

**THE REPUBLIC OF UGANDA**

**IN THE SUPREME COURT OF UGANDA**

**ATIAMPALA**

**(CORAM: KATUREEBE CJ, TUMWESIGYE, ARACH-AMOKO, JJ.SC,  
ODOKI,  
TSEKOOKO, OKELLO AND KITUMBA, AG. JSC**

**CIVIL APPEAL NO: 02 OF 2014**

**BETWEEN**

**UGANDA NATIONAL ROADS AUTHORITY ::::::::::::::::::::::::::::::: APPELLANT**

**AND**

- 1. IRUMBA ASUMANI**
- 2. PETER MAGELAH ::::::::::::::::::::::::::::::: RESPONDENT**

*[Appeal from judgment and orders of the Constitutional Court (Kasule, Mwangusya, Mwendha, Kakuru and Kiryabwire JJA) in Constitutional Petition No. 40 of 2012 delivered at Kampala on 8<sup>th</sup> November, 2013]*

**JUDGMENT OF TUMWESIGYE, JSC**

I have had the benefit of reading in draft the judgment prepared by my learned sister, Hon. Justice Kitumba, Ag. JSc. I agree with it and the orders she has proposed.

Dated at Kampala this 29<sup>th</sup> Day of *October* 2015

Jotham Tumwesigye  
**JUSTICE OF THE SUPREME COURT**

REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: KATUREEBE CJ, TUMWESIGYE, ARACH-AMOKO, JJSC, ODOKI  
TSEKOOKO, OKELLO AND KITUMBA, AG.JJSC)

CIVIL APPEAL NO: 02 OF 2014 BETWEEN

UGANDA NATIONAL ROADS AUTHORITY:.....APPELLANT

AND

2. IRUMBA ASUMANI
3. PETER MAGELAH:..... :::: :: :: ::::: ::::: ::::: :: :: :::RESPONDENTS

*[Appeal from judgment and orders of the Constitutional Court (Kasule, Mwangusya, Mwondha, Kakuru and Kiryabwire JJA in Constitutional Petition NoAO of 2012 delivered at Kampala on 8<sup>th</sup> November, 2013J*

JUDGMENT OF ARACH-AMOKO, JSC

I have had the advantage of reading in draft the judgment prepared by my learned sister, Kitumba Ag.JSC. I agree with her that this appeal ought to be dismissed. I also agree with the orders she has proposed.

.....

ARACH-AMOKO, JSC

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: KATUREEBE CJ, TUMWESIGYE, ARACH-AMOKO JJ. SC;  
ODOKI, TSEKOOKO, OKELLO, AND KITUMBA AGJJ.SC)

CONSTITUTIONAL APPEAL NO 02 OF 2014

BETWEEN

UGANDA NATIONAL ROADS AUTHORITY ..... :APPELLANT

AND

1. IRUMBA ASUMAN PETER }  
2. MAGELAH } ..... : RESPONDENTS

*[Appeal from judgment and orders of the Constitutional Court at  
Kampala  
(Kasule, Mwangusha, Mwendha, Kakuru, and Kiryabwire, JJ.A) in  
Constitutional  
Petition No 40 of 2012 dated e" November 2013J*

JUDGMENT OF DR ODOKI AG JSC

I have had the advantage of reading in draft the judgment prepared by my learned  
sister, Kitumba, Ag JSC, and I agree with it, and the orders she has proposed.

Dated at Kampala this 29<sup>th</sup> day of *October* 2015

Dr. B J Odoki  
AG JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

5

{Coram: Katureebe CJ, Tumwesigye & Arach-Amoko, JJSc.; Dr.Odoki,  
Tsekooko, Okello & Kitumba, Ag JJSc.}

10

ConsbillbonalAp[X2l No. 020f2014.

Between

UGANDA NATIONAL ROADS AUTHORITY (UNRA):.....  
APPELANT

And

15

1. IRUMBA ASUMANI }.....RESPONDENTS.  
2. PETER MAGEUAH }

20

{Appeal Irom the decision of the Constitutional Court at Kampala (Kasule,  
Mwangusya,  
Mwondbs, Kskuru & Kuysbwire „HA. / CC) dated 08' November, 2013 in  
Constitutional  
Petition No. 40of2013.j

25 JUDGMENT OF J.W.N. TSEKOOKO, AG.JSC.:-

I have had the benefit of reading in draft the judgment prepared by my  
learned sister, the Hon. Lady Justice C.N.B. Kitumba, Ag. JSC., and I agree  
with her conclusions that this constitutional appeal should be dismissed.

