THE REPUBLIC OF UGANDA,

IN THE CONSTITUTONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO 30 OF 2017

(CORAM: OWINY DOLLO, DCJ, KAKURU, EGONDA – NTENDE, BARISHAKI, MADRAMA, JJA/JJCC)

KRISPUS AYENA ODONGO} ..... PETITIONER

VERSUS

1. **THE ATTORNEY GENERAL}**
2. **THE PARLIAMENTARY COMMISSION} ..... RESPONDENTS**

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JA/JCC

The petitioner Mr Krispus Ayena Odongo, is a member of the Uganda Law Society and an Advocate and filed this petition under articles 50 (1), (2) and 137 (2) and (3) of the Constitution of the Republic of Uganda alleging violation of the human rights of judicial officers and contravention of provisions of the Constitution.

The petitioner avers in the petition that the rights of judicial officers provided for under the Constitution are being violated by being paid at a much lower rate in comparison to other government employees in terms of remuneration, which act is inconsistent with law and in contravention of the Constitution. Secondly, the petitioner alleges that the second respondent failed to enact a law for the administration of the Judiciary, being an independent organ of the state, equal in stature, with the Legislature and Executive, leaving the administration of the Judiciary to fall under the Public Service, a failure that is inconsistent with or in contravention of the Constitution.

The petitioner asserts that the failure of the second respondent to enact laws under the provisions of article 40 (1) (b) of the Constitution to ensure equal pay for equal work without discrimination, put members of the judiciary at disadvantage in comparison to other government employees in terms of remuneration and is inconsistent with law and in contravention of the Constitution. Further, he asserts that the subjugation of the judiciary, being an independent organ of the State, to the budgetary control of the Executive in relation to its finances is inconsistent with or in contravention of the Constitution. That the action of the first respondent to preferentially give higher salaries to members of the legal profession employed in other government departments and agencies different from those given to the judges and other judicial officers, is inconsistent with and in contravention of the Constitution.

The petitioner states that as a member of the legal profession and a former member of Parliament, he has a right to lodge the petition under article 50 (2) of the Constitution against the violation of the human rights of judicial officers, and inconsistency with or contravention of the Constitution.

The petition avers that article 128 of the Constitution of the Republic of Uganda generally makes provision for the independence of the judiciary from the Executive arm of Government as it relates to judicial appointment process, interference with the judicial process, security of tenure, remuneration and finance. Secondly, that objective V (1) of the National Objectives and Directive Principles of State Policy of the Constitution of the Republic of Uganda contains provisions for the active support by the state of the distribution of powers and functions as well as checks and balances provided for in the Constitution among various organs and institutions of government through the provision of adequate resources for effective functioning of the judiciary at all levels and guarantee financial independence of the judiciary. He contends that the objective is to secure

independent funding of the judiciary, free from Executive interference and control.

The petitioner further averred that article 128 (5) of the Constitution of the Republic of Uganda exempts the annual budget estimates from Executive Appropriation Bill presented by the first respondent. That by virtue of these provisions, the remuneration, salaries and allowances of judicial officers and the recurrent expenditures of the judiciary should be charged directly on the Consolidated Revenue Fund of the State.

The petitioner avers that contrary to article 126 (6) of the Constitution of the Republic of Uganda, the present practice is that the judiciary has to submit its annual budget estimates to the budget office of the respondent for inclusion in the Executive Appropriation Bill sent to the second respondent.

The petitioner asserts that the respondents are in joint continuing breach of the constitutional provisions under article 128 of the Constitution and as a result the judiciary is dependent on the first respondent for its budgeting and funding as in the manner stated in the affidavit in support of the petition.

The petitioner avers that by paying judicial officers at a much lower rate than the rate at which other employees of government departments and agencies are being paid for the same work or less work is a violation of their rights protected under the Constitution.

Further that the organs and agencies of the state are not being guided by the National objectives and principles in the application or interpretation of the Constitution or law relating to employment terms in taking and implementing policy decisions for the establishment and promotion of a free, just and democratic society.

The petitioner avers that the second respondent who is duty bound to enact laws to ensure for judicial officers' equal payment for equal work without discrimination, as enshrined under article 40 (1) (b) of the Constitution, has not done so.

Further that the second respondent has failed to enact laws to enforce such equality as mentioned above, thereby putting members of the judiciary at a disadvantage in terms of remuneration and violating their right to appropriate payment as provided for under the Constitution.

The second respondent and the executive arm of the state are not according the court such assistance as may be required to ensure the effectiveness of the court in line with the independence of the judiciary.

The provision of article 128 of the Constitution is not being purposefully interpreted to empower the judiciary, not only to be self-accounting but also to deal directly with the Ministry responsible for finance in relation to its finances.

The petitioner avers that members of the legal profession employed in the judiciary are the least remunerated compared to other members of the legal profession employed in other government departments and agencies.

Lastly, the petitioner avers that other heads of other government organs and agencies such as the Inspector General of government, was appointed by virtue of being a High Court judge and is earning Uganda shillings 17,875,000/=; the principal judge, who heads the High Court; Justices of the Supreme Court, Justices of the Court of Appeal, Judges of the High Court; respectively earn Uganda shillings 10,532,581/=, 9,688 506/=, 9,358,216/= respectively.

The petitioner prays that this court be pleased to grant the orders prayed for in the petition namely:

i. A declaration that the remuneration, salaries, allowances and recurrent expenditures of the judiciary, being constitutionally guaranteed charges (first charge) on the Consolidated Fund, do not form part of the estimates to be included in the Appropriation Bill as proposed expenditures by the President as is the present practice.

ii. A declaration that by virtue of the constitutional guarantee of independent funding of the judiciary, the judiciary ought not to send its annual budget estimates to the budget office of the executive arm of government or any other executive authority as is the present practice but ought to send the estimates directly to Parliament for appropriation.

iii. A declaration that the continued dependence of the judiciary on the executive arm for its budgeting and funds release is directly responsible for the present state of underfunding of the judiciary, work and inadequate judicial infrastructure, low morale among the judicial personnel, alleged corruption in the judiciary, delays in administration of justice and judicial services delivery and general low quality and poor output by the judiciary.

iv. A declaration that the present practice on judiciary funding by the respondents, which is dependent on the executive arm in budgeting and release of funds is in violation of the relevant articles of the Constitution and therefore unconstitutional, null and void.

v. Perpetual injunction against the respondents from all practices on judiciary funding which would run contrary to the relevant constitutional provisions, to wit, submitting judiciary is estimates to the executive instead of directly to the parliament and release of the judiciary is filed in warrants by the executive instead of directly to Parliament for disbursement.

vi. A consequential order, restraining the first and third defendant from appropriating the funds for the judiciary in the Annual Appropriation Act.

vii. A directive that the second defendant shall prepare the judiciary's annual estimates as charged upon the consolidated revenue fund of the Federation and submitted to the Accountant General of the Federation for Constitutional transferred to the second defendant.

viii. A declaration that, inconsistent with or in contravention of article 40 of the Constitution, the second respondent has failed to enact a law or laws under the provisions of to ensure equal payment for equal work without discrimination for the judiciary, thereby putting members of the judiciary at a disadvantage in terms of remunerations.

ix. Declare that, inconsistent with or in contravention of the said article of the Constitution, the second respondent has failed to make any law or laws to ensure equal pay for equal work without discrimination for the judiciary.

x. Grant an order of redress, directing the second respondent to make a law or laws for the enforcement of the rights of and freedoms of members of the judiciary provided for under article 50 (3) of the Constitution.

xi. Grant an order of redress specifically recognising the independence of the judiciary and its empowerment, not only to be self-accounting but also to deal directly with the ministry responsible for finance in relation to its finances.

xii. Grant an order of redress directing appropriate monthly remuneration in particular salaries as specified by the petitioner in the petition.

xiii. Grant an order of redress for such regularisation and enhancement of the salaries and the moment take retrospective effect from the time of promulgation of the 1995 constitution.

xiv. Provide for the costs of the petition on a higher scale.

xv. Any other relief that this court may deem fit and equitable in the circumstances.

The petition is supported by the affidavit of the petitioner that majorly reproduces the contents of the petition. In addition, the affidavit in support of the petition gives the monthly salary earnings of several officers of the defendant governmental agencies juxtaposed against that of judicial officers and the IGG. I have found no need to reproduce the contents of the affidavit as it tries to demonstrate that the actions of the respondents contravened the various articles of the Constitution indicated in the petition itself.

