THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ
HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. JUSTICE S.G. ENGWAU, JA
HON. JUSTICE A.TWINOMUJUNI, JA
HON. JUSTICE C.N.B. KITUMBA, JA

CONSTITUTIONAL PETITION NO. 08 OF 2006

1. **DARLINGTON SAKWA**
2. **ATHANASIUS RUTAROH:::::::::::::::::::::: PETITIONERS**

VERSUS

THE ELECTORAL COMMISSION

& 44 OTHERS:: RESPONDENTS

JUDGEMENT OF THE HON. DEPUTY CHIEF JUSTICE L.E.M. MUKASA-KIKONYOGO

Darlington Sakwa and Athanasius Rutaroh, hereafter to be referred to as the petitioners brought this petition under **Article 137(1) and 3(b) of the Constitution of Uganda 1995 and the Rules of the Constitutional Court (Petitions for Declarations under Article 137 of the Constitution) Directions S.1 13-15. (Sic) The Constitutional Court (Petitions and References) Rules 2005.**

The petitioners, both male Ugandans, had offered themselves as candidates in the 2006 Parliamentary General Elections for Bungokho South and Rujumbura constituencies respectively to 8th Parliament but were not successful. As interested parties, the petitioners were affected and aggrieved by some matters relating to the nomination and election of the 2nd to the 45th respondents which are inconsistent with some provisions of the 1995 Constitution. They are, therefore, seeking declarations and Orders of redress under **Article 137(3) of the Constitution.**

The 1st respondent in the petition is the Electoral Commission whilst the remaining 44 respondents were members of 7th Parliament and at the time the hearing of this petition started some of them had been sworn in as members of the 8th Parliament. The 4th respondent, Dr.

Bukenya Gilbert, had been appointed Vice President of Uganda whilst a number of the remaining ones had been appointed Cabinet Ministers and Ministers of State in various ministries in the present Government.

The petition is supported by two affidavits deponed to by both petitioners. The 45 respondents also filed affidavits in reply to rebut adverse allegations and to adduce supporting evidence where necessary.

The background of the petition is that in January 2006, the 1st respondent nominated the 2nd to the 35th respondents inclusive as candidates in the 2006 Parliamentary General Elections in various constituencies across the country. In the same month, His Excellency the President of Uganda, nominated respondents 36th to 45th as candidates for 10 seats reserved for the Uganda Peoples Defence Forces as a special interest group (underlining is mine). The aforesaid nominations were approved on either 12th or 13th February 2006 by the 1st respondent. Subsequently, on 23-02-2006, all the 44 respondents were elected as members of the 8th Parliament under a multi party system of Government. Respondents 36-45 were elected as representatives of the UPDF. At the time of the nomination and the election none of the respondents had resigned their offices 90 days prior to their nomination as required by **Article 80 (4) of the Constitution as amended by the Constitution (Amendment) Act 11 of 2005** which reads as follows:-

> ***"(4) Under the multiparty political system, a public officer or a person employed in any Government department or agency of the government or any body in which government has controlling interest, who wishes to stand in general election as a member of Parliament shall resign his or her office at least ninety days before nomination day"***

It is contended for the petitioners that, clearly, respondents 2-45 were either public officers or persons employed in Government departments or agencies of Government. The 36th-45 respondents were all commissioned officers employed by and serving in various capacities in the UPDF and affiliated bodies. It was argued for the petitioners that non compliance with **Article 80 (4) of the Constitution** rendered, the election, declaration and the gazetting of the 2nd to 45th respondents as members of the 8th Parliament of the Republic of Uganda, following the 2006 Parliamentary General Elections, unconstitutional. Clearly, their nomination contravened **Article 80 (4) of the Constitution** as amended by **Act 11 of 2005**.

The petitioners, in public interest, are praying for the following Declarations and Orders:

" 1. A declaration that the nomination of the 2nd –45th respondents inclusive as candidates in 2006 Parliamentary General Elections was inconsistent with and contravened Article 80(4) of the Constitution of the Republic of Uganda as inserted by section 18 of the Constitution (Amendment) Act 11 of 2005.

2. **A declaration that the election and gazetting of 2nd to 45th respondents inclusive as members of 8th Parliament of the Republic of Uganda and following Parliamentary General Elections were inconsistent with Article 80(4) of the Constitution of the Republic of Uganda due to their nominations which were made contrary to the express provisions of the same Article."**

<u>The agreed issues by the parties are as follows</u>

1. **"Whether the 2nd–45th respondents were required to resign at least 90 days prior to their nomination as candidates in the 2006 Parliamentary General Elections.**

2. **Whether the nomination of the 2nd–45th respondents as candidates in 2006 Parliamentary General Elections contravened Article 80 (4) of the Constitution.**

3. **Whether the election of the 2nd–45th respondents as members of Parliament in 2006 Parliamentary General Elections contravened Article 80 (4) of the Constitution.**

4. **Whether the petitioners were entitled to the relief sought."**

The team of lawyers representing the petitioners consisted of Mr. David K. Mpanga and Mr. Fredrick Mpanga. Miss Christine Kahawa, Senior State Attorney represented the 1st respondent whilst Mr. Peter Kabatsi assisted by Mr. David Mpanga and Mr. Oscar Kambona represented the remaining 44 respondents.

On the first issue, Mr. Mpanga rightly pointed out that **Article 80 of the Constitution** deals with qualifications and disqualifications of members of Parliament. However, it was recently amended by the **Constitution (Amendment) Act No. 11 of 2005** which inserted and amended a number of sub-articles in our Constitution. **Section 18 (d) of the Constitution (Amendment) Act** amended, **Article 80** by inserting **Clause 4 (supra).**

On the first issue, Mr. Mpanga endeavored to prove that respondents 2nd – 45th were persons envisaged and affected by **Article 80 (4) (supra).** With regard to the meaning of the term employment, he conceded that there was no elaborate definition to describe it. There was, also, no hard and fast rule to define the term **'employee'**.

However, he referred this Court to Halsbury's Laws of England, Fourth Edition, 2000 Reissue Vol. 16 where the term 'employee' at common law is defined as follows: -

> ***" 'Employee' means an individual who has entered into or works under, or where the employment has ceased, worked under, a contract of employment, employment in relation to a worker, means employment under contract and 'contract of employment' means a contract of service or apprenticeship, where express or implied, and, if its is express, where it is oral or in writing" Whether a person is or is not an employee it is a question of fact which in proceedings under the Employment Rights Act 1996 is essentially a matter for the employment tribunal"***

Relying on the aforesaid definitions, counsel submitted that all the 44 respondents were affected by the amendment.

He pointed out that the Vice President, Cabinet Ministers and Ministers of State are appointed by the President, under **Article 113 of the Constitution** and approved by Parliament and are subject to the provisions of the Constitution. They hold various portfolios in the Executive and receive emoluments in the form of salaries, allowances and sundry benefits payable directly out of the Consolidated Fund and/ or directly out of monies provided by Parliament. Their appointments can be revoked. They can be censured and are bound by the rules of the code of conduct. The President and the Government have a high degree of control over them. On appointment they take the oath of allegiance.

With regard to the 36th to 45th respondents inclusive, they were all commissioned officers employed by and serving in various capacities in the Uganda Peoples Defence Forces (UPDF) and affiliated bodies. In the premises all the respondents were employees in government departments or agencies which they head or where they work.

Quoting Black's Law Dictionary, counsel defined the term ***"Department' as one of the major administrative divisions of the executive branch of the government usually headed by an***

officer of the cabinet rank, for example department of the State. Generally a branch or division of Governmental administration"

In conclusion, counsel submitted that generally the 2nd to the 45th respondents were employees of the Executive Branch of the Government of Uganda. In particular 2nd –35 respondents were employees of the departments they head. The 36th-45th respondents were employees of UPDF, a branch of the Executive under chapter 12 of the Constitution. Alternatively they were employees of a Government Agency under the Ministry of Defence. Counsel prayed Court to find the answer to issue No. 1 in the affirmative. Respondents 2-45 were required to resign at least 90 days prior to their nomination as candidates in the 2006 Parliamentary General Elections.

Relying on the same submissions and reiterating the same arguments on issues 2 and 3, Mr. Mpanga submitted that the provisions of **Article 80 (4)** are mandatory. The nomination of the 44 respondents was made in contravention of the said **Article**. Similarly the subsequent election of the respondents to the 8th Parliament founded on the said nomination also contravened **Article 80 (4)**. As the proper procedure laid down by the Constitution was not followed, the respondents were disqualified to be elected members of Parliament. The election was in contravention of **Article 80 (4) of the Constitution as amended by the Constitution (Amendment) Act 11 of 2005**.

Lastly, on the 4th issue, Mr. Mpanga submitted that on the arguments he advanced and authorities cited the petitioners were entitled to the declarations prayed for. On their behalf he prayed this Court to declare that the election of the respondents as members of Parliament to the 8th Parliament based on the nomination to 2006 Parliamentary General Elections was in contravention and inconsistent with **Article 80 (4) of the Constitution.**

In reply, Mr. Kabatsi, vehemently opposed the petition. He took a different approach from that of Mr. Mpanga. He based his submissions on what he termed "headings" but covered, the main issues agreed upon by the parties.

On the first heading he contended that the 2nd to 45 respondents were not persons envisaged and affected by **clause 4 of Article 80 of the Constitution** as amended. **(supra**). As far as he was concerned, firstly the term **" a person employed in any government department"** affects the public officer as defined by **Articles 175 and 257(2) (b) of the Constitution.** Secondly, it was intended to apply to persons in government departments, local government councils and thirdly

to those persons employed in corporations, companies or parastatal bodies or those on Commissions. Mr. Kabatsi submitted that by virtue of the definitions in the above mentioned Articles, the 2nd -45th respondents are outside the ambit of **Article 80 (4)**. It is not applicable to them. The term **"public officer"** does not refer to them.

Similarly, the 2nd -45th respondents are not affected by **Clause 4 of Article 80.** He submitted that this was a proper case in which to apply the rule of ejusdem generis (things of the same kind or nature) enunciated in the case of **Gregory vs. Fearn (1953) 1 WLR 974.** On that doctrine counsel submitted that the respondents were excluded from the application of **clause (4).** Mr. Mpanga did not agree. To him the doctrine was irrelevant. The law is clear on issues of construction. Where the language of the Act is clear, effect must be given to it, in which case the law should apply to the respondents.

On the second heading, Mr. Kabatsi contended, that the **Constitution (Amendment) Act 11 of 2005** could not have affected the nomination of candidates of 2006 Parliamentary General Elections. Parliament could not have enacted a law knowing it would be applicably impossible.

On the third heading, counsel argued that the application of **Article 80 (4)** to respondents 36-45, would disqualify them for the elections. They have to be members of the special group they are representing in Parliament, in this case the Army. Mr. Mpanga, however, argued that the representatives of the said special group could have been retired officers. They did not have to be in active service.

