THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, C.J., TSEKOOKO, MULENGA, KANYEIHAMBA, KATUREEBE J.J.S.C., ENGWAU AND BYAMUGISHA AG.J.J.S.C)

CONSTITUTIONAL APPEAL NO. 2 OF 2006

BETWEEN

BRIGADIER HENRY TUMUKUNDE ::::::::::::::::::::: APPELLANT

AND

1. THE ATTORNEY GENERAL
2. ELECTORAL COMMISSION :::: ::::::::::::::: RESPONDENTS

(Appeal arising from the judgment and orders of the Constitutional Court (Mukasa- Kikonyogo, D.C.J., Mpagi –Bahigeine, A.Twinomujuni ,C.N.B Kitumba and S.Kavuma, J.J.A)in Constitutional Petition No 6. of 2005 dated 7th March 2006)

JUDGMENT OF KANYEIHAMBA, J.S.C

THE BACKGROUND

The appellant petitioned the Constitutional Court on the ground that his forced resignation from Parliament as a representative of the Uganda People's Defence Forces (*hereafter referred to as the UPDF*) contrary to the provisions of the Constitution and other laws and the subsequent declaration of his Parliamentary seat vacant as a result of the said resignation were unconstitutional. By a majority decision of the Justices of the Constitutional Court, the appellant's petition was dismissed. Hence this appeal. The facts and background to this appeal may be stated as follows: The appellant, Brigadier Henry Tumukunde, is a senior officer in the UPDF and was at the time of the resignation in issue an honourable Member of Parliament as an elected representative for the UPDF special constituency.

While still a Member of Parliament, the appellant made certain remarks on radio without authorization from the army which the UPDF Command regarded as contrary to the Army Code of Conduct and as disparaging to the name and reputation of the UPDF. He was summoned at short notice to a meeting attended by UPDF High command and directed to resign from Parliament. That meeting was held on the 27th of May, 2005. On the following day, the 28th May, 2005, the appellant wrote to the Speaker of Parliament purportedly resigning his Parliamentary seat.

The letter was copied to the UPDF Commander- in- Chief and to the UPDF Council. It would appear that following the meeting of the UPDF Command and its directive, the appellant was later arrested and placed under military detention. On the 30th May, 2005 he was charged before the UPDF's General Court Martial with the charges framed as follows:

"UGANDA PEOPLES' DEFENCE FORCES IN THE GENERAL COURT MARTIAL HOLDEN AT MAKINDYE ON THE 7TH DAY OF JUNE 2005"

CHARGE SHEET

UGANDA VERSUS: RO/III BRIG HENRY TUMUKUNDE; Male adult, Senior Officer of the Regular Forces of UPDF, is hereby charged with:

Count 1: STATEMENT OF OFFENCE

CONDUCT PREJUDICIAL TO GOOD ORDER AND DISCIPLINE C/S 66 (1), (2) AND (5) OF THE UPDF (CAP.307

PARTICULARS OF OFFENCE

RO/III BRIG. HENRY TUMUKUNDE, on or about the 5th day of May 2005, while at Radio One Station, Kampala Central Division in Kampala District, without permission or authorization from the appropriate authorities, appeared on a talk show hosted by David Mushabe and made public speech and/or statements on Radio one 90.0 F.M Radio Station which conduct or act is prejudicial to good order and discipline of the Army (UPDF).

COUNT II: STATEMENT OF OFFENCE

SPREADING HARMFUL PROPAGANDA C/S 38 (1) AND (2) (C) OF THE UPDF ACT (CAP.307).

PARTICULARS OF OFFENCE.

RO/III BRIG HENRY TUMUKUNDE on or about the 5th day of May 2005, while at Radio One Station, Kampala Central Division in Kampala District, appeared on a talk show on Radio one 90.0 FM Radio Station hosted by David Mushabe and made oral statements ill of the Army or Government of Uganda to the effect that: *"…. I am sure you know how many people call themselves very pro the President and I am sure even in the Forces People who have got either sympathy or levels of patronage, so you would not want to leave such a person hovering on top of a force. It interferes even with orders and main direction of the force… and I do know how much time one needs in power really to make a difference".*

On 7th June,2005, Messrs, Twarebireho & Co. Advocates on behalf of the appellant filed petition No.06 of 2005 in the Constitutional Court challenging the decisions of the UPDF Command and seeking several declarations and remedies. The petition was in part worded as follows:

1. **"That your Petitioner is an adult male citizen of Uganda of sound mind being aggrieved by actions infringing my rights under the Constitution and also having interest in the defence of the Constitution and affected by the following matters being inconsistent with the Constitution of the Republic of Uganda, 1995, whereby your petitioner is also aggrieved.**
2. **That the act of the Commander- In - Chief and Some officers of the UPDF directing your petitioner to resign from his position as Army Representative in Parliament of Uganda is inconsistent with and contravenes Articles 80,83(1) and 84 of the Constitution.**
3. **That the act of the Speaker of Parliament in accepting and declaring your Petitioner's seat in Parliament vacant on the basis of a letter implementing a directive to resign is inconsistent with and contravenes Articles 80, 83 (1) and 84 of the Constitution when the Petitioner has not done any act in conflict with Article 80 of the Constitution.**
4. **The act of Uganda People's Defence Forces of restraining your Petitioner as a member of Parliament from expressing himself on all "Political matters irrespective**

of the Constituency that your petitioner represents while exempting others from the same restriction is contrary to Articles 20, 21 and 29 of the Constitution".

The Petition was supported by the appellant's affidavit dated 7th June, 2005, to which was annexed his letter to the Speaker (Exhibit "A").

The respondent filed answers to which were annexed the affidavits of Ms. Angela Kiryabwire Kanyima, Principal State Attorney of the Attorney General's Chambers and of Major General Joshua Masaba, the Chief of Staff of the UPDF with an annex containing an extract from the proceedings of Parliament of 9th, March, 2005.

THE LAW APPLICABLE

The Constitution of the Republic of Uganda, 1995, placed Parliament, the supreme representative body of the people, first, and ordained that henceforth the acts and decisions of the Executive including those of the President and Cabinet shall be subjected to the scrutiny and approval of Parliament.

Significantly, the people, through their popularly elected Constituent Assembly, and under the auspices of the governing political forces of the National Resistance Movement, recognizing the people's struggle against the forces of tyranny, oppression and exploitation, sponsored and decreed in an entirely different chapter from that which had hitherto created and empowered the Executive, this time, chapter Twelve on Defence and National Security, that the Uganda Peoples' Defence Forces shall be non-partisan, national in character, patriotic, professional, disciplined, productive and **subordinate to the civilian authority established under this Constitution**(*emphasis added*). They further decreed that any laws or regulations to govern the UPDF were to be enacted by Parliament.

Article 1 (I) of the Constitution provides that, **"all power belongs to the people who shall exercise their sovereignty in accordance with the Constitution.**

(2) Without limiting the effect of clause (1) of this Article, all authority in the state emanates from the people of Uganda; and the people shall be governed through their will and consent.

(3) All power and authority of government and its organs derive from this Constitution, which in turn derives its authority from the people's consent to be governed in accordance with this Constitution.

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

.

I had occasion in Rtd***. Col. Dr. Kiiza Besigye V Yoweri Presidential Election Petition*** *of 2006, (S.C), (unreported*), I emphasized the nature and binding effect of the Constitution and cited the South African case of ***Speaker of the National Assembly V. De Luke,*** *1999(4)S.A. 863 (SC A)* in which that country's Supreme Court declared;

> ***"The Constitution is the ultimate source of all lawful authority in the country, no Parliament however bona fide or eminent its membership and, no official , however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorized by the Constitution is entitled to the protection of the Court"***

Second in importance and of relative binding force are Acts of Parliament properly enacted by Parliament. Consequently, if in conformity with and under the Constitution, Acts of Parliament bind everyone else including members of Parliament, of the Executive and of the Judiciary. Acts of Parliament authorize or enable a host of subordinate legislations, rules and regulations to be made, all of which can be declared or found to be in conflict either with the Constitution or Acts of Parliament in which event, the latter prevail UPDF regulations come into the category of subordinate laws, and I will revert to them during the course of this Judgment.

THE ROLES OF THE PRESIDENT OF THE SOVEREIGN REPUBLIC OF UGANDA

In my book "*Constitutional Law and Government in Uganda* **"**published in 1975. I enumerated the different roles the President of Uganda plays as the Head of the Executive, Head of state, Head of Government, Commander - in -Chief and a private citizen. I was then basing my comments on the 1967 Constitution and the government policies and practices of the 1960[s] and 1970[s]. Since the enactment, promulgation and coming into force of the 1995 Constitution, the President's roles have increased considerably, both domestically and internationally.

Under Uganda's new brand of multipartism, the President is leader of a political party which is increasingly demanding partisan loyalty and performance from national security forces of the UPDF and the Police. This is clearly contrary to the provisions of the Constitution and of its Articles 208(2) and 211(3). The President is also the fountain of honour and cannot be a proprietor of business.

Consequently, whatever decision or act the President makes or does must be seen and judged according to the role he is playing at any given time, amongst so many other functions assigned or attributed to him or her. Other important and independent activities of state whose roles shall be examined in the course of this judgment are the office of the Speaker of Parliament and the Uganda Electoral Commission.

THE ISSUES FOR DETERMINATION

The Memorandum of Appeal in this Court Contains three grounds framed as follows:

1. **The learned Justices of the Constitutional Court erred in fact and law when they held that the appellant lawfully resigned his seat in Parliament.**
2. **The learned Justices of the Constitutional Court erred in law in holding that the actions of the Electoral Commission in declaring the appellant's seat in Parliament vacant were lawful.**
3. **The learned Justices of the Constitutional Court erred in law when they found that the pressing of charges against the appellant who was a member of Parliament before the General Court Martial for expressing himself on a political matter did not violate or contravene Articles 20,21 and 29 of the Constitution**.

Counsel for the parties filed written submissions under rule 93 of the Rules of this Court. Counsel for the appellant, argued grounds 1 and 2 together. It is counsel's contention that the appellant did not lawfully resign his Parliamentary seat. Counsel contend that the appellant's letter to the Speaker of Parliament did not constitute a resignation but was only intended to bring to the attention of the Speaker the directive he had received from the Commander- in -Chief.

Counsel contend further that it was erroneous on the part of the Constitutional Court to import into the plain wording of the letter something extraneous to the effect that it was a letter of resignation when it was not written voluntarily. Counsel contend that the constitutional Court erred in attributing to the appellant's letter a meaning which is at variance with the provisions of Article 83(1) (a) of the Constitution.

In the alternative, counsel submit that a resignation letter is void if it is procured under duress and in overbearing circumstances. In Counsel's view, a Member of Parliament cannot be lawfully ordered to vacate his Parliamentary seat by the President. Counsel further submit that the respondents were wrong to contend that all that is needed for a resignation to be effective is

that it is signed, addressed and accepted by the Speaker of Parliament. Counsel for the appellant contend further that their understanding of the meaning of Article 83 (1) (b) is different from that advanced by Counsel for the respondents. Counsel further submit that the Speaker should have first inquired into the circumstances under which the appellant tendered his resignation before accepting it.

Counsel cited the case of ***Smith V Mutasa and Anor (1990)***

LRC (Const), 87, as authority for his contention on the matter of resignation.

