

5

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

10

(CORAM: KATUREEBE, TUMWESIGYE, KISAAKYE JJ.S.C AND ODOKI, TSEKOOKO, OKELLO KITUMBA, AG. JJ.S.C.)

CONSTITUTIONAL APPEAL NO.04 OF 2011

15

BETWEEN

NATIONAL COUNCIL FOR HIGHER EDUCATION:.....APPELLANT

20

AND

ANIFA KAWOOYA BANGIRANA:.....RESPONDENT

25

[Appeal from the judgment of the Constitutional Court at Kampala before (Mpagi Bahigaine DCJ, Twinomujuni, Kavuma, Nshimye, Arach-Amoko JJA) dated 2nd February 2011, in Constitutional Petition No.42 of 2010]

30

JUDGMENT OF C.N.B. KITUMBA AG.JSC

This is an appeal by National Council for Higher Education (NCHE) hereinafter referred as the “appellant” against the decision of the Constitutional Court. The Constitutional Court allowed a petition by Hon. Anifa Kawooya Bangirana, hereinafter referred to as the “respondent”. The petition was against a decision by the appellant of recalling her Certificate of Equivalence which she alleged was unconstitutional.

40

The background to this appeal.

The respondent is a Woman Member of Parliament for Sembabule District.

5 On 18th October 2005, she appeared before the appellant and
requested that her academic qualifications be verified and equated for
the purposes of the 2006 National Elections. She did not have the
Uganda Advanced Certificate of Education (***“A level certificate”***)
which is the minimum requirement under the Constitution of Uganda
10 to qualify for election as a Member of Parliament. She made a written
application to the appellant to have her documents verified.

The respondent presented to the appellant a Bachelor of Arts Degree
in Development Studies from Nkumba University issued to her on
15 23rd April 2005 and a degree in Public Administration from Knights
Bridge University UK. The respondent’s admission to Nkumba
University was based on the Knights Bridge University degree in
Public Administration.

20 When the appellant did not respond to the verification of these
qualifications the respondent appealed to the Minister of Education
who has powers under the Universities and Other Tertiary
Institutions Act to intervene. In that appeal she added other
qualifications. The Minister intervened and requested the appellant to
25 expedite her application.

The appellant issued a letter of verification of her Nkumba University
Degree in Development Studies. In that letter the appellant notified
the respondent that her other qualifications were pending further
30 investigation. After the appellant had issued her the letter, the law
was amended. The Parliamentary Elections Act of 2005 introduced
the requirement of a certificate of equivalence and not letters from the

5 appellant. The respondent returned to the appellant. On 8th
December 2005 the appellant issued to the respondent a certificate of
equivalence. The certificate was to the effect that her Bachelor's
Degree in Development Studies from Nkumba University had satisfied
the appellant that she had completed a formal equivalent.

10

On 2nd November 2005 the appellant sent an email to the British
Accreditation Council inquiring about the accreditation status of
Knights Bridge University UK. The appellant conducted investigations
with a regulatory body called NARIK-UK, the world wide professional
15 body on International qualifications and the British Accreditation
Council.

The British Accreditation Council that accredits institutions in the
United Kingdom found the institution non-existent and advised them
20 to check with Denmark since they had found a website in Denmark
referring to the respondent's qualification. The appellant then made
inquiries with the Ministry of Education in Denmark which also
found that Knights Bridge University did not exist.

25 The respondent submitted her documents for nomination in respect
of 2006 Parliamentary Elections as she had obtained a clearance from
the appellant. She was nominated and elected Woman Member of
Parliament for Sembabule District during the elections held in
February 2006.

30

Mrs. Joy Kabatsi who was the respondent's opponent in the elections
was not satisfied with the results. She, therefore, petitioned the High

5 Court for declarations that among other irregularities committed by the respondent she was not qualified to be elected as a Member of Parliament.

The High Court and the Supreme Court held that the respondent was
10 qualified for election as a Member of Parliament. The Supreme Court, however, nullified her election on other grounds. A bye election was held and the respondent was victorious.

On 2nd September 2010, the respondent received a letter from the
15 appellant (NCHE) recalling the Certificate of Equivalence which had been issued to her on 8th December 2005. The recall was apparently based on the complaint by one Major Kakooza Mutale purportedly on behalf of the office of the President. In that letter, it was alleged that the author had irrefutable evidence that the respondent's academic
20 qualifications were forgeries. He urged the appellant to recall and cancel the Certificate of Equivalence.

The letter was received by the respondent just before the date for the nomination for the 2011 Parliamentary Elections. The respondent
25 had not been heard by either the Office of the President or the appellant in defence of her academic qualifications before the letter, recalling her certificate of equivalence was written. According to the respondent, such an act was an attempt to prevent her from being nominated as a Woman Member of Parliament.

30 The respondent believed that her constitutional rights were being infringed upon by the appellant. She filed in the High Court Misc

5 *Civil Application No.26 of 2010* for judicial review and sought for the prerogative orders of certiorari and prohibition but withdrew it.

Then she filed Constitutional Petition No.42 of 2010 in the Constitutional Court alleging, inter alia, that her constitutional
10 rights especially the right to a fair hearing under articles 28 (1) 38, 42 and 43 of the Constitution had been violated by the appellant.

The following issues were framed for determination by the Constitutional Court.

