

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
(Buteera, DCJ; Kakuru, Bamugemereire, Madrama & Mulyagonja,
JCC)

CONSTITUTIONAL PETITION NO.02 OF 2016

EDDIE KWIZERA WA-GAHUNGU.....PETITIONER

VERSUS

1. THE ATTORNEY GENERAL
2. NSABA BUTURO
3. ELECTORAL COMMISSION }**RESPONDENTS**

JUDGMENT OF IRENE MULYAGONJA, JCC

Introduction

This petition was brought under Article 137(3) of the Constitution of the Republic of Uganda and the Constitutional Court (Petitions & References) Rules to challenge the manner in which proceedings were held in the High Court, in Civil Suit No. 047 of 2015, between the petitioner and the 2nd respondent.

Background

The petitioner and the 2nd respondent contested for the post of National Resistance Movement Organisation (NRMO) flag bearer for Bufumbira East in the 2015 Primary Elections held by the NRMO. The 2nd respondent emerged as the winner and therefore was declared the candidate to contest for the Parliamentary seat for the NRMO. The petitioner being dissatisfied with the results filed Civil Suit No. 047 of 2015 in which he complained about malpractices in the Primary Elections of the NRMO.



Both the petitioner and 2nd respondent later presented themselves to the 3rd respondent and were duly nominated as independent candidates to contest for the seat of Member of Parliament Bufumbira East Constituency. The suit was dismissed on a preliminary point of law. On 8th January, 2016, the 2nd respondent together with the NRMO filed an application seeking an order to compel the 3rd respondent to nominate the 2nd respondent as the flag bearer for the NRMO to contest for the seat for Bufumbira East Constituency.

On 11th January, 2016, court set the 13th January 2016 as the date for the hearing of the application. On learning about it, the petitioner wrote to the Registrar of the High Court at Kabale expressing his interest to be joined as a party to the application. On 13th January 2016 the matter was adjourned to the following day, the 14th of January 2016 and it was heard. The court delivered a ruling in which the 3rd respondent was ordered to nominate the 2nd respondent as the party flag bearer for NRMO to run for the seat for Bufumbira East Constituency.

Being aggrieved with the decision of the court denying him leave to be joined as a party to the application the petitioner filed this petition on the grounds that:

- a) The act of the Registrar of the High Court of Uganda giving one day's notice for the hearing of an application and thereby depriving your petitioner of an opportunity to be added as a party is in contravention of Articles 21 (1) and 28 (1) of the Constitution.
- b) The act of hearing Miscellaneous Cause No. 1 of 2016 without affording your petitioner an opportunity to be heard is inconsistent with and contravenes Articles 21 (1) and 28 (1) of the Constitution.



- c) The decision of the court compelling the third respondent to nominate the second respondent as the flag bearer of the National Resistance Movement Party is inconsistent with and contravenes Article 126 (2) (e). (sic)
- d) The omission to include the petitioner in Miscellaneous Cause No 01 of 2016 by the second respondent is inconsistent with and contravenes Articles 21 (1), 28 (1) and 126 (2) (e). (sic)

The petitioner sought the following declarations and orders:

- a) That the act of the Registrar of the High Court in giving a days' notice and thereby excluding the petitioner from the proceedings is in contravention of Article 21 (1) and 28 (1) of the Constitution.
- b) That the acts of the Court entertaining an application which excluded your petitioner is inconsistent with and contravenes Articles 21 (1) and 28 (1) of the Constitution.
- c) That the decision of the court compelling the third respondent to nominate the second respondent as NRM flag bearer after the closure of nominations is inconsistent with and in contravention of Articles 21 (1) and 28 (1) of the Constitution.
- d) That the second respondent having left the party and stood as an independent could not by order of court be nominated as a flag bearer of the party he left.
- e) The act of the second respondent commencing proceedings to the exclusion of your petitioner is inconsistent with and contravenes Articles 21 (1) and 28 (1) of the Constitution.
- f) The decision of the court making an unenforceable order not in conformity with the law is inconsistent with Article 126 (1) of the Constitution.



- g) The second respondent is not a flag bearer of the NRM and a permanent injunction restraining the 3rd respondent from nominating the 2nd respondent as flag bearer.

In his conferencing notes the petitioner's counsel stated five grounds raised for the determination of this court as follows:

- 1) Whether the petition is misconceived, frivolous, superfluous, vexatious, and incompetent and does not disclose a cause of action.
- 2) Whether the petition is an abuse of court process and improper.
- 3) Whether the act of the Registrar of the High Court giving a day's notice of hearing of Misc. Cause No.1 of 2016 is inconsistent with and contravened Article 21(1) and Article 28 of the Constitution.
- 4) Whether the act of hearing Misc. Cause No. 1 of 2016 without giving the petitioner an opportunity to be heard is inconsistent with Article 28(1) of the Constitution.
- 5) Whether the decision compelling the 3rd respondent to nominate the 2nd respondent is inconsistent with and contravenes Article 28(1) and 126(1) of the Constitution.