The fourth argument advanced by Mr. Kabatsi was based on the fear that if **Clause 4 of Article 80** is interpreted to include the respondents, it would lead to absurdity. It would also be prejudicial to the country in that it would leave the President and the country without a Vice President, Cabinet, Parliament,
Army Commander and other senior officers of the UPDF whose constitutional duties would be unattended to. Parliament could not have intended to create such an absurd and prejudicial situation.

Mr. Mpanga ruled out the issue of absurdity. It did not arise. **Sub-Article 4** did not require the entire Cabinet to resign but only those who wished to stand for 2006 Parliamentary General Elections. The Constitution had to be read as a integrated whole.

Finally, Mr. Kabatsi prayed Court to strike out the petition with costs. It was filed incompetently because there was nothing to interpret by this Court. It, therefore, had no jurisdiction to entertain it.

I heard the submissions and legal arguments advanced by counsel for the parties. I also had a careful perusal of the evidence on record, relevant provisions of the law and the authorities cited by the parties. Before I proceed with the evaluation of the evidence I would like to comment on the views expressed by my learned brother, Twinomujuni JA which I noted when I read his draft judgment in this petition.

At the stage of drafting his judgment, he realized that two procedural matters had been 'mismanaged' at the conferencing stage, and wrong assumptions had been acted upon by the Court. He, therefore, decided to reframe the issues under **Order. 13 rule. 5 (1) of the Civil Procedure Rules** without consulting and giving the parties opportunity to address the Court on the matter.

In his judgment, the learned justice pointed out to the Court that the issues agreed upon by the parties were framed incorrectly. To him the petitioners' prayers and orders as well as the framed issues wrongly assumed that **Article 80 (4)** as introduced by **S. 18 (d)** of the **Constitution (Amendment) Act 11 of 2005** had already formed part and parcel of the 1995 Constitution.

As **Section 18 (d) of the Constitution (Amendment) Act No. 11 of 2005** is part of an Act of Parliament intended to amend **Article 80 of 1995 Constitution** by inserting **Clause (4) (supra),** this Court had first to test it. Before forming part of the 1995 Constitution it had to pass the test laid down under **Article 2 of the Constitution** which reads as follows: -

"2. (1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void."

That view holds that if the entire Amendment Act or any part of it is found to have been irregularly enacted (i.e. not in accordance with 1995 Constitution), or contravenes or is inconsistent with any provision of the **1995 Constitution**, then this Court has the power under

Article 137 of the Constitution to nullify such amendment Act or any part thereof to the extent of the contravention or inconsistency.

Relying on the decision in **Constitutional Appeal No. 1 of 2001 Ssemwogerere and Others vs. Attorney General,** Hon. Justice Twinomujuni insisted that before considering the issues in the both petitions, it was incumbent on this Court to first decide whether **Section 18 (d)** of **the Constitution (Amendment) Act 11 of 2005** effected valid **amendment** to **Article 80 (4) of the Constitution** of Uganda. The Court and counsel should not have assumed so. Instead the court should have, therefore, ordered the parties to amend the issues they had agreed upon and reframed them before the trial.

To him, if the issue of validity of the amendment under **S. 18 (d)** had been considered first by the Court, it would have disposed of the petition without going into the remaining issues.

Additionally, the learned justice, relying on the decision in **Major General David Tinyefuza vs. Attorney General Constitutional Appeal No. 12 of 1999**, cited the rule of harmony which requires the Constitution to be read as an integrated whole where no one particular part should destroy but sustain each other.

For the aforesaid reasons, the answer on the first issue he reframed namely **"whether Section 18 (d) of the Constitution (Amendment) Act No. 11 of 2005, effectively amended Article 80 of the 1995 Constitution"** was in the negative. As far as he was concerned, the amendment did not form part and parcel of the Constitution and should be declared null and void.

With great respect I disagree with the holding of my learned brother. I am not persuaded by the reasons and conclusion on issue No. 1 as reframed by him.

First and foremost, although the issue involved a point of law, it would be a violation of the rule of natural justice, namely, **"not to condemn a man unheard"**. On the authority of **Oriental Insurance Brokers Ltd vs. Transocean Ltd C. Appeal No. 55/95.pages 197 – 227**, where a court amends issues which parties had agreed upon, it is necessary to give the parties the right to adduce further evidence or address the court on the amended issues.

I am alive to the provisions of **Order 13 rule 5 (1) of the Civil Procedure Rules (supra)** which empower a court to reframe the issues where necessary and which read as follows: -

"5. (1) The court may at any time before passing the decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed."

See also- **Makula International Ltd vs. His Eminence Cardinal Nsubuga & Another 1982 HCB 11**

The aforesaid law not-withstanding, I am of the view that, where the parties had closed pleadings and submitted on agreed issues, the court, still, has to consult the parties and give them a hearing, if they so wish, as held in the case of **Oriental Insurance Brokers Ltd vs. Transocean (U) Ltd Civil Appeal No. 55/95 page 197 – 227 (supra).** It is not disputed that the trial proceeds on issues which are in dispute. The parties must know the issues which require proof so that they adduce the required evidence. Service on the Attorney General was imperative as he was not heard on the matter involving enactment of legislation which was subsequently was to be declared null and void.

It must be noted that the petitioners did not challenge the validity of the **Constitution (Amendment) Act No. 11 of 2005.** They were satisfied that **Section 18 (d)** had effectively amended **Article 80 of the Constitution**. Their grievance was **not** non compliance with the laid down procedure but the substance of **Clause 4**. The assumption, which I find correct, is fortified by the revised edition of the Constitution which has incorporated the amendments up to today, including **Article 80 (4)** at page 73.

Further, **Article 137 (1) of the Constitution** does not empower this Court to amend or draft petitions on behalf of aggrieved parties to the extent of changing their character. In the instant petition the additional issue, framed as issue No. 1, in my view, amended that petition. I disagree that it is incumbent on this Court, in the first place, to test the validity of the substance of the Act on the Court's own motion without even involving the parties.

As far as I am concerned, the test is applicable to the procedure or where the Court has been moved. That, in my view, was the issue considered in **Constitutional Appeal No. 1 of 2001 Ssemogerere & 2 others vs Attorney General (supra).** Clearly, the aforesaid authority is distinguishable from the present petition. As already indicated the grievance in that petition was the non-compliance with the laid down procedure. The petitioners were challenging the repeal of

Article 88 and the creation of **Article 257 A** without complying with the laid down correct procedure, in particular to amend the Constitution by infection.

The petitioners, in the present petition, are challenging the act and conduct of the Electoral Commission which they allege was inconsistent or in contravention of the provisions of **Article 80 (4) of the Constitution**.

My understanding on this issue is that once Parliament had enacted the **Constitution (Amendment) Act No. 11 of 2005** in accordance with the correct procedure, and the President had assented to the Act, **Clause 4** became part and parcel of **Article 80 of the Constitution**. There was no more **Act No. 11 of 2005,** therefore, to challenge or declare null and void. It had formed part and parcel of **Article 80** as **Clause 4**. The right course was for the petitioners to proceed with their petition on the issues framed and agreed upon by them. In those circumstances the petitioners were aggrieved by the non compliance with the amendment as an integral part of **Article 80 (4) of the Constitution.**

In the premises I do not agree with my brother, Twinomujuni, J.A that, the amendment under **Clause (4) of Article 80** should be declared null and void for failure to meet the test under **Article 2 of the Constitution. (supra).**

I will now proceed with the examination of the issues framed and agreed upon by the parties before the Registrar during the scheduling conferencing.

For convenience I propose to start with the question on the jurisdiction of this Court raised by Mr. Kabatsi. In my view, it would have been better to raise it as a preliminary point of law. However, being a point of law, it could be heard at any stage.

It was contended by Mr. Kabatsi that this petition should have been handled by the High Court under **Article 86 (1) (a)** which reads as follows:-

> ***"(1) The High Court shall have jurisdiction to hear and determine any question whether-***
>
> ***(a) a person has been validly elected a member of Parliament or the seat of a member of Parliament has become vacant"***

To him, there are no issues for interpretation as provided by **Article 137**. The petitioners should have filed an action for non compliance with the relevant provisions of the law. Counsel cited **Constitutional Appeal No. 1 of 1997 Attorney General vs. David Tinyefunza** in support of his arguments.

The answer to the question whether this Court is seized with jurisdiction to hear this petition is not hard to find. Whilst I concede there is an element of validity of the election of the respondents to the 8th Parliament, it was not the petitioners' sole complaint. The petitioners' main grievance was the act or

conduct of the 1st respondent of approving the respondents' nomination in contravention of **Article 80 (4) of the Constitution**. The 2nd-45th respondents being persons envisaged under **clause 4 of Article 80 of the Constitution**, had not resigned at least 90 days before their nomination was approved which was unconstitutional.

Article 137 clearly spells out the jurisdiction of this Court. It reads inter alia as follows:-

"**1. Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.**

2. ……

3. A person who alleges that

a) an Act of Parliament or any other law or anything in, or done under any authority of law or

b) an Act or omission by any person or authority is inconsistent with or in contravention of a provision of this Constitution , may petition the Constitutional Court for a declaration to that effect and for a redress where appropriate.

……The contents on this matter include"

As can be seen from the above provisions of the Constitution it

cannot be disputed that this Court had jurisdiction to hear this petition. It was not, incompetently filed as submitted by Mr. Kabatsi. It is properly before this Court. The objection to jurisdiction is overruled.

I will now turn to the remaining three issues. As both learned counsel rightly pointed out the petition hinges mainly on issue No.1. I, therefore, propose to start with and dwell on this issue since the answer to it will dispose of all the remaining ones.

The main issue this Court has to determine is whether the 2nd to the 45th respondents had to comply with the provisions of **Article 80 (4) (supra).** If the answer to that question is in the affirmative, proof is required to the effect that at the material time, some of the respondents were, public officers or employed in government departments, government agencies or were working in bodies in which the government had controlling interest.

The Constitution under **Articles 175 and 257** defines the terms ***"public service", "public officer", minister" ……."*** *b*ut on the **Amendment in Clause 4,** it is silent as to the meaning of ***"a person employed in government department".*** The task of interpreting the aforesaid terms contained in the insertion in **clause 4 of Article 80** was left to this Court.

In matters of interpretation or construction of constitutional and statutory provisions, the Court is guided by a set of principles, doctrines, presumptions and other authorities including the intention of the legislature when it is known. For the purposes of this petition, whose main concern is interpretation, I find it useful to mention some of those principles we intend to apply or rely on to determine the three remaining issues.

One of the cardinal principles of interpretation, as rightly observed by Mr. Mpanga, is the rule of harmony. The courts of law and in particular the Constitutional Court are enjoined to read the entire Constitution as an integrated whole and no one particular provision should destroy the other. This rule is also referred to as the rule of completeness.

For the aforesaid reasons, no one provision of the Constitution is to be segregated from the others and be construed alone. All provisions bearing upon a particular subject are brought into view and interpreted so as to effectuate the greater purpose of the instrument or relevant provision.

In the instant petition, for example, this Court will have to address its mind to the provisions of **Articles 78, 175 and 257 of the Constitution** and other relevant ones when determining whether the respondents are persons envisaged and affected by the amendment under **Article 80 (4) of the Constitution.**

Another principle relied on in interpretation of constitutional and statutory provisions, is the requirement to give the widest construction possible in its context according to the ordinary meaning of the words used and each general word should be held to extend to all ancillary matters.