15 ***(1)Whether the petition raises issues for constitutional interpretation.***

(2)Whether the act by the National Council for Higher Education recalling the Certificate of Equivalence issued to the petitioner on 8th December, 2005 is inconsistent with or is in contravention of articles 28 (1) 38, 42 and 44 of the Constitution.

20

(3)Whether the matter of the petitioner's academic qualifications upon which the Certificate of Equivalence was recalled is res judicata.

25

The Constitutional Court decided all the above issues in favour of the respondent and granted her the following declarations and orders:

30

(a)A declaration that the recalling and cancellation of the petitioner's Certificate of equivalence issued by the

5 ***National Council for Higher Education on December 08, 2005 was inconsistent with and or in contravention of Article 28(1), 42 and 44 of the Constitution which guarantee her a right to a fair hearing and a right to just and fair treatment in administrative decisions is thus null and void.***

10 ***(b) A permanent injunction against the National Council for Higher Education restraining it from recalling and/or cancelling the Certificate of equivalence issued to the petitioner on December 08, 2005 or any other such order or act.***

15 ***(c) A declaration that all matters concerning the academic qualifications of the petitioner in so far as they relate to elections and her academic competence to stand for elective office are res judicata .***

20 ***(d) Cost of the suit.”***

25 Dissatisfied with the decision and orders of the Constitutional Court the appellant filed an appeal to this court on six grounds which I shall later state in this judgment.

Representation:

30 During the hearing of the appeal in this Court the appellant was represented by Mr. Edmund Wakida and Ms Faridah Bukirwa. Messr. Kandebe Ntambirweki and Adoch Luwumu appeared for the respondent.

5 Mr. Edmund Wakida argued grounds 1 and 2 together, grounds 3 and 4 separately and ground 5 and 6 jointly in that order.

Mr. Kandebe Ntambirweki argued grounds 4 and 5 jointly, followed by ground 3 separately then grounds 1 and 2 jointly and finally
10 ground 6 separately.

In this judgment I will deal with the grounds of appeal according to the order counsel for the appellant has argued them.

15 **Grounds 1 and 2**

1. The learned Justices of the Constitutional Court erred in law and in fact in holding that the Petition raised matters for Constitutional interpretation.

20 ***2. The learned Justices of the Constitutional Court erred in law and in fact in holding that the Petition disclosed a cause of action and that the said court had jurisdiction.***

Submitting on both grounds Mr. Wakida narrated to Court in detail
25 the background of appeal and contended that the respondent had no cause of action. Counsel submitted that issues relating to academic qualifications and examinations or grading are not constitutional issues that require interpretation. He submitted further that the question of equating academic qualifications is within the jurisdiction
30 of the appellant and Parliament enacted specific laws to cater for that. In case one is dissatisfied with the decision of the appellant he or she under section 4 (11) of the Parliamentary Election Act or section 129

5 of the Universities and Other Tertiary Institutions Act (Act No 7 of
2001) may appeal to the High Court against the decision which may
confirm, modify or reverse the decision. Counsel argued that the
respondent was aware of the right procedure to be followed and that
is why she filed Miscellaneous Application No.26 of 2010. (**SC. Hon.**
10 **Anifa Bangirana Kawooya Vs National Council for Higher
Education and Attorney General**) in the High Court for judicial
review but later withdrew it.

Counsel argued that the respondent's filing of the application for
judicial review in the High Court was an admission/recognition that
15 there was no cause of action for a constitutional petition. He
conceded, however, that the institution of judicial review proceedings
is not a bar to filing a constitutional petition.

In conclusion counsel for the appellant contended that there was no
20 issue for constitutional interpretation and there was, therefore, no
cause of action.

In reply, Mr. Kandebe, for the respondent supported the judgment of
the Constitutional Court that there were issues for constitutional
25 interpretation and that the petition disclosed a cause of action. He
submitted that the petition states the act of the appellant complained
of which is alleged to be in breach and in contravention of the
constitution. The petition sought for a remedy of declaration which
the court granted.

30

5 Learned Counsel submitted that according to the test that has been laid down by this court the petition may disclose a cause of action though it might not succeed.

He argued that in the petition the respondent alleged that the act of the appellant was in breach of Articles 28, 38, 42 and 44 of the
10 Constitution. The respondent sought the Constitutional Court to interpret the provisions of the Constitution with regard to fair hearing.

In support of his submission counsel relied on the authority of **Ismail**
15 ***Serugo Vs Kampala City Council and another (Constitutional Appeal No 2 of 1998)***. He contended that the respondent was not empowered to challenge the act of the appellant only by judicial review. Counsel reasoned that judicial review is exercised at the discretion of the High Court and that, therefore, the option of
20 petitioning the Constitutional Court as of right must be open to the respondent.

Mr. Kandebe further argued that it is a requirement of law that litigation must come to an end. Counsel contended that the
25 constitutional petition was aimed at seeking declaratory remedies which would put an end to litigation in this particular case. He submitted that the evidence by Major Kakooza Mutale and the appellant had already been considered by the other courts and it would not be prudent to go through the same evidence. There are
30 remedies which the Constitutional Court is empowered to grant and cannot be granted by the High Court in judicial review. He submitted further that the petition had been properly filed.

Consideration of Counsels Arguments.

The point of determination regarding grounds 1 and 2 is whether the Constitutional Court was right to hold that the respondent had a cause of action and there were issues for constitutional interpretation and whether the Constitutional Court had jurisdiction to hear and determine the petition.

