THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

[CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA, JJ.SC. AND BYAMUGISHA, AG. JSC].

CONSTITUTIONAL APPEAL No.1 OF 2002

BETWEEN

1. PAUL. K. SSEMOGERERE]
2. ZACHARY OLUM] ----------APPELLANTS
3. JULIET RAINER KAFIRE]

AND

ATTORNEY GENERAL ---------- RESPONDENT

[Appeal from the Judgment of the Constitutional Court at Kampala (Mukasa - Kigonyogo, DCJ, Kato, Mpagi-Bahigeine, Twinomujuni and Kitumba, JJ.A) dated 17th April, 2002, in Constitutional Petition No. 7 of 2000]

JUDGMENT OF TSEKOOKO, JSC: This appeal is against the decision of the Constitutional Court dismissing, by a majority, the appellants' petition to that Court in which the appellants had sought a number of declarations.

I have read in advance, the lead judgment prepared by my Lord Justice G.W. Kanyeihamba, JSC, and concurring judgments by my Lords the Chief Justice and A.H.Oder, JSC. I agree that this appeal ought to succeed substantially and that the declarations sought by the appellants, as set out in the lead judgment ought to be granted.

In Constitutional Petition No.3 of 1999, the 1st and the 2nd appellants challenged the validity of the enactment by Parliament of the Referendum and Other Provisions Act, 1999 on ground that the Act had been passed by Parliament without the requisite quorum stipulated in the Constitution. On 23/9/1999 the Constitutional Court dismissed the petition summarily leading to an appeal to this Court which on 31/5/2000 reversed that decision and remitted the matter to the Constitutional Court for hearing. The present respondent was the respondent in the petition. The latter court heard the petition and on 10/8/2000 granted the declarations sought and struck down the Act. There was no appeal. However, on 1/9/2000 the Government reacted by moving Parliament to enact the Constitution (Amendment) Act 2000 (Act 13 of 2000) whose effect was, inter alia, to nullify the said judgment of the Constitutional Court. Act 13 of 2000 amended Articles 88, 89, 90 and 97 of the Constitution. The amendment also affected Article 41, among others, and introduced a new Article 257A. The appellants herein thereupon instituted a fresh petition (No. 7 of 2000) against the respondent challenging the amendment. In summary this time the appellants contended, inter alia, that: -

(a) The Act indirectly amended, inter alia, Article 41 of the Constitution.

(b) Act 13 of 2000 made Parliament Supreme over the Constitution of 1995 yet the reverse is the position.

(c) Act 13 of 2000 creates a one party state, the NRM, and eliminates other political parties.

On 10/11/2000, when the petition was called for hearing in the Court below, Mr. Deus Byamugisha, Ag. Director of Civil Litigation, objected first to the competence of the petition and secondly to the jurisdiction of the court to hear the petition. Ruling on the objection was given on 29/11/2000, overruling the first point of objection but the Court held that it had no

jurisdiction ***" to declare that one part of the constitution was in conflict with the another."*** *After* hearing the petition subsequently, the Constitutional Court, by a majority of three to two, dismissed the petition. The appellants now appeal against the dismissal and base the appeal on six grounds which have been set out in the judgment of Kenyaihamba, JSC.

I would like to make observations on ground 6 of the appeal. For easy reference I will reproduce it and it was formulated this way:

> *The Constitutional Court erred in law and fact and misconstrued the gist of the petition and the petitioners' contention when they held that a Constitutional Court would have no jurisdiction to construe part of the Constitution as against the rest of the Constitution and thereby came to the wrong conclusion.*

This ground relates partly to the court's ruling to which I have just alluded by which the court accepted Mr. Byamugisha's contention that the court had no jurisdiction to interpret Act 13 of 2000 because the Act was part and parcel of the Constitution and the Court itself cannot construe one part of the constitution against another part of the same constitution.

At the commencement of the hearing of the petition in the Constitutional Court and partly because of the earlier ruling alluded to above, the court disabled and restricted itself by framing only one issue as follows: -

> ***"Whether the Constitutional Amendment Act No.13 of 2000 complied with the Constitutional requirements for amendment of the constitution".***

It would appear from the opening remarks in that court by Mr. Lule, who was counsel for the petitioners, that this was not the only issue which arose from the pleadings. Indeed in his dissenting judgment, Twinomujuni, JA (at pages 2 and 3) lamented that the issues raised by the petition could have been more directly addressed if the court considered -

> ***"Whether the Constitution (Amendment) Act No.13 of 2000 was consistent or inconsistent) with the Constitution of Uganda".***

This shows that the pleadings raised more than one issue and indeed this is reflected in the submissions which were made in the Court below and before us.

Now whether it is a constitutional matter or an ordinary suit, it is trite that a trial court must frame all issues arising out of the pleadings so as to determine the matter, or matter, in controversy. A perusal of the pleadings in this case (petition and affidavits) shows that among the issues in controversy was consistency or inconsistency between the Act and some other parts of the Constitution. That is what needed to be clearly framed and decided upon.

Be that as it may, Mr. Godfrey Lule, SC, counsel for the appellants in this Court argued that the majority learned Justices of the Constitutional Court erred when they held that the Court had no power to interpret one part of the Constitution against another part. In a way Mr. Bireije, Commissioner for Civil Litigation, conceded this point when he agreed that the court had jurisdiction to harmonise various provisions of the Constitution provided that the right procedure of amending the Constitution had been followed Here he quite properly abandoned the position taken in the Constitutional

Court by his colleague, Mr. D. Byamugisha. He however glossed over the point whether the court would have jurisdiction to harmonise the original articles of the Constitution which is the holding of the Constitutional Court.

