

**THE REPUBLIC OF UGANDA**

**IN THE SUPREME COURT OF UGANDA**

**AT MENGGO**

**(CORAM: ODOKI CJ, ODER, TSEKOOKO, KAROKORA, MULENGA,  
KANYEIHAMBA, J.J. S.C, AND OGOOLA, AG. JSC)**

**CONSTITUTIONAL APPEAL NO.3 OF 2004**

**BETWEEN**

**THE ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::::::**

**APPELLANT**

**AND**

**1. PAUL K. SSEMOGERERE}**

**2. HON ZACHARY OLUM }::::::::::::::::::::::::::::::::::::**

**RESPONDENTS**

*(An appeal from the decision of the Constitutional Court of Uganda at Kampala (Okello, Mpagi-Bahigeine, Engwau, Twinomujuni and Kitumba JJA,) dated 25th June 2004, in Constitutional Petition No. 3 of 2000)*

**JUDGMENT OF THE COURT**

This is an appeal against the decision of the Constitutional Court of Uganda dated 25<sup>th</sup> June 2004, whereby the petition filed by the respondents challenging the validity of the Referendum (Political Systems) Act 2000, was granted, and the Act was declared void.

The respondents alleged in the petition that they were affected and aggrieved by the following matters being inconsistent with the Constitution:

"(a) *That the Referendum (Political Systems) Act 2000 (the Act) declared passed by the Parliament of Uganda on 7th June, 2000, was passed in contravention of Article 90 (1) and (3) (a) and (e) of the Constitution of Uganda and Rules 99 and 100 of the Rules Procedure of the Parliament of Uganda in that the Bill was neither discussed by the relevant Committee of Parliament or were recommendations thereon duly made.*

(b) *That Section 2 of the Act is calculated to confer power upon Parliament to make the Political Systems Referendum law outside the time prescribed under Article 271 (2) of the Constitution thus effecting an amendment of Article 271 (2) without following the Constitutional Procedures laid down in Articles 259, 260 and 261 and as such the provisions of Section 2 are in contravention of those Articles of the Constitution.*

(c) *That the passing of the Act on 7th June, 2000 being just about one year before the expiry of the term of the first Parliament elected under the 1995 Constitution, was in contravention of Article 271 (2) of the Constitution, and deprives the voters including the petitioners of their right thereunder.*

(d) *That in contravention of Article 75 of the Constitution, the Act promotes and establishes one political party, the Movement, to the extent that the Act failed to comply with Articles 73 of the Constitution but instead incorporated the Electoral Commission Act, No. 3 of 1997 and the Parliamentary Election (Interim Provisions) Statute No. 4 of 1996 which deny political parties recognised under Article 269 in the referendum prescribed under Article 271 of the Constitution and in consequence the Act is inconsistent with, and is in contravention of, Articles 20, 21, 29 (1) (a), (b), (d) and (e), 43 (2) (a), and (c), 73 and 269, of the Constitution and clauses (iv), (v) and (vi) of the National Objectives and Directive Principles of State Policy.*

(e) *That the omission by Parliament to enact the Political Organisations Bill under Article 269 allowing political party activities has so thoroughly corrupted the democratic process that the fundamental right to free and fair elections cannot be provided in the Referendum in contravention of Article 69 of the Constitution.*

(f) *That Section 27 and the whole Act is inconsistent with Article 271 of the Constitution in that contrary to the Provisions of Article 271 the Act is parallel to*

*the Referendum and Other Provisions Act, 1999 which by the 7th June, 2000 was still on the Statute books of Uganda unrepealed by Parliament*

*(g) That to the extent that the Act has the intendment to nullify the decisions of the Supreme Court of Uganda in Constitutional Appeal No. 1 of 2000 between the Petitioners and the Attorney General and to interfere with the trial of Constitutional Petition No. 3 of 1999 between the same parties, the Act was passed in contravention of Articles 28, 92 and 128 (2) of the Constitution.*

*(h) That the Act is further unconstitutional in that it violates the obligations of Uganda to respect the Fundamental Rights to free speech, free and fair elections, freedom of association and freedom of assembly embodied in various International Human Rights Convention to which Uganda is a party or with which Uganda is otherwise obligated to comply and in the premises the Act is in contravention of Articles 20, 52 (h) and 286 of the Constitution and Clause XXVIII of the National Objectives and Directive Principles of State Policy of the Constitution."*

The respondents stated further that by reason of the matters stated in paragraph 1 (a), (b), (c), (d), (e), (f), (g), and (h) above, the Referendum (Political Systems) Act 2000 is unconstitutional and must be struck down as null and void.

