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THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 51 OF 2013

(Coram: Egonda-Ntende, Musoke, Cheborion, Kibeedi, Mulyagonja, JJCC)

1. PETER SSAJJABI

10 **2. SWIFT COMMERCIAL ESTABLISHMENT LIMITED:.....PETITIONERS**

VERSUS

1. THE ATTORNEY GENERAL OF UGANDA

2. BANK OF UGANDA:.....RESPONDENTS

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Judgment of Cheborion Barishaki, JCC.

The petitioners are challenging the constitutionality of provisions in certain Acts of Parliament. They seek this Court's interpretation of the Constitution so as to determine whether certain acts alleged to have been done by the respondents are in contravention of the Constitution. The Petition is brought pursuant to
20 Articles 2, 137 (1), (3) (b) & (4) and 150 of the Constitution and the Constitutional Court (Petitions and References) Rules S.I 91 of 2005.

Background

From September to November, 2012 the 1st petitioner was under Police investigation for suspected commission of offences including among others, illicit
25 enrichment, conspiracy to defraud and causing financial loss. He was suspected to have been involved in the much publicized corruption scandal involving

5 payment of money to questionable beneficiaries of the East African Community who were entitled to pension by the Ministry of Public Service. The 1st appellant was not an official of the Ministry for Public Service; but at one time he was the National Secretary of the East African Community Beneficiaries Association (EACOBAs) which had some connection to that scandal. It appears that the 1st
10 petitioner was eventually charged and tried in connection with some offences related to the said scandal but it is not clear if he was eventually convicted or acquitted.

The 2nd petitioner, is a legal person in which the 1st petitioner is both a shareholder and a director. Although the 2nd petitioner was never under
15 investigation for any criminal act, it was affected by several orders made against it presumably because of the 1st respondent's involvement with it.

The 1st respondent is the government's representative in civil actions of this nature, and has been sued for the acts of their agents. The 2nd respondent, is the Central Bank of Uganda, and a regulator of commercial banks and is sued
20 with regard to certain acts and omissions done in that capacity. The evidence and the allegations against the respondents are set out in more detail later in this Judgment.

As a result of the impugned acts or omissions, the petitioners pray for the following declarations:

25 “(i) *A Declaration that Legal Notice No. 9 of 2009 (the impugned Legal Notice) which establishes in the High Court, a division known as the*

5 *Anti-Corruption Court is inconsistent with, and contrary to Articles 2, 126, 150 and 232 of the Constitution of the Republic of Uganda, 1995 as amended and any proceedings commenced and prosecuted under the Anti-Corruption Court are contrary to and contravene, Articles 2, 126, 150 (1) and 232 (2) (e) of the Constitution and the said Legal*
10 *Notice No.9 of 2009 is null and void.*

(ii) *A Declaration that the failure and/or refusal by the 2nd Respondent to allow the Petitioners to make representations prior to the issuing of directives to the Petitioners' bankers to freeze, and its failure and/or refusal to lift the freezing of the Petitioners' bank accounts after the*
15 *lapse of the court order on the 7th September 2013 is arbitrary and illegal and constitutes an abuse of its regulatory powers and of the law under Section 118 of the FIA and is contrary to, and contravenes, Articles 2, 26, 28 (1), (3) (a), 42, 44 (c) and 126 of the Constitution;*

(iii) *A Declaration that the actions of the police/state agencies in confiscating/seizing the property of the Petitioners prior to being*
20 *charged, tried, convicted and sentenced are illegal and unconstitutional and contrary to, and contravene Articles 2, 20, 26, 28 (1), (3) (a), 40, 44 (c) and 126 of the Constitution;*

(iv) *A Declaration that section 34 of the Act [Anti-Corruption Act] is*
25 *unconstitutional in so far as it contravenes Articles 2, 20, 26, 28 (1), (3) (a), 40 (2), and 44 (c) of the Constitution and is null and void;*

- 5 (v) *A Declaration that any proceedings commenced and prosecuted and any decision made under the Section 34 of the Act are contrary to, and contravene, Articles 2, 20, 26, 28 (1), (3) (a), 44 (c) and 126 of the Constitution and such proceedings and decisions are null and void;*
- 10 (vi) *A Declaration that the court order dated 7th March 2013 issued by the Anti-Corruption Court under section 34 of the Act against the Petitioners who are not charged of any offences under the Act is inconsistent with, and in contravention of, Articles 2, 26, 28 (1), (3) (a), 44 (c) and 126 of the Constitution and such order is null and void;*
- 15 (vii) *A Declaration that the act of the DPP charging the 1st Petitioner in the Anti-Corruption Court with the offences of theft C/S 254, 261 and conspiracy to defraud C/S 309 of the Penal Code Act which offences do not fall within the jurisdiction of the Anti-Corruption Court which is a specialized court and is not seized with jurisdiction to try offences under the Penal Code Act and the purported trial in the Anti-*
- 20 *Corruption Court is inconsistent with, and contravenes Articles 2, 20, 28 (1), (3) (a), 42, 44 (c), 120 (5) and 133 (b) of the Constitution;*
- 25 (viii) *A Declaration that the decision of the Anti-Corruption Court denying the 1st petitioner access to his passport to enable him attend medical treatment abroad when the Anti-Corruption Court recognized that the 1st Petitioner suffers from medical condition stated in the medical report is an abuse of judicial discretion and inconsistent with, and*

