

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

[CORAM: Kakuru, Egonda-Ntende & Musoke, JJCC.]

CONSTITUTIONAL APPLICATION NO.02 of 2017

(Arising from Constitutional Petition No.03 of 2017)

BETWEEN

1.Murisho Shafi
2.Kironde Godfrey
3.Sowale Abedi
4.Sam S Male
5. Nnume Edward
6.Kalisa Kalangwa Moses



APPLICANTS

AND

1. Attorney General
2. The Inspectorate of Government



RESPONDENTS

RULING

Egonda-Ntende, JCC

Introduction

1. This is an application seeking a temporary injunction to restrain the respondents from further investigations and prosecution of the applicants in Criminal Case No. CO-0096 of 2016; stay of proceedings in the said criminal case pending the disposal of the Constitutional Petition before this court and that costs of this application be provided for. The application has been brought by notice of motion and is supported by the affidavit of the Sixth Applicant. The application is opposed by the respondents and the second respondent filed an affidavit in reply. When this application came before this court for hearing this court raised the issue of whether the court as presently constituted by a three judge panel

or, for that matter, whether a single justice of this court, were seized with jurisdiction to handle applications of this nature.

2. We raised this issue against a background of two conflicting decisions of three judge panels of this court, James Isabirye v Attorney General and Anor Miscellaneous Application No. 001 of 2007, 2008 [ULR] 523; George Owor v Attorney General and Anor Constitutional Application No. 38 of 2010 (unreported); and a multiplicity of single judge decisions on the applications of a similar nature in the past and present. Counsel appearing in the matter were as helpful as they could be but essentially adopted the position that the choice of single judge or three judge panel or a full constitutional court was the decision of the court, and not their own decision.

Analysis

3. In James Isabirye v Attorney and Anor (supra) a three judge panel had an application for stay of execution and stay of proceedings pending the disposal of a constitutional petition. The court concluded that neither a three judge panel nor a single judge of the court had jurisdiction to hear such an application.
4. The court opined,

‘At the close of the proceedings we realized that there were some procedural irregularities rendering the proceedings a nullity. This application should have been heard by a panel of five justices and not three. Similarly, the interim order granted to the applicant should have been issued a panel of three justices and not a single judge.

Although Constitutional Court (Petitions and Reference) Rules, 2005 SI 2005/91 do not provide for a specific rule for the procedure of instituting constitutional miscellaneous Applications, Rule 23 takes care of such scenarios.

It reads as follows:-

“Subject to the provisions of these Rules, the practice and procedure in respect of the petition or a reference shall be regulated as nearly as may be, in accordance with the Civil

Procedure Act and the Rules made under that Act and the Court of Appeal Rules, with such modifications as the Court may consider necessary in the interest of the Justice and expedition of the proceeding.”

The present application being a miscellaneous application was, hence, brought under the aforesaid ordinary procedure, in particular Rules 53(2)(b) of the Judicature (Court of Appeal Rules) Directions which provides for the hearing of an application for a stay of execution, injunction and stay of proceedings by a full bench of the Court. Mutatis Mutandis this rule if applied to constitutional miscellaneous applications would entail modification in the interpretation to the effect that a full bench to hear this application would constitute five justices and not three. In the premises, the panel for handling interim orders would also consist of three justices and not a single judge.

This is because under rule of the Constitutional Court (Petitions and References) Rules, 2005, (supra) the term ‘Court’ means “ the Constitutional Court established by Article 137 of the Constitution”, whose full bench under Article 137 (2) of the Constitution consists of five justices.

This Court under Rule 2(2) is seized with jurisdiction to correct its own errors. Clearly, for want of jurisdiction the proceedings before the Court were a nullity, and are accordingly set aside.

For the same reason, the interim order of stay of execution entered by a single Justice is also a nullity and is accordingly vacated.’

