THE REPUBLIC OF UGANDA,

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO 38 OF 2017

AYENA ODONGO KRISPUS CHARLES} .....PETITIONER

VERSUS

ATTORNEY GENERAL} .....RESPONDENT

CORAM:

HON. MR. JUSTICE RICHARD BUTEERA, DCJ

HON. MR. JUSTICE KENNETH KAKURU, JCC

HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JCC

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JCC

HON. LADY JUSTICE IRENE ESTHER MULAYGONJA, JCC

JUDGMENT OF JUSTICE CHRISTOPHER MADRAMA, JCC

The Petitioner lodged this petition under Articles 50 & 137 (3) of the Constitution and contended that the Court of Appeal contravened Article 28 of the Constitution by not according him a fair hearing in **Electoral Petition Appeal No 26 & 94 - Okello P. Charles & Another vs. Ayena Odongo Krispus Charles.** The Petitioner also includes other Election Petitions appeals since 2010 that he stated the Court of Appeal failed to hear and determine within a period of six months as prescribed by law thereby violating the Petitioner's right to a fair and speedy trial.

Secondly, the Petitioner contends that the judgments of the Court of Appeal in **Election Petition Appeal No 26 & 94, Okello P. Charles & Another v**

Ayena Odongo Krispus Charles and all other judgments delivered by the Court of Appeal on election petition appeals after six months of filing the appeals are without jurisdiction and contravene Article 134 of the Constitution.

Thirdly, the Petitioner contends that Section 14 of the Parliamentary Elections (Amendment) Act, 2010 is inconsistent with Article 132 of the Constitution in so far as it provides that notwithstanding Section 6 of the Judicature Act, the decisions of the Court of Appeal in parliamentary elections petition appeals shall be final.

The petition discloses that it is for the following reliefs:

1. A declaration that the Judgment of the Court of Appeal in Election Petition **No 26 & 94, Okello P. Charles & Another v Ayena Odongo Krispus Charles** and all other judgments issued after six months from the time of filing were time barred, made without jurisdiction and are therefore null and void.

2. In the alternative, a declaration that Section 14 of the Parliamentary Elections (Amendment) Act 2010 contravenes Article 132(1) of the Constitution and as such, the Court of Appeal cannot be the final court of appeal on any matter, including parliamentary election petitions.

3. A declaration that the hearing and determination of **Election Petition No 26 & 94, Okello P. Charles & Another v Ayena Odongo Krispus Charles** and all other election petition appeals after the expiry of the six months' limitation period contravenes Article 28 of the Constitution.

4. In the alternative, a declaration that Election Petition **No 26 & 94, Okello P. Charles & Another v Ayena Odongo Krispus Charles** and

all other election petition appeals automatically lapsed after six months from the time they were filed and hence the decision of the High Court remains valid.

5. A declaration that the judgment of the Court of Appeal in **Election Petition No 26 & 94, Okello P. Charles & Another v Ayena Odongo Krispus Charles** and all other judgments made by the Court after the six months prescribed by Section 14 of the Parliamentary Elections (Amendment) Act, 2010 contravened Article 132(1) of the Constitution.

6. An order of redress to the effect that the Petitioner and all other persons who suffered the impugned judgments of the Court of Appeal have the right to appeal such judgments to the Supreme Court as the final court of appeal in the land.

7. An order for the cost of this petition.

The petition is supported by the affidavit of the Petitioner Mr. Krispus Ayena Odongo which mainly reproduces the averments in the petition. Further, the Petitioner states that **Election Petition No 26, Okello P. Charles & Another v Ayena Odongo Krispus Charles** and **Election Petition Appeal No. 94 Electoral Commission v Ayena Odongo Krispus Charles** were filed on 5 July 2016. Thereafter the Court of Appeal heard the appeal on the 1 June 2017 and determined it on the 23 October 2017, and the decision was barred by limitation and is illegal.

The petition is opposed by the Respondent's Answer to the petition filed on 7 November, 2017 where the Respondent contends that the Petition does not raise any matters for interpretation of the Constitution; and as such, it should have been filed in the High Court under Article 50 of the Constitution.

Secondly, the Court of Appeal accords litigants in election petitions a fair and speedy hearing and that this does not contravene Article 28 of the Constitution as alleged by the Petitioner. Further, Section 14 of Act No. 12 of the Parliamentary Elections (Amendment) Act 2010 does not contravene Article 132 of the Constitution.

The Respondent contended that the decision of the Court of Appeal in **Election Petition Appeal No. 26 & 94 Okello P. Charles & Another v Ayena Odongo Krispus Charles** and all other judgments made by the Court in respect of election Petition appeals after six months prescribed under Section 14 of Act No. 12 of the Parliamentary Elections (Amendment) Act, 2010 being final, are not inconsistent with Articles 134 of the Constitution.

The Respondent's Answer to the Petition is supported by the affidavit of Batanda Gerald, a State Attorney in the chambers of the Respondent. He deposed that the quick disposal of Election Petition No. 26 of 2016 was partly hampered by the conduct of the Petitioner and /or his lawyers who were in most cases unable to comply with the time frame set by the Court. He further stated that a Notice of Appeal was lodged in the Court of Appeal on 28 June 2016 and on the same date, the 1st Respondent, Okello P. Charles requested for a record of proceedings to enable him file an appeal but the Record of Proceedings was not readily availed to him until His worship Mr. Isaac Muwata made a request for the file in a letter dated 8 November 2016. Further, that the Appellant lodged an application for extension of time to file the record of appeal and time was extended by court on 11 January 2017 and that the preparation of the record of proceedings and availability of the copy of the judgment was commenced on 29 June 2016 and completed on 9 November 2016.

The hearing of Election Appeal No. 26 of 2016 commenced on 1 June 2017 and judgment was delivered on 23rd October 2017 within the statutory period

of six months. Further, throughout the Election Appeal proceedings, the Petitioner did not raise the alleged issue of lack of jurisdiction of the Court of Appeal to entertain Election Petition No. 20 of 2016 at all. In conclusion, the deponent stated that there is no inconsistency between Article 132(1) (2) of the Constitution and Section 14 of the Parliamentary Elections Act in so far as it provides that the final court in Election Petition appeals is the Court of Appeal.

In rejoinder to the answer to the Petition, Nowamani Mark, an advocate involved in prosecuting the impugned election petitions filed an affidavit in which he rejoined as follows: The Respondent's Answer to the Petition and the Affidavit in support are generally evasive and not specific on the issues raised in the petition and in the affidavit in support. While the Respondent agrees with the position of the law that the Court of Appeal should accord to litigants in Election Petitions a fair and speedy hearing and determination, it did not present any facts to support its contention that failure to do so within the prescribed time does not contravene Article 28 of the Constitution.

Additionally, the intention of the legislature in prescribing the specific time frame of six months within which to hear and determine Election Petitions was to ensure the expeditious hearing and determination of such petitions and therefore, to ignore the time frame defeats the intention of the legislature.

Counsel further deposed that upon the Notice of Appeal and the letter requesting for copies of proceedings dated 28 June 2016, the Registrar of the High Court, Land Division signed and made ready the record of proceedings on the 2 September 2016 at the request of the trial Judge. The Appellant knew where the record of proceedings was and therefore the letter of His Worship Muwata, the Registrar of the High Court at Kampala of 8 November 2016 was not necessary. Further, that given that the Registrar

issued a Certificate of Correctness on the 9th November 2016 and that extension of time within which to file the record of Appeal was granted on the 11 November 2016, there was no reason why the Petition could not be heard before 5 January 2017. He stated that the hearing was completed on 1 June 2017 and judgment delivered on 23 October 2017, both dates being beyond the limitation time of six months from the 5 July 2016 when the appeal was filed.

Counsel deposed that an illegality once brought to the attention of Court overrides all issues of pleadings and as such the failure by the Petitioner to raise the issue of jurisdiction during the hearing of the Election Petition Appeal does not validate the illegal proceedings in the Court of Appeal.

Representation

At the hearing of the petition, the Petitioner represented himself while the Respondent was represented by Mr. Wanyama Kodoli Senior Principal State Attorney holding brief for Mr. Richard Adrole Principal State Attorney

Petitioner's written submissions

In his amended written submissions, the Petitioner proposed the following issues for determination by this Court:

1. Whether the provisions of Section 14 of Act 12 of the Parliamentary Elections (Amendment) Act, 2010 is inconsistent with and in contravention of Article 132(1) of the 1995 Constitution of Uganda, as amended?

2. Whether the Court of Appeal heard and determined the questions in the Appeals expeditiously? If not, whether its failure infringed on the right of the Petitioner guaranteed under Article 28 of the 1995 Constitution of Uganda, as amended?

3. Whether the Court of Appeal had jurisdiction to hear and determine the appeal from the Election Petition from the decision of the High Court after the lapse of six months prescribed by Section 14(2) of the Parliamentary Elections (Amendment) Act, 2010?

4. What remedies are available to the parties?

Issue One

Whether the provisions of Section 14 of Act 12 of the Parliamentary Elections (Amendment) Act, 2010 is inconsistent with and in contravention of Article 132(1) of the 1995 Constitution of Uganda, as amended?

On issue one the gist of the Petitioners submissions is that Section 14 of the Parliamentary Elections (Amendment) Act (Act No. 12 of 2010) is inconsistent with Article 132 of the Constitution in so far as it ousts the jurisdiction of the Supreme Court provided in clause (1) of Article 132. The Section purports to amend Section 66(3) of the Parliamentary Elections Act by providing that the Court of Appeal is the final appellate court in election petitions appeals. The section contravenes Article 132, 86 and 140 of the Constitution and Section 6 of the Judicature Act which confer jurisdiction on the Supreme Court as the final appellate Court.

Secondly, reading from the marginal note of Article 132 of the Constitution and the words: "**jurisdiction of the Supreme Court,**" it can be inferred that the provisions of any other law taking away jurisdiction from the Supreme Court is subject to the mandatory, express and unequivocal provision of Article 132 of the Constitution which confers jurisdiction on the Supreme Court.

Thirdly, Article 140 (2) of the Constitution prescribes the procedure and conduct of the Court of Appeal and the Supreme Court when hearing appeals on questions referred to in Article 86 (1) of the Constitution. These questions relate to election matters. The Petitioner submitted that if the Legislature in enacting the Constitution intended that the Supreme Court should not have jurisdiction to hear and determine election petitions, they would not have prescribed a procedure and conduct of such proceedings in the Supreme Court and Court of Appeal respectively. Further, the inference is made clearer by the marginal note of Article 140 of the Constitution which reads "**Hearing of election cases.**" The marginal note envisages the existence of jurisdiction of the Supreme Court to hear election appeals. Further, section 6 of the Judicature Act which confers appellate jurisdiction on the Supreme Court does not exclude appeals from election petitions and stipulates that an appeal shall lie as of right to the Supreme Court from decisions of the Court of Appeal. However, the provision is redundant and does not add anything to Article 132 of the Constitution which confers jurisdiction on the Supreme Court as the final appellate Court in all matters.

The Petitioner submitted that from the use of the phrase "**from such decisions of the Court of Appeal as may be prescribed by law**" it is manifestly clear that the drafters of the Constitution did not intend to make it absolutely necessary to enact a law prescribing appeals to the Supreme Court. Therefore, the enactment of such a law cannot be allowed to usurp the jurisdiction conferred by the Constitution on the Supreme Court. Further, even if section 6 of the Judicature Act was not enacted, the jurisdiction of the Supreme Court under Article 132 of the Constitution would not be impaired. The Petitioner argued that this implied that the jurisdiction conferred on the Supreme Court under Article 132 of the Constitution is conclusive. Consequently, if the effect of Section 14 of Act No. 12 of 2010 is to remove the jurisdiction of the Supreme Court in election petition appeals, then the

section is to that extent, inconsistent with and in contravention of Article 132 of the Constitution.