Counsel for the appellant, having described the circumstances under which the appellant had been forced to resign and the UPDF authorities involved; submit that it should have been incumbent upon the Speaker to carry out an enquiry to satisfy himself that the member's resignation was voluntary. Counsel further argue that it could not have been the intention of the framers of the Constitution that a resignation of a Member of Parliament be secured in any manner. Citing the previsions of the Constitution, Counsel contends that a Member of Parliament can only cease to be a member in accordance with the provisions of the Constitution. Finally, Counsel for the appellant contend that, considering that the resignation of the appellant was written under immense fear and undue coercion, there can be no basis for that resignation to have legal effect. Counsel argued that for the reasons he had advanced on ground one of appeal, ground 2 also ought to succeed since the Speaker had no legal basis upon which to declare the seat vacant or the Electoral Commission to proceed with the actions they carried out to deprive the appellant of his Parliamentary Seat.

The Attorney General, Counsel for both respondents opposed the appeal and also argued grounds 1 and 2 together. He contended that the correct findings and decisions of the Constitutional Court should be upheld. He submits that, having subjected the appellant's letter of resignation to scrutiny, the five Justices of Appeal unanimously held that the appellant's letter amounted to a legitimate resignation. Counsel contends that the three ingredients of an effective resignation are that the resignation be in writing, be signed by the person resigning and be addressed to the Speaker of Parliament. It is the counsel's submission that the appellant's letter of resignation fulfilled the three ingredients.

In the alternative, Counsel for the respondents contends that when notifying the Speaker of his decision to resign, the appellant intimated to the Speaker that the purpose of his communication was to draw the Speaker's attention to the directive to accordingly comply." Counsel contends further that nowhere in the Petition or in the affidavit of the appellant is it shown that the appellant was forced to resign. Counsel further contends that even if force or an act of coercion

had been exerted on the 27th May, 2005, the appellant submitted his letter of resignation on the 28th May,2005, signifying that a long time had lapsed between the alleged exertion of force or coercion and writing of the letter which indicates that the appellant's resignation was voluntary.

Counsel contends further that there is no requirement for the Speaker to know the reasons why a Member of Parliament is resigning his seat. Counsel submits that therefore the Speaker was right to accept the appellant's resignation. Counsel for the respondents contends that as a member of the UPDF and of Parliament, the appellant is under a duty of double loyalty to both Parliament and the UPDF which is regulated and governed by an Act of Parliament and the Force's regulations and, his conduct is governed by the latter in default of which he is liable to be disciplined whether in or out of Parliament.

Although Counsel argued ground 1 and2 together, I find it appropriate to deal with ground 1 of this appeal first. Earlier in this Judgment, I set out the relativity and importance of our laws, commencing with the Constitutional provisions which are superior to any other law and authorities and I ended with Acts of Parliament and rules and regulations which are subordinate to the Constitution. Acts of Parliament come next in order of importance and binding force.

Chapter six of the Constitution deals with the establishment, composition and functions of Parliament all of which are prescribed by the provisions of the same Constitution. Thus, Article 77(1) provides that **"there shall be a Parliament of Uganda (2) The Composition and functions of Parliament shall be as prescribed by this Constitution".**

Article 78(1) provides that: "**Parliament shall consist of:-**

(a) **"Members directly elected to represent (geographical) constituencies**

(b) **One woman representative for every district**

(c) **Such numbers of representatives of the army, youth, workers, persons with disabilities and other groups as Parliament may determine".**

(4) **Parliament shall**, "**by law, prescribe the procedure for elections of representatives referred to in paragraph (b), (c) of the clause 1 of this Article".**

Parliament has already enacted the Parliamentary Elections Act 17 of 2005 and passed the Parliamentary Elections (Special Interest Groups) Regulations of 2001 which constitute the laws that prescribe the procedure for election of special representatives in such a way as to create

electoral colleges for representatives of the UPDF, youth, workers and persons with disabilities. For women, it is specified groups of voters in a district who constitute District Women constituencies.

It is thus clear that every Member of Parliament whether of the (a) category or of the group representatives, has his or her own constituency which I will resort to later in this Judgment. Whereas it is clear that the Constituencies of Members of Parliament are different when they join Parliament and are sworn in, they all, without exception become honourable Members of Parliament with common tasks, rights, obligations, immunities and privileges and can only be removed before the expiry of their respective terms of tenure in accordance with the provisions of the Constitution.

Article 83 Provides that: (1) **a Member of Parliament shall vacate his or her seat in Parliament**.

(a) "If he or she resigns his or her office in writing signed by him or her and addressed to the Speaker,

(b) If such circumstances arise that if that person were not a member of Parliament would cause that person to be disqualified for election as a member of Parliament under article 80 of this Constitution

(c) subject to the provisions of this Constitution, upon dissolution of Parliament

(d) if that person is absent from fifteen sittings of Parliament without permission in writing of the Speaker during any period when Parliament is continuously meeting and is unable to offer satisfactory explanation to the relevant parliamentary committee for his or her absence".

(e) if that person is found guilty by the appropriate tribunal of violation of the Leadership Code of Conduct and the punishment imposed is or includes the vacation of the office of a member of Parliament,

(f) if recalled by the electorate in his or her constituency in accordance with this Constitution,

g) if, that person leaves the political party for which he or she stood as a candidate for election for Parliament to join another party or to remain in Parliament as an independent member;

(h) if, having been elected to Parliament as an independent candidate, that person joins a political party;

i) if that person is appointed a public officer".

2…

3 The provision of clauses (1) (g) and (h) and (2) of this article, shall only apply during any period when the multiparty system of government is in operation.

Article 83 is amplified further by the provisions of Article 252 of the Constitution.

In my view, it is only Articles 83 (1) (a), (b), (c), (f), (i) and 252 which apply in this particular case.

An analysis of the appellant's resignation letter reveals more than the resignation prescribed by the Constitution. The Letter is a speaking instrument which means that it contains and reveals much more than what the Constitutional Court deemed it to be and therefore subject to judicial view.

A genuine voluntary letter of resignation by an honourable Member of Parliament need not say more than the simple communication that he or she is resigning the Parliamentary seat immediately or with effect from a certain date. He or she may simply state that "**I hereby resign"** without further ado. Consequently, the Speaker and anyone else reading the appellant's letter which I reproduce hereafter in this judgment for clarity and understanding is bound to ask whether it is a resignation or a cry for help. The letter written in the appellant's own long hand speaks volumes.

It reads as follows;

"Mr. Speaker Sir,

I was summoned to a meeting by the Commander- in- Chief of the UPDF on the 27th of May, 2005, to which I complied.

During the meeting attended by UPDF Command, I was directed to write to you Mr. Speaker, resigning. This directive had a deadline of 12 hours. This explains my writing on weekend. The purpose of this communication is to draw your attention to the above directive and to accordingly comply. Please do not hesitate to contact me if you need any further clarification".

It is to be noted from the beginning that nowhere in this communication does the appellant state that he is resigning. He simply states that he was directed to resign.

One sentence in his letter is not clear. When the appellant says that **"the purpose of this communication is to draw your attention to the above directive and to accordingly comply**", it is not obvious whether the Speaker is to comply by responding to the letter or accept

the letter as written. This certainly lends credence to the view that this is not a letter of resignation.

The contents of the appellant's letter have not been denied by the first respondent. On the contrary, in the written statement of arguments, counsel for the respondents accepts the truth of the contents of the letter and merely contends that they are tantamount to resignation.

In my opinion, the manner and style in which it is framed, the appellant's letter addressed to the Speaker is not a true communication of his resignation of his seat in Parliament. A Member of Parliament, the supreme legislative organ of the land should never have to resign under the threat or directive of anyone but only in accordance with the provisions of the country's Constitution and laws made by Parliament and do so voluntarily. I see the letter as constituting a soldier's obedience to superior orders under protest. It is a desperate appeal to the Speaker of Parliament who is the guardian and protector of members' rights, immunities and privileges which are clearly defined and enshrined in the Constitution of Uganda, its laws and in the Parliamentary Rules, Conventions and Practices.

I do not find the two affidavits in support of the respondents helpful. The one of Ms Kiryabwire Kanyima contains opinions about the meaning and evaluation of law and that of Major General Joshua Masaba reveals knowledge of what is supposed to have transpired in a committee of Parliament sitting on the 9th, March, 2005, and as I will show later in this judgment (*infra*), with great respect, the Major General has no competence to testify or depone on the internal proceedings of Parliament which, in any event, are privileged and protected from production.

However, the Major General's affidavit in part reveals the real reason why the appellant incurred the displeasure of the Commander-in –Chief and of the UPDF leadership who then directed him to resign from Parliament. Paragraph 6 of Major General Masaba's Affidavit states:

> **"That I know the conduct of the Petitioner in Parliament was contrary to both the decision taken by the UPDF Forces Council and UPDF Standing Instructions given to all Army Representatives in Parliament, namely to be listening posts for the UPDF Forces Council in Military matters when need arise; to report to the UPDF Forces Council on proceedings in Parliament; and to consult the UPDF Forces Council in Controversial issues that arise in Parliament."**

Important as they are, the UPDF instructions do not override the primary functions of Parliament and of its members which are spelt out in Article 79, of the Constitution and include, ***"make laws on any matter for the peace, order, development and good governance of Uganda".*** If it had been intended that representatives of the Army should not participate in the above functions, the Constitution would have said so expressly. It would also have expressly excluded the same representatives from enjoying the immunities and privileges accorded to members of Parliament. As it is, the statement by Major General Masaba has no constitutional basis.

To penalize a Member of Parliament for what he or she says in Parliament violates the provisions of the Constitution and of the Parliament (Powers and Privileges) Act, Cap.258 of the Laws of Uganda. The long title of that Act provides:

> **"An Act to declare and define certain powers, privileges and immunities of Parliament, and the members of Parliament, to secure freedom of speech in Parliament, to regulate admittance to the precincts of Parliament, to give protection the persons employed in the publication of the reports and other papers of Parliament and for purposes incidental to or connected with the matters"**

Part II of the same Act spells out the privileges and immunities that the law accords Members of Parliament. Section 2 thereof states:

"No civil or criminal proceedings may be instituted against any member for words spoken before, or written in a report to, Parliament or to a committee, or by reason of any matter or thing brought by the Member of Parliament or a committee by petition, bill, motion or otherwise"

In my opinion, the only legitimate method available to anyone wishing to unseat a Member of Parliament is to resort to one of the devices spelt out in Articles 83 and 252 of the Constitution (***supra***). The appellant's seat could only have become vacant if the appellant voluntarily resigned. In this judgment, I have endeavoured to show that this is not what happened. Therefore, the appellant did not resign. The appellant could have vacated his seat if UPDF had proceeded with actions and decisions prescribed under Article 83.

One method available to the President, as Head of Government and Commander- in - Chief who wishes to dislodge a UPDF member from Parliament is the method prescribed in Article 83

(1) (i). The member can be appointed to a public office. In my opinion, neither the Commander-In- Chief nor members of the High Command are empowered by the Constitution to force a member of Parliament to resign or recall him or her from Parliament. The only other route to be taken to recall an MP who is also an active soldier is to invoke the provisions of Article 83 (1) (f).