In reply the second respondent denies the allegations of inconsistency contained in the petition and asserts that the second respondent is created by article 87A of the Constitution and section 2 of the Administration of Parliament Act Cap 257. The second respondent averred that the functions of the second respondent are well articulated in section 6 of the Administration of Parliament Act and do not include the passing or enactment of laws. Further the second respondent asserts that the petition does not disclose a cause of action against it and the petitioner is not entitled to the declarations and orders sought in the petition. In the premises, the second respondent prays for orders that the petition discloses no cause of action against the second respondent. Secondly, that the petition is void of merit, frivolous and vexatious as against the second respondent. Thirdly, that the second respondent should be struck off as a party to the petition.

The answer to the petition of the second respondent is supported by the affidavit of the Clerk of Parliament Mrs Jane L. Kibirige wherein she deposes that she understood the contents of the petition and affidavits in support thereof. In answer thereof she knows that the Parliamentary Commission is created under article 87A of the Constitution and section 2 of the Administration of Parliament Act Cap 257. Secondly, the Parliamentary Commission has corporate status with power to sue and be sued in its corporate name and to suffer to be done all things which may be done or suffered by a body corporate. Further, that the functions of the Parliamentary Commission are prescribed in section 6 of the Administration of Parliament Act and do not include passing or enacting laws. She repeats the averments in the answer to the petition that the petition has no merit and ought to be dismissed with costs.

At the hearing of the petition the Petitioner Mr Ayena Odong, appeared in person, learned counsel Ms Emelda Adong State Attorney represented the Attorney General while learned counsel Ms Sitnah Cherotich represented the second respondent. The learned counsel with leave of court adopted their conferencing notes as the written submissions for and against the petition respectively.

The record has the petitioner's conferencing notes filed on 19th of October 2019 and the second respondent's conferencing notes filed on 10th January 2018. The record however does not have the conferencing notes of the Attorney General, who is the first respondent.

Submissions of the second respondent

The second respondent's conferencing notes discloses a preliminary point in which the second respondent prays that it is struck off as a party to the petition for being improperly joined to the petition.

The crux of the second respondent's submissions is that the Parliamentary Commission is a creature of statute and is created under article 87A of the Constitution with functions prescribed under the Administration of Parliament Act. Secondly, the functions of the Parliamentary Commission are set out under section 6 of the Act and do not include enactment of laws. Ms Cherotich relied on the case of **Parliamentary Commission v Twinobusingye Severino and Attorney General, Constitutional Application No 53 of 2011 (arising from Constitutional Petition No 47 of 2011**) in which the Parliamentary Commission had applied to be joined as a co – respondent in a case where a petition had been filed against the Attorney General for the manner in which Parliament acted. The petitioner challenged the manner in which Parliament had conducted a probe into the mismanagement of the oil sector. The Constitutional Court disallowed the application on the basis of section 6 of the Administration of Parliament Act. She emphasised that none of the functions of the Parliamentary Commission under the cited section 6 include the enactment of laws. Furthermore, she submitted that none of the functions include appropriation of funds for running of the Judiciary as an arm of Government.

Secondly, Ms Cherotich submitted that the petitioner has no cause of action because the petition does not disclose that the petitioner enjoyed a right, that the right has been violated and that the second respondent is liable (see **Tororo Cement Company Ltd v Frokina International Ltd S.C.C.A. No. 2 of 2004**, **Colter v Attorney General for Kenya (1938) 5 EACA 18** and **Auto Garage v Motokov (1971) EA 514**).

In the premises, the respondent's counsel submitted that the name of the second should respondent be struck off the petition as the name of a person improperly joined as a party to the petition. Further, she submitted that there is no cause of action against the second respondent.

Submissions of the petitioner

For his part Mr Ayena Odong did not address the preliminary issues of law and relied on his earlier submissions filed on 19th October, 2017. The preliminary objected was left to court for decision.

Mr Ayena submitted that the underlying concept of the doctrine of separation of powers is to ensure the independence of each branch of government and that an independent judiciary is crucial to upholding the rule of law in the society. The rationale for an independent judiciary is to enable court to freely decide cases without external influence and to provide enough funds to maintain and sustain judicial business. Mr Ayena submitted that the independence of the judiciary is a universally recognised concept and many international conventions support this. The international conventions are:

(1) The United Nations Basic Principles of the Independence of the Judiciary.
(2) The Commonwealth (Latimer House) principles of the accountability and relationship between the three branches of government.
(3) International principles on the independence and accountability of judges, lawyers and prosecutor, the practitioners guide.
(4) Bangalore principles on the domestic application of international human rights norms.

Mr Ayena submitted that the overarching issue in the petition is whether the Ugandan Judiciary is constitutionally guaranteed to be financially independent from the Executive arm of government. He submitted that the basis of the doctrine of separation of powers proposes that powers of government are divided into separate and distinct arms of the Executive, Legislature and Judiciary, which must function basically independent of one another. He submitted that apart from the fact that this doctrine has been

traditionally accepted in various jurisdictions including Uganda, much as it does not expressly stated it, the Constitution of the Republic of Uganda nonetheless gives clear delineation of powers to the respective arms of government and makes it clear that the doctrine has been adopted.

Mr Ayena relied on the case of **Queen v Beauregard [1986] 2 S.C.R. 56** where it was stated from the words of Prof Shimon Shetreet that the judiciary has developed from a dispute resolution mechanism, to a significant social institution with an important constitutional role which participates along with other institutions in shaping the life of its community (The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montréal Declaration" in S. Shetreet and J. Deschenes (eds), *Judicial Independence: the Contemporary Debate* (1985), at page 393).

Ayena submitted that in order to maintain such a significant social institution with an important constitutional role which participates along with other positions in shaping the life of its community, the judiciary must maintain its independence under the principle of separation of powers and particularly in terms of financial independence.

Mr Ayena submitted that the scope of the status or relationship of judicial independence was defined in a very comprehensive manner by Sir Guy Green Chief Justice of the state of Tasmania in "The Rationale and Some Aspects of Judicial Independence" (1985), 59 A.L.J. 135 at 135 that:

> I thus define judicial independence as the capacity of the court to perform their constitutional function free from actual or apparent interference by, and to the extent that is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control.

Secondly, Le Dain J in Valente v The Queen, [1985] 2 S.C. R. 673 at pages 685 and 687 stated that:

> Judicial independence connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, which rests on objective conditions or guarantees.

Further it was noted that judicial independence involves both individual and institutional relationships. Individual independence of the judge, as reflected in such matters as security of tenure and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government.

Mr Ayena submitted that the rationale for the two pronged modern understanding of judicial independence is a recognition that the courts are not charged solely with the adjudication of individual cases. There is also a second, different and equally important role, namely which include *inter alia* protection of the Constitution and the fundamental values embodied in it namely the rule of law, fundamental justice, equality, preservation of the democratic process etc. He submitted that judicial independence is essential for a fair and just dispute resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies.

Mr Ayena further submitted that it was necessary to discuss the question of financial security as a component of judicial independence. He relied on the case of **Beauregard** (supra) for the submission that judicial independence requires security of tenure and financial security. That financial security has been recognised as the central component of the international concept of judicial independence.

The petitioner further submitted that Le Dain, J in **Valente v The Queen**, (supra) stated that the second essential condition of judicial independence is what may be referred to as financial security. It means security of salary or other remuneration and where appropriate security of pension. The essence of such security is that the right to salary and pension should be established by law and should not be subject to arbitrary interference by the executive in a manner that could affect judicial independence

Mr Ayena further relied on a decision of the Federal High Court, Nigeria in **Olisa Agbakoba v FG, The NJC & National Assembly**; **Suit No: FHC/ABJ/CS/63/2013** in a case involving remuneration, salaries, allowances and recurrent expenditures of the judiciary. It was stated that the President has no power to approve funds for the remuneration, salaries and allowances and recurrent expenditures of the judiciary. Further that the constitutionally guaranteed funds are a first charge on the consolidated revenue fund of the Federation. Thirdly, that the funds should be released directly to the judiciary.