The respondents prayed for the following declarations:

*"(i) That the passing of the Referendum (Political Systems) Act 2000 by Parliament in one day, 7<sup>th</sup> June, 2000, without first referring it to the relevant Standing Committee of Parliament was inconsistent with Article 90 (1) and (3) of the Constitution.*

*(ii) That the enactment of a Political Systems Referendum law which denies political parties of the Constitutional right to participate in the referendum to choose a political system under Article 271 but instead institutes the 'Movement' as*

*the only recognised political system before the Referendum is held and in contravention of Articles 20, 21, 29, 73, 75 and 269 of the Constitution is null and void and ineffectual.*

- (iii) That Parliament was incompetent to enact the Referendum (Political Systems) Act 2000 upon expiry of the time prescribed by the Constitution and thereby reduce the time allowed for canvassing, the law so enacted is null and void.*
  
- (iv) That the passing of the Referendum (Political Systems) Act 2000 was outside the competence of Parliament to the extent it was calculated to alter the judgment or decisions of the Courts between the petitioners and the Government.*
  
- (v) That the Referendum (Political Systems) Act 2000 is a colourable legislation whose objectives and effect is to outlaw Political Organisations permanently except the Movement political organisation and institute a one party State and consequently the Act is in contravention of the Constitution."*

The petition was accompanied by affidavits sworn by each of the respondents and one other affidavit sworn by Hon. Daniel Omara Atubo, in support of the petition.

The appellant filed an answer to the petition in which he stated that both the Referendum (Political Systems) Act 2000 and the referendum which was held pursuant to the Act were enacted and organised in accordance with the Constitution. The answer to the petition was supported by the affidavits sworn by Mr. Joseph Matsiko, Senior State Attorney and the Rt. Hon. Edward K. Ssekandi, Speaker of Parliament.

The petition, which was filed on 22nd June 2000, was not heard until 28<sup>th</sup> April 2004, over three years after the referendum on political systems had been held on 29<sup>th</sup> June 2000. At the hearing of the petition, the following issues were framed for determination:

- "1. Whether or not the Referendum (Political Systems) Act, 2000 is law and can be challenged.**
  
- 2. Whether or not the procedures applied in enacting the Referendum (Political Systems) Act 2000 were consistent with the procedures prescribed under the Constitution of Uganda.**
  
- 3. Whether or not the Act was made in contravention of Article 271 of the Constitution of Uganda.**
  
- 4. Whether or not the absence of a law regulating the activities of political organisations as provided under Article 269 of the Constitution contravened Article 69 by perpetuating a political environment under which the people of Uganda could not make a free and fair choice of the political system as to how they should be governed.**
  
- 5. Whether or not any relief should be granted."**

After hearing the petition, the Constitutional Court, by a unanimous decision allowed the petition with costs to respondents and made the following declarations:

**"(a) The passing of the Referendum (Political Systems) Act 2000 by Parliament on 7<sup>th</sup> June 2000 was in contravention of Articles 89, 90 (1) and (3) of the Constitution for failure to follow the voting procedure set out in Article 89 and failure to refer the Bill to the relevant Standing Committee of Parliament as prescribed in the Constitution.**

**(b) Holding the referendum under the Referendum (Political Systems) Act 2000 before passing a law under Article 269 to set free Political Organisations: contravened Article 69.**

**(c) Parliament had no authority to pass the Referendum (Political Systems) Act 2000 after the expiry of the period stated in Article 271 (2), without first amending that provision of the Constitution."**

The appellant being aggrieved by the above decision has appealed to this Court on fourteen grounds of appeal.