Under article 83 (1) (f) a special meeting of the UPDF Constituency which is the only body constitutionally authorized to elect and recall their members who represent them in Parliament, would have to be called and debate and pass, if at all, a resolution to recall any UPDF member who is also a member of Parliament.

Counsel for the respondent cited and supplied this Court with copies of the Army's Standing Orders which contain many dos and donts for members of the UPDF. They include such dos and donts as dont walk near to or address persons senior to you with your hands in your pockets, never report to Headquarters in civil clothes even when you are on leave, do not get used to drinks before meals because it leads you to alcoholic addiction which is harmful to your mental and body health. Do not hesitate to discontinue drinking when you feel you have had enough, never smoke when you are in a group of senior officers, do not use sun-glasses on uniform except under medical prescription. These are certainly good guidelines but hardly sufficiently serious to be equated with constitutional dogma. There are other rules which appear useful in a democratic society for the effective operations and management of a disciplined, efficient and patriotic UPDF. These include such rules as to salute all those who are senior to you in rank, to co-operate with civil authority, conserve your military uniform, never gamble, dress in uniform as laid down from time to time and avoid unnecessary conflicts.

It was under one of these regulations, namely, that military personnel are not to contact the Press unless approved by the Army Commander, that the appellant came to be forced to resign and later charged with a military offence. Be that as it may, the military procedures which permit the UPDF to discipline or punish members of the Force are not the same that empower the UPDF to force UPDF members of Parliament to resign their seats

I am persuaded by the argument advanced by counsel for the appellant which they expressed in paragraph 31 of their submissions that:

> **"Currently, over a hundred (100) members of Parliament represent different interest groups set out in Article 78 of the Constitution. These interest groups**

> **include the representatives of army, women, youth, workers, and the disabled. This accounts for a third of the total number of the members of Parliament. It is important to note that crucial decisions of Parliament are supposed to be made by two thirds majority of the members. If all interest groups were to be commanded by extraneous forces in the execution of their mandate- this would in effect create a phantom Parliament operating at the will and desire of its masters".**

I agree with council for the appellant. Clearly, the rights privileges and immunities which accrue to Members of Parliament while in Parliament or within its precincts cover solider Members of Parliament as well.

In my opinion, this Honourable Court has an obligation to strike down any precedent that creates and seeks to perpuate such a scenario. Ugandans must decide what kind of Parliament they wish to protect their fundamental freedoms and basic rights. On the promulgation of the 1995 Constitution, by the Constituent Assembly delegates, the President of Uganda, Parliament, Ugandans and members of the International community witnessed the function and believed that Uganda had created an independent, powerful and truly representative Parliament with unshakable constitutional and legal strength to scrutinize, monitor and check the acts and decisions of the other two organs of government, namely; the Executive and the Judiciary. It is the duty of this Court to ensure that Constitutional equilibrium between the organs of government and citizens is maintained at all times.

For the reasons I have given, it is my view that ground 1 of this appeal is well founded and ought to succeed.

At this juncture, I am constrained to comment on two important issues that arise from this appeal.

Firstly, I wish to observe that a Uganda soldier who is elected by his or her peers to represent them in Parliament while continuing to be a member of the UPDF occupies unenviable position of responsibility.

On the one hand, Article 79 of the Constitution prescribes that such a member of Parliament is equal in all respects to other honourable members of Parliament who are collectively empowered to exercise the supreme legislative authority of Uganda on any matter for the peace, order, development and good governance of the country.

On the other hand, such member's continued membership and participation in the activities of the nation's security forces severely restricts that member's ability to perform effectively in the realization of the aspirations of the constituents he or she represents, let alone the whole of Uganda.

In my view, this unattainable dual role of the UPDF members of Parliament ought to be revisited again by this nation.

Several issues which relate to the immunities and privileges of members of Parliament need to be considered. These are partly prescribed in the *Parliament (Powers and Privileges*) Act which outlines some of them and other detailed rights, immunities and privileges are contained in the Rules of Parliament supplemented or amplified by ancient conventions and rules of practice in free and parliamentary democracies.

Amongst the Speaker's functions and roles, is his or her duties to guard and protect the' rights and security of members both within and outside the precincts of Parliament. In the House, the Speaker's orders are the only practical and binding law to members only subject to their own rules or procedure. Outside it, his counsel, advice and recommendations should be respected by all and sundry. The Speaker is fully protected from the jurisdictions of court by the provisions of section 25 of the Parliament (Powers and Privileges) Act, (*Supra*)**.**

The reactions and powers of the Speaker should always be much more vocal and clear when the person of a Member of Parliament is threatened or its rules are challenged. The oldest rules and conventions which have guided Parliaments, Speakers and Governments in free and democratic countries, particularly those of the Commonwealth of Nations date back to centuries. In 1642, when Charles 1 of England, at the time, an absolute monarch attempted to arrest five members of the House of Commons and demanded that its Speaker Identify them so that they could be arrested, the then Speaker of Parliament, Lenthall, bravely, politely but firmly responded to the King, thus;

> **"Sire, I have neither the eyes to see no ears to hear except as directed by this House whose servant I am."**

Henceforth, the primary duty of the Speaker was and has always been to Parliament and not to the King or to the Executive. Having established in this case that the appellant's letter was a speaking communication, the duties, rules and privileges of Parliament required the Speaker to do more than simply accept what appeared to him to be a resignation letter from a member. Where it is apparent on the face of the record and the Speaker is alerted to it, there immediately arises an anomaly which needs to be cleared first before anyone is deemed to have resigned. The

alert immediately creates an awesome responsibility of the Speaker as the pre-eminent guardian of the members' rights and privileges and compels him or her to act decisively and not merely to accept routinely what, in reality is not a resignation but an appeal for intervention.

The Parliament (Powers and Privileges) Act has a long history behind it. in Britain, at the opening of each session of Parliament, the Speaker formally claims from the Crown for the members of the House of Commons ***"their ancient and undoubted rights and privileges".*** Those particularly mentioned are "***that their persons may be free from arrests and molestations and that they may enjoy liberty of speech in all their debates***". The privilege of freedom of a Member of Parliament protects him or her from civil proceedings for a period of from forty days before to forty days after a meeting of Parliament. In the case of the **King V. Wilkes, (1763), 2 Wilson 151**, the English Court of Common Pleas held that the privilege of a Member of Parliament protected him from arrest for seditious libel. However that decision was overturned by a resolution of both Houses of Parliament. The privilege of freedom of speech is manifestly, the most important in assemblies of representatives in a free and democratic society.

In an English case reported in 561 H.C, Deb. code 239-43 and H.C. 27 (1956) a Member of Parliament was bombarded with telephone calls from the members of the Public who had been advised to telephone him following a controversial question he had ashed in Parliament.

The advice had been published in a publication called Sunday Graphics. The Committee of Privileges of the House of Commons found that the publication inviting the people to telephone him was a clear breach of the member's freedom of speech.

In England the Parliamentary privilege of freedom of speech was often challenged at different times of British Constitutional history until it eventually became one of the most important principles of Parliamentary democracy. As early as 1397, one **Haxley**, was prosecuted for treason because he sponsored a Bill designed to curtail the King's household expenses. When Henry IV became king, he caused the judgment to be reversed, a decision that is said to have recognized the privilege of freedom of speech in Parliament. The incident came to be known as **<u>Haxley's case</u>.**

During the reign of King Henry VIII, a Member of Parliament by the name of Strode was fined and imprisoned by the Stannary Court of Devon for introducing a Bill in Parliament to regulate mines in Devon County. Later, Parliament passed an Act declaring that any legal proceedings ***"for any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament should be utterly void and of none effect".*** This came to be known as **<u>Strode's</u>**

case. The privilege was extended later to protect Members of Parliament from the acts of the King. In the case of **Sir John Eliot,** Sir John who with three others had been convicted for criticizing the King's government but the decision was overturned by the highest Court in the land, the House of Lords. Ultimately, the matter of Parliamentary Privilege of freedom of speech was finally settled by the Bill of Rights of 1688, in which it was provided ***"that the freedom of speech and debates in Parliament ought not to be impeached or questioned in any court or place out of Parliament".***

In my opinion therefore, and with the greatest respect, the Speaker of Parliament acted hastily in this case and deprived himself of the authority to defend the appellant as a Member of Parliament.

In totality, a Member of Parliament is entitled to speak freely on any matter and no legal action can be brought against such a member for anything he/she says within Parliament.

The actions of the Commander-in-Chief and the members of the UPDF

Command in relation to the appellant in this particular case were those of military authorities which, as the provisions of Article 208 (2) of the Constitution and the Army Code of Conduct clearly provide, are subordinate to the civilian authority as established under The Constitution of Uganda.

I will now determine ground 2 of the appeal. Article 81 (2) of the Constitution provides as follows;

"Whenever a vacancy exists in Parliament, the Clerk to Parliament shall notify the Electoral Commission in writing within ten days after the vacancy has occurred, and a bye-election shall be held within sixty days after the vacancy has occurred".

One of the privileges of Parliament is that only the Speaker, Officers and members of Parliament are privy to what occurs inside Parliament and therefore are the only ones authorized to know whether and when seats in Parliament fall vacant. The Electoral Commission, like any other stranger to the august house, has neither the powers nor the knowledge, let alone the means of finding out this information. The provisions of Article 94 of the Constitution provide authority for this view. Consequently, the Electoral Commission cannot be blamed for acting on information received from Parliament. They had no reason to doubt the Clerk's information and the allegations against the Electoral Commission cannot be sustained.

In my opinion therefore there is no merit in ground 2 of this appeal which ought to be dismissed.

Finally, I will dispose of ground 3 of appeal. As long as the appellant remains an active soldier he also remains subject to the discipline and rules of the UPDF command, institutions and superior officers, only subject to the provisions of the Constitution and laws of Uganda. Whether or not any of its men and officers including the appellant committed any military offence remains a matter for the UPDF command to determine and direct what action should be taken. Subject to the Constitution and Laws of Uganda, military authorities continue to exercise jurisdiction over UPDF personnel outside Parliament.

Consequently, I find no merit in ground 3 of this appeal which ought to be dismissed.

All in all therefore, this appeal substantially succeeds

a) I would hold that the appellant did not willingly resign from Parliament.
b) I would award the costs of this appeal to the appellant against the first respondent in this Court and in the Constitutional Court.

Dated at Mengo 13th day of October 2008

G.W.KANYEIHAMBA

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, CJ, TSEKOOKO, MULENGA, KANYEIHAMBA KATUREEBE JJ.SC, ENGWAU AND BYAMUGISHA AG. JJ.SC.)

CONSTITUTONAL APPEAL NO 2 OF 2006

BETWEEN

BRIGADIER HENRY TUMUKUNDE :::::::::::::::::::: APPELLANT

AND

THE ATTORNEY GENERAL}
ELECTION COMMISSION } ::::::::::::::::::::::::: RESPONDENTS

[Appeal from the decision of the Constitutional Court (Mukasa-Kikonyongo DCJ, Mpagi-Bahigeine, Twinomujuni, Kitumba and Kavuma JJ.A) in Constitutional Petition No.6 of 2005 dated 7th March 2006]

JUDGMENT OF ODOKI, CJ

I have had the benefit of reading in draft the judgment prepared by my learned brother Kanyeihamba JSC and I agree that this appeal should substantially succeed by upholding ground one and dismissing grounds 2 and 3 of appeal. I would concur in the order he has proposed as to costs.