Mr Ayena contended that likewise, funds for the funding of the judiciary should be released direct to the judiciary. He submitted that in the Nigerian the case of **Olisa Agbakoba v FG, The NJC & National Assembly** (supra) it was held that the funding of the judiciary is provided for and guided by the Constitution. The practice where the Minister of Finance controls funds meant for the judiciary directly offends the provisions of the Constitution and undermines the financial independence of the judiciary. It was further observed that the budgetary estimates from the judiciary were tampered with and this affected the dispensation of justice in the country.

As far as the facts of the petitioner are concerned, the petitioner submitted that the Constitutional Court has the mandate to entertain this petition. He relied on article 126 of the Constitution for the proposition that judicial power is derived from the people and shall be exercised by the courts in

the name of the people and in conformity with law and with the values, norms and aspirations of the people. Secondly, under article 50 (1) of the Constitution any person who claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened has a right to apply to a competent court for redress which may include compensation. He contended that the petition is aimed at the quest for enforcement of fundamental rights of judicial officers. He further submitted that under article 129 of the Constitution, different courts are provided for in Uganda and competent courts for enforcement of human rights includes the High Court and the Court of Appeal sitting as a Constitutional Court. Mr Ayena further submitted that the Constitutional Court was chosen on the basis that the petition calls for interpretation of the Constitution. He contended that the High Court does not have the right to determine questions as to interpretation of the Constitution.

He submitted that the court should not shy away from its constitutional role provided for under article 129 (1) of the Constitution to exercise judicial power. That the judges are not sitting in their own cause because the question was which organ or institution would determine the issues arising? He further relied on the Nigerian case of **Olisa Agbakoba v FG, The NJC & National Assembly** (supra) for illustration that the question can be adjudicated by the judiciary.

He further submitted that the petitioner has a standing to present the petition under article 50 (2) of the Constitution of the Republic of Uganda which allows any person or organisation to bring an action against the violation of another person's or groups' human rights.

Whether the present appropriation practice of the respondents, whereby the judicial arm of government is dependent on the first respondent for judicial estimates and funding does not indeed violate the National Objectives and Directive Principles of State Policy, article 14 (1) (b) and

article 128 of the Constitution of the Republic of Uganda 1995 and therefore unconstitutional?

Mr Ayena relied on the words of the former Chief Justice of Kenya (as he then was) Gicheru in a paper presented to a South African judges conference in Maputo Mozambique between 9th – 13th August, 2006 entitled "Financial and Administrative Autonomy of Courts" where he said that:

> The institutions that controlled the purse and the administrative support of the judiciary can also directly control the extent and efficiency of the role. It is simply the case of he who pays the piper calling the tune.
>
> The necessary judicial independence of the courts cannot be achieved if the court finances are determined by the political organs of the Executive and the Legislature over whom they should exercise judicial control.

Mr Ayena submitted that the basis for the financial independence of the judiciary Uganda is found under article 120 Constitution and particularly article 128 (5) (6) and (7) of the Constitution which gives the judiciary power and control over its own funds. He submitted that article 153 establishes the Consolidated Fund of Uganda while article 128 states that there shall be Consolidated Fund in which shall be paid all revenues all other monies raised received for the purpose of or in behalf of or in trust of the government. Further that article 154 provides that all monies are drawn from the Consolidated Fund of Uganda. He submitted that the article recognises only two ways that money can be lawfully withdrawn from the Consolidated Fund namely:

- By direct charge upon the fund,
- By appropriation

Further, article 128 of the Constitution provides that:

> (5) The administrative expenses of the judiciary, including salaries, allowances, gratuities and pensions payable to or in respect of persons serving in the judiciary, shall be charged on the Consolidated Fund.
>
> (6) The judiciary shall be self-accounting and may deal directly with the Ministry responsible for finance in relation to its finances.

He submitted that an analysis of article 154 (1) (a) of the Constitution show that direct charge withdrawal for administrative expenses of the judiciary, including salaries, allowances, gratuities, and pensions payable to or in respect of persons serving in the judiciary, while appropriated withdrawals under article 154 (1) (b) of the Constitution relate to the first respondent. Mr Ayena submitted that the Judiciary is funded by direct charge while the Executive is funded by Appropriation Acts. This suggested that the two branches of government are meant to be funded in separate ways in terms of withdrawals from the Consolidated Fund.

Mr Ayena contends that an analysis of the constitutional provisions he referred to shows that the independent funding of the judiciary was not followed by the respondent. He contends that this offends the provisions of article 2 which requires public officers and institutions to obey the Constitution.

In the premises, he prayed that we should hold that by virtue of article 128 (5) and (6) of the Constitution, the remuneration, salaries, allowances and recurrent expenditures of the Judiciary are charged on the Consolidated Revenue Fund and therefore does not form part of the estimates to be included in the Appropriation Bill as proposed expenditures by the first respondent.

Secondly, the practice of the first respondent, laying the estimates of the Judiciary before Parliament and practice of Parliament appropriating the funds of the judiciary violate article 128 (5) and (6) of the Constitution and are therefore unconstitutional, null and void.

By virtue of article 128 (5) and (6) of the Constitution, monies standing to the credit of the judiciary in the Consolidated Revenue Fund shall be fully paid directly to the judiciary.

The second method of release of funds from the Consolidated Fund is by appropriation and applies only to the first respondent as provided by article 154 (4) and (5) of the Constitution. Article 154 (4) authorises the President to present his annual budget estimates to Parliament. It applies generally to the estimates of revenue and expenditure of the country but article 154 (2) specifically excludes expenditures charged upon the Consolidated Revenue Fund from the general estimates.

Mr Ayena submitted that funds of the judiciary charged upon the Consolidated Fund of the country as envisaged under article 154 (1) of the Constitution are not subject to appropriation by the first respondent and Parliament. The only fund relating to the judiciary that is subject to appropriation is called capital expenditure, because it is not provided in article 154 (1) (a) of the Constitution which sets out the funds charged on the Consolidated Revenue Fund. He invited the court to carefully note the words used under article 154 relating to authorisation of withdrawals from the Consolidated Fund. The words used are "charged" and "appropriation". He submitted that it is clear that the framers of the Constitution wanted to make the judiciary independent of the first respondent and Parliament. This was designed to achieve financial independence of the judiciary. He submitted that the judicial budget does not go through the appropriation process in which the President under article 156 (1) lays before Parliament

which appropriates the request through a Bill. The judicial expenditure is charged on the Consolidated Fund.

Mr Ayena further submitted that the practice that requires heads of court to appear before Parliament for budget defence is unconstitutional and contrary to article 128 (5) of the Constitution. He contended that the correct mode of funding the judiciary is stipulated in the Constitution.

Mr Ayena submitted that the judiciary is supposed to prepare its annual estimates consisting of remuneration, salaries, allowances if judicial officers guided by the relevant national annual price and other indices. It also prepares estimates of recurrent expenditure of judicial offices. Thereafter the total estimate is charged on the Consolidated Fund and paid in full to the judiciary without interference by the respondents. Lastly, capital expenditure for the judiciary is not charged on the Consolidated Fund and is the only fund relating to the judiciary that is subject to appropriation.

Mr Ayena further referred to the speeches of several judicial officers including that of Chief Justice Bart Katureebe, former Principal Judge James Ogoola and the former Chief Justice Benjamin Odoki all of which refer to the underfunding of the judiciary and the problem of 'begging' for funds from the Executive and Legislature to fund judiciary activities. He submitted that the judiciary gets about 0.6% of the national budget allocated to it.

Mr Ayena submitted that the present mode of funding the government is by appropriation of funds through an Appropriation Act but this is wrong when it relates to the judiciary. In the circumstances, the court is invited to hold that the present appropriation practice is a violation of the Constitution of the Republic of Uganda 1995 and is therefore unconstitutional.

Mr Ayena further submitted that the continued dependence of the judiciary of the Executive arm for its budgeting and release of funds is directly

responsible for the present state of affairs in terms of underfunding of the judiciary, poor and inadequate judicial infrastructure, low morale among judicial personnel, alleged corruption in the judiciary, delays in administration of justice and judicial services delivery, and general low quality and poor output by the judiciary. He proposed that the poor condition of salaries will not attract honest and decent people to the bench.