5. In George Owor v Attorney General and Anor (supra) a panel of three judges of this court had before it an application for an interim order to restrain a sitting member of Parliament from continuing to sit in the House until the Petition in the matter had been heard and disposed of. The court itself raised the issue of whether or not a single justice of the court had jurisdiction to dispose of the application before it. After a review of the relevant authorities it concluded that a single justice of the court had the jurisdiction to hear such an application.

6. It stated,

‘We have now carefully considered our decisions in the Isabirye case and OLARA OTUNNU case in light of section 13 of the Judicature Act. The rationale behind the decision in Isabirye was the provisions of Rule 53(1) and 2(b) of the Judicature (Court of Appeal Rules) Directions which prohibits a single justice from hearing applications for a stay of execution, injunction or stay of proceedings. In our view, to the extent that Rules 53(1) and 2(b) refer to temporary applications for execution, injunction or stay of proceedings, and NOT INTERIM ORDERS, then the decision in Isabirye is correct to that extent only. However, Rule 53(1) and 2(b) appears to conflict with section 13(1) of the Judicature Act which gives a single justice power to exercise the powers of the Court in interlocutory matters. We agree with the holding of this court in Olara Otunnu (supra) where the single justice after considering the holding in Isabirye stated:

“It is true that since February 2008, the procedure mentioned in the above extract has not been uniformly applied in this Court. There are many instances where a single justice has entertained interim applications for stay of execution or proceedings. In many of these cases, the orders sought were granted and the Attorney General has never sought to appeal against the order. I can cite examples of such applications arising from Constitutional high profile applications like in cases involving Hon. Jim Muhwezi and Others, Dr. Rtd Colonel Kizza Besigye and others and General Kazini, in which a single justice of this court entertained similar applications and granted reliefs and the Attorney General did not appeal. There are also situations where only three justices have entertained main applications for stay of execution or proceedings instead of five as stated in Isabirye judgment. This is not to suggest in any way that the decision in Isabirye should not be followed. That decision is binding on this court and must be followed unless special circumstances exist. In the case of Attorney General v Uganda Law Society Constitutional Appeal No.1 of 2006 the Supreme Court

per Justice Mulenga JSC had this to say about the binding power of precedent:-

“Under the doctrine of *stare decisis* which is a cardinal rule in our jurisprudence, a court of law is bound to adhere to its previous decision save in exceptional cases where the previous decision is distinguishable or was overruled by a higher court on appeal or was arrived at *per incuriam* without taking into account a law in force or a binding precedent. In absence of any such exceptional circumstances a panel of an appellate court is bound by previous decisions of other panels of the same court.”

It is surprising to note that in this application as well as other similar applications heard by this court in the past, including the case of Isabirye, the provisions of section 13 of the Judicature Statute (Statute No.13 of 1996) have never been referred to or considered by counsel or the court.

The section provides,

“13(1) A single justice of Appeal may exercise any power vested in the Court of Appeal in any interlocutory cause, or matter before the Court of Appeal.

(2) Any person dissatisfied with the decision of the a single Justice of Appeal in the exercise of any power under subsection (1), shall be entitled to have the matter determined by a bench of three justices of Appeal which may confirm, vary or reverse the decision.”

Rule 23 of the Constitutional Court (Petition and References) Procedure Rules, 2005 quoted in Isabirye case omitted reference to Section 13 of the Judicature Act.

To me, this provision made in a statute of Parliament overrides the subsidiary legislation cited in Isabirye (*supra*) and does not need any interpretation or modification. Under the section, a single Justice has all powers vested in the Court of Appeal (Constitutional Court) in any interlocutory cause or matter before that court. Any one unhappy with the decision of the single Justice can appeal to a bench of three justices of the

Court. Surely, in my view, it is not necessary to require all five justices of the Court of Appeal to hear a simple application. In the same way, it does not need three justices to sit to consider an urgent interim application such as this one. The Justices of the Court of Appeal are extremely few and extremely busy. It is not practical to require five of them or three of them to assemble when a simple application is involved. This is what section 13 of the Judicature Act is designed to prevent.”