Further, in construction of matters similar to the present petition, courts are guided by the purpose and effect which principle was applied by the Supreme Court in **Attorney General vs. Salvatori Abuki Constitutional Petition No. 1 of 1998.**

Another important and useful principle in construction especially of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. A case in point is the **Republic vs. EL Mann Mwenda Co. Int. 1969 EARLR 357** where it was held that:-

> **"Where the language of an Act is clear and explicit we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak of the intention of the legislature".**

The aforesaid notwithstanding, where the language of the legislature admits of two constructions and if there is likelihood of leading to obvious injustice, the court acts on a view that such a result could not have been intended. The courts of law would avoid enforcing laws that would result in absurdity.

Guided by some of the above mentioned principles and other relevant ones not mentioned, I will continue with the consideration of issue No.1. The first question to answer is whether any of the 2nd-45th respondents were public officers.

As the law stands, it is not disputed that respondents 2-35 by virtue of **Article 175 and 257(2) (b) of the Constitution of Uganda** are not referred to as public officers. It is more appropriate to refer to them as political leaders. It follows, therefore, that in general the regulations for civil servants or public officers, are not applicable to them.

Article 175 reads as follows:-

> **"In this Chapter, unless the context otherwise requires-**
> **"public officer" means any person holding or acting in an office in the public service;**

"public service" means service in any civil capacity of the Government the emoluments for which are payable directly from the Consolidated Fund or directly out of moneys provided by Parliament."

Article 257 (2) (b) provides that:-

"A reference to an office in the public service does not include a reference to the office of the President, the Vice President, the Speaker or Deputy Speaker, a Minister, the Attorney General, a member of Parliament or a member of any commission, authority, council or committee established by this Constitution."

It is, however, argued by the petitioners that **Article 80 (4**) has a wider application than **Articles 175 and 257** and it was intended to apply to the 2nd to 45 respondents. As already indicated, it was unfortunate that unlike in **Article 257 (2) (b)** Parliament did not clarify whether **Clause 4** was applicable to the respondents, who are still political leaders as opposed to civil servants in the Public Service. It was not categorically stated that the exemption under **Article 257 (2) (b)** was or was not applicable to **clause 4 of Article 80**.

The next pertinent question to ask is whether any of the respondents were employed in government departments, agencies or bodies where the Government had controlling interest. Without hesitation I do not agree that the 2nd-35th respondents fall under any of those categories. I do not accept Mr. Mpanga's submission that Cabinet Ministers and Ministers of State are employed in the ministries/departments which they head. It is important to note that, they are political heads but not the administrators like, for example, Permanent Secretaries.

There are cogent reasons for my holding. Whilst I agree both Ministers and State Ministers are referred to under **Article 257 (1) of the Constitution** as **"Ministers of the Government",** they are not **employees** of the Government. They are not appointed under the Public Service but by the President. It is true their appointments are approved by Parliament but the President can revoke them as and when he wishes. They are appointed at his pleasure. He hires and fires them. The respondents cannot sue the President like a public officer can sue for wrongful dismissal.

The Minister has no permanent place of work. He may not even have a ministry to head for there are ministers without portfolio. A copy of the letter of appointment of Ministers to the

recently formed Cabinet bears me out on this point. It is written in a form of circular letter with the list of the names of the newly appointed ministers.

It reads as follows:-

"REPUBLIC OF UGANDA

APPOINTMENT OF MINISTERS OF THE GOVERNMENT OF UGANDA

I, Yoweri Kaguta Museveni, President of the Republic of Uganda, acting in pursuance of the powers conferred upon me by Articles 113(2) and 114 (3) of the Constitution of the Republic of Uganda (1995), do hereby appoint the following Ministers in the respective portfolios in Cabinet of the Government of the Republic of Uganda, as set out below:-

Cabinet Ministers:

1. ***Prime Minister/Leader of Government Business – Nsibambi Apollo***
2. ***1st Deputy Prime Minister/Minister in Charge of the East African Affairs – Antigay Eriya***
3. ***2nd Deputy Prime Minister/Minister of Public Service – Kajura Henry***
4. ***3rd Deputy Prime Minister/Minister of Information and National Guidance- Kivejjinja Kirunda***
5. ***Minister in charge of Security- Mbabazi Amama***
6. ***Minister in charge of the Presidencey- Wabudeya Beatrice***
7. ***Minister in charge of General Duties/Office of the Prime Minister- Mwesigye Adolf***
8. ***Minister of Agriculture, Animal Industry and Fisheries- Onek Hilary***
9. ***Minister of Defence – Kiyonga Crispus***
10. ***Minister of Relief and Disaster Preparedness- Kabwegyere Tarsis***

etc."

It was preceded by a nomination letter by His Excellency the President addressed to the Speaker which I need not reproduce.

It is not correct as submitted by counsel for the petitioners that the Standing Orders apply to the respondents. The 2nd -35th respondents being Ministers have no contract of service like the traditional civil servants.

Although Mr. Mpanga, rightly pointed out, they take the Oath of Allegiance, they remain political leaders. The oath of allegiance does not change their status. It is similar to an official oath taken by an officer when he assumes charge of his office, whereby he declares that he will faithfully discharge the duties of that office, or whatever else may be required by Statute in the particular case. The oath of allegiance is one by which a Minister in this case promises and binds himself to bear true allegiance to the sovereignty or Government of Uganda. Such oath is administered generally to all high officers and soldiers. It does not necessarily turn one into a government employee although a majority of the officers **who take it are employees of the Government**.

Further, it is not correct to conclude as Mr. Mpanga did, that receipt of emoluments is further proof that the respondents are employed in Government departments/ministries. They are assigned duties by His Excellency the President in respect of those ministries/departments as political heads. A cleaner who cleans Government offices and whose services are paid for by the Government does not necessarily become an employee of Government. He or she has to be recruited properly.

In my view the respondents are ministers of the Ugandan State but not employees of the government as envisaged by **Article 80 (4).** They do not head the Civil Service like the Permanent Secretaries do, for Ministers come and go. They are members of the Executive Arm of Government. They are responsible for political supervision of the ministries assigned to them by the President. As it were they are agents or representatives of the President.

Additionally, I find merit in Mr. Kabatsi's submission that Parliament would not have intended the provisions of **Article 80 (4) supra** to apply to the respondents.

To assist us to find out the intention of Parliament we called for the Hansard. A careful perusal of the relevant excerpts of the debate on the **Constitution (Amendment) Bill**, under **Clause 4** reveals that Parliament had no intention of extending its application to 2nd-45th respondents. The Hansard indicates that the enactment was partly intended to broaden the scope of those persons required to resign as envisaged by it. It is also indicated that it was considered necessary to level the playing field to stop some public officers from taking unfair advantage of their positions. Clearly, from the references by the members, in the debate, to the persons to whom this law was intended to apply, **Clause 4** could not have been intended to apply to 2nd -35th respondents. The

House was more concerned about the conduct of **"the public officers"** as opposed to the political leaders. To support my finding, I hereby, reproduce some reports of the debates in the Hansard.

In the Hansard of July 7th 2005 at page 14734, Hon. Oulanyah states inter alia that:-

> **"The justification is to broaden the scope of those who must resign, before seeking nomination, Mr. Chairman."**

At page 14735 of the same Hansard Hon. Bamwanga states as follows:-

> ***"Mr. Chairman, when members are raising this issue they are looking at leveling the playing ground. The fact that they are more interested in taking part in politics, if they are civil servants as we talk now and***
> ***they are already campaigning in the constituencies using government vehicles and facilities, it is not a level playing ground for Members of Parliament to keep quiet about it. That is what we are trying to cure by raising this matter on the Floor of the House. Thank you".***

At page 14734 of the July Hansard Hon. Wadri stated inter alia that

> ***"I remember it was the Sixth Parliament, which even floated the idea that if a person is holding a public office he should take 120 days' leave, and then it was reduced to 3 days. This meant that before nomination a person holding a public office should have taken leave, according to that time, at least one month before the nomination days. What we are saying here is that if this person who is holding a public office is expected to resign then there must be a stipulated time within which his resignation should be tendered in before nomination. Otherwise, a person will tender his resignation on the same day when the nomination is supposed to take place and yet he has been using the Government resources to campaign. I think there must be something done".***

At page 14735 Professor Kamuntu had this to say:-

> ***"Mr. Chairman, thank you very much. I still have the Floor. I would agree with you that if you want to guard against temptations to abuse public office, we can start counting from the date, (underlining is mine) which is known in advance when the term of Parliament expires and we put a time like two months before the expiry of the sitting Parliament, and then that will be practically possible".***

Further at page 14735 Hon. Ochieng in his debate on the **clause 4,** states inter alia-

> **"Mr. Chairman, the guidance I want on this particular matter is if all goes well, by next elections we shall be under a multi-party arrangement. I wonder how a <u>public servant</u> who is not supposed to be partisan will undergo partisan issues, go through primaries, go through all these things to nomination without resigning? How are we going to go about this kind of thing"?**

Similarly Hon. Wacha, who followed him, had this to say:-

> ***"Thank you very much, Mr. Chairman and I want to thank Hon. Ochieng for that comment. Under a Multi-party arrangement the political scenario changes completely. <u>A public servant is not supposed to be partisan</u> but immediately he undertakes to go for primaries of any political party and then he is chosen by that political party to represent it in that constituency, then he will have dropped from that height of partisan; he becomes partisan. How do you expect a <u>partisan public servant</u> to continue in office after he has declared himself partisan? The scenario changes completely.***
>
> ***Waiting for a nomination date is not the issue. Once he is chosen by his party in the primaries to represent it, then he must leave office".***

Other relevant parts of the debate include contributions of Hon. Wacha and Hon. Oulanyah at page 15059 of 8/8/2005 Hansard and of Hon. Mwonda.

Hon. Oulanyah in his debate had this to say:-

> "***In which case the formulation that I read earlier should be the one we retain. This is because what Hon. Wacha is reading is from the amendment previously proposed by the Government. Therefore, it would now read as follows: "Under the Multi-party political system, a public officer or a person employed in any government department or agency of the Government or an employee of a Local Government or any organization in which the Government has control or interest who wishes to stand in a general election as a Member of Parliament shall resign his or her office, at least 90 days before nomination day."***

Hon. Wacha had this to say:-

"Thank you Mr. Chairman. We have had consultations with the Attorney General and his deputy on this matter and we have agreed that this particular sub-clause be recast in this manner: "Under the Multiparty political system, a public officer or a member of a commission, authority or committee established by the Constitution who wishes to stand at a general election as a Member of Parliament shall resign his or her office three months before nomination day".

Hon. Mwondha had this to say:-

"Mr. Chairman, I was wondering whether I could make one small observation while that tallying is going on? It looks like by this amendment we have ruled out <u>public officers in the next general elections</u> because <u>they need to give three months notice</u> before they <u>resign; they must resign three months</u> before <u>nomination</u>. This is August; we are holding elections in March, which means that they are technically out. I just thought I would put this on record."