5 *contravenes Articles 2, 20 (2), 22, 28 (1), (3) (a) and 126 of the Constitution;*

(ix) *A Declaration that section 118 of the FIA is unconstitutional in so far as it contravenes Articles 2, 20, 26, 28 (1), (3) (a), 42, 44 (c) and 126 of the Constitution and is null and void;*

10 (x) *A Declaration that any directive, implementation or enforcement of section 118 of the Financial Institutions Act by the 2nd respondent or any financial institution made against the Petitioners is contrary to and contravenes Articles 2, 20, 26, 28 (1), (3) (a), 40 (2), 44 (c) and 126 of the Constitution and the implementation of such directive*
15 *under the section 118 of the Financial Institutions Act is null and void; and*

(xi) *A Declaration that the actions of State agencies in abducting the 1st Petitioner and blindfolding him and subjecting him to interrogation is contrary to and contravenes Articles 2, 24, 44 (a) and 126 of the*
20 *Constitution.*

The Petitioners also seek for the following orders:

(i) *An order directing the Ant-Corruption court seized with the trial and proceedings against the 1st Petitioner to forthwith discharge the 1st Petitioner;*

25 (ii) *An order that the Petitioners be compensated for the wrongs suffered;*

- 5 (iii) *An order for payment of general damages for inconvenience, loss and damage to the person and business;*
- (iv) *An order unconditionally unfreezing all the bank accounts and lifting of any restrictions by the police and 2nd Respondent regarding the property/assets inclusive of lifting of directives on closure of the*
10 *businesses and business premises of the Petitioners;*
- (v) *An order directing the police including the Directorate of Criminal Investigations and Intelligence Department to deliver up and hand over all of the Petitioners' confiscated and seized property/assets;*
- (vi) *An order of a Permanent injunction against the Respondents and/or*
15 *any organ of Government, its officers, agents or servants restraining them from applying, implementing or enforcing any of the impugned sections, conducting any business under the impugned Legal Notice in particular, business at the Anti-Corruption Court; and*
- (vii) *Any further and better relief this Honourable Court may deem*
20 *appropriate in the circumstances.*

The Petition is supported by the affidavit of the 1st petitioner and an additional affidavit of Joel Mukambwe. The respondents filed their respective answers in opposition to the Petition supported respectively by affidavits of Geoffrey W. Madete for the 1st respondent and Margaret K. Kasule for the 2nd respondent.

5 **Representation.**

At the hearing, Mr. Patrick Olunga Albarez, learned counsel, appeared for the petitioners. Ms. Claire Kokunda learned State Attorney with the 1st respondent's Chambers, holding brief for Mr. Oburu Odoi Jimmy, a Principal State Attorney from the same Chambers appeared for the 1st respondent. Mr. Alfred
10 Byamugisha, learned counsel appeared for the 2nd respondent, whose Senior Principal Legal Officer, Ms. Loy Nankya was present in Court.

With leave of the Court written submissions were filed for the respective parties and have been considered in reaching the decision herein. At the hearing, Court put questions to the respective counsel, and their replies have been considered.

15 **Analysis**

I have studied the Petition, the affidavits in support thereof and the annextures to the said affidavits; considered the answers to the Petition, the affidavits in support thereof and the annextures attached thereto. I have also had regard to submissions by counsel, the law and authorities cited in support of the
20 respective parties' cases. I have in addition considered authorities found applicable to the Petition although not cited by the parties.

The Petition raises four issues namely; the constitutionality of the Anti-Corruption Division of the High Court, the scope and extent of the right to property under the Constitution and its applicability to the circumstances of the
25 present Petition, the constitutionality of section 118 of the Financial Institutions Act, 2004 and whether the Petitioners are entitled to any of the remedies sought.

5 The principles for constitutional interpretation which guide court in deciding constitutional petitions such as the present have been summarized and restated in many constitutional petitions and appeals both by this court and the Supreme Court and include the following ;

10 *1. The Constitution is the Supreme law of the land and forms the standard upon which all laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of the inconsistency.*

15 *2. The entire Constitution has to be read together as an integrated whole with no particular provision destroying the other but rather each sustaining the other. No one provision of the Constitution is to be considered alone but that all the provisions bearing upon a particular subject are brought into view and are to be interpreted so as to effectuate the greater purpose of the instrument.*

20 *3. Where words and phrases are clear and unambiguous, they must be given their primary, plain and natural meaning. The language used must be construed in its natural and ordinary sense. Where the language of a statute sought to be interpreted is imprecise or ambiguous, a liberal, generous and purposeful interpretation should be given. The interpretation should not be narrow and legalistic, but should be broad and purposeful so as to give*
25 *effect to the spirit of the Constitution.*

5 4. *In determining the constitutionality of legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality, either of the unconstitutional purpose, or unconstitutional effect animated by the object the legislation intends to achieve.*

10 5. *A constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given dynamic, progressive, liberal and flexible interpretation, keeping in view the ideals of the people, their socio-economic and political cultural values so as to extend the benefit of the right to those it is intended*
15 *for.*

6. *The history of the country and the legislative history of the Constitution is relevant and a useful guide in constitutional interpretation.*

7. *Judicial power is derived from the people and shall be exercised by the courts established under the Constitution in the name of the people and in*
20 *conformity with the law and with the values, norms and aspirations of the people and the courts shall administer substantive justice without undue regard to technicalities.*

On the constitutionality of the Anti-Corruption Division of the High Court (ACD), the Petitioner submitted that the Division was established in a manner
25 inconsistent with the Constitution, and that Legal Notice No. 9 of 2009, which

5 provided for the establishment was made in disregard of the requirements of Articles 2, 126 (1), 150 (1) and 232 (2) (e) of the Constitution.

