THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSOLIDATED PETITIONS

5 **1. CONSTITUTIONAL PETITION NO. 16 OF 2013**

1. HON.LT(RTD) SALEH M.W.KAMBA
2. MS AGASHA MARY ....PETITIONERS

VERSUS

1. THE ATTORNEY GENERAL
10 **2. HON.THEODORE SSEKIKUBO**
3. HON.WILFRED NIWAGABA .... RESPONDENTS
4. HON.MOHAMMED NSEREKO
5. HON.BARNABAS TINKASIMIRE

15 **AND CONSTITUTIONAL APPLICATION NO.14 OF 2013 ARISING FROM CONSTITUTIONAL PETITION NO. 16 OF 2013**

2. CONSTITUTIONAL PETITION NO.21 OF 2013

NATIONAL RESISTANCE MOVEMENT....PETITIONER

20 **VERSUS**

1. THE ATTORNEY GENERAL
2. HON.THEODORE SSEKIKUBO.... RESPONDENTS
3. HON.WILFRED NIWAGABA
4. HON.MOHAMMED NSEREKO
25 **5. HON.BARNABAS TINKASIMIRE**

AND CONSTITUTIONAL APPLICATION NO.25 OF 2013 ARISING FROM CONSTITUTIONAL PETITION NO. 21 OF 2013

3. CONSTITUTIONAL PETITION NO.19 OF 2013

JOSEPH KWESIGA..................................PETITIONER

VERSUS

ATTORNEY GENERAL.............................RESPONDENT

5

4. CONSTITUTIONAL PETITION NO.25 OF 2013

HON.ABDU KATUNTU.............................PETITIONER
(SHADOW ATTORNEY GENERAL)

10 **VERSUS**

THE ATTORNEY GENERAL.....................RESPONDENT

15 **CORAM: HON.MR. JUSTICE S.B.K KAVUMA AG. DCJ/PCC,**
HON. MR. JUSTICE A.S. NSHIMYE JA/JCC,
HON. MR. JUSTICE REMMY KASULE JA/JCC,
HON. LADY JUSTICE FAITH MWONDHA JA/JCC,
HON. MR. JUSTICE RICHARD BUTEERA JA/JCC,

20

JUDGMENT OF:

HON. MR. JUSTICE S.B.K KAVUMA AG. DCJ/PCC
HON. MR. JUSTICE A.S. NSHIMYE JA/JCC,
25 **HON. MR. JUSTICE RICHARD BUTEERA JA/JCC,**

Introduction

Constitutional petition Nos 16,19,21 and 25 of 2013 were
30 filed into this court separately and later consolidated. Nearly at the same time, the Constitutional Application Nos.16, 14 and 23 of 2013, arising from Constitutional

Petitions Nos. 16 and 21 were also filed separately. The Court decided to consolidate the said Petitions and Constitutional Applications and hear them together.

5 **Facts and background**

The facts from which the consolidated Constitutional Petitions and Applications arise are as follows:

The 2nd, 3rd, 4th and 5th respondents in Constitutional Petition Nos.16 and 21 of 2013 are the elected Members of
10 Parliament (MPs), representing Lwemiyaga County in Sembabule District, Ndorwa East, Kabale District, Kampala Central, Kampala District,(Now Kampala Capital City Authority), and Buyaga East, Kibale District Constituencies respectively. They all once belonged to the National
15 Resistance Movement (NRM) Party.

On 14th April 2013, the Central Executive Committee (CEC) of the NRM expelled the four from the party on grounds that they had acted/behaved in a manner that contravened various provisions of the party constitution. The
20 respondents challenged their expulsion in the High Court and the matter is still pending.

Following the expulsion of the said four MPs from the NRM party, the Secretary General of the Party wrote to the Rt. Hon. Speaker of Parliament informing her of the party's decision and requesting her to direct the Clerk to Parliament to declare the seats of the 2nd, 3rd, 4th and 5th respondents in Parliament vacant to enable the Electoral Commission conduct by-elections in their constituencies.

On the 2nd of May 2013, the Rt. Hon. Speaker in her ruling in Parliament declined to declare the seats vacant and upon that refusal, Hon. Lt. (Rtd) Saleh Kamba and Ms.Agasha Marym filed Constitutional Petition No.16 of 2013 in this Court challenging the constitutionality of the Speaker's decision.