In summary Mr Ayena submitted that an independent judiciary is fundamental to a democratic state. To sustain a democracy in the modern world an independent, impartial and upright judiciary is a necessity. That is why the international system has developed conventions to promote the concept of judicial independence. He submitted that the Constitution of the Republic of Uganda 1995 contains similar provisions to guarantee the independence of the judiciary in Uganda. He invited the court to peruse the conventions outlined in the submissions in coming up with a decision in the matter. He prayed that the petition is allowed.

Consideration of the petition

I have carefully considered the petitioner's petition and preliminarily the issue of the proper parties to the petition. The first respondent's counsel did not put in an answer to the petition neither did the Attorney General file written submissions.

The second respondent on the other hand objected to the petition on the ground that there was no cause of action against it. The basis of the objection is that failure to enact a law operationalizing the independence of the judiciary, including its financial independence is not one of the functions of the second respondent. The second respondent relied on article 87A of the Constitution as well as section 6 of the Administration of Parliament Act which establishes the second responded as the Commission and provides for its functions.

Article 87A of the constitution of the Republic of Uganda provides as follows:

> 87A. Parliamentary Commission
>
> There shall be a commission called the Parliamentary Commission whose composition and functions shall be prescribed by Parliament by law.

The commission was established by the Administration of Parliament Act, Cap 257 section 2 (1) thereof. Particularly section 2 (2) of the Administration of Parliament Act gives the composition of the commission as comprising of the Clerk, the leader of government business, the Minister responsible for finance and the members of Parliament elected by Parliament none of whom shall be a minister. In addition, the commission is a body corporate with perpetual succession and a common seal and can be sued or may sue in its name and to do or suffer to be done all the things which may be done or suffered by a body corporate.

The functions of the commission as set out by section 6 of the Administration of Parliament Act which provides as follows:

> 6. Functions of the commission.
>
> The functions of the commission shall include –
>
> (a) to a point, promote and exercise disciplinary control over persons holding public office in Parliament;
> (b) to review the terms and conditions of service, standing orders, training and qualifications of persons holding office in Parliament;
> (c) to provide security staff to maintain proper security for members of Parliament and facilities within the precincts of Parliament;
> (d) to provide a parliamentary reporting service;

(e) to provide such other staff and facilities as are required to ensure the efficient functioning of Parliament;

(f) cause to be preparing each financial year estimates of revenues and expenditure for Parliament for the next financial year;

(g) to make recommendations to Parliament on or, with the approval of Parliament, determine the allowances payable and privileges available to the Speaker, Deputy Speaker and members of Parliament;

(h) to do such things as may be necessary for the well-being of the members and staff of Parliament.

In the amended petition in paragraph 1 (c) and (d) the petitioner alleges firstly in (c) that the failure of the second respondent to enact a law for the administration of the judiciary, being an independent organ of the state, equal in stature, to the legislature and executive, leaving the administration of the judiciary to fall under the public service, is inconsistent with law in contravention of the Constitution. Secondly, in (d) that the failure of the second respondent to enact laws under the provisions of article 40 (1) (b) of the Constitution to ensure equal payment for equal work without discrimination, thereby putting members of the judiciary at a disadvantage in comparison to other government employees in terms of remuneration, is inconsistent with or in contravention of the Constitution.

The second respondent has no mandate to enact any laws. Secondly, the composition of the second respondent demonstrates clearly that it is an organ corollary to Parliament and is not Parliament. Article 79 of the Constitution which provides for the functions of Parliament provides *inter alia* that Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda. Particularly, article 79 (2) prohibits any other authority or person to legislate in Uganda in the following words:

(2) Except as provided in this Constitution, no person or body other than Parliament shall have power to make provisions having the force of law in Uganda except under authority conferred by an Act of Parliament.

The second respondent not only does not have authority to enact any laws but is also barred from doing so by article 79 (2) of the Constitution of the Republic of Uganda. In the premises, there is no cause of action against the second respondent and I would preliminarily strike out the petition as against the second respondent with costs.

The second question for consideration is whether there is any question or questions as to interpretation of the Constitution. The jurisdiction of the court to determine questions as to interpretation of the Constitution is clearly stipulated under article 137 (1) of the Constitution of the Republic of Uganda which provides that any question as to interpretation of the Constitution shall be determined by the Court of Appeal sitting as a Constitutional Court. It is further provided under article 137 (3) of the Constitution of the Republic of Uganda that any person who alleges that an Act of Parliament or any other law or anything in or done under the authority of any law or any act or omission by any person or authority is inconsistent with or in contravention of the Constitution, may petition the Constitutional Court for a declaration to that effect and for redress where appropriate.

The crux of the petition as I understand it alleges that funding the judiciary through the Appropriation Act presented by the Executive contravenes articles 154 (1), article 156 and article 128 (5), (6) of the Constitution the effect of which contravenes article 128 (1) of the Constitution which provides that the courts shall be independent and shall not be subject to the direction or control of any person or authority. In my judgment the petitioner has alleged contravention of the Constitution and a substantial

question as to whether the manner of funding of the judiciary does not contravene the above written articles of the Constitution.

In the premises, the petitioner's right to present the petition does not fall under article 50 (2) of the Constitution which enables any person or organisation to bring an action against the violation of another person's or group's human rights as submitted by the petitioner. The petitioner's right to present the petition falls under article 137 which allows a person who alleges that an Act of Parliament or any other law or anything done in or under the authority of any law or any act or omission by any person or authority is inconsistent with or in contravention of a provision of the Constitution. It is therefore a public interest petition seeking interpretation by this court to establish whether the act of the Executive in the manner in which it funds the judiciary contravenes the provisions of the Constitution. It follows that this court has jurisdiction to entertain the petition and the petitioner has *locus standi* to present a public interest petition on the issue of funding of the judiciary and alleged compromise on the independence of the judiciary by the arrangement or manner of funding of the judiciary.

The petitioner in a nutshell is alleging that the process of subjecting the funding of the judiciary to the appropriation process by presenting the estimates for approval of Parliament in an Appropriation Bill is not the manner of funding envisaged by the Constitution and is unconstitutional. He asserts that the manner of funding of the judiciary is by charge on the Consolidated Fund under article 128 (5) of the Constitution. On the same point the petitioner is alleging that a withdrawal of funds can be made from the Consolidated Fund without an Appropriation Act or a Supplementary Appropriation Act because article 154 (1) of the Constitution permits withdrawals from the Consolidated Fund where the expenditure is charged by the Constitution. The petitioner further alleges that as a consequence of the manner of funding of the Judiciary through estimates presented to

finance and put before Parliament by the President for the enactment of an Appropriation Act for any financial year compromises the independence of the Judiciary and subjects the Judiciary to control by other arms of the State such as the Executive.

Principles of interpretation of the Constitution

It is a cardinal rule of interpretation of statutes that the first effort in interpretation should be to ascertain the natural or ordinary meaning of a word or phrase that may be in issue. Sir Rupert Cross in **Statutory Interpretation; London Butterworth's 1976** set out cannons of statutory interpretation at pages 29 thereof and quotes from Lord Reid the following principles of interpretation:

> (i) "In determining the meaning of any word or phrase in a statute the first question to ask is what is the natural or ordinary meaning of the word or phrase in its context in the statute. It is only when the meaning leads to some result which cannot reasonably be supposed to have been the intention of legislature that it is proper to look for some other possible meaning of the word or phrase. (*Pinner v Everett, [1969] 3 All E.R. 257 at 258*).
>
> (ii) "Then [in case of doubt] rules of construction are relied on. They are not rules in the ordinary sense of having some binding force. They are our servants, not our masters. They are aids to construction, presumptions or pointers. Not infrequently one 'rule' points in one direction, another in a different direction. In each case we must look at all relevant circumstances and decide as a matter of judgement what weight to attach to any particular 'rule'." (*Maunsell v Olins, [1975] A.C. 373 at 382*; *Maunsell v Olins and another [1975] 1 All ER 16 at 18)*

(iii) "It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can choose between those meanings, but beyond that you must not go." (*Jones v Director of Public Prosecutions, [1962] AC 635, at page 688*.)

Further to the cardinal rules of interpretation stated above, a Constitution has to firstly be construed on the basis of its language and not on the basis of other materials as held by the Privy Council in **Minister of Home Affairs and another v Fisher and another [1979] 2 All E.R. 21** at 26 per Lord Wilberforce that:

> … The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.
>
> It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second.