As noted already, on 29th November, 2000, the Constitutional Court which at that time was differently composed, ruled upholding one of the objections to the petition by Mr. D. Byamugisha that the "*Court would have no jurisdiction to inquire into the question whether amending sections if they properly became part of the constitution were unconstitutional".*

Mr. Byamugisha, the then Ag. Director for Civil Litigation, had argued, during the hearing of the preliminary objection, that once an Act amending the Constitution became law, it became part and parcel of the Constitution. Of course this last point is indisputable. However, Mr. Byamugisha's strange view suggests that once a constitution amending Act becomes law, and part of the Constitution, it acquires sanctity against interpreting its provisions against the rest of the constitution. For this strange view, Mr. Byamugisha and the Constitutional Court relied on the Indian case of **Kesavananda Vs. State of Kerala** 1654 SC. reported at paragraph 788 A.I.R and on the Ugandan Constitutional Petition decision in **Rwanyarare** & Wegulo Vs Attorney General, Constitution Petition No.5 of 1999 (unreported).

Thus the Constitutional Court in its ruling administered to itself a preventive dose which in effect disabled it from considering one of the relevant issues raised by the petition and, therefore, the court abdicated its duty by declining from examining the impugned articles of the constitution in order to determine whether the complaints raised in the petition were valid. or otherwise. This is unfortunate.

It is my considered opinion, and with due respect to the Constitutional Court, that **Kesavananda case** was misunderstood and, therefore, misapplied to the facts of the petition. The provisions of our constitution override that case. Clauses **(1) and (3) of Article 137 of our Constitution** are very clear. The first clause gives unlimited jurisdiction to the Court to interpret our constitution. It reads:

> ***"Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as a Constitutional court".***

If there was any clear answer to the doubts in the mind of the Constitutional Court as to its jurisdiction to interpret any provision of the Constitution, clause (1) is the answer. In my opinion clause (3) does not fetter in any way whatsoever the powers of the court contained in clause (1).

Clause (3) reads: -

"1. A person who alleges that -

> ***(a) An Act of Parliament or any other law or anything in or done under the authority of an law; or***
>
> ***(b) An 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".***

The issue which was in the **Kesavananda case** appears to have been whether an Act of Parliament had become part and parcel of the Constitution. That was and is not the issue in the petition giving rise to the appeal before us. Indeed nobody can dispute the fact that a Constitutional Provision introduced by an amendment of the Constitution forms part and parcel of the Constitution.

No copy of the judgment of **Kesavananda case** was availed to us. I have not been able to lay my hands on the full judgment. But passages of it are quoted in the Singaporean case of **Teo Soh Lung Vs Minister for Home Affairs and others** (1990) LRC (Const.) 490. At page 504, Chua.J., quotes a passage from a judgment of one of the judges in **Kesavananda case** as follows:

> ***"Fundamental or basic principles can be changed. There can be radical changes in the Constitution like introducing a Presidential system of Government for a cabinet system or a unitary system for a federal system. But such amendment would in its way bring all consequential changes for the smooth working of the new systems.'***
> ***(Para 932).***
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> ***Those who frame the Constitution also know that new and unforeseen problems may emerge; that problems once considered important may lose their importance because priorities have changed; that solutions to problems once considered right and inevitable are shown to be wrong or to require considerable modification; that judicial interpretation may rob certain provisions of their intended effect; that public opinion may shift from one philosophy of Government to another…. The framers of the Constitution did not put any limitations on the amending power because the end of a Constitution is the safety, the greatness and well being of the people. Changes in the Constitution serve these great ends and carry out the real purposes of the Constitution, (Para 959)".***

This passage indicates that written constitutions are not static and are liable to be amended.

There is an obvious implication in this passage that courts have to interpret constitutional provisions to bring the constitution in line with current trends. Implicit in this is the real possibility that one part of the constitution can be harmonised with another part of the same constitution.

Further in para (h) of the report, Chua. J., pointed out that Malaysian Courts had declined to follow **Kesaananda** doctrine. Moreover the decision in the case itself was not unanimous which robs it of its full persuasive value.

Besides, I am of the considered view that even if the provisions of the Constitution (Amendment) Act, 2000 are part and parcel of the Constitution, its provisions as enacted constitute an Act of Parliament. That is how the Act describes itself. According to definitions in the Acts of Parliament Act and the Interpretation Act, "Act or Act of Parliament" means a law made by Parliament. That is so whether the Act amends or does not amend the constitution.

For the foregoing reasons, I think that the decision of the Constitutional Court in **Dr. Rwanyarare & Wegulo Vs Attorney General** (Petition 5 of 1999) in so far as the Constitutional Court held that it has no jurisdiction to interpret one provision of the Constitution against another represents a wrong approach to our principles of Constitutional interpretation and in my opinion that case was wrongly decided and represents a wrong view of the law which should not be followed.

Ground six ought therefore to succeed.

I agree with the minority judgment of the Constitutional Court that the appellants had in the main established their complaints as raised by the Constitutional Petition. Therefore I would allow the appeal. I agree with the orders proposed by Kanyeihamba, JSC.

Delivered at Mengo this……day of……2004.

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J.W.N. Tsekooko
Justice of the Supreme Court