Counsel for the petitioners further submitted that when the ACD was set up by the Chief Justice in 2009, it was intended to be a special court for combatting corruption yet under Article 232 (2) (e) of the Constitution, such special Court
10 could only be set up by Parliament passing a law for that purpose. In counsel's view, the Chief Justice usurped powers of Parliament set up the ACD which rendered the division unconstitutional and illegal.

In reply to above assertions, the 1st respondent made a flat denial stating that Legal Notice No. 9 of 2009 was not inconsistent with the Constitution and that
15 the ACD was established in accordance with the law.

There is a rebuttable presumption that every legislation is constitutional and the onus of rebutting the presumption rests on the person who is challenging its constitutionality see ***Akankwasa Damian V. Uganda Constitutional Petition No. 5 of 2011***

20 Article 2 of the Constitution underlines the supremacy of the Constitution which is stated thereunder to be the supreme law of the land, and if any other law or any custom is inconsistent with any of the provisions of the Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.

25 Article 126 (1) of the Constitution provides for exercise of judicial power by courts of judicature and states that:

5 ***(1) Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people.***

The Constitution establishes the Supreme Court, the Court of Appeal, the High
10 Court and several subordinate courts. The Constitution also envisages the establishment of special courts with unique mandate. With regard to combating corruption, the constitution in Article 232 (1) and (2) (e) directs Parliament to establish a special court to aid the Inspectorate of Government in combating corruption. The article states;

15 ***232. Powers of Parliament regarding inspectorate.***

(1) Parliament shall, subject to the provisions of this Constitution, make laws give effect to the provisions of this Chapter.

(2) Laws made for the purpose of this chapter may, in particular, provide for-

20 ***(e) establishing a special court within the Judiciary for combating corruption and prescribing the composition and jurisdiction and procedures of the court and appeal from the court.***

Article 232 is one of the articles in Chapter 13 of the Constitution which
25 establishes the Inspectorate of Government and sets out its role in combating corruption in public office.

5 Article 129 (1) (c) of the Constitution recognizes the High Court as one of the Courts which may exercise judicial power and its jurisdiction is set out in Article 139 (1) which provides thus;

10 ***The High Court shall, subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law.***

The High Court has unlimited original jurisdiction in all matters, including trying and deciding corruption related offences. Under the constitution, the High Court may be divided into such circuits and divisions as the Chief Justice may deem
15 fit. Article 138 (2) provides that the High Court shall sit in such places as the Chief Justice may, in consultation with the Principal Judge, appoint; and in so doing, the Chief Justice shall, as far as practicable, ensure that the High Court is accessible to all the people. In 2009, the Chief Justice deemed it fit to establish the ACD for purposes of trying corruption related offences. This was within the
20 powers conferred on the Chief Justice by the Article 133 (1) of the constitution which states;

(1) The Chief Justice –

(a) shall be the head of the judiciary and shall be responsible for the administration and supervision of all courts in Uganda; and
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(b) may issue orders and directions to the courts necessary for

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proper and efficient administration of justice.

By mandate granted in Article 133(1)(b) of the Constitution, the Chief Justice under Legal Notice No. 9 of 2009 established the Anti-Corruption Division as an administrative division of the High Court and not as a special court envisaged under Article 232 (2) (e) of the Constitution as asserted by counsel for the
10 petitioners. The creation of the division was therefore, done in accordance with the Constitution. Its exercise of jurisdiction to try suspects including the 1st appellant in criminal cases is lawful and does not contravene the Constitution.

Right to property

Regarding the scope and extent of the right to property provided under the
15 Constitution and its applicability to the circumstances of the present Petition, the thrust of the Petition is that the petitioners' right to property was infringed by several acts of the respondents which included freezing of their bank accounts.

The Constitution recognizes and protects the right to property in article 26 which
20 provides that;

26. Protection from deprivation of property.

(1) Every person has a right to own property either individually or in association with others.

***(2) No person shall be compulsorily deprived of property or any
25 interest in or right over property of any description except where the following conditions are satisfied—***

5 ***(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and***

(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for—

10 ***(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property;***

and

(ii) a right of access to a court of law by any person who has an interest or right over the property.

15 The right to property is also recognized in international human rights law, for instance, article 17 of the Universal Declaration of Human Rights (UDHR) provides that;

(1) Everyone has the right to own property alone as well as in association with others; and

20 ***(2) No one shall be arbitrarily deprived of his property.***

The African Charter on Human and Peoples' Rights (ACHPR) guarantees the right to property in article 14 thereof which provides that:

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the

5 ***community and in accordance with the provisions of appropriate laws.***

Although Uganda is not a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms Article 1 of the Protocol provides that every natural or legal person is entitled to the peaceful enjoyment of his
10 possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure
15 the payment of taxes or other contributions or penalties.

It is clear from Article 44 of the Constitution which lists non derogable rights that the right to own property is not absolute and may in appropriate circumstances be legitimately derogated from. In ***Chapman vs. The United Kingdom, Application No. 27238/95*** the European Court of Human Rights
20 noted that interference with the right to property is permissible under the ECHR, as long as the following conditions are satisfied:

- 1) The interference must be in accordance with the law;
- 2) The interference must pursue a legitimate aim;
- 3) It must be shown that the interference was necessary in a democratic society.