For emphasis, I wish to comment only on the first ground of appeal which stated: "***The learned Justices of the Constitutional Court erred in fact and in law when they held that the appellant lawfully resigned his eat in Parliament."*** The letter written by the appellant on 28 May 2008 to the Speaker of Parliament stated,

> ***"I was summoned to a meeting by the Commander-in-Chief of the UPDF on 27th May 2005, to which I complied. During the meeting attended by UPDF Command, I was directed to write to you Mr. Speaker resigning. This explains my writing on weekend. The purpose of this communication is to draw your attention to the above directive and to accordingly comply. Please do not hesitate to contact me if you need any further clarifications."***

On the true construction of the letter of resignation and the surrounding circumstances under which it was written, it is clear that the appellant wrote the letter over the weekend in a state of fear or duress arising out of his meeting with the Commander in Chief of the UPDF and the UPDF Council. His letter itself speaks of a directive from his superiors to tender his resignation within a specified time and he informs the Speaker that he is complying with directive.

Clearly the appellant could not be compelled to resign his seat in Parliament except in accordance with the Constitution and relevant laws. He could have been recalled by his constituency the UPDF but this was not done. In the absence of any formal recall by his constituency the only thing that his superiors could do if he was no longer suitable to represent his constituency, was to advise him to voluntarily resign in accordance with the provisions of Article 83 (1) (a) of the Constitution which provides:

> ***"(1) A Member of Parliament shall vacate his or her seat in Parliament,***

(a) ***if he or she resigns his or her office in writing signed by him or her and addressed to the speaker."***

In my view resignation under this provision must be voluntary and not against the will of the Member of Parliament, as it happened in this case.

As the other members of the Court agree with the judgment of Kanyeihamba JSC and the orders he has proposed, this appeal is allowed with costs awarded against the 1st Respondent in this Court and the Constitutional Court.

Dated at Mengo this 13th day of October 2008

B J Odoki
CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, CJ, TSEKOOKO, MULENGA,
KANYEIHAMBA AND KATUREEBE, JJ.SC.,
ENGWAU, BYAMUGISHA, AG. JJSC.)

CONSTITUTIONAL APPEAL NO. 2 OF 2006

BETWEEN

BRIGADIER HENRY TUMUKUNDE :::::::::::::: APPELLANT

AND

1. **ATTORNEY GENERAL** } :::::::::: **RESPONDENTS**
2. **ELECTORAL COMMISSION** }

[Appeal from the decision of the Constitutional Court at Kampala, (Mukasa-Kikonyogo, DCJ., Mpagi-Bahigeine, Twinomujuni, Kitumba and Kavuma, JJA,), dated 25th August, 2005 in Constitutional Petition No. 6 of 2005]

JUDGMENT OF TSEKOOKO, JSC.:

I have read in advance the draft judgment of my learned brother, the Hon. Dr. Justice Kanyeihamba, JSC., and I agree with his conclusions that the appeal ought to succeed.

This appeal is of some constitutional importance. Therefore I consider it appropriate to give reasons in my own words in support of allowing the appeal.

My learned brother has outlined the background to this appeal. I would emphasise that the appellant was at the time material to this appeal, a Brigadier in the Uganda Peoples Defence forces (UPDF) which he represented in Parliament. UPDF is one of the special interest constituencies which elect representatives under paragraph (c) of Clause (1) of Article 78 of the Constitution. Clause (4) of that Article empowers Parliament to prescribe procedure for elections of, inter alia, army representatives. According to S. 8(4)(b) of Parliamentary Elections Act, 2005 (PEA), UPDF representatives are elected in a manner prescribed by Regulations. Regulation 3 of the Parliamentary Elections (Special Interest Group) Regulations, 2001 (S. I. 2001 No. 31) stipulates that the UPDF Council is the body which would elect UPDF representatives to Parliament. Because of the provisions of Article 84 of the Constitution, it is the UPDF Council which can recall its representative from Parliament on grounds set out in that Article.

Articles 83 and 84 of the constitution and the PEA have provisions spelling out how members are supposed to vacate Parliament or cease to be members of Parliament.

In the present case, there is evidence to the effect that after the appellant had made some statements on Radio One and apparently in Parliament, which statements were considered by the Commander-in-Chief and the High Command to be inappropriate, he was summoned to appear and he did appear before the Commander-in-Chief of the UPDF together with four other Senior Officers who are members of the Army High Command on Friday 27th/5/2005. The four others included Major – General Joshua Masaba, the Chief of Staff. During the meeting, according to the appellant, he was ordered and directed to resign from Parliament within twelve hours. The following day (a Saturday) the appellant wrote a letter addressed to the Speaker the contents of which are reproduced below. The appellant annexed to his affidavit a copy of that letter as well as two charge sheets filed in the General Court Martial on 30th/5/2005, showing that he was to be prosecuted for the statements he made on the Radio. Likewise Major–General Joshua Masaba annexed the same documents to his affidavit which he swore in support of the respondents' answer to the petition.

The appellant's letter to the Speaker reads as follows:-

"I was summoned by the Commander-in-Chief of the UPDF on the 27th of May, 2005 to which I complied.

During the meeting attended by UPDF command I was directed to write to you Mr. Speaker resigning. This directive had a deadline of 12 hours. ***This explains why I am writing on a weekend.***

The purpose of this communication is to draw your attention to the above ***directive*** *and to accordingly comply.*

Please do not hesitate to contact me if you need any further clarifications.

Yours faithfully,

Henry Tumukunde

BRIGADIER.

c.c. Commander-in-Chief of the UPDF.

c.c. UPDF Forces Council."

In my opinion the letter especially the last two paragraphs render it equivocal. It shows that he did not write the letter out of his free will. This explains why (on 7th June, 2005) barely 8 days after his purported resignation, the appellant instituted a petition in the Constitutional Court complaining that the conduct and actions of the Commander-in-Chief and some UPDF Officers, the Speaker of Parliament and the Electoral Commission (2nd respondent) contravened various provisions of the Constitution. The appellant alleged in paragraph 2 of his petition that the directive for him to resign from his position as Army representative in Parliament is inconsistent with and contravenes Articles 80, 83(1) and 84 of the Constitution. In para 3 he alleged that the Speaker's act in declaring the seat vacant was inconsistent with and contravened Articles 80, 83(1) and 84. In para 4, the appellant, in effect complained that UPDF's action of restraining him as Army representative in Parliament from expressing himself on all political matters is contrary to Articles 20, 21 and 29 of the Constitution. By the petition the appellant wanted to stop the process of declaring his seat vacant and replacing him.

In their joint answer, the respondents claimed in regard to para 2 that the actions of the President/Commander-in-Chief are not challengeable in Court and, as regards the 3rd para, that the Speaker did not breach Articles 80, 83(1) and 84. In relation to paragraph 4, the respondents asserted that the appellant is barred by the Constitution and the UPDF Act from engaging in

partisan politics or engaging in conduct that is partisan or prejudicial to good order and discipline.

Five issues were framed for determination by Court.

On the first issue of whether the actions of the Commander – in – Chief can be challenged in a court of law, one of the Justices answered it in the negative while four held that such actions are challengeable.

On the second issue whether the petitioner's letter amounted to a resignation of his seat in Parliament, the answers were that resignation was effective.

On the third issue of whether the notification of the Electoral Commission that the petitioner's seat had fallen vacant contravened articles 80, 83(1) and 84 of the Constitution the Court's answer was a negative.

Finally on the fourth issue of whether in pressing charges against the petitioner, UPDF contravened articles 20, 21 and 29 of the Constitution three justices answered it the negative while the other two answered yes.

By majority of three to two justices, the petition was dismissed. The appellant has appealed to this Court on the following three grounds–

1. *The learned Justices ……… erred in fact and Law when they held that the appellant lawfully resigned his seat in Parliament.*
2. *The learned Justices ………. erred in law holding that the actions of the Electoral Commission in declaring the appellant's seat in Parliament vacant were lawful.*
3. *The learned Justices ……… erred in law when they found that the pressing of charges against the appellant who was a member of Parliament before the General Court Martial for expressing himself on a political (matter's* ***sic****) did not violate or contravene Articles 20, 21 and 29 of the Constitution.*

In their written arguments Messrs Twarebireho & Co. Advocates, counsel for the appellant, argued grounds 1 and 2 together but ground 3 separately. This was the method adopted by the Attorney General, counsel for the respondents.

On the second ground I would briefly state that once the Speaker had notified the 2nd respondent, that the seat was vacant there was no alternative left for the Commission to do. So the ground fails.

Before considering the 1st ground, I would say that the real problem which was before the Constitutional Court was the interpretation of or construction to be given to the appellant's letter, which was substantially the 2nd issue. This is the crux of the matters in the first ground of appeal. The problem of interpreting documents by courts is not new. It has been faced by other Courts in days past. That is why courts developed a number of rules for guidance in the interpretation of documents. Although those rules are not strictly law, in practice they are effective weapons in the resolution of disputes concerning the meaning or effect of contents of disputed documents.

The first rule which appears relevant to this case is that–

> *The meaning of a document or of a particular part of it is therefore to be sought for in the document itself.*

In many cases, Courts have applied this rule to mean that a judge must consider the meaning of the words used in the document not what a judge may guess to be the intention of the parties. Of course where the words or statements are clear and plain there would be no difficulty. However where the words or statements are not clear and are ambiguous, one or more of the other rules are resorted.

Appellant's counsel contend that in his letter the appellant communicated to the Speaker the directive that he should resign and not that he had resigned. In the alternative learned counsel contend in effect that the resignation was not voluntary and therefore not effective. Counsel for the respondents asserts the contrary and ask Court to uphold the decision of the Constitutional Court and further contends that the plain wording of the letter shows it was a resignation letter.

In order to put proper construction to the appellant's letter I must bear in mind the context within, and circumstances under which it was written and apparently delivered. Here I mean the background before the letter was written, the language of the letter, the time of its writing. The other contexts are the provisions of both the Constitution and the Parliamentary Elections Act, 2005 relating to vacation of seats by Members of Parliament.

Background: The background against which the letter was written is set out in his affidavit and his letter and the affidavit of Major – General Joshua Masaba to which were annexed the **HANSARD** of March 9th, 2005, reflecting the appellant's speech in Parliament which UPDF considered to be inappropriate. A perusal of Major-General Masaba's affidavit suggests that prior to the meeting of 27th May, the appellant was under some sort of surveillance about what he was saying both outside and inside Parliament. It must also be remembered that by 30/5/2005 (a Monday) and two days after the letter a charge sheet bearing counts on which the appellant was to be prosecuted was filed in the General Court Martial.

Language: Ordinarily, I would have expected the appellant to write to the Speaker (preferably in typed form) stating simply that he is resigning his seat as a Member of Parliament. If he wished to explain he could say I resign because of such and such a reason. This is not the case here.

In this case the words used by the appellant in his letter are quite equivocal. I understand the appellant to tell the Speaker: *"Look, I have been forced on a weekend to write to you within twelve hours to say that I am resigning. Is this correct? Help me."*

I say so because if he was resigning voluntarily, why should he state that he has been given twelve hours within which to write during the weekend. Why should he ask the Speaker to contact him? Is he asking the Speaker to accept the resignation or to understand why he is purporting to resign or is he asking the Speaker to seek clarification before acting on the letter? In my opinion the latter is the case. This is evident from his affidavit.