30

I also agree that each party should bear their own costs here and in the  
Constitutional Court.

4.

Delivered at Kampala this 29<sup>th</sup> day of October 2015

JWN  
Tsekooko

**JUSTICE OF  
THE  
SUPREME  
COURT**

*Pg.*

**THE REPUBLIC OF UGANDA**

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

**(CORAM: Katureebe CJ; Tumwesigye & Arach-Amoko JJSC;  
Dr. Odoki, Tsekooko, Okello & Kitumba, Ag. JJSC)**

**CONSTITUTIONAL APPEAL NO. 02 OF 2014**

**BETWEEN**

**UGANDA NATIONAL ROADS AUTHORITY (UNRA) ..... APPELLANT**

**AND**

**1) IRUMBA ASUMAN**

**2) PETER MAGELLAH: ..... RESPONDENTS**

**JUDGMENT OF G.M. OKELLO, AG. JSC**

I have had the opportunity to read in draft the judgment prepared by my learned sister Lady Justice C.N.B. Kitumba, Ag. JSC, and I agree with her that this appeal must, for the reasons she has given, be dismissed.

I also concur with the Order of costs she proposed.

Dated at Kampala this 29<sup>th</sup> day of *October* 2015

..... ~ \* ..... \*

**G.M.OKELLO**

**AG. JUSTICE OF THE SUPREME COURT**

**THE REPUBLIC OF UGANDA**

**IN THE SUPREME COURT OF UGANDA**

**AT KAMPALA**

**(CORAM: KATUREEBE CJ, TUMWESIGYE, ARACH-AMOKO,  
JJSC, ODOKI, TSEKOOKO, OKELLO, KITUMBA, AG. JJ,SC.)**

**CONSTITUTIONAL APPEAL NO.02 OF 2014**

**BETWEEN**

**UGANDA NATIONAL ROADS AUTHORITY ::::::::::::::::::::APPELLANT**

**VERSUS**

**1. IRUMBA ASUMANI**

**2. PETER MAGELAH: ::::::::::::::::::::RESPONDENTS**

*[An appeal from judgment and orders of the Constitutional Court (Kasule, Mwangusya, Mwendha, Kakuru, Kiryabwire JJA) in Constitutional Petition No 40 of 2012 delivered at Kampala on 8<sup>th</sup> November, 2013]*

**JUDGMENT OF KITUMBA AG.JSC**

This appeal arises from the decision of the Constitutional Court allowing the petition which was brought by originally three petitioners but the third one was struck out by court for lack of capacity to sue.

Irumba Asuman and Peter Megelah hereinafter referred to as the respondents filed a petition against the Attorney General who was the first respondent and the Uganda National Road Authority which was the second respondent under Article 137 (1) (2) and (3) of the Constitution challenging the constitutionality of Section 7 of the Land Acquisition Act (Cap 226) of the Laws of Uganda. They alleged that the Act was in contravention of Article 26 of the Constitution. There were supporting affidavits to the petition. The Uganda National Roads Authority, hereafter referred to as the appellant, denied that the impugned section contravened the Constitution. The appellant filed affidavits in opposition to the petition.

## **BACKGROUND:**

The background to the petition as found by the Constitutional Court is briefly as follows:

The government of Uganda commissioned a project to upgrade Hoima – Kaiso – Tonya road, Hoima District in order to ease and facilitate the oil exploration activities in the area. The project was being implemented by Uganda National Roads Authority (appellant), a government agency.

The process of upgrading the road necessitated acquiring more land. The government then proceeded under the Land Acquisition Act to compulsorily acquire land from the people affected by the project. The complaint by the respondents was that their land was taken from them without prior payment of compensation which contravened their right to property as enshrined in Article 26 of the Constitution. The respondents did not complain about the value of the land as assessed or the quantum of the award. It was argued for the appellant that section 7(1) of the Land Acquisition Act is still good law because it pre-dates the 1995 Constitution.

During the trial in the Constitutional Court, the following two issues were framed for determination.

