

# THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

## CONSTITUTIONAL APPLICATION NO.07 OF 2012

(Arising from Constitutional Petition No.003 of 2012)

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SULAIMAN MUWONGE LUBEGA :::::::::::::::::::::APPELLANT

VERSUS

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

10 CORAM: HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, DCJ  
HON. LADY JUSTICE M.S. ARACH AMOKO, JA  
HON. JUSTICE REMMY KASULE, JA

### RULING OF THE COURT

15 The applicant brought this application seeking a temporary injunction to restrain *The Commission of Inquiry (Mismanagement of Funds under Universal Primary Education (UPE) and Universal Secondary Education (USE))* from carrying out its work pending the disposal of Constitutional Petition No.003 of 2012.

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The application is brought under **Article 137** of the Constitution of Uganda, **Rules 10 and 23** of the **Constitutional Court (Petitions and References) Rules, 2005** and also **Rules 2 (2), 43 and 44** of the **Judicature (Court of**

**Appeal Rules) Directions** and section 64 (e) of the Civil Procedure Act,  
25 Cap.71.

The applicant filed an affidavit dated 31.01.2012 in support of the application. He also filed an affidavit in rejoinder dated 18.04.2012 in reply to the affidavits filed for the respondent.

30 The affidavits filed for the respondent were those of Ms Ketrach Katunguka, a Commissioner in the Ministry of Justice & Constitutional Affairs and also Secretary/Legal Counsel to the Commission, Dr. Rose Nassali Lukwago and Engineer Patrick M. Batumbya, both members of the Commission.

35 The said **Commission of Inquiry** was established by His Excellency The President of Uganda through **Legal Notice No.15 of 2009** of 11.12.2009, under The **Commissions of Inquiry Act, Cap.166**. It has as its Chairperson Justice E. Muhanguzi of the Uganda High Court.

40 The terms of reference of the Commission, in essence, consist of undertaking a systematic review of the Education Management Information system, inquiring into ghost pupils and teachers, attendance of pupils and teachers, disbursement of UPE/USE funds/ resources, inspection systems, and the capacity of supervisors to ensure value for UPE/USE  
45 funds/resources. The Commission is to make appropriate recommendations. Originally the Commission was scheduled to complete

its work within six (6) months from 20.10.09, but, over time, it has had extensions, and as of now it is required to complete its work on 14.08.2012.

50 It is the case of the applicant that as a citizen and a parent with children under Universal Primary and Secondary Education, he has interest in or is aggrieved by the fact that the Commission is by its character and composition biased and incapable of discharging its mandate, and by reason thereof, **Legal Notice No.15 of 2009** that sets it up is inconsistent  
55 and/or in contravention of the Constitution. Accordingly he on 31.01.2012 instituted in this court **Constitutional Petition No.003 of 2012** challenging the said unconstitutionality of the Commission. The same is still pending in this court. This application now seeks a temporary injunction stopping the activities of the Commission pending disposal of the said **Constitutional**  
60 **petition.**

Learned Counsel for the applicant has urged us to allow the application because the Commission is characterized by partiality and therefore cannot act fairly in discharging its mandate. This is because Dr. Nassali Lukwago  
65 and Eng. P.M. Batumbya both Commission Members are part and parcel of and/or are closely interlinked with UPE and USE funds and as such are the very people whom the Commission ought to be investigating and not the other way round. It is further submitted for the applicant that both members are potential witnesses to appear before the Commission of Inquiry. This  
70 state of affairs offends the law against bias and is likely to render the commission findings and report a nullity. This is the conclusion that the

Constitutional Court is likely to arrive at, when it determines **Constitutional Petition No.3 of 2012**. It is thus fair and necessary that a temporary injunction issues restraining the Commission from carrying out any further  
75 work pending the disposal of the said **Constitutional Petition**.

For the respondent, learned State Attorney Ellison Karuhanga, submitted that the applicant had failed to establish a prima facie case to warrant being granted a temporary injunction. The applicant had failed to show what  
80 harm he would suffer if the Commission continued with its work. He had also failed to show any instance of bias on the part of the Commission. All that the applicant engaged in was mere speculations and a court of law does not act on such. Further, a court temporary injunction would cause a lot of inconvenience to the Government and the general public by stopping  
85 the work of the Commission now, when only a few months remain before the Commission completes its work on 14.08.2012. He prayed court to dismiss the application.

An injunction court order is one whereby court requires a party to do or  
90 refrain from doing a particular act. A temporary injunction is intended to maintain the status quo of things pending the determination by court of some serious cause pending before it. In **Supreme Court Civil Appeal No.8 of 1990: Robert Kavuma Vs Hotel International**, Wambuzi CJ, as he then was, held:-

95 ***“It is generally accepted that for a temporary injunction to issue, the court must be satisfied:-***

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- i. That the applicant has a prima facie case with a probability of success.***
  - ii. That the applicant might otherwise suffer irreparable damage which would not be adequately compensated for in damages.***
  - iii. If the court is in doubt, on the above two points, then the court will decide the application on a balance of convenience. In other words, whether the inconveniences which are likely to issue from withholding the injunction would be greater than those which are likely to arise from granting it. See the case of: L.D. Cotton International Vs African Farmers Trade Associates & Anor. [1996] HCB 57".***
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The above principles of law are applicable to this application.

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We have considered the pleadings and the submissions of the respective parties.

115 It is an undisputed fact that the Commission has been carrying out its work since 20.10.2009 and is due to complete the same on 14.08.2012, about three and half (3 ½) months from now. Almost 80% of the work of the Commission is completed. It appears to us that the Commission is in its last stages of its mission. While, it is the right of the applicant to exercise his constitutional right to petition the Constitutional Court, as he has done

120 under ***Constitutional Petition No.003 of 2012***, the applicant has not  
offered to court any plausible explanation as to why he has had to wait  
without doing anything to stop the work of the Commission from 2009,  
when the Commission started its work, to 31.01.2012 when he decided to  
file in court the Constitutional Petition and this application.

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The burden is upon the applicant to convince court, that, if a temporary  
injunction is not granted, he is likely to suffer irreparable damage in respect  
of which he cannot be adequately compensated by way of monetary  
damages. He has not adduced evidence of irreparable damage or a  
130 threatened injury to him or a member of his family, or otherwise, likely to be  
suffered due to the continued working of the Commission.

In terms of balance of conveniences, members of the Commission and  
supporting staff have so far carried out almost 80% of the work. This has  
135 been done at great public expense. The appointing authority, possibly  
expects the Commission report by August, 2012. The applicant, even  
when the report comes out, will still have his right to subject the said report  
to constitutional scrutiny before the Constitutional Court, or to Judicial  
Review before the High Court, as he pleases. We are therefore not  
140 convinced that the balance of convenience is in favour of the issuance of a  
temporary injunction to stop the work of the Commission, albeit temporarily.

We have thus come to the conclusion that, all in all, the applicant has not made out a case for being granted a temporary injunction. We dismiss the application.

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As to costs, since Constitutional Petition No.003 of 2012 from which this application arises, is still pending in this court, we order that the costs of this application abide the outcome of the said Constitutional Petition.

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We so order.

Dated at Kampala this ...**30<sup>th</sup>** ...day of ...**April**...2012.

Hon. A.E.N. Mpagi-Bahigeine

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**DEPUTY CHIEF JUSTICE**

Hon. M.S. Arach-Amoko

**JUSTICE OF APPEAL**

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Hon. Justice Remmy Kasule

**JUSTICE OF APPEAL**