In para 3 of his affidavit, the appellant gives his evidence that he wrote the letter against his will and without choice. In para 5 he explains that because he was immediately arrested and detained he was denied opportunity to explain to the Speaker the circumstances under which his letter was

written. In her affidavit in reply, Mrs. Angela Kiryabwire Kanyima, a Principal State Attorney, claimed that there was no evidence of any unlawful or forceful order. This is strange. As stated earlier, Major – General Masaba's affidavit (para 9) shows he (Masaba) was DIRECTED to attend the meeting. If he, a Major-General and a Chief-of-Staff could be directed to attend the meeting it is inconceivable that the Commander-in-Chief could not order or direct the appellant a Brigadier to resign.

In my view the Major General is being less than candid in paras 10 to 12 of his affidavit. For instance, in para 12 he avers that *"at no time did the President ever force the petitioner, in any way to resign his seat in Parliament"* whereas a copy of the appellant's letter annexed to the same affidavit clearly contradicts the Major-General by stating that he *"was directed to write to the Speaker resigning. This directive had a dead line of twelve hours. This …….. explains why (he) had to write on a weekend."*
Indeed in the Constitutional Court, Mr. Tibaruha, the Solicitor-General, who represented the respondents there, conceded that a directive was given. That is what the appellant asserts in his letter.

I hold that the appellant was ordered and directed to resign and because he was given a date line he wrote the letter without intending to resign.

Timing: This is largely covered under the foregoing discussion. The appellant was summoned on a Friday to appear before his military superiors. Being an army man, he obeyed and met his superiors whereupon he was ordered and directed to resign his seat within 12 hours. I have no doubt in my mind that when the appellant wrote the letter, he was labouring under undue influence or duress arising from his meeting with the Commander-in-Chief and the four members of the high command. He did not have a free will. In his affidavit the appellant avers that he was arrested soon after writing the letter. The arrest emphasises what the appellant asserts that he did not voluntarily resign. His assertion as to arrest is supported by the charge sheet, which was filed in the General Court Martial on Monday 30/5/2005.

The Concise Law Dictionary 5th edition, defines "duress" as constraint by injury or imprisonment or by threats." It adds that an act done under duress is generally invalid. I think that a Member of Parliament must vacate Parliament according to the legal procedures established by the

Constitution and other laws as stated in the petition. If in a constitutional democracy, Members of Parliament are to be forced to resign their seats outside the law, this will be setting a dangerous precedent amounting to violation of the independence of the members of Parliament whatever may be the whims of their constituents.

Manner of vacating parliamentary seat under constitution and parliamentary elections act, 2005 (Act 17 of 2005)

Article 83(1) of the Constitution and S. 84 of PEA (17/2005) enumerate nine ways in which a Member of Parliament shall vacate his or her seat in Parliament. The first is if he or she resigns his or her office in writing signed by him or her and addressed to the Speaker. Article 84 of the Constitution and S. 85 of Act 17 of 2005 elaborate on one of the ways, namely the recall by his electorate in his or her constituency in accordance with the Constitution.
Reading the above laws, it is very clear to me that the resignation from Parliament by a seating member must certainly be voluntary.

I have no doubt in my mind that the acts of the Commander-in-Chief and the four Senior Officers of the High command in ordering or directing the appellant to resign were unconstitutional and had no foundation in law whatsoever.

The order or directive contravened Articles 83 and 84 of the Constitution and the Parliamentary Elections Act, 2005, which provide for modes of vacation of seats by a Member of Parliament. At the peril of being lengthy it is imperative that I reproduce pertinent parts of Articles 83 and 84 and the corresponding Sections of PEA, which set out procedures that must be followed.

In so far as relevant, Article 83(1) provides that–
A Member of Parliament shall vacate his or her seat in Parliament–

(a) *if he or she resigns his or her office in writing signed by him or her and addressed to the Speaker.*
(b) *to (e) ……………..*
(f) *if recalled by the electorate in his or her constituency in accordance with this Constitution.*

These provisions are replicated in Section 84(1)(a) and (f) of the Parliamentary Elections Act in identical terms.

Article 84 sets out an elaborate procedure to be followed whenever a Member of Parliament is to be recalled. The provisions to my mind suggest the seriousness which the framers of the Constitution and Parliament which enacted S. 84 must have attached to the removal of a sitting member of Parliament.

The Article is couched in these words –

84 (1) Subject to the provision of this article, the electorate of any constituency and of any interest group referred to in article 78 of this Constitution have the right to recall their member of Parliament before the expiry of the term of Parliament.

(2) A Member of Parliament may be recalled from that office on any of the following grounds–

(a) physical or mental incapacity rendering that Member incapable of performing the functions of the office; or

(b) misconduct or misbehaviour likely to bring hatred, ridicule, contempt or disrepute to the office; or

(c) persistent deserting of the electorate without reasonable cause.

(3) The recall of a Member of Parliament shall be initiated by a petition in writing setting out the grounds relied on and signed by at least two-thirds of the registered voters of the constituency or of the interest group referred to in clause (1) of this article, and shall be delivered to the Speaker.

(4) On receipt of the petition referred to in clause (3) of this article, the Speaker shall, within seven days require the Electoral Commission to conduct a public inquiry into the matters alleged in the petition and the Electoral Commission shall expeditiously conduct the necessary inquiry and report its findings to the Speaker.

(5) The Speaker shall–

(a) declare the seat vacant, if the Electoral Commission reports that it is satisfied from the inquiry, with the genuineness of he petition; or

(b) *declare immediately that the petition was*

unjustified, if the Commission reports that it is not satisfied with the genuineness of the petition.

(6) *Subject to the provisions of clause (2), (3), (4)*

and (5) of this article, Parliament shall, by law prescribe the procedure to be followed for the recall of a Member of Parliament.

Thus the Parliamentary Elections Act, 2005 has Section 85 whose wording in several Subsections is a replication of the contents of the Article. For emphasis it adds–

84 (5) *on receipt of the petition referred to in subsection*

(4), the Speaker shall, within seven days require the Commission to verify whether the petition is initiated within the requirements of subsection (4) and to conduct a public inquiry into the matters alleged in the petition and the Commission shall expeditiously conduct the necessary inquiry and report its findings to the Speaker.

(6) *The Speaker shall–*

(a) *declare the seat vacant, if the Commission reports that it is satisfied from the inquiry,* ***with the genuineness of the petition;***

or

(b) ***declare immediately that the petition was unjustified, if the Commission reports that it is not satisfied with the genuineness of the petition.***

(8) *The member of Parliament to whom the inquiry*

relates is entitled to appear in his or her own defence and to be represented by counsel of his or her choice.

In the case of physical or mental incapacity, a medical board must carry out investigations to establish that state. Likewise, in the case of misconduct or misbehaviour, a judicial officer appointed by the Chief Justice must carry out investigations and determine whether the allegations are established or not.

None of these provisions provide for the mode adopted by the Commander-in-Chief and UPDF commanders in this case. I do not think that the Army Standing Orders relied on by counsel for the respondents replace or detract from the provision of the Constitution.

If the Commander-in-Chief considered that the appellant should vacate his seat as a Member of Parliament, he should have asked the Army Council to utilize the above relevant provisions of the Constitution and of the Parliamentary Elections Act, 2005, to recall the appellant from Parliament. Alternatively the Commander-in-Chief could have invoked his Executive and administrative powers to dismiss the respondent from the army, which I think could render him ineligible as the army representative.

For the fore going reasons, I have no doubt whatsoever that the respondent was unlawfully forced to write his so called letter resigning as a Member of Parliament representing the UPDF. The letter was not effective and the Speaker should not have acted on it. In my view Article 252 of the Constitution on the effective time of resignation applies only where the letter of resignation is written voluntarily in compliance with the law. In this case the laws applicable are Articles 83 and 84 and Sections 84 and 85 of the PEA, 2005.

There is one matter about which I should comment even though it is not a ground of appeal. This is part of the first order of the Constitutional Court which is set out in the joint judgment of the learned Deputy Chief Justice and Lady Justice Kitumba, JA. I fear it can be misconstrued in future by litigants.

That order arises from the determination by the Court of the first issue. The order reads thus –

By a majority of four to one, it is declared that the actions of the President of Uganda can be challenged in a competent court of law. However, while holding office, the President shall not be liable to proceedings in Court.

The issue for determination was: *"whether the actions of the Commander-in-Chief/President can be challenged in a court of law."*

I think that the first part of the order of the Court was an adequate answer. It seems to me that the second part is superfluous and creates quandary and is likely to lead to misunderstanding and misinterpretation of the ratio decidendi of the decision. The second part of the decision is clearly a reproduction of clause (4) of Article 98 of the Constitution which provides the basic immunity of the person of an incumbent President against court proceedings for reasons I need not go into

here. It was not necessary to dilute the holding on the first issue by adding the principle inherent in Clause (4) of Article 98.

Secondly, it appears to me that it is the Presiding Justice (in this case, the Deputy chief Justice) who ought to have made the final order of the court since in this case, the decision of the court was not unanimous. Whereas I have no problem with two or more Justices preparing a joint judgment, I think that it is inappropriate for two Justices, including the Presiding one, to sign a joint order as the order of the court where more other Justices have proposed similar or different orders. Such a final order should be issued by the presiding justice, in this case the Deputy Chief Justice.

I would allow the appeal with costs to the appellant here and in the Court below. I think that this is a Pyrrhic victory because, in the circumstances of this case, it is not practical to grant remedies other than costs.

Delivered at Mengo this 13th day of October 2008.

J. W. N. TSEKOOKO
JUSTICE OF T HE SUPREME COURT.

IN THE SUPREME COURT OF UGANDA
AT MENGO

CORAM: ODOKI CJ. TSEKOOKO, MULENGA, KANYEIHAMBA, & KATUREEBE JJ.S.C. & ENGWAU & BYAMUGISHA Ag. JJ.S.C.

CONSTITUTIONAL APPEAL NO. 2 OF 2006

BETWEEN

BRIG. HENRY TUMUKUNDE::::::::::::::::::::::::::::::::APPELLANT

AND

1. **ATTORNEY GENERAL**
2. **ELECTORAL COMMISSION:::::::::::::::::::::RESPONDENTS**

[Appeal from decision of the Constitutional Court (Mukasa-Kikonyogo DCJ, Mpagi-Bahigeine, Twinomujuni, Kitumba and Kavuma JJ.A) at Kampala dated 7th March 2006, in Constitutional Petition No.6 of 2005.]

<u>JUDGMENT OF MULENGA J.S.C.</u>

The appellant petitioned the Constitutional Court for diverse declarations and orders of redress to nullify his resignation as a Member of Parliament and the resultant consequences thereof. By a majority decision, the Constitutional Court dismissed the petition; hence this appeal.

Although I agree with my learned brother Kanyeihamba J.S.C., whose judgment I had opportunity to read in draft, that the appeal be allowed, I came to the conclusion for a different reason from his reasons most of which I respectfully do not agree with.