The Petitioner submitted that the purpose of Article 132 (2) of the Constitution is to enable Parliament enact a law prescribing the right of appeal to the Supreme Court. The provision does not limit the right of appeal. Since the right to appeal to the Supreme Court is guaranteed under the Constitution, it can only be removed by amendment of the Constitution and not by an Act of Parliament purportedly amending another Act of Parliament, which has the effect of amending the Constitution.

The Petitioner submitted that Article 86 of the Constitution which provides for a right of appeal to the Court of Appeal is silent on whether or not an appeal may lie to the Supreme Court from the Court of Appeal. The issue then is whether Article 86 of the Constitution by omitting to specifically provide for the jurisdiction of the Supreme Court in election petitions is conclusive that the Supreme Court has no appellate jurisdiction to hear election petitions from the Court of Appeal. In this regard, the Petitioner sought to distinguish the Supreme Court case of **Baku Raphael Obudra and Obiga Kania v the Attorney General, SC Constitutional Appeal No. 1 of 2005** whose facts he states are distinguishable from the facts of the instant case. In **Baku Raphael Obudra & Obiga Kania v the Attorney General** (supra), the Appellants wanted to lodge a second appeal to the Supreme Court but were barred by the wording of Section 68 (3) of the Parliamentary Elections Act, 2001, that there is no appeal from the decision of the Court of Appeal to the Supreme Court on election matters. The Appellants in that case also argued that Section 68 (3) of the Parliamentary Elections Act was inconsistent with Article 86 and 140 of the Constitution but did not rely on Article 132 of the Constitution. Consequently, Article 132 of the Constitution was not canvassed by the Court when determining the petition and the appeal. On the other hand, the Petitioner now contends that Section 14 of

the Parliamentary Elections (Amendment) Act has the effect of ousting the jurisdiction of the Supreme Court conferred by Article 132 (1) of the Constitution. As such, the Petitioner is not asking this Court to declare that Section 14 of Act No. 12 of 2010 is inconsistent with Article 86 and 140 of the Constitution, but rather, that the said Section 14 of Act No. 12 of 2010 is inconsistent with and in contravention of Article 132 of the Constitution.

Further, in **Baku Raphael v Obiga Kania** (supra), the Supreme Court did not take cognisance of the import of the optional phrase "**as may be prescribed by law**" used in Article 132 of the Constitution. The Court did not therefore make a determination whether the first part of the Article having provided in mandatory terms that "**an appeal shall lie to the Supreme Court,**" the jurisdiction of the Supreme Court conferred under Article 132(1) of the Constitution would not be exercised if a law prescribing the exercise of such jurisdiction was not enacted. The Petitioner criticized the decision of Tsekooko JSC in his lead Judgment when he held that Article 86 of the Constitution is conclusive on jurisdiction in election petition appeals. According to the Petitioner, the learned Justice based his decision on a misconceived interpretation of clauses (1) and (2) of Article 86 of the Constitution read together with the marginal note thereto. The learned Justice while referring to the marginal note of Article 86 of the Constitution held that the note defines the role and purpose of the Article which is to spell out how and where the (election) disputes would go. He added that if Parliament intended at the time that the Supreme Court should hear election petition appeals from the decisions of the Court of Appeal, it would have included it in Article 86 of the Constitution and not made a passing reference in Article 140 of the Constitution. The learned Justice of the Supreme Court did not consider the fact that jurisdiction conferred on the Supreme Court by Article 132 of the Constitution is sufficient for the Supreme Court to exercise jurisdiction on election petition matters without the need to refer to any

prescription law such as in the Judicature Act. Further, the Petitioner contended that if Parliament had intended at the time that the Supreme Court should not hear and determine election petition appeals from the decisions of the Court of Appeal, it would have provided an exclusion clause.

In the premises, the Petitioner invited this Court to distinguish the facts of the **Raphael Baku & Obiga Kania v AG (supra)** case and depart from it. He relied on the Nigerian case of **Isaac Obiuwevbi v Central Bank of Nigeria, SC No. 266 of 2006, at page 6** where it was held that before following precedent, facts must be examined.

The Petitioner further faulted the learned Justices of the Supreme Court for holding in **Raphael Baku & Obiga Kania v AG (supra)** that Article 86 of the Constitution is conclusive on jurisdiction in election petition appeals. He submitted that if the matter was as simple and straight forward as the learned Justice put it, the law makers would have simply amended the Constitution to clearly state that the Supreme Court does not have jurisdiction to entertain election petition appeals instead of enacting Act No. 12 of 2010 several years after the Judgment of the Supreme Court in **Raphael Baku & Obiga Kania v Attorney General, SC Constitutional Appeal No. 1 of 2005.** Secondly, the Petitioner submitted that when the Constitution is read as a whole, it would point to the fact that the Legislature was cognizant that there was a specific provision, namely Article 132 (1) of the Constitution conferring appellate jurisdiction on the Supreme Court to hear appeals from the Court of Appeal in election petitions. This explains why there was no need to provide for it under Article 86 of the Constitution. Thus, it could not be said that the failure of the Legislature to provide for the jurisdiction of the Supreme Court under Article 86 of the Constitution is conclusive of the assertion that it was not intended for the Supreme Court to hear and determine election petition appeals from the Court of Appeal.

Thirdly, the Petitioner submitted that the marginal note "**Determination of questions of membership**" does not define the role and purpose of Article 86 of the Constitution as the Learned Justice held. It only points to the fact that the primary role of determination of the question of membership is placed upon the High Court as a court of first instance. The role and purpose of Article 86 of the Constitution is spelt out in the Article itself. The Petitioner submitted that although Article 86 of the Constitution is about determination of election petitions by the High Court, it is not true, as held by the Learned Justice, that the whole of Article 86 of the Constitution governs the hearing and determination of election petitions in courts, excluding the Supreme Court. If Parliament had intended at that time that Article 86 of the Constitution was conclusive on determination of questions of membership, to the exclusion of the Supreme Court, it would not have provided for the jurisdiction of the Supreme Court and the right of appeal to the Supreme Court in Articles 132 and 140 of the Constitution. Further, the Petitioner argued that there is no similar provision for the jurisdiction of the Court of Appeal under Article 134 of the Constitution which establishes the Court of Appeal, as is the case with the Supreme Court under Article 132(2) of the Constitution. Accordingly, the provision for the jurisdiction of the Court of Appeal to hear appeals from the High Court under Article 86 of the Constitution could therefore be attributed to the fact that it was not provided for anywhere else.

The Petitioner contended that Parliament did not make a passing reference in Article 140 of the Constitution touching on the jurisdiction of the Supreme Court in election petition appeals from the Court of Appeal. The provision of Article 140 of the Constitution was not a mere passing reference to Article 86 of the Constitution, according to the Petitioner, the effect of clause (1) and (2) of Article 140 when read against each other cannot be a reference made in passing.

The Petitioner submitted that according to Section 86 (4) (5) (6) and (7) of the Parliamentary Elections Act, an election petition may be lodged at the High Court at the instance of the Attorney General upon an application made to him by more than 50 voters, if the Attorney General does not act within 30 days of the application, any voter may take up the matter and petition the High Court. Any party aggrieved by the decision of the High Court may appeal to the Court of Appeal and subsequently to the Supreme Court. These provisions were not affected by Act No. 12 of 2010 and the Petitioner contends that if the Supreme Court had considered these provisions in the case of **Baku Raphael & Obiga Kania v AG, (supra),** it would not have come to the conclusion that Article 86 of the Constitution is conclusive on all election petition matters. Further, apart from the provision of Article 134 (2) of the Constitution, the Constitution itself does not in specific terms confer appellate jurisdiction on the Court of Appeal as is the case with the Supreme Court under Article 132 of the Constitution. Additionally, the Petitioner submitted that Article 132 (2) and 134 (2) of the Constitution by the use of the word '**may**' suggest that it is not mandatory for the law to prescribe the right of appeal to be enacted. Secondly, Article 132 is couched in mandatory terms by use of the phrases '**shall be the final court of appeal'** and '**shall lie to the Supreme Court.'** The provisions do not suggest any limitations on the right to appeal to the Supreme Court.

In conclusion of issue one, the Petitioner invited this Court to find that Section 14 of Act No. 12 of 2010 is inconsistent with and in contravention of Article 132 of the Constitution.

Issue Two

Whether the Court of Appeal heard and determined the questions in the Appeals expeditiously? If not, whether its failure infringed on the right

of the Petitioner guaranteed under Article 28 of the 1995 Constitution of Uganda, as amended?

On issue two, the Petitioner submitted that the Court of Appeal is given limited jurisdiction of six months to hear and determine an election appeal per Section 2 of the Parliamentary Elections (Amendment) Act, Act No. 12 of 2010. In the instant case, the two appeals complained of – Election Petition Appeal No. 26 of 2016 and No. 94 of 2016 were filled on 5th July 2016. The Court of Appeal heard and determined the appeals on 1st June 2017 and 23rd October, 2017, respectively. This was well outside the six months' limitation period. Further, the Petitioner submitted that the delay in hearing and determining the appeals infringed on the Petitioner's right to a fair trial guaranteed under Article 28(1) of the Constitution. He relied on **Part A, Paragraphs (i) and (j) of the 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' of the African Commission on Human & Peoples' Rights of the African Union** which provides for the entitlement to a determination of rights and obligations without undue delay and with reasons for the decisions and a right to appeal to a higher judicial body.

Secondly, the Petitioner submitted that after coming to the conclusion that the case of the Petitioner was not altogether without merit, the Court of Appeal failed in its constitutional duty to expeditiously determine the rights of the Petitioner in the appeal thereby infringing on the Petitioner's rights guaranteed under Article 28 of the Constitution.

Thirdly, the Petitioner submitted that by curtailing his right to appeal the decision of the Court of Appeal to the Supreme Court, Section 14 of Act No. 12 of 2010 infringes on the Petitioner's right to a higher judicial body. According to the Petitioner, the phrase '**entitlement to an appeal to a higher judicial body'** espoused under **Part A, Paragraphs (i) and (j) of the**

'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' of the African Commission on Human & Peoples' Rights of the African Union suggests that as long as there is a higher Court above the one that determined the matter in issue, a litigant has an imperative right of appeal to the higher Court.

In conclusion on issue two, he submitted that in the circumstances of the instant case where neither the parties nor the Court caused the extension of time within which to hear and determine the impugned election petition appeals, it was unconstitutional for the Court of Appeal to hear and determine the appeals outside the prescribed time of six months.

Issue three

Whether the Court of Appeal had jurisdiction to hear and determine the appeal from the Election Petition from the decision of the High Court after the lapse of six months prescribed by Section 14(2) of the Parliamentary Elections (Amendment) Act, 2010?