We also agree with learned counsel for the Applicant [Dr Akumpumuza] that holding otherwise would be contrary to the letter and spirit of article 28(1) of the Constitution which requires that:-

“In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.”

It is for these reasons that we ruled that this application proceeds before a single justice’

7. This court in the George Owor v Attorney General and Anor (supra) is critical of the decision of this Court in Isabirye v Attorney General and Anor for failing to refer to Section 13 of the Judicature Act. It is equally critical of all other cases that did not make reference to Section 13 of the Judicature Act. It therefore departs from Isabirye v Attorney General and Anor on the ground that Isabirye v Attorney General and Anor was decided *per incuriam*, contrary to Section 13 of the Judicature Act.
8. This criticism, with respect, in my view is erroneous. Section 13 of the Judicature Act is clear and unambiguous. It applies to business before the Court of Appeal. The Court of Appeal is not the Constitutional Court. Two separate courts with separate jurisdiction were created by the Constitution. One cannot simply read the provisions that relate to one and apply them to the other. A single justice of appeal is authorised to exercise the power of the Court of Appeal in any interlocutory cause or matter ‘**before the Court of Appeal.**’ [Emphasis added.] This statute was made in 1996 after the promulgation of the Constitution and no doubt the

legislature was aware that the Constitutional Court exists and that it is resident in the Court of Appeal. Nevertheless it deliberately omitted to make any references to the Constitutional Court.

9. In statutory interpretation, words in a statute must be given their ordinary, natural and plain meaning where there is no ambiguity. This Court in the case of The Returning Officer Kampala and Anor v Margaret Ziwa, Civil Appeal No. 39 of 1997 (unreported), held that:-

‘... where the words of the Statute to be construed are clear and unambiguous, they must be given their ordinary and natural meaning irrespective of the consequences. In Craies on Statute 6th Edition at page 66, the learned author said: -

“.....if the words of the Statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the laws-givers.”

10. Hence a reference to the Court of Appeal and to the business of the Court of Appeal must be a reference to the Court of Appeal only, the business before it and not any other court.
11. The logic that section 13 of the Judicature Act must be restricted to the Court of Appeal only is also implicit in subsection 2 thereof which provides a reference of a decision of single justice to a bench of three judges which is the full court in the Court of Appeal.
12. In relation to business before the Constitutional Court it cannot therefore be suggested that Section 13 of the Judicature Act overrides Rule 53 of the Court of Appeal Rules. It can override it in relation to business before the Court of Appeal where it applies and not in relation to business before the Constitutional Court to which it does not apply.
13. This Court in George Owor v Attorney General and Anor (Supra) notes that Rule 23 of the Constitutional Court (Petition and References) Procedure Rules, 2005 omits any reference to section 13 of the Judicature Act. This omission in my view was deliberate. Section 13 of the

Judicature Act had no application to business before the Constitutional Court.

14. This court in George Owor v Attorney General and Anor faults the court in Isabirye v Attorney General and Anor for extending the application of Rule 53 (2) of the Court of Appeal Rules to interim orders when the rule refers to temporary injunctions, stay of execution or stay of proceedings. Again with the greatest respect, this criticism is misplaced. What is important is not the name 'interim order' which can hardly be found in any rules but the substance of that interim order. Is it seeking injunctive relief or a stay of execution or a stay of proceedings for however brief the period of its currency? Once it seeks any order that amounts to injunctive relief or a stay of proceedings or stay of execution it must still be covered by Rule 53(2).
15. However, for business before the Court of Appeal Rule 53 must be read together with Section 13 of the Judicature Act which is a statute and in fact a latter statute. Section 13 of the Judicature Act can therefore override Rule 53 in relation to business before the Court of Appeal.
16. This Court in George Owor v Attorney General and Anor suggests that justices of the Court of Appeal are too few and too busy to bring together a panel of five justices to hear applications for interim orders or interlocutory applications. Therefore a single justice of the Court should be able to do so. In support of this proposition Article 28 is cited in aid. Again with respect this is misconceived. Jurisdiction is first and foremost not founded on convenience but on the law. Secondly in practical terms a court with fourteen judges [full complement being fifteen] can constitute a standing panel of five judges for a specific period to hear any urgent matters. This may be on a fortnightly, monthly, or quarterly roster. After all constitutional matters are supposed to take precedence over any other business before the Court.
17. It may be true that the Attorney General had not appealed the decisions preceding George Owor v Attorney General and Anor (supra) where a single justice of the Court of Appeal granted orders for temporary injunctions, stay of proceedings and stay of execution in constitutional