5 Property as spelt out in Article 26 of the Constitution has a broad definition, and includes all movable and immovable property as well as money whether physical or electronic.

The petitioners contend that section 34 of the ACA, which permits a competent court on application of the DPP, to make orders for confiscation of property
10 belonging to a person suspected of committing a corruption related offence, for which compensation may be payable upon the conviction of that person is unconstitutional. The Section provides as follows:

34. Court to restrict disposal of assets or bank accounts of accused, etc.

15 **(1) A court may, upon application by the Director of Public Prosecutions or Inspector General of Government issue an order placing restrictions as they appear to the court to be reasonable, on the operation of any bank account of the accused person or a person suspected of having committed an offence or any person associated with such an offence or on the disposal of any property of the accused person, the suspected person or a person associated with the offence or the suspected person for the purpose of ensuring the payment of compensation to any victim of the offence or otherwise for the purpose of preventing the dissipation of any monies or other property derived from or related to an offence under this Act.**

25 **(2) A restriction imposed under subsection (1) on the operation of the bank account of a person shall be limited to the amount which is**

5 ***necessary to compensate the victim of the offence or an amount not exceeding the amount involved in the commission of the offence whichever is higher; and any money in the account in excess of that amount shall continue to be at the disposal of the person to whom the order under subsection (1) relates.***

10 ***(3) The order imposing a restriction shall be reviewed by the court every six months if it is still in force.***

(4) The order shall, unless earlier revoked, expire six months after the death of the person against whom it was made.

15 ***(5) The Director of Public Prosecutions shall ensure that an order issued by a court under subsection (1) is served on the banker, or an accused person or a suspected person and any other person to whom the order relates.***

20 ***(6) A person who knowingly fails to comply with an order issued under this section commits an offence and is liable on conviction to a term of imprisonment not exceeding five years or a fine not exceeding one hundred and twenty currency points or both.***

Section 34 of the ACA gives the relevant authorities the right to make an application to Court for an order placing restrictions on the enjoyment of property suspected to be related to a suspected criminal. In my view this is
25 necessary in ensuring that those who are suspected and later convicted of corruption do not hide property considered to be proceeds of crime. The provision

is intended to ensure that upon conviction, the said property will be available to either compensate the victims of crime or for forfeiture to the State. The rationale for legislation freezing suspected proceeds of crime or property suspected to be related to crime was discussed by the UK Supreme Court in **R v. Waya [2012] UKSC 51**, where court had this to say on the rationale of freezing legislation;

“Its legislative purpose ...is to ensure that criminals and especially professional criminals engaged in serious organized crime do not profit from their crimes, and it sends a strong deterrent message to that effect.”

The Court further referred to the decision of Lord Steyn in **R v Rezvi [2002] UKHL 1, [2003] 1 AC 1099, para 14**, where the learned judge stated:

“It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential. The provisions of the 1988 Act are aimed at depriving such offenders of the proceeds of their criminal conduct. Its purposes are to punish convicted offenders, to deter the commission of further offences and to reduce the profits available to fund further criminal enterprises. These objectives reflect not only national but also international policy.”

Though made in reference to the UK legislation on the same subject, I find the views expressed by Lord Steyn pertinent and would add that there is legitimate expectation on the part of members of the public requiring that those who have been implicated in corruption are prevented from earning from crime. The public

5 expects that, as a means of combating corruption, ill-gotten property will be returned to the national purse once the suspect is convicted after trial. This will only be possible if the suspect is prevented from moving property out of the reach of Court, and one means of achieving this is through the implementation of Section 34 of the ACA.

10 The legal regime provided under section 34 of the ACA is therefore, permissible under Article 43 of the Constitution which in appropriate circumstances allows limitation on enjoyment of rights under the Constitution. The Article provides as follow;

15 ***43. General limitation on fundamental and other human rights and freedoms***

(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

(2) Public interest under this article shall not permit—

20 ***(a) political persecution;***

(b) detention without trial;

(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.

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5 The limitation placed on the enjoyment of rights and freedoms is permissible under Article 43 of the Constitution only when the limitation is considered to be acceptable and demonstrably justifiable in a free and democratic society. While section 34 of the ACA permits interference with the property rights of Ugandans, the question to be answered then is whether the interference warranted by this
10 section is acceptable and demonstrably justifiable in a free and democratic society.

The import of Article 43 was discussed by the Supreme Court albeit in the context of the right to freedom of expression in **Charles Onyango Obbo and Another vs. Attorney General, Supreme Court Constitutional Appeal No. 2**
15 **of 2002** where Mulenga, JSC held that Article 43 places prohibitions on the enjoyment of rights prescribed under the Constitution if such enjoyment prejudices rights of others or the public interest. The learned Justice further stated that;

*"This [Article 43] translates into a restriction on the enjoyment of one's rights
20 and freedoms in order to protect the enjoyment by "others", of their own rights and freedoms, as well as to protect the public interest. In other words, by virtue of the provision in clause (1), the constitutional protection of one's enjoyment of rights and freedoms does not extend to two scenarios, namely: (a) where the exercise of one's right or freedom "prejudices" the human right
25 of another person; and (b) where such exercise "prejudices" the public interest. It follows therefore, that subject to clause (2), any law that derogates from any human right in order to prevent prejudice to the rights*

