent about future nomination.

The decision complained of is on page 102 of the record of appeal as follows:-

“The right to associate and the right to stand as an independent or on a political party ticket, like most rights and freedoms in this

Constitution, are not absolute. They can be derogated from as long as the derogation is done within the limits provided for in Article 43 of the Constitution. In our view, article 83 (1) (g) and (h) is a legitimate derogation of those freedoms. As already discussed above, the 2nd respondent should have vacated his seat in Parliament before offering himself for election as a flag bearer of NRM. He did not. His nomination for election to the 9th Parliament is therefore invalid and null and void. At the same time, by seeking the nomination on a political party ticket when he was still a seating independent Member of Parliament, he clearly joined NRM and was accepted as its flag bearer. He is deemed to have vacated his seat in Parliament from the date of the purported nomination as a flag bearer of NRM.”-

Upon considering and analyzing the arguments of counsel, the relevant laws and the authorities cited, I agree with Dr. Akampumuza that the right to associate is a matter of an individual's choice. In the instant case, Mr. William Oketcho had made his choice the moment he offered himself for nomination as a flag bearer of NRM party and the Constitutional Court found, rightly in my opinion, that:

“he clearly joined NRM and was accepted as its flag bearer. He is deemed to have vacated his seat in Parliament from the date of his purported nomination as a flag bearer of NRM”.

As I have stated in ground 1 above, generous and purposive interpretative principle enjoins Court to give a Constitutional provision a broad, liberal and purposive interpretation. This entails reading, into the provision under construction, if necessary, words to remedy unfair situation and or absurdity, where they exist, so as to give effect to the spirit and intention of the provision.

In the instant case, Article 83(1) (g) (h) is very clear as to the sanction or punishment for its violation. It prescribed automatic loss by the offending MP of his or her seat in Parliament. The intention behind this sanction was to instill in the MPs integrity, accountability and a sense of respect for the wishes of the electorate, by

subjecting offending MP to fresh election, if he or she wishes to regain his or her seat in Parliament, or to seek election to the next Parliament. It does not prevent offending MP from contesting election to regain his or her seat in Parliament, if he or she wishes on that other party's ticket or as an independent. This reflects the spirit of the article and intention of its framers. There is neither unfair situation nor absurdity in the article as can be discerned from the words used. There was thus no justification at all for the Constitutional Court to read into the said article the words that nomination of the offending MP for election to the 9th Parliament was invalid, null and void ab initio.

Failure to resign or vacate one's seat in Parliament is no ground for declaring nomination of the offending MP for election to the next Parliament invalid under Article 83(1)(g)(h). Factors which could invalidate a nomination for a Parliamentary seat are set out in section 13 of Parliamentary Elections Act and failure to resign or vacate one's parliamentary seat under Article 83 (1)(g)(h) is not one of those factors.

I should also add that I find the holding of the Constitutional Court that nomination of William Oketcho for election to the next Parliament was invalid was, with respect, contradictory. This is because while the reason for declaring the nomination of Mr. William Oketcho invalid was stated to be his failure to resign or vacate his seat in Parliament at the time of nomination, the same Court also found that the said William Oketcho was *deemed to have vacated his seat in Parliament when he offered himself for nomination as a flag bearer of NRM*, an event which took place before the impugned nomination for election to the next Parliament. Clearly, at the time of his impugned nomination for election to the next Parliament, Mr. William Oketcho had been deemed to have vacated his seat in Parliament. That meant that at the time of his impugned nomination, Mr William Oketcho was no longer legally in Parliament.

For the reasons given herein above, grounds 2 and 3 also succeed.

Conclusion:

All the three grounds of appeal have been upheld for the reasons contained in the judgment. In the result, I would allow the appeal.

As regards to costs, I am aware that in the ordinary parlance of things, costs should follow the event. In the instant case however, as the matter is of public interest, I would order that each party bears its own costs.

THE REPUBLIC OF UGANDA IN THE SUPREME COURT OF

Dated at Kampala this 25th day of March..... 2014.

**[Coram! Katureebe, Kitumba, Tumwesigye, Kisaakye, JJSC, :
Odoki, Tsekooko, Okello, Ag. JJSC.]**

**CONSTITUTIONAL APPEAL NO. 01 OF 2011 BETWEEN
AG. JUSTICE OF THE SUPREME COURT.**

ATTORNEY GENERAL APPELLANT

AND

GEORGE OWOR RESPONDENT

[Appeal from the decision of the Constitutional Court at Kampala (Mpagi-Behigeine, Twinomujuni, Kauuma, Nshimye and Arach Amoko, JJA) dated 15th February, 2011 in the Constitutional Petition No. 38 of 2010.]

JUDGMENT OF KATUREEBE, JSC.

I have read, in draft the judgment of my learned brother, Okello, Ag. JSC., and I agree with it and the orders he has proposed.