- 1. *Whether section 7 (1) of the Land Acquisition Act is inconsistent with Article 26 (2) (c) of the Constitution.***
- 2. *Whether various acts of the 2<sup>nd</sup> respondent complained of in the petition violated the 2<sup>nd</sup> respondent's rights guaranteed under Article 26 (2) (c) of the Constitution.***

In its judgment the Constitutional Court only considered and resolved the first issue because, in the court's view, that would automatically answer the second issue.

The Constitutional Court resolved the first issue in favour of the current respondent and made the following declarations.



- 1. That Section 7(1) of the Land Acquisition Act is hereby nullified to the extent of its inconsistency with Article 26(2) of the Constitution. That is to say, to the extent that it does not provide for prior payment of compensation, before, government compulsorily acquires or takes possession of any person's property.**
- 2. It is hereby declared that, the acts of the 2<sup>nd</sup> respondent complained of in the petition, to wit:-taking possession of the 2<sup>nd</sup> respondents land prior to payment of compensation contravened his right to property as enshrined in Article 26(2) of the 1995 Constitution.**
- 3. No order is made as to costs.**

Dissatisfied with decision of the Constitutional Court, the appellant filed its appeal in this Court on five grounds which were framed as follows:-

- 1. The Learned Justices of the Constitutional Court erred in law when they proceeded to determine the petition in respect to Section 7(1) Land Acquisition Act after having found that the same did not require constitutional interpretation.**
- 2. The Learned Justices of the Constitutional Court erred in law when they failed to consider the question as to whether Constitutional Petition No 40 of 2012 as against the Appellant raised a question for constitutional interpretation.**
- 3. The Learned Justices of the Constitutional Court erred in law and fact when they held that the appellant's acts complained of were unconstitutional without evaluating the evidence presented by the parties.**
- 4. The Learned Justices of the Constitutional Court erred in law when they failed to consider that Article 26 of the Constitution is not absolute but a derogable right.**
- 5. The Learned Justices of the Constitutional Court erred in law when they failed to consider that in certain circumstances Section 7(1) of the Land Acquisition Act is a necessary limitation of the right to property under Article 26.**

During the hearing of the appeal in this Court the appellant was represented by learned counsel Ruth Sebatindira and Olive Matovu, Learned counsel, Francis Tumusiime, appeared for the respondents. Counsel for both parties relied on their written submissions.

In their written submission counsel for the appellant argued grounds 1 separately 2 and 3 together and 4, 5 jointly. On the other hand counsel for the respondent argued 1,2,3 separately and grounds 4 & 5 jointly.

In this judgment I will handle the grounds of appeal in the following manner. Grounds 1, 2 and 3 are interrelated and I will consider them together first. Lastly I will deal with grounds 4 and 5 jointly.

The complaint by the appellant's counsel is in the first three grounds can be summarized as follows:

- (a) *That the Constitutional Court erred to determine the petition after holding that it did not require constitutional interpretation.*
- (b) *The Constitutional Court did not consider whether the petition raised issues for constitutional interpretation and*
- (c) *The Constitutional Court did not evaluate the evidence before concluding that the appellant's action was unconstitutional.*

Arguing grounds 1, 2, and 3 appellant's counsel contended that the jurisdiction of the Constitutional Court as provided by Article 137(1) and (3) of the Constitution is to determine matters that raise issues for constitutional interpretation. Counsel argued that where there is no question for constitutional interpretation the Constitutional Court should refer the parties to appropriate Courts for redress.

In support of that submission counsel relied on ***Attorney General Versus Major General Tinyefuza Constitutional Appeal No 1 of 1997*** where this court stated that the Constitutional Court has jurisdiction under Article 137 of the Constitution is to interpret the Constitution and to deal with matters arising therefrom.

Counsel submitted further that following the above interpretation by this court, the Constitutional Court dismissed the cases which did not require constitutional interpretation, namely: Re ***Sheik Abdul Sentamu & Another*** Constitutional Petition No 7 of 1998 and ***Richard Mwami Vs Attorney General*** Constitutional Appeal No. 821 of 2013.

Counsel argued that in the Constitutional Court the appellant contended that the petition did not raise matters for constitutional interpretation. The argument was and is still that section 7 of the Land Acquisition Act was saved by Article 274 of the Constitution, because it was an existing law before the 1995 Constitution came into force. Article 274 provides that the existing law shall continue to operate and that law ought to be construed with such modifications, adaptations,

qualifications and exceptions as may be necessary to bring it into conformity with the Constitution.