With regard to issue three, the Petitioner submitted that the law on limitation is strict and cannot be circumvented except by express extension. In the instant case, the jurisdiction of the Court of Appeal to hear and determine the impugned election petition appeals was six months from the date of filing. The limitation in Act No. 12 of 2010 was put in place to cure the mischief where election petitions would sometimes be determined five years after the end of the term of service. The limitation was therefore deliberate and intended to put an end to the injustice wrought upon parties to the petition and to their Constituencies. The Court could have exercised its inherent powers to extend the time on its own motion or upon application by any of the parties but it did not. In the premises, the Petitioner submitted that the Court of Appeal acted without jurisdiction. The Petitioner relied on the Nigerian case of **Isaac Obiuwevbi v Central Bank of Nigeria SC No.**

266 of 2006 and **The USA Montana Law Review, Volume 16, Article 5, Issue 1 Spring 1955 January 1955, pages 1,288** where the case of **Elliot et al v The Lessee of Peirsol et al (1828), 1 Pet. 328, 7 L. Ed. 164**, was quoted for the principle that '**if a court has no jurisdiction of the subject of an action, a judgment rendered therein does not adjudicate anything. No party is bound by it and it cannot be made the foundation of any right. It is a mere nullity without life or vigor**.'

The Petitioner invited this Court to take a purposive approach in interpreting the relevant provisions of the law cited in resolution of the issues raised in this Petition. He relied on the case of **Seaford Court Estates Ltd v Asher [1949] 2KB 481** per Lord Denning and an Article by Muhammad Masood Asghar; '**Ouster Clauses and a Quest for Rule of Law**' where the learned author quoted Lord Reid in the case of **Anisminic Ltd v Foreign Compensation Commission [1969] 1 ALLER 208** on what Judges should do if a provision of any statute is capable of more than one meaning and cautioned against attributing to the Legislature an intention of introducing a radical or sudden change of policy.

In conclusion, the Petitioner submitted that the Court of Appeal acted without jurisdiction when it heard and determined the election petition appeals after six months from the date of filing.

Issue Four

What remedies are available to the parties?

On issue four, the Petitioner sought the following reliefs:

1. A declaration that Section 14(2) of the Parliamentary Elections (Amendment) Act, No. 12 of 2010 is null and void
2. A declaration that the decision of the Court of Appeal was without jurisdiction

3. An order that the status quo in the High Court ante the impugned decision be maintained.
4. An award of damages for loss of expected earnings for the Petitioner
5. Costs of the petition

On the award of costs, the Petitioner relied on **Kripus Ayena Odongo v Attorney General, Constitutional Petition No. 30 of 2017** wherein the Petitioner was represented by a law firm, but because he chose to address court during submission, the Court nevertheless awarded him costs.

Resolution of the Petition

I have carefully considered the petition, the submissions of the Petitioner, the authorities cited and the law. The court was addressed by way of written submissions. The Petitioner represented himself and prayed for leave and leave was granted to amend his written submissions. The Petitioner was required to file and serve his amended written submissions by 12th February, 2021 and the Respondent to file a reply by 19th February 2021 whereupon the Petitioner would file a rejoinder thereto by 24th February 2021 and judgment was reserved on notice. By 19th of February, 2021, no written reply had been filed on court record and no attempt was made to enlarge the time to file the reply and this judgment proceeds without the written submissions of the Respondent.

The petition concerns two main questions. The first question is about whether the Supreme Court of Uganda is the final court of appeal in election petition appeal matters in relation to election of members of Parliament. This question can be considered from the judicial precedents on the matter.

The second question concerns the issue of whether failure by the Court of Appeal to handle the petition and particularly the appeal therefrom expeditiously infringed rights of the Petitioner. All other matters arise from

the above 2 issues. The second issue seems to flow from the requirement of section 66 (2) of the Parliamentary Elections Act, as amended which stipulates that election petition appeals shall be determined within a period of 6 months. On the face of it, this will not require interpretation of the Constitution. However, the issue is whether, non-expeditious determination of the election petition appeals contravenes Article 140 (1) and (2) of the Constitution. The issue was strangely framed as a matter of contravention of Article 28 (1) of the Constitution in terms of a right to a fair and speedy hearing.

The Petitioner represented himself and in his written submissions set out the issues for determination of the petition as written above.

Issue 1.

Whether the provisions of section 14 of Act 12 of the Parliamentary Elections (Amendment) Act 2010 is inconsistent with and in contravention of Article 132 (1) of the 1995 Constitution of Uganda (as amended)?

On issue 1, the gist of the submission of the Petitioner is that section 14 of the Parliamentary Elections (Amendment) Act 12 of 2010 is inconsistent with Article 132 of the Constitution in so far as it is counter to the jurisdiction of the Supreme Court provided in Article 132 (1) of the Constitution. Learned counsel also asked the court to consider the effect of the amendment which amends section 66 (3) of the Principal Act to the effect that the Court of Appeal is the final court of appeal in election petitions whereas the Constitution provides that the Supreme Court would be the final appellate court in election petition matters.

Section 14 of the Parliamentary Elections (Amendment) Act amends section 66 of the Principal Act by substituting subsections (2) and (3). Section 66 of

the Parliamentary Elections Act 2005 as amended by Act 12 of 2010 reads as follows:

> 66. Appeals.
>
> (1) A person aggrieved by the determination of the High Court on hearing an election petition may appeal to the Court of Appeal against the decision.
>
> (2) The Court of Appeal shall proceed to hear and determine an appeal under this section within six months from the date of filing of the appeal and may for that purpose suspend any other matter pending before it.
>
> (3) Notwithstanding section 6 of the Judicature Act, the decisions of the Court of Appeal pertaining to parliamentary elections petition shall be final.

I have carefully considered the matter before the court and established that it has been the subject matter of litigation on a similar point save for the fact that there is an amendment to the Parliamentary Elections Act 2005 that I will consider presently to contextualise the issue and the precedents on the subject. Starting with the statutory law, Article 86 of the Constitution provides for the determination of questions of membership in Parliament and stipulates as follows:

> 86. Determination of questions of membership.
>
> (1) The High Court shall have jurisdiction to hear and determine any question of whether –
>
> (a) a person who has been validly elected member of Parliament or seat of a member of Parliament has become vacant; or
>
> (b) a person has been validly elected as Speaker or Deputy Speaker or having been so elected, has vacated the office.
>
> (2) A person aggrieved by the determination of the High Court under this Article may appeal to the Court of Appeal.
>
> (3) Parliament shall by law make provision with respect to –

(a) the persons eligible to apply to the High Court for determination of any question under this Article; and

(b) the circumstances and manner in which and the conditions upon which any such application may be made.

The controversy that confronts the court is whether Article 86 (2) of the Constitution restricts the right of appeal from the decision of the High Court to the Court of Appeal and no further. Secondly, if the first question is answered in the affirmative, whether Article 86 (2) of the Constitution conflicts with Article 140 of the Constitution which provides as follows:

140. Hearing of election cases.

(1) Where any question is before the High Court for determination under Article 86 (1) of this Constitution, the High Court shall proceed to hear and determine the question expeditiously and may, for that purpose, suspend any matter pending before it.

(2) This Article shall apply in similar manner to the Court of Appeal and the Supreme Court when hearing and determining appeals on questions referred to in clause (1) of this Article.

It is apparent from Article 140 (2) that it is envisaged that a matter might be before the Court of Appeal in relation to election petitions as envisaged under Article 86 (1) of the Constitution. Secondly, a second appeal to the Supreme Court emanates from a decision of the Court of Appeal on appeal from the decision of the High Court. On the other hand, Article 86 (2) of the Constitution is silent about the right of appeal to the Supreme Court. It only provides that any person aggrieved by the determination of the High Court under Article 86 (2) may appeal to the Court of Appeal.

The above controversy was fully addressed by the Supreme Court and the issue here is whether it can be reopened by the Constitutional Court. The controversy was the subject of the decision of the Supreme Court of Uganda

in **Baku Raphael Obudra and Obiga Kania v Attorney General (2) (Constitutional Appeal - 2005/1) [2006] UGSC 56 (15 March 2006)**. The facts as far as relevant are that the appellants contested elections in the High Court and the same were dismissed. Each of the appellants appealed to the Court of Appeal against the dismissal and the Court of Appeal upheld the decisions of the High Court. The appellants wanted to lodge second appeals to the Supreme Court but could not on the ground of **section 67 (3) the Parliamentary Elections Act, 2001** whose effect is that there is no right of appeal from a decision of the Court of Appeal to the Supreme Court. The Appellants filed a petition challenging the provisions of section 67 (3) (supra) as being inconsistent with Articles 86 and 140 of the Constitution which according to the appellants permitted appeals arising from election petitions to be lodged in the Supreme Court. For ease of reference section 67 (3) of the Parliamentary Elections Act, 2001 provided that:

> 67. Appeals
>
> (1) A person aggrieved by the determination of the High Court on hearing an election petition may appeal to the Court of Appeal against the decision.
>
> (2) The Court of Appeal shall proceed to hear and determine an appeal under this section expeditiously and may, for that purpose, suspend any other matter pending before it.
>
> **(3) The decision of the Court of Appeal in an appeal under this section is final.**

The issue was whether section 67 (3) of the Parliamentary Election Petitions Act which denied the appellants a right of appeal in an election petition from the Court of Appeal to the Supreme Court was inconsistent with Articles 140 and 86 of the Constitution. The Constitutional Court found that the fact the Court of Appeal was the final court was not inconsistent with Articles 86 and 140 of the Constitution and this decision was affirmed by a majority decision of the Justices of the Supreme Court which I will quote in detail for ease of

reference. On appeal to the Supreme Court, Tsekooko, JSC after considering the various Articles of the Constitution stated as follows:

> "Jurisdiction cannot be prescribed by mere inference. Therefore, learned counsel's attempt to distinguish the decision in the Shah case (supra) is unhelpful.
>
> I reiterate my opinion that Article 140 of the Constitution is about procedure and standards which must be applied in hearing election disputes. Clause (2) thereof does not confer any jurisdiction on any Court. Let me further reiterates my earlier opinion that jurisdiction of the High Court to hear cases and appeals not related to petitions, is conferred by a separate Article (139) and not Article 140. Similarly, jurisdictions of the Court of Appeal and of the Supreme Court to hear and determine non-election cases and appeals are conferred by Articles 134 (2), 137 and 132 respectively.
>
> This puts in sharp contrast the point that in matters to do with election, the jurisdiction is conferred on the High Court and the Court of Appeal only by Article 86 and of course section 67 of the Parliamentary Elections Act. If this obvious distinction is understood, the argument to the effect that Article 140 (2) prescribes the appellate jurisdiction would not be tenable or sustainable.
>
> May I also add if I may that when Parliament enacted the Parliamentary Elections Act, 2001 and included the provisions of section 67 (3), Parliament must have been aware of the above-mentioned existing rights of appeal conferred by the Constitution. Subsection (3) used the intention of Article 86 (2). Therefore, after the promulgation of the Constitution, in my view, the limiting of the right of appeal by section 96 (3) of statute 4 and subsequently by section 67 (3) of the Act of 2001 must have been deliberate. I therefore agree with majority opinion that Article 140 of the Constitution merely urges Courts to expedite the hearing of elections disputes but does not create a substantive right of appeal. Nor does it confer jurisdiction on this court. If the latter were the case, I do not see any sound reason why that jurisdiction was not included or provided for in Article 132 which created appellate jurisdiction of the Supreme Court."

On the same issue Odoki, CJ stated as follows:

"While I agree that the term "*law*" generally includes the Constitution, I am unable to agree that "*prescribed by law*" under Article 132 (2) included the same Constitution. I think, the framers of the Constitution meant "*prescribed by law by Parliament*". Indeed, Parliament subsequently prescribed the right of appeal in election petitions under the Parliamentary Elections Act. The Parliamentary Elections Act which is a special legislation about elections would take precedence over the Judicature Act in matters of jurisdiction relating to election petitions. The existence of appeal provisions in the Judicature Act and the Parliamentary Elections Act tends to show that the right of appeal to the Supreme Court was not resolved long ago by Articles 86 and 140 of the Constitution..."