These two grounds were issue No 1 for determination by the Constitutional Court.

Counsel for the appellant has vehemently argued that the Constitutional Court was wrong to hold that there were issues for constitutional interpretation and that it had jurisdiction to hear and determine the petition. He submitted that this was a matter for judicial review, to be handled by the High Court.

20

Counsel for the respondent opposed the position and supported the decision of the Constitutional Court on the ground that the respondent's constitutional right to fair hearing was contravened contrary to Article 28, 42 and 44 of the Constitution.

I appreciate the argument by counsel for the appellant that section 4(11) of Parliamentary Election Act, 2005 gives a right of appeal to an aggrieved party regarding a grant or refusal of a certificate.

The Section provides:

30

“4(11) A person aggrieved by the grant or refusal to grant a certificate by National Council of Higher Education under this section is entitled to appeal to the High Court against

5 ***the decision and the High Court may confirm, modify or reverse the decision”.***

I also note that the burden was on the respondent to prove the authenticity of her qualifications. Section 4(7) of the Parliamentary
10 Election Act provides.

***“(7) A person who claims to possess a qualification referred to in subsection (5) (c) of this section shall before the issue of the certificate prove to the satisfaction of the
15 National Council for Higher Education that admission to that qualification was obtained on the basis of Advanced Level standard or its equivalent”.***

Also section 129 of the Universities and Other Tertiary Institution Act
20 provides for an appeal to the High Court by one who is aggrieved by decision of the appellant.

According to Article 2 of the Constitution, the Constitution is the supreme law of Uganda and all other laws are subordinate to it. The
25 right to file a constitutional petition for an aggrieved person cannot be subjected to the provisions of other laws as counsel for the appellant seemed to suggest. The petition by the respondent in the instant appeal was that the appellant had withdrawn her certificate of equivalence without giving her a fair hearing and just before
30 nomination for 2011 Parliamentary Elections which was in contravention and contrary to Articles 28, (1) 42, 43 and 38 (1) of the Constitution.

5

In essence the complaint was about the procedure taken by the appellant in withdrawing her certificate and the timing of withdrawal. She quoted the provisions of the Constitution which in the process she alleged had been contravened by the appellant and sought for remedies.

According to article 137 of the Constitution a person who is aggrieved by an act or omission done under the authority of any law may petition the Constitutional Court for constitutional interpretation and for redress. Article 137 (3) states:

“A person who alleges that—

(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or

(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate”.

25

Accordingly, for a petition to lie under Article 137 of the Constitution, it should be a matter for Constitutional interpretation. In the circumstances, the respondent’s claim stems from the appellant recalling her certificate of equivalence without giving her a right to be heard.

30

5 Undoubtedly, the decision was made by the appellant in exercise of its powers. The appellant is a public body that was established under **The Universities and Other Tertiary Institutions Act of 2001**, an Act of Parliament; wherein **Section 4** states;

10 ***“4(1) There is hereby established a Council to be known as the National Council for Higher Education.”***

The Constitutional Court in its judgment considered the issue whether the respondent had a cause of action and whether there were
15 issues for constitutional interpretation thus:

***“This issue is about whether this petition raises matters for constitutional interpretation. Put differently, the respondents are contending that the petition discloses no
20 cause of action under article 137 of the Constitution. This matter has been the subject of consideration in the Supreme Court of Uganda in Major General Tinyefuza vs Attorney General Constitutional Appeal No. 1 of 1997 (SC) (unreported), Serugo vs Kampala City Council, Constitutional Appeal No.2 /98 (S.C) and Baku Raphael Obudra & Anor vs Attorney General, Const. Appeal No. 1 of 2003”.***

*In the latter case, the Supreme Court per Kanyeihamba JSC (as
30 he then was) had these comments to make on the issue:-*

5 *“In the case of Major General Tinyefuza vs Attorney General, Const. Appeal No.1 of 1997 (S.C), (unreported), this Court considered what is a cause of action in cases involving the interpretation of constitutional instruments. It was said that:*

10 ***“A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment in court.....”*** (Per Oder, J.S.C).

15 *In the case of Serugo v Kampala City Council, Const Appeal No. 2/98 (S.C), certified edition 1999-2000, it was observed that generally,*

“a cause of action in a plaint is said to be disclosed if three essential elements are pleaded namely;

- 20 ***i) of existence of the plaintiff’s right***
- ii) violation of that right and***
- iii) of the defendant’s liability for that violation.”***

As for constitutional petitions, Mulenga, J.S.C put it this way;

25 ***“A petition brought under this provision (137) (3) in my opinion, sufficiently discloses a cause of action, if it describes the act or omission complained of and shows the provision of the Constitution with which the act or omission is alleged to have been contravened by the act or omission, and pray for a***

30 ***declaration to that effect”***

5 ***In this petition, the petitioner alleges that she was
granted, in 2005, a Certificate of Equivalence as
required by Article 80(1) (c) of the Constitution in order
to qualify to be elected as a member of Parliament of
the Republic of Uganda. The petition alleges that the
10 act of the 2nd respondent recalling her certificate of
equivalence without giving her a hearing to defend her
qualification contravenes her right guaranteed by
article 28 (1) of the Constitution. She has described
the act of the respondent complained of, and shows
15 the provisions of the Constitution allegedly
contravened by the act and prays for a declaration to
that effect. In our view, this petition complies on all
fours with the requirements of a cause of action as
described in the authorities which have been cited
20 above”.***

I have no reason to fault the reasoning and the holding of the
Constitutional Court. The respondent had a cause of action and
the petition raised issues for constitutional interpretation
Grounds 1 and 2 should fail.