5 or freedoms of others or the public interest, is not inconsistent with the
Constitution. However, the limitation provided for in clause (1) is qualified
by clause (2), which in effect introduces "a limitation upon the limitation". It
is apparent from the wording of clause (2) that the framers of the
Constitution were concerned about a probable danger of misuse or abuse of
10 the provision in clause (1) under the guise of defence of public interest. For
avoidance of that danger, they enacted clause (2), which expressly prohibits
the use of political persecution and detention without trial, as means of
preventing, or measures to remove, prejudice to the public interest. In
addition, they provided in that clause a yardstick, by which to gauge any
15 limitation imposed on the rights in defence of public interest. The yardstick
is that the limitation must be acceptable and demonstrably justifiable in a
free and democratic society. This is what I have referred to as "a limitation
upon the limitation". The limitation on the enjoyment of a protected right in
defence of public interest is in turn limited to the measure of that yardstick.
20 In other words, such limitation, however otherwise rationalised, is not valid
unless its restriction on a protected right is acceptable and demonstrably
justifiable in a free and democratic society."

Article 126(1) of the constitution is a mandatory provision which enjoins the
courts while exercising judicial power to do so in conformity with the law, values,
25 norms and aspirations of the people. In essence section 34 of the ACA was
enacted with the aim of combating corruption which is one of the biggest
challenges facing the Ugandan society today. In **Davis Wesley Tusingwire v.**

5 **The AG, Constitutional Petition No. 2 of 2013**, Justice Solomy Bosa JCC had this to say about the prevalence of corruption in this country

“I recall that corruption is widespread in the country and take judicial notice that it has lead to vast financial losses of public funds and impacted negatively on the development of the country. It was this concern that prompted
10 *Parliament to pass the Anti-Corruption Act No. 6 of 2009. The Title of the Act speaks of the seriousness of the matter”*

 Combatting corruption is thus a matter of public interest and section 34 of the ACA is for that reason justifiable by virtue of the provisions of Article 43 of the Constitution; that the property rights of a suspected criminal must give way to
15 that greater public interest.

 In order to be effective, the orders made under Section 34 of the ACA must be made without undue delay because the property may be moved or dissipated in a short period of time so as to make it unavailable to the court on conviction of the suspects. The petitioners’ contention that it is necessary to hear
20 representations from persons against whom the freezing orders are made because the Constitution guarantees the right to fair hearing is for that reason untenable and would defeat the purpose for which the law was enacted.

 In **R v. Rafilovich, 2019 SCC 51**, the Supreme Court of Canada expressed the following views about the rationale for confiscation of proceeds of crime:

5 *“The overall goal of this complex and multi-factored regime was to ensure that crime does not pay, and to deter offenders by depriving them of their ill-gotten gains.”*

The Court went on to state that;

10 *“Under this regime, the state may seize property from accused persons where the property is believed, on reasonable and probable grounds, to be proceeds of crime. The seized property is then held for possible forfeiture to the Crown at a future sentencing hearing ... This initial seizure means that accused persons, who are presumed innocent and have not been found guilty of any crime, may nevertheless have their property taken away and*
15 *held by the state prior to and throughout trial.”*

In the peculiar circumstances of this petition with respect to confiscation of property suspected to be proceeds of crime, it will be self-defeating to the rule of law in the country if suspects of crime are allowed to keep the property which they may dissipate or otherwise move out of the reach of the Court. I therefore
20 find that section 34 of the ACA does not contravene any of the listed provisions of the Constitution.

It is however, possible that circumstances may arise where the legal framework permitting the placing of restrictions on the use of property suspected to be proceeds of crime is applied in a manner which infringes a person’s right to
25 property. This goes to the application of the legislation, and not its constitutionality.

5 In the present Petition, it is alleged that the freezing orders in respect to the petitioners' property have been in place from 7th September, 2013 pursuant to a court order of that date. At the hearing of the petition, Court was informed that the freezing order over the petitioners' property was still subsisting at the date of hearing in 2020. This is over seven years since the order was issued.

10 Even where interference with the right to property is allowed under a law in this case the ACA, such an interference must be in pursuance of a legitimate aim and necessary in a democratic society. Under the constitution the interference must be acceptable and justifiable in a free and democratic society.

The European Court of Human Rights in ***Handyside vs. The United Kingdom, Application No. 5498/92***, while interpreting the European Convention on Human Rights held that in determining whether the interference with a right is acceptable in a democratic society, the restriction on fundamental rights and freedoms must be proportionate to the legitimate aim being pursued.

The issue then is whether keeping restrictions on the use of the property of the petitioners in place for over 7 years is proportionate to the legitimate aim envisaged under Section 34 of the ACA. ***In the matter of Kevin Francis Donnelly case [2010] NIQB***, Treacy J. of the High Court of Northern Ireland was considering an application for discharge of an order restraining the use of property suspected to be proceeds of Crime. The restraint order had been in place for 3 years at the time of the application to have it set aside and the learned

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5 judge articulated the following principles that Court may consider in determining whether a restraint order meets the reasonable time threshold:

- 1) *The period of time which has elapsed during which the applicant has been subject to the restraint order.*
- 2) *While the complexity of the case matters, referring to Lord Bingham's statements in Dyer (2004) 1 AC 379 at para 53, "with any case, however complex there comes a time when the passage of time becomes excessive and unacceptable."*
- 3) *The conduct of the parties and in particular whether the conduct of the restrained party has materially contributed to delay;*
- 4) *the manner in which the case has been dealt with by the administrative and judicial authorities.*

In the present case, there is no suggestion that the petitioners' conduct justified the delay. Even the excuse that there had been complexity in securing the conviction of the 1st petitioner cannot by any stretch of imagination justify this state of affairs. It is not justifiable for an order restricting the use of property to subsist for a period of over 7 years. The continued restrictions whether they emanated from a court order or elsewhere constitute a violation of the Constitution.