Representation

At the hearing of the Petition, the petitioner was represented by Mr. Wandera Ogalo while the 1st respondent was represented by Mr. Hilary Nathan Ebira holding brief for George Kalemera. The 2nd respondent was represented by Mr. Augustine Idoot while the 3rd respondent was represented by Mr. Enock Kugonza.

Mr. Wandera Ogalo, with leave of Court withdrew the petition as against the 2nd and 3rd respondents on ground that the orders sought against them, in particular, under Paragraph 4 of the Petition were overtaken



by events. The petitioner's claim therefore remains as against the 1st respondent only.

Counsel for the petitioner adopted the written submissions filed in court on 4th January 2021. Counsel for the respondent was given up to 9th February 2021 to file and serve their written submissions but they did not do so.

Before submitting on the issues raised, counsel for the petitioner abandoned his arguments with regard to Articles 21(1) and 126(2)(e) of the Constitution on the ground that the matters in paragraph 4 of the petition were overtaken by events since they related to the Elections that were held in 2016. Counsel also prayed that the petition against the 2nd and 3rd respondent not continue but the petition against the 1st respondent should continue.

Submissions of Counsel

In his submissions, counsel for the petitioner addressed court on issues 3, 4 and 5 above.

With regard to the 3rd and 5th issues, counsel stated that though the petitioner informed the Registrar in Miscellaneous Cause No 01 of 2016 that he wished to be heard in the matter, the Registrar gave only one days' notice before the application was heard. That the time given was insufficient for the petitioner to instruct and advocate to represent him and get himself added as a party to the application.

He explained that the petitioner was a party to Civil Suit No. 47 of 2015 from which the application originated. That filing an application without adding him as a party and fixing it in a manner that did not give him time to appear was in contravention of his right to be heard. Counsel referred us to the decision in **Mpungu Transporters v Attorney General, Civil Appeal No 17 of 2001**, where the court laid down factors



that would be considered to determine whether the complainant has established that he or she had a right to be heard.

Counsel further submitted that where two parties are fighting over the same subject matter, sufficient time ought to be given by court when fixing a hearing date. That the action of the registrar contravened the petitioner's right to be heard, especially because the nature of the inquiry was a complicated one which should not have been settled by a simple originating motion. That as a result, the actions contravened Article 28 (1) of the Constitution.

With regard to the 5th issue, counsel for the petitioner submitted that judicial power must be exercised by court in conformity with the law. That both the petitioner and the 2nd respondent presented themselves as independent candidates. None wanted the NRM flag. Under section 9 of the Parliamentary Elections Act, the 3rd respondent was required to appoint two days for nomination and issue notice in the gazette to that effect. That the Electoral Commission did take notice of the Gazette and Court was also supposed to take judicial notice of it but did not and declared the 2nd respondent as the candidate of the NRM. That to that extent, the judge exercised judicial power contrary to the law, which rendered his decision in contravention of Article 126 of the Constitution.

He concluded that the failure to hear the petitioner rendered the decision of the court unconstitutional and this court should grant the declarations prayed for.

In reply, counsel for the 3rd respondent explained the circumstances that led to the hearing of the Miscellaneous Cause No 01 of 2016 in the absence of the petitioner and why he was not joined as a party. That the petitioner wrote a letter to the Registrar instead of filing an application to be joined as a party. That the 3rd respondent did not carry out any action against the petitioner that contravened provisions of the

Constitution. That the petitioner and the second respondent were not fighting for the same thing because the petitioner had already been nominated as an independent candidate. That as a result, he had no rights to defend in the application between the 2nd and 3rd respondent.

Finally, that since the petitioner did not make out a case that any of his constitutional rights had been violated, the petition should be disallowed.

In his answer to the petition, the 2nd respondent raised objections that the petition was misconceived, frivolous, vexatious and incompetent. Further that it disclosed no questions for constitutional interpretation.

With regard to the objections raised by the 2nd respondent, Order 29 rule 6 of the Civil Procedure Rules (CPR) is applicable in this court by virtue of rule 23 of the Constitutional Court (Petitions and Reference) Rules, SI 91 of 2005. Rule 6 of Order 29 CPR provides that:

“If, in the opinion of the court, the decision of the point of law substantially disposes of the whole suit, or of any distinct cause of action, ground of defence, setoff, counterclaim, or reply therein, the court may thereupon dismiss the suit or make such other order in the suit as may be just.”