Similarly Mr. Joseph Kwesiga filed Constitutional Petition No. 19 of 2013 challenging the same decision. This was followed by Constitutional Petition No. 21 of 2013 which was filed by the National Resistance Movement party also challenging the same decision.

On 8th May 2013, the Attorney General wrote to the Rt. Hon. Speaker of Parliament advising her to reverse her decision on the grounds that it was unconstitutional. Constitutional Petition No.25 of 2013 filed by the Shadow

Attorney General, Hon. A. Katuntu challenges the Attorney General's advice to the Speaker.

The Attorney General filed a reply, in addition to which he filed a cross Petition to Constitutional Petition No. 25 of 5 2013.

The scheduling conference conducted inter parties, left a disputed fact as to whether the Speaker allocated the expelled MPs special seats in Parliament. At the said scheduling conference, counsel for the 2nd, 3rd, 4th and 5th 10 respondents also raised a preliminary objection as to whether Constitutional Petition Nos 16 and 21 disclosed a cause of action.

At the scheduling conference, 13 issues were framed and at the commencement of the hearing of the consolidated 15 Constitutional Petitions issue No.7 was framed by court bringing the total number of issues to 14 substantially listed as below:-

1. **Whether the expulsion from a political party is a ground for a Member of Parliament to lose his / her 20 seat in Parliament under Article 83(i)(g) of the 1995 Constitution of Uganda.**

2. **Whether the act of the Rt.Hon. Speaker in the ruling made on the 2nd of May 2013 to the effect that the 4 MPs who were expelled from the National Resistance Movement (NRM), the party for which they stood as candidates for election to Parliament should retain their respective seats in Parliament is inconsistent with or in contravention of the named constitutional provisions.**
3. **Whether the Rt.Hon.Speaker of Parliament in her communication created a peculiar category of Members of Parliament, peculiar to the Constitution.**
4. **Whether the continued stay in Parliament of the four MPs after their expulsion from the NRM Party on whose ticket they were elected is contrary to and/or inconsistent with Articles 1(1) (2)(4), 2(1), 21(1)(2), 29(1)(e), 38(1), 43(1), 45, 69(1), 71, 72(1), 72(2), 72(4), 78(1), 79(1)(3) and 255(3) of the Constitution.**
5. **Whether the said expelled MPs who left and/or ceased being members of the Petitioner vacated their respective seats in Parliament and are no**

longer Members of Parliament as contemplated by the Constitution.

6. **Whether the said expelled MPs vacated their respective seats in Parliament and are no longer Members of Parliament as contemplated by the Constitution.**
7. **Whether the Court should grant a Temporary injunction stopping the said four members of Parliament from sitting in Parliament pending the determination of the consolidated constitutional petitions.**
8. **Whether the Rt.Hon. Speaker had jurisdiction to make a ruling on such a matter and whether her action is inconsistent with or in contravention of the Constitution.**
9. **Whether the act of the Attorney General of advising that the only persons who can sit in Parliament under a multiparty political system are members of political parties and representatives of the army is inconsistent with and in contravention of Article 78 of the Constitution.**
10. **Whether the act of the Attorney General of advising that after their expulsion from the NRM**

Party, Hon. Theodore Ssekikubo, Hon. Wilfred Niwagaba, Hon. Mohammed Nsereko and Hon. Barnabas Tinkasimire are no longer Members of Parliament, is inconsistent with and in contravention of Article 83(1) (g) of the Constitution.

11. **Whether the act of the Attorney General of advising the Speaker of Parliament to declare the seats of Hon. Theodore Ssekikubo, Hon. Wilfred Niwagaba, Hon. Mohammed Nsereko and Hon. Barnabas Tinkasimire in Parliament, are now vacant because of their expulsion from the NRM Party is inconsistent with and or in contravention of Article 86(1) (a) of the Constitution.**

12. **Whether the act of the Attorney General of advising the Speaker of Parliament to reverse her ruling on whether the seats of Hon. Theodore Ssekikubo, Hon. Wilfred Niwagaba, Hon. Mohammed Nsereko and Hon. Barnabas Tinkasimire is inconsistent with and or in contravention of Article 119 of the Constitution.**

13. **Whether the act of the Attorney General of advising the Speaker of Parliament to reverse her**

ruling on whether the seats of Hon. Theodore Ssekikubo, Hon. Wilfred Niwagaba, Hon. Mohammed Nsereko and Hon. Barnabas Tinkasimire are vacant when the said ruling is the subject of court's interpretation in Constitutional Petition No.16 of 2013, where the Attorney General is the 1st respondent, is inconsistent with and in contravention of Article 137 of the Constitution.