The Constitutional Court upheld the appellant's contention and in its judgments at page 20 stated:

***“The Constitution clearly envisages that existing laws would in one way or the other be inconstant with its provisions. It is therefore not necessary that every time a law is found to be inconsistent with the Constitution, recourse is made to this court. Some of the inconsistencies such as the impugned Section 7 (1) of the Land Acquisition Act are too obvious and require no interpretation by this court. The purpose of Article 274 of the Constitution was to avoid a situation where each and every provision of the old laws, those that pre-date the 1995 Constitution, found to be inconsistent with the Constitution had to end up in this Court, for interpretation and for declarations to that effect. All courts of law have the power to do that. To enforce and put into effect Article 274 of the Constitution. This court has applied the provisions of Article 274 in the case of Pyarali Abdu Rassaul Ismail vs Adrian Sibbo; Constitutional Petition Number 9 of 1997”.***

Counsel criticized the Justices of the Constitutional Court that having stated as above they erred in law when they proceeded to determine the petition. She argued that after that holding the Constitutional Court should have forwarded the case to the High Court for determination.

In reply, counsel for the appellant submitted that Article 274 of the Constitutional Court does not limit or oust the powers of the Constitutional Court to interpret the Constitution. According to counsel Article 274 empowers the Constitutional Court once called upon to interpret the law in accordance with Constitution.

He further submitted that there were issues for constitutional interpretation because the appellant did not construe section 7(1) of the Land Acquisition Act in accordance with Article 26(2) of the Constitution.

Besides, there were two issues framed for determination at the beginning of trial. If the Constitutional Court had not considered whether the impugned section 7(1) of the Land Acquisition Act was unconstitutional it would have determined the second issue which concerned the constitutionality of the actions of the appellant.

He contended that the authorities which were cited by the appellant, ***Sheik Abdul Sentamu & Another and Richard Mwami Vs Attorney General*** (supra) are not relevant to the instant appeal. He argued that those cases were purely on enforcement of fundamental human rights. The issue of

contention in this appeal, however, is whether the Constitutional Court should have proceeded to interpret the impugned provision of the law which was a subject of complaint by the respondent that it was inconsistent with the Constitution.

### **Consideration of Counsel's Arguments:**

Counsel for the appellant has argued mainly that since section 7(1) of the Land Acquisition Act is as found by the Constitutional Court is existing law i.e. pre – 1995 Constitution and the learned Justices erred in fact and law to interpret that law. On the other hand counsel for the respondent has contended that Article 274 of the Constitution does not limit or oust the powers of the Constitutional Court to interpret the existing law to be in conformity with the Constitution.

In the petition that was before the Constitutional Court it, was specifically pleaded that section 7(1) of the Land Acquisition Act was inconsistent with Article 26 of the Constitution. This was in paragraph 9 and 10 of the petition wherein it was stated as follows:

*9. Section 7(1) of the Land Acquisition Act Cap 226 is inconsistent with Article 26 of the constitution in a sense that the article preconditions the prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property but S.7 (1) of the Land Acquisition Act cap 226, empowers the assessment officer to take possession of the land as soon as he or she has made his or her compensation award.*

*10. That section 7(1) of the land Acquisition Act Cap 226 is inconsistent with Article 26 of the Constitution in that if the Minister certifies that it is in the public interest for the assessment officer to take possession of the land, the section empowers the assessment officer to take possession of the land at any time after the publication of the declaration that the land is needed for a public purpose.*

The first issue and the only issue that was dealt with by the Constitutional Court was,

**“Whether section 7(1) of the Land Acquisition Act is inconsistent with Article 26(2) (c) of the Constitution”.**

Before deciding that issue the Constitutional Court, rightly took into account the principles that guide courts in Constitutional interpretation as laid down by the courts.

In the authority of Advocates *Coalition for Development and environment and 40 Others Vs Attorney General & Another* (Constitutional Petition No. 14 of 2011).

I agree with those principles though I will not reproduce them here.

The Court considered both Article 26 of the Constitution and the impugned section 7(1) of the Land Acquisition Act.