It was submitted by the Petitioner that Section 118 of the FIA is unconstitutional in that it allows the 2nd respondent to direct the freezing by financial institutions of bank accounts held with them provided the 2nd respondent is of the view that

5 the monies held on such accounts are suspected proceeds of crime yet the provision does not provide for a right of those affected by the 2nd respondent's orders to access court for redress if aggrieved.

In reply, the 2nd respondent offered a general denial stating that Section 118 of the FIA does not prevent access to courts by those aggrieved by the acts of the
10 2nd respondent in ordering the freezing of bank accounts with money suspected to be proceeds of crime.

The petitioners submitted that the effect of Section 118 of the FIA is that the 2nd respondent is empowered to have bank accounts frozen purportedly because monies believed to be proceeds of crime are held thereon without giving the
15 owner of the bank accounts a chance to explain the source of the monies thereon so as to clarify that the monies are not proceeds of crime. Counsel stressed that proceeding in the manner envisaged under Section 118 of the FIA undermines several constitutionally enshrined rights to which those aggrieved are entitled. First is the right to a fair hearing because the provision overlooks the
20 requirement to summon the bank account owners to provide material facts to be relied on by the 2nd respondent in arriving at a just opinion, in good faith about the origins of the money on the bank accounts. Second is protection from compulsory acquisition of property without payment of adequate compensation given that; in counsel's view, the monies on the bank accounts are taken over by
25 the Government when the 2nd respondent orders such accounts to be frozen. As such, counsel submitted that Section 118 of the FIA has an unconstitutional effect.

5 Counsel for the 2nd respondent disagreed with the submissions of his counterpart for the petitioners and submitted that in directing for the freezing of the petitioners' accounts, the 2nd respondent was exercising its powers under the Constitution. He argued that under Objective principle XXVI of the National Objectives and Directive Principles of State Policy all lawful measures must be
10 taken to expose, combat and eradicate corruption and abuse of power by those holding political and other public offices. That Objective XXIX enumerates several duties of a citizen including the duty to acquaint oneself with the provisions of the Constitution and to uphold and defend the Constitution and the law. Such provisions include Article 17 of the Constitution which imposes
15 duties on every citizen to protect and preserve public property and to combat corruption and misuse or wastage of public property.

Counsel further submitted that there was no compulsory acquisition of the petitioners' property in the terms of Article 26 (2) of the 1995 Constitution as alleged in the Petition. That although the 2nd respondent directed for the freezing
20 of the petitioners' bank accounts, the monies thereon even after the fact of freezing order was made remained the property of the petitioners. That the bank accounts were frozen merely to aid the Police which at the time was investigating the petitioners in connection with several criminal offences. Thus, in counsel's view, there was nothing unconstitutional about Section 118 of the FIA or the
25 impugned acts of the respondents which to him were authorized by that provision.

5 In determining the constitutionality of Section 118 of the FIA, it is important to
note that the provision is part of the legal framework aimed at deterring
suspected criminals from benefitting from proceeds of their crime. The section
empowers the Bank of Uganda (BOU) to direct financial institutions under its
supervision to freeze bank accounts with suspected proceeds of crime. It provides
10 thus:

“118. Freezing of accounts

***(1) The Central Bank shall if it has reason to believe that any
account held in any financial institution has funds on the account
which are the proceeds of crime, direct in writing the financial
15 institution at which the account is maintained to freeze the account
in accordance with the direction.***

***(2) A financial institution acting in compliance with a direction
under subsection (1) of this section shall incur no liability solely as
a result of that action.”***

20 The present Petition alleges that when the BOU exercises its powers under
Section 118 of the FIA, there will be no recourse for the aggrieved bank account
owner to the courts. In its answer to the allegation the 2nd respondent submitted
that it acted in accordance with the law because it had reason to believe that the
impugned accounts held funds which were proceeds of crime arising from illicit
25 accumulation of wealth by public officials who allegedly conspired to create ghost
pensioners causing substantial loss to the Ministry of Public Service.

5 It is apparent from reading Section 118 of the FIA that an aggrieved account holder who wishes to challenge a freezing order is barred from accessing court. Section 124 of the FIA which has a bearing on the matter provides as follows:

“124. Protection of Central Bank

***No suit or other legal proceedings shall lie against the Central Bank
10 or any officer, employee or agent of the Central Bank for anything
which is done or is intended to be done in good faith under this Act.”***

When read together, Sections 118 and 124 of the FIA make it impossible for a person aggrieved by the act of the BOU directing the freezing of his bank accounts to bring an action challenging the propriety of the freezing order. This
15 is potentially problematic. For example, assume the BOU directs for the freezing of A, a company’s bank account pursuant to Section 118 of the FIA. The BOU insists that its directives against A were done in good faith. It turns out that the freezing order against A was made because of its connection with B who is suspected of corruption. B is actually a minority shareholder in A yet freezing its
20 bank accounts will impede the proper functioning of A to the benefit of the other shareholders.