As all the other members of the Court agree, the appeal is hereby allowed. Each Party shall bear its own costs.

Delivered at Kampala this ..25th.....day of March 2014

B.M. Katureebe
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KATUREEBE; TUMWESIGYE; KISAAKYE JJ.SC. ODOKI;
TSEKOOKO; OKELLO; KITUMBA; AG JJ.S.C.

**CONSTITUTIONAL APPEAL NO. 01 OF
2011**

BETWEEN

ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::::::: APPELLANT

AND

GEORGE OWOR

RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Mpagi-Bahigeine DC), Twinomujuni, Kavuma, Nshimye and Arach Amoko, JJ.A) dated 15th February, 2011 in Constitutional Petition No. 38 of 2010]

JUDGMENT OF TUMWESIG YE. TSC

I have had the benefit of reading in draft the judgment prepared by my learned brother, Okello, JSC, and I agree with the conclusions he has reached in the judgement and the orders he has proposed.

25th day of March

Dated at Kampala this .

2014

**JOTHAM TUMWESTSYE E
JUSTICE OF THE SUPREME**

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: KATUREEBE, KITUMBA, TUMWESIGYE, KISAAKYE, ODOKI,
TSEKOOKOAND OKELLO, JJ.S.C.)

CONSTITUTIONAL APPEAL NO. 01 OF 2011

ATTORNEY GENERAL
APPELLANT AND GEORGE
OWOR
RESPONDENT

{Appeal from the Decision of the Constitutional Court (Mpagi-
Bahigeine, DCJ., Twinomujuni, Kavuma, Nshimye and Arach Amoko,
JJ.A.) dated 1st Feb. 2011, in Constitutional Petition No. 38 of 2010}

JUDGMENT OF DR. KISAAKYE, JSC.

I have had the benefit of reading in draft the judgment prepared by
my learned brother, Okello, Ag. JSC.

I agree with the decision and orders that he has proposed.

**Dated at Kampala this 25th.. day of
.....March....2014.**

**HON. JUSTICE DR. ESTHER KISAAKYE
JUSTICE OF THE SUPREME COURT**

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: KATUREEBE, KITUMBA, TUMWESIGYE,
KISAAKYE, JJSC, ODOKI, TSEKOOKO AND OKELLO, AG.
JJSC)

CONSTITUTIONAL APPEAL NO. 01 OF 2011

BETWEEN

ATTORNEY GENERAL

APPELLANT

AND

GEORGE OWOR

RESPONDENT


[Appeal from the judgment of the Constitutional Court {Bahigeine DCJ, Twinomujuni, Kavuma, Nshimye and Arach Amoko, JJA} in Constitutional Petition No 38 of 2010].

JUDGMENT OF ODOKI, AG JSC

I have had the benefit of reading in draft the judgment prepared by my learned brother Okello, Ag JSC, and I agree with the judgment and the orders he has proposed.

Dated at Kampala **this**

2nd day of *March* 2014.



B J Odoki

AG. JUSTICE OF THE SUPREME COURT

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

[Coram: Katureebe, Kitumba & Tumwesigye,
Kisaakye, JJSC.; Odoki, Tsekooko, Okello, Ag. JJSC.]

Constitutional Appeal No. 01 of 2011

Between
15 ATTORNEY GENERAL APPELLANT
And
GEORGE OWOR RESPONDENT


{Appeal from the decision of the Constitutional Court at Kampala (Mpagi-Bahigeine, Twinomujuni, Kavuma, Nshimye & Arach Amoko, JJA) dated 1st* February, 2011 in the Constitutional Petition No. 38 of 2010.}

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

I have had the benefit of reading in draft the judgment prepared by my learned brother, Okello, JSC. I agree with his conclusions that the appeal be **30** allowed and that each party bears its own costs.

Delivered at Kampala this 25th day of March.


35 J.W.N. Tsekooko
Justice of the Supreme Court.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: KATUREEBE, TUMWESIGYE., KISAAKYE., JJ.S.C.ODOKI,

TOBY OBIRO, KITUMBA, A. N. JSC)

CONSTITUTIONAL APPEAL NO. 01 OF 2011

BETWEEN

ATTORNEY G E N E R A L A P P E L L A N T

AND



GEORGE OWOR:.....
RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Mpagi Bahigeine DCJ, Twinomujuni, Kavuma, Nshimye and Arach Amoko, JJA) dated 15th February, 2011 in

JUDGMENT OF KITUMBA, JSC.

I have had the advantage of reading in draft the judgment of my brother Okello JSC.

I agree with the reasons, the conclusions he has reached in that judgment and the orders proposed herein.

Dated at Kampala, this -V-----day of  2014.

C.N KITUMBA
AG. JUSTICE OF THE SUPREME COURT