Section 7(1) of the Land Acquisition Act states:

***“Where a declaration has been published in respect of any land, the assessment officer shall take possession of the land as soon as he or she has made his or her award under section 6; except that he or she may take possession at any time after publication of the declaration if the Minister certifies that it is in the public interest for him or her to do so.”***

Article 26 of the Constitution which the respondents alleged to have been contravened provides:

***“26 protection from deprivation of property.***

- 1. Every person has a right to own property either individually or in association with others.***
- 2. No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied-***
  - (a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and***
  - (b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for-***
    - (i) prompt payment of fair and adequate compensation prior to the taking of possession or acquisition of the property and***
    - (ii) a right of access to a court of law by any person who has an interest or right over the property.”***

After considering the historical background in this country where people’s properties were compulsorily acquired by government during the past regimes, the Constitutional Court concluded that the 1995 Constitution is very restrictive on the powers of the government to acquire land compulsorily. The Constitution also provides for prior payment of compensation before taking possession or acquisition.

Before such compulsory acquisition takes place Article 26 (b) (i) provides that:

***“Prompt payment of fair and adequate compensation; prior to the taking of or acquisition of property.”***

The Constitutional Court noted that it was not dispute that the government had taken over the second respondent’s property under Statutory Instrument No 5 of 2013, The Land Acquisition Act (Hoima – Kaiso- Tenya road). Instrument issued under section 3 of the Land Act Cap 226, dated 8<sup>th</sup> February, 2013.

The Constitutional Court held that since section 7(1) of the Land Acquisition Act does not provide for prior payment of compensation before government takes possession or before it acquires any person’s property to that extent it is inconsistent with and contravenes articles 26(2) (b) of the Constitution.

After holding so however, the Constitutional Court noted Article 274 of the Constitution which states:

***“(1). Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modification, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution”.***

The Constitutional Court noted that the Land Acquisition Act commenced on the 2<sup>nd</sup> July 1965 that is thirty years before the coming into force of the 1995 Constitution.

The Court observed that Section 7 of the Land Acquisition Act could have been interpreted according to the provisions of Article 274 of the Constitution and this would have involved reading in to the section the phrase “*prior payment*”.

However, the Justices went on to hold that since the matter was before the Court they were required to solve it.

***“Be that as it may, since the matter is before this court, we are required to resolve it. We clarify that both the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners are not seeking compensation or enforcement of any orders in this petition. All the orders sought in this petition are declaratory. Any parties or other persons effected by the actions of the respondents are at liberty to seek redress from a competent court under Article 50 of the Constitution or any other relevant law,”***

Counsel for the appellant has strongly criticized them for taking that course of action as according to her when a petition does not raise issues for constitutional interpretation the Constitutional Court should forward it to the High Court for enforcement. With due respect to counsel, that is and can not be the mandatory procedure for the Constitutional Court to follow for two reasons.

Firstly, not all the petitions which fail at the Constitutional Court have issues of enforcement. One may file a petition in the Constitutional Court simply seeking for declaration like is the case in the instant appeal.

Secondly, and more importantly, the Constitutional Court has the original jurisdiction to interpret the Constitution. Article 137 provides:

- (1) Any question as to the interpretation of the Constitution shall be determined by the Court of Appeal sitting as the constitutional court.**
- (2) -----**
- (3) A person who alleges that-**
  - (a) An Act of Parliament or any other law or anything in or done under the authority of any law; or**
  - (b) Any act of omission by any person or authority is inconsistent with or in contravention of a provision of this Constitution may petition the constitutional court for a declaration to that effect, and for redress where appropriate.**
- (4) Where upon determination of the petition under clause (3) of this article the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may-**
  - (a) grant an order of redress; or**
  - (b) refer the matter to the High Court to investigate and determine the appropriate redress**

In the case of ***Ismail Serugo and Another Vs Kampala City Council and Another*** Constitutional Appeal no 2 of 1998. This court held that a case for constitutional interpretation is made out once a petition makes allegations which fit with the provisions of Article 137(3) (a) and (b) of the Constitution.

This is what the respondents did in the petition. The allegation was that section 7 (1) of the Land Acquisition Act was in contravention of the Constitution and that the appellant had taken over their land without compensation which was in contravention of the Constitution

It is correct that Article 274 could have been used any other court to interpret section 7(1) of the Land Acquisition Act to be in conformity with *Article 26 of the Constitution but that did not oust the jurisdiction of the Constitutional Court to interpret the Constitution.*

The authorities of the Re Sheik Abdul ***Sheik Abdul Sentamu & Another and Richard Mwami Vs Attorney General*** (supra) are distinguishable from the instant appeal. They were references to the Court and the petitioners were seeking for enforcement of fundamental human rights and there were no issues requiring constitutional interpretation. This petition had issues of constitutional interpretation. Though Article 274 of the Constitution allows existing laws to be interpreted by other courts and tribunal so as to bring them in conformity with the Constitution, the Constitutional Court has the original jurisdiction for constitutional interpretation which should not be denied to it by anybody if it so chooses to exercise it.