During the hearing of this appeal, the appellant was represented by Hon. Amama Mbabazi, Attorney General, assisted by Mr. Joseph Matsiko, Principal State Attorney. The respondents were represented by Mr. G.S. Lule, assisted by Mr. Joseph Balikuddembe.

At the commencement of the hearing Hon. Amama Mbabazi indicated to the Court that he would abandon the first ground of appeal which complains that the learned Judges of the Constitutional Court erred in law and in fact in not writing a judgment of the court. At the conclusion of his submissions, Hon Mbabazi informed the Court that he had already covered ground 12 and he would not argue ground 13.

These grounds are as follows:

***"12. The learned Judges of the Constitutional Court erred in law and in fact in failing to evaluate the evidence on record and thereby came to wrong conclusions, and decisions;***

***13. The learned Judges of the Constitutional Court erred in law and in fact being biased against the Respondent and thereby came to wrong conclusions."***

We think that the learned Attorney General took the right course of action on these grounds.

The remaining grounds were argued by Counsel for the appellant in five batches, as follows:

- (a) Grounds 2 and 3 together;
- (b) Grounds 4, 7 and 8 together;
- (c) Grounds 9,10 and 11 together;
- (d) Grounds 5 and 6 together; and
- (e) The rest of grounds separately.

We heard this appeal from 9th to 11th August 2004 and we reserved our judgment to be given on notice. In view of the urgency and importance of the issues involved in the appeal, we have found it appropriate to announce our decision in the appeal and reserve the detailed reasons for our decision, to be given later on notice.

In rendering our decision we propose to adopt the same approach with regard to the consideration of the grounds of appeal in batches as adopted by the learned Attorney General, with slight variation. We shall also alter the order of considering the batches by considering grounds 4,7 and 8, after grounds 5 and 6, and grounds 9, 10 and 11 in that order. Finally we shall deal with the relief of declaration separately.

### **Grounds 2 and 3:**

The 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal state as follows:

***"2. The learned Judges of the Constitutional Court erred in law and in fact in holding that the expired Referendum (Political Systems) Act, 2000 can be challenged as being unconstitutional;***

***3. The learned Judges of the Constitutional Court erred in law and in fact in hearing and deciding on a Petition challenging a non-existing dispute on the basis of a non-existing law."***

The Referendum (Political Systems) Act No.9 of 2000 was enacted as an Act of Parliament and was in force on 22<sup>nd</sup> June 2000, when the respondents filed a petition in the Constitutional Court, alleging that the Act was passed in contravention of diverse provisions of the Constitution. The subsequent expiry of the Act, after its purpose was accomplished, did not erase its effects, nor did it extinguish the cause of action to which the enactment gave rise. The Constitutional Court was seized of a live and existing dispute and did not err in holding that the Act can be challenged in Court under



Article 137 of the Constitution. We find no merit in grounds 2 and 3, which must fail.

**Grounds 5 and 6:**

Grounds 5 and 6 are that:

**"5. The learned Judges of the Constitutional Court erred in law and in fact in holding that the Referendum (Political Systems) Act, 2000 was passed in contravention of Article 271 (2) of the Constitution.**

**6. The learned Judges of the Constitutional Court erred in law and in fact in holding that the Referendum (Political Systems) Act, 2000 amended Article 271 (2) of the Constitution."**

Under its Transitional Provisions in Chapter 19, the Constitution commands Parliament under Article 271, to enact laws to give effect to the provisions in that Article. The laws to be enacted were to ensure *inter alia* that -

- Two years before the expiry of the term of the first Parliament elected under the Constitution any person is free to canvass for public support for a political system of his or her choice for purposes of a referendum, as provided in clause 2 of that Article;

- During the last month of the fourth year of the term of the first Parliament, a referendum is held to determine the political system the people of Uganda wish to adopt.

