THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

5 *{Coram: Tumwesigye, Dr. Kisaakye & Arach-Amoko, JJSC.; Dr. Odoki, Tsekooko, Okello & Kitumba, Ag. JJSC.}*

Constitutional Appeal No. 01 of 2015.

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Between

1. HON. THEODORE SSEKIKUBO
2. HON. WILFRED NIWAGABA
3. HON. MOHAMMED NSEREKO ::::::::::::::::::::::::::::::::: APPLICANTS.
4. HON. BARNABAS TINKASIMIRE
5. HON. ABDU KATUNTU

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And

1. THE ATTORNEY GENERAL
2. HON. LT. (RTD.) SALEH M. W. KAMBA
3. MS. AGASHA MARY. ::::::::::::::::::::::::::::::::: RESPONDENTS.
4. NATTIONAL RESISTANCE MOVEMENT
5. JOSEPH KWESIGA

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{Appeal from majority decision of the Constitutional Court at Kampala (Kavuma, Ag. DCJ., Nshimye, Mwondha, Butera, JJA../ JJCC.)(Kasule, JA/ JCC dissenting) in Constitutional Petitions No. 16, 19, 21 and 25 of 2013 consolidated, dated 21st February, 2014.}

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JUDGMENT OF THE COURT:

Introduction:

This Constitutional appeal arises from the decision of the 35 Constitutional Court as a trial Court. The decision was by majority. This appeal raises constitutional issues of great public importance relating to the development of parliamentary democracy in Uganda. The issues include the role of political parties in

controlling Members of Parliament who belong to them and the effect of that control and the status of Members of Parliament expelled from their parties. All these issues call for decision. The independence of Parliament and the role of the Speaker in managing the working of Parliament is another issue to be considered. There is the question of which Court has jurisdiction to determine whether a Member of Parliament has ceased to hold his or her seat. Other issues to be considered are the authority and legal status of the advice of the Attorney General to Government and other public institutions, and the scope of the immunity granted to the President from legal process.

Background:

The background to this appeal is that Constitutional Petitions No 16, 19, 21, and 25 of 2013 were filed in the Constitutional Court separately but were later consolidated. Nearly at the same time, Constitutional Applications No. 16, 14, 23 of 2013 arising from Constitutional Petitions No. 16 and 21 were also filed separately. The Constitutional Court decided to consolidate them with the said Petitions and hear them together.

The brief facts from which the consolidated Constitutional Petitions and the Applications arise are as follows:

Hon. Theodore Ssekikubo (1st appellant) Member of Parliament for Lwemiyaga County, Sembabule District; Hon. Wilfred Nuwamanya (2nd appellant) Member of Parliament Ndorwa East, Kabale District; Hon. Mohammed Nsereko (3rd appellant) Member of

Parliament, Kampala Central, Kampala District and Hon. Barnabas Tinkasimire (4th appellant) Member of Parliament, Buyaga East in Kibale District, were the 2nd, 3rd, 4th, and 5th respondents in Constitutional Petitions No. 16 and 21 of 2013. At the time of parliamentary elections, they all belonged to the National Resistance Movement (NRM) Party.

On 14th April 2013, the Central Executive Committee (CEC) of the NRM expelled the four from the party on grounds that they had acted/behaved in a manner that contravened various provisions of the Party Constitution. The Appellants challenged their expulsion in the High Court and the matter is still pending.

Following the expulsion of the said four MPs from the NRM Party, the Secretary General of NRM wrote to the Speaker of Parliament informing her of the party's decision and requesting her to direct the Clerk to Parliament to declare the seats of the 2nd, 3rd, 4th, and 5th Appellants in Parliament vacant to enable the Electoral Commission conduct by-elections in their constituencies.

On the 2nd of May 2013, the Speaker in her ruling in Parliament declined to declare the seats vacant and upon that refusal, Hon. Lt. (Rtd.) Saleh Kamba (2nd respondent) and Ms. Agasha Mary (3rd respondent) filed Constitutional Petition No. 16 of 2013 in the Constitutional Court challenging the constitutionality of the Speaker's decision.

Similarly, Mr. Joseph Kwesiga (5th respondent) filed Constitutional Petition No. 19 of 2013 challenging the same decision. This was followed by Constitutional Petition No. 21 of 2013, which was filed by the National Resistance Movement Party (4th respondent) also challenging the same decision.

On 8th May 2013, the Attorney General (the present 1st respondent) wrote to the Speaker of Parliament advising her to reverse her decision on the ground that it was unconstitutional. Constitutional Petition No. 25 of 2013 filed by the Shadow Attorney General, Hon. A. Katuntu (the 5th appellant) challenged the Attorney General's advice to the Speaker.

The Attorney General filed a reply and a cross Petition to Constitutional Petition No. 25 of 2013.

All the parties to the petitions held a scheduling conference during which they framed issues. They left a disputed fact as to whether the Speaker allocated the expelled MPs special seats in Parliament. At the said scheduling conference, counsel for the 2nd, 3rd, 4th, and 5th Appellants also raised a preliminary objection as to whether Constitutional Petitions No. 16 and 21 disclosed a cause of action.

At the scheduling conference, 13 issues were framed and at the commencement of the hearing of the consolidated Constitutional

Petitions, issue No. 7 was framed by Court bringing the total number of issues to 14 substantially listed as follows:—

"1. Whether the expulsion from a political party is a ground for a Member of Parliament to lose his/her seat in Parliament under Article 83(i)(g) of the 1995 Constitution of Uganda.

2. Whether the act of the Rt. Hon. Speaker in the ruling made on the 2nd of May 2013 to the effect that the 4 MPs who were expelled from the National Resistance Movement (NRM) Party for which they stood as candidates for election to Parliament should retain their respective seats in Parliament is inconsistent with or in contravention of the named constitutional provisions.

3. Whether the Rt. Hon. Speaker of Parliament in her communication created a peculiar category of Members of Parliament, peculiar to the Constitution.

4. Whether the continued stay in Parliament of the four MPs after their expulsion from the NRM Party on whose ticket they were elected is contrary to and/or inconsistent with Articles 1(1) (2) (4), 2(1), 21(1)(2), 29(1)(E), 38(1), 43(1), 45, 69(1), 71, 72(1), 72(2), 72(4), 78(1), 79(1)(3), and 255(3) of the Constitution.

5. Whether the said expelled MPs who left and/or ceased being members of the Petitioner vacated their respective seats in Parliament and are no longer Members of Parliament as contemplated by the Constitution.

6. Whether the said expelled MPs vacated their respective seats in Parliament and are no longer

Members of Parliament as contemplated by the Constitution.

7. ***Whether the Court should grant a temporary injunction stopping the said four Members of Parliament from sitting in Parliament pending the determination of the consolidated Constitutional Petitions.***

8. ***Whether the Rt. Hon. Speaker had jurisdiction to make a ruling on such a matter and whether her action is inconsistent with or in contravention of the Constitution.***

9. ***Whether the act of the Attorney General of advising that the only persons who can sit in Parliament under a multiparty political system are members of political parties and representatives of the army is inconsistent with and in contravention of Article 78 of the Constitution.***

10. ***Whether the act of the Attorney General of advising that after their expulsion from the NRM Party, Hon. Theodore Ssekikubo, Hon. Wilfred Niwagaba, Hon. Mohammed Nsereko and Hon. Barnabas Tinkasimire are no longer Members of Parliament, is inconsistent with and in contravention of Article 83(1)(g) of the Constitution.***

11. ***Whether the act of the Attorney General of advising the Speaker of Parliament to declare the seats of Hon. Theodore Ssekikubo, Hon. Wilfred Niwagaba, Hon. Mohammed Nsereko and Hon. Barnabas Tinkasimire in Parliament, are now vacant because of their expulsion from the NRM Party is inconsistent with and or in contravention of Article 86(1)(a) of the Constitution.***

12. Whether the act of the Attorney General of advising the Speaker of Parliament to reverse her ruling on whether the seats of Hon. Theodore Ssekikubo, Hon. Wilfred Niwagaba, Hon. Mohammed Nsereko and Hon. Barnabasi Tinkasimire is inconsistent with and or in contravention of Article 119 of the Constitution.

13. Whether the act of the Attorney General of advising the Speaker of Parliament to reverse her ruling on whether the seats of Hon. Theodore Ssekikubo, Hon. Wilfred Niwagaba, Hon. Mohammed Nsereko and Hon. Barnabasi Tinkasimire are vacant when the said ruling is the subject of Court's interpretation in Constitutional Petition No. 16 of 2013, where the Attorney General is the 1st respondent, is inconsistent with and in contravention of Article 137 of the Constitution.