14. What remedies are available to the parties?

Representation

Petitioners/Applicants

At the hearing of the consolidated Constitutional Petitions and the applications, Counsel John Mary Mugisha (lead Counsel), Joseph Matsiko, Chris John Bakiza Sam Mayanja and Severino Twinobusingye represented the Petitioners in Constitutional Petition Nos 16 and 21 of 2013 and in application No.14 and 23 of 2013.

Counsel Elison Karuhanga represented the petitioner in Constitutional Petition No. 19 of 2013.

Counsel Peter Mukidi Walubiri represented the Petitioner in Constitutional Petition No. 25 of 2013.

Attorney General

5 The first respondent in all the above consolidated Petitions and the cross Petitioner in Constitutional Petition No. 25/2013 was represented by Mr. Cheborion Barishaki, the Director of Civil litigation at the Attorney General's Chambers, Ms Patricia Mutesi, Principal State Attorney, 10 Mr. Richard Adrole, Ms Moureen Ijang, and Ms Imelda Adongo all State Attorneys at the same chambers.

Counsel for the respondents in Constitutional Petition No.16 and Constitutional applications Nos. 14 and 23 of 2013.

15 The 2nd, 3rd, 4th and 5th respondents in Constitutional Petition Nos 16 and 21 and Constitutional Application Nos. 14 and 23 of 2013 were represented by Counsel Prof.G.W.Kanyeihamba (lead Counsel), Prof. Fred Sempebwa, Ben Wacha, Wandera Ogalo, Emmanuel Orono, 20 Medard Sseggona, Kyazze Joseph, Galisonga Julius, and Caleb Alaka.

Principles of Constitutional interpretation

We find it appropriate at this juncture to restate some of the time tested principles of constitutional interpretation we consider relevant to the determination of Constitutional Petitions and Applications before court. These have been laid down in several decided cases by the Supreme Court, this Court, other courts in other Commonwealth jurisdictions and expounded in some legal literature of persuasive authority.

These principles are:

1. *The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconstant with or in contravention of the Constitution is null and void to the extent of the inconsistency. See* ***Article 2(2****) of the Constitution. See also The* ***Supreme Court in Presidential Election Petition No.2 of 2006 (Rtd) Dr. Col Kiiza Besigye vs Y.K. Museveni*** *and* ***Supreme Court Constitutional Appeal No.2 of 2006, Brigadier Henry Tumukunde versus The Attorney General*** *and* ***Another****.*

2. In determining the constitutionality of a legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality, of either an unconstitutional purpose or an
5 *unconstitutional effect animated by the object the legislation intends to achieve.*

See. ***Attorney General vs Silvaton Abuki Constitutional Appeal No. 1/1998(SC).***

3. The entire Constitution has to be read together as an

10 *integral whole and no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness. See* ***P.K Ssemogerere and Another vs Attorney General*** – ***Constitutional Appeal No. 1/2002 (SC)*** *and* ***The***
15 ***Attorney General of Tanzania vs Rev. Christopher Mtikila [2010.].EA13***

4. A constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given a dynamic,
20 *progressive, liberal and flexible interpretation, keeping in view the ideals of the people, their socio economic and*

political cultural values so as to extend the benefit of the same to the maximum possible.

See ***Okello Okello John Livingstone and 6 others Versus The Attorney General and another****,* ***Constitutional Petition No. 1 of 2005(CA), Kabagambe Asol and 2 others vs The Electoral Commission and Dr. Kiiza Besigye. Constitutional Petition No.1of 2006 (CA)*** *and* ***South Dakota vs South Carolina 192, U.S.A 268, 1940.***

5. Where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense.

6. Where the language of the Constitution or a statute sought to be interpreted is imprecise or ambiguous, a liberal, generous or purposeful interpretation should be given to it. See ***The Attorney General Versus Major General David Tinyefuza*** *(Supra)*

7. The history of the Country and the legislative history of the Constitution is also relevant and a useful guide in constitutional interpretation.