...It is trite law that there is no such thing as inherent appellate jurisdiction. Appellate jurisdiction must be specifically created by law. It cannot be inferred or implied in my view, Article 140 of the Constitution is too vague to confer appellate jurisdiction on the Supreme Court in election petitions.

It appears to me that Article 140 was intended to be triggered off where jurisdiction was conferred by law. The Article is not superfluous but it is procedural. It demonstrates that the constitution envisaged that Parliament might at some future point decide as a matter of public policy to allow appeals to the Supreme Court in election petitions.

It will be recalled that under section 51 of the 1967 Constitution, there was no right of appeal against a decision of the High Court determining election petitions. The decision of the High Court was final. The overriding policy seems to have been to expedite the determination of election petitions so as to settle as soon as possible the question of peoples' representation in Parliament. This position was changed in the 1995 Constitution provide for right of appeal to the Court of Appeal.

Recently, there seems to have been a change in public policy and Parliament in its wisdom enacted a law to confer appellate jurisdiction of this court in election petitions. Now section 66 (3) of the Parliamentary Elections Act 2005, allows second appeals in parliamentary election petitions from the Court of Appeal to the Supreme Court. In effect, therefore, this appeal has been overtaken by events since the issue under consideration has been resolved in favour of the appellants by the legislature....

"The case of Shah is not distinguishable from the current case in the main issue as to when the right of appeal exists to an appellate court. In Shah's case there was no express provision and the Court of Appeal was called upon to interpret section 34 of the Judicature Act and section 82 and 68 of the Civil Procedure Act against Article 89 of the Constitution which provided: "an appeal shall lie to the Court of Appeal from any such final decisions of the High Court as prescribed by law." This Article is similar to Article 132 (2) of the current constitution.

I am satisfied that the Constitutional Court in this case adopted the right approach in interpreting the Constitution and came to the correct conclusion that no right of appeal to the Supreme Court existed in election petitions."

The Supreme Court was interpreting Articles 86 and 140 of the Constitution as well as Article 132 contrary to the submissions of the Petitioner that Article 132 of the Constitution was not considered by the Supreme Court and therefore the Constitutional Court can revisit it. The Supreme Court Justices variously considered the provision under Article 132 (1) that the Supreme Court shall be the final court of appeal and (2) that an appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law is a general provision. Oder JSC stated that:

"this section, in my view, provides a general appellate jurisdiction of the Supreme Court only as prescribed by law. As far as I know, no law had prescribed for the Supreme Court an appellate jurisdiction in election matters at the time the petitions in this instant case were filed in the Constitutional Court.

In my opinion, clause (2) of Article 132 recognised the long-standing legal principle that appellate jurisdiction is a creature of statute. There is no such thing as an inherent appellate jurisdiction. Section 4 of the Judicature Act, makes similar provisions...

With regard to Article 86 Oder, JSC stated:

"in my opinion Article 86 confers appellate jurisdiction in election matters on the Court of Appeal only. If the framers of the Constitution intended to confer a second appellate jurisdiction on the Supreme Court, they would have done so under this

Article, since they were legislating under that Article on the determination of questions of membership of Parliament. I think that the omission to provide for appeal on election matters from the Court of Appeal to the Supreme Court was deliberate. The reference to the Supreme Court in Article 140 (2) was superfluous. It did not create an appellate jurisdiction in election matters on the Supreme Court.

Mulenga, JSC on the same issue stated as follows:

"again with the greatest respect to the learned Justice of Appeal, I must say that her conclusion is based on erroneous premises. First, as I said earlier in this judgment, Article 148 does not purport to confer jurisdiction on any court and consequently does not confer on anyone a right of appeal. Secondly, the absence in Article 86 of the provision that the Court of Appeal decision shall be final is no more a basis for holding that a second appeal shall lie to the Supreme Court than for saying that no second appeal shall so lie. Interestingly, both sides to this appeal use the argument with equal force: one contending that if the intention was to make the Court of Appeal the final court in election cases it would have been stated explicitly, and the other contending that if the intention was to confer jurisdiction on the Supreme Court it would have been stated so expressly. Lastly, Article 132 alone or with Article 140 (2), far from guaranteeing an unrestricted right of appeal to the Supreme Court it creates a circumscribed right. The right of appeal and the jurisdiction conferred by Article 132 (2) can only be activated by an enactment of a law prescribing what decisions of the Court of Appeal are appealable to the Supreme Court.

Last but not least Katureebe, JSC came to the same conclusion and held that there was no right of appeal to the Supreme Court in election matters at the material time, and no such right was violated. By enacting section 67 (3) of the Parliamentary Elections Act, 2001 Parliament did not exceed its constitutional mandate and that section was not inconsistent with Articles 86 and 140 or any other provisions of the Constitution.

Karokora, JSC came to a different decision and found that Articles 86 and 140 of the Constitution gives a right of appeal from the Court of Appeal to the Supreme Court and an attempt by section 67 (3) to limit the right of appeal

provided by Articles 86 and 140 of the Constitution cannot stand and must be unconstitutional and hence null and void.

Further justice Kanyeihamba, JSC also came to a contrary decision that:

> "in my opinion with the greatest respect, the view expressed by the majority learned justices of appeal that the omission to mention the Supreme Court in Article 68 (2) was deliberate and that if Parliament election petition appeals were to be permitted to go to the Supreme Court, there would be unnecessary delays and congestion in the two courts is purely speculative and I can find no basis for it was in fact and law.
>
> The reading together of Articles 86, 132 and 140 leaves no doubt that the Supreme Court is vested with jurisdiction to hear appeals from the decisions of the Court of Appeal on parliamentary election petitions. To hold otherwise would render Article 140 (2) redundant, a consequence clearly not intended by the framers of the 1995 Constitution.

The majority decision of the Supreme Court in **Baku Raphael Obudra and Others v Attorney General** (supra) in an appeal from a Constitutional Court decision is reinforced by amendment to section 66 of the Parliamentary Elections Act 2005 by section 14 of the Parliamentary Elections (Amendment) Act, 2010 which provides in subsection 3 of section 66 that notwithstanding section 6 of the Judicature Act, the decisions of the Court of Appeal pertaining to parliamentary election petitions shall be final.

The jurisdiction of the Constitutional Court under Article 137 (1) of the Constitution is to determine questions as to interpretation of the Constitution. The question as to interpretation of the Constitution in relation to Articles 86, 132 and 140 of the Constitution on the issue of whether there is a right of appeal conferred by Article 140 (2) of the Constitution to the Supreme Court from decisions on appeal of the Court of Appeal in election appeals, was conclusively determined by the majority of their Lordships in **Baku Raphael and Others v Attorney General** (supra). The Supreme Court

was hearing an appeal from a decision of the Constitutional Court. An appeal lies to the Supreme Court from decisions of the Constitutional Court under Article 132 (3) of the Constitution which provides that:

> "(3) Any party aggrieved by a decision of the Court of Appeal sitting as a Constitutional Court is entitled to appeal to the Supreme Court against the decision; and accordingly, an appeal shall lie to the Supreme Court under clause (2) of this Article.

The Supreme Court being an appellate court for purposes of decisions of the Constitutional Court, sets a binding precedent on any issue as to interpretation of the Constitution under Article 137 (1) of the Constitution and therefore, the Constitutional Court cannot depart from the decision unless it was issued *per incuriam*. In the circumstances of this petition, the same question as to interpretation of the Constitution was argued before the Constitutional Court whereupon an appeal was preferred to the Supreme Court which by majority determined the issue. As far as the Constitutional Court is concerned, the matter is res judicata. It is only the Supreme Court which can revisit the issue. I therefore find no merit in issue number 1 and find that the issue of whether the provisions of section 66 of the Parliamentary Elections Act, 2005 as amended by section 14 of the Parliamentary Elections (Amendment) Act is inconsistent with or in contravention of Article 132 (1) of the Constitution is untenable because this court lacks jurisdiction to reopen the matter for a fresh decision. This court cannot override or ignore a binding decision of the Supreme Court as stated above. The question of whether the Court of Appeal is the final court of appeal with regard to election petitions for the post of member of Parliament or whether it is the Supreme Court which is the final court of appeal therefore is a matter that can only be revisited by the Supreme Court in the circumstances of this petition. I must add that the Supreme Court interpreted the provisions of the Constitution and section 66 of the Parliamentary

Elections 2005 as amended merely states the position of the law as interpreted by the Supreme Court that the Court of Appeal is the final court in election petition matters in respect of membership of Parliament. I would disallow this ground.

Issue number 2.

Whether the Court of Appeal heard and determined the questions in the petition expeditiously. If not whether it's failure on the right of the applicant guaranteed under Article 28 of the Constitution?

The gist of the submissions is that sections 2 of the Parliament Election Amendment Act 12 of 2012 prescribes a period of 6 months within which the Court of Appeal is to determine an appeal from an election petition decided by the High Court. The question of fact as to whether certain election appeals referred to in the submissions of the Petitioner were decided within the 6 months' limitation period is not important. The crux of the dispute is whether failure to decide an election appeal within six months would render a decision arrived at after six months null and void ab initio. The issue of whether such a decision is without jurisdiction address the same concern of whether it is a nullity. The issue as to whether this would be an unfair trial in terms of the provisions of Article 28 (1) of the Constitution of Uganda depends on a determination of what is "fair, and speedy". It would be hard to give an objective decision on all matters of what constitutes a speedy trial as this may depend on a variety of factors which are not before the court. It would further be difficult to hazard an objective test. The only test that is applicable is that Parliament prescribed a period of 6 months within which an appeal should be handled and the question is whether failure to do so would render the decision arrived at in breach of the 6 months' limitation period a nullity. Last but not least the question of whether the failure to hear an issue of membership to Parliament within a reasonable time would be unfair has an obvious answer. The contest is for a seat of Parliament which has a limited term of five years. If the decision is rendered in the 11th Month of the 4th year, it would have frustrated a possible objective in case of a

candidate wishing to be the Member of Parliament on valid grounds. The unfairness of that situation does not have to be juxtaposed against the concept of a fair and speedy hearing under Article 28 (1) of the Constitution. In the circumstances, I would highlight the fact that failure to comply with the statutory law has the potential to cause serious inconvenience to persons having a genuine grievance against an elected member of Parliament who ought not to serve in the Parliament. In any case, members of Parliament are the representatives of the people and the will of the people is sovereign under Article 1 of the Constitution. That will can only be exercised through elected representatives. Failure to comply with the statute is ordinarily a tort of breach of statute and the principles developed depend on the finding of the court as to whether a statutory provision is mandatory or directory. The law of tort is a branch of the common law applicable in Uganda and "breach of statute" is a common law tort applicable by virtue of reception of the common law by section 14 (2) (b) (i) and (3) of the Judicature Act. Breach of statute is a tort which entitles a plaintiff upon proof to claim damages or obtain an injunction or to both. In the case of **Dawson v Bingley Urban Council [1911] 2 KB 149,** Farwell L.J. explained the tort in the following words:

> "breach of a statutory duty created for the benefit of an individual or a class is a tortuous act, entitling anyone who suffers special advantages there from to recover such damages against the tortfeasor"

Further Vaughan Williams L.J. at page 153 held that

> Although well-established authorities make it clear that public bodies representing the public are not liable to be sued by an individual member of the public who has sustained injuries in consequence of the omission of such a body to perform a statutory duty created for the benefit of a class of which such a person is one, yet the Public body may be liable if by its acts, it alters the normal condition of something which it has a statutory duty to maintain and in consequence some person of a class for whose benefit the statutory duty is imposed is injured. The reason why the Public Body is liable in such a case is that it is not mere non-feasance but a misfeasance of the public body, which has caused the injury.