Counsel for the appellant requested this court to rule that whenever there is a petition seeking for the interpretation of the law that pre dates the 1995 Constitution the Constitutional Court should never attempt to interpret the Constitution. To me that tantamounts to requesting this court to amend the Constitution. I am of the considered view that it would not be prudent for this court to do so as the amendment of the Constitution is not its role. Article 2(1) of the Constitution provides for supremacy ***“this Constitution is the supreme law of Uganda and shall have biding force on all authorities and persons through at Uganda.”***

I am unable to fault the Constitutional Court forexercising its constitutional jurisdiction.

The appellant’s counsel has complained that the Constitutional Court did not deal with the issue of whether the petition raised issues for constitutional interpretation. It is difficult for me to appreciate this complaint,



In the instant appeal the Court considered the impugned section of the Land Acquisition Act and Article 26 of the Constitution. The Court interpreted the two and stated thus at page 19 of its judgment:

***“In this case it is common ground that the government indeed has taken over the second respondent’s property under Statutory Instrument Number 5 of 2013, The Land Acquisition (Hoima-Kaiso – Tonya road) Instrument issued under Section 3 of the Land Acquisition Act Cap 226, and dated 8<sup>th</sup> February 2013.***

***The issue in this petition is whether Section 7(1) of the Land Acquisition Act Cap 226 is a law that is in conformity with Article 26(2) of the Constitution. We have already set out the provisions of Section 7(1) of the Land Acquisition Act above. Clearly that Section does not provide anywhere for prior payment of compensation before government takes possession or before it acquires any person’s property.***

***To that extent therefore we find that Section 7(1) of Land Acquisition Act Cap 226 is inconsistent with and contravenes Article 26(2) (b) of the Constitution”.***

According to my understanding of the above quotation the Constitutional Court was interpreting the Constitution.

According to Article 26 of the Constitution compensation should have been made before the land was gazetted for acquisition by government

By the operation of the law the appellant took over the respondent’s land. There was no need to evaluate the evidence. The appellant’s complaint of the Constitutional Court’s failure to evaluate evidence is not, therefore, justified.

Grounds 1, 2 and 3 would fail.

I now turn to grounds 4 and 5

#### **Ground 4**

The learned justices of the Constitutional Court erred in law when they failed to consider that Article 26 is not absolute but a derogable right.

## Ground 5

The learned Justices of the Constitutional Court erred in law when they failed to consider that in certain circumstances S.7 (1) of the Land Acquisition Act is a necessary limitation to the right to property under Article 26.

Counsel submitted that in exceptional circumstances the right to payment of adequate compensation prior to taking possession of property under Article 26 is derogable in the interest of public good. According to Article 43 of the Constitution its right to property is not among the non derogable rights and freedoms provided for under Article 44 of the Constitution.

She submitted further that Article 26 can be derogated in exceptional circumstances like disasters and emergencies under Article 110 of the Constitution that warrants the immediate taking of possession of the land to avert loss of lives and other public inconveniences. Counsel implored Court to take judicial notice of the disasters that have occurred in the recent past. Such examples include the land slides in Bududa, torrential rains that caused the collapse of roads and bridges in Kasese and Mbale. These emergencies necessitated resettling the affected communities and diversion of the road to enable the public access to those areas.

Counsel argued that it is impractical to compensate the land owners prior to addressing the urgent needs of the affected communities. In such situations, section 7 of the Land Acquisition Act should not be limited by the rights enshrined in Article 26(2) of the Constitution.

In support of limitation to the enjoyment of fundamental rights within the provisions of Article 43, counsel relied on the case of **Charles Onyango Obo & Anor V Attorney General Const. Appeal No. 2 of 2002**. She contended that the learned Justices, therefore, erred, when they considered Article 26 in isolation of Article 43 which is contrary to the cardinal principles of constitutional interpretation that a Constitution has to be read together as an integrate whole and with no one particular provision destroying the other. In support of that submission she relied on the case of **Paul K Ssemwogere & ors V Attorney General Const.app No.1 of 2002 (SC)**.