In the above scenario, it would be just for A to commence proceedings so that a court can examine the propriety of the BOU’s directives to have its bank accounts frozen. Yet, by virtue of Section 124 of the FIA, such legal proceedings will be
25 barred by law as the BOU will be insulated from any legal proceedings by arguing

5 that its directives were made in good faith so that no legal proceedings can be determined against it.

 This gives unjustified and arbitrary protection to the BOU, which is contrary to Article 21 (1) of the Constitution which provides that all persons are equal before and under the law in all spheres of political, economic, social and cultural life
10 and in every other respect and shall enjoy equal protection of the law.

 Given that, the BOU's directives to freeze a person's accounts have a bearing on the constitutional right to property, it is vital in safeguarding those rights that the courts retain the power to scrutinize the actions of Bank of Uganda on their merits. This will ensure, not only that freezing orders are not unjustly made but
15 also that the BOU's receives equal treatment as other persons who in similar circumstances will be amenable to legal proceedings.

 The general principle of law is that a party must be given an opportunity to be heard before his rights are prejudiced or affected by another's decision.

 No one, not even the BOU can be shielded from being answerable to the dictates
20 of justice. Unfortunately, Section 124 of the FIA does just that and gives section 118 of the FIA that undesirable effect. Accordingly, I would hold that to the extent alluded to above, the impugned sections 118 and 124 of the FIA are inconsistent with and in contravention of articles 2, 20 (2), 22, 28 (1), (3) (a), 42,44(c) and
126 the Constitution.

25 As to whether the Petitioners are entitled to any of the orders sought, the Petition fails in part and for the reasons given in this Judgment, I would decline to make

5 any of the declarations sought in paragraphs 6 (a) (i), (ii), (iii), (iv), (v), (vi) and (vii) of the Petition.

I have not deemed it necessary to make any decision regarding the declarations sought in paragraphs 6 (a)(viii) and (xi) because in my view, the allegations therein can best be determined by a competent court where evidence can be
10 taken to satisfactorily address the said allegations.

The Petition however succeeds in two respects. First, the continued existence of a court order placing restrictions on the use of property of the petitioners, over a period of 7 years from when such orders were made. This represents an unreasonable restraint on the petitioners' right to property as enshrined in the
15 Constitution. A declaration is hereby issued to that effect. Henceforth, if the restrictions are still in place, the same shall stand discharged as and against the Petitioners who may forthwith deal with their property as they deem fit.

The Petition also succeeds regarding sections 118 and 124 of the FIA which when read together have an unconstitutional effect in that the provisions empower the
20 BOU to make directives for the freezing of bank accounts yet subsequently such directives cannot be subject to Court scrutiny for purposes of determining whether they are justified. This is unconstitutional in that it denies the account holders access to court and shields the BOU from scrutiny in Court proceedings. The sections give the BOU favorable and unequal treatment which
25 is contrary to Article 21 (1) of the Constitution.

5 Henceforth, Section 34 of the ACA be considered as the exclusive applicable law
with regards to bank account freezing orders because it conforms to the
Constitution and balances the public interest in ensuring that crime does not
pay but also takes into account the interests of the bank account owners. Under
Section 34 of the ACA, the decision to freeze bank accounts is ordered by the
10 Court which takes into account the interests of justice. The aggrieved bank
account owner has an opportunity to move the Court to vary or set aside the
order. These are hall marks of fairness and go a long way in ensuring equal
treatment of all those involved.

In addition, I would reiterate that the subsistence of the bank account freezing
15 order based on the directives of the BOU for over 7 years as relates to the
petitioners, amounts to an unjustifiably protracted interference with their right
to property beyond what is justifiable in a free and democratic society. In this
case, the evidence for the petitioners is that in the period from about 8th to 15th
November, 2012, the 2nd respondent issued bank account freezing orders against
20 their property. In my view, regardless of the merits, a freezing order should never
last for close to 8 years as it has in the present case. This situation would have
been avoided if regulations had been put in place to limit among others the time
the freezing orders can subsist. Accordingly, I would order that the bank account
freezing orders placed on the respective petitioners' bank accounts on the
25 directives of the 2nd respondent are discharged.

5 The petitioners also prayed that this Court awards them general damages and compensation for the wrongs they allegedly suffered at the hands of the respondents. At paragraphs 6 (b) (ii) and (iii), it is stated:

“(ii) An order that the Petitioners be compensated for the wrongs suffered;

10 (iii) An order for payment of general damages for inconvenience, loss and damage to the person and business;”

It must be stated that upon determination of a constitutional petition, this Court may, if it considers it to be appropriate, grant an order of redress in addition to any declarations it may have made. Article 137 (4) of the Constitution provides that:

15 “(4) Where upon determination of the petition under clause (3) of this article the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may—

 (a) grant an order of redress; or

20 (b) refer the matter to the High Court to investigate and determine the appropriate redress.”

Despite the prayer for general damages in the Petition, no evidence was given in the affidavits in support of the Petition for this Court to base on to award the said damages. The 1st petitioner merely states in paragraph 33 of his affidavit that it is in the interests of justice to grant the orders sought in the Petition, including the order to award general damages to the petitioners.