14. What remedies are available to the parties?"

By a majority of four to one Justices, the Constitutional Court granted Petitions No. 16, 19, 21, and the cross Petition in Constitutional Petition No. 25 of 2013. The Constitutional Petition No. 25 of 2013 was dismissed. The Justices gave reasons for granting Constitutional Applications No. 14 and 25 of 2013.

The Constitutional Court made the following declarations:—

"1. The expulsion from a political party is a ground for a Member of Parliament to lose his/her seat in Parliament under Article 83(1)(g) of the Constitution.

2. The act of the Rt. Hon. Speaker in the ruling made on the 2nd of May 2013, to the effect that the four Members of Parliament who were expelled from the National Resistance Movement (NRM), the party for which they stood as candidates for election to Parliament should retain their respective seats in Parliament is inconsistent with and in contravention of Articles 1(1)(2)(4), 2(1), 20(1)2), 69, 71, 72, 74, 78(1), 79(3), 81(2), 83(1)(g), 83(3) of the Constitution of the Republic of Uganda.

3. The Rt. Hon. Speaker of Parliament in her communication to the House on the 2nd day of May 2013, created a peculiar category of Members of Parliament unknown to the Constitution and contrary to Articles 1(1)(2)(4), 2(1)(2), 20(1)(2), 21, 43(1)(2)(c), 4, 69, 7, 73, 77(1)(2), 78(1), 79(3), 80, 81(2), 83(1)(g)(h), 83(3) of the Constitution.

4. The continued stay in Parliament of the 2nd, 3rd, 4th, and 5th respondents as Members of Parliament after their expulsion from the NRM Party on whose ticket they were elected is contrary to and inconsistent with Articles 1(1), 2(1), 2(4), 29(1)(e), 69(1), 72(4), 78(1)(a), and 79(3) of the Constitution.

5. The said expelled Members of Parliament who left and or ceased being members of the Petitioner (Constitutional Petition N. 21/2013) vacated their respective seats in Parliament and are no longer Members of Parliament as contemplated by the Constitution.

6. The Rt. Hon Speaker had jurisdiction and a duty to make a ruling on the matter before the House but she discharged the said duty

unconstitutionally in contravention of the Constitution notably Articles 28 and 42 thereof.

7. ***The act of the Attorney General of advising on persons who can sit in Parliament under a multiparty political system, in the context and peculiar circumstances of the instant Constitutional Petitions was not inconsistent with nor in contravention of Article 78 of the Constitution.***

8. ***The act of the Attorney General of advising that after their expulsion from the NRM Party, Hon. Theodore Ssekibubo, Hon. Wilfred Niwagaba, Hon. Mohammed Nsereko, and Hon. Barnabas Tinkasimire are no longer Members of Parliament, is neither inconsistent with nor in contravention of Article 83(1)(g) of the Constitution.***

9. ***The act of the Attorney General of advising the Rt. Hon. Speaker of Parliament to declare the seats of Hon. Theodore Ssekikubo, Hon. Wilfred Niwagaba, Hon. Mohammed Nsereko, and Hon. Barnabas Tinkasimire in Parliament, became vacant on their expulsion from the NRM Party was neither inconsistent with nor in contravention of Article 86(1) of the Constitution.***

10. ***The act of the Attorney General of advising the Rt. Hon. Speaker of Parliament to reverse her ruling regarding the seats of Hon. Theodore Ssekikubo, Hon. Wilfred Niwagaba, Hon. Mohammed Nsereko, and Hon. Barnabas Tinkasimire in Parliament was neither inconsistent with nor in contravention of Article 119 of the Constitution.***

11. The act of the Attorney General of advising the Rt. Hon. Speaker of Parliament to reverse her ruling on whether the seats of Hon. Theodore Ssekikubo, Hon. Wilfred Niwagaba, Hon. Mohammed Nsereko, and Hon. Barnabas Tinkasimire, are vacant when the said ruling was the subject of the Court's interpretation in Constitutional Petition No. 16 of 2013, where the Attorney General is the first respondent was neither inconsistent with nor in contravention of Article 137 of the Constitution."

The Constitutional Court also made the following orders:—

"1. The 2nd, 3rd, 4th, and 5th respondents are hereby ordered to vacate their seats in Parliament forthwith.

2. The Electoral Commission is directed following the service to it of a copy of this judgment by the 1st respondent to conduct by-elections in the constituencies hitherto represented by Hon. Theodore Ssekikubo, Hon. Wilfred Niwagaba, Hon. Mohammed Nsereko, and Hon. Barnabas Tinkasimire in accordance with the electoral laws of this country.

3. A Permanent Injunction is hereby issued restraining the Rt. Hon. Speaker and the Rt. Hon. Deputy Speaker of Parliament from allowing the 2nd, 3rd, 4th, and 5th respondents to continue sitting in Parliament or to take part in any parliamentary activity or any of its committees and to stop payment to the 2nd, 3rd, 4th, and 5th respondents of any salaries, allowances, other emoluments and entitlements, save those that may have accrued to them immediately before the issuance of these orders.

4. The mandatory injunction issued by this Court on 10th September 2013 is hereby vacated.

5. We grant costs to the successful parties in the consolidated Constitutional Petitions and applications with a Certificate for two counsel. We so order.”

The appellants have appealed to this Court against the decision and orders of the Constitutional Court on 10 grounds which are reproduced in this judgment.

Representation:

Mr. Peter Walubiri, Mr. Ben Wacha, Mr. Caleb Alaka and Mr. Sam Muyizi represented the appellants. Mr. Cheborion Barishaki, Director for Civil Litigation and State Attorneys Richard Adrole and Maureen Ejang represented the Attorney General. Mr. Joseph Matsiko, Mr. Sam Mayanja, Mr. Chris Bakiiza and Mr. Kiryowa Kiwanuka represented the 4th respondent. Mr. Alison Karuhanga represented the 5th respondent.

Arguments By Counsel:

For the appellants, Mr. Alaka argued grounds 1 and 5 together and grounds 2 and 3 together. Mr. Ben Wacha argued ground 4 while Mr. Walubiri argued grounds 6, 7 and 8 separately and grounds 9 and 10 together. The other counsel did not follow a particular order.

Grounds 1 and 5:

1. The learned majority Justices of the Constitutional Court erred in law in holding that Article 86(1)(a) of the Constitution only applied to election matters and not questions of vacation of office under

Article 83(1)(g) of the Constitution and thereby came to the wrong conclusion that the High Court had no jurisdiction in the matters in issue in the consolidated Constitutional Petitions and thereby wrongly assumed jurisdiction in the matter.

5. ***The learned majority Justices of the Constitutional Court erred in law in extensively considering the merits of miscellaneous Cause No. 251 of 2013 for judicial review pending in the High Court and making conclusions there from regarding the consolidated Petitions and thereby coming to the wrong conclusion that the 1st, 2nd, 3rd, and 4th Appellants voluntarily left the National Resistance Movement and that their subsequent expulsion from the said National Resistance Movement was a mere formality.***

Submissions of counsel on ground 1 and 5:

Mr.Alaka submitted that in the Constitutional Court, grounds 1 and 5 were covered by issue No. 11, which was whether the act of the Attorney General of advising the Speaker of Parliament to declare the seats of the appellants vacant because of their expulsion from the NRM Party was inconsistent with or in contravention of Article 86(1)(g) of the Constitution. He argued that the Constitutional Court was wrong in holding that Article 86(1)(g) was not applicable in as far as the High Court had jurisdiction in resolving the question whether a seat of a Member of Parliament has fallen vacant.

He contended that in accordance with Article 86(3) of the Constitution, Parliament enacted the Parliamentary Elections Act

(Act 17 of 2005) in respect of persons eligible to apply to the High Court for determination of the question of vacation of a seat and the circumstances and manner in which such an application may be made. He submitted further that according to the Parliamentary Elections Act, it is the Attorney General who is mandated to petition the High Court under Article 86 for determination of the question of vacation of the seat of Parliament. Learned counsel contended that the case of ***Baku Raphael Obudra & Another Vs. Attorney General*, *Const. App No. 1 of 2005*** which was relied on by the Constitutional Court was distinguishable as the issue raised herein was not argued in that appeal.

It was counsel's submission that had the Constitutional Court addressed itself to this issue it would have found that the Attorney General erred in advising the Speaker instead of petitioning the High Court so that the appellants could be given a hearing. He concluded on ground one that this Court holds that the High Court has jurisdiction to determine the question whether a seat of a Member of Parliament has become vacant.