Kennedy L.J. at page 159 held

> that the proper remedy for a breach of statute is an action for damages especially where the statute lays no rule for non-compliance or breach and in appropriate cases an injunction.

In **Pickering vs. Liverpool Daily Post and Echo Newspapers plc [1991] 1 ALL ER 622** at 632 H.L. per Lord Bridge, when such a cause of action would lead to or entitled a plaintiff to damages was extensively considered:

> I should find it impossible to construe r 21(5) in the 1983 rules as giving a cause of action for breach of statutory duty to a patient applying for his discharge to a mental health review tribunal in respect of the unauthorised publication of information about the proceedings on that application. In holding that the rule did give him such a cause of action, Lord Donaldson MR and Glidewell LJ considered that it fell within the principle formulated by Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd* [1981] 2 All ER 456 at 461, [1982] AC 173 at 185:
>
> > '... where on the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Acts and similar legislation.'
>
> But in order to fall within the principle which Lord Diplock had in contemplation it must, in my opinion, appear upon the true construction of the legislation in question that the intention was to confer on members of the protected class a cause of action sounding in damages occasioned by the breach. In the well-known passage in the speech of Lord Simonds in *Cutler v Wandsworth Stadium Ltd (in liq)* [1949] 1 All ER 544 at 547–548, [1949] AC 398 at 407–409, in which he discusses the problem of determining whether a statutory obligation imposed on A should be construed as giving a right of action to B, the whole discussion proceeds upon the premise that B will be damnified by A's breach of the obligation. I know of no authority where a statute has been held, in the application of Lord Diplock's principle, to give a cause of action for breach of statutory duty when the nature of the statutory obligation or prohibition was not such that a breach of it would

be likely to cause to a member of the class for whose benefit or protection it was imposed either personal injury, injury to property or economic loss.

In the facts of this appeal, section 66 (2) of the Parliamentary Elections Act, 2005 as amended by the Parliamentary Elections (Amendment Act) 2010 provides that:

> 66. Appeals.
>
> (1) ...
>
> (2) The Court of Appeal shall proceed to hear and determine an appeal under this section within 6 months from the date of filing of the appeal and may for that purpose suspend any other matter pending before it.

Under article 128 (4) a judicial officer is not liable to any civil action or suit for any act or omission by that person in the performance of judicial functions. Section 66 (2) of the Parliamentary Elections Act, 2005 as amended stipulates that the Court of Appeal shall proceed to hear and determine an appeal within a period of 6 months. It requires the courts to ensure that election appeals are heard and determined within six months from the date of filing the appeal. Mandatory language is used.

Generally, the non-observance of a mandatory requirement in a statute is fatal. **According H.W.R. Wade** in, **Administrative Law Fifth Edition** at page 218:

> "Non-observance of a mandatory condition is fatal to the validity of the action. But if the condition is held to be merely directory, its non-observance will not matter for this purpose."

The common law is spelt out by **Halsbury's laws of England 4th Edition Reissue Vol 44 (1)** which discusses the general principles developed by courts in determining whether a statute couched in mandatory terms should be construed as mandatory or directory in paragraph 1238 pages 730 – 731:

Mandatory and directory enactments. The distinction between mandatory or directory enactments concerns statutory requirements and may have to be drawn where the consequence of failing to implement the requirement is not spelt out in the legislation. The requirement may arise in one of two ways. A duty to implement it may be imposed directly on the person; or legislation may govern the doing of an act or the carrying on of an activity, and compel the person doing the act or carrying on the activity to implement the requirement as part of a specified procedure. The requirement may be imposed merely by implication.

To remedy the deficiency of the legislature in failing to specify the intended legal consequence of non-compliance with such a requirement, it has been necessary for the courts to devise rules. These lay down that it must be decided from the wording of the relevant enactment whether the requirement is intended to be mandatory or merely directory.

...

Requirements are construed as directory if they relate to the performance of public duty, and the case is such that to hold void acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, without at the same time promoting the main object of the legislature. This is illustrated by many decisions relating to the performance of public functions out of time, and by many related to the failure of public officers to comply with formal requirements. On the other hand, the view that provisions conferring private rights have been greatly treated as mandatory is less easy to support, the decisions on provisions of this type appear, in fact, to show no really marked leaning either way.

If the requirement is found to be mandatory, then in a case where a duty to implement it is imposed directly on a person, non-compliance will normally constitute the tort of breach of statutory duty, while in a case where it is to be implemented as part of a specified procedure, non-compliance will normally render the act done invalid. If the requirement is found to be directory only then in either case the non-compliance will be without direct legal effect, though there might be indirect consequences such as an award of costs against the offender."

The principles of construction developed for statutes that concern the performance of a public duty was considered in **Cullimore v Lyme Regis Corporation [1961] 3 All ER 1008** and the judgment of Edmund Davies J at pages 1011 – 1012 quoting the general principles for determination of whether an enactment is mandatory or directory from Maxwell on Interpretation of Statutes:

> A number of cases has been helpfully cited to me by learned counsel, but every case where questions of the kind raised here come before the court has to be determined primarily by looking at the statute which is under consideration and examining the whole scope and purpose thereof. Other cases may provide some assistance in determining what the general principles to be applied are, and those general principles are conveniently stated in summary form in Maxwell On Interpretation of Statutes (10th Edn), at p 376:
>
> > "It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment ... A strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty and where they relate to a privilege or power. ... But when a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative."
>
> A little later, referring to a judgment of Sir Arthur Channell, in Montreal Street Ry Co v Normandin ([1917] AC at pp 174, 175), Maxwell continues, at p 381:
>
> > "On the other hand, where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere

instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only."

I have further considered local authorities in relation to the timelines set for the filing and hearing of election petitions. In **Besweri Lubuye Kibuka v Electoral Commission and Another (Constitutional Petition No. 8 of 1998) [1998] UGCC 5** (22 December 1998) the facts were that Kalangala District elections were held on 19th April 1998 whereupon the second Respondent was declared winner. The aggrieved party filed an election petition in the High Court on 14th May 1998 and answers thereto were filed on 28th May 1998. The Petition was fixed for hearing on 10th August – 13th August 1998. For some reason the petition could not be completed within the time envisaged by section 143 (2) of the Local Government Act. Because the petition could not be heard and determined within the prescribed time, the parties moved court and court made a reference to the Constitutional Court to make a determination as to whether Section 143 (2) of the Local Government Act, 1997, is inconsistent with the Constitution of 1995. Section 143 (2) provides that:

"the High Court, chief magistrate shall proceed to hear and determine the matter within 3 months after the date on which the Petition was filed and may, for that purpose, suspend any other matter pending before court."

The court held that it was to cater for such possible unforeseen circumstances that Parliament enacted section 173 which provided that:

"173 for any issue not provided for under this part of the Act, parliamentary Elections Law in force for the time being shall apply with such modifications as are deemed necessary."

They held that the Parliamentary Elections Law in force was the Parliamentary Elections (Interim provisions) Statute, 1996 which gave power under section 121 thereof to the Chief Justice to make rules as to the practice and procedure to be observed in respect of any jurisdiction under the statute

exercisable by the High Court concerning the practice and procedure to be observed in the hearing of election petitions and the service of the petition on the Respondent as well as priority to be given to the hearing of election petitions and other matters coming before the courts under the statute. They found that the Chief Justice issued the Parliamentary Elections (Election Petitions) Rules, 1996 and rule 19 thereof allows the court on its own motion or on application by any party to the proceedings and upon such terms as the justice of the case may require to enlarge the time prescribed where there exist certain special circumstances as make it expedient to do so. The question was whether the court had any residual or inherent jurisdiction to extend the period beyond the period limited by the law enacted by Parliament. The Court considered inter alia the decision of the Court of Appeal in **Makula International Ltd versus His Eminence Cardinal Emmanuel Nsubuga [1982] HCB 11** where it was held that the court has no residual or inherent jurisdiction to enlarge the time set by Parliament under section 62 of the Advocates Act. It is relevant to cite section 62 of the Advocates Act cap 267 laws of Uganda. Particularly section 62 (1) which provides that:

> Any person affected by an order or decision of a Taxing Officer made under this Part of the Act or any regulations made under this Part of this Act may appeal within 30 days to a judge of the High Court who on that appeal may make any order that the Taxing Officer might have made.

In **Makula International Ltd versus His Eminence Cardinal Nsubuga and another** (supra) the Court of Appeal which was the highest appellate court at that time determined whether courts have jurisdiction to enlarge the time prescribed by section 62 (1) of the Advocates Act cited above for an aggrieved party to appeal out of the prescribed time. The background facts to the appeal were that there was an appeal against a taxation award by a Taxing Master of the High Court, to a High Court judge and objected was

raised to the appeal on the ground that it was time barred because an appeal had to be filed within 30 days under section 61 (1) of the Advocates Act now section 62 (1) of the revised Advocates Act. On further appeal, the issue before the Court of Appeal was whether courts have jurisdiction to enlarge time to file the appeal outside the stipulated 30 days. The Court of Appeal held inter alia that a court has no residual or inherent jurisdiction to enlarge a period of time laid down by statute and therefore the judge's order extending the time within which to appeal, several months after the expiry of the statutory period, was made without jurisdiction.

In **Besweri Lubuye Kibuka v Electoral Commission and Another** (supra) the court did not directly handle the question of whether the provision in the Act setting time within which to do an act couched in mandatory language renders the act done in disregard of or outside the period a nullity. They found that the period of time could be enlarged under rules enabled by the Parent Act. The question of nullity of an act done after the period stipulated in the statute did not arise pursuant to powers to extend the time. The decision in **Makula International v Nsubuga** (supra) was distinguishable. Further and by necessary implication, the decision remained untouched and good law.

The decision in **Makula International Ltd** (supra) was revisited in **Sitenda Sebalu vs. Sam K Njuba and another Election Petition Appeal Number 26 of 2006) [2008] UGSC 7** (22 May 2008). The issue for consideration was *inter alia* whether or not Court had jurisdiction to extend time within which to serve the notice of presentation of petition under section 62 of the Parliamentary Elections Act. The Court of Appeal upheld the decision of the trial judge that the court had no jurisdiction to extend time fixed by statute. On further appeal to the Supreme Court, the issues/grounds of appeal revolved around the holding that the court has no jurisdiction to extend the time fixed for serving the notice and particularly the finding that the

requirement to serve the notice within 7 days is mandatory. Secondly, that rule 19 of the Election Petition Rules cannot apply to a time fixed by statute and lastly whether the non-service of the notice rendered the petition null and void. The Supreme Court underlined the word "shall" in section 62 of the Parliamentary Elections Act and the question was whether it imposed a mandatory obligation to carry out the activity within the time prescribed. The Justices of the Supreme Court considered whether because of the use of the word "shall" the provision was mandatory or directory. The relevant provision reads as follows:

> "Notice in writing of the presentation of petition accompanied by a copy of the petition shall, within seven days after the filing of the petition, be served by the Petitioner on the Respondent or Respondents, as the case may be."

The Supreme Court in a judgment of court stated *inter alia* that:

> "Much as we agree with learned counsel for the appellant to the extent that where a statutory requirement is augmented by a sanction for non-compliance it is clearly mandatory, that cannot be the litmus test because all too often, particularly in procedural legislation, mandatory provisions are enacted without stipulation of sanctions to be applied in case of non-compliance.