applications. This, however, does not strengthen the legality of such orders. Nor can it be further justification for continuing with a practice that has no basis in law or is fundamentally unlawful.

18. I am inclined to the view that the decision of this court in George Owor v Attorney General and Anor (supra) does not express the correct position with regard to the law that applies to interlocutory and other applications before the Constitutional Court. I would not follow it for the reasons enumerated above.

19. I am inclined to follow Isabirye v Attorney General and Anor save for the fact that I have failed to find the basis for the holding that the Constitutional Court can be constituted by three judge panels in interlocutory matters. In my view this was not simply reading the Court of Appeal Rules with modifications and adaptations allowed by rule 23 of the Constitution (Petition and Reference) Rules of Procedure. This amounted to the court in Isabirye v Attorney General and anor (supra) assuming rule making powers which the Constitutional Court does not have. In any case it was not fully constituted as the Constitutional Court and had found the proceedings before it a nullity.

20. Composition of the Court of Appeal as the Constitutional Court has been determined under Article 137(2) of the Constitution. It states,

‘When sitting as a constitutional court, the Court of Appeal shall consist of a bench of five members of that court.’

21. Fidelity to the law, an essential strand underpinning the rule of law, would compel the Court of Appeal to respect the above provisions, however inconvenient!

22. In the light of the foregoing I would order that this application be placed before a bench of five judges that complies with Article 137 (2) of the Constitution.

Signed, dated and delivered at Kampala this 23rd day of February 2017



Fredrick Egonda-Ntende
Justice of the Constitutional Court

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CIVIL APPLICATION NO. 02 OF 2017
(CONSTITUTIONAL PETITION NO. 03 OF 2017)

1. MURISHO SHAFI 2. KIRONDE GODFREY 3. SOWALE ABEDI 4. SAM S. MALE 5. NNUME EDWARD 6. KALISA KALANGWA MOSES	}	APPELLANTS
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VERSUS

1. ATTORNEY GENERAL
2. THE INSPECTORATE OF GOVERNMENT.....RESPONDENTS

CORAM:

HON. MR. JUSTICE KENNETH KAKURU, JCC
HON. MR. JUSTICE F.M.S. EGONDA NTENDE, JCC
HON. LADY JUSTICE ELIZABETH MUSOKE, JCC

RULING

RULING OF HON. LADY JUSTICE ELIZABETH MUSOKE, JCC

I have had the opportunity to read in draft the Ruling of my brother Hon. Mr. Justice Egonda-Ntende, JCC. I agree with the reasoning he has given for referring this matter to a full Coram of the Constitutional Court, and his

conclusion that this application be placed before a bench of five Justices in compliance with Article 137(2) of the Constitution.

Dated at Kampala this^{23rd}..... day of ^{February}..... **2017**.