Background

The background to the petition as disclosed in the pleadings and supporting affidavit evidence can be simply stated. The appellant, a senior Army Officer in active service, was until May 2005, a Member of Parliament elected by the Army Council of the Uganda Peoples Defence Forces (UPDF). On 27th May 2005 he was summoned to a meeting with the Commander–in–Chief of the UPDF, which was also attended by four other senior officers of the UPDF High Command. The subject of the meeting appears to have been the appellant's conduct in taking part in radio

shows without leave contrary to military regulations; and his stand in Parliament over the UPDF Bill 2003, which was contrary to instructions given by the UPDF Army Council to all the army representatives in Parliament. In the course of the meeting, the appellant was directed to write to the Speaker of Parliament resigning his seat in Parliament. He complied with the directive by a letter dated 28th May 2005.

Shortly after writing the letter, the appellant was arrested and on 30th May 2005, was charged before the General Court Martial with offences under the UPDF Act, arising from statements he made during the radio shows.

Meanwhile, upon receipt of the appellant's letter the Speaker instructed the Clerk of Parliament to notify the Electoral Commission of the vacant seat in Parliament resulting from the appellant's resignation.

On 7th June 2005, the appellant filed the said petition under Article 137 of the Constitution, alleging *inter alia,* and seeking declarations -

- that the act of the Commander-in-Chief and some senior officers of the UPDF directing him to resign from his position as Army Representative in Parliament, and the act of the Speaker declaring his seat in Parliament as vacant on basis of his letter implementing a directive to resign, were inconsistent with and contravened Articles 80, 83(1) and 84 of the Constitution;
- that the act of the UPDF restraining him from expressing himself on all political matters, while exempting others, was inconsistent with and contravened Articles 20, 21 and 29 of the Constitution; and
- that he was still the legally elected representative of the UPDF in Parliament.

Further, he prayed for an order prohibiting an election for his replacement, and for damages for violation of his freedoms of speech, movement and assembly.

By majority decision, the Constitutional Court held that the appellant had lawfully resigned his seat and it refused to grant the declarations and other orders for which he had prayed.

It is noteworthy that though in his petition the appellant sought a declaration that he was still a Member of Parliament, he did not seek any direct holding on the constitutional effect of his letter

to the Speaker. It is therefore, fitting that the 1st and only substantial ground of appeal, focuses more on the legality of the resignation than the constitutionality of the directive. It reads -

> ***"The learned Justices of the Constitutional Court erred in fact and law when they held that the appellant lawfully resigned his seat in Parliament."***

In his written submissions, learned counsel for the appellant argues this ground on basis of two alternative propositions. The first proposition is that the letter to the Speaker did not constitute a resignation. The alternative proposition is that the appellant did not write the letter voluntarily and consequently it was not his resignation. The sum total is that the appellant did not resign his seat in Parliament within the meaning of Article 83(1) (a) of the Constitution. I will consider the two propositions separately.

In respect of the first proposition, learned counsel submits that the purpose of the letter the appellant wrote was to bring to the attention of the Speaker the directive he had received from the Commander-in-Chief, and maintains that what the appellant communicated was the directive and not a resignation. Accordingly, he argues that the Constitutional Court ***"imported into the plain wording of the letter something extraneous"*** in order to construe it as ***"a letter of resignation".***

The letter is dated 28th May 2005, and is addressed to the Right Honourable Speaker of Parliament of Uganda and copied to the Commander-in-Chief of the UPDF and to the UPDF Forces Council. It reads **–**

> ***"Mr. Speaker Sir,***
>
> ***I was summoned to a meeting by the Commander in Chief of the UPDF on 27 March 2005 to which I complied.***
>
> ***During the meeting attended by UPDF, I was directed to write to you R Hon Speaker resigning. This directive had a deadline of 12 hours. This therefore explains why I had to write on a weekend. The purpose of this communication is to draw your attention to the above directive to accordingly comply.***
>
> ***Please do not hesitate to contact me if you need any further clarification."*** (Emphasis added)

In my view, counsel's first proposition is untenable because it excludes part of the stated purpose of the communication. It appears to me that the appellant expressly discloses a two-pronged purpose of writing to the Speaker, namely: ***"to draw*** [the Speaker's] ***attention to the directive"*** and ***"to accordingly comply"***. Although the conjunctive word "and" is missing, I am satisfied that the expression "to accordingly comply" makes sense only in relation to him and not to the Speaker. I cannot visualise any other meaning to put on the sentence than that the appellant was informing the Speaker, as well as the UPDF Commander-in-Chief and the UPDF Forces Council to whom he copied the letter, that he was complying with the directive to write to the Speaker resigning, within the stipulated deadline.

I am fortified in this view by the appellant's affidavit evidence. In his own affidavit in support of the petition, the appellant, after reiterating that he had been directed and ordered to write to the Speaker resigning his seat, said in paragraph 3: ***"That against my will and without choice, I complied and wrote to the Speaker as directed."*** This is quite unequivocal. He did not say that he wrote the letter to solicit the Speaker's intervention or for any other purpose. He said on oath that he wrote to the Speaker in compliance with the directive, which directive was that he writes to the Speaker resigning his seat in Parliament. I therefore find that the Constitutional Court did not "import anything extraneous in the letter" and did not err in holding as a fact that the appellant did knowingly resign his seat in writing albeit against his will.

That leads to the second alternative proposition. Learned counsel for the appellant premises it on assertions that the appellant wrote the letter as a result of force, coercion, intimidation and/or overbearing circumstances perpetrated by the President, and that for that reason the letter was in law not the appellant's resignation. These assertions, however, are not supported by evidence.

The two participants at the meeting of 27th May 2005 who testified on the matter were the appellant and Maj. Gen. Joshua Masaba, the UPDF Chief of Staff. The appellant's testimony on the matter is in his affidavit sworn on 7th June 2005 in which *inter alia* he averred –

> ***"2. That on 27th May 2005, I was summoned by the Commander in Chief of the … UPDF and during a meeting attended by four senior officers of the UPDF High Command, <u>I was ordered and directed to write to the Speaker resigning my seat</u> as one of the Army Representatives in the Parliament of Uganda.***

3. That <u>against my will and without choice</u> I complied and wrote to the Speaker as directed.

.....

5. That the said letter was not my resignation from Parliament as is provided for in the Constitution and since I was immediately arrested and detained soon after, <u>I was denied the opportunity of writing to the Speaker explaining the circumstances, under which the letter was written.</u>" (Emphasis is added)

On the other hand, Maj. Gen. Masaba, after stating in his affidavit that in the Parliamentary debate on the UPDF Bill 2003, the appellant had taken a stand that was contrary to instructions the Army Council gave to its representative Members of Parliament; and that on several occasions the appellant had contacted the press without approval of UPDF authority, went on to aver in paragraphs 8 to 12 as follows -

"8. That H.E. the President raised the above two issues with the Petitioner in the meeting he had with him and expressed his displeasure with the Petitioner's conduct.
9. That on the 27th May 2005, H.E. the President summoned the Petitioner for a meeting with him and he directed me to attend that meeting which I did.
10. That H.E. the President advised the Petitioner to resign his seat from Parliament in view of his above said conduct.
11. That the Petitioner accepted the advice and stated that he was going to communicate to the Speaker of Parliament immediately.
12. That at no time did the President ever force the petitioner in any way to resign his seat in Parliament."

It is not clear if the meeting referred to in paragraph 8 is the same as, or different from, that of 27th May 2005. What is clear, however, is that neither the appellant nor Maj. Gen. Masaba testified to the use of force, coercion or threats by the President/Commander-in-Chief to induce the appellant to resign, and neither of them alleged that the resignation letter was written under overbearing circumstances.

In his affidavit, the appellant lamented that he was denied opportunity to explain to the Speaker the circumstances under which he wrote the letter; yet he omitted to use the opportunity of the affidavit to explain any more than was in the letter to the Speaker. He only added the averment

that he resigned ***"against [his] will and without choice"***, which averment is a description of his state of mind. His only explanation for that state of mind is that he was ***"directed and ordered to write to the Speaker resigning"***. I have no doubt that, if the appellant was subjected to any force, coercion or threats as submitted by his learned counsel, he would have disclosed it in his affidavit. Counsel's submission in this regard is no more than inadmissible conjecture.

In my view, the affidavit evidence of the two witnesses did not establish with certainty what transpired on 27th May 2005 at the meeting with the Commander-in-Chief, a deficiency that could have been cured at the trial through cross-examination of the deponents. Nevertheless, from the described purpose and composition of the meeting as well as the appellant's reaction, it can be reasonably inferred on a balance of probabilities that the appellant was directed rather than advised to resign. That leads to the issue whether the directive vitiated the appellant's act of resigning so as to render the resignation "unlawful" as is implicit in this ground of appeal.

I agree with the submission of learned counsel for the appellant that the President/Commander-in-Chief did not have power "to kick the appellant out of Parliament". Indeed the President/Commander-in-Chief himself did not purport to exercise any such power. He must have recognised that resignation from Parliament is effective only if it is done by the Member of Parliament personally in writing to the Speaker; hence the directive to the appellant to resign rather than addressing the directive to the Speaker to declare the appellant's seat vacant.

In my view, what transpired in the instant case is analogous to what may happen when political pressure is applied on any Member of Parliament by those that wield political influence in his/her constituency. I do not share the view that parliamentary privilege renders a Member of Parliament immune from such influence or pressure in every case. Where such pressure contravenes the Constitution or is otherwise unlawful, the Member of Parliament affected bears the primary responsibility to resist it. For example, if a Member of Parliament chooses to succumb to such pressure and resigns his/her seat rather than face the prospect of going through the process of being recalled, he/she cannot blame the Speaker for not protecting him/her. It may well be that a civilian Member of Parliament would be more disposed to put up such resistance than a Member of Parliament representing the army. Nevertheless the responsibility of both is the same.

It seems to me that essentially the appellant petitioned the Constitutional Court to avoid responsibility for his resignation. However, he did not seek to avoid the responsibility on the ground that he did not resign or because he resigned under duress in the legal sense of the word, as argued by his learned counsel. He did so because he resigned only in order to comply with superior orders but against his will. His averment that he ***"had no choice"*** but to comply with the directive to resign can only be in that context. Yet, in fact and in law, the appellant had the alternative choice of refusing to resign. He had no legal obligation to comply with the directive because the directive was not a lawful order.

Notwithstanding that, however, I accept the appellant's evidence that he resigned against his will. It is obvious that he did so in the apparent belief that as a soldier he was under obligation to comply with the directive from his Commander-in-Chief.

Article 83(1)(a) of the Constitution provides that a Member of Parliament shall vacate his or her seat in Parliament ***"if he or she resigns his or her office in writing signed by him or her and addressed to the Speaker".*** Although the provision makes no stipulation as to any requisite state of mind in which a Member of Parliament must be when resigning, I deduce from the requirement that the resignation be in writing signed by him or her that what is envisaged is a Member of Parliament who chooses willingly to resign his or her seat. I am persuaded that it is erroneous to construe the provision as including an unwilling resignation. I agree therefore that the appellant's resignation was not consistent with Article 83(1)(a) and for that reason I also agree that his appeal ought to succeed, but would not award costs.