See ***Okello Okello John Livingstone and 6 others Versus the Attorney General and Another. Constitutional Petition No.4 of 2005 (CA)***

8. The National Objectives and Directive Principles of State
5 *Policy in the Constitution are also a guide in the interpretation of the Constitution.*

Bearing in mind the above principles of Constitutional interpretation among others, we now proceed to consider submissions of Counsel for all the parties and the evidence
10 before us and relate them to the issues raised in the said petitions and Applications.

Issues no.1, 4, 5 and 6.

The above four issues were argued together by all counsel that handled them. We too shall consider them together. At
15 the conferencing there was no agreement on the wording of issues No.5 and 6 which were retained as they were with liberty to counsel to argue them as they preferred.

It became clear in the course of the hearing, that the gist in these issues is whether the expelled Members of Parliament
20 *left* the party for which they stood and were elected to Parliament and whether they *vacated* their seats thus

rendering their continued stay in parliament unconstitutional.

Counsel for the Petitioners in Constitutional Petition numbers 16, 19 and 21 of 2013, with counsel for the Attorney General were in agreement, and took a common stand on these issues.

They argued that, upon expulsion from the NRM party, which party had sponsored the 2nd, 3rd, 4th and 5th respondents, and for which they stood for elections, they *left* the party and no longer represented its interests in Parliament. They did not join and do not represent the opposition. They were not under the control or direction of any of the parties represented in Parliament. They were not independents as provided for in the Constitution. Counsel argued that the word ***leave*** used in **Article 83(1)(g)** is neutral as to cause. The expelled MPS could not, counsel submitted, become independents legally as they had not been elected to Parliament as independents. Counsel contended that the 2nd, 3rd 4th and 5th respondents became ***de facto independents*** in Parliament and that this was in contravention of **Article 83 (1) (g)**.

Submissions by Counsel for the 2nd 3rd 4th and 5th respondents and Counsel for the Petitioner in Constitutional Petition No.25 of 2013 on issues No. 1,4,5 and 6

5 Counsel for the 2nd, 3rd, 4th and 5th respondents and counsel for the Petitioner in Constitutional Petition No.25/2013 argued that the expulsion of the 2nd, 3rd, 4th and 5th respondents from the NRM party did not result into their leaving the party for which they stood as candidates
10 and were elected to Parliament as envisaged under **Article 83(1)(g).**

To Counsel, the word *leave* used in **Article 83(1)(g)** imports voluntary action on the part of the person who leaves a party to join another or to become an independent.
15 Counsel submitted that **Article 83(1)(g)** was designed as an instrument to prevent a Member of Parliament from voluntarily leaving his /her party and crossing the floor to join another party or to become an independent. They submitted that the issue of expulsion from a political party
20 was not contemplated. There was a lacuna in the Constitution and according to Counsel, that should be handled by Parliament and not by this Court.

Court's resolution of Issues No. 1,4,5 and 6

The meaning of the word *leave* as used in **Article 83(1)(g)** is important for the determination of the issues now under consideration.

The word , in our view, is clear and unambiguous.

We find the literal rule of constitutional interpretation stated above as appropriate to apply in interpreting the word *leave*.

What is the ordinary and natural meaning of the word *leave*? The Oxford Advanced Learner's Dictionary defines *leave* as **"go away from; cease to live at (a place) belong to a group",** Webster's New World Dictionary defines **"leave"** as **"to go away from/to leave the house, to stop living in, working for, or belonging to; to go away"**. From the above, we find that the word *leave* in the context in which it is used is neutral as to cause and connotes, *inter alia* going away and/or ceasing to belong to a group.

Counsel for the 2nd 3rd 4th and 5th respondents invited us to consider the legislative history of **Article 83(1)(g)** of the Constitution and we oblige. **Article 83(1)(g)** was in the

1995 Constitution. It was worded as it is currently after the 2005 Constitutional amendment.

The background to the inclusion of **Article 83(1) (g)** is reflected in the report of the Uganda Constitutional
5 Commission, Analysis and Recommendations. The relevant part was annexed and marked as 'D' to the affidavit of the Hon. Theodore Ssekikubo.