With regard to ground 5, learned counsel referred to the judgment of Mwondha JA where she addressed herself to Misc. Application No. 251 of 2013, and submitted that the Constitutional Court erred in having convassed extensively the merits of that application for judicial review which was still pending determination in the High Court. It was his submission that the

Constitutional Court erred in coming to the conclusion that the appellants had voluntarily left the NRM, and their subsequent expulsion from the NRM was a mere formality.

5 Mr. Karuhanga, learned counsel for the 5th appellant arguing ground 5 submitted that the majority Justices of the Constitutional Court did not consider the merits of Misc. Application No. 251 of 2013, since Mwondha JA only referred to that application, and held correctly that the matter was still pending before the High Court. 10 Therefore, she did not determine the merits of that application, counsel submitted.

Consideration of ground 1:

Article 86 (1) (a) of the Constitution *reads as follows—*

15 ***86.*** *Determination of questions of Membership.*

(1) The High Court shall have jurisdiction to hear and determine any question whether—

(a) a person has been validly elected a Member 20 ***of Parliament*** *or* ***the seat of a Member of Parliament has become vacant;***

It is instructive to note that the decision of the High Court is appellable to the Court of Appeal (which is also the Constitutional 25 Court) under Article 86 (2) which reads thus—

(2) ***A person aggrieved by the determination of the High Court under this Article may appeal to the Court of Appeal.***

30 Indeed in matters relating to election disputes under Article 86 (1) (a) where the Attorney General is involved, the Attorney General

must petition the High Court. This is very clear from reading the following Clauses of Article 86.

86 (3) *Parliament shall by law make provisions with respect to—*

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

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

Pursuant to the provisions of this Clause (3), in 2001 Parliament enacted the Parliamentary Elections Act, 2001, which together with Regulations made there under regulated Parliamentary Elections and related matters. The Act of 2001 was repealed and replaced by the Parliamentary Elections Act, 2005. S. 86 of that Act makes provisions regulating determination of questions of membership of Parliament. For the sake of clarity we produce it.

Section 86 reads as follows—

86. Determination of Question of Membership:

(1) *The High Court shall have jurisdiction to hear and determine any question whether—*

(a) *a person has been validly elected a Member of Parliament or the* ***seat of a Member of Parliament has become vacant;***

(b) *...*

(2) *A person aggrieved by the determination of the High Court under this*

section may appeal to the Court of Appeal.

(3) *Subject to the provisions of this Act in relation to election petitions, and to the provisions of Article 137 of the Constitution, the Attorney General may petition the High Court under Article86 of the Constitution for the determination of the question referred to in that Article.*

(4) *If upon application to the Attorney General in writing signed by not less than fifty registered voters stating that the question referred to in subsection (1) has arisen stating the ground for coming to that conclusion the Attorney General fails to petition to the High Court within thirty days after receipt of the application, any one or more of the persons who made the application may petition the High Court for determination of the question.*

(5) *Any party aggrieved by the decision of the High Court may appeal to the Court of Appeal against the decision and subsequently appeal to the Supreme Court.*

(6) *The High Court, the Court of Appeal or the Supreme Court shall proceed expeditiously to hear and determine any question or as the case may be, any appeal before it under this section and may for that purpose suspend any other matter pending before it.*

(7) *In any case the High Court shall determine a question under this section within twelve months after the petition in relation to the question was lodged.*

In view of these clear and unambiguous provisions, we are not, with due respect, persuaded by counsel for respondent that the Constitutional Court had powers to hear the petitions. It is abundantly clear that the High Court has the jurisdiction (or the Constitutional powers) to hear and determine any questions about

whether “the seat of a Member of Parliament” has become vacant.

The provisions of S. 86 of the Parliamentary Elections Act, 2005 are thus very clear. Whoever wanted court to determine position of vacation of a seat in Parliament whether he or she was the Attorney General or an ordinary person, had to petition the High Court and not the Constitutional Court as it was done by the respondents in this case. In our considered opinion, S. 86 (4) emphasizes this. It is therefore our considered opinion and with the greatest respect to the majority Justices of the Constitutional Court, it was wholly wrong for the Constitutional Court to uphold the petitions and to make the declarations that the seats of the present appellants were vacant when it has no powers to make such declarations.

In our opinion, ground 1 succeeds.

Consideration of ground 5:

Under ground five of appeal, learned counsel for the appellants faulted the Constitutional Court for having canvassed extensively the merits of ***Misc. CauseNo.251 of 2003*** for Judicial Review filed by the appellants in the High Court. The basis of this criticism, from the submissions by Mr. Alaka is the judgment of Mwonda JA. We have perused the excerpts of the judgment counsel has referred us to. It is indeed true that the learned Justice of the Constitutional Court did refer to the said matter

which was pending before the High Court at that material time in reaching the conclusion that the appellants had voluntarily left their seats in Parliament and their subsequent expulsion was a mere formality. However, a careful perusal of the joint judgment of the majority of the Justices of the Constitutional Court (Kavuma Ag. DCJ (as he then was), Nshimye and Buteera, JJA/JJCC), indicates to us that the judgment does not contain any such detailed reference at all to **Misc. Cause No. 251 of 2003** and none was referred to us by Mr. Alaka in his submissions on this point. That being the case, we find merit in the submission by Mr. Karuhanga that the reference by Mwonda JA., to **Misc. CauseNo.251 of 2003** in her judgment had no bearing at all on the decision of the majority with which she only concurred. This ground lacks merit, for that reason.

Grounds 2 and 3:

2. ***The learned Justices of the Constitutional Court erred in law in admitting the affidavit of President Yoweri Kaguta Museveni contrary to Article 98(4) of the Constitution of the Republic of Uganda.***

3. ***Without prejudice to ground 2 hereinabove, the learned Justices of the Constitutional Court having admitted the affidavit of President Y. K. Museveni erred in law and in fact in refusing to allow Appellants leave to cross-examine President Kaguta Museveni on his said affidavit.***

Submissions by counsel on ground 2 and 3:

With regard to ground 2, Mr. Alaka submitted that the Constitutional Court erred in admitting the affidavit sworn by the

President as the President is not liable to proceedings in any Court while he is still in office. He contended that the Constitutional Court should have given the provisions of Article 98(4) of the Constitution its literal or plain meaning since it was clear and unambiguous. He contended that the purpose of the immunity was to protect that President as the fountain of honour from facing embarrassment in Court during cross-examination, or being held in contempt of Court and generally detracting him or her from his public duties. He maintained that the President could not volunteer to give information as that would not be in his interest but he would rather allow other officials to do so on his behalf. He concluded that the Constitutional Court erred in admitting the affidavit evidence of the President.

Arguing ground 3, which was an alternative to ground 2, Mr. Alaka submitted that having admitted the affidavit evidence of the President, the Constitutional Court erred in refusing to allow the appellants to cross-examine the President. Counsel contended that while the decision to allow or not to allow cross-examination of a witness who has sworn an affidavit is discretionary, the Constitutional Court erred in not allowing the President to be cross-examined. He submitted that the Court should have not have asked for what questions were going to be put to the deponent before exercising its discretion not to allow cross-examination. He argued that cross-examination serves several purposes one of which is to test the character of the witness and the truthfulness of his or her evidence. He contended that cross-

examination of a witness was part of the right to a fair hearing guaranteed by Articles 28 and 44 of the Constitution. It was his submission, therefore, that the Constitutional Court exercised its discretion wrongly in not allowing the President to be cross-examined on his affidavit.

Arguing grounds 2 and 3 together, Mr. Matsiko submitted that under Article 98(4) of the Constitution, the President is not liable to proceedings in any Court, and therefore, the President cannot be made liable. However, he contended that there is nothing in the Constitution, which stops the President on his own volition to voluntarily come to Court as a witness or even as a party.

Regarding the criticism against the Constitutional Court for not allowing the President to be cross-examined, counsel pointed out that under Rule 12 of the Constitutional (Interpretation) Rules, all evidence in Constitutional Petitions are adduced by affidavit. He submitted that the rule allows a person swearing an affidavit to be cross-examined if the Court is of the opinion that the evidence is likely to assist the Court to arrive at a just decision. It was his contention that counsel for the appellants never justified the need to cross-examine the President.

Consideration of Grounds 2 and 3:

Ground 2 concerns the admission by the learned Justices of the Constitutional Court of the affidavit sworn by His Excellency President Yoweri Kaguta Museveni as evidence in support of the

petition. The main thrust of this argument is that the swearing of the affidavit exposed the President to cross-examination contrary to the provisions of Article 98(4) of the Constitution which provides that:—

5 ***"(4) While holding office, the President shall not be liable to proceedings in any court."***

Ground 3 is an alternative ground arising from the admission of the affidavit in question. It is a complaint about the refusal by the
10 Learned Justices to allow the appellant's counsel to cross-examine the President on his affidavit. Counsel contended that the refusal was not only contrary to the provisions of the Civil Procedure Rules, but defeated the appellants' right to a fair hearing under Articles 28 and 44 of the Constitution as well.