I am constrained to conclude with an observation on the dichotomy in the position of the army representative in Parliament. While such representative is subject to obligations and duties and is entitled to unfettered Parliamentary privileges and other rights on the same footing as the civilian counterparts, as long as he/she remains in active service he/she remains subject to military discipline including the rules on the chain of command. The averment by Gen. Masaba that the army representatives in Parliament are "listening posts" clearly reflects the UPDF expectations of its MPs on the one hand. On the other hand the fact that an officer of the standing and capacity of the appellant could comply with the directive, which he knew had no legal basis, illustrates the perception the military MP has of military discipline vis a viz his/her role as a Member of Parliament. Needless to say that underscores the question whether it is desirable to continue

having a membership of the National Parliament that is subject to constraints of military discipline. However, that is a political question that is not within the judicial domain.

Dated at Mengo this 13th day of October 2008

J N Mulenga

Justice of Supreme Court

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: [ODOKI CJ., TSEKOOKO, MULENGA, KANYEIHAMBA, KATUREEBE, JJ.SC., ENGWAU & BYAMUGISHA Ag. JJ.SC].

CONSTITUTIONAL APPEAL NO. 2 OF 2006

B E T W E E N

BRIG. HENRY TUMUKUNDE :::::::::::::::::::: APPELLANT

AND

1. **ATTORNEY GENERAL**
2. **ELECTORAL COMMISSION ::::::::::::: RESPONDENTS**

[Appeal from decision of the Constitutional Court (Mukasa-Kikonyogo, DCJ., Mpagi-Bahigeine, Twinomujuni, Kitumba and Kavuma, JJ.A) at Kampala dated March 2006, in Constitutional Petition No. 6 of 2005].

JUDGMENT OF KATUREEBE, JSC

I have had the benefit of reading in draft the Judgment of my learned brother, Kanyeihamba, JSC and I agree with him that this appeal be allowed in part for the reasons he has given. I also concur in the orders he has proposed.

DATED at Mengo this 13th day of October 2008.

Bart M. Katureebe

Justice of the Supreme Court

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

[CORAM: ODOKI,CJ, TSEKOOKO, MULENGA, KANYEIHAMBA, KATUREEBE, J.J.S.C. ENGWAU AND BYAMUGISHA AG, J.J.S.C.]

CONSTITUTIONAL APPEAL NO. 2 OF 2006

BETWEEN

BRIDADIER HENRY TUMUKUNDE :: APPELLANT

AND

1. THE ATTORNEY GENERAL
2. ELECTORAL COMMISSION] ::: RESPONDENTS

(*Appeal against the judgment and orders of the Constitutional Court, (Mukasa-Kikonyogo, DCJ, Mpagi-Bahigeine, Twinomujuni, Kitumba and Kavuma, J.J.A) in Constitutional Petition No. 6 of 2005, dated 7th March 2006]*

JUDGMENT OF ENGWAU, AG.J.S.C.

I had the benefit of reading, in draft, the lead judgment prepared by Hon. Kanyeihamba, J.S.C and I entirely agree with him that this appeal ought to succeed. I have, however, some observations to make by way of emphasis.

The brief facts of this appeal are that at the time of his alleged resignation from parliament, the appellant was a member of the Uganda Peoples' Defence Forces (UPDF). He was elected by the

UPDF Forces Council to represent the army in Parliament as a special interest group under Article 78 (1) of the Constitution.

In 2005, the statements made by the appellant in Parliament when the UPDF Forces Bill was tabled for debate and the statements that he made during the radio debates, did not augur well with the President and Commander-in-Chief of the UPDF.

Consequently, the Commander-in-Chief convened a meeting of the UPDF Command on 27th May, 2005. The appellant was summoned to attend and he complied. Some senior officers including the Army Commander and the Chief of Staff also attended. In that meeting, the Commander-in-Chief directed the appellant to resign his seat in Parliament.

The following day, 28th May 2005, the appellant wrote a letter to the Speaker of Parliament purporting to resign his seat in Parliament in compliance with the directive. The letter reads:

> ***"Mr. Speaker Sir,***
>
> ***I was summoned to a meeting by the Commander-in-Chief of the UPDF on 27th May, 2005, to which I complied. During the meeting attended by UPDF Command, I was directed to write to you Mr. Speaker, resigning. This directive had a deadline of 12 hours. This explains my writing on weekend. The purpose of this communication is to draw your attention to the above directive and to accordingly comply. Please do not hesitate to contact me if you need any further clarification."***

The appellant was thereafter arrested and placed under military detention. On 3rd May 2005, the appellant was charged before the General Court Martial. In the 1st count, he was charged with conduct prejudicial to good order and discipline contrary to section 66(1),(2) and (5) of the UPDF Act. In the 2nd count, he was charged with spreading harmful propaganda contrary to section 38(1) and (2) of the UPDF Act.

Being aggrieved with the actions of the President and Commander-in-Chief, the appellant unsuccessfully filed Constitutional Petition No.6 of 2005 challenging the actions of the President and Commander-in-Chief in the Constitutional Court, hence this appeal on the following grounds:

1. **The learned Justices of the Constitutional Court erred in fact and law when they held that the appellant lawfully resigned his seat in Parliament.**

2. **The learned Justices of the Constitutional Court erred in law in holding that the actions of the Electoral Commission in declaring the appellant's seat in Parliament vacant were lawful.**

3. **The learned Justices of the Constitutional Court erred in law when they found that the pressing of charges against the appellant who was a member of Parliament before the General Court Martial for expressing himself in a political matter did not violate or contravene Articles 20, 21 and 29 of the Constitution.**

In their written submissions, counsel for the parties argued grounds 1 and 2 together and ground 3 separately. I intend, for convenience, to consider the 3 grounds separately and in their order.

It was the contention of counsel for the appellant that the appellant never lawfully resigned his parliamentary seat. According to counsel, the letter which the appellant wrote to the Speaker of Parliament, sought to bring to the attention of the Speaker the directive he had received from the Commander-in-Chief. In counsel's view, what the appellant communicated was the directive and not a resignation.

In the alternative, it was the argument of counsel for the appellant that the letter in question was not written voluntarily to make it a resignation within the meaning of Article 83(1)(a) of the

Constitution. Under this article, a member of Parliament vacates his or her seat if he or she resigns his or her office in writing, signed by him or her and addressed to the Speaker. Counsel pointed out that in the present case, the alleged letter of resignation was procured under duress and in overbearing circumstances perpetrated by the President. In counsel's view, a member of Parliament cannot be lawfully ordered to vacate his parliamentary seat by the President.

As regards the duties of the Speaker of Parliament under Article 82 of the Constitution, learned counsel submitted that the Speaker must exercise his duties in accordance with the provisions of the Constitution. Counsel further submitted that the directive which was communicated to the Speaker by the appellant clearly intimated appellant's willingness to furnish details and the nature of the circumstances of his peculiar situation. In that regard, the Speaker was under a duty to inquire into the circumstances under which the appellant purportedly tendered his resignation letter before accepting it.

According to counsel, if the Speaker had inquired into the matter, he would have found that the appellant wrote the letter as a result of overbearing circumstances and coercion perpetrated by the President, Counsel further submitted that if a proper inquiry was done, an option of recall by a constituency under Article 83(1)(f) of the Constitution would have been available to the authorities in the army including the Commander-in-Chief.

All in all, counsel submitted that failure by the Speaker to seek a clarification as indicated by the appellant in his letter, mere writing, signing and addressing the letter to the Speaker, did not mean that the letter was written voluntarily under Article 83(1)(a) of the Constitution. Therefore, the appellant did not resign his parliamentary seat lawfully.

Counsel for the respondents did not agree. What is required according to them, under Article 83(1)(a) of the Constitution, is that a member of Parliament vacates his or her office in writing signed by him or her and addressed to the Speaker. In their view, the appellant's letter dated 28th May 2005, meets those requirements and therefore it is an effective resignation.

Counsel further argued that the appellant was communicating his resignation and requesting the Speaker to comply when he stated, ***"The purpose of this communication is to draw your attention to the above directive to accordingly comply."*** In counsel's view, the letter amounted to an effective resignation.

The respondents further contend that it was not averred in the petition or the affidavit in support thereof that the appellant was forced to resign by the President and Commander-in-Chief or by any other person. The appellant should have stated the nature of force or threat exerted on him but he did not. Therefore, the letter of resignation cannot be vitiated. Alternatively, the appellant should have withdrawn his letter, explaining the type and magnitude of force. Failure to do so, the appellant wrote his letter of resignation willingly.

Further, it is the argument of the respondents that in accepting the letter of resignation which letter stated he should "comply", the Speaker was exercising his duties and mandate under Article 83(1)(a) of the Constitution. In counsel's view, the Speaker of Parliament does not need to know the reasons why a member of Parliament is resigning. Therefore, the Speaker's acceptance of the appellant's letter of resignation was lawful.

I have read the letter which the appellant wrote to the Speaker of Parliament, purporting to resign his parliamentary seat. I have reproduced the contents of that letter in this judgment. It is important to know the background facts which made the appellant write that letter before analysing it. He says that he was summoned to a meeting by the Commander-in-Chief of the UPDF on the 27th May, 2005, to which he complied.

During the meeting attended by UPDF Command, he was directed to write to the Speaker, resigning. This means that the appellant was purporting to resign unwillingly. The directive had a deadline of 12 hours, and that explains why he was writing during the weekend. The alleged resignation letter was not written voluntarily.

Learned counsel for the appellant argued that the letter was informing the Speaker about the directive to resign but it was not a resignation letter that was voluntarily written. Counsel for the respondents submitted that the letter was a resignation that was effective. Be that as it may, the question is, did the appellant resign lawfully?

Article 98(1) provides that: ***"There shall be a President of Uganda, who shall be the Head of State, Head of Government and Commander-in-Chief of the Uganda Peoples' Defence Forces and the Fountain of Honour."***

Article 99(1) further states that: ***"The executive authority of Uganda is vested in the President and shall be exercised in accordance with this Constitution and the laws of Uganda."***

My understanding of these provisions of the Constitution is that the executive authority vested in the President must be exercised in accordance with the provisions of the Constitution and the relevant laws of Uganda. This means that any actions of the President which are not exercised in accordance with the Constitution can be challenged in court.

In this particular case, the President and Commander-in-Chief of the UPDF directed the appellant to resign his seat in Parliament for two reasons: First, the appellant as a representative of the army in Parliament, did not support the UPDF Bill that was tabled in Parliament. He opposed clause 26 of the Bill, a photocopy of the Hansard relating to the debate on the said Bill was attached as Annexture "A".

Secondly, the appellant was directed to resign his parliamentary seat because of making public political statements during talk shows at various radio stations without the approval of any UPDF authority.

The affidavit evidence in support of the respondents' answer to the petition sworn by Major-General Joshua Masaba in his capacity as the Chief of Staff of the UPDF, avers in paragraphs 3,4,5,6,7,8,9, and 10 as follows:

"3. That I know that the President is the Commander-in-Chief and the Chairperson of the Uganda Peoples' Defence Council that elects representatives of the UPDF in Parliament.