The term of the first Parliament commenced on 2<sup>nd</sup> July 1996 and expired on 1<sup>st</sup> July 2001. The time by which every person was to be free to canvass for a political system of his or her choice, i.e. two years before expiry of that term, as provided in Article 271(2), was 2<sup>nd</sup> July 1999, and the last month of the fourth year of the said term was June 2000. According to its long title, the Referendum (Political Systems) Act No.9 of 2000, was enacted "**to make provision for the holding of the referendum required to be held under article 271**". The passing of the Act on 7<sup>th</sup> June 2000, therefore, was in contravention of, and inconsistent with Article 271(2) because, contrary to the time prescribed in that Article, the Act was passed long after it was due, and it sought to abridge the period for canvassing for the purposes of the referendum. The provisions of the Act in section 2, to give the Act retrospective effect, and in section 29 to validate actions taken and statutory instruments made in good faith could not cure the invalidity of the Act. We therefore hold that the Constitutional Court did not err in holding that the Act was passed in contravention of Article 271(2) of the Constitution. Grounds 5 and 6 must also fail.

#### **Grounds 9,10 and 11:**

Grounds 9, 10 and 11 are framed as follows:

***"9 The learned Judges of the Constitutional Court erred in law and in fact in holding that a Committee of the whole House is not a Standing Committee of Parliament;***

10. ***The learned Judges of the Constitutional Court erred in law and in fact in holding that the passing of the Referendum (Political Systems) Act, 2000 contravened Article 90 of the Constitution;***

11. ***The learned Judges of the Constitutional Court erred in law and in fact in holding that the voting method adopted by Parliament in passing the Referendum (Political Systems) Act, 2000 contravened Article 89 of the Constitution."***

We find no merit in ground 9. The Constitutional Court was right in holding that the Committee of the Whole House is not a Standing Committee of Parliament. Though it may be permanent, it does not possess the characteristics of a Standing Committee as specified in Article 90 (2) (a) of the Constitution. Ground 9 therefore fails.

However, there is merit in grounds 10 and 11. First, it is our considered opinion that the Constitutional Court erred in holding that the passing of the Referendum (Political Systems) Act 2000 contravened Article 90 by reason of the omission to refer the Bill for that Act, for scrutiny and recommendations by any Standing Committee. Parliament has power under Article 79 (1) to make laws on any matter for the peace, order, development and good governance of Uganda. We find nothing in Article 90, which makes it mandatory for Parliament to refer a Bill to a Standing Committee before exercising that power. In our view, the provision in Article 90 (3) that makes it a function of Standing Committees to discuss and make recommendations on all Bills laid before Parliament, only empowers Standing Committee to do so in the course of assisting Parliament to discharge its functions efficiently. The provision cannot be construed as a restriction on, nor as providing a condition precedent for Parliament in the exercise of its legislative power.

Secondly, with regard to the method of voting in Parliament, we find that the Constitutional Court erred in holding that Parliament contravened Article 89 in passing the said Act. It appears that the Constitutional Court misconstrued the decision of this Court in Constitutional Appeal No.1 of 2000: **P.K.Ssemoaerere & Two Others vs. Attorney General.** We reiterate what the learned Chief Justice said therein: -

***"....the procedure provided in Article 257 A does not apply to the amendment of the Constitution where a two-thirds majority of all Members of Parliament with voting rights is required to pass such amendment. The procedure of voting by "Ayes" and "Noes" is incapable of providing accuracy and certainty that the necessary numbers of Members of Parliament required to pass such important legislation have been obtained. The procedure may be applicable in deciding questions where only simple majority of Members of Parliament present and voting is required in non-contentious matters, as provided under Article 89 (1) of the Constitution."***

(underlining supplied)

Accordingly, grounds 10 and 11 succeed.

**Grounds 4, 7 and 8:**

Grounds 4, 7 and 8 are as follows:

*"4. The learned Judges of the Constitutional Court erred in law and in fact in holding that the Referendum which was held on 29<sup>th</sup> June, 2000 was invalid;*

7. *The learned Judges of the Constitutional Court erred in law and in fact in holding that the 2000 Referendum on choice of Political Systems was held in contravention of Article **69** of the Constitution.*

8. *The learned Judges of the Constitutional Court erred in law and in fact in holding that the people of Uganda in a referendum held on 29<sup>th</sup> June 2000 never adopted a political system under Article 69 of the Constitution;"*