25 ***Ground 3***

***The learned Justices of the Constitutional Court erred in law
and in fact in holding that the appellant had no right to
investigate or recall the academic qualifications of the
respondent.***

30

The complaint in ground 3 is that the learned Justices of the
Constitutional Court erred in law and in fact in holding that the

5 appellant's recalling of the certificate of equivalence was inconsistent with articles 28 (1) 38, 42 and 44 of the Constitution. This was issue No.2 in the Constitutional Court.

Submitting on ground 3, counsel for the appellant stated that the
10 ground relates to natural justice. He conceded that the right to fair hearing is a fundamental human right which is protected by the Constitution. He argued that, in the instant appeal the right to fair hearing was not violated.

15 Counsel contended that much as the right to a fair hearing is a fundamental human right under the Constitution it was not violated in the circumstances of the case. He cited the authorities of ***Mpungu & Sons Transporters Ltd Vs Attorney General (SCCA No.17 of 2001)*** and ***Rev. Bakaluba Peter Mukasa Vs. Betty Namboze Bakileke (SCCA No.4 of 2009)*** which laid down the guidelines that
20 should be followed in determining whether natural justice or the right to fair hearing has been violated. He submitted that those authorities, state that each case should be determined on the circumstances peculiar to it and Court must determine whether there was a right to
25 be heard, if the complainant was given sufficient notice of the case against him/her, and whether one had sufficient time or opportunity to present one's case.

Counsel submitted that the respondent put her application in writing
30 and attached her academic qualifications. She appeared before the Minister and presented her case with additional qualifications. In counsel's view that was sufficient. He reasoned that according to

5 section 4 (7) of the Parliamentary Elections Act the burden is on the
candidate to prove to the satisfaction of the appellant that he or she
has the necessary qualifications before the certificate of equivalence is
issued to him or her. He argued that, therefore, the hearing which is
envisaged by the law is before the certificate of equivalence is issued
10 but not afterwards.

He submitted further that the only other body or person as provided
by section 4(6) of the Parliamentary Election Act to be consulted and
be given a hearing on a matter of academic qualification is made is
15 Uganda National Examination Board (UNEB). In case one is not
satisfied with the decision of the appellant he/she may appeal to the
High Court in accordance with section 4(11) of the Act.

Counsel criticized the decision of the Constitutional Court that the
20 respondent had a right to be heard before the recalling of her
certificate. He vehemently argued that she did not have that right at
all. Mr. Wakida submitted that the recalling of the certificate of
equivalence was an interim measure and the respondent was going to
be heard as was clarified in the affidavits of the Executive Director of
25 the appellant.

Counsel submitted that the procedure adopted by the appellant in the
respondent's case was not new and had been used in the case of
Lubyayi Kisiki (Supra) by recalling the certificate first and then
30 investigating afterwards. He clarified to court that the qualifications
that were being investigated were of Knights Bridge University.

5 In reply counsel for the respondent supported the finding of the Constitutional Court that the appellant's recall of the certificate of equivalence was inconsistent with articles 28 (1) 38, 42 and 44 of the Constitution. He implored this court to re-evaluate the evidence on record.

10

He submitted that the Constitutional Court rightly decided that the recall was calculated at a time of high political activity and was intended to prevent the respondent from being nominated as a Member of Parliament.

15

Counsel emphasized that since the appellant had alleged forgery on the part of the respondent, it ought to have adduced evidence to support the allegations. In case the appellant had called the respondent, she would have defended herself by showing them, the judgment of the High Court and the reasoning of Mukibi J which showed that the certificate of Kampala Business School was not forged, that it had been signed by the Chairman of the Committee but not Hon. Mwendha and also presented her witnesses which was not done.

25

Counsel contended that before issuing the Certificate of Equivalence, the appellant had consulted UNEB, therefore, it ought to have done the same at the time of the cancellation. That the appellant was widely consulted before and during the proceedings before Mukiibi J. The judge even set out the documents and affidavits which had been sent to the appellant.

5 Counsel for the respondent maintained throughout his arguments that before the appellant withdraws a certificate of equivalence it must at all times give a hearing to the holder of that certificate. This had to be done regardless of whether the certificate was issued in error by the appellant.

10

In reply counsel for the appellant stated that the respondent will be heard on this matter, and will have the opportunity to defend her papers and a decision will be taken after the investigations.

15 **Consideration of the Arguments**

Counsel for both parties agree, that the right to fair hearing is fundamental. They only differ on one point whether the respondent had the right to be heard or not before recalling her certificate of equivalence.

20

Counsel for the appellant's contention is that the respondent had a right of hearing before the issuing of the certificate of equivalence and not afterwards. On the other hand counsel for the respondent has argued strongly that in this case the respondent had a right to be
25 heard and that such a right should all the time be availed to one before a certificate of equivalence is withdrawn.