Elizabeth Musoke

JUSTICE OF THE CONSTITUTIONAL COURT

5 **THE REPUBLIC OF UGANDA**
IN THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA

CIVIL APPLICATION NO. 2 OF 2017
(Arising from Constitutional Petition No 3 of 2017)

10 1. MURISHO SHAFI
 2. KIRONDE GODFREY
 3. SOWALE ABEDI
 4. SAM S. MALE
15 5. NNUME EDWARD
 6. KALISA KALANGWA MOSES

..... APPELLANTS

VERSUS

20 1. ATTORNEY GENERAL
 2. THE INSPECTORATE OF GOVERNMENT.....RESPONDENTS

COARAM:

HON. MR. JUSTICE KENNETH KAKURU, JCC

HON. MR. JUSTICE F.M.S EGONDA NTENDE, JCC

25 **HON. LADY JUSTICE ELIZABETH MUSOKE, JCC**

RULING OF HON. JUSTICE KENNETH KAKURU, JCC

30 This application is brought under *Rule (2) (2)* and *Rule 43* and
44 of the Rules of this Court, and *Section 64 (e)* of the Civil
Procedure Act, (CAP 71) and Rules 10 and 23 of the
Constitutional Court (Petitions and References) Rules SI No. 95
of 2005.

5 It seeks the following orders;-

10 **a) A Temporary Injunction doth issue restraining the Respondents, their servants, officials or agents and or those claiming authority from them from further investigations and prosecution of the applicants under Criminal Case No. CO-0096 of 2016 until the determination of Constitutional Petition __ of 2017 pending in this court.**

15 **b) An order of stay of Proceedings of Anti-Corruption court Division in Criminal Case No. CO-0096 of 2016 be issued until the determination of Constitutional Petition __ of 2017 pending in this court.**

20 **c) Costs of the application be provided for.**

The grounds of this application are set out as follows:-

25 **1. The applicant lodged Constitutional Petition number __ of 2017 challenging, among others, the constitutionality of the charges and prosecution of the applicants and this petition has a high likelihood of success.**

30 **2. That the Inspectorate of Government has acted unconstitutionally in failing and or refusing to respect and observe court orders, an illegality that court cannot take lightly.**

5 **3. That if this application is not heard and granted, the applicants shall suffer irreparable damage to their persons and reputation, and their right to be heard in the Petition shall be prejudiced.**

10 **4. That the Magistrate's court at Anti-Corruption Court Division has issued criminal summons against the applicants.**

15 **5. That the said court has commenced the hearing of the criminal case, whose institution is being challenged in this court.**

20 **6. That if this order is not granted, the court shall continue with the hearing with the resultant effect of possible arrest and detention.**

7. That it is in the interest of justice that this application be granted.

25 The motion is supported by the affidavit of the 6th applicant. The 1st respondent filed an affidavit in reply and so did the 2nd respondent.

30 When this application came up before us for hearing, Court raised the issue of jurisdiction. The question put to the parties was; "*whether or not the Court as constituted had jurisdiction to hear and determine this application*".

35 Counsel for the applicants **Mr. Asuman Basalirwa** submitted that the Court did have jurisdiction to hear and determine the

5 application. **Mr. Adrole** and **Ms. Akello** for the 1st and 2nd respondent respectively did not appear to have a strong position on this matter, leaving it to court to determine.

10 This is not the first time this very question is coming up for determination before this Court. As already set out in the Judgment of my brother Egonda-Ntende JA the same question was considered in **James Isabirye vs Attorney General and another (Constitutional Court Miscellaneous Application No. 1 of 2007)** unreported. In that application it was held that
15 an application of this nature must be heard by a full Coram of this Court Constituting of five Justices and not three. It was further held that a Coram of three Justices and not a single Justice could hear applications for interim orders.

20 As ably elaborated by my learned brother Egonda- Ntende JA this position was departed from by a single Justice of this Court in **Olara Otunu Vs Attorney General: Constitutional Application No. 26 of 2010**. In that application it was held that the decision in **Isabirye (Supra)** had been arrived at *per incurium* because the Court had failed to take into account
25 Section 13(1) of the Judicature Act. That Section provides as follows;-

“13. Powers of a single Justice of the Court of Appeal.