The last speaker, Hon. Mwondha, clearly, shows that the enactment under **Clause 4** was intended to apply to **public officers**, like **civil servants**, **members of civil agencies**, companies but definitely not to the 2nd-35th respondents. The story may be different with the 36th-45th respondents but we shall come back to those later.

Closely related to the intention of the legislature is the rule of harmony mentioned earlier. This Court has a duty in the interpretation of **Article 80 (4**) to harmonize it with **Articles 78, 175, 257 (2) (b)** and any other relevant provision to avoid conflicting interpretation of the Constitution. This takes care of the argument advanced by the petitioners that since **clause (4)** is a later enactment to the aforesaid **Articles**; Parliament must have intended it to apply to the 44 respondents.

I do not ascribe to that view for as we have already seen above, the Court is enjoined to ensure that one provision of the Constitution does not destroy another. It follows, therefore, that where as in the instant case, the statute did not specifically speak its mind, the court must apply established principles, presumptions or doctrines to enable it make correct interpretation of the law and come to a reasonable or sensible and just decision.

It is partly for that reason that I disagreed with my learned brother Twinomujuni J.A that the amendment was inconsistent and contravened **Articles 2, 21 (1), 78 (1) (c), 175 and 257 2 (b) of The Constitution** and as such it did not form part and parcel of **Article 80 (4) of the Constitution**.

The amendment is a general one intended to apply to the categories of persons mentioned therein but not necessarily applicable to specific categories of persons in earlier enactments.

Furthermore, courts of law would avoid laws that would result in absurdity or injustice. Hence, where there is likelihood or obvious defeat of the purpose of the enactment, courts would act on the view that such result could not have been intended by the legislator. For example, if in the present petition, the provisions of **Article 80 (4)** were to be applied to respondents 2-45, as it was rightly submitted by Mr. Kabatsi, it would lead to an absurd and prejudicial situation in the country. Uganda would be left without a Vice President and Cabinet Ministers for at least three months. There would be no Army Commander and some 9 senior UPDF officers for 90 days or more. Their consultative and other duties would be unattended to. As all members of the Cabinet sit in Parliament, business in Parliament would also be paralyzed.

Further, the extension of the term of the 7th Parliament to 12th May 2006, by Article 288 would have aggravated the crisis if the respondents had resigned. For even up to 7 months the President would have had to run the Government with only a few ministers like the Prime Minister. Worse still if the amendment was to be extended to all the members of the Executive and Parliament including the President, himself, nobody would remain both in the Executive and Parliament to perform the state duties. Parliament could not have intended such a situation to occur in the country.

I am alive to the argument by counsel for the petitioners that the enactment was only applicable to those employees wishing to stand for election. On perusal of the names of the 2nd -35th respondents, it would be noted that all those persons were members of the Cabinet.

Administrative Law requires that for the proper running of any government, all legal systems of government should be let to operate. There would be no justification, therefore, for Parliament to pass such a law to disarm the Executive and leave the President to work without Ministers.

With regard to the 36-45th respondents, the situation would be worse if the enactment was to be applied to them. It is worthy, noting that the said 36th-45th respondents are commissioned officers of UPDF appointed by His Excellency the President. Unlike the first category these ones are employed in the Ministry/Department of Defence. In the premises as submitted by Mr. Mpanga, the requirement to resign under the enactment would be mandatory.

However, Parliament could not have intended it because its application to 36-45 respondents would result in absurdity for a number of reasons stated below;

Firstly there is the specific provision under **Article 78 (1) of the Constitution** which provides that:-

> ***"Parliament shall consist of***
> ***a)……..***
> ***b)……..***
> ***c) such numbers of representatives of the army, youth, workers, persons with disabilities and other groups as Parliament may determine."***

Secondly, the ten respondents represent the Army Constituency as a special group envisaged in **Article 78 (supra).** Requiring them to resign 90 days prior to their nomination would not only disqualify them as candidates but also defeat the purpose for their representation in Parliament.

Thirdly Mr. Mpanga's submission that representation could consist of retired officers is not tenable. When a soldier retires, he or she ceases to be governed by the institutional laws in place. He effectively becomes a civilian.

Additionally, as observed above a general amendment similar to the present one (**Clause 4)** cannot, in the absence of a specific provision, override a specific enactment or provision of the Constitution for example **Articles 78(1) (c) or 175 or 257 (2) (b)** in the present petition.

The strongest and most cogent argument that can be advanced for the respondents and on which alone this petition could be determined, as submitted by Mr. Kabatsi, is the inadequacy of time for effective implementation. Clearly, on simple mathematics it was impossible for the 2nd-45 respondents to comply with the requirement to resign 90 days prior to the nomination dates of 12th and 13th January 2006.

Although the **Constitution (Amendment) Act No. 11 of 2005** was enacted in time for the candidates to comply with the requirement of **Act 80 (4),** the operational law was not in place. **The Parliamentary Elections Act No. 17 of 2006** under which the nomination dates were appointed was assented to on 16/11/2005. It commenced on 21/11/2005 and gazetted on 23/12/2005 leaving 51 days and 18 days respectively to the nomination dates. The requirement to resign at least 90 days prior to the nomination was mandatory. It could not be partially implemented for example by resigning within the available time, which had to be less than 90 days. Whoever resigned in such circumstances, did not comply with the law. For the 2006 Parliamentary General Elections, therefore, it might have been justifiable for the Electoral Commission by interpretation to waive the requirement to resign by those affected. It is, hence, reasonable to conclude that the insertion contained in **Clause 4,** although mandatory, was legally not applicable to candidates for 2006 Parliamentary General Elections for the 8th Parliament. However, it might probably apply to those to come after the 2006 Parliamentary General Elections.

Lastly, as the enactment in issue was mandatory as required the respondents to resign, it would have had the effect of retrospective operation if complied with. Courts of law are generally against retrospective operation of statutes. It is, for example, a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such construction appears very clear in the terms of Act, or arises by necessary and distinct implication" In the Kenyan case of **Municipality of Mombasa vs. Nyali Ltd 1963 EACA 371-4** it was held inter alia that:-

> ***"Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation…….one of the rules governing construction is that if the***
> ***legislation affects substantive rights it would not be construed to have retrospective operation unless a clear intention to that effect is manifested".***

In the instant petition, on the record before Court, this is not a proper case in which to allow a retrospective operation of the **Article 80 (4).** The circumstances do not warrant it and there is no clear intention to that effect nor are there procedural issues to justify it.

On the evidence before court I find that this petition must fail for the reasons summarized below.

Firstly the 2nd-35th respondents are not public officers within the meaning of **Articles 175 and 257 (2) (b) of the Constitution.**

Secondly it is my holding that the 2nd-45th respondents are not persons employed by government as envisaged and affected by **Article 80 (4) of the Constitution.**

Thirdly and additionally, due to the inadequacy of time for the 2006 Parliamentary General Elections**, Article 80 (4)** was not applicable to all the candidates who stood for those elections including the 2nd-45th respondents. However, the said **Article 80 (4)** might be effective for future Parliamentary General Elections as time will not be an issue.

In the result the answer to issue No.1, is in the negative. The 2nd-45th respondents were not required to resign from their office 90 days prior to the nomination dates of 12 and 13th of January 2006. This answer also disposes of the questions framed under the remaining issues namely, 2, 3 and 4. I would, therefore, find the nomination of the 2nd and 45th respondents to the 2006 Parliamentary General Elections, the elections to the 8th Parliament and the gazetting of the same was not inconsistent to any provision of the Constitution.

In the premises, as the other members of the Court substantially agree with my judgment and orders as proposed, the petition would be dismissed with the following declarations and orders: -

DECLARATIONS OF THE COURT

On – Issue No. 1

(1) **By a unanimous declaration of the Court, the 2nd–45th respondents, as candidates for the 2006 Parliamentary General Elections and as members of the 8th Parliament did not have to resign their offices at least 90 days prior to the nomination day.**

Issue No. 2

(2) **By a unanimous declaration of the Court, the nomination of the 2nd-45th respondents inclusive as candidates for 2006 Parliamentary General Elections was not inconsistent and did not contravene any provision of the Constitution.**

Issue No. 3

(3) **By a unanimous declaration of the Court, the declaration of the election and gazetting of the 2ndto the 45th respondents inclusive, as members of the 8th Parliament of the Republic of Uganda in and following the 2006, Parliamentary General Elections were not inconsistent with any provision of the Constitution.**

10

In the result by the unanimous decision of the Court the petition is without merit and is dismissed. Each party is ordered to bear its own costs as this is public interest litigation.

Dated at Kampala this 4th day of August 2006.

L.E.M. Mukasa-Kikonyogo
HON. DEPUTY CHIEF JUSTICE

20

JUDGMENT OF TWINOMUJUNI, JA:

Darlington Sakwa and Athanasius Rutaroh, hereafter to be referred to as the petitioners brought this petition under **Article 137(1) and 3(b) of the Constitution of Uganda 1995 and The Constitutional Court (Petitions and References) Rules 2005.**

The petitioners, both male Ugandans, had offered themselves as candidates in the 2006 Parliamentary General Elections for Bungokho South and Rujumbura county constituencies respectively to 8th Parliament but were not successful. As interested parties, the petitioners were
30 affected and aggrieved by some matters relating to the nomination and election of 2nd to 45th respondents which, they allege, are inconsistent with some provisions of the 1995 Constitution. They are, therefore, seeking declarations and orders of redress under **Article 137(3) of the Constitution.**

The 1st respondent in the petition is the Electoral Commission whilst the remaining 44 respondents were members of 7th Parliament and at the time the hearing of this petition started, some of them had been sworn in as members of the 8th Parliament. The 4th respondent, Dr. Bukenya Gilbert, had been appointed Vice President of Uganda whilst a number of the remaining ones had been appointed Cabinet Ministers and Ministers of State in various ministries in the present Government.

The petition is supported by two affidavits deponed to by both petitioners. The 45 respondents also filed affidavits in reply to rebut adverse allegations and to adduce supporting evidence where necessary.

The background of the petition is that in January 2006, the 1st respondent nominated the 2nd to 35th respondents inclusive as candidates in the 2006 Parliamentary General Elections in various constituencies across the country. In the same month, the President of Uganda, nominated respondents 36th to 45th as candidates for 10 seats reserved for Uganda Peoples Defence Forces as a special interest group (underlining is mine). The aforesaid nominations were approved on either 12th or 13th February 2006 by the 1st respondent. Subsequently, on 23/02/2006, all the 44 respondents were elected as members of the 8th Parliament under a multi party system of Government. Respondents 36-45 were elected as representatives of the UPDF. At the time of the nomination and election none of the respondents had resigned their offices 90 days prior to their nomination as required by article 80(4) as amended by section 18(d) of the Constitution (Amendment) Act No.11 of 2005 which reads:-

> **'(4) Under the multiparty political system, a public officer or a person employed in any government department or agency of the government or an employee of a local government or any body in which the government has controlling interest, who wishes to stand in a general election as a member of Parliament shall resign his or her office at least ninety days before nomination day."**

It is contended for the petitioners that respondents 2-45 were either public officers or persons employed in Government departments or agencies of Government. The 36th-45th respondents were all commissioned officers employed by and serving in various capacities in the UPDF and affiliated bodies. It was argued for the petitioners that non-compliance with **Article 80(4) of the**

Constitution as amended rendered the election, declaration and the gazetting of the 2nd-45th respondents as members of the 8th Parliament of the Republic of Uganda, unconstitutional.