25

5 I note that the 1st petitioner also mentioned at paragraphs 24, 25, 26, 27, 28 of
his affidavit, that from 2012, after he had been taken before the High Court for
trial, he started to suffer from some health issues such as hypertension,
dyslipidemia, sleep apnoea and panic disorder, for which he has had to seek
and get medical treatment at both local and international hospitals. However,
10 the petitioner did not state that the health issues were related to the freezing of
his bank accounts. I would therefore, find that in the present case, there was
insufficient evidence to base on to award general damages to the petitioners.
Accordingly, in the terms of Article 137 (4) of the Constitution, and for the stated
reasons, I would conclude that it is not appropriate to award damages against
15 the respondents in the present case.

In conclusion, I would allow the Petition in part, and make the following
declarations and orders:

1. The creation of the Anti-Corruption Division of the High Court was done in
accordance with the Constitution.
- 20 2. Section 34 of the ACA does not contravene Articles 2, 20, 26, 28 (1), (3) (a),
40 (2) 44(c) and 126 of the Constitution.
3. Sections 118 and 124 of the FIA are inconsistent with and in contravention
of articles 2, 20 (2), 21, 22, 28 (1), (3) (a), 42, 44(c) and 126 of the Constitution.
4. That the continued existence of a court order placing restrictions on the use
25 of property of the petitioners over a period of 7 years from when such orders
were made is unconstitutional.

- 5 5. I would order that the 1st respondent immediately puts in place regulations, in accordance with this Judgment, necessary to ensure that Section 34 of the Anti-Corruption Act is applied in a manner that complies with the 1995 Constitution.
6. I would make no order as to costs.
- 10 I would so order.

Dated at Kampala this 26th day of Aug 2021.



Cheborion Barishaki

Justice of Appeal/Constitutional Court

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
(Coram: Egonda-Ntende, Musoke, Cheborion, Kibeedi and Mulyagonja, JJCC)

CONSTITUTIONAL PETITION NO.51 OF 2013

1. PETER SSAJJABI

2. SWIFT COMMERCIAL ESTABLISHMENT LIMITED.....PETITIONERS

VERSUS

1. THE ATTORNEY GENERAL

2. BANK OF UGANDA.....RESPONDENTS

JUDGMENT OF IRENE MULYAGONJA, JCC

I have had the benefit of reading in draft the judgment of my learned brother, Hon. Justice Cheborion Barishaki, JCC.

I entirely agree that the petition should succeed in part with no order as to costs.

Dated at Kampala this 26th day of Aug 2021

Irene Mulyagonja.

Irene Mulyagonja

JUSTICE OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 51 OF 2013

[*Coram: Egonda-Ntende, Musoke, Barishaki Cheborion, Kibeedi & Mulyagonja, JJCC*]

BETWEEN

Peter Ssajjabi=====Petitioner No.1
Swift Commercial Establishment Ltd=====Petitioner No. 2

AND

Attorney General=====Respondent No.1
Bank of Uganda=====Respondent No.2

Judgment of Fredrick Egonda-Ntende, JCC

- [1] I have had the opportunity of reading in draft the judgment of my brother, Barishaki Cheborion, JCC. I agree with it and have nothing useful to add.
- [2] As Musoke, Kibeedi and Mulyagonja, JJCC, agree, this petition is allowed in part and rejected in part with the orders proposed by Cheborion, JCC.

Dated, signed, and delivered at Kampala this ^{26th} day of ^{Aug} 2021


Fredrick Egonda-Ntende
Justice of the Constitutional Court

**THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 0051 OF 2013**

1. PETER SSAJJABBI

2. SWIFT COMMERCIAL ESTABLISHMENT LTD:.....PETITIONERS

VERSUS

1. ATTORNEY GENERAL

2. BANK OF UGANDA:.....RESPONDENTS

CORAM: HON. MR. JUSTICE FREDRICK EGONDA-NTENDE, JCC

HON. LADY JUSTICE ELIZABETH MUSOKE, JCC

HON. MR. JUSTICE CHEBORION BARISHAKI, JCC

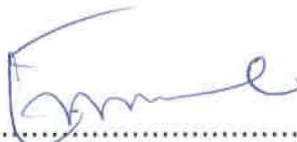
HON. MR. JUSTICE MUZAMIRU KIBEEDI, JCC

HON. LADY JUSTICE IRENE MULYAGONJA, JCC

JUDGMENT OF ELIZABETH MUSOKE, JCC

I have had the advantage of reading in draft the Judgment of my learned brother Cheborion, JCC in this matter. For the reasons he has given therein I agree with him that this Petition should be allowed in part on the terms he has proposed.

Dated at Kampala this 26th day of Aug 2021.



.....
Elizabeth Musoke

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Elizabeth Musoke, Cheborion Barishaki, Muzamiru Kibeedi, & Irene Mulyagonja, JJA/JJCC]

CONSTITUTIONAL PETITION NO. 0051 OF 2013

1. PETER SSAJJABI
2. SWIFT COMMERCIAL ESTABLISHMENT LTD :::::::::::PETITIONERS

VERSUS

1. THE ATTORNEY GENERAL OF UGANDA
2. BANK OF UGANDA :::::::::::RESPONDENTS

JUDGMENT OF MUZAMIRU M. KIBEEDI, JCC

I have had the advantage of reading in draft the Judgment prepared by My Lord, the Hon. Cheborion Barishaki, JCC. I am in total agreement with the reasoning and the Orders he has proposed.

Dated at Kampala this 25th day of Aug 20



Muzamiru Mutangula Kibeedi

JUSTICE OF THE CONSTITUTIONAL COURT