On the face of it, the question whether the referendum held on 29<sup>th</sup> June 2000 was valid or invalid was not expressly raised in the petition, which was filed before the referendum was held, nor were the pleadings amended at anytime subsequently to expressly include it. Consequently, the question did not expressly feature among the framed issues. However, in our view, it was implicit in the pleading in paragraph 1 (e) of the petition, wherein it was alleged that omission to enact a law allowing political party activity would inhibit the holding of a free and fair referendum and thereby contravene Article 69. This led to framing of the fourth issue, which reads thus -

*"(d) Whether or not the absence of a law regulating the activities of political organisations as provided under Article 269 of the Constitution contravened Article 69 by perpetuating a political environment under which the people of Uganda could not make a free and fair choice of the political system as to how they should be governed."*

Clearly, in answering this issue it was inevitable to consider if the referendum held on 29<sup>th</sup> June 2000 contravened Article 69. Accordingly, we hold that although it was not expressly framed as an issue, the question

was properly before the Constitutional Court, and that the court was not in error to consider and make a decision on it.

We have considered if, in absence of a valid law passed pursuant to Article 271(4), the referendum can be construed as validly held on authority of Articles 69 and 271(3). Article 69 generally entrenches the right of the people of Uganda to adopt a political system of their own choice, while Article 271(3) fixed the period in mandatory terms, when they would for the first time exercise that right in a referendum. In our view, it could be so construed if the referendum was free and fair in compliance with the stipulation in Article 69. The Constitutional Court found that because of the legal regime prevailing at the material time, political parties were not free to canvass for the multiparty political system to which they subscribed, and concluded that the referendum held on 29<sup>th</sup> June 2000 could not have been free and fair as required by Article 69. While we would not fault that finding as a postulate, we hold that it was not a proper basis for granting the relief of the declaration sought. Notwithstanding the uncontradicted affidavit evidence of Hon. Zachary Olum to the effect that he and other members of the Democratic Party were, on a number of occasions and in diverse places, prevented by the police from holding public meetings, the actual conduct of the referendum and the results thereof were not challenged nor inquired into to determine if it was, or was not free and fair. As a consequence of the referendum, the movement political system was retained in place, and the affairs of State have been conducted on that basis for over four years. To declare the referendum a nullity would have far reaching consequences. In our view, these were compelling circumstances in respect of which the Constitutional Court ought to have exercised its discretion to decline granting the second declaration. To the extent that grounds 4, 7 and 8 relate to the second declaration, they succeed.

**Ground 14:**

Ground 14 states:

*"14 The learned Judges of the Constitutional Court erred in law and in fact in holding that the doctrine of prospective over-ruling could not apply to the petition."*

In view of our decision on the foregoing grounds, we do not find it necessary to give a decision on this ground.

In the result, by unanimous decision, this appeal partially succeeds. **Declarations and orders.**

1. In view of our holding on grounds 9,10 and 11, the first declaration made by the Constitutional Court, to the effect that the Referendum (Political Systems) Act 2000 contravened Articles 89 and 90, cannot stand. We set it aside.

2. In view of our holding on grounds 5 and 6, the third declaration made by the Constitutional Court is upheld but we modify it to read thus: -

*"The enactment of the Referendum (Political Systems) Act 2000 on 7<sup>th</sup> June 2000 was inconsistent with provisions of Article 271(2) and rendered that Act null and void."*

3. In view of our holding in respect of grounds 4, 7 and 8 we set aside the second declaration made by the Constitutional Court to the effect that the holding of the referendum contravened Article 69, and substitute it with an order declining to make a declaration in that regard.

4. We order that each party bears its costs of this appeal but the respondents get half of the costs in the Constitutional Court.

***Dated at Mengo this 2<sup>nd</sup> day of September 2004.***

B J Odoki  
CHIEF JUSTICE

A H O Oder  
JUSTICE OF SUPREME COURT

J W N Tsekooko  
JUSTICE OF SUPREME COURT

A N Karokora  
JUSTICE OF SUPREME COURT

J N Mulenga  
JUSTICE OF SUPREME COURT

G W Kanyeihamba  
JUSTICE OF SUPREME COURT

J M Ogoola  
AG JUSTICE OF SUPREME COURT