The petitioners pray for the following Declarations and Orders:-

"1. A declaration that the nomination of the 2nd-45th respondents inclusive as candidates in 2006 Parliamentary General Elections was inconsistent with an contravened Article 80(4) of the Constitution of the Republic of Uganda as inserted by section 18 of the Constitution (Amendment) Act 11 of 2005.

2. A declaration that the election and gazetting of 2nd-45th respondents inclusive as members of 8th Parliament of the Republic of Uganda and following Parliamentary General Elections were inconsistent with Article 80(4) of the Constitution of the Republic of Uganda due to their nominations which were made contrary to the express provisions of the same Article."

The following issues were agreed upon and framed by both parties:

1. **"Whether 2nd-45th respondents were required to resign at least 90 days prior to their nomination as candidates in the 2006 Parliamentary General Elections.**
2. **Whether the nomination of 2nd-45th as candidates in 2006 Parliamentary General Elections contravened Article 80(4) of the Constitution.**
3. **Whether the election of 2nd-45th respondents as members of Parliament in 2006 Presidential General Elections contravened Article 80(4).**
4. **Whether the petitioners were entitled to the relief sought."**

At the trial, Mr. David K. Mpanga and Mr. Fredrick Mpanga represented the petitioners. Ms Christine Kahwa represented the 1st respondent while Mr. Peter Kabatsi assisted by Mr. David Mpanga and Mr. Oscar Kambona represented the other 44 respondents.

Before I go into the merits of this petition, let me deal with two procedural matters which in my view were mismanaged at the conferencing stage of the petition and were unfortunately overlooked by the Court till after it was too late to do anything to correct the errors.

The first one is that at the end of his full submissions on behalf of the respondent, Mr. Kabatsi raised as his sixth point of argument a matter that, in my view, should have been raised as a preliminary point of law shortly before the hearing of the petition on merits began. He submitted that matters raised by the petitioners in this petition are not matters requiring constitutional interpretation within the meaning of article 137(1) of the Constitution. In his view, they concerned the enforcement of constitutional rights which could be dealt with by the High Court under article 86(1) (a) of the Constitution and section 60 of the Parliamentary Elections Act 2005. As the matter seems to have taken the petitioners by surprise, it did not attract sufficient response from their counsel. We held the view that the manner in which the matter was raised was an ambush to the petitioners but being a point of law, we agreed to entertain the matter giving the petitioners opportunity to respond. Mr. David K. Mpanga's response was that under the jurisdiction of this court conferred by article 137(1) of the Constitution, this court had the power to consider whether article 80(4) as amended applied to the respondent, which was a matter of constitutional interpretation.

In my judgment, the gist of the complaint in this petition, as I propose to show below, was

(a) whether section 18(d) of the Constitution (Amendment) Act No 11 of 2005 was consistent with the 1995 Constitution and

(b) Whether act of the Electoral Commission of nominating and declaring the respondent's as elected in the February 2006 Parliamentary Elections was valid or not. In my view, this falls within the jurisdiction conferred on this court by article 137(3) which states:-

> **137(3) A person who alleges that-**
>
> (a) **an Act of Parliament or any other law of anything in or done under the authority of any law: or**
>
> (b) **any act or omission by any person or authority,**
>
> **is inconsistent with or in contravention of a provision of this Constitution, any petition the Constitutional Court for a declaration to that effect, and for redress where appropriate."**

In the agreed issues, it was agreed that this court should determine whether the act of nominating the respondents as candidates and declaring them as elected contravened article 80(4) of the Constitution. Further, this court is being asked to declare whether the amendment applied to the Ministers and Army members of Parliament whose offices and tenure are set out in the

Constitution. Such a declaration involves the interpretation of the Constitution. Treating this issue as a preliminary point of objection to the jurisdiction of this court, as we should have done in the first place, I find no merit in it and I would reject the objection.

The second procedural matter, which is more relevant to the merits of the whole petition, is the manner the issues (stated above) in this petition were framed and presented to us at the trial of the petition. There is confusion which was brought about by the fact that the petitioners based their case on a false assumption that article 80(4) as introduced by section 18(d) of the Constitution (Amendment) Act No 11 of 2005 was already part and parcel of the 1995 Constitution. In my opinion, section 18 of the Constitutional (Amendment) Act No.11 of 2005 is part of an Act of Parliament which was enacted with intention to effect an amendment to Article 80 of the Constitution by adding a new Clause (4) thereon. Before it becomes part of our 1995 Constitution, if challenged, it has to be tested and pass the test laid down in Article 2 of the Constitution thus:-

> **"2. (1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.**
>
> (2) **If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void."**

If the entire amendment Act or any part of it is found to have been irregularly enacted (i.e. not in accordance with the 1995 Constitution) or contravenes or is inconsistent with any provision of the 1995 Constitution, then this court has the power under Article 137 of the Constitution to nullify such an amendment Act or any part thereof to the extent of the contravention or inconsistency.

This was the main issue in the celebrated decision of the Supreme Court in **Ssemwogerere and 2 others vs. The Attorney General**, **Constitutional Appeal No.1 of 2001**. In the Constitutional Court where the appeal originated, the petitioners challenged the validity of the Constitutional (Amendment) Act, No.13 of 2000 on the grounds that in purporting to amend Article 97 of the Constitution, Parliament indirectly and/or by infection amended other provisions of the Constitution, not expressly mentioned, but which required to be amended under a special

procedure prescribed by Article 259(1) of the Constitution, which was not followed in the purported amendment. By a majority of 4 to 1, the Constitutional Court held that once it is established that Parliament followed a correct procedure in enacting an amendment to the Constitution, then that amendment became part and parcel of the Constitution and it was no longer open to this court to interpret its provisions against the other provisions of the Constitution. In their view, Article 137 of the Constitution did not confer such a power on the Constitutional Court. In a unanimous decision of the Supreme Court on appeal, the court held as per Kanyeihamba, JSC:-

> **"In my view, an Act of Parliament which is challenged under Article 137(3) remains uncertain until the appropriate court has pronounced itself upon it. The Constitutional Court is under a duty to make "declaration", one way or the other. In denying that they had jurisdiction to make a declaration on this petition, the learned majority Justices of the Constitutional Court abdicated the function of the court."** [Emphasis mine]

His Lordship Justice Oder, JSC concurred in the following terms:-

> **"The Constitutional Courts jurisdiction to declare an Act of Parliament inconsistent with or in contravention of the Constitution goes together with the one for interpretation of the Constitution. It is unlimited. The Constitutionality or otherwise of an Act of Parliament must be construed vis-à-vis Constitution. The court's powers in Article 137(3)(a) must be applied together with the one in Article 137(1). In my view, these provisions apply to any Act of Parliament which a person alleges is inconsistent with or contravenes the Constitution. For purposes of exercising this jurisdiction, by the Constitutional Court, there can be no distinction between an Act passed to amend the Constitution or an Act passed for other purposes."**

Justice Tsekooko, JSC did not mince words:-

> **"For the foregoing reasons, I think that the decision of the Constitution in Dr. Rwanyarare & Wegulo vs Attorney General (Petition No.5 of 1995) in so far as the Constitutional Court held that it has no jurisdiction to interpret one provision of the Constitution against another presents a wrong**

approach to our principles of Constitutional interpretation and in my opinion, that case was wrongly decided and represents a wrong view of the law which should not be followed."

It is now my considered view that before this court considered whether the 44 respondents or indeed any other person was required to resign at least 90 days prior to their nomination as candidates in 2006 general election, it was incumbent upon us to first decide whether section 18(d) of the Constitution (Amendment) Act No.11 of 2005 effected a valid amendment to Article 80 of the Constitution. Though the validity of section 18(d) of the Constitution (Amendment) Act No.11 of 2005 was not being challenged by the petitioners, throughout his arguments, Mr. Kabatsi learned counsel for the 2nd to 45th respondents forcefully argued that the amendment was not consistent with articles 116, 175, 257 and 289 of the Constitution. In doing so, he put in question the validity of the constitutional amendment and the issue could not any longer be ignored even if it was not originally framed as a separate issue. This, in my view, should have been the first issue in this petition. Instead, both counsel and ourselves assumed that the proposed Article 80 (4) had already become part of the 1995 Constitution and therefore beyond challenge.

The question arises as to whether this court should have ordered amendment to the issues agreed upon by counsel or whether at this stage, this court can base its judgment on an issue that was not framed at the trial. My answer to both these questions is in the affirmative.

First, Order 13 Rule 5(1) of the Civil Procedure Rules (Applicable in constitutional petitions) states:-

"The court may at any time before passing the decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between shall be so made or framed."

Furthermore, Rule 2 of the same Order provides:-

"Where issues of law and fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed on issues of law only, <u>it shall try those issues first,</u> and for that purpose may, if it thinks fit

postpone the settlement of the issues of fact until after the issues of law have been determined." [Emphasis supplied by me]

I must hasten to add that where a court deems it necessary to frame a new issue based on new facts and evidence, it is imperative that before the court does so, the parties be given opportunity to challenge the evidence and address the newly framed issue. See **Oriental Insurance Brokers Ltd vs Transocean (U) Ltd, Civil Appeal No.55/95.** However, where the issue is purely an issue of law, it may not always be possible for the parties to address it at the trial. If brought to the attention of court, the court could recall the parties to address the issue or proceed to determine it if no injustice will be occasioned. In the instant case, the issues involved are only points of law and the validity of section 18(d) Act No.11 of 2005 was canvassed and addressed by both counsel.

It is my considered opinion that consideration of whether section 18(d) of the Constitutional (Amendment) Act No.11 of 2005 was consistent or contravened any part of the Constitution, could have, if considered first, disposed of the entire petition. With regret, I think we failed to consider the matter.

Secondly, there are two cardinal principles (relevant to the matter at hand) among others, which a Constitutional Court should always have in mind:-

(a) The rule of harmony requires that the Constitution must be read as an integrated whole and no one particular provision destroying the other, but each sustaining the other.
   - See **Major General Tinyefuza vs Attorney General Constitutional Petition No.12 of 1996** (The judgment of Manyindo, DCJ as he then was)

(b) All provisions of the Constitution concerning an issue should be considered together. This means that provisions bearing upon a particular subject must be brought into focus to be so interpreted in order to effectuate the instrument.

Bearing these principles in mind, it is my considered judgment that no amount of commission or omission, on the part of counsel or the parties should justify the Constitutional Court to refrain from consideration of a Constitutional provision or law or any act, whether framed into an issue or not, in furtherance of the two cardinal principles of Constitutional interpretation I have stated

above. In my judgment, the issue of constitutionality of an Act of Parliament, whether ordinary or intended to amend the Constitution, is always on the table for consideration by this court whether it has been framed into an issue or not. Even if its unconstitutionality is brought to the attention of the court relatively late in the proceedings, the court cannot simply ignore it.