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We think that Article 98(4) is clear and unequivocal; therefore we shall apply the literal rule of constitutional interpretation. From this interpretation and from the authorities cited by Counsel for the appellant including the **Constitutional Law Cases and**
20 **Essays, 2nd Edition by Sheldon Goldman pp 252-3, and Nixon v Fitzgerald, 457 US 731 (1982),** it is clear and we agree with counsel for the appellant that the President cannot be subjected to any court proceedings during his term in office. As Mukasa-Kikonyogo and Kitumba JJA, (as they were then), aptly
25 held in **Brigadier Henry Tumukunde v. Attorney General & Anor, Constitutional Petition No. 6 OF 2005 (CC)** at page 13 of their joint judgment:—

"The acts of the President in appropriate cases can be challenged in Courts of law; however, while holding office, the President shall not be liable to court proceedings in any court."

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According to the above authorities and others cited by counsel, the rationale for the grant to the President of the privilege and immunity from court proceedings while holding office, is to ensure that the exercise of presidential duties and functions are free from

10 hindrance or distraction, considering that the Chief Executive of the government is a job that, aside from requiring all the office holder's time, also demands undivided attention.

"Because of the singular importance of the President's duties, diversion of his energies by

15 ***concern with private law suits would raise unique risks to the effective functioning of government."*** *(See:* ***Nixon v Fitzgerald, per Powell J*** *(supra).*

However, the sub-article does not, in our view preclude a sitting

20 President from voluntarily giving evidence in court as a witness. In other words, a sitting President is a competent but not a compellable witness. According to **Musa Sekaana** in his book entitled **Civil Procedure & Practice in Uganda at p. 67:—**

"........................ there is nothing in our laws that

25 ***would preclude the president from waiving the privilege. Thus, if so minded the president may shed the protection afforded by the privilege and submit to the court's jurisdiction.***

30 ***The choice of whether to exercise the privilege or to waive it is solely the president's prerogative. It is a decision that cannot be assumed and imposed by any other person."***

This leaves the discretion to allow cross-examination purely in the hands of court. In constitutional petitions, this power is expressly conferred upon the Constitutional Court by Rule 12 of the **Constitutional Court (Petitions and References) Rules, 2005, Statutory Instrument No. 91 of 2005** which provides that:—

> ***"(2) <u>With the leave of the Court, any person swearing an affidavit which is before Court</u>, <u>may be cross-examined</u> or recalled as a witness if the Court is of the opinion that the evidence of the witness is likely to assist the Court to arrive at a just decision."*** *(underlining is added for emphasis).*

From the wording of Rule 12(2) above, the Court's power is purely a discretionary one. That being the case, it is well settled that this Court will not, as an appellate Court, interfere with the exercise of discretion by a lower court including the Constitutional Court, unless it is shown that the Court took into account an irrelevant matter which it ought not to have taken into account or failed to take into account a relevant matter which it ought to have taken into account or that the Court has plainly gone wrong in its consideration of the issues raised before it. ***(See. Mbogo and Ors v Shah [1968] E.A 93.)***

In the instant case, upon perusal of the record of appeal and after careful consideration of the submission by the appellant's counsel, it is our finding that no such complaint has been raised against the decision of the learned Justices of the Constitutional Court in

this appeal. Rather, the complaint in ground 3 of appeal is that the learned Justices of the Constitutional Court not only refused to allow cross examination of the President, but they first directed counsel for the appellants to point out the questions and areas
5 they intended to cross-examine the President on, before taking the decision complained of. To us, the learned Justices were only executing their duty of first establishing the material upon which to base their decision to allow or disallow the request by the appellant's counsel. This is in line with the well settled principle of
10 law that the court must exercise its discretion judicially on the basis of material placed before it by the parties, not whimsically or capriciously.

It is further our finding that the procedure adopted by the learned
15 Justices of the Constitutional Court did not in any way, defeat the right to a fair hearing as alleged by the appellant's counsel since the record clearly shows that both sides were afforded an opportunity to address court on the issue before the Court arrived at its decision. In the premises, this Court declines the invitation to
20 interfere with the decision of the learned Justices of the Constitutional Court.

Grounds 2 and 3 accordingly, fail.

Grounds 4:

25 ***The learned majority Justices of the Constitutional Court erred in law and misinterpreted Article 83(1)(g) of the Constitution and thereby came to the wrong conclusion that the expulsion from a political party is a ground for a Member of Parliament to lose his or***

her seat in Parliament and wrongly concluded that the 1st, 2nd, 3rd, and 4th Appellants left the National Resistance Movement Organisation upon their expulsion and thereby vacated their seats in Parliament.

Submissions of counsel for the appellants on ground 4:

In arguing ground 4, Mr. Wacha, learned counsel for the appellants, first adopted the appellants' submissions in the Constitutional Court. He then submitted that he agreed with the majority judgment of the Constitutional Court that the word "leave" is central to the issue under consideration and that where the word is clear and unambiguous, the literal rule of interpretation should be applied in interpreting the word.

Mr. Wacha however, contended that the majority Justices erred in interpreting the word "leave" out of context of the provisions of Article 83(1) (g). Counsel referred to the case of ***Pinmen Vs. Everett* (1969) 3 All ER 257** where the Court held that in determining any word or phrase in a statute, the first question to ask is what is the natural or ordinary meaning of that word in the context of the Statute, and that it is only when that meaning leads to some result that cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning.

Mr. Wacha submitted that the word "leave" was used in the context of to "join another political party or to remain in Parliament as independent." He contended that according to

Black's Law Dictionary 9th Edition, the verb "leave" means to depart voluntarily, go away, or depart willfully with intent not to return. He reiterated his submission that the word leave as used under Article 83(1)(g) means to voluntarily go away from the political party or to voluntarily remain in Parliament as independent. He argued therefore, that the Constitutional Court was wrong when it held that the word "leave" was neutral as to the cause and connoted going away or ceasing to belong to a group, which interpretation was contrary to Article 83(1)(g) of the Constitution.

Learned counsel agreed with the Constitutional Court as regards the historical basis of Article 83(1) (g) as reflected in the Report of the Uganda Constitutional Commission (The Odoki Report) that the intention of the provision was to cure the mischief of crossing the floor. He contended, however, that the Constitutional Court erred in adding a second mischief to be cured as the weakening of the political parties when it was not included in the Odoki Report.

Counsel submitted that with regard to crossing the floor, there was an attempt to amend Article 83(1)(g) by the Constitutional (Amendment) Bill No 3 of 2005, which stated "or if he or she is expelled from a political organisation or political party for which he or she stood as a candidate for election to Parliament" but this proposal was abandoned.

It was counsel's submission that there is, therefore, only one way in which a Member of Parliament ceases to be a Member of Parliament under Article 83 (1) (g) and that is by voluntarily leaving his or her political party and joining another one or
5 voluntarily trying to remain in Parliament as an independent Member. He contended that the reason why the Government abandoned the amendment was of no concern to this Court, and that the petitioner was trying to smuggle into the Constitution a provision, which had been abandoned.

10

Learned counsel further argued that the Constitutional Court having found that the word "leave" was clear and unambiguous, it erred in adopting another rule of interpretation namely the liberal and generous interpretation. Counsel cited the decision of this
15 Court in the case of ***Chowdrey Vs. Uganda Electricity Board.***

He submitted further that the Constitutional Court erred in using such interpretation to hold that the appellants became "de facto independents" whereas the Constitution does not recognise such
20 a concept, but only independent Members of Parliament under Article 84. Counsel also submitted that the Constitutional Court tried to smuggle into the Constitution another concept called "numerical strength of political parties in Parliament" basing itself on the New Zealand case of ***Richard William Prebble & Others
25 Vs. Donna A Hauta, Supreme Court App. No. SC CIV 9/2004.*** It was his contention that that concept does not exist in the Constitution or electoral laws of this country. He argued that

the **Hauta** case was decided on the interpretation of the New Zealand Electoral Act, which was later amended by Electoral Integrity Amendment Act 2001, whose object was to enhance the maintenance of the proportionality of political party
5 representation in Parliament. He prayed that the Court finds that the Constitutional Court's interpretation of the word "leave" was wrong and that the Court finds that the appellants have not vacated their seats on account of being expelled from Parliament by their political party.