The respondent in her petition alleged that the appellant's act was contrary and in contravention of the following articles of the
30 Constitution which states:

5 **“ 28(1) 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.”**

Article 38 (1) states:

10 **“Every Uganda citizen has the right to participate in the affairs of government, individually or through his/her representatives in accordance with law.”**

Article 42 of the Constitution provides that;

15 **“Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.”**

Article 44 of the Constitution further makes the right to be heard non-derogable. It reads;

20 **“Prohibition of derogation from particular human rights and freedoms.**

Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms—

25 **(a).....**

(b).....

(c) the right to fair hearing

(d).....”

5

The right to a fair hearing is not defined by the Constitution; it can be oral or written depending on the regulations of the administrative body or tribunal.

10 On the right to fair hearing, in **Rev. Bakaluba Peter Mukasa Vs Betty Nambooze Bakileke** (Supra), Katureebe JSC in his lead judgment after quoting the provision of Article 28 (1) of the Constitution and saying that Article 44 makes the right non-degorable stated as follows:

15

“The Constitution only gives the salient features of what constitutes fair trial, i.e. that it must be before “an independent and impartial court or tribunal established by law “it does not define fair trial but because of its importance, allegations of denial of the right of fair hearing or trial are very serious indeed and should not be made lightly or merely in passing. They impact on the core of our trial system.”

20

25 Fair and impartial trial is defied under Black’s Law Dictionary as;

“ A hearing by an impartial and disinterested tribunal; a proceedings which hears before it condemns, which proceeds upon inquiry, and tenders judgment only after trial consideration of evidence and facts as a whole.”

30

In **Mpunga and Sons Transporters Ltd Vs Attorney General & Anor** (supra) the same learned Justice considered the Audi Alteram

5 rule which is the same as the right to fair hearing and quoted with approval the authority of ***Russell Vs Norfolk (1949) 1 ALLER 109*** wherein it was stated thus:

10 ***“The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, and the subject matter that is being dealt with.”***

15 I respectfully agree with the above statement of law in both authorities.

Counsel for the appellant’s submission is that the respondent having made two written applications for the grant of a certificate of equivalence and having made an appeal to the Minister of Education this amounted to a second hearing. According to my understanding, 20 the written applications were in respect of the acquisition of the Certificate of Equivalence but not its recall or cancellation. The argument by the appellant’s counsel that the respondent could not be heard further since she had been heard in writing is not, therefore, 25 acceptable.

The arguments by appellant’s counsel that, a full hearing would be given to the respondent before revocation proceedings and that the Certificate had been recalled pending investigations cannot be 30 believed. A consideration of the record of appeal does not indicate that. There is a letter addressed to the Vice Chancellor of Nkumba University from the Appellant dated 3rd September 2010, the heading

5 and the 2nd paragraph therein indicate that a decision that the academic documents of the respondent are not authentic had already been made. It bears the signature of Prof. Michel Lejune, who was the Deputy Executive Director of the appellant at the time. It reads;

10 **“RE: WITHDRAWAL OF DEGREES AND OTHER MATTERS**
Pursuant to a meeting held at our offices on 3rd September 2010. We request that you withdraw the degrees of the following people:

1. Hon. Anifa Kawooya

15 **2.....**

We have verified the academic qualifications on which their admission to Nkumba University was based and concluded that these qualifications are not authentic.”

In addition, Prof. Abdu B.K. Kasozi who was the Executive Director of the appellant then had also sworn an affidavit in High Court Miscellaneous Cause No.26 of 2010. Clearly, paragraphs 19 and 21 of the affidavit show that a conclusion that the respondent’s papers are false had been reached before giving her a hearing.

The paragraphs state:

25 **19. “That I verily believe by virtue of the above that the Certificate of verification obtained by Hon. Anifa Bangirana Kawooya from NCHE on December 8th 2005, was obtained by false misrepresentations and false. (sic)**

30 **21. That I believe the National Council for Higher Education exercised due diligence and established beyond**

5 ***reasonable doubt that the Applicants impugned papers are false.***”

Counsel for the appellant argued that the procedure adopted in recalling the respondent’s certificate was also used in the case of ***Iddi***
10 ***Kisiki Lubyayi vs Sewankambo Musa Kamulegeya (SCCA No.8 of 2006)***. In ***Iddi Kisiki’s*** case, Counsel for both parties raised preliminary objections on which both parties were heard and the objections substantially disposed of the appeal. That notwithstanding the fact that it was used does not make it right in all cases. Each case
15 must be decided according to its circumstances.

In its judgment the Constitutional Court considered the nature and effect of the act of the appellant. The learned Justices of the Constitutional Court noted that the appellant wrote a letter of recall
20 only two weeks after receipt of the letter by Major Kakooza Mutale. The certificate of equivalence had been given to the respondent on 8th December 2005 after investigations and it enabled her to stand for election as a Woman Member of Parliament for Sembabule District. Five years had elapsed since then and no complaints had been made
25 about the authenticity of the respondent’s qualifications.

From the available evidence on record there was no new evidence which the appellant had received that had established beyond reasonable doubt that the respondent’s certificate were forged. Major
30 Kakooza Mutale who had neither powers nor authority from the President or the President’s Office to investigate, wrote the letter without giving the respondent the opportunity of being heard. In

5 addition, the appellant had already taken the decision to withdraw
the respondent's certificate of equivalence without giving her the
opportunity to be heard. This letter was written just a few weeks
before nominations for the Parliamentary Election of 2011. This
would deprive her of her constitutional right to stand for a political
10 position.