Counsel further submitted that if the Constitutional Court decision is upheld without due regard to disasters and emergencies, Government would be in a dilemma when faced with such calamities yet the process of payment takes time. That this Court should find that in emergency situations the provisions of Section 7 of the Land Acquisition Act should be invoked. Counsel prayed that the appeal is allowed and each party bears its own costs.

In reply, counsel for the respondent contended that Article 26 has no exceptions and should be interpreted as it is. Article 43 cannot be interpreted to put a limitation to Article 26. Article 26 caters for acquisition in public interest but subject to payment of a fair and adequate compensation prior to taking possession.

Respondent's counsel submitted that Article 110 on State of emergencies does not apply to this case.

Counsel in applying the principles of constitutional interpretation argued that Section 7 of the Land Acquisition Act is clearly inconsistent with Article 26(2) (b) of the Constitution. He contended that the spirit of Article 26 was to ensure payment prior to taking of possession or acquisition of the property.

Counsel argued that paving a road to ease oil activities is a public benefit whose construction should be carried out in accordance with the law. Government holds oil on behalf of the public as per Article 244 and it can never be justified that in the process of extracting public resources it should deprive the owners of their right to property and life.

Counsel prayed that the appeal is dismissed with costs to the respondents.

In reply to grounds 4 and 5, counsel for the appellant submitted that Counsel for the respondent agreed that Section 7 of the Land Acquisition Act is inconsistent with Article 26(2) of the Constitution and recognized that government has an obligation to pay compensation for land compulsorily acquired prior to taking possession. That Section 7 of the Land Acquisition Act was saved by Article 274 and should be construed to bring it into conformity with Article 26(2) (b) of the Constitution.

Counsel for the appellant reiterated that the appellant seeks Court to find that there are exceptional circumstances where Section 7 of the Land Acquisition Act may not be construed strictly in conformity with Article 26.

Counsel indicated that the right to fair compensation must always be upheld, however, it is the timing for payment against the taking of possession that this Court must look into especially in situations of natural disasters and other emergencies.

On the issue of costs, Counsel cited the case of **AG V David Tinyefunza Const. app No.1 of 97** and prayed that this being a matter of public interest; each party bears its own costs.

## Consideration of arguments

Counsel for the appellant submitted that Article 26 of the Constitution is derogable in exceptional circumstances of natural disasters or emergencies and in the interests of public good. That it is impracticable to compensate property owners prior to addressing the urgent needs of the communities in emergency situations.

Article 26 of the Constitution requires prior payment of compensation for the deprivation of property by the Government. Article 43 of the Constitution limits the enjoyment of fundamental rights and freedoms where it is demonstrably justifiable and if provided for by the Constitution.

Article 43 2 (c) of the Constitution states that public interest shall not permit

***“any limitation of enjoyment of rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided in this Constitution”.***

The provisions are very clear and I cannot appreciate the arguments by appellant’s counsel that when one reads Articles 26 and 43 together taking one’s land prior to compensation becomes constitutional. This in my view would be contrary to the rules of Statutory and Constitutional interpretation. Where a provision of the law is clear it must be interpreted as it is. The authority of ***Paul K. Semwogerere and 2 others Vs Attorney General*** (Supra) does not permit interpretation of new words which result into constitutional amendment.

It is evident from Article 44 that Article 26 is not indicated among the non derogable rights. That notwithstanding, it does not give powers to government to compulsorily acquire people’s property, without prompt of fair and adequate compensation prior to the taking of possession of the property.

In the instant appeal we are dealing with a project that had been planned for by the Government of Uganda before it was carried out.

In my view appellant’s counsel is requesting Court to determine academic issues which are not before Court. The Constitutional Court was not dealing with emergency situations and disasters.

In the premise, I am not persuaded by the arguments of the appellant that the learned Justices erred when they considered Article 26 in isolation with Article 43.

Grounds 4 and 5 would fail.

In the result I would dismiss this appeal.

I would uphold the judgment of the Constitutional Court and the orders made therein.

I would order that each party bears its own costs.

**Dated at Kampala this 29<sup>th</sup> day of October 2015**

.....

**C.N.B. KITUMBA,**

**AG.JUSTICE OF THE SUPREME COURT**