After considering several precedents, the Supreme Court found that the best test in determining whether an act done in disregard of a mandatory statutory provision is null and void or not is to ask whether it was the purpose of the legislature that an act done in breach of the provision should be invalid. The court concluded as follows:

> "We have no hesitation in answering in the negative, the question whether the purpose and intention of the legislature was to make an act done in breach of section 62 of the PEA invalid. In so doing, we noted the use of imperative language in the provision but also took into consideration the whole purpose of enactment of Part X of the PEA. It is evident from the provisions and limitation of time within which to file the petition (Section 63 (2)) and to serve the notice, (section 62),

> together with the directive to the trial and appellate courts to expeditiously dispose of the petition and appeals arising from it, giving them priority over other matters pending before the courts (sections 63 (2) and 66 (2) and (4), that the purpose and intention of the legislature, was to ensure, in the public interest, that disputes concerning election of people's representatives are resolved without undue delay. In our view, however, that was not the only purpose and intention of the legislature. It cannot be gainsaid that the purpose and intention of the legislature in setting up an elaborate system for judicial inquiry into alleged electoral malpractices, and for setting aside the election results found from such inquiry to be flawed on defined grounds, was to ensure, equality in the public interest, that such allegations are subjected to fair trial and determined on merit."

It is important to highlight the fact that the Supreme Court found that the requirement to serve the petition within 7 days though, couched in mandatory language is a procedural requirement. Secondly, that there was no penalty prescribed for noncompliance with the requirement. The requirement was therefore a directory and failure to comply with it does not render act done in disregard a nullity.

Clearly the Supreme Court found it to be of importance in arriving at its decision that the procedural limitation period in the statute was meant for expedition of the resolution of the dispute which takes priority over other matters pending before the courts in a fair trial. Secondly, it was of importance too that election petitions are heard on the merits so that the courts inquire into the allegations of electoral malpractice or malpractices. This objective is also in the public interest.

For that reason, a judgment ought not to be declared a nullity for coming out after the six month's period as this would work serious injustice and inconvenience to innocent persons who have nothing to do with the delay and cannot influence the judiciary. The above cited Supreme Court in **Sitenda Sebalu vs. Sam K Njuba and another** (supra) is binding authority for holding that the requirement to hear cases within a period of 6 months

as stipulated by section 66 (2) of the Parliamentary Elections Act as amended is a procedural and directory requirement and the failure by the court or the parties to complete the hearing and determination of the appeal within a period of 6 months would not render any decision made in breach of the 6 months' limitation period a nullity. Further, there is an equally important public interest objective in the enactment of enquiring into alleged electoral malpractices thereby enhancing the rule of law by having the matter resolved by the highest appellate court prescribed by Parliament.

The imperative/directive to conduct the appeals within a period of 6 months is a just and reasonable directive meant to ensure that justice is done within a reasonable time. The reasonable time imports in it the concept of fairness so that a dispute as to who should be or not be a Member of Parliament representing a constituency is determined within a reasonable period to enable the MP duly elected to represent the constituents. This is also in relation to the periodic time to serve in Parliament and the fact that the term of each period is only five years before the next general elections. Obviously, any person who fails to comply with the statutory period can be considered to be in breach of section 66 (2) of the Parliamentary Elections Act as amended (the tort of breach of statute) and the question is what are the consequences of non-compliance especially in the circumstances of this petition. As noted above, judicial officers are immune from civil action for acts or omissions in the performance of judicial functions though they are required to comply with and uphold laws enacted by Parliament. More so the Constitution stipulates that election matters shall be handled expeditiously under article 140. Further, Parliament exercising its mandate under Article 86 (2) and (3) to enact section 66 (2) of the Parliamentary Elections Act as amended operationalized the requirement for expeditious hearing by giving a time frame to do so.

Granted the officials who could be responsible for failure to complete the hearing and resolution of the election petition within a period of 6 months may be held accountable and found culpable if the fault is on their or his/her side. Parliament has already directed the courts to prioritise election petitions and suspend the hearing of other matters through commands in the law. The law represents the will of the people who are sovereign and exercise their sovereignty through the people they have elected to represent them in Parliament as stipulated by Article 1 (4) of the Constitution. Failure to complete appeals in time may make the judicial officials concerned culpable but it does not make a decision issued after a period of 6 months a nullity.

The courts concerned should seriously address the issue of delays in hearing and determining electoral appeals and reflect on the possible mischief that would be occasioned by delays in hearing election appeals. Serious mischief would have been occasioned if the court finds that the person challenging the election is the duly elected member of Parliament or that the person elected ought not to be the duly elected member of Parliament and a reelection ought to be done. Yet if the decision comes after the term of Parliament has expired or is about to expire, serious mischief has been occasioned that Parliament in its wisdom tried to avert by enacting section 66 (2) of the Parliamentary Elections Act, 2005 as amended.

While the decision of the court is not unconstitutional; it would defeat the constitutional requirement to hear appeals expeditiously, if a duly elected representative of the people envisaged under Article 1 of the Constitution never got to represent the people who elected him or her for the term for which he or she was elected, if that failure was due to avoidable delay in hearing the appeal. It is therefore the delay which courts should not condone though the judgment of the court would be valid after delay. The judgment of the court is valid and may determine the appeal on the merits on matters of fact or law. It may for instance determine and give guidance on the law

and how it should be followed or applied. Judges are sworn to uphold the Constitution and are the guardians of it and not infringers thereof. Article 1 of the Constitution provides that:

> 1. Sovereignty of the people.
>
> (1) All power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.
>
> (2) Without limiting the effect of clause (1) of this Article, all authority in the State emanates from the people of Uganda; and the people shall be governed through their will and consent.
>
> (3) All power and authority of Government and its organs derive from this Constitution, which in turn derives its authority from the people who consent to be governed in accordance with this Constitution.
>
> (4) The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.

Clearly Article 1 (2) of the Constitution of the Republic of Uganda brings out the principle that all authority in the state emanates from the people of Uganda and they will be governed through their will and consent. One of the ways of obtaining the consent of the people is through elections of their representatives in Parliament, a branch of the state. Secondly, Article 1 (3) of the Constitution clearly stipulates that all power and authority of government and its organs derive from the Constitution which in turn derives its authority from the people who consent to be governed in accordance with the Constitution. In examining the concept of consent, there is implicit in it, the ability of the people to choose who should govern them. This is made clearer by Article 1 (4) of the Constitution which stipulates that the people shall express their will and consent on who should govern them and how they should be governed through regular, free and fair elections of their representatives or through referenda.

In the facts and circumstances of this petition, the will of the people which is in issue is that of whether there was a free and fair election of their representative. The inquiry of the court as to the conduct of the election in relation to the petition is one of the processes of ensuring that there is or should be a regular, free and fair election of the representative. Obviously, if the matter cannot be determined within the term of office of the Parliament for the electoral period being one of the regular periodic elections conducted every 5 years, then the right of regular, free and fair elections is compromised. The court should determine whether an election is regular, free and fair within a reasonable time and within a short period of the very term for which the elected representative in a disputed election would make their contribution in Parliament. It is in that context that undue delays in the hearing of election petition appeals, go against the constitutional principle of free and fair elections. The courts *inter alia* determine whether the elections were free and fair. Similarly, the duration of the term of Parliament is a material consideration in considering whether the period taken for determination of the appeal as well as the election petition in the High Court is a reasonable period commensurate with the time of the elected representatives in parliament for the term of that parliament until the next regular elections are held.

For the above reasons, I would only agree with a hypothetical scenario proposed by the Petitioner in his submissions that for a petition to be determined 5 years after the end of the term of Parliament would be an absurdity and would have defeated the object of the enactment to handle the petition and appeal therefrom expeditiously. I further agree that if the matter is not handed expeditiously, the Petitioner or any other person who would be entitled to be a member of Parliament would not only have lost his or her dream to represent his people but also the earnings that he or she would have got from being a member of Parliament. I agree that that is the

mischief which section 66 (2) of the PEA was *inter alia* intended to cure. I would further add that the issue of whether the delay is unreasonable may be determined on a case – by case basis depending on the facts and circumstances. The question would be whether in resolving the Petition from the time it was filed to the time the final court resolved the appeal after unreasonable delay going against the spirit of the Constitution for holding fair, regular and free elections and the spirit of resolving election petitions expeditiously in particular. While an individual MP may be compensated for the delay by an award of damages and costs, the loss of the period in having a duly elected leader cannot be atoned for adequately for the injury to the rights of the electorate. However, the way the Petitioner framed the issues is whether the Court of Appeal heard and determined the questions in the petition expeditiously. This depends on facts. Secondly, if not whether the failure infringed on the right of the applicant guaranteed under Article 28 of the Constitution.

The right guaranteed under Article 28 of the Constitution is a right to a fair and speedy hearing. In the context of the election petitions, Parliament has determined the duration within which the appeal should have been determined. I have already alluded to the mischief that the limitation period of 6 months was intended to cure. The delay in the hearing of the appeal, leads to absurd consequences. The failure to conduct the appeal and determine the same within the period stipulated in the statute could amount to unfair hearing. However, every appeal has to be determined on the basis of its own facts and the circumstances of the judiciary have to be taken into account in terms of capacity to determine the appeal within a period of 6 months. Further, what is relevant and should be taken into account is the imperative that the court is required to suspend the hearing of other appeals in other matters where it is necessary to expedite the hearing of election appeals. Failure to do so would be contrary to the command in Article 140 of

the Constitution which stipulates that in the determination of the issue of membership of Parliament under Article 86 (1) of the Constitution, the question shall be determined expeditiously and the court may for that purpose suspend any other matter pending before. The fact that the provision gives the court discretionary power as to whether to suspend any matter pending before it, should be read together with the requirement that the question shall be determined expeditiously. This implies that the court does not have to suspend the determination of any other matter pending before it, if the election appeal can be determined expeditiously. However, if it cannot be determined expeditiously, it is imperative to achieve the command for expeditious hearing of questions involving the election of members of Parliament in terms of Article 140 (1) and (2) of the Constitution for the court to suspend any other matter pending before it in order to fulfil the requirements to handle the petition or the appeal expeditiously. It would therefore not be a valid reason to delay the hearing of an election petition appeal because there are other appeals in relation to other matters not being election petition appeals, pending before the court.

In the premises, there is no need to determine the first part of issue number 2 as to whether the Court of Appeal heard and determined the questions in the petition expeditiously. What is reasonable delay or unreasonable delay being a question of fact and because the period of 6 months directed for the hearing of the petitions is directory, there may be instances where there may be some delays of 2 or 3 months after the 6 months' period has elapsed. Parliament representing the will of the people in enacting a law set a period of 6 months from the filing of an appeal from the decision of the High Court in an election petition, to the determination thereof, to be a reasonable period and the Court of Appeal should be guided accordingly.

The question for determination is not whether there was a reasonable period after the 6 months' period but whether failure to conduct the appeal within

a period of 6 months would render the judgment without jurisdiction and therefore a nullity. I have already held that failure to comply with the 6 months' period would not render the decision a nullity or without jurisdiction. I would therefore consider the second leg of issue number 2 which is whether the failure infringed the right of the applicant guaranteed under Article 28 of the Constitution.

The facts are that the appeal was filed on 5th of July 2016 and the Court of Appeal heard and determined the appeal on 1st of June and 23rd of October 2017 respectively. This was a period of about one year. In the circumstances of this petition, the delay can be atoned for by an award of damages depending on the outcome of the petition or the appeal. The court did not dwell on the grounds for the delay and therefore cannot determine whether the delay was reasonable or unreasonable and the consequences therefore. Such a prayer for damages should be a consequential relief pursuant to the determination of an election petition or appeal or even remitted back to the High Court by the Court of Appeal for assessment of damages only. The claim for damages following delays or other torts are not questions as to interpretation of the Constitutional Court but follow an order for enforcement of rights. It would be material to consider when elections were conducted and whether the Petitioner succeeded in the appeal. The above notwithstanding, the Court of Appeal had jurisdiction to award any damages to the appellant occasioned by any delay and the issue of unfairness due to delay ought to be handled then. In any case, damages have to be proved. In the premises, I would answer issue number 2 in the negative.