In disposing of this petition, I propose to reframe the issues to be determined as follows:-

(i) ***Did section 18(d) of the Constitution (Amendment) Act No.11 of 2005 effectively amend Article 80 of the Constitution?***

(ii) ***If the answer is in affirmative, did Article 80(4) of the Constitution as amended required the respondents or any other person intending to stand as a Parliamentary candidate in 2006 Election to resign his office in public service.***

(iii) ***Whether the 1st respondent contravened the Constitution by causing the nomination and election of the respondents.***

(iv) ***Whether the petitioners are entitled to any relieves.***

ISSUE NO. ONE

This is about the constitutionality of section 18(d) of the Constitution (Amendment) Act No.11 of 2005 and whether it effectively amended the Constitution by addition of Clause (4) to Article 80 of the Constitution. The impugned amendment reads:-

> **"Article 80 of the Constitution is amended by inserting immediately after Clause (3) the following**
>
> > **'(4) Under the multiparty political system, a public officer or a person employed in any government department or agency of the government or an employee of a local government or any body in which the government has controlling interest, who wishes to stand in a general election as a member of Parliament shall resign his or her office at least ninety days before nomination day."**

On the other hand Article 257(2)(b) of the Constitution provides:-

> **"257(2)(b) a reference to an office in the public service does not include a reference to the office of the President, the Vice-President, the Speaker or**

Deputy Speaker, a Minister, the Attorney General, a member of Parliament or a member of any commission, authority, council or committee established by this Constitution"

Owing to the fact that the petitioners wrongly assumed this amendment to be already part and parcel of our Constitution, they did not address this issue directly. Their main emphasis was that Ministers and Army members of Parliament were included in the phrase **"a person employed in any government department or agency of the government or any body in which the government has a controlling interest."**

Counsel David K. Mpanga cited various common law and local authorities to support his argument that the respondents were "employees" in a government "departments or agencies".

In reply, Mr. Peter Kabatsi submitted that the constitutional amendment, if valid, was not intended to apply to the respondents who were political leaders who were already excepted under article 257(2)(b) of the Constitution.

In his view, the amendment only included:-

(a) "public officers" as defined by article 175 of the Constitution.

(b) Other persons employed in government departments or agencies.

(c) Persons employed in local government councils.

(d) Persons employed in bodies in which government has a controlling interest.

My answer to this issue is in the negative because of the following reasons:-

(1) It was conceded that The Vice President, Ministers and Members of Parliament are not public officers because of the definition of that phrase in Article 257(2)(b) of the Constitution. However, it was contended that they are included in the expression **"or a person employed in any government department or agency or anybody in which the government has controlling interest."**

Looking at the plain language of section 18(d) of the Constitution (Amendment) Act No.11 of 2005, with the provisions of Article 257(2)(b) of the Constitution in mind, it is clear to me

that Parliament intended the amendment to apply to as many civil and public servants in government controlled agencies and departments, except POLITICAL LEADERS. Confirmation for this view could be found in the reports of debates on the amendment contained in the HANSARD referred to in the judgment of my Lord the Deputy Chief Justice. It is very clear from the reports that the honourable members of Parliament were only concerned with civil servants mainly those who were perceived to be using public assets to decampaign the members of Parliament before the official time of campaigning. For example at page 14738 of the Hansard Hon. Musumba stated:-

> **"Mr Chairman I want to seek clarification from the chairman of the committee. First of all, the intention is understood that we are talking about civil servants but I just want to be comforted that what is proposed now cannot be construed to include political leadership as well. I do not understand when we say delete and replace sub-clause (4) to include "a person". What does that mean?"**
>
> **The Chairman: We are dealing with the committee's report. (*Laughter*)"**

Throughout the debate, no one ever addressed the concerns of Hon. Musumba. On the same page Hon. Sabiiti wondered whether Army members of Parliament and Ministers were included in the definition of "public officer or a person working in any Government department". Again that concern was not addressed throughout the debate. It seems to me the Chairman and the House assumed that the definition of those phrases was beyond question and could not include Army members of Parliament and political leaders. I would agree that this is a logical deduction from the plain language of the amendment and the intention of the legislature apparent from the records of the debates on the amendment. But in his contribution to the debate, Hon. Sabiiti on page 14738 raised a pertinent issue. He stated:-

> **"Thank you Mr. Chairman. I have a problem with the definitions of a public officer or a person working in any government department. Does this include army officers and ministers? Because if the reason behind this amendment is to stop public officers from accessing certain facilities, which belong to the public and a minister who has already identified himself in a given political**

party continues using the facilities of the state while on the other side a public officer who is also doing his work as a Government public officer, is stopped from using those resources! It takes me aback. So, we should look at how best to solve it. In my opinion we should not put this restriction. It should be when he is nominated because I was a public officer and I remember this was used against some of the public officers and some members of Parliament wanted to bar people from using public assets and they themselves continued using public assets. I suggest that if we want to bar any public officer or anybody working with the Government or any Government department, it should cover everybody. It should not cover only a section of the society. So I really suggest that we do not insert two or three months, but we leave it at the time of nomination."

Hon. Sabiiti's contribution raised the concern that if the amendment was passed, it would accord unequal treatment to different parliamentary candidates, which is prohibited under Article 21(1) which provides:-

"All persons are equal before and under the law in all spheres of political, economic, social and culturing life and in every other respect and shall enjoy equal protection of the law."

Now, I am quite aware that no one mentioned Article 21(1) of the Constitution, before, during or after the hearing of this petition. I have already stated that I have a duty to construe the Constitution as a whole and I would be failing in my duties if I failed to observe that the amendment in issue, if it excluded the political leaders, as I hold it does, then it is not consistent with Article 21(1) of the Constitution.

First, it allows the political leaders, including Army members of Parliament, not to resign 90 days before nomination whereas all other public officers vying for the same office must resign 90 days before nomination. Secondly, it allows political leaders to use public vehicles and other public assets for campaigning before the campaigns are officially declared opened whereas all other public officers are prohibited from doing so. This Constitution amendment does not pass the test laid down in Article 2(1) of the Constitution (supra). It is therefore null and void.

I do not agree with the petitioners that ministers and army members of Parliament are included in the phrase **"or a person employed in any government department or agency of government or an employee of a local government or any body in which the government has a controlling interest."**

The term "employed" is defined in Halsbury's Laws of England, 4th Ed. 2000 RE ISSUE VOL. 16 page 10 as follows:-

> **"'Employee' means and individual who has entered into or works under, or, where the employment has ceased, worked under, a contract of employment; 'employment', in relation to an employee, means employment under a contract of employment and, in relation to a worker, means employment under his contract; and 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and, if it is express, whether it is oral or in writing"**

The learned author gives characteristics of the relationship of employment at page 12 as follows:-

> **"<u>Characteristics of the relationship:</u> There is no single test for determining whether a person is an employee; the test that used to be considered sufficient, that is to say the control test, can no longer be considered sufficient, especially in the case of the employment of highly skilled individuals, and is now only one of the particular factors which may assist a court or tribunal in deciding the point. The question whether the person was integrated into the enterprise or remained a part from, and independent of, it has been suggested as an appropriate test, but is likewise only one of the relevant factors, for the modern approach is to balance all those factors in deciding on the overall classification of the individual. This may sometimes produce a fine balance with strong factors for and against employed status. Moreover, in many employments the contract will not be discernible just from one document, but will require consideration of several documents, oral exchanges (for example at interview) and subsequent conduct.**
>
> **The factors relevant in a particular case may include, in addition to control and integration: the method of payment; any obligation to work only for that employer; stipulations as to hours; overtime, holidays etc; arrangements for payment of**

income tax and national insurance contributions; how the contract may be terminate; whether the individual may delegate work; who provides tools and equipment; and who ultimately, bears the risk of loss and the chance of profit. In some cases the nature of the work itself may be an important consideration."

The term "employee" and "employer" are also defined in the Employment Act (Cap) 219) Laws of Uganda as follows:-

"'Employee' means any persons employed for wages and includes an apprentice and a domestic servant."

"'Employer' means any person, company, firm or corporation that has entered into a contract of service to employ any other person, and the agent, foreman, manager or factor of that employer, and where a person has entered into a contract of service with the Government, or with any officer on behalf of the Government, the Government officer under whom that person is working shall be deemed to be his or her employer."

In my view, none of these definitions applies to Ministers and Army members of Parliament. Ministers are not "employed" or. "employees" of a government department or agency. They have no contract with any government department or agency. They are appointed at the whims of the President. He alone can and does deploy, not employ them. He can dismiss them on radio and they have no recourse to any law court or authority. He can deploy them to hold one, two or several portfolios or no portfolio at all. He can wake them up at 3 a.m. for duty and he can shift them from right to left (so to say) at any time of the day or night. In my view, theirs is not "employment". It is "deployment".

I hold the view which I stated in the case of Brig **Henry Tumukunde vs Attorney General & Anoth Constitutional Petition No.6 of 2005** that once a soldier takes oath as a member of Parliament, the oath supersedes his oath of office as a soldier. However, for as along as he remains in military uniform, he/she is beholden to the President as Commander-in-Chief. Therefore his "employment" or "deployment" does not differ significantly from that of Ministers.

The second reason why I answer the first issue in the negative is that the amendment introduces so many absurd possibilities which Mr. Kabatsi ably pointed out in detail during his submissions. Even if I was to agree with the petitioners that the amendment was valid and that it applies to Ministers and Army members of Parliament, I would find it difficult to accept that Parliament could have intended it to become part of our beautiful (albeit some defects) 1995 Constitution. Consider the following absurdities:-

(a) The amendment could not have become operational until a law to operationalise it was enacted by Parliament. A law called; **Parliamentary Election Act 2005** was enacted for that purpose. It was assented to by the President on 16th November 2005 and its commencement date is stated to be the 21st November 2006. After the law came into force, the Electoral Commission declared nomination days to be 12 and 13th January 2006. The choice of this date was dictated by the other provisions of the Constitution relating to duration of the 7th Parliament and the Election of the 8th Parliament. For anyone to comply with the amendment to article 80 of the Constitution, one would have needed to resign in the middle of October 2005. By that time, even the Parliamentary Elections Act 2005 was not yet enacted!! How then could anyone have complied with the ninety days compulsory resignation requirement before nomination day!?

(b) If the amendment applied to Ministers and Army members of Parliament as the petitioners tried to impress on us, there would be absolutely no reason for it not to apply to other political leaders like the President and all members of Parliament. If indeed all these political leaders were required to resign ninety days before nomination, this country would have had to do without the Vice President, all the Ministers and members of Parliament from mid October 2005 till May 2006 when a new Parliament would be in place. Did, could, Parliament intend that the country be governed by only the President for up to seven months? Our Constitution ordains a Presidential system of governance. The President has to be assisted by the Vice President and the cabinet. Parliament must be in place to provide the checks and balances to the powers of government. The Constitution does not provide for a vacuum period when the country would be ruled by only one person. Any attempt to amend the Constitution to provide such a vacuum would tantamount to a constitutional coup. It would need very clear language in such constitutional amendment to persuade this court, that such a constitutional coup was

indeed intended. Even if I was able to agree with the petitioners that the amendment applied to all political leaders, which I don't, I would still find it too absurd and a recipe for disaster and I would hold it to be unconstitutional.