In **Attorney General v. Major General David Tinyefuza, Supreme Court Constitutional Appeal No 1 of 1997**, Tsekoko, JSC ruled as follows:

“I think that where a preliminary objection is raised at the beginning of the trial, it is prudent to give reasons for or against the objection before the trial proceeds. The matter is normally discretionary. Reasons may be given either before the hearing of the case or in the judgment after conclusion of the hearing of the case. Certainly, where the trial judge is satisfied that the objection is such that upholding it would conclude the case, it would be an exercise in futility to postpone giving reasons till after hearing the case...”

A handwritten signature in black ink, appearing to be 'Jum', located in the bottom right corner of the page.

The jurisdiction of this court is provided for by Article 137 of the Constitution. The relevant parts of Article 137 of the Constitution state that:

- (1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.**
- (2) When sitting as a Constitutional Court, the Court of Appeal shall consist of five members of that Court.**
- (3) A person who alleges that-**
 - (a) An Act of Parliament or any other law or anything in or done under the authority of any law; or**
 - (b) Any act or omission by any person or authority,****is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.**

In **Ismael Serugo v. Kampala City Council, Constitutional Appeal No. 02 of 1998**, the Supreme Court (Kanyeihamba, JSC) reviewed its decision in **Attorney General v. Major General David Tinyefuza, (supra)** and stated thus,

There is a number of facets to the decision of the Supreme Court in that case. Nevertheless, when it comes to that Court's view of the jurisdiction of the Court of Appeal as a Constitutional Court, its decision in that case is that the Constitutional Court has no original jurisdiction merely to enforce rights and freedoms enshrined in the Constitution in isolation to interpreting the Constitution and resolving any dispute as to the meaning of its provisions. The judgment of the majority in that case, [Wambuzi, C.J., Tsekooko J.S.C., Karokora J.S.C., and Kanyeihamba J.S.C], is that to be clothed with jurisdiction at all, the Constitutional Court must be petitioned to determine the meaning of any part of the Constitution in addition to whatever remedies are sought from it in the same petition. It is therefore erroneous for any petition to rely solely on the provisions of Article 50 or any other Article of the Constitution without reference to the provisions of Article 137 which is the sole Article that breathes life in the jurisdiction of the Court of Appeal as a Constitutional Court.

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The Supreme Court (Wambuzi, CJ) in **Attorney General v. Tinyefuza** (supra) set out the limits of the jurisdiction of this court as provided for in Article 137 of the Constitution, as follows:

“In my view, jurisdiction of the Constitutional Court is limited in Article 137 (1) of the Constitution to interpretation of the Constitution. Put in a different way no other jurisdiction apart from interpretation of the Constitution is given. In these circumstances, I would hold that unless the question before the Constitutional Court depends for its determination on the interpretation of the Constitution or construction of a provision of the Constitution, the Constitutional Court has no jurisdiction.”

The petitioner's complaint is that the Registrar did not afford him a hearing in Miscellaneous Cause No. 001 of 2016 which was between the NRM, the 2nd respondent and the 3rd respondent. That the registrar ought to have considered his letter to have him joined as a party to the cause.

It is important to point out that the petitioner's letter to the Registrar had no force of law. Litigants cannot move court by letters. The letter was not part of the pleadings on record and could not be brought to the attention of the Judge. The petitioner should have filed a formal application to be joined as a party any time before the decision of the Judge. The time that it took to write and deliver the letter was sufficient to prepare and file his application.

The matters that the petitioner complains about are purely procedural and the petitioner had several options through which he could have obtained redress from the High Court. The first is that any person aggrieved by an order of court may apply to set it aside. It was also possible for the petitioner, though not a party to the proceedings, to apply for review of the decision if he felt that he had not been afforded

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the right to be heard in a matter in which he clearly had an interest. The petitioner also could have complained to the Electoral Commission under provisions of the Electoral Commission Act.

Turning back to the petition at hand, the petitioner does not advert to interpretation of any provision of the Constitution in his petition. His claim would not have even been tenable under the provisions of Article 50 of the Constitution because his complaints are against the actions of the Registrar of the Court and there are ample procedures for ensuring that officers of court accord parties the right to be heard within the procedural rules and statutes. Parties therefore need not complain against the Attorney General for the actions of judicial officers. I say so because it seems that the Electoral Commission was made a party to this petition as a nominal respondent, not because the petitioner had any complaint against it.

As a result, this court has no jurisdiction to entertain the matters raised in the petition. I would dismiss it for that reason. I would award costs to the 2nd respondent and make no orders as to costs for the 1st and 3rd respondents.

It is so ordered.