Issue 3

Whether the Court of Appeal had jurisdiction to hear and determine appeals for election petitions after the lapse of 6 months prescribed by section 14 (2) of the Parliamentary Elections (Amendment) Act 2010?

I have already answered the question in considering issue number 1 that the provisions of section 66 (2) of the Parliamentary Elections Act, 2005 as amended is directory and not mandatory. Failure to conduct the hearing and determination within 6 months of the filing in the Court of Appeal would not render the decision issued after the 6 months' period a nullity. Further, an award of damages and costs may be awarded for any delay by the trial court or appellate court.

I would find that the Court of Appeal had jurisdiction to determine the election petition appeal after a period of 6 months and its decision rendered after 6 months is a valid and binding decision.

REMEDIES

I have already resolved the issues set out in the submissions of counsel.

The Petitioner sought the following remedies:

1. A declaration that section 14 (2) of the Parliamentary Elections (Amendment) Act 12 of 2010 is and void ab initio.

   On the basis of the holding in issue 1, the declaration is declined. Section 66 of the Parliamentary Elections Act is not unconstitutional.

2. The Petitioner also sought a declaration that the decision of the Court of Appeal was without jurisdiction.
   I would decline to issue this declaration and a decision of the Court of Appeal issued after a period of 6 months stipulated under section 66 (2) of the Parliamentary Elections Act, as amended is not a nullity ab initio or without jurisdiction. The declaration sought is not allowed.

3. The Petitioner sought a declaration that the court awards damages for loss of expected earnings of the Petitioner.

Loss of expected earnings can only be awarded where there is pleading and evidence that the Petitioner succeeded in being declared a member of Parliament after an election petition or the appeal therefrom succeeded. It is further to be awarded where merited by the trial or appellate court as the case maybe.

I have already indicated that there was a delay of between 6 months to one year after the 6 months stipulated by section 66 (2) of the Parliamentary Elections Act, as amended. The affidavit in support of the petition does not disclose any facts upon which an award for loss of income can be made as it does not indicate the outcome of the election petitions.

Any claim for loss of income should be based on the claim that the Petitioner was kept out of the seat of Parliament and subsequently the judicial process was able to prove that this was unlawful and occasioned damages to him personally. That finding ought to be arrived at by the trial court after assessing relevant factors or in the appeal itself.

There is no such basis for an award of damages to the Petitioner and the same is declined.

4. The Petitioner prayed for costs:

The award of costs usually follows the event as stipulated by section 27 (2) of the Civil Procedure Act unless otherwise for good reason the court otherwise orders. In the circumstances of this petition, the petition failed on all the declarations sought.

I would dismiss the petition with no order as to costs.

Dated at Kampala the 27th day of April 2021

Christopher Madrama

Justice of Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO.38 OF 2017

AYENA ODONGO KRISPUS CHARLES ..... PETITIONER

VERSUS

ATTORNEY GENERAL.....RESPONDENT

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 benefit of reading in draft the Judgment of my learned brother Christopher Madrama Izama JA/JCC. He has ably set out the background to this petition, the representations and submissions of Counsel. He has also set out the principles of constitutional interpretation and the relevant law. I have found no reason to repeat them here.

I agree with him that the 1st issue ought to be answered in the negative. As I also find that Section 14 of Act 12 of the Parliamentary Elections (Amendment) Act 2010 is not inconsistent with Article 132(1) of the Constitution.

However, with all due respect, I am unable to agree with my learned brother in respect of the second issue, which is framed as follows;-

Whether the Court of Appeal heard and determined the questions in the Appeal expeditiously? If not whether its failure infringed on the right of the petitioner guaranteed under Article 28 of the 1995 Constitution of Uganda as amended.

The law is not exercised in a vacuum. Courts of law do not act as robots or automated machines. The work of Court must be put in its proper context.

The petitioner herein was duty bound to prove that, the Court of Appeal's failure to deliver judgment in Election Petition Appeal No. 26 of 2017 and 94 of 2017 within the prescribed 6 (six) months was either due to the negligence, incompetence, prejudice or any other such other vice on the part of the court. He had the obligation to set out the number of election appeals heard and determined within the specific election period by the Court of Appeal. He had a burden to prove that his petition was the exception.

Further that, the Court had the necessary resources availed to it by Parliament within the stipulated time to expedite the process of hearing election appeals in respect of the year in question.

Lastly that, the Court had the manpower at all levels required to hear and determine all election appeals within the time stipulated by the law.

Tortious offences of breach of statute cannot by any stretch of imagination be extended to apply to Courts of law. A Court of law cannot find itself guilty of a tort. This would contravene the constitutional principles of immunity of Judicial Officers and independence of the Judiciary as enshrined in Article 128 of the Constitution.

A Court of law is not a public body established to carry out the will of the legislature. It is a third arm of Government whose role is clearly set out in the Constitution. The Judiciary is not under the control or direction of the Legislature as to be liable to sanctions in the same manner as administrative bodies.

The Common Law of England is inapplicable in this case. In England Parliament is supreme, in Uganda it is not. It is the Constitution that is supreme. The Constitution doesn't make the Judiciary subservient to the Legislature. They are at parity.

With all due respect the English authorities cited by my brother Madrama, JCC are inapplicable in this particular case. The common law is generally inapplicable in many aspects of our Constitutional Law.

In this regard therefore, construing the impugned act on the basis of Halsbury's Laws of England is unhelpful to say the least. It is comparing apples to oranges. The authority cited as already stated relate to the powers of Parliament to regulate and hold accountable public bodies and not the judiciary.

In the petition before us, we are required to determine whether or not an Arm of Government, the Legislature, can require another arm the Judiciary to perform its constitutional task in a specific manner within a specific time. This, itself brings into question the constitutionality of the very provision of the law sought to be enforced by the petitioner.

Sitenda Sebalu vs Sam K. Njuba & Another, Supreme Court Election Petition Appeal No. 26 of 2007 is distinguishable. It is in respect of a requirement of law to be performed by a litigant. It is the litigant required to comply. It is him or her who may seek for extension of time. The case of *Makula International vs Cardinal Emmanuel Nsubuga, Supreme Court Civil Appeal No. 4 of 1981* was cited for the proposition that a court does not have inherent power to enlarge time set by statutes. I agree. The principle relates to sanctions against a non-compliant litigant who must suffer the consequences for his non-compliance.

In this case, the defaulting party is not the litigant, it is the court. Parliament cannot sanction a court of law, the result of which would be prejudicial to an innocent litigant. Further, I cannot accept the notion that when a court fails to deliver judgment in time the result is that the dispute abates.

Supposedly, this would result in the dismissal of the case in favor of the respondent, without the dispute having been heard and determined by Court. This would violate the plaintiff's or appellant's right to be heard.

Whenever an appeal abates, the final order of Court is a dismissal. The Court determines that the appeal is moot and goes ahead to dismiss it. Every appeal must be brought to a final conclusion by an order of the Court. An appeal cannot be dismissed on account of the court's failure to determine it within time. It can only abate and may be dismissed on account of having been overtaken by events.

For the above reason, failure by a Court to determine an appeal within the time stipulated by the law cannot be unconstitutional act. The delay is not an "act" envisaged under Article 137 of the Constitution. It is a series of events intervening over a long period of time. Some of those events are foreseeable whereas others are not. They maybe in most instances be beyond the control of the Court or the Judiciary. A recent example is the COVID- 19 Pandemic. The delay may be caused by lack of funds resulting from delay caused by Parliament itself. It maybe that, the Court is short of personnel such as Judges the appointment of which is outside its scope. To hold that, failure to complete an appeal within the specific time is one "act" committed by the Judge would be too simplistic in my humble view.

In this regard therefore, Articles 1 and 2 of the Constitution have no relevancy.

Let me add if I may, that failure to comply with the provision of a statute cannot on its own amount to a breach of the Constitution. It is simply a breach of that specific statute. Ultimately every law emanates from the Constitution. See: *Attorney General vs Major General David Tinyefuza, Supreme Court Constitutional Appeal No. 1 of 1997* and *Mbabaali Jude vs Hon. Edward Kiwanuka Ssekandi Constitutional Petition No. 0028 of 2012.*

The correct position of the law in my humble view is that, Parliament cannot direct the Judiciary and specifically Courts of law to perform specific acts within a specific period of time. It can only suggest or offer guidance. Whenever Parliament

sets timelines in a statute for the Judiciary to follow, such a provision ought to be construed as regulatory and not mandatory. Construing such a provision as mandatory would render the legislation in question as unconstitutional on account of breach of separation of powers provided for under the Constitution.

The principles of separation powers have been set out by this Court in *Hon. Jim Muhwezi and 3 Others vs Attorney General and Another Constitutional Petition No. 10 of 2008.* In have no reason to reproduce them here.

The Hon. The Chief Justice may make rules for the purpose of guiding Courts to ensure that the regulatory provisions of Parliament in respect of timelines are complied with by Courts. Even with such guidelines in place, it is still probable that a Court may not be able to meet them for reasons beyond its control. It cannot be the law that, the timelines must be met at any cost. That is why the provisions setting time such as the impugned law shall therein be construed as regulatory and not mandatory.

I have already stated that the impugned Section 62 as amended is regulatory, I must add that the *Sitenda Ssebalu vs Sam. K. Njuba (Supra)* petition the non-compliance was in respect of service of a notice of petition by a party. The time limitation was not directed at the court, but rather at the litigant.

To that extent the decision is distinguishable from the one at hand. Even then, the Supreme Court held that the provision was not mandatory as no sanctions for none compliance had been set out in the statute.

In this petition, no sanctions for non-compliance have been set out under Section 62 of the Parliamentary Elections Act as amended. Even if they were, I have already stated that, they would render that specific Section of the law unconstitutional on account of the principle of separation of powers.

In my view, the position taken by the Court of Appeal in *Edward Byaruhanga Katumba vs Daniel Kiwalabye Musoke, Court of Appeal Civil Appeal No, 2 of 1998* ought to be followed, as it appears to be on all fours with the one at hand. In that case Okello, JA (as he then was) in his lead judgment stated as follows;-

> *"In a nutshell, the above principles indicate that to determine whether the legislature intended a particular provision of a Statute to be mandatory, the Court must consider the whole scope, and purpose of the Statute. Then to assess the importance of the impugned provision in relation to the general object intended to be achieved by the Act, Court must consider the protection of the provision in relation to the rights of the individual and the effect of the decision that the provision is mandatory.*
>
> *In the instant case, the purpose of Part X of the Local Government Act No.1 of 1997 in which Section 143 (2) falls is to set up Local Governments by elections. Section 139 thereof anticipated disputes arising from the elections and provided for the method of solving these disputes. An aggrieved candidate may petition the High Court. Section 43 (2) deals with the trial of such petitions. It requires that petitions filed under Section 139 shall be heard and determined by Court within ninety days after the date of filing. The Section is not concerned with the jurisdiction of the Court. It was only concerned with the speed at which the trial of the petitions should take. It should be expeditious. To hold that the legislature intended that provision of Section 143 (2) to be mandatory and therefore to oust the jurisdiction of the Court would be contrary to established principle, because the Section does not expressly or by clear words state the ouster.*
>
> *In my view, the word "shall" in Section 143 (2) of the Local Government Act therefore was not intended to be mandatory. It was intended to be directory only to ensure expeditious hearing and determination of election petitions filed under the Act. This is intended to enable the setting lip of Local Governments without undue delay. The legislature could not have intended to oust the jurisdiction of the Court over the matter after the expiration of the prescribed period merely by the use of the word "shall". The ouster of the jurisdiction of the Court after the expiration of the prescribed period would be prejudicial to an aggrieved candidate as it would leave them without any means of resolving*

their disputes. For these reasons, I hold that Section 143 (2) of the Local Government Act No.1 of 1997 is not mandatory but only directory.