I agree with the decision of the Constitutional Court that the recalling
of the respondent's certificate of equivalence was made in bad faith.
It was an attempt to prevent her from standing as a Member of
15 Parliament on allegations of forgery of her certificate. In my view, the
circumstances of this case show that a hearing of the respondent was
required before the recalling of her Certificate of Equivalence. The
argument by counsel for the appellant that according to section 4(7)
of the Parliamentary Elections Act, the respondent only had a right to
20 be heard before the certificate of equivalence is issued and not when
it is recalled, is not acceptable. In view of the Constitutional
provisions that entrenched the respondent's right to a fair hearing, it
is a contradiction to the fundamental right to fair hearing and right to
be treated justly and fairly which rights are non derogable.

25

Ground 3 would fail.

Ground 4

***The learned Justices of the Constitutional Court erred in law
and fact in holding that the matter before the said court was
30 barred by resjudicata.***

5 Counsel for the appellant submitted that this matter was not res
judicata because the appellant was not a party to the proceedings in
Joy Kabatsi Vs Anifa Kawooya (SCCA No.25 of 2007). He stated
that the holding by the Constitutional Court that it was bound by the
decision of Kanyeihamba JSC was erroneous since the lead judgment
10 was written by Justice Tsekooko and Kanyeihamba JSC wrote the
minority judgment.

Counsel cited the case of **Mansukhulal & Anor Vs Attorney
General & Anor** (SCCA No.20 of 2002) which lays down the
principles of res judicata.

15

Counsel for the respondent did not agree. He submitted that the case
was res-judicata. He urged Court to interpret **Mansukhalals'** case
(Supra) in conjunction with the Parliamentary Elections Rules (S.I 41-
2) which apply in election petitions. He prayed to Court to find that
20 election petition judgments are not judgments in persona because
according to the Parliamentary Election Rules; such cases are filed by
petition and must be served on the Attorney General. Besides, the
petition does not abate on the death of the respondent. He also cited
Rule 16 of the Parliamentary Election Rules which empowers the
25 Attorney General to take part in the petition. According to Rule 22,
consent of the Court must be sought if one is to withdraw an election
petition.

Counsel contended that the matter was res judicata since the High
30 Court and the Supreme Court had held that the respondent was
qualified to stand as a Member of Parliament.

5 Counsel cited the ***Black’s Law Dictionary 9th Edition and Section 7 of the Civil Procedure Act*** which defined res judicata as a thing adjudicated. He submitted that a matter is resjudicata if there is an earlier decision or issue, with a final judgment on the merits and it involved the same parties or parties in privy with the original parties.
10 He thus contended that there was an earlier decision by Mukiibi J, where a judgment was finalized and unanimously confirmed by the Supreme Court.

In reply, counsel submitted that counsel for the respondent is using
15 res judicata to find a cause of action yet it should be used as a defence.

He invited Court to observe that no argument as to the authenticity of the academic documents had been raised, especially the Knights
20 Bridge University Degree. Counsel urged Court to consider Mukiibi’s J judgment at Page 41 where he stated that;

“It is in my view that the petitioner has not adduced any evidence to prove that the Knights Bridge University degree was forged. In the circumstances I find nothing new raised by the petitioner which would affect the assessment by Nkumba University of the said degree.”
25

Counsel reasoned that the High Court left that position open. Mukiibi
30 J could not cancel the degree because no evidence regarding its authenticity had been adduced.

5 Counsel invited Court to consider the inconsistencies in the address
of the Knights Bridge University address in the United Kingdom. He
informed Court that National Council inquired from the British
Accreditation Council in the United Kingdom as had been indicated
by the respondent in her documents and NARIC the worldwide
10 professional body on International qualifications which informed the
Council that the institution is not recognized in UK or Denmark. The
British Accreditation Council in its reply informed the National
Council that it is not recognized in Britain but it browsed the internet
and found it somewhere in Denmark.

15 The appellant then wrote to the Ministry of Education in Denmark
which in reply stated that it did not know Knights Bridge University;
and that in Denmark they have only twelve Universities and do not
allow private University education.

20 Counsel implored Court not to ignore the evidence that has come to
its attention that there was clear forgery. He cited *section 5 of the
Parliamentary Elections Act* which makes it an offense to utter any
forged documents for elections purposes. He cited the case of ***Farm
International Ltd vs Mohammed Hamid El-Faith*** (SCCA No.16 of
25 1993) which found fraud a very serious matter, which must be struck
out whenever it appears.

Consideration of the arguments

I have carefully perused the record and the lengthy arguments of
30 counsel for both parties regarding the issue of res-judicata in the
instant appeal.

5 Statutory and case law defines the doctrine of res judicata. Section 7
of the Civil Procedure Act (Cap 71) provides as follows:

10 ***“ No Court shall try any suit or issue in which the matter
directly and substantially in issue has been directly and
substantially in issue in a former suit between the same
parties, or between the parties under whom they or any of
them claim, litigating under the same title, in a Court
competent to try the subsequent suit or the suit in which
the issue has been subsequently raised, and has been
15 heard and finally decided by that Court.”***

In the case of **Manshukhlal & Anor Vs Attorney General & Anor
(SCCA No. 20 of 2002)** the two courts below had held that the case
was res judicata because the ownership of the suit property had
20 already been decided in the previous suit and on appeal. However,
two of the plaintiffs/appellants were not parties to this suit.