4. ***That I know that when the Uganda Peoples' Defence Bill 2003 was about to be debated in Parliament, the UPDF Forces Council met, discussed and approved the contents of the said Uganda Peoples' Defence Forces Bill, and directed all UPDF representatives in Parliament to support the said Bill.***

5. ***That when the said Bill was tabled before Parliament, the petitioner did not represent the views of the UPDF Forces Council but gave positions that were different. In particular he opposed clause 26 of the Bill. Photocopy of the Hansard relating to the debate on the UPDF Bill is attached as Annexture "A" hereto.***

6. ***That I know that the conduct of the petitioner in Parliament was contrary to both the decision taken by the UPDF Forces Council and the UPDF Standing Instructions given to all Army Representatives in Parliament, namely to be listening posts for the UPDF in Parliament to provide guidance to Parliament in military matters when need arises, and to consult the UPDF Forces Council on controversial issues that arise in Parliament.***

7. ***That I also know that on several occasions the petitioner contacted the press without approval by any UPDF authority and made public statements over the radio which were prejudicial to good order and discipline of the army. Copy of the charges that were brought against the Petitioner were attached to the affidavit of the petitioner.***

8. ***That H.E. the President raised the above two issues with the petitioner in the meeting he had with him and expressed his displeasure with the petitioner's conduct.***

9. ***That on the 27th May 2005, H.E. the President summoned the petitioner for a meeting with him and he directed me to attend that meeting which I did.***

10. ***That H.E. the President advised the petitioner to resign his seat from Parliament in view of his above said conduct."***

In my view, the appellant did not resign lawfully. He was directed to resign for both what he did in Parliament and for what he did outside Parliament.

The doctrine of Separation of Powers basically states that the three arms of government, that is the Legislature, the Executive and the Judiciary, must be independent of each other and separate from one another. There are, however, various overlaps, for example, in Uganda; Cabinet Ministers are drawn mostly from elected members of Parliament, whereas Judges are appointed by the President upon approval of Parliament. It is generally accepted that what the doctrine advocates is a system of checks and balances aimed at the prevention of tyranny by conferment of too much power on any one person or body and the checking one power by another. The doctrine is entrenched in chapters six, seven and eight of the Constitution respectively.

The doctrine was thus expounded by Montesquieu, a French Jurist:

> ***"Political liberty is to be found only where there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go…. To prevent this abuse, it is necessary from the nature of things that one power should be a check on another….When the executive and legislative powers are united in the same person or body ….There can be no liberty if the judicial power is not separated from the legislature and the executive…. There would be an end of everything, if the same person or body, whether of the nobles or of the people, were to exercise all three powers."***

In this particular case, the President as head of the Executive arm of government, ought to have exercised the executive authority vested in him in accordance with the Constitution and relevant laws of Uganda. The Legislature must be allowed to enjoy its independence as an institution in the performance of its legislative duties under Article 79 of the Constitution.

Members of Parliament, regardless of those representing special interest groups, are accorded parliamentary immunities and privileges under Article 97(1) of the Constitution and Part II of the Parliament (Powers and Privileges) Act (CAP 258).

Article 97 (1) reads: ***"The Speaker, the Deputy Speaker, Members of Parliament and any other person participating or assisting in or acting in connection with or reporting the proceedings of Parliament or any of its committees shall be entitled to such immunities and privileges as Parliament shall by law prescribe".***

Accordingly, Parliament enacted the Parliament (Powers and Privileges) Act (CAP 258) thus: ***"PART II – No civil or criminal proceedings may be instituted against any member for words spoken before, or written in a report to, Parliament or to a committee, or by reason of any matter or thing brought by the member in Parliament or a committee by petition, bill, motion or otherwise".***

My understanding of the above provisions of the Constitution and the Act, is that a member of Parliament enjoys complete immunities and privileges for what transpires in Parliament. No civil or criminal proceedings can be instituted against a member of Parliament for what he or she has spoken before Parliament or to a committee of Parliament.

Consequently, the directive that the appellant should resign his seat in Parliament was unfortunate. It was a directive that had no basis in law. It was immaterial that the order was from superior officers. The appellant was completely protected and privileged under Article 97(1) of the Constitution and under The Parliament (Powers and Privileges) Act.

It was therefore unconstitutional, in my view, that the appellant's conduct about the speeches he had made while on the floor of Parliament was questioned. The directive to make the appellant vacate his parliamentary seat was therefore null and void as far as his refusal to support the UPDF Bill in Parliament was concerned. He was not obliged to comply with unconstitutional directive.

It is, however, a different matter if a member of Parliament repeats what he or she had said in Parliament outside the Parliament. Any member of Parliament who repeats his or her words outside Parliament does so at his or her own risk. Such a member of Parliament does not enjoy parliamentary immunities and privileges. Civil or criminal proceedings may be instituted against him or her.

In the present case, the appellant was on a frolic of his own when he made public statements during radio talks without permission from the UPDF Forces Council. In that regard the appellant had subjected himself for disciplinary action as a member of the UPDF. He had also subjected himself to be recalled under Articles 83 (1)(f) and 84(1) and (2)(b) of the Constitution.

Article 83 (1)(7) provides that: ***"A member of Parliament shall vacate his or her seat in Parliament – if recalled by the electorate in his or her constituency in accordance with this Constitution".***

Article 84 (1) and (2)(b) provides that:

"Subject to the provisions of this Article, the electorate of any constituency and of any interest group referred to in article 78 of this Constitution have the right to recall their member of Parliament before the expiry of the term of Parliament.

(2) A member of Parliament may be recalled from that office on any of the following grounds:-

(b) misconduct or misbehaviour likely to bring hatred, ridicule, untempt or disrepute to the office".

It is my considered view that the appellant should count himself lucky for not being recalled by the army council as a constituency.

As regards the role and functions of the Speaker of Parliament, it is my understanding that the Speaker must also exercise his duties in accordance with the Constitution. Any member of Parliament may vacate his or her seat in Parliament under Articles 83(1)(a) and 252 of the Constitution. The resignation is effective once a member of Parliament writes a resignation letter, signs it, addresses the letter to and it must be accepted by the Speaker of Parliament. It is a misconception, in my view, to say that in all cases the Speaker does not need to know the reasons why a member of Parliament is resigning his or her seat in Parliament. He controls and safeguards the interests of Members of Parliament within the precincts of Parliament under Article 97 (1) of the Constitution and under The Parliament (Powers and Privileges) Act.

In the instant case, the letter that the appellant wrote to the Speaker purporting to resign his seat made the situation unique. It was a peculiar situation because the President and Commander-in-Chief is not vested with authority to direct any member of Parliament to vacate his or her seat in Parliament even if that member is representing the army in Parliament. It would have been of great concern to the Speaker not only to control any business of Parliament, but also to protect and safeguard the interests of members of Parliament for speeches that they make while inside Parliament.

That duty was placed on the Speaker's shoulders by the provisions of Article 97 (1) of the Constitution and The Parliament (Powers and Privileges) Act. If the Speaker had inquired into the unique circumstances under which the appellant purportedly resigned his seat in Parliament, he would have been faced with two scenarios: The first one would have been, the appellant was directed to resign his seat in Parliament because he did not support the UPDF Forces Bill that was tabled in Parliament. It would have been the duty of the Speaker to protect the appellant for the decision he took while in Parliament. His decision not to support the Bill was completely privileged and unquestionable.

The second scenario would have been the unprivileged public statements which the appellant had made outside Parliament. Any member of Parliament including the appellant, is responsible for statements made outside Parliament. Members of Parliament enjoy immunities, rights and privileges only when they are in Parliament. In that regard, I do not think that the appellant was discriminated upon in any way for statements that he had made at the radio stations. I do not see how his fundamental rights of speech and expression were violated. Article 97(1) of the Constitution and The Parliament (Powers and Privileges) Act protected equally all members of Parliament from what they say or do in Parliament except for what they say or do outside Parliament. The appellant should not have been directed to vacate his parliamentary seat for not supporting the views of the UPDF in Parliament when the UPDF Bill was tabled for debate. In protection of his parliamentary immunities and privileges, the 1st ground of this appeal ought to succeed.

On ground 2, the complaint is that the appellant's letter was not a resignation of his parliamentary seat and therefore it had no legal effect. Consequently, the actions of the Electoral Commission in declaring his seat vacant were unlawful.

Article 81(2) provides that ***"Whenever a vacancy exists in Parliament, the Clerk to Parliament shall notify the Electoral Commission in writing within ten days after the vacancy has occurred; and a by-election shall be held within sixty days after the vacancy has occurred."***

Article 87(1) further provides that; ***"There shall be a public officer designated Clerk to Parliament appointed by the President acting in accordance with the advice of the Public Service Commission."***

My understanding of the above provisions of the Constitution is that the Clerk to Parliament is a public officer who sits in Parliament. He or she oversees the business of Parliament whereas the Electoral Commission staff do not sit in Parliament and therefore do not know what goes in Parliament.

When the Clerk to Parliament informs the Electoral Commission that there exists a vacancy in Parliament, the hands of the Electoral Commission are tied. They have no reason to doubt the information given by the Clerk to Parliament but to act accordingly. In that regard, ground 2 fails for lack of merit.

The gist of the 3rd ground is that the pressing of charges against the appellant who was a member of Parliament before the General Court Martial for expressing himself in a political matter violated or contravened Articles 20, 21 and 29 of the Constitution.

Members of Parliament, including the appellant, were entitled to all the powers and privileges, including deliberations on all matters of national interest during a debate or motion in Parliament. They are elected to speak not only for the good of their constituencies but also for the good of the whole country. All their powers and privileges in their deliberations are guaranteed under Article 97(1) of the Constitution and under The Parliament (Powers and Privileges) Act.

Members of Parliament do not enjoy parliamentary immunities and privileges outside Parliament. They must confine themselves and abide by the law in force. Although some members of Parliament were free to speak to the press or address radios, they were supposed to do so while observing law. They were not completely free to utter words which were detrimental and get away with it.

In the instant case, the appellant was a soldier representing the army in Parliament. He was under duty to observe military laws, for example UPDF Act, Army Code of Conduct and Army Standing Orders. Rule 20 of the Army Standing Orders, for example, states that military personnel are not allowed to contact the press unless approved by the Army Commander. The freedom extended to the appellant in Parliament did not rescue him against his controversial statements to the press outside Parliament. In the premises, I would not default Justices of the Constitutional Court when they held that the pressing of charges against the appellant did not contravene the Constitution. Therefore, ground 3 also fails.

In the result, I would allow this appeal with costs to the appellant in respect of the 1st ground.

Dated at Kampala this 13th of October 2008

S.G. ENGWAU

AG. Justice of the Supreme Court.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CORAM: ODOKI, CJ, TSEKOOKO, MULENGA, KANYEIHAMBA, KATUREEBE JJSC, ENGWAU AND BYAMUGISHA AG.J.J.S.

CONSTUTITIONAL APPEAL NO.2/06

BETWEEN

BRIGADIER HENRY TUMUKUNDE ....APPELLANT

AND

1 ATTORNEY GENERAL

2 ELECTORAL COMMISSION.........................RESPONDENTS

[Appeal from the judgement and orders of the constitutional court dated 7th march 2007 (Mukasa Kikonyongo, DCJ, Mpagi-Bahageine, Twinomujuni, Kitumba and Kavuma J.J.A) in constitutional petition No.6/o5]

JUDGMENT OF BYAMUGISHA, Ag. JSC

This is an appeal against the decision of the constitutional court which by majority decision dismissed the appellant's petition with orders that each party bears its own costs

I had the benefit of reading the very full judgment prepared by Kanyeihamba JSC which has just been delivered. It sets out the facts clearly and my own views of the case that I find it unnecessary to add anything further.

I concur in the judgement and the orders he has proposed.

Dated at Kampala this 13th day of October 2008

C.K.Byamugisha

Ag. Justice of the Supreme Court