> ***"The Commission reported that because of Concerns arising from the memory of the***
10 ***crossing of the floor by almost all opposition members during the Obote I Government and some considerable number in Obote II, Government formed the basis for submission of strong views***
15 ***that in case of a Multi-party Parliament, any member wishing to cross the floor must first resign his or her seat and seek fresh mandate from his constituency... In addition, the members elected as***
20 ***independent candidates should be treated the same way if they join political parties."(sic)***

The Constitutional Commission recommended inclusion of a constitutional provision to deal with this vice. **Article 83(1) (g)** thus found its way into the 1995 Constitution. The mischief that was targeted in 1995 was to stop the weakening of political parties by elected Members of Parliament crossing from the parties for which they were elected and joining other parties whilst in Parliament without seeking a fresh mandate from the electorate or becoming independent whilst in Parliament without seeking such a mandate.

There was an attempt to amend **Article 83(1) (g)** in 2005 by **The Constitutional (Amendment)(No.3) Bill, 2005**. The proposed amendment was:-

> ***"83(1)(g) if that person leaves the political organization or political party for which he or she stood as a candidate for election to Parliament to join another political organization or political party or to remain in Parliament as an independent member or if he or she is expelled from the political organization or***

<u>political party for which he or she stood as a candidate for election to Parliament</u>"

The underlined are the words that were proposed to be added to the original article in order to effect the amendment. The proposed amendment was debated on 7th July 2005 and again on 8th August 2005 when the same was withdrawn. It was a heated debate. There was opposition to amending the article for various reasons. Some members, for example, opposed the amendment and called for its deletion because it would lead to dismissals and counter dismissals from political parties and it would be used for internal discipline of political parties.

There are others, however, who supported deletion of the proposed amendment because it was redundant. These included Hon. Jacob Oulanyah who chaired the Legal and Parliamentary Committee that had proposed the amendment. He stated:-

> ***"on Clause 26, the Committee had proposed an insertion but after reflection and considering what***

exists in the Constitutional provision, it is not necessary,…"

Hon. Ben Wacha was of the same view as Hon. Jacob Oulanyah. He supported the proposal for deletion of the proposed amendment and stated:-

> ***"I am supporting it just because the words he is complaining about are actually redundant. What is the effect of a person if he or she is in Parliament? That person would (a) choose to remain independent or (b) he or she might choose to join another party now, if those are the two effects, then they are fully covered by the first part of the clause, which therefore makes the second half, which honourable Wandera is complaining about; so this becomes redundant."(sic)***

Hon. Adolf Mwesigye, the responsible Minister, explained that the purpose of the amendment was to make it clearer. He stated:

"The Constitution, Article 83(1)(g), there is already a provision, which provides for the vacation of a seat of a Member of Parliament if a person leaves a political party organisation for which he contested.

When you are expelled from a party, the effect of the expulsion is that you leave the party that is the effect. You cannot be expelled and stay. You can actually be expelled, and you choose not to run as an individual or not even to run for another political party.

So Madam Chairperson, the purpose of introducing this amendment was to make it clearer ...(sic)"

The debate continued with members expressing different views. The person then chairing the debate that afternoon was the then Deputy Chairperson (Hon. Rebbecca Kadaga). According to the Hansard, she stated:-

> ***"Honourable Members, if you are expelled you do not stay; when you are expelled you go."***

The amendment was withdrawn by the Minister of Justice
5 and Constitutional Affairs. He said:

> ***"...had caused a lot of controversy. Honourable members expressed serious concerns about what it meant. We can go into explaining what it meant and so on,***
> 10 ***but we propose in the interest of peace that the clause be deleted."***

This was reconciliatory language used by, the learned Minister of Justice and Constitutional affairs/Attorney General but did not remove the redundancy of the
15 proposed amendment that he withdrew. The proposed amendment was withdrawn but not defeated.

The interpretation that the legislators read into **Article 83(1)(g)** in the debate of 2005 had been pointed out in the debate leading to the 1995 Constitution. That
20 interpretation was not new. It was debated and retained in the 1995 Constitution.

The Hansard reporting proceedings of 23rd March 1995 shows that the Constituent Assembly debated this same issue. See pages 3533,3534 of the Hansard.