Tsekooko JSC when interpreting section 7 of the Civil Procedure Act
stated thus:

25 *“The provision indicates that the following broad minimum conditions
have to be satisfied:-*

- (1) ***There have to be a former suit or issue decided by a
competent court.***
- (2) ***The matter in dispute in the former suit between parties
must also be directly or substantially in dispute between
30 the parties in the suit where the doctrine is pleaded as a
bar.***

5 (3) **Parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title.**

In HCCS 553 of 1966 (**Ismail Karshe Vs Uganda Transporter ltd**) case on Civil Procedures and Evidence Vol.3 page 1, Sir Udo Udoma, former Chief Justice of Uganda, put it this way: **“Once a decision has been given by a court of competent jurisdiction between two persons over the same subject matter, neither of the parties would be allowed to relitigate the issue again or to deny that a decision had in fact been given, subject to certain conditions.”** In my opinion this is a correct summary of S.7”.

Clearly, the appellant was not party to the proceedings in the case of **Joy Kabatsi vs Anifa Kawooya (SCCA No.25 of 2007)**, neither did the parties claim under the appellant. In that case Joy Kabatsi, was alleging election irregularities on part of the respondent and that the respondent (Anifa Kawooya) did not possess the requisite educational qualifications to be elected Woman MP for Sembabule District. In the instant appeal, we are dealing with the recalling of a certificate of equivalence without a hearing which led the respondent to petition the Constitutional Court. The two issues are thus distinct and the parties are different. It is my considered opinion that res judicata does not apply.

In its judgment, the Constitutional Court held that the issue of the respondent’s academic qualifications had already been determined by the Mukibi J and the Supreme Court. During the appeal in the Court of Appeal it was not a ground of appeal which implied that Ms.

5 Kabatsi was satisfied with the decision of the High Court. Since Joy
Kabatsi had not raised the matter in the Court of Appeal she had no
right to resurrect it in the Supreme Court. The matter was therefore,
res judicata. Besides, the appellant council which is the government
agency which had the duty to defend and enforce the observance of
10 Article 80 of the Constitution which lays down the qualification of
members of Parliament did not apply to be joined as a party to the
suit.

With greatest respect, I find the reasoning of the Constitutional Court
15 above not acceptable. Mukibi J. did not consider the authenticity of
the Knights Bridge University because there was no evidence. The
Supreme Court did not hold that all the respondent's qualifications as
presented to the appellant were authentic. Failure by the appellant to
apply to be joined to the election petition does not make the ***matter***
20 ***res judicata***. It is rather absurd to expect the appellant to watch out
for any election petition where academic qualifications are in issue
and apply to be joined to such suit. This would be expecting too much
of the appellant. It is none of its functions as provided by law.

25 With greatest respect, I am of the considered view that the learned
Justices of the Constitutional Court erred in law when they
formulated and considered issue No 3 of the petition and determined
it in favour of the petitioner who is the respondent in this appeal,

30

5 The issue was:

“Whether the matter of the petitioner’s academic qualifications upon which the Certificate of Equivalence was recalled was res-judicata”.

10 According to article 137 of the Constitution and decided authorities which I have quoted in this judgment, the Constitutional Court is seized with jurisdiction to hear and determine cases that raise issues for constitutional interpretation and enforcement.

15 Res Judicata is a doctrine of Civil Procedure and as counsel for the appellant has correctly stated, it is used as a defence and not a cause of action.

In the instant appeal, res judicata was not an issue for constitutional interpretation.

20 It is my considered view that whatever the Constitutional Court stated in this case on the issue of res judicata was obiter dicta and had no relevance to the petition which was before it. Res Judicata was not an issue for Constitutional Interpretation.

25 I have stated elsewhere in this judgment that the respondent had the right according to section 4(11) of the Parliamentary Elections Act to appeal against the decision of appellant’s cancellation of the Certificate of Equivalence. In case the respondent had done so, she would have possibly raised the doctrine of res judicta there but not in
30 the Constitutional Court which has limited jurisdiction of Constitutional interpretation.

Ground 4 would succeed.

Grounds 5

The learned Justices of the Constitutional Court erred in law and fact in holding that the appellant had no right to investigate or recall the academic qualifications of the respondent.

In arguing this ground, counsel for the appellant contended that the Constitutional Court erred in its findings on this ground. He cited **Section 4(13) of the Parliamentary Elections Act** which gives the appellant powers to verify and equate academic qualifications.

15

Counsel for the respondent supported the holding by the Constitutional Court.

He submitted that after issuing the certificate of equivalence, the appellant became functus officio and urged this Court to find so. According to Section 4(11) of the Parliamentary Elections Act, those who were aggrieved by the issuance of the certificate should have petitioned the High Court.

In support of his submissions, Counsel relied on **Gole Nicholas vs. LK Kiryapawu and Abdul Balangila Nakendo vs Patrick Mwendha SC Election Petition No. 09 of 2007.**

In reply, Counsel for the appellant informed Court that the appellant consulted Nkumba University which informed it that the admission of the respondent for the Bachelor in Development Studies was based on the Knights Bridge University degree. He contended that the appellant was not functus officio. He relied on the case of **Farm International Ltd vs Mohammed Hamid El-Faith (SCCA No.16 of**

5 **1993)** wherein a certificate of incorporation was cancelled because of fraud.