10

On ground 4, Mr. Matsiko submitted that this ground is the heart of the appeal, and that a decision on the meaning of Article 83(1)(g) would be helpful in resolving the rest of the grounds of appeal. Counsel contended that the expulsion of the appellants from the
15 Central Executive Committee of NRM was never challenged in any Court, but the 1st, 2nd and 4th appellant had filed a notice of motion in the High Court under Miscellaneous Application No. 251 of 2013 challenging the disciplinary proceedings of the NRM Central Executive Committee and seeking Court orders to quash the
20 proceedings. Counsel argued that we ought to follow the literal rule of interpretation, and give the word **"leave"** its natural meaning, and that to do this it was necessary to refer to the Oxford Advanced Learners Dictionary, which defines the word leave as "to go away from a person or place" or "to stop living in a
25 place belonging to a group, working for an employer, etc." It was his contention that based on the proceedings of the Constituent Assembly the words "leave" and "expulsion" have the same

meaning. Therefore, he argued, expulsion amounted to leaving within the provision of Article 83(1) (g).

Learned counsel submitted that when there is a doubt in the meaning of a word in the Statute, the history of the legislation especially the Hansards can be called in aid. He cited the case of **Pepper (Inspector of Texas) Vs. Hart (1993) 1 All ER 43** and **Darlington Sakwa vs. Electoral Commission, Constitutional Petition No.8/2006** in support of his submission. It was his contention that the intention of the Constituent Assembly in enacting Article 83(1)(g) was to cover both leaving voluntarily and leaving by expulsion. Counsel submitted, therefore, that expulsion is already catered for by Article 83(1)(g).

Learned counsel supported the holding of the Constitutional Court that one of the mischiefs behind Article 83(1)(g) was to stop the weakening of political parties. He submitted that the mode of leaving whether voluntarily or by expulsion has the effect of weakening a political party in Parliament, as that member no longer belongs to that party.

Counsel further argued that the only modes of accessing Parliament under Article 78 is either under party sponsorship, or standing as an independent candidate and that the Constitution does not allow a member to change that status once elected. He pointed out that the Constitution recognises the Leader of

Opposition and therefore, the Constitution recognises numerical strengths of political parties. He also referred to provision for Chief Government Whip, Committees of Parliament, and Rules of Procedure of Parliament, which demonstrate the numerical strength of parties. It was his contention therefore, that it is not correct to state that when the numerical strength of parties is reduced, the party is not weakened. He relied on the case of ***Richard* William Treble Vs. Donna AHauta** (Supra) to support his submission.

Counsel also referred to the case of **Attorney General vs. George Owor, Constitutional Appeal No. 1 of 2011** where this Court had occasion to interpret Article 83(1) (g), and held that the intention and spirit of this Article was to instil discipline and respect for the electorate.

In his reply in regard to ground 4, Mr. Walubiri submitted that if the proceedings in **Misc. Appl. No. 251 of 2013,** were quashed, then the expulsion based on those proceedings would be affected, but the matter was still pending in the High Court.

Regarding the interpretation of Article 83(1)(g), counsel submitted that the authorities are clear that what you look at are the words in a given provision or statute and not the system of representation. For instance, he contended, in the case of **Richard William Prebo & Others vs. Dona AwateryHauta** (Supra) the word ceasing was used and that is what was

interpreted in that case. He submitted that in Uganda, the position is different and you leave your political party or remain independent, and therefore, it was not mere cessation.

Regarding the current status of the appellants, learned counsel
5 submitted that there are Members of Parliament in accordance with Article 78. He argued that the case of **Attorney General Vs. Owor** (Supra) was distinguishable in that the persons who had been elected to Parliament as independents deliberately contested primaries in the NRM Party, and therefore, they left
10 their seats in Parliament in terms of Article 83(1) (h).

Consideration of Ground 4:

We shall for purposes of considering this ground, take it as a fact that the 1st, 2nd, 3rd and 4th appellants were expelled from the NRM
15 party though we are aware that there is an application still pending in the High Court for determination, which the four appellants lodged challenging their expulsion from their party.

The gist of the argument advanced by Mr. Matsiko is that having
20 been expelled from their party for which they stood to be elected as members of Parliament, the four appellants thereby, "left" their party and accordingly, they have to vacate their seats in Parliament in compliance with Article 83(1)(g) of the Constitution.

25 Mr. Wacha and Mr. Walubiri, on the other hand, argue that a member of Parliament can only be required to vacate his or her seat in Parliament under Article 83(1)(g) if he or she voluntarily

leaves his or her political party to join another party or to become an independent member, and that the provision does not cover a member of Parliament who is expelled from his party to vacate his or her seat in Parliament.

5

The majority Justices of the Constitutional Court stated in their judgment thus:

> ***"In conclusion to these issues, we do find that the 2nd, 3rd, 4th and 5th respondents were expelled from the NRM party for which they stood as candidates for election to Parliament….Upon their expulsion they left the party. We follow the binding decision in <u>George Owor</u> case and hold that they vacated their seats in terms of Article 83(1) (g) of the Constitution. Vacation of their seats was by operation of the law."***

10

15

It was the view of the majority Justices of the Constitutional Court that the word "leave" as used in Article 83(1)(g) is clear and unambiguous and that, in the context in which it is used in the

20 Article, it means ceasing to belong to a group. It was also their view that the Article was enacted to, among other things, strengthen political parties. They stated in their judgment thus:—

> ***"….Article 83(1)(g) in the 1995 Constitution targeted, inter alia, the problem of MPs crossing the floor of Parliament. But is the evil or mischief merely crossing the floor? Crossing the floor is only part of the problem. The mischief is much wider. The purpose of incorporating the article in the Constitution was to protect multipartism in particular."***

25

30

Article 83(1) of the Constitution states:—

"(1) ***A member of Parliament shall vacate his or her seat in Parliament***

……

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

The Constitutional Court, and both counsel for appellants and respondents, all agree that the quoted words are clear and unambiguous. We respectfully share this view.

The first and cardinal rule of statutory interpretation is that where words are clear and unambiguous, they should be given their primary, plain, ordinary and natural meaning. However, if the language of the Constitution is imprecise, unclear and ambiguous, the liberal, generous and purposive interpretation should be applied. See **Attorney General vs. Maj. Gen. David Tinyefuza**, SCCA No. 01 of 1997.

The majority Justices of the Constitutional Court had this to say in their judgment about the word "leave".

> ***"The meaning of the word "leave" as used in Article 83(1)(g) is important for the determination of the issues now under consideration. The word, in our view, is clear and unambiguous. We find the literal rule of constitutional interpretation stated above as appropriate to apply in interpreting the word "leave".***
>
> ***What is the ordinary and natural meaning of the word "leave"? The Oxford Advanced Learners Dictionary defines "leave" as to go away from; cease to live at (a place) or to belong to a group". Webster's New World dictionary defines "leave" as to go away from/to leave the house,***

to stop living in, working for, or belonging to; to go away."
From the above, we find that the word "leave" in the context in which it is used is neutral as to cause and connotes, inter alia, going away and/ or ceasing to belong to a group."

Mr. Matsiko supported the conclusion of the majority Justices of the Constitutional Court that "leave" and "expulsion" have the same meaning and, therefore, expulsion of the four appellants amounted to their leaving the political party within the provision of Article 83(1) (g).

Mr. Matsiko sought to reinforce his argument by citing the cases of **Richard William Prebble and Others v. Donna Awatere Hauta**, New Zealand Supreme Court Appeal No. SC CIV9/2004 and Malawi Supreme Court Presidential Reference Appeal No. 44 of 2006, In Re: **Question of Crossing the Floor by Members of the National Assembly.**

We think the majority Justices of the Constitutional Court erred, and so did Mr. Matsiko in his submissions, to take the word "leave" out of the context in which it is used in Article 83(1)(g) and try to interpret it in isolation of the rest of the words which are used in the Article. A word can have different meanings depending on the context in which it is used.

In **Pinmen v. Evarett** (supra), a case cited by the appellants' counsel, it was held that in determining any word or phrase in a

statute, the first question to ask is what is the natural or ordinary meaning of the word in the context of the statute. We agree with this holding. We think that the word "leave" can only be properly understood within the context in which it is used in the Article.

5

The context of the word "leave" in Article 83(1)(g) is: **"if the person <u>leaves</u> the political party …to join another party or to remain an independent member."** These words are plain, clear and unambiguous. We respectfully agree with counsel for

10 the appellants that in the context in which the word "leave" is used in the Article, it implies a voluntary act because the leaving of the political party is given a purpose or a choice which is **"to join another political party or to remain in Parliament as an independent member".**

15

A Member of Parliament who is expelled from his or her political party is not given the privilege of exercising a choice as far as what he or she is leaving the party for is concerned. He or she is expelled from the party, period. So the words used in Article 83(1)

20 (g) "to join another party or to remain in Parliament as an independent member" would clearly not apply to him or her as it would only apply to a member of Parliament who voluntarily leaves his or her party.