30

1) A single Justice of the Court of Appeal may exercise any power vested in the Court of Appeal in any interlocutory cause or matter before the Court of Appeal.

5 The above section of the Judicature Act was construed in
Olara-Otunu (Supra) to extend to and to apply to the
Constitutional Court, with necessary modifications, thus giving
a single Justice of the Constitutional Court the same powers as
a single Justice of the Court of Appeal. It was further held that
10 this section overrides *Rule 53 (2) (b)* of the Rules of this Court
which provides as follows:-

“Hearing of applications.

15 ***(1) Every application, other than an application
included in subrule (2) of this rule, shall be
heard by a single judge of the court; except
that any such application may be adjourned
by the judge for determination by the court.***

20

(2) This rule shall not apply to—

(a)

25

***(b) an application for a stay of execution,
injunction or stay of proceedings.***

The above position was re-echoed in ***George Owor vs Attorney
General and another Constitutional Application No 38 of
2010*** (unreported) effectively departing from the decision in

5 **Isabirye** (*Supra*). In **Owor** (*Supra*) just like **Isabirye** (*Supra*) the matter was decided by a Coram of three Justices of this Court.

10 In **Olara Otunu** (*supra*) a single Justice of the Constitutional Court was bound by the doctrine of *stare decisis* and ought to have followed the decision of three Justices in the **Isabirye** (*Supra*) or should have referred the question to a full Coram of the Constitutional Court.

15 Be that as it may, the holding that *Section 13* of the Judicature Act is applicable to an application of this nature as held in both **Olara Otunu** (*supra*) and **Owor** (*Supra*) in my humble view is erroneous. The Judicature Act came into force on 17th May 1996. Its long title provides as follows:-

20 **“An act to consolidate and revise the Judicature Act to take into account the provisions of the Constitution relating to the Judiciary.”** (*Emphasis added*).

25 Accordingly, the legislature was at all times alive to the need to provide for all matters relating to the whole Judiciary including the Constitutional Court in that Act. *Section 13* of that Act reproduced above says nothing about the composition of the Constitutional Court as it restricts itself only to the Court of
30 Appeal. It is therefore not applicable.

The Judicature Act having been enacted after the coming into force of the Constitution cannot be construed with necessary modifications to suit the provisions of the Constitution because

5 it is not “an existing law” under *Article 274* of the Constitution that Act, having come into force later.

The Court therefore, erred when in ***Olara Otunu (supra)*** and ***Owor (Supra)*** it found that the decision in ***Isabirye (Supra)***
10 had been arrived at *per incurrium* on account of its failure to take into consideration *Section 13* of the Judicature Act.

Neither *Rule 53(2)* of the Court of Appeal Rules nor *Rule 23* of the *Statutory Instrument No. 95 of 2005* grant Jurisdiction to a
15 single Justice of the Constitutional Court or three Justices of that Court, jurisdiction to hear Constitutional applications of any nature. In addition, the above Rules could not in any way vary the provisions of *Articles 137* of the Constitution which establishes the Coram of the Constitutional Court.

20 A Coram of a Court of law cannot be established by inference or interpretation. It must, in my humble view, be expressly and positively set out in a positive law.

25 It has been argued elsewhere that, the Supreme Court in ***Lukwago Erias versus Attorney and Kampala Capital City Authority (Supreme Court Civil Application No. 6 of 2014)*** (unreported) held that a single Justice of appeal may exercise the power of the Court of Appeal. We agree with the above
30 proposition of the law. However, in ***Lukwago (Supra)*** the Supreme Court was sitting as an appellate Court from the decision of the Court of Appeal. The determination of that application had nothing to do with procedure at the Constitutional Court. That decision therefore, is only applicable
35 to the Court of Appeal and not the Constitutional Court. It is

5 irrelevant in the determination of the question now before us. The argument that **Lukwago (Supra)** applies to the Constitutional Court is devoid of any merit and is completely misconceived.