Mr. Lumala Deogratius (RIP) (Kalungu west), sought
5 clarification as stated below:-

> ***"Madam Chairman, I am seeking clarification with regard to changing parties from one to the other. In practice, someone may decide not to formally***
> 10 ***resign from one party to another for fearing that he will not be elected if he did so. So he sits on benches of the opposition but will always vote with the other party"(sic)***

15 Mr. Mulenga(RIP) offered clarification in response in the following words:-

> ***"Perhaps to put the minds of Hon. Lumala and others at ease, the word used is leaves. He can leave either voluntarily or***
> 20 ***by expulsion. If that party notices that he is no longer supporting them, they***

might expel him from the party and therefore, he leaves the party."

The above is the legislative history of **Article 83(1)(g).**

This Court had occasion to interpret this article before. 5 This was in **Constitutional Petition No.38 of 2010 George Owor vs The Attorney General & Hon. William Okecho.**

The 2nd respondent had contested for a seat in Parliament and he was elected as an Independent. Whilst still in 10 Parliament, he joined the National Resistance Movement Party and contested in the party primary elections. When interpreting **Article 83(1)(g)** this Court held:-

> **"that Article 83(1)(g) is a simple and clear provision. It is not ambiguous and should 15 be construed basing on the natural meaning of the English words used in the relevant Clause."** The Court held;
>
> "**In our judgment the provision means**:-
>
> **(I) A Member of Parliament must vacate 20 his/her seat if he/she was elected on a political party/organization ticket and**

then before the end of that Parliament the member joins another party.

(II) He/she must vacate his/her seat if he/she was elected on a party ticket and elects to be nominated as an Independent before the term of the Parliament comes to the end.

(III) If he/she was elected to Parliament on a party ticket, he/she cannot remain in Parliament as an Independent member.

(IV) Common sense dictates that if one was elected to Parliament on a political party ticket and joins another party, he/she cannot be validly nominated for election on the ticket of that latter party unless he/she has at the time of nomination resigned or vacated the seat in Parliament.

(V) If one was elected to Parliament on a party ticket and he/she leaves that party to become independent, he/she cannot validly be nominated as an independent unless he/she has ceased to be or has vacated the seat in Parliament...

The rationale of this interpretation is easy to see. You cannot, in a multiparty political system continue to represent the electorate on a party basis in Parliament while at the same time offering yourself for election for the next Parliament on the ticket of a different political party or as an independent."

It was submitted by Counsel for the 2nd, 3rd, 4th and 5th respondents and for the Petitioner in Const. Petition No.25 of 2013 that the **George Owor Case** (supra) is in respect of an MP voluntarily changing and should not be applied to one who has been expelled from his political Party. To Counsel, the expulsion of a Member of Parliament from his political party is not a constitutional matter. It is a matter between the Member of Parliament and his political party.

Counsel for the petitioners, (save for Counsel for the Petitioner in Constitutional Petition No.25/2013) and the Attorney General, submitted that when the 2nd, 3rd, 4th and 5th respondents left their party, they were no longer controlled by their political Party. They became ***de facto***

independent Members of Parliament. They were not elected as independent Members of Parliament. Their stay in Parliament is unconstitutional.

Article 83(1)(g) in the 1995 Constitution targeted, *inter*
5 *alia*, the problem of MPs crossing the floor of Parliament. But is the evil or the mischief merely crossing the floor? Crossing the floor, in our view is, only part of the problem. The mischief is much wider. The purpose of incorporating the article in the Constitution was to protect multi-partism
10 in particular.

The article should therefore be interpreted using the liberal or generous rule of interpretation. As was held by Justice G.W.Kanyeihamba JSC, (as he then was) in the case of the **Attorney General vs. Major General David Tinyefuza**
15 (supra) at page 9:-

> ***"It is also a recognized principle by Courts in many jurisdictions that in interpretation, a Constitution of a state must be given a generous and purposive***
> 20 ***construction as was opinionated by*** **Lord Diplock in the Gambian case of Attorney General v Modou Jobe (1984) AC 689, at**

P.700 and by Lord Keith in the Trinidad & Tobago case of Attorney General v. Whiteman (1991)2 WLR, 1200, at P. 1204 with the marks:-

5 **"*The language of a constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively so as to give effect to its spirit, and this is particularly true of*

10 *those provisions which are concerned with the protection of Constitutional rights.*"**

In the same case, his Lordship, with approval, quoted the case Botswan of **Dow v Attorney General** (**1992) LRC**

15 **(623)**. Agunda, JA, said:-

"…It (the Constitution) cannot be a lifeless museums piece; on the other hand, <u>the Courts must continue to breathe life into it from time to time as the occasion may</u>

20 **<u>arise to ensure the healthy growth and development of the State through it</u>… We must not shy away from the basic fact**

that whilst a particular construction of a Constitutional provision may be able to meet the designs of the society of a certain age such a construction may not meet those of a later age. I conceive it that the primary duty of the Judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity."