25 It is our view that if the makers of the Constitution had intended that members of Parliament who are expelled from their political parties should vacate their seats under Article 83(1)(g), they

would not have found it necessary to add the words **"…to join another party or to remain…as an independent member".** To interpret the Article to include members who are expelled from their political parties is, in our view, to render those words quoted above meaningless and purposeless.

The majority Justices of the Constitutional Court stated in their judgment that they based their decision on **George Owor**(supra) as a binding authority for their holding that a member of Parliament who gets expelled from his or her political party must vacate his or her seat in Parliament. The brief facts of **George Owor** case are that a Member of Parliament was elected to Parliament on an independent ticket. While still a Member of Parliament as an independent member, he joined a political party (NRM) and contested in that party's primary elections.

Article 83(1) (h) of the Constitution provides that **"A member of Parliament shall vacate his or her seat in Parliament…if, having been elected to Parliament as an independent candidate, that person joins a political party".** A petition was brought seeking, among other things, a declaration that the member's continuing to sit in Parliament as a Member of Parliament after joining the NRM party was unconstitutional. The Constitutional Court agreed with the petitioner and rightly granted the declaration the petitioner sought. The member of Parliament was ordered by that court to vacate his seat in Parliament.

We think that the Constitutional Court erred to base their decision in the instant case on **George Owor** case because that case is clearly distinguishable from the instant case. In **George Owor** case, a Member of Parliament voluntarily joined a political party when he was in Parliament as an independent member. In the instant case, the four appellants did not voluntarily leave their political party. They were expelled. We, therefore, find that the facts and issues in **George Owor** case bear little resemblance to those in the instant case and, therefore, that case cannot and should not have been used as a binding authority to order the four appellants to vacate their seats in Parliament.

The Constitutional Court itself found that the word "leave" as it is used in Article 83(1)(g) is plain, clear and unambiguous, and must be interpreted using the literal rule of statutory interpretation. However, in spite of this finding, it went out of the provision of the Constitution itself to look for aid elsewhere for its interpretation. We respectfully think that this was an error on the part of the majority Justices of Constitutional Court. The words of Article 83(1)(g) being plain, clear and unambiguous should not have necessitated the Constitutional Court going to the Hansard to look for their interpretation.

Furthermore, it is not correct to state, as the majority Justices of the Constitutional Court did, that Article 83(1) (g) was enacted to strengthen multipartism or to prevent its weakening. The 1995 Constitution was based on the views of the people, views which

were collected by the Constitutional Commission, analyzed and presented in the Report of the Constitutional Commission with recommendations. One of the complaints of the people was lack of accountability of members of Parliament in a multiparty legislature through "crossing the floor" of Parliament and joining the governing party arising from what the people called "inducements**.**" This happened mostly in 1960s but also in the first part of 1980s. (See Chapter 11 para 11.14 and 11.18 of the Constitutional Commission Report).

As a result, the Commission recommended in Chapter 11 paragraph 11.74 of the Report that a person should cease to be a member of Parliament if he or she **"(f) leaves the political party for which he or she stood as a candidate, or, if elected as an independent candidate, joins a party…"** The Constituent Assembly adopted this recommendation by enacting, almost word for word, Article 83(1)(g). It is our view, therefore, that, going by the Report of the Constitutional Commission, Article 83(1)(g) was enacted to ensure loyalty and accountability of members of Parliament to their electorate. It was not enacted to deal with members of Parliament who are expelled from their political parties. It is also noteworthy that the historical background of "crossing the floor" of Parliament shows that members of Parliament who "crossed the floor" did so voluntarily and not after being expelled from their parties.

Nowhere in this Report does the Commission say that the people's views indicated a need to strengthen multipartism or to prevent its weakening. This is not surprising because the majority views collected as reflected in the Report was in support for the continuation of the Movement Political system as opposed to the Multiparty Political system. (see Chapter 8 of the Report on Political Systems). As a result of this finding the Movement Political System was to continue in operation up to 2005 when the Multiparty Political System was introduced through a national referendum. The provisions on multiparty Political system which had already been enacted in the Constitution then became operational.

Government has made attempts to amend the Article by requiring members of Parliament who are expelled from their political parties to vacate their seats. It did so in 2005 and abandoned the matter, and it has again tabled a Bill in 2015 which Bill is still pending debate and, if it is supported by the majority members, passing as a Constitutional Amendment Act to Article 83(1)(g). We agree with counsel for the appellants that by being called upon to interpret Article 83(1)(g) so that members of Parliament who are expelled from their political parties are made to vacate their seats in Parliament, the respondents are asking this court to amend Article 83(1)(g) instead of Parliament. Needless to say, the power of amending the Constitution and Acts of Parliament lies with Parliament and not with the judiciary. We also find it difficult to agree with Mr. Matsiko that it would be redundant for Parliament

to amend Article 83(1)(g) to include expelled members of Parliament. In our view, presentation by Government of Constitutional Amendment Bills to Parliament to amend Article 83(1)(g) to cover members of Parliament who are expelled from their political parties shows that the Government itself realizes that Article 83(1)(g) as it stands now does not cover members of Parliament who are expelled from their parties.

The majority Justices of the Constitutional Court, and Mr. Matsiko in his submissions, went to great length to show that in the Constitution there are several provisions such as Article 82 A on the Leader of the Opposition, Article 90 on Parliamentary Committees and a number of Rules in the Rules of Parliament, etc. all of which reflect the operation of multipartism and the importance of strengthening parties in Parliament. We respectfully find it illogical, however, to say that because such provisions exist in the Constitution, therefore, Article 83(1)(g) was enacted to strengthen multipartism in Parliament. As we stated above, the historical background to the making of the 1995 Constitution as reflected in the Report of the Constitutional Commission does not show anywhere that strengthening of multipartism was one of the purposes for enacting Article 83(1)(g) in the Constitution.

To conclude on this ground, we are of the view that the majority of Justices in the Constitutional Court erred when they interpreted Article 83(1)(g) to mean that members of Parliament who are expelled from their political parties have to vacate their seats in

Parliament by virtue of that Article. It was, therefore, wrong for the Constitutional Court to order the 1st, 2nd, 3rd, and 4th appellants to vacate their seats in Parliament on that ground. Accordingly ground 4 must succeed.

5

Grounds 6 and 7:

6. ***The learned majority Justices of the Constitutional Court erred in law in their interpretation of Article 119 of the Constitution of the Republic of Uganda and thereby came to the wrong conclusions regarding the advice of the Attorney General to the Rt. Hon. Speaker of Parliament and holding that such advice was generally binding on the Rt. Hon. Speaker of Parliament.***

15

7. ***The learned majority Justices of the Constitutional Court erred in law in holding that the Rt. Hon. Speaker of Parliament in her ruling discharged her duty unconstitutionally in contravention of Articles 28 and 42 of the Constitution of the Republic of Uganda*.**

Submission of counsel on grounds 6 and 7:

The appellants' complaint in these grounds is against the interpretation which the majority justices of the Constitutional Court have put to article 119 (3) of the Constitution regarding the status of the Attorney General's advice to the Rt. Hon. Speaker of Parliament. Mr. Walubiri submitted that the Constitutional Court in its majority judgment erred in interpreting the advice of the Attorney General as generally binding. He contended that the phrase "generally binding" is ambiguous as it is not clear whether it means always binding, or sometimes binding or often binding. He argued that the Constitutional Court was not justified in

distinguishing its earlier decision in **Kabagambe and Others Vs Electoral Commission and Dr. Kizza Besigye**: Constitutional Petition No. 01 of 2006 where it held that no advice can be binding. However, the Constitutional Court had
5 held in this case that the case of **Kabagambe** was distinguishable because the Attorney General was advising an independent institution which was constitutionally insulated.

Learned counsel pointed out that the phrase "generally binding"
10 came from the judgment of Odoki CJ (as he then was) in the case of **Gordon Sentiba and Others Vs Inspector General of Government**, Civil Appeal No. 06 of 2009 where the Chief Justice relied on the case of **Bank of Uganda Vs Bank Arabe Espanol**, **Civil Appeal No. 08 of 1998** and submitted that the
15 Chief Justice did not give reasons for his opinion.