10 In addition to the above cases (**Olara Otunu, Owor and Lukwago**), similar decisions on this issue, by any single Justice of this Court are equally irrelevant as they are not binding on us. Suffice it to state that, they were all arrived at in error. These decisions include among others *Maj. Gen. James*
15 *Kazini Vs Attorney General (Constitutional Applicant No. 8 of 2008) (Per: S.B.K Kavuma JA)* and *Hon. Jim Muhwezi versus Attorney General and Inspectorate of Government (Constitutional Application No. 18 of 2007) (Per: Amos Twinomujuni JA)* both unreported. With respect, it is not necessary for me to delve
20 into their merits here, for I find none.

There has been confusion in jurisprudence, especially at this Court arising from its failure to separate and treat as separate entities, the Constitutional Court and the Court of Appeal.
25 These are two separate and distinct Courts established separately by the Constitution each with its own jurisdiction and Rules of procedure. In my humble view it is of utmost importance to keep them separate as the law so requires.

30 This confusion is highlighted in the **Olara Otunu (Supra)** when at page 7 of his Ruling the learned Justice States:-

35 ***“To me, this provision clearly made in a Statute of Parliament overrides the subsidiary legislation cited in Isabirye (supra) and does not need any interpretation or modification. Under the section, a***

5 ***single Justice has all powers vested in the Court of
Appeal (Constitutional Court) in any interlocutory
cause or matter before the court. Anyone unhappy
with the decision of the single Justice can appeal to a
bench of three Justices of the Court. Surely, in my
10 view, it is not necessary to require all five justices of
the Court of Appeal to hear a simple application. In
the same way, it does not need three justices to sit to
consider an urgent interim application such as this
one. The Justices of the Court of Appeal are extremely
15 few and extremely busy. It is not practical to require
five of them or three of them to assemble when a
simple application is involved. This is what section
13 of the Judicature Act is designed to prevent.”***

20 Clearly the learned Justice in this matter referred to the Court
of Appeal and the Constitutional Court interchangeably as if
they were one and the same Court. Through the above excerpt
he refers to the Court of Appeal and Justices of the Court of
Appeal in a Constitutional application that had nothing to do
25 with the Court of Appeal.

As already stated above, the Courts are different and distinct.
Whereas the Court of Appeal has only appellate jurisdiction,
the Constitutional Court has original jurisdiction. The Coram
30 for each of the Courts is constituted differently. Their
respective mandate also differ. The two Courts have mutually
exclusive jurisdiction and not a concurrent one. Thus a
decision of the Court of Appeal cannot be held to be that of the
Constitutional Court and the reverse is true.

5 I find therefore, that the Constitutional Court constituted of
five Justices of Appeal is the only Court with jurisdiction to
hear and determine this application. This is the law as set out
in *Article 137 (2)* of the Constitution and no other law sets out
the jurisdiction or Coram of the Constitutional Court. This was
10 the holding of this Court in ***Alenyo George William -vs-
Attorney General, Law Council and Juliet Nasuna
(Constitutional Petition No. 5 of 2000)*** wherein the Court
held as follows:-

15 ***“It is now trite that the jurisdiction of this court is
exclusively derived from Article 137 of the
Constitution. In the Supreme Court case of Ismail
Serugo vs. Kampala City Council and Another
Constitutional Appeal No.2 of 1988. It was held as
per Mulenga J.S.C. that:-***

20 ***“Although there are a number of issues in that
case (Attorney General vs. Tinyefunza
Constitutional Appeal No.1/99) decided on the
basis of majority view, it is evident from proper
reading of the seven judgments in that case, that
25 it was the unanimous holding of the court that
the jurisdiction of the Constitutional Court was
exclusively derived from Article 137 of the
Constitution.”***

30 I have already concluded on this issue above, I need not to add
anything more.

The question then arises as to whether or not a panel of three
Justices of Appeal may hear and determine an application for

5 an interim order of injunction arising from an application such as this one.

There is no law in any statute book in Uganda that provides for interim injunctions. Interim orders appear to have emanated from an amendment to the Civil Procedure Rules that introduced *Rule 3 of Order 4* which states as follows:-

15 ***“The Court shall in all cases before granting an injunction direct notice of the application for injunction to be given to the opposite party.”***

Faced with this law Courts found an ingenuous way around it by creating “interim injunctions” to bridge the gap between the filing of the application for injunction and its hearing which is required to be inter-parties. Although interim orders were well intended, they have been grossly abused by both courts and litigants. Interim orders have no place in constitutional law because *Article 137 (7)* of the Constitution provides as follows;-

25 ***137 (7) “Upon a petition being made or a question being referred under this article, the Court of Appeal shall proceed to hear and determine the petition as soon as possible and may, for that purpose, suspend any other matter pending before it.”***

30 The practice at this court has been that a constitutional petition is filed together with two applications, one seeking a substantive injunction pending the hearing of the petition and the other seeking an interim order of injunction pending the hearing of the substantive application.

Once the interim order has been granted, the petitioner substantially obtains the relief sought in the petition and ceases to have any further interest in its determination. The court too loses interest in the matter and does not bother to fix it for hearing. This is illustrated by the fact that a report of this court presented at the 19th Annual Judges conference held between 26th-30th January, 2017 indicates that there are 309 Constitutional petitions and 241 Constitutional applications pending hearing at this court. Many of these were filed more than five years ago.

I am inclined to believe that in most of these petitions *interim orders* are in force and have been in force for as long as the petitions and the substantive applications have been pending. This mischief in my humble view has been created by this court issuing interim orders without jurisdiction creating a mischief that the Constitution intended to prevent under *Article 137(7)* reproduced above.

It may be argued, with some justification that, circumstances may require that an interim injunction be issued by this court to prevent irreparable loss or damage or to stop a possible serious violation of a constitutional right especially if the matter concerns fundamental human rights and freedoms. This however, can only be legally addressed by the legislature or the Hon. The Chief Justice issuing a legal instrument providing for interim orders in constitutional matters and specifically providing for a Coram that is less than five Justices where the circumstances so require. Such a law however, must pass the Constitutional test, especially in regard to jurisdiction.

5

An interim or substantive order of injunction, nonetheless, may still be granted by a full Coram of the Constitutional Court under such term and conditions as it may deem appropriate because it is ceased with jurisdiction to do so.

10

I am therefore in full agreement with my brother Egonda-Ntende JA that this Court as is now constituted has no jurisdiction to hear and determine this application as that jurisdiction is vested in the full Coram of the Court, as set out under *Article 137 (2)* of the Constitution.

15

The Registrar of this court is directed to place this file before a Coram of five Justices of this court for its hearing and determination at the earliest possible date.

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As Elizabeth Musoke, JA also agrees. It is ordered.

We make the following consequential orders and directions:-

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a) All interim orders issued by a single Justice of the Constitutional Court which are still in force are null and void and of no effect.

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b) Any interim or substantive orders of injunction issued by a Coram of three Justices of the Constitutional Court which are still in force are null and void and of no effect.

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c) The Registrar of this court is directed to place all pending Constitutional applications before a

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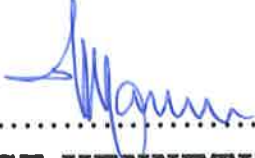
full Coram of Constitutional Court for determination including those which have been heard by either a single Justice or a Coram of three but whose Rulings have not been delivered.

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d) No order is made as to costs.

Dated at Kampala this23.....day of Feb.....2017.

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HON. JUSTICE KENNETH KAKURU
JUSTICE OF CONSTITUTIONAL COURT