The underlining is ours for emphasis.

If a Member of Parliament was expelled from the political party for which he or she stood as a candidate for election to Parliament he/she would have left his/her political party.

Upon expulsion he/she is no longer under the control or direction of the party for which he/she was a candidate and was elected. He/she is not under the control, direction and does not belong to any political party that is represented in Parliament.

Black's Law Dictionary defines independent as:

> **"(ii)...not subject to the control or influence of another**
>
> **Not associated with another (often larger entity)."** Webster's' New World dictionary defines Independent as
> **"(i) free from the influence, control, or determination of another or others. (c) not connected with any political party organization."** It is further defined in another definition as
> **"a person not an adherent of any political party;"**

After expulsion, the 2nd, 3rd, 4th and 5th respondents became ***de facto independents*** in Parliament. They do not qualify to be *de jure* independents as they did not stand for elections as independents. Would they stay in Parliament in that capacity when they are ***de facto independent*** and yet they had stood for a political party during their elections to Parliament? Would their stay in Parliament in those circumstances promote the growth of multi-partism as contemplated by the enactors of **Article 83(1)(g**)?

In our view, a Member of Parliament that has been expelled from the political party for which he/she stood as a candidate and was elected to Parliament, would not adhere to his/her political party after the expulsion.

If he/she remained in Parliament after the expulsion, he/she would in effect, not be different from the one who would have crossed voluntarily.

The party he/she left would be disadvantaged and would not rely on him or her. It needs the same protection as the party of the members who voluntarily crossed the floor. Multi-partism needs the same protection from the conduct of such Members of Parliament if it is to grow.

That was the purpose of enacting **Article 83(1)(g)** in the Constitution. The Article should be interpreted to give effect to the purpose for which it was enacted.

It was submitted by counsel for the 2nd, 3rd, 4th and 5th respondents that members of Parliament represent constituencies and not political parties in Parliament. Counsel further submitted that members of Parliament have their individual rights and should therefore be protected from the dictates of the parties for which they

stood as candidates during elections. It was argued that they were elected by their Constituencies which comprised of different political parties and that the electorate comprised of different political party members. They, therefore, were not elected only by members of the political party for which they stood as candidates. The members of Parliament, therefore, according to counsel, are accountable to Parliament.

It is true that Members of Parliament represent their Constituencies in Parliament. Political parties, however, are the driving engines and play recognized significant roles in Parliamentary affairs in a multiparty political dispensation. This is recognized and provided for, *inter alia*, in the National Objectives and Directive Principles of State Policy, various provisions of the Constitution and the Rules of procedure of Parliament.

Article 82A of the Constitution for instance provides for the position of Leader of the Opposition. **Article 90** provides for appointment of Parliamentary Committees for the efficient discharge of Parliamentary functions. Parliamentary Committees operate under the Rules of

Procedure of Parliament which are made under **Article 94** of the Constitution.

Rule 148 (3) (of the Rules of Procedure of Parliament) provides:-

5 **Rule 148(1)…**

(2)…

3"…so far as reasonably practicable, the overall membership of Committees shall reflect proportional membership in the house
10 ***taking into consideration the numerical strength of the parties and the interests of the independent members***."

Rule 148 (5*) provides:-*

"parties have powers to withdraw
15 ***and relocate members from individual Committees."***

Political parties are so important in their roles in Parliament that the rules of procedure provide clearly for party leadership in Parliament.

Rule 14 provides for the posts of the Government Chief Whip, the Chief Opposition whip and a party Whip for a Party in opposition. These leaders ensure due attendance, conduct of their members, participation in proceedings and voting in Parliament of members of their parties.

In view of these provisions, it's clear that although members of Parliament represent their constituencies, they play important roles in Parliament on behalf of their political parties.

If expelled Party members remained in Parliament after their expulsion, then the numerical strength of the party they left and its representation on Parliamentary Committees would be