He further argued that in the **Bank Arabe Espanol's** case, the agreement, which was guaranteed by the Bank of Uganda, needed the legal opinion of the Attorney General to make it valid
20 and legally enforceable. It was Counsel's contention that the opinion of the Attorney General would be binding in circumstances, which give rise to estoppel where a third party has relied on the opinion to which Government has been a party. He submitted that the case of **Gordon Sentiba** (Supra) which relied
25 on **Bank Arabe Espanol** (Supra) is distinguishable. It was Counsel's submission on this ground that the opinion of the Attorney General to Government is not "generally binding" but it

should be accorded the highest respect as Justice Kanyeihamba, JSC (as he then was) stated in the **Bank Arabe Espanol** case and as Kasule JA held in his dissenting judgment in the present case.

5

Mr. Walubiri submitted on ground 7 that the Speaker of Parliament was not a judge in her own cause because she was dealing with the issue of expulsion in Parliament and not the National Executive Committee of the National Resistance
10 Movement, which was deciding whether the Constitution of the Movement had been breached. On the contrary, the Speaker was required to interpret Article 83 (1) (g) of the Constitution and it was her duty to guide Parliament on whether the appellants had vacated Parliament and therefore she was not a judge in her own
15 cause.

Mr. Cheborion Barishaki who argued grounds 6 & 7 submitted that the legal advice of the Attorney General is arrived at after looking at the facts and the law and therefore, it should not only be
20 respected but it should be binding. He contended that to hold that the advice of the Attorney General should be respected is vague because it is not clear whether the advice should be followed or merely tolerated.

25 Counsel submitted further that when interpreting Article 119 of the Constitution, the purpose and effect principle of Constitutional interpretation should be followed. He cited the case of **Bank**

Espanol (Supra) where the Spanish Government required that the Attorney General should issue a binding legal opinion before the Spanish National Bank could lend money to Uganda. He argued that no country can lend money where the legal opinion of
5 the Attorney General is not binding. It was his contention that the Court had to look at the effect of the interpretation. Referring to the opinion of Kanyeihamba JSC in the **Bank Espanol's** case, to the effect that the opinion of the Attorney General "should be accorded the highest respect by government and public
10 institutions and their agents," Counsel submitted that if you respect the advice, then you follow it and you cannot respect and discard it at the same time; and therefore, the advice is binding.

Counsel supported the decision in the case of **Gordon Sentiba**
15 (Supra) that the opinion of the Attorney General is "generally binding" on public and government institutions. He went further and contended that the legal advice of the Attorney General is binding even on the President because it is based on the law. It was his contention that the opinion of the Attorney General can
20 only be challenged in Court. He referred to the case of **Attorney General Vs Major General David Tinyefuza, Civil Appeal No. 01 of 1997** where it was held that Courts would only intervene when the agents of state have exceeded their powers or acted unfairly to cause injury. Counsel concluded by supporting
25 the holding of the Constitutional Court that the opinion of the Attorney General is generally binding on Government including the Speaker of Parliament.

In reply, Mr. Walubiri submitted that the broader question was whether the opinion of the Attorney General is binding in all circumstances. It was his contention that the advice is binding to third parties on the basis of estoppel but cannot be binding on individuals, corporate entities or even on the President.

Consideration Of Counsel's Arguments:

We have carefully considered the arguments of Counsel for both parties on this ground. The issue raised by those arguments is whether legal opinion of the Attorney General as Principal Legal Advisor of the Government under Article 119 (3) of the Constitution is "generally binding" on the government and public institutions. To answer that question requires interpretation of the relevant Article 119 (3) of the Constitution.

We think it is elementary to know that interpretation is the process of determining the intention of the author or framers of the document under interpretation by analyzing the meaning of the words used in the document. Several principles of Constitutional interpretation have, over the years, been developed by Courts to guide on the methodology to apply. A few of such principles are:-

1) Literal plain meaning (Textual) rule.
2) Generous and purposive rule
3) Purpose and effect rule and

4) Reading of the Constitution as integrated whole with each provision sustaining the other- Rule of harmony.

State Policy

5 Article 8A of the Constitution provides that Uganda is governed on the principles of National interest and common good contained in the National Objectives and Directive Principles of State Policy. Paragraph 1(i) of the National Objectives and Directive Principles of State Policy also enjoins amongst others,
10 interpreters of this Constitution, to look to these principles for guidance on what to consider when interpreting this Constitution. That paragraph 1(i) of the National Objectives and Directive Principles of State Policy further shows that one of the principles of State Policy is that Uganda is based on democratic
15 principles. One of the key democratic principles is "Separation of powers" which provides checks and balances between the arms of government and promotes the rule of law. This is one of the principles to be considered when interpreting this Constitution.

Article 8A of the Constitution reads thus:-

20 "***8 A National interest***

1) Uganda shall be governed based on principles of national interest and common good enshrined in the National Objectives and Directive Principles of State Policy.

25

2) Parliament shall make relevant laws for purpose of giving full effect to Clause (1) of this Article."

Paragraph 1(i) of the National Objectives and Directive Principles
30 of State Policy reads as follows:-

"1 Implementation of Objectives

(i) The following objectives and principles shall guide all organs and agencies of the State, all citizens, organizations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society."

<u>Article 119 (3)</u>

Article 119 (3) of the Constitution whose interpretation is in issue reads thus:-

"***The Attorney General shall be the principal legal adviser of the Government***."

The key word in that provision is "adviser." Oxford Advanced Learners Dictionary 17th Edition defines "adviser" to mean:-

"***A person who gives advice, especially who knows a lot about a particular subject."***

The same Dictionary defines the word "advice" to mean:-

"…an opinion or a suggestion about what to do in a particular situation"

Mr. Walubiri criticized the majority decision of the Constitutional Court for departing from their earlier decision in **Kabagambe and Others** (Supra) to follow the decision of this Court in **Gordon Sentiba's** case (Supra) where Odoki, CJ (as he then was) held that opinion of the Attorney General to government and public institutions is "generally binding". Learned counsel submitted that the phrase "generally binding" is ambiguous as it is not clear whether the opinion is always binding or sometimes

binding or is often binding. He contended that the opinion of the Attorney General to Government is not “generally binding” but it should be accorded the highest respect as Justice Kanyeihamba JSC (as he then was) stated in **Bank of Uganda Vs Bank Arabe Espanole** (Supra). He added that it should be binding in circumstances which give rise to estoppel.

Mr. Cheborion Barishaki supported the interpretation of the majority decision of the Constitutional Court that the opinion of the Attorney General to Government and Public institutions is “generally binding”. He argued that opinion of the Attorney General is based on law because it is arrived at after considering the facts and the law. It is his contention therefore that opinion of the Attorney General should be “generally binding” on Government, Public institutions and even on the President. He stated that no foreign Government or international organizations including the World Bank will accept to deal with the Government or its agents where the Attorney General’s does not issue binding legal opinion.

We respectfully accept Mr. Walubiri’s submission that the phrase “generally binding” is ambiguous firstly because of the uncertainty of the extent of the binding nature of the opinion, and secondly because the word “opinion” in its literal ordinary plain meaning does not convey an obligation on the person or body to whom the opinion is given to comply with it. The circumstances where the opinion is binding need to be spelt out. This is because

there may be circumstances, where the opinion must be accorded the highest respect or must be binding. For example, under Article 119 (5) of the Constitution, the legal opinion of the Attorney General is mandatory for the conclusion of agreement, contract, treaty, convention or document by whatever name called to which government is a party or in respect of which government has interest. In our opinion, in such a circumstance, applying the generous and purposive rule of constitutional interpretation, the legal opinion of the Attorney General must be binding on the government and or on public institutions to give third parties confidence to deal with government and public institutions.

Mr. Cheborion Barishaki urged us to apply "purpose and effect" rule of Constitutional interpretation when interpreting Article 119 (3) of the Constitution. The principle behind this rule is that either the purpose or effect of an Act of parliament can determine the constitutionality of the Act.

In **Attorney General Vs Aboki & Anor;** Constitutional Appeal 01 of 1998, this Court (Oder JSC, (RIP) applied that principle to determine the constitutionality of Section 7 of the Witchcraft Act which provided for exclusion order. He found that the effect of exclusion order was inconsistent with Article 22 (1) of the Constitution because it amounted to a threat to the respondent's livelihood.

The effect of interpretation of legal opinion of the Attorney General as binding may in certain circumstances contravene some principles of state policy as we shall see herein later.

5 **Separation of Powers**

As we have pointed out earlier in this judgment, one of the principles of state policy which interpreters of the Constitution amongst others, are enjoined to be guided by when interpreting this Constitution is democratic principles. One of the key 10 democratic principles is "Separation of powers".