Counsel urged Court to make a decision whether investigation of the authenticity of people's certificates or qualifications should be made
10 by the appellant or Courts of law.

Counsel prayed that the appeal be allowed.

Consideration of the arguments

I have carefully read the record and submissions of counsel and will
15 now consider their arguments.

It is important to note that this ground has been substantially considered in ground 3 of this appeal. I will explain further for the sake of clarity.

20 According to **Article 80 of the Constitution**, a Member of Parliament must have a minimum formal qualification of advanced level or its equivalent.

During the proceedings at the Constitutional Court, the issue was
25 whether the appellant had breached **Articles 28(1), 38, 42 and 44 of the Constitution** when it recalled the respondent's certificate without granting her a hearing. As I have discussed and held in grounds 1 and 2, this was an issue that required Constitutional interpretation. It was within the jurisdiction of the Constitutional Court according to
30 **Article 137 of the Constitution.**

5 **The Parliamentary Elections Act** under **Section 4(13)** however mandates the appellant to verify and equate academic qualifications of Parliamentary candidates.

Further still, **Section 4(k) of the Universities and other Tertiary**
10 **Institutions Act** re-echoes the powers or functions of the appellant. It states;

“To determine the equivalence of all types of academic and professional qualifications of degrees, diplomas and certificates obtained elsewhere with those awarded by
15 *Uganda institutions of Higher Education for recognition in Uganda.”*

The same Act establishes the appellant and in **section 3** sets out its objects. It reads;

“3 The objects of this Act are to establish and develop a
20 *system governing institutions of higher education in order to equate qualifications of the same or similar courses offered by different institutions of higher education while at the same time respecting the autonomy and academic freedom of the institutions and to widen the accessibility*
25 *of high quality standard institutions to students wishing to pursue higher education courses by-*

- (a)Regulating and guiding the establishment and management of those institutions;*
- 30 *(b)Equating the same professional or other qualifications as well as the award of degrees,*

5 ***diplomas, certificates and other awards by the
different institutions.”***

According to the above provisions, the appellant is an independent institution vested with powers to verify, equate, manage and ensure standards in the education sector. It is in exercise of this power that
10 the inconsistencies in the Knights Bridge University degree which was used by the respondent to be admitted to Nkumba University for the degree in Development Studies came to light. The certificate of equivalence was issued to the respondent based on the degree from Nkumba University.

15
Clearly, it would be improper for courts of law to usurp the powers that are explicitly set out for an institution in an Act of Parliament. Courts can only intervene if the appellant in exercise of its powers fails to observe the correct procedures and in case of the
20 Constitutional Court, if there is failure to observe the provisions of the Constitution. The aggrieved party would then proceed to the appropriate Court for remedies.

It should be noted that the wrong procedure in determining whether
25 the appellant has powers to investigate academic qualifications was adopted when the respondent filed a Constitutional petition. This was not a matter for constitutional interpretation by the Constitutional Court.

30 The appellant being the issuing institution of the certificate of equivalence, if informed of any illegalities, has the powers to recall a certificate and have it cancelled after observing the rights of the

5 respondent guaranteed under the Constitution. The appellant was, therefore, not functus officio.

Ground 5 would succeed.

Ground 6.

10 ***The learned Justices erred in fact and law in granting the reliefs sought.***

Counsel for the appellant contended that it was inappropriate for the Constitutional Court to award the respondent an equitable remedy of injunction since she had come to Court with unclean hands as shown
15 in the affidavit of Prof. Kasozi who was the Executive Director of the Council.

Counsel for the respondent, however, stated that the Constitutional Court was right to grant the reliefs.

20 **Consideration of arguments**

The Constitutional Court granted four reliefs to the respondent and I will deal with each of them separately;

(a) The recall and cancellation of the respondent's certificate of equivalence contravened the Constitution.

25 The Constitutional Court rightly granted the relief in (a) because according to **Article 44 of the Constitution**, the right to be heard is non-derogable and must be observed by all decision making bodies which was denied in this case.

5 **(b)A permanent injunction against the appellant restraining it
from recalling and/or cancelling the Certificate of
equivalence issued the respondent.**

The grant of this relief infringed on the powers of the appellant as provided by Parliament. This was not an issue for interpretation by
10 the Constitutional Court as earlier discussed in ground 5 of this appeal.

**(c)A declaration that all matters concerning the academic
qualifications of the respondent in so far as they relate to
15 elections and her academic competence to stand for elective
office are res judicata.**

This was inappropriate because res judicata is a doctrine of civil procedure that should have been pleaded as a defence in a civil suit. It was not an issue for Constitutional interpretation.

20 The respondent, therefore, ought to have petitioned the High Court for a remedy as envisaged in **Section 4(11) of the Parliamentary Elections Act.**

(d) Costs of the suit

The award of all the costs of the petition to the respondent by the
25 Constitutional Court was inappropriate. Had the Constitutional Court considered that some of the issues did not require Constitutional interpretation, the learned justices would not have awarded all the costs to the respondent.

Ground 6 succeeds.

30 In the result, this appeal is dismissed on grounds 1, 2, 3 and allowed on grounds 4, 5 and 6.

5 I would order that each party bears its own costs in this Court and the Court below.

Dated at Kampala this.....day of2015

10

**C.N.B. KITUMBA
AG. JUSTICE OF THE SUPREME COURT**