Irene Mulyagonja

JUSTICE OF APPEAL/CONSTITUTIONAL COURT

27th - 04 - 2021

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
[Coram: Buteera, DCJ; Kakuru, Bamugemereire, Madrama, Mulyagonja; JJA/JJCC]
CONSTITUTIONAL PETITION NO. 02 OF 2016

EDDIE KWIZERA WA-GAHUNGU..... **PETITIONER**

VERSUS

- 1. ATTORNEY GENERAL**
2. NSABA BUTURO
3. ELECTORAL COMMISSION..... **RESPONDENTS**

JUDGMENT OF RICHARD BUTEERA, DCJ

I have had the benefit of reading in draft the judgment of my learned sister Irene Mulyagonja, JA/JCC and I agree with her that this petition fails for the reasons she has set out in her judgment. I also concur with the orders she has proposed.

As Kakuru, Bamugemereire and Madrama, JJA/JJCC also agree, this petition is hereby dismissed with costs to the 2nd respondent and no orders as to costs for the 1st and 3rd respondents.

Dated at Kampala this..... 27th day of..... April.....2021

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RICHARD BUTEERA
DEPUTY CHIEF JUSTICE

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO.02 OF 2016

EDDIE KWIZERA WA-GAHUNGU PETITIONER

VERSUS

1. ATTORNEY GENERAL

2. NSABA BUTURO

3. ELECTORAL COMMISSIONRESPONDENTS

CORAM: Hon. Mr. Justice Richard Buteera, DCJ
Hon. Mr. Justice Kenneth Kakuru, JA/JCC
Hon. Lady Justice Catherine Bamugemereire B.K, JA/JCC.
Hon. Mr. Justice Christopher Madrama, JA/JCC
Hon. Lady Justice Irene Esther Mulyagonja, JA/JCC


JUDGMENT OF JUSTICE KENNETH KAKURU, JA/ JCC

I have had the opportunity of reading in draft the Judgment of my learned sister Hon. Irene Mulyagonja, JA/JCC.

I agree with her that, this petition ought to be dismissed for the reasons she has set out in her judgment.

I also agree with the orders she has proposed and I have nothing useful to add.

Dated at Kampala this 27th day of April 2021.


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Kenneth Kakuru

JUSTICE OF APPEAL/CONSTITUTIONAL COURT

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

CONSTITUTIONAL PETITIONAL No. 002 of 2019

EDDIE KWIZERA WA-GAHUNGU..... PETITIONER

VERSUS

1. ATTORNEY GENERAL
2. NSABA BUTURO
3. ELECTORAL COMMISSION..... RESPONDENTS

Coram: Hon. Mr. Justice Richard Buteera, DCJ
Hon. Mr. Justice Kenneth Kakuru, JCC
Hon. Lady Justice Catherine Bamugemereire, JCC
Hon. Mr. Christopher Madrama, JCC
Hon. Lady Justice Irene Esther Mulyagonja, JCC

JUDGMENT OF CATHERINE BAMUGEMEREIRE, JCC

I have had the benefit of reading in draft the Judgment of my Learned Sister Irene Mulyagonja JCC. I agree with her reasoning and conclusions.



Catherine Bamugemereire
Justice of the Constitutional Court

27-04-2021

THE REPUBLIC OF UGANDA,
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO 02 OF 2016

EDDIE KWIZERA WA – GAHUNGU}PETITIONER

VERSUS

1. THE ATTORNEY GENERAL}
2. NSABA BUTURO }RESPONDENTS
3. ELECTORAL COMMISSION}

JUDGMENT OF JUSTICE CHRISTOPHER MADRAMA IZAMA, JCC

I have had the benefit of reading in draft the judgment of my learned sister Hon. Lady Justice Irene Mulyagonja, JCC.

I agree with my learned sister Hon. Lady Justice Irene Mulyagonja, JCC that this Petition lacks merit as there was a judicial decision against which the Petitioner had a right of appeal on the grounds disclosed in the Petition. The Constitution confers a right of appeal to a higher court under 139 and 134 (2) thereof against the decision of a Registrar of the High Court or that of a High Court Judge respectively. The Petitioner's remedy was not to file a Petition in this court for determination of questions as to the interpretation of the Constitution; as no such question is disclosed in the Petition, but to seek enforcement of his rights, if any through the appellate or review process. In the premises, I concur that petition be dismissed with the orders proposed by my learned sister and I have nothing useful to add.

Dated at Kampala the 27th day of April 2021



Christopher Madrama Izama

Justice of Court of Appeal/Constitutional Court

Decision of Hon. Mr. Justice Christopher Madrama Izama *Trufully madramm735securityx 2021 style XTOPHER COURT OF APPEAL ApplOpini*