In **Attorney General Vs Major General David Tinyefuza**, SCCA No. 01 of 1997 this Court stated that

> ***" the greatest care must be taken to ensure that as 15 far as possible the principle of separation of powers is duly observed by the three arms of government to avoid unnecessary erosion of each other's constitutional functions otherwise good and balanced governance may be unduly hampered."***

20

We agree that the principle of separation of powers should be duly observed to avoid erosion of the Constitutional functions of the other arms of government. In the instant case, the effect of interpreting the legal opinion of the Attorney General, a member 25 of the Executive, relating particularly, to the manner in which the Speaker of Parliament, the head of the Legislative arm of Government, should carry out his/her constitutional functions, as binding clearly violates that principle of separation of powers. In our opinion, in applying the generous and purposive rule of

constitutional interpretation, while the legal opinion of the Attorney General must be accorded the highest respect, it must be binding where it relates to contract, agreement or any other legal transactions to which government or public institution is a party or has an interest. This is to give confidence to third parties to deal with the government.

The Constitutional Court in compliance with the principle of stare *decisis* had relied on the decision of this Court though that decision had made the generalized remarks in error. Under article 132 (4) of the constitution, this Court has power, while treating its previous decisions as normally binding, to depart from a previous decision when it appears to it right to do so. The clause reads:-

> ***"The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on question of law."***

The Constitutional Court had therefore erred in holding that the opinion of the Attorney General to the Rt. Hon. Speaker of Parliament was binding on her. This ground therefore succeeds.

On ground 7, we respectfully accept Mr. Walubiri's argument that in interpreting Article 83(1) (g) of the Constitution, the Speaker of Parliament discharged her duty to guide Parliament on the issue. There was nothing unconstitutional about it as she did not need to

give a hearing to the parties concerned. This ground also succeeds.

5 **Grounds 8:**

The learned majority Justices of the Constitutional Court erred in her communication to the House on the 2nd of May 2013, created a peculiar category of Members of Parliament unknown to the Constitution and contrary to Articles 1(1)(2)(4), 2(1)(2), 20(1)(2), 21, 43(1)(2)(c), 4, 69, 7, 73, 77(1)(2), 78(1), 79(3), 80, 81(2), 83(1)(g)(h), 83(3) of the Constitution.

10

The issue in Ground 8 is whether by allowing the four appellants to remain in Parliament after their expulsion from their party, the Speaker of Parliament created a peculiar category of members of Parliament unknown to the Constitution. There was also reference to the four appellants by one Justice of the Constitutional Court as **"aliens"** in Parliament.

15

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Under article 78(1) of the Constitution Parliament consists of members directly elected to represent Constituencies, among other members such as women representatives, representatives of the army, youth, workers etc. It is the view of this court that once the four members were elected by their constituencies to represent them in Parliament they remained members of Parliament unless they vacated their seats on any of the grounds listed under Article 83 of the Constitution.

25

We have shown above that by being expelled from NRM party, the four appellants did not vacate their seats under that Article. Therefore, by remaining in Parliament after their expulsion, they continued to be in the category of ***"members directly elected to represent their constituencies"*** and did not become **"**aliens**"** or a peculiar category unknown to the Constitution.

It is, therefore, our view that the majority members of the Constitutional Court erred when they held that the Speaker of Parliament created a peculiar category of members through her communication that the four appellants would remain in Parliament after their expulsion. Ground 8, therefore, succeeds.

Grounds 9 and 10:

9. The learned majority Justices of the Constitutional Court erred in law in granting a Mandatory Injunction against the 1st, 2nd, 3rd, and 4th Respondents on the 6th day of September 2013.

10. The learned majority Justices of the Constitutional Court in their conduct throughout the proceedings in the consolidated Petitions and all applications arising there from acted with apparent bias against the Appellants."

Submissions of counsel:

Arguing grounds 9 and 10 together, learned counsel submitted that the Constitutional Court erred in granting a mandatory injunction without any justification, ordering the appellants to vacate Parliament, a week before the judgment after the petition

had been heard. He contended that this was the clearest evidence of bias as held by Kasule JA in his dissenting judgment. Counsel contended that the apparent bias was exhibited by the conduct of the proceedings. It was his submission that bias could not only be inferred from the pecuniary or properietary interest that Judges had in the matter but by their sheer conduct, if it can be shown that a reasonable person would see that there was bias. Counsel relied on the cases of ***Prof. Isaac Newton Ojok Vs. Uganda***, Criminal Appeal No. 33/91 (SC) to support his argument.

Lastly, Learned counsel submitted that the order of mandatory injunction was not warranted as that remedy is discretionary and can be given only in extraordinary circumstances where grave injustice, or damage which could not be atoned in damages. However, in this case the presence of appellants in Parliament would be up to the date of judgment and would therefore pause no grave danger to anybody. He relied on the authority of ***Attorney General Kenya Vs Blick & Another*** (1959) EA 180 and ***Redland Bricks Ltd. Vs Morrisand Another*** (1969) 2 All ER 576 in support of his submission.

On ground 9 Mr. Masiko argued that the matter was overtaken by events because the judgment in the matter lifted the mandatory injunction. He relied on the case of ***Hon. Ssekikubo & Others,*** Constitutional Application No. 06 of 2013 which held that this Court cannot sit and determine an appeal emanating from the Constitutional Court on interlocutory matters, and that this Court

sits to determine matters that arise from the interpretation of the Constitution under Article 137.

Mr. Karuhanga submitted that parties made elaborate submissions on the issue of mandatory injunction in the Constitutional Court which were duly considered. It was unfortunate to advance the allegation of bias merely because the appellants disagreed with their decision, basing on the dissenting judgment of one Justice of the Court.

In reply to the respondent's submission Mr.Walubiri submitted that the problem was the timing of the ruling on the mandatory injunction. It was his contention that the ruling was pre-empting the judgment as if it had been predetermined. Counsel argued that to determine the issue of bias you look at what the ordinary members of public would think.

Consideration of Counsel's Argument:

Grounds 9 and 10 are closely connected because of the time the mandatory injunction was given. According to submissions of counsel for the appellants the petition had been adjourned for judgment. According to counsel the majority Justices of the Constitutional Court were, therefore, biased when they issued a mandatory injunction ordering the stay of the Speaker's ruling. This disposed of the whole case and Kasule J, who dissented, was of the opinion that this was evidence of bias.

We agree with the legal position as quoted in Halsbury's Laws of England Volume 61 (2010) paragraph 633 apparent bias.

> ***"It is generally unnecessary to establish the presence of actual bias although the courts are not precluded from entertaining such an allegation. It is enough to establish the appearance of bias. It is now established that a uniform test applies which requires the court to inform itself about all the circumstances which relate to the suggestion that the decision-maker is biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker was biased. In previous cases a variety of linguistic formulations were used, including a real danger or a real likelihood, that in the circumstances of the case an adjudicator will be biased, or that a reasonable person acquainted with the outward appearance of the situation would have reasonable grounds for suspecting bias or a more exacting test based on whether or not justice had been manifestly seen to be done. Although these different formulations are no longer opposite, the decisions themselves still provide examples of the general principle in action."***

We must state from the onset that this court is not hearing an appeal against the mandatory injunction which is a discretionary order. Besides, the mandatory injunction was vacated when the judgment was delivered. Our concern is whether the majority Justices were biased throughout the trial of the petition as it alleged in ground 10.

We have carefully perused the record and we find no indication of bias. All parties were given opportunity to present their case. We

do not see any actual or apparent bias. The authority of ***Isaac Newton Ojok (supra)*** is not applicable here. The Justices were not related to the petitioners/respondents and there is no apparent reason why they would have been biased in favour of
5 the petitioners/respondents.

The learned justices might have made an error of law by giving a ruling which had the effect of disposing of the petition. That notwithstanding they made the judgment. We cannot hold that
10 because Kasule JA held that the ordinary people must have considered the majority Justices biased, they must have, therefore, been biased. It would be wrong for this court to find that the Constitutional Court was biased because there was a dissenting judgment.

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Grounds 9 and 10 lack merit.

In the result this appeal majorly succeeds. We order that the appellants get ¾ (three quarters) of their costs both here and in
20 the Constitutional Court, with a certificate for two counsel.

Delivered at **Kampala** this **..........** day of **October, 2015.**

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J. Tumwesigye
Justice of the Supreme Court.

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Dr. E. Kisaakye
5 **Justice of the Supreme Court.**

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M. S. Arach - Amoko
Justice of the Supreme Court.

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Dr. B.J. Odoki
Ag. Justice of the Supreme Court.

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J.W. N. Tsekooko
25 **Ag. Justice of the Supreme Court.**

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30 **G.M. Okello**
Ag. Justice of the Supreme Court.

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C.N.B. Kitumba
Ag. Justice of the Supreme Court

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