(c) In order for a person to be eligible to be elected an Army member of Parliament, one has to be a soldier or a serving officer in the Uganda Peoples Defence Forces (UPDF) in the first place. Any person who ceased to be a member of UPDF would not qualify to be elected. If the impugned amendment to the Constitution required them to resign 90 days before nomination, they would no longer be eligible to be nominated. The requirement would contravene article 78(1)(c) of the Constitution. Could our legislature have intended such an absurd result without using a clear language to that effect? I doubt.

(d) Article 116 of the Constitution provides:-

The office of a Minister shall become vacant -

(a) if the appointment of the holder of the office is revoked by the President; or

(b) if the holder -

(i) resigns;

(ii) becomes disqualified to be a member of Parliament; or

(iii) dies.

These are the only circumstances under which a Minister can vacate office. How then could section 18(d) of the Constitution (Amendment) Act 11 of 2005 include Ministers without amendment to article 116 of the Constitution? This is absurd.

In conclusion, on the first issue as re-framed above, whether you agree with the petitioners that section 18(d) of the Constitution (Amendment) Act No.11 of 2005 applied to Ministers and Army members of Parliament or whether you agree with the respondent that it did not, the conclusion would be the same, that the amendment was unconstitutional and void and did not form part of the 1995 Constitution. This is because it is inconsistent with articles 21(1), 78(1)(c) and 116 of the Constitution. The result would be that nobody was required to resign 90 days before nomination and nobody will be required to do so unless a proper amendment to the Constitution is enacted to that effect.

All the other issues framed above are also answered in the negative. The petition would be dismissed with no orders as to costs. This is because the petition raised a very important issue of public interest.

Dated at Kampala this 04th day of August 2006.
Hon. Justice Amos Twinomujuni
JUSTICE OF APPEAL

JUDGMENT OF S. G. ENGWAU, JA

The petitioners, Darlington Sakwa and Athanasius Rutaroh, brought this petition under Article 137 (1) and (3) (b) of the Uganda Constitution, 1995 and The Constitutional Court (Petitions and References) Rules 2005.

The petition is for public interest, seeking the following declarations and orders:-

"1. A declaration that the nomination of the 2nd to 45th respondents, inclusive, as candidates in the 2006 Parliamentary General Elections was inconsistent with and contravened Article 80 (4) of the Constitution of the Republic of Uganda, 1995, as inserted by section 18 of the Constitution (Amendment) Act 2005.

2. A declaration that the election, declaration and gazetting of the 2nd to 45th respondents, inclusive, as members of the 8th Parliament of the Republic of Uganda in and following the 2006 Parliamentary Article 80(4) of the Constitution of the

Republic of Uganda by reason of their said nominations having been contrary to the express provisions of the same Article."

The petitioners are aggrieved as hereunder:-

(a) **THAT in January 2006 the 1st Respondent nominated all of the Respondents, from the 2nd to 35th Respondents, inclusive, as candidates in the Parliamentary General Elections in various constituencies across the country.**

(b) **THAT in or around January 2006 His Excellency the President of the Republic of Uganda nominated the 36th to the 45th Respondents, inclusive, as candidates in the 2006 Parliamentary General Elections for the 10 seats reserved for the Uganda Peoples Defence Forces as a special interest group.**

(c) THAT the 2006 Parliamentary General Elections, including the election of the 10 members of Parliament for the Uganda Peoples Defence Forces as a special interest group, were held under a multiparty political system.

(d) **THAT at the time of their respective nominations by the 1st Respondent or, in the case of the 36th to the 45th Respondents, His Excellency the President of the Republic of Uganda, all of the Respondents were public officers or persons employed in Government departments or agencies of Government in so far as:**

(i) **The 2nd to the 35th Respondents, inclusive, were Cabinet Ministers or Ministers of State, upon appointment by His Excellency the President of Uganda, holding various portfolios in the Executive and receiving there for emoluments in the form of salaries, allowances and sundry benefits payable directly out of the Consolidated Fund and/or directly out of monies provided by Parliament; while**

(ii) **The 36th to the 45th Respondents inclusive, were all Commissioned officers employed by and serving in various capacities in the Uganda Peoples Defence Forces and affiliated bodies**

(e) **THAT contrary to Article 80 (4) of the Constitution of the Republic of Uganda, 1995,as inserted by section 18 of the Constitution (Amendment) Act No. 11 of 2005, none of the 2nd to 45th Respondents, inclusive, resigned their respective offices at least 90 days before their respective nominations as candidates in the 2006 Parliamentary General Elections.**

(f) **THAT in the premises of the foregoing the election, declaration and gazetting of the 2nd to 45th Respondents as Members of the 8th Parliament of the Republic of Uganda in and following the 2006 Parliamentary General Elections was unconstitutional by reason of their said nominations having been contrary to the express provisions of Article 80 (4) of the Constitution of the Republic of Uganda.**

All the averments in the petition were totally denied by the respondents. They contend that all the respondents are not persons envisaged and affected by the provisions of Article 80 (4) of the Constitution. Article 80 (4) reads:

"(4) Under the multiparty political system, a public officer or a person employed in any government department or agency of the government or an employee of a local government or anybody in which the government has controlling interest, who wishes to stand in a general election as a member of Parliament shall resign his or her office at least ninety days before nomination day."

The respondents further contend that the above clause affects public

officers as defined in Articles 175 and 257 (2) (b) of the 1995 Constitution. It also affects employees in Government departments, local councils, parastatal bodies or corporations. In their

view, it does not affect the 2nd to 45th respondents as alleged and that the petition therefore, be dismissed with costs.

In my view, the amendment in clause (4) of Article 80 should be revisited. If it was the intention of Parliament to exclude the present respondents from resigning 90 days before their nominations and thereafter elections, the amendment should be couched explicitly as the couching of Article 257 (2) (b) of the 1995 Constitution. Leaving the amendment as it is in Article 80 (4), might in future affect even the present respondents on the ground that it is general.

Further, it was argued that Parliament never intended that the 2nd to 45th respondents were persons envisaged and affected by clause 4 of Article 80 as amended due to inadequacy of time for the 2006 Parliamentary General Elections. My humble opinion on that issue is that a level ground should always be put in place on time. Late legislation for elections should not be made a habit to exonerate the Government. Any legislation affecting democratic process ought to be passed early enough to allow free and fair elections. All the aspiring candidates must be equal before and under such a legislation.

As regards reframing of issues, it is trite that parties should be allowed to adduce evidence and address court. See: **Oriental Insurance Brokers Ltd. vs Transocean Ltd., Civil Appeal No. 55 of 1995**. In

the instant case, however, my brother Twinomujuni, JA simply paraphrased the issues based on the submissions of counsels for both parties. I do not see anything wrong with that style of approach.

Lastly, I have read in draft the judgment prepared by Hon. Justice L.E.M. Mukasa-Kikonyogo, DCJ. I concur with it and the orders she proposed. I have got nothing useful to add.

Dated at Kampala this ……4th .. day of ……August……. 2006.

S. G. Engwau

JUSTICE OF THE CONSTITUTIONAL COURT.

JUDGEMENT OF HON JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

Darlington Sakwa and Athanasius Rutaroh petitioned this court in the public interest seeking the following declarations and orders:-

> **"1. A declaration that the nomination of the 2nd to 45th respondents, inclusive, as candidates in the 2006 Parliamentary General Elections was inconsistent with and contravened Article 80 (4) of the Constitution of the Republic of Uganda, 1995, as inserted by section 18 of the Constitution (Amendment) Act 2005.**
>
> **2. A declaration that the election, declaration and Gazetting of the 2nd to 45th respondents, inclusive, as Members of the 8th Parliament of the Republic of Uganda in and following the 2006 Parliamentary General Elections was inconsistent with Article 80 (4) of the Constitution of the Republic of Uganda by reason of their said nominations having been contrary to the express provisions of the Article."**

The petition was brought under Article 137 (1) and (3) (b) of the Constitution of the Republic of Uganda, 1995 and the rules of the Constitutional Court (Petitions for Declarations under Article 137 of the Constitution) Directions S.1.13-15.

It was based on the following grounds:-

(a) **THAT** in January 2006 the 1st Respondent nominated all of the Respondents, from the 2nd to 35th Respondents, inclusive, as candidates in the 2006 Parliamentary General Elections in various constituencies across the country.

(b) **THAT** in or around January 2006 His Excellency the President of the Republic of Uganda nominated the 36th to the 45th Respondents inclusive, as candidates in the 2006 Parliamentary General Elections for the 10 seats reserved for the Uganda Peoples Defence Forces as a special interest group.

(c) **THAT** the 2006 Parliamentary General Elections, including the election of the 10 members of Parliament for the UPDF as a special interest group, were held under a multiparty political system.

(d) **THAT** at the time of their respective nominations by the 1st Respondent or, in the case of the 36th to the 45th Respondents were public officers or persons employed in Government departments or agencies of Government insofar as:

(i) The 2nd to the 35th Respondents, inclusive, were Cabinet Ministers or Ministers of State, upon appointment by His Excellency the President of Uganda, holding various portfolios in the Executive and receiving therefor emoluments in the form of salaries, allowances and sundry benefits payable directly out of the Consolidated Fund and/or directly out of monies provided by Parliament; while

(ii) The 36th to the 45th Respondents inclusive, were all commissioned officers employed by and serving in various capacities in the Uganda Peoples Defence Forces and affiliated bodies;

(e) **THAT** contrary to Article 80(4) of the Constitution of the Republic of Uganda, 1995, as inserted by section 18 of the Constitution (Amendment) Act No. 11 of 2005, none of the 2nd to 45th Respondents, inclusive, resigned their respective offices at least 90 days before their respective nominations as candidates in the 2006 Parliamentary General Elections.

(f) **THAT** in the premises of the foregoing the election, declaration and Gazetting of the 2nd to 45th Respondents as Members of the 8th Parliament of the Republic of Uganda in and following the 2006 Parliamentary General Elections was unconstitutional by reason of their said nominations having been contrary to the express provisions of Article 80(4) of the Constitution of the Republic of Uganda.

In their answer to the petition the respondents denied the allegations in the petition contending that they were not envisaged or covered under the said amendment to the Constitution. In the alternative but without prejudice to the foregoing, the 1st Respondent avers that the Respondents did not breach article 80(4) of the Constitution as the requirements of the said article were at the

time of the nominations for the 2006 Parliamentary Elections, incapable of being legally complied with.

They prayed for dismissal of the petition on ground of its being incompetent and misconceived.

I read in draft the lead judgement of my Lord Kikonyogo-Mukasa, DCJ. I entirely agree that the petition should be dismissed. I have nothing terribly useful to add except one or two comments for emphasis only.