In view of the above holding, the Court has inherent power to extend the time limit to meet the end of justice."

See also *David B Kayondo vs the Cooperative Bank, Supreme Court Civil Appeal Number 10 of 1992, (unreported), Secretary of State for Trade and industry vs Langridge [1991J ALL ER 591 and Jaffer Brothers Ltd vs Mohamed Magid Bagalaliwo and 2 others, Civil Appeal No.43 of 1977(CA) (unreported).*

The above decision reaffirmed the principle that Parliament can only oust the jurisdiction of court expressly and by clear words. Further that Court has inherent power to extend time set by the legislature to meet the ends of justice.

I find that, Section 62 of the Parliamentary Elections Act as amended does not expressly oust the jurisdiction of the court and must therefore be construed as directory and not mandatory.

I hasten to add that had the Parliament used clear words ousting the jurisdiction of the court, such provision of the law would be unconstitutional as it would violate the principle of separation of powers and would also deny litigants their constitutional right to be heard, when they are at no fault.

The law and the facts in this petition are distinguishable from those in Presidential election petitions. The timelines in Presidential elections petition are set out in the Constitution itself, under Articles 61, 103, 104 and 105.

To that extent, it is mandatory for the Supreme Court to adhere to the timelines set for filing, hearing and determination of a Presidential petition are mandatory.

I would therefore answer the second issue in the negative. I find that the failure by the Court of Appeal to determine the petitioner's election petition within the time

prescribed under Section 62 of the Parliamentary Elections Act as amended was not unconstitutional. That Section is not mandatory. It is directory.

I would dismiss this petition with no order as to costs.

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

.....

Kenneth Kakuru

JUSTICE OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA#

Coram: Buteera Richard, DCJ, Kakuru, Bamugemereire, Madrama and Mulyagonja, JJCC.

CONSTITUTIONAL PETITION NO: 0038 OF 2017

AYENA ODONGO KRISPUS CHARLES:::::::::::::::::: PETITIONER

VERSUS

ATTORNEY GENERAL:: RESPONDENT

JUDGMENT OF IRENE MULYAGONJA, JCC

I have had the advantage of reading in draft the judgment of my brother, Christopher Madrama, JA/JCC in this matter. I agree with the reasoning and the conclusion that the petition should be dismissed with no order as to costs.

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

Irene Mulyagonja,

JUSTICE OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION No. 0038 OF 2017

Coram: *Hon Mr Justice Richard **BUTEERA**, Deputy Chief Justice; Hon Mr Justice Kenneth **KAKURU** JCC; Hon. Lady Justice Catherine **BAMUGEMEREIRE** JCC; Hon Mr Justice Christopher **MADRAMA** JCC; Hon. Lady Justice Irene Esther **MULYAGONJA**, JCC*

AYENA ODONGO KRISPUS CHARLES :::::::::::::::::::::::::::: PETITIONER

VERSUS

ATTONEY GENERAL ::RESPONDENTS

JUDGMENT OF CATHERINE BAMUGEMEREIRE JCC

I have had the benefit of reading, in draft, the lead Judgment of my Learned Brother Madrama JA and I do agree with his reasoning on most of the issues except issue No. 3 at which I will take a granular look. It is the issue whether the Court of Appeal (CA) had jurisdiction to hear and determine Appeals from Election Petitions after the lapse of six months prescribed by section 14 (2) of the Parliamentary Elections (Amendment) Act (P.E.A) 2010?

In submitting on the above issue Ayena Odongo, who was self-represented opined as follows:

> "The law of limitation is strict and cannot be circumvented except by express extension. In the instant case the jurisdiction of the CA was limited to six months from when an Election is filed. As already stated above, the **Parliamentary Elections (Amendment) Act 12 of 2010** was put in place on the background of past experiences whereby election Petitions would sometimes be determined five years after the end of the entire term. The cap of six months within which to hear and determine an Election Petition was therefore deliberate and intended to put an end to the injustice wrought upon parties to the Petition. As already stated above, we are aware that the limitation time of six months was capable of being extended at the instance of either of the parties or at the instance of the court

exercising its inherent power so to do. In the instant case we are not aware of any extension of the time within which to hear and determine the Petition."

Consequently, Ayena Odongo invited this court to find that it acted without jurisdiction when it heard and determined the Petition well after the laps of six months from the time the Petition was filed. I will take a 30 thousand feet view of section of the Parliamentary Elections Act (P.E.A.) touching upon the mandate of this Court to hear appeals in s. 66(2) of the P.E.A. This section of the Parliamentary Elections Act 2005 as amended states in s.66 subsection (2)states as follows:

" 66. Appeals

1) ...

2) ...The Court of Appeal shall proceed to hear and determine an appeal under this section within 6 months from the date of filing of the appeal and may

for that purpose suspend any other matter pending before it."

The wording in the above section is plain, clear and unambiguous. I do not share the majority view that court can circumvent, side-step or go round s. 66(2) of the P.E.A for reasons that it is unconstitutional. The starting point is Article 140 (1) of the Constitution which provides that where any question is before the High Court for determination under article 86 (1) of the Constitution, the High Court shall proceed to hear and determine the question expeditiously and may, for that purpose, suspend any other matter before it.

The Parliamentary Elections Act sets out time lines within which the High Court and the Court of Appeal may determine election Petitions. In as much as it is possible, the meaning of any words, in statutes or even in the Constitution, should be assigned their ordinary meanings and they should not be read into unless the

written word was constructed to meet a deeper mischief. See the case of **Hon. Theodore Sekikubo & Others V AG & 4 others Constitutional Court Appeal No. 1 of 2015** where in reaction to the application of the purposive rule, it was held that words of a statute should be assigned their ordinary meaning where a statute is clear and unambiguous. It was held as follows: -

> "The Constitutional Court itself found the word "leave" as it is used in Article 83 (1) (g) plain, clear and unambiguous and must be interpreted using the literal rule of statutory interpretation. However, in spite of this finding it went out of the provision of the Constitution itself to look for aid elsewhere for its interpretation. We think that was an error on the point of the Majority Justices of the Constitutional Court."

See also the Constitutional Appeal of *Charles Onyango Obbo Anor v AG Const. Pet. No. 15 of 1997.* Following closely on what the

Supreme Court Justice Mulenga JSC held, I fear that we may as a Court of Appeal be once again be failing to read a clear writing on the wall. The words "six months" in s.66(2) of the P.E.A means six months. I do appreciate the need for the independence of the Judiciary to be upheld at all times but my humble view is that this is neither the case nor the space for this court to read too much into our mandate as whittled down by the Parliamentary proclamation that we ought to hear appeals within 'six months'. The Parliament was simply doing its duty. Indeed this may be a good place to examine the notion of separation of powers in a democracy.

Montesquieu, writing about the doctrine of the separation of powers, stated that:

> **"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty... there is no liberty if the judiciary power be not separated from the legislative**

and executive... there would be an end to everything, if the same man or the same body... were to exercise those three powers." Source: M.J.C. Vile, Chapter 4, *Constitutionalism and the Separation of Powers* (2nd ed.) (Indianapolis, Liberty Fund 1998)

The Constitution is a manifestation of the above doctrine of separation of powers, as it provides checks and balances between the three arms of state to ensure that none acts excessively. Indeed as a way of providing checks and balances this Court has weighed in on some of the actions of Parliament. On many occasions, this Court has had the privilege of reversing enactments by the Parliament. In the consolidated Petitions of the **Uganda Law Society and Others Constitutional Court Petitions v AG No. 49 of 2017, and others including No.3 of 2018, Np.5 of 2018, No.10 of 2018, and No.13 of 2018** this Court reversed constitutional enactments passed by the Parliament of Uganda.

We can also look to Article 86 of the Constitution (1995), which grants this Court the power to determine whether a member of Parliament is validly elected or not. This is subject to Article 86(3)(b), which provides that Parliament shall determine the "circumstances and manner" in which an application to the Court can be made under this article. Section 66 of the P.E.A, as outlined above, provides the roadmap for the circumstances and manner in which the application may be made. The logical interpretation of this is that even where the Constitution grants the Courts specific powers in ensuring fairness in the electoral process, these powers are prescribed by Acts of Parliament. The function of our parliamentary democracy is that the law will guide the powers and responsibilities of the Courts. Since Parliamentarians are directly elected by the people, it is hoped that in exercising the power to legislate, the parliamentarians act on behalf of the people whom they represent. Absent inconsistency with the Constitution, procedural irregularities in the passing of legislation and the

infringement of the fundamental rights of the people in this nation, this Court has a duty to interpret and oversee the enforcement of legislation passed by Parliament. In a matter such as this, where the expeditious administration of justice is at issue, the Court should uphold its duty to ensure that it carries out its role in the electoral process within the timeframe stipulated.

Given that we have so much backlog in the system as a result of having cases that outlive their time, it is important that in certain situations such as in Election and Constitutional Petitions, special time is allotted to start and complete such matters. The Courts perform their role on behalf of the people of Uganda and it is in their interest that election matters are not delayed. This is particularly important since the people of Uganda aspire to know within a particular electoral cycle who their representatives are and if they were properly elected. Elections are held in cycles. Once we delay in disposing of these matters within that election cycle, we render these matters nugatory and hearing them ***ex post facto,***

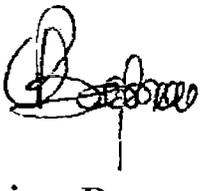
after the fact, is an exercise in futility. I find the time of six months allotted to hear election petitions restrictive but useful in terms of enshrining the right to vote by expecting the Judiciary to *expeditiously* handle in a the periodic and the cyclical fashion election Petitions whenever they are brought before the Court. In considering whether courts can enlarge time within which to do an act the court must determine that there is an enabling provision in the statute providing for the period within which to appeal, that allows for extension of time. In absence of such a provision, courts do not have jurisdiction to extend or enlarge the time fixed by statute.

It is well-established in **Makula International v Cardinal Nsubuga [1982] HCB 11** that a court has no residual or inherent jurisdiction to enlarge a period laid down by statute. It is settled law that when time is fixed by a Statute itself a court cannot intrinsically invoke its powers to enlarge such time. Where no law or regulation grants the court discretion to expand or reduce the time set by statute or

regulations, such court should find that it has no has no residual or inherent jurisdiction to expand the period established by statute.

I therefore would allow this Appeal on issue No. 3 and hold that it is indeed unconstitutional for the Court of Appeal to hear and determine appeals outside of the prescribed time of six months.

I would however disallow any costs emanating from the above appeal for reasons that constitutional matters are of public interest not for private gain. This is not a matter of ***fiat justiciar ruam caelam*** 'let justice be done though the heavens fall'. I would invoke the floodgate principle to state that granting costs in this case may inundate our courts with endless claims and suits in tort, I would rather that the principle is declared free of cost.. I would therefore order that each party bear its own costs.



27-04-2021

Catherine Bamugemereire

Justice of the Constitutional Court