This principle is also stated in other words by the South African Constitutional Court by Chaskalson P in **State v Makwanyane and Another [1995] 1 LRC 269** that:

> We are concerned with the interpretation of the Constitution, and not the interpretation of ordinary legislation. A constitution is no ordinary statute. It is the source of legislative and executive authority. It determines how the country is to be governed and how legislation is to be enacted. It defines the powers of the different organs of state, including Parliament, the Executive, and the Courts as well as the Fundamental Rights of every person which must be respected in exercising such powers.

The need to interpret a Constitution on the basis of its own language is also reflected in the judgment of Amissah JP of the Court of Appeal of Botswana

in **Dow v Attorney General (of Botswana) [1992] LRC (Const.) 623** at page 632 when he stated that:

> A written constitution is the legislation or compact which establishes the state itself. It paints in broad strokes on a large canvas the institutions of that state; allocating powers, defining relationships between such institutions and between the institutions and the people within the jurisdiction of the state, and between the people themselves. The Constitution often provides for the protection of the rights and freedoms of the people, which rights and freedoms have thus to be respected in all future state action. The existence and powers of the institutions of state, therefore, depend on its terms. The rights and freedoms, where given by it, also depend on it. … By nature, and definition, even when using ordinary prescriptions of statutory construction, it is impossible to consider a Constitution of this nature on the same footing as any other legislation passed by a legislature which is self-established, with powers circumscribed, by the constitution. The object it is designed to achieve evolves with the evolving development and aspiration of its people.

Secondly, different parts of a Constitution should be read in harmony and not in conflict. This was stated in the judgment of Justice White of the Supreme Court of the United States in **South Dakota v North Carolina 192 U.S. 286 (24 S. Ct. 269, 48 L. Ed. 448 (1940)** at page 465 that:

> I take it to be an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all the others, and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. If, in following this rule, it be found that an asserted construction of any one provision of the Constitution would, if adopted, neutralize a positive prohibition of another provision of that instrument, then it results that such asserted construction is erroneous, since its enforcement would mean, not to give effect to the Constitution, but to destroy a portion thereof.

The harmonisation principle was also restated by the Supreme Court of Uganda by Odoki CJ in **National Council for Higher Education v Anifa**

Kawooya Bangirana Constitutional Appeal No 4 of 2011 at page 49 of his judgment:

> The second question is one of harmonisation. The Constitutional Court was in error to hold that it did not have jurisdiction to construe one provision against another in the Constitution. It is not a question of construing one provision as against another but of giving effect to all the provisions of the Constitution. This is because each provision is an integral part of the Constitution and must be given meaning or effect in relation to others. Failure to do so will lead to an apparent conflict within the Constitution

I have carefully considered the petitioner's petition which in effect is unopposed in terms of failure to file an answer to the petition and to address the court in written submissions in reply by the Attorney General.

Turning to the petition of the petitioner, paragraph 1 (a) deals with the right of the petitioner to bring the petition and has already been handled. Secondly, paragraph 1 (b) of the petition alleges that:

> The rights of judicial officers provided for under the Constitution are being violated by them being paid at a much lower rate in comparison to other government employees in terms of remunerations, is inconsistent with and in contravention of the Constitution.

I do not see how the payment of members of the judiciary is inconsistent with or in contravention of the Constitution because the petitioner does not cite any provision of the Constitution that has been or is being infringed on this ground. The petitioner only alleges that the mode of funding of the Judiciary contravenes articles 128 and 154 of the Constitution. There is no evidence of who caused funding of different sectors at different rates and what standards should be applied to grade different offices to conceptualise the right to equal pay for equal work. Which equal work? Article 137 (3) of the Constitution requires an allegation of inconsistency or

contravention of a provision of the Constitution to be specifically pleaded. Such an inconsistency has to be alleged in the body of the petition which the petitioner has not done. This part of the petition discloses no cause of action for not establishing the right and who violated it (See Auto Garage v Motokov.

Thirdly, in paragraph 1 (c) of the petition, the petitioner alleges that

> Failure of the second respondent to enact a law for the administration of the Judiciary, being an independent organ of the state, equal in stature to the Legislature and Executive, leaving the administration of the Judiciary to fall under the Public Service, is inconsistent with law in contravention of the constitution.

The petition against the second respondent, the Parliamentary Commission, has already been dismissed for disclosing no cause of action because the Parliamentary Commission does not enact laws. This grievance of the petitioner cannot be handled in this petition since it was brought against a wrong party. Moreover, inasmuch as a petition may be brought against no particular respondent and may only be brought for declarations, the petitioner's petition specifically seeks a declaration against the second respondent. Such a declaration cannot be granted because the second respondent does not have any function of enacting any laws.

Fourthly, it follows that the allegation in paragraph 1 (d) that there was failure of the second respondent to enact laws under the provisions of article 40 (1) (b) of the Constitution to ensure equal payment for equal work without discrimination and thereby putting members of the judiciary at a disadvantage in comparison to other government employees in terms of remunerations is inconsistent with or in contravention of the Constitution, cannot likewise be sustained.

Fifthly, the allegation in the petition in paragraph 1 (f) of the petition that the action of the first respondent to preferentially give higher salaries to members of the legal profession employed in other government departments and agencies different from those given to the judges and other judicial officers is inconsistent with or in contravention of the Constitution may be handled as a consequential issue. However, as a preliminary point, I wish to point out that even this allegation does not indicate, in terms of article 137 (3) of the Constitution, which provision of the Constitution has been contravened. The requirement to specify the provision or the provisions of the Constitution which have been contravened in terms of article 137 (3) is clearly provided for by the mandatory provisions of **Constitutional Court (Petitions and References) Rules, 2005, S. I. 2005 No 91** and particularly Rule 3 (1) and (2) thereof which provides that:

3. Form and contents of petition
   (1) A petition under article 137 (3) shall be in the form specified in the schedule to this Rules.
   (2) The petition shall allege –.
      (a) that an Act of Parliament or any other law or anything in or done under the authority of any law is inconsistent with or in contravention of a provision of the Constitution; or
      (b) that any act or omission by any person or authority is inconsistent with or in contravention of the decision; or …

By stating that the petition shall allege inconsistency with a provision of the Constitution, Rule 3 (2) (supra) makes the requirement mandatory for purposes of compliance. Further, Form 1 in the Schedule to the Rules read together with the said Rule 3 (supra) requires the allegation of inconsistency to be made in paragraph 1 as had been done by the petitioner. In paragraph 2, the petitioner is required to state the reasons

relied on to show why the act, or law, or anything done under the authority of any law, or the act or omission is inconsistent with or in contravention of the Constitution. In the premises this part of the petition does not comply with rule 3 (2) of the **Constitutional Court (Petitions and References) Rules, 2005, S. I. 2005 No 91** as well as article 137 (3) of the Constitution. In **Ismail Serugo v Kampala City Council & Attorney General Constitutional Appeal No. 2 of 1998 (unreported) Wambuzi CJ (**as he then was) at page 204 stated that:

> In my view for the Constitutional Court to have jurisdiction the petition must show, on the face of it, that interpretation of a provision of the Constitution is required. *It is not enough to allege merely that a Constitutional provision has been violated*. (Emphasis added)

The petition must on the face of it allege that a constitutional provision has been violated. In conclusion, this part of the petition discloses no cause of action. It follows that the prayers as flow from paragraphs 1 (b), (c), (d) and (f) of the Petitioner's allegation of inconsistency or contravention of the Constitution and as supported by the reasons in paragraphs 2 of the petition cannot be granted. The prayers which cannot be granted for reason of not disclosing a cause of action are:

viii. A declaration that, inconsistent with or in contravention of article 40 of the Constitution, the second respondent has failed to enact a law or laws under the provisions of to ensure equal payment for equal work without discrimination for the judiciary, thereby putting members of the judiciary at a disadvantage in terms of remunerations.

ix. Declare that, inconsistent with or in contravention of the said article of the Constitution, the second respondent has failed to

make any law or laws to ensure equal pay for equal work without discrimination for the judiciary.

x. Grant an order of redress, directing the second respondent to make a law or laws for the enforcement of the rights of and freedoms of members of the judiciary provided for under article 50 (3) of the Constitution.

xi. Grant an order of redress …

xii. Grant an order of redress directing appropriate monthly remuneration in particular salaries as specified by the petitioner in the petition.

xiii. Grant an order of redress for such regularisation and enhancement of the salaries and the moment take retrospective effect from the time of promulgation of the 1995 constitution.

Prayers viii, ix, x, xii and xiii flow from the above cited paragraphs and are hereby dismissed.

I note that the reasons given to support the pleading of inconsistency and the petitioners case in paragraphs 2 (iv) – (vi) of the petition support the averment in paragraph 1 (e) of the petition which in a nutshell alleges that there was compromise to the independence of the Judiciary through subjecting the Judiciary to budgetary control of the Executive. The particular paragraphs I (e) and 2 (iv), (v) and (vi) of the petition deal with the process of financing the judiciary.

I will therefore go straight away to what I consider to be the only justiciable basis of the petition which is the assertion that the judiciary is independent and shall not be subject to the direction or control of any person or authority but is being subjected to budgetary control. This is further premised on the provisions of article 128 (5) and (6) of the Constitution the Republic of Uganda which provides for the administrative expenses of the judiciary to be charged on the Consolidated Fund as well as the fact that

the judiciary shall be self-accounting and may deal directly with the Ministry responsible for finance in relation to its finances. Article 128 of the Constitution has a head note which reads "Independence of the judiciary". It provides as follows:

> 128. Independence of the judiciary.
>
> (1) In the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.
>
> (2) No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions.
>
> (3) All organs and agencies of the State shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts.
>
> (4) A person exercising judicial power shall not be liable to any action or suit for any act or omission by that person in the exercise of judicial power.
>
> (5) The administrative expenses of the judiciary, including all salaries, allowances, gratuities and pensions payable to or in respect of persons serving in the judiciary, shall be charged on the Consolidated Fund.
>
> (6) The judiciary shall be self-accounting and may deal directly with the Ministry responsible for finance in relation to its finances.
>
> (7) The salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial power shall not be varied to his or her disadvantage.

(8) The office of the Chief Justice, Deputy Chief Justice, Principal Judge, a justice of the Supreme Court, a justice of Appeal or a judge of the High Court shall not be abolished when there is a substantive holder of that office.

There are specific principles which flow from article 128 of the Constitution. I find it important that the head note reads "Independence of the judiciary". It gives the import that article 128 of the Constitution of the Republic of Uganda is about the ground rules and principles in the operationalization of the independence of the judiciary. I note that there may be no need to refer to international norms if these principles enshrined in the Constitution are clear and unambiguous. The principles provide the basic guidelines for upholding the independence of the judiciary. I must add that the term "judiciary" has not been defined under article 257 of the Constitution which is the interpretation article of the Constitution of the Republic of Uganda and the term "Judiciary" shall receive its contextual meaning. The article 128 principles are that;

In the exercise of judicial power, the courts shall be independent and shall not be subject to the direction or control of any person or authority. In other words, the courts shall perform their functions of the exercise of judicial power free from any interference direction or control of any person or authority. The petitioner advanced the view that subjecting the finances of the Judiciary to appropriation by Parliament through the actions of the Executive compromises the independence of the Judiciary.

Secondly, it is forbidden for any person or authority to interfere with the courts or judicial officers in the exercise of their judicial functions.

Thirdly, and most importantly in relation to the petition, all organs and agencies of the State shall accord the courts such assistance as may be required to ensure the effectiveness of the courts. In the context of the

expenses of the judiciary, such assistance may also promote the independence of the judiciary. It is an assertion that the functionality of the judiciary depends on the funding of its activities and subject to the approval of Parliament, what funding is required to be effective in the administration of justice should be within the determination of the Judiciary with approval of Parliament. To subject the funding of the Judiciary to the Executive arm of the State might involve them in determining what priorities the Judiciary should fund. Such determination compromises on the independence of the judiciary in the carrying out of its judicial functions in the sense that the judiciary cannot prioritise its funding without an input or direction of the Executive arm of Government.

Fourthly, and under article 128 (5) of the Constitution, the administrative expenses of the judiciary, including all salaries, allowances, gratuities and pensions payable to or in respect of persons serving in the judiciary, shall be charged on the Consolidated Fund. This should be read together with article 128 (6) of the Constitution which provides that the Judiciary shall be self-accounting and may deal directly with the Ministry responsible for finance in relation to its finances. I emphasise the discretionary right of the judiciary to deal directly with the Ministry responsible for finance in relation to its finances. The facts that permissive language is used means that the Judiciary may handle its finances in another way. The scope of such dealing ought to be within the determination of the Judiciary. The petitioner emphasised the aspect of charging of administrative expenses, salaries, allowances, gratuities and pensions for persons serving the judiciary on the Consolidated Fund. There is need to categorise the different kinds of expenses referred to in article 128 (5) of the Constitution. They are:

- Administrative Expenses of the judiciary. Under the caption of administrative expenses, specifically includes;
    - salaries,

- allowances,
- gratuities and pensions payable to or in respect of persons serving in the judiciary.

- This should be further defined by setting out who the persons serving in the judiciary are.

An inclusive language is used and therefore the phrase "administrative expenses of the judiciary" should include all expenses for managing the judiciary. As I noted above, the word "judiciary" is not defined specifically in the Constitution. Chapter 8 of the Constitution however is entitled "The Judiciary". Article 126 thereof deals with the exercise of judicial power. Further, article 129 of the Constitution separately sets out the *Courts of Judicature*. Going back to article 257 (1) (d) of the Constitution, the word "court" as used in the Constitution is defined to mean a court of judicature as established by or under the authority of the Constitution. The article further separately defines the "Court of Appeal", the "High Court" and the "Supreme Court". All the said courts are defined as courts of judicature under article 129 of the Constitution. Because the courts are separately defined, the expression "The Judiciary" refers to the institution of the judiciary including its administrative setup comprising of different categories of staff inclusive of judicial officers. For emphasis, chapter 6 of the Constitution of the Republic of Uganda specifically deals with "The Legislature". It provides for the establishment, composition and functions of Parliament. Further, Parliament enacted the Administration of Parliament Act. Secondly, chapter 7 deals with "The Executive" the Executive include the President and the office of the President. It deals with executive authority of Uganda, the Cabinet, office of Ministers, office of the Attorney General and Deputy Attorney General as well as the office of the Directorate of Public Prosecutions. Chapter 8 of the Constitution then deals with the judiciary under which falls the administration of justice. Chapter 9 of the Constitution deals with "Finance" and the institutions concerned with

finance. The Constitution also establishes other commissions and offices such as that of the Inspectorate General of Government and the Human Rights Commission. In conclusion, the judiciary encompasses the administrative setup under which the Courts of Judicature are managed and of which the Courts of Judicature are the components of the structure with staff that includes staff to administer the judiciary as well as staff categorised as judicial officers.

It is the administrative expenses of the judiciary which shall be charged on the Consolidated Fund. The Consolidated Fund is set up by article 153 of the Constitution. Further, withdrawals from the Consolidated Fund are catered for by article 154 of the Constitution. Particularly, the petitioner emphasised article 154 (1) of the Constitution which allows funds to be withdrawn from the Consolidated Fund if it is charged by the Constitution or an Act of Parliament. Article 154 (1) of the Constitution provides as follows:

> 154. Withdrawal from the Consolidated Fund.
>
> (1) No monies shall be withdrawn from the Consolidated Fund except –
>
> (a) to meet expenditure charged on the fund by this Constitution or by an Act of Parliament; or
>
> (b) where the issue of those monies has been authorised by an Appropriation Act, a Supplementary Appropriation Act or as provided under clause (4) of this article.
>
> (2) No monies shall be withdrawn from any public fund of fund other than the Consolidated Fund, unless the issue of those monies has been authorised by law.

(3) No money shall be withdrawn from the Consolidated Fund unless the withdrawal has been approved by the Auditor General and in the manner prescribed by Parliament.

(4) If the President is satisfied that the Appropriation Act in respect of any financial year will not or has not come into operation by the beginning of that financial year, the President may, subject to the provisions of this article, authorise the issue of monies from the Consolidated Fund Account for the purposes of meeting expenditure necessary to carry on the services of the Government until the expiration of four months from the beginning of that financial year or the coming into operation of the Appropriation Act, whichever is the earlier.

(5) Any sum issued in any financial year from the Consolidated Fund Account under clause (4) of this article in respect of any service of the Government— (a) shall not exceed the amount shown as required on account in respect of that service in the vote on account approved by Parliament by resolution for that financial year; and (b) shall be set off against the amount provided in respect of that service in the Appropriation Act for that financial year when that law comes into operation.

Article 154 (1) (a) of the Constitution allows money to be withdrawn from the Consolidated Fund if it is charged by the Constitution or by an Act of Parliament. It provides that money may be withdrawn from the Consolidated Fund to meet expenditure charged on the fund by this Constitution or by an Act of Parliament. As we noted above, article 128 (5) of the Constitution provides that the administrative expenses of the judiciary, including all salaries, allowances, gratuities and pensions payable to or in respect of persons serving in the judiciary, shall be charged on the Consolidated Fund. The Constitution does not specify the quantum of what

is to be charged on the Consolidated Fund. We shall further develop this point later on. For now it is sufficient to state that such quantum of what is charged on the Consolidated Fund has to be determined through another process.

It is therefore the Constitution which provides that the money for payment of the administrative expenses of the judiciary is charged on the Consolidated Fund. Under article 154 (1) of the Constitution no money shall be withdrawn from the Consolidated Fund except to meet expenditure charged on the fund by the Constitution or by an Act of Parliament. Clearly, withdrawal of monies by way of authorisation under an Appropriation Act, a Supplementary Appropriation Act does not apply to withdrawal of monies charged on the Consolidated Fund by the Constitution or an Act of Parliament. It follows that the judiciary administrative expenses cannot go through the process of appropriation stipulated under article 156 of the Constitution but under a different process.

For emphasis, it is not only the administrative expenses of the judiciary which is charged by the Constitution on the Consolidated Fund. Even the emoluments of Parliament do not go through the procedure of appropriation of funds by an Appropriation Act under article 154 (1) read together with articles 155 and 156 of the Constitution. However, the estimates are presented to Parliament by the President. The procedure under those articles requires the President to lay before Parliament financial year estimates of revenues and expenditure by government for the next financial year. These estimates are presented to the President by all departments and organisations and are laid by the President before Parliament without revision (See art 155 (3) of the Constitution). Secondly, the heads of expenditure contained in the estimates other than expenditure charged on the Consolidated Fund by the Constitution or any Act of Parliament shall be included in a Bill to be known as an Appropriation Bill to

be introduced into Parliament to provide for the issue from the Consolidated Fund of the funds necessary to meet expenditure and appropriation of the sum for purposes specified in the Appropriation Bill. In other words money charged on the Consolidated Fund by the Constitution or an Act of Parliament does not feature in an Appropriation Bill. Article 156 (1) of the Constitution provides as follows:

> 156. Appropriation Bill.
>
> (1) The heads of expenditure contained in the estimates, *other than expenditure charged on the Consolidated Fund by this Constitution or any Act of Parliament*, shall be included in a bill to be known as an Appropriation Bill which shall be introduced into Parliament to provide for the issue from the Consolidated Fund of the sums necessary to meet that expenditure and the appropriation of those sums for the purposes specified in the bill. (*Emphasis added*)

The issue of funds from the Consolidated Fund to meet administrative expenses of the judiciary as authorised by the Constitution does not require seeking the mandate of Parliament through an Appropriation Act. It is charged on the Consolidated Fund by article 128 (5) of the Constitution of the Republic of Uganda. The remaining issue lies in how the quantum and the items of expenditure to be charged on the Consolidated Fund are to be determined and effected.

Similarly, the issue of funds from the Consolidated Fund to meet the expense of the emoluments of Parliament is charged by an Act of Parliament in terms of article 154 (1) of the Constitution and is not authorised through an Appropriation Act. For emphasis article 85 of the Constitution of the Republic of Uganda provides that:

> 85. Emoluments of members of Parliament.

(1) A member of Parliament shall be paid such emoluments, and such gratuity and pension, and shall be provided with such facilities, as may be determined by Parliament.

The Parliamentary Commission which is established by the Administration of Parliament Act, Cap 257 and section 2 (1) thereof to deal *inter alia* with the administration of Parliament for the function *inter alia* of payment of their emoluments. Particularly, 6 of the Administration of Parliament Act give the functions of the Commission as follows:

6. Functions of the commission.

The functions of the commission shall include –

(a) to appoint, promote and exercise disciplinary control over persons holding public office in Parliament;
(b) to review the terms and conditions of service, standing orders, training and qualifications of persons holding office in Parliament;
(c) to provide security staff to maintain proper security for members of Parliament and facilities within the precincts of Parliament;
(d) to provide a parliamentary reporting service;
(e) to provide such other staff and facilities as are required to ensure the efficient functioning of Parliament;
(f) cause to be prepared in each financial year estimates of revenues and expenditure for Parliament for the next financial year;
(g) to make recommendations to Parliament on or, with the approval of Parliament, determine the allowances payable and privileges available to the Speaker, Deputy Speaker and members of Parliament;
(h) to do such things as may be necessary for the well-being of the members and staff of Parliament.

Section 6 (f) of the Administration of Parliament Act, enables the commission to provide budget estimates for purposes of article 155 of the Constitution of the Republic of Uganda. Further, section 6 (g) (supra) allows the Commission to make recommendations to Parliament on or, with the approval of Parliament, determine the allowances payable and privileges available to the Speaker, Deputy Speaker and members of Parliament. Most importantly, the expenses of Parliament are charged on the Consolidated Fund by section 20 of the Administration of Parliament Act which provides that:

> 20. Expenses of Parliament.
>
> The administrative and operational expenses of Parliament, including all salaries, allowances, gratuities and pensions payable to or in respect of the persons serving Parliament, shall be charged on the Consolidated Fund.

It is therefore clear from the law set out above that the administrative expenses of Parliament and Judiciary are charged on the Consolidated Fund and there is no requirement whatsoever before withdrawal of funds to present the estimates via an Appropriation Bill for approval of Parliament. Another procedure is called for. The difference between the Judiciary and Parliament is that the administrative expenses of the judiciary is charged on the Consolidated Fund by article 128 (5) of the Constitution, while that of Parliament is charged by another Act of Parliament, namely by section 20 of the Administration of Parliament Act.

Save for the requirement to present financial year estimates which are not to be reviewed before laying before Parliament by the President and which shall be presented by the President to Parliament every financial year for purposes of the next financial year, the Executive is not involved in the preparation and review of a budget of Parliament or the Judiciary for

approval by Parliament. The only time and the only way the Executive gets involved is in making comments supporting the laying in Parliament of financial year estimates of revenue and expenditure of Government by the President. Secondly it is the president to lay financial year estimates of revenue and expenditure of Government before Parliament. Under article 257 (l) of the Constitution, the term "Government" means the Government of Uganda. This is inclusive of all organs of Government which include the Judiciary and the Parliament. The said financial year estimates are presented by the President without revision to Parliament every financial year.

The issue of the procedure for increasing the emoluments or expenses of Parliament was considered by the Constitutional Court in **Mwesigye Wilson v Attorney General and the Parliamentary Commission; Constitutional Petition No 31 of 2011**. In that petition the petitioner contended that on numerous occasions Parliament had increased its emoluments by resolution in accordance with section 5 of the Parliamentary (Remuneration of Members) Act, Cap 259 without compliance with article 93 of the Constitution.

I note that section 1 provides that, members of Parliament, shall be paid the salary and gratuity specified in the Schedule to the Act. Section 4 of the Parliamentary (Remuneration of Members) Act allows the Minister by statutory instrument to make regulations in respect of the allowances and amenities of members of Parliament provided he or she does not derogate from the powers of a committee of Parliament to determine allowances payable to members of Parliament presumably as enabled by article 85 (1) of the Constitution. There is a clear distinction between allowances and amenities and salaries and gratuity. Salary and gratuity are specified in the Schedule to the Act while the Minister makes regulations in respect of amenities and allowances under section 4. The Minister is defined as the Minister responsible for Public service and Cabinet affairs. Furthermore,

section 5 thereof provides that Parliament may from time to time by resolution amend the Schedule to the Act. The Schedule to the Act contained the specified salaries and gratuity of members of Parliament.

In **Mwesigye Wilson v Attorney General and the Parliamentary Commission** (supra) it was argued that Parliament had no powers to pass a resolution which had the effect of a charge on the consolidated fund contrary to article 93 of the Constitution. The Constitutional Court held *inter alia* that in as much as Parliament may determine the emoluments of its members in terms of article 85 of the Constitution, the motion or the bill moving Parliament has to be laid before Parliament by the Executive/the President in the terms of article 93 of the Constitution. On appeal by the Parliamentary commission to the Supreme Court in **Parliamentary Commission v Mwesigye Wilson Constitutional Appeal No 08 of 2016** the Supreme Court upheld the decision of the Constitutional Court to the effect that as long as the emoluments are going to result into a charge on the Consolidated Fund, the bill or motion for increasing the emoluments must be brought on behalf of the Government and not the Parliamentary Commission. The Supreme Court emphasised that it is the President who is charged with the responsibility of preparing or causing to be prepared estimates of revenues and expenditure of government to be laid before Parliament in accordance with article 155 (1) of the Constitution. The Supreme Court further noted that article 155 (2) of the Constitution requires the head of any self-accounting department, commission or organisation set up under the Constitution to cause to be submitted to the President at least once before the end of each financial year, estimates of administrative and development expenditure and estimates of revenue of the respective department, commission or organisation for the following year. It followed that the Parliamentary Commission was required to submit the estimates of the emoluments and amenities of Parliament to the

President for laying before the Parliament. What is emphasised in the above decision is article 93 (ii) of the Constitution which provides that:

> 93. Restriction on financial matters.
>
> Parliament shall not, unless the bill or the motion is introduced on behalf of the Government—
>
> (a) proceed upon a bill, including an amendment bill, that makes provision for any of the following—
>
> (i) the imposition of taxation or the alteration of taxation otherwise than by reduction;
>
> (ii) the imposition of a charge on the Consolidated Fund or other public fund of Uganda or the alteration of any such charge otherwise than by reduction; …

Article 93 (a) (ii) permits a reduction to a charge on the Consolidated Fund but not an increase without following the procedure laid out under article 93. When article 93 is read together with article 155 (1) of the Constitution, it is clear that the President submits the estimates to Parliament for approval in the manner stipulated in this judgment. This decision is distinguishable on one material proposition that the Parliament (Remuneration of Members) Act, Cap 259 and section 1 thereof stipulates that the salary and gratuity of members of Parliament are specified in the Schedule to the Act. It should therefore be possible to move a motion for amendment of the Schedule. The Constitutional Court declared that section 5 which allows Parliament from time to time by resolution to amend the schedule to be unconstitutional null and void. However, this still leaves open a motion for amendment of the provision of an Act of Parliament to increase or decrease the schedule provided article 93 of the Constitution is complied with.

Similar to Parliament, the Judiciary has the Judicial Service Commission established under article 146 of the Constitution whose functions are

similar to that of the Parliamentary Commission. The functions of the Judicial Service Commission are set out under article 147 of the Constitution as follows:

> 147. Functions of the Judicial Service Commission.
>
> (1) The functions of the Judicial Service Commission are—
>
> (a) to advise the President in the exercise of the President's power to appoint persons to hold or act in any office specified in clause (3) of this article, which includes power to confirm appointments, to exercise disciplinary control over such persons and to remove them from office;
>
> (b) subject to the provisions of this Constitution, to review and make recommendations on the terms and conditions of service of judges and other judicial officers;
>
> (c) to prepare and implement programmes for the education of, and for the dissemination of information to judicial officers and the public about law and the administration of justice;
>
> (d) to receive and process people's recommendations and complaints concerning the judiciary and the administration of justice and, generally, to act as a link between the people and the judiciary;
>
> (e) to advise the Government on improving the administration of justice; and
>
> (f) any other function prescribed by this Constitution or by Parliament.
>
> (2) In the performance of its functions, the Judicial Service Commission shall be independent and shall not be subject to the direction or control of any person or authority.

(3) The offices referred to in clause (1) (a) of this article are—

(a) the office of the Chief Justice, the Deputy Chief Justice, the Principal Judge, a justice of the Supreme Court, a justice of Appeal and a judge of the High Court; and

(b) the office of the Chief Registrar and a registrar.

As far as appointments of staff are concerned, the Judicial Service Commission is restricted to the appointment of judicial staff and does not appoint or discipline other administration staff. Yet the Judiciary is run by judicial and non-judicial staff. Secondly, article 147 (1) (b) of the Constitution does not give power to the Judicial Service Commission to determine the terms and conditions of service of the Judiciary but to only review and make recommendations on the terms and conditions of service of judges and other judicial officers.

Who then would process or administer the finances and present the funding needs of the Judiciary for approval by Parliament? It should be emphasised that article 128 (6) of the Constitution clearly stipulates that the Judiciary shall be self-accounting and may deal directly with the Ministry responsible for finance in relation to its finances. It is obvious that other than judicial officers, the Judiciary requires other members of staff to handle its administrative work. The Judicial Service Commission does not appoint these other non-judicial members of staff of the Judiciary. Secondly, the process of budgeting and policy-making may, at the discretion of the judiciary, be dealt with directly with the Ministry responsible for finance. The Constitution envisages an independent judiciary in relation to administration and financial management. The institutional framework by way of the functions of the Judicial Service Commission does not take care of the personnel to handle other administrative functions of the judiciary. Secondly, article 150 of the

Constitution allows Parliament to make laws providing for the structures, procedures and functions of the judiciary. Such a law has not yet been enacted.

The petitioner's surviving cause of action in the present petition is that the present mode of funding the Government is by appropriation of funds under the Appropriation Acts. As a question of fact, the petitioner supports his averments in only paragraphs only 23, 24, 25 and 26 of the affidavit in support of the petition.

I have carefully considered the petition and most of the submissions relate to the alleged subjugation of the judiciary through the financing of the judiciary in paragraph 1 (e) and (f) of the Petition. In paragraph 2 (iv) – (vi) the petitioner alleges that the mode of payment of funding of the judiciary is unconstitutional. Article 150 of the Constitution is couched in permissive language and provides that Parliament may make laws providing for the structures, procedures and functions of the judiciary. It is therefore not imperative for Parliament to enact such a law. This does not detract from the fact that the Constitution has to be complied with. It follows that the judiciary should be permitted and is it entitled to present its budget to the President for laying before Parliament without amendment an only with comments of the President to accompany it. It is the Judicial Service Commission to make recommendations with regard to the administrative expenses of the Judiciary in terms of salaries, allowances, gratuities and pensions payable in respect of persons serving in the Judiciary and which expenses are charged on the Consolidated Fund. Unlike Parliament, such expenses have not been enacted in an Act of Parliament. This does not stop the judiciary from dealing with the Ministry of finance in respect of its finances without interference.

In the premises, I would allow the petition only on the limited grounds set out in my judgement limiting it only to the mode of payment and funding

of the judiciary. It follows that the some declarations prayed for by the petitioner would reinforce the constitutional provisions I have considered above and I would issue them in the following terms:

i. A declaration issues that the remuneration, salaries, allowances and recurrent expenditures of the judiciary are charged by the Constitution on the Consolidated Fund and do not form part of the estimates to be included in the annual Appropriation Bills.

ii. A declaration issues that the Judiciary is only obliged to send its financial estimates of revenue and expenditure to the President for laying before Parliament without any review or amendment by the President thought it may be accompanied by comments of the President as part of the proposed estimates of Government annually for each succeeding financial year.

iii. A declaration issues that the practice of funding the judiciary through an Appropriation Act is inconsistent with articles 128 (5), (6) and 154 (1) (a) of the Constitution.

iv. A declaration issues that the Judiciary may, if it chooses, present its annual budget for administrative expenses in terms of article 128 (5) and (6) of the Constitution in collaboration with the Ministry responsible for Finance to Parliament for approval in the same manner the Parliamentary Commission does without going through an Appropriation Bill and the procedure therefor.

In the final result, the petition partially succeeded and the costs of the petition are awarded to the petitioner and shall be paid by the First Respondent.

Dated at Kampala the __ day of November, 2019

Christopher Madrama Izama

Justice of Appeal