The first is whether or not article 80(4) became part and parcel of the 1995 Constitution when Section 18 of the Constitution (Amendment) Act No. 11 of 2005 came was enacted or came into force.

It is trite there are three requisites for amending a Constitution, namely by:

(1) **Passing an Act of Parliament,**

(2) **The Act repeals, varies or adds to any provision of the Constitution**

(3) **The Act must be passed in accordance with the prescribed provisions of the Constitution.**

The Hansard did not project any erroneous or unconstitutional procedure when the Act was being passed. When the correct procedure is followed, then the amendment becomes part and parcel of the Constitution – **Kasavananda v State of Kerala AIR (1973) SC 1451 (page 1651 paragraph 788)**. If the correct procedure is not complied with, then that Amendment Act does not become part of the Constitution – **Paul Kawanga Ssemwogerere and 2 Others v Attorney General, Constitutional Appeal No. 1 of 2001**. In that case this court is mandated to nullify the Act. Once the amendment has become part of the Constitution this Court has power to construe one provision against another and harmonise them. If it is impossible to harmonise or reconcile the provisions, this has to be pointed out to the authorities with a recommendation. This Court cannot nullify any provision of the Constitution. In this case the complaint was not about the procedure.

On the other hand, if the amendment Act fails to become part and parcel of the Constitution, then this court can nullify such provision on the ground of inconsistency or contravention of the Supreme Law. (Article 2 of the Constitution). I would therefore agree with the learned DCJ's holding on this issue.

Secondly, I had occasion to comment in Constitutional Petition No. 14 of 2005 that though Parliament intended to level the electoral playing field by enacting the amendment (article 80(4)), however, by leaving themselves out including the entire political class as specified under article 257 (2)(b) on the ground that they are not public officers, Parliament was clearly rendering the playing field even more tilted than before. I base this on the sole ground that they are the main players in the electoral field. They are more facilitated by the state than those ordinary officers targeted by article 80(4).

Levelling the field is a necessary basic precept in the entire electoral process as was succinctly put by my Lord Ben Odoki, CJ in **Col (Rtd) Dr. Kizza Besigye v Yoweri Museveni Kaguta, Presidential Election Petition No. 1/2001** (with the concurrence of the full Bench) thus:

> **"To ensure that elections are free and fair… there must be a levelling of the ground so that the incumbents or government Ministers and officials do not have unfair advantage… Fairness and transparency must be adhered to in all stages of the electoral process …"**

The result is that article 80(4) remains irreconcilable and inconsistent with article 1(4) prescribing free and fair elections and which situation does not augur well with transparency, fair play and the rule of Law. This position warrants an appropriate action from the responsible authorities.

I would, however, grant the declarations as ordered in the lead judgement.

Dated at Kampala this ……4th…….. day of …August…… 2006.

A.E.N. MPAGI-BAHIGEINE
JUSTICE OF APPEAL

JUDGMENT OF C.N.B. KITUMBA, JA.

Darlington Sakwa and Athanasius Rutaroh, hereinafter to be referred to as the petitioners, filed this petition in this court under Article 137 (1) (3) (b) of the 1995 Constitution and

under the Rules of the Constitutional Court (Petitions and Reference) Rules, 2005. They are seeking for; -

i) ***A declaration that the nomination of the 2nd to 45th respondents, inclusive, as candidates in the 2006 Parliamentary General Elections was inconsistent with and contravened Article 80 (4) of the Constitution of the Republic of Uganda, 1995, as inserted by section 18 of the Constitution (Amendment) Act 2005;***

ii) ***A declaration that the election, declaration and Gazetting of the 2nd to 45th Respondents, inclusive, as Members of the 8th Parliament of the Republic of Uganda in the following the 2006 Parliamentary General Elections was inconsistent with Article 80(4) of the Constitution of the Republic of Uganda by reason of their said nominations having been contrary to the express provisions of the same Article.***

The petition reads;-

1. *Your petitioners are adult male Ugandans of sound mind, who offered themselves as candidates in the 2006 Parliamentary General Elections for Bungokho South and Rujumbura Constituencies respectively, who have an interest in and are affected by the following matters being inconsistent with the Constitution by reason whereby you petitioners are aggrieved:*

(a) *THAT in January 2006 the 1st Respondent nominated all of the Respondents, from the 2nd to 35th Respondents, inclusive, as candidates in the 2006 Parliamentary Elections in various constituencies across the country;*

(b) *THAT in or around January 2006 His Excellency the President of Uganda nominated the 36th to 45th Respondents inclusive, as candidates in the 2006 Parliamentary General Elections for the 10 seats reserved for the Uganda Peoples Defence Forces as a special interest group.*

(c) *THAT the 2006 Parliamentary General Elections, including the election of the 10 members of Parliament for the Uganda Peoples Defence Forces as a special interest group, were held under a multiparty political system.*

(d) *THAT at the time of their respective nominations by the 1st Respondent or, in the case of the 36th to the 45th Respondents, His Excellency the President of the Republic of Uganda, all of the respondents were public officers or persons employed in Government departments or agencies of the Government insofar as:*

i) The 2nd to 35th Respondents, inclusive, were Cabinet Ministers or Ministers of State, upon appointment by His Excellency the President of Uganda, holding various portfolios in the Executive and receiving therefor emoluments in form of salaries, allowances and sundry benefits payable directly out of the Consolidated Fund and/or directly out of monies provided by Parliament; while.

ii) *The 36th to the 45th Respondents inclusive, were all commissioned officers employed by and serving in various capacities in the Uganda Peoples Defence Forces and affiliated bodies;*

(e) *THAT contrary to Article 80(4) of the Constitution of the Republic of Uganda, 1995, as inserted by section 18 of the Constitution (Amendment) Act No. 11 of 2005, none of the 2nd to 45th Respondents, inclusive, resigned their respective officers at least 90 days before their respective nominations as candidates in the 2006 Parliamentary General Elections.*

(f) *THAT in the premises of the foregoing the election, declaration and Gazetting of the 2nd to 45th Respondents as members of the 8th Parliament of the Republic of Uganda in and following the 2006 Parliamentary General Elections was unconstitutional by reason of their said nominations having been contrary to the express provisions of Article 80(4) of the Constitution of the Republic of Uganda.*

The petition is supported by the affidavits of the two petitioners.

In answer to the petition all respondents denied the petitioner's claims and swore affidavits in support of the answer.

In a nutshell all respondents No. 2-45, averred that the provisions of Article 80(4) of the Constitution were not applicable to them. In the premise, their nomination and inclusion as candidates for the Parliamentary General Elections was not inconsistent and did not contravene the Constitution. They stated further, that their gazetting as members of the 8th Parliament did not contravene article 80(4) of the Constitution. In the premise the 1st respondent did not do anything wrong.

The following is background of the petition. On the 23rd February 2006, Parliamentary General Elections were held under the multiparty political system of government. The 2nd to the 45th respondents, inclusive, were elected to the 8th Parliament in the said elections. All the respondents were gazetted by the 1st respondent as duly elected members of the 8th Parliament.

During the hearing of the petition the learned counsel Mr. David K. Mpanga and Mr. Frederick Mpanga represented the petitioners. Learned Senior Counsel, Mr. Peter Kabatsi together with Mr. David Mpanga appeared for the respondents 2nd to 45th and learned counsel Ms Christine Kahwa, appeared for the 1st respondent.

The following issues were agreed upon by the parties;-

1. **Whether the nomination of the 2nd to 45th Respondents as candidates in the 2006 Parliamentary Elections contravened article 80(4) of the Constitution.**

2. **Whether the 2nd to 45th Respondents were required to resign at least 90 days prior to their nomination as candidates in the 2006 Parliamentary elections.**

3. **Whether, if issues 1 and/or 2 are answered in the affirmative, the election of all or any of the Respondents contravened article 80(4) of the Constitution.**

4. **Whether the petitioners are entitled to the relief sought.**

I have had the benefit of reading the draft judgments of my brother and sister Justices on the coram. I agree with their conclusions except that of Hon. Justice A. Twinomujuni, JA on the point of framing issues.

I would like to make the following comment on the matter. The petition as it stands the petitioners' counsel and the bench assumed that Article 80(4) is part of the Constitution. The petitioners never prayed for its nullification.

During the course of writing our judgments, our attention was drawn by our brother A. Twinomujuni, JA to the legal position that in as far as the said article was inconsistent with articles 21(1), and 78(1)(c) and 116 of the Constitution, it could not be part of the Constitution. I respectfully agree, as I am bound to do so, with the Supreme Court's holding in Paul Kawanga Semwogerere and another vs Attorney General, Constitutional Appeal No. 1/2002**. The Supreme Court held that the Constitution empowers Parliament to amend any of its provisions, but does not empower it to make any law that is inconsistent with any of its provisions.**

That notwithstanding, Order 13 of the Civil Procedure Rules envisages that issues should be framed in the course of trial and tried by way of adducing evidence and submissions on points of law. This is in line with article 28(1), of the Constitution, which provides for a fair trial in all civil and criminal proceedings before court. To do otherwise, would contravene the aforesaid constitutional provision. The proposed issue by my brother Justice A. Twinomujuni, JA. is in effect challenging an act of Parliament which the petitioners were not challenging in the petition. In that regard the Attorney General who represents the Government has to be made a party to the petition so as to defend the actions of Parliament and the Executive. This was not done. Thus this court cannot cure it by framing an issue that was not agreed upon by parties during the trial.

Further, I would like to make the following comments. The 4th respondent who is Vice-President and the 2nd to 35th respondents who were either full ministers or ministers of state are not employees of government. They are not civil servants but political leaders of government. The oath of allegiance, which they take in that capacity, is allegiance to the Republic of Uganda and not the President. The oath is in the following terms: -

> **"I…swear in the name of the Almighty God/solemnly affirm that I will be faithful and bear true allegiance to the Republic of Uganda and that I will preserve, protect and defend the Constitution. [So help me God]"**

I am of the considered view that this oath contains a commitment to the duties of every citizen, to be royal to Uganda and to protect and defend the Constitution, as stated in XX1X- National Objectives and Directive Principles of State Policy and article 3 of the Constitution.

The provisions of Article 80(4) of the Constitution would apply to the 35th-45th respondents who are commissioned officers in the Uganda Peoples Defence Forces, which is, in my view, department of government. However, article 78(1)(c) of the 1995 Constitution provides for the army as a special interest group. It provides as follows:-

> **"78(1) Parliament shall consist of-**
> **a)……..**
> **b)……..**
> **c) such members of representatives of <u>the army</u>, youth, workers, persons with disabilities and other group as Parliament may determine; and"**
> **(***The underlining is mine.)*

From the above it is clear that Article 80(4) clearly contradicts article 78 (1)(c) of the 1995 Constitution.

However, the qualification of an army representative to Parliament is that he or she is a member of the army. It is obvious that the legislature did not intend article 80(4) to apply to representatives of the army.

In the result I would dismiss the petition and order that each party bears its own costs.

Dated this 08th day of August 2006.

C.N.B. Kitumba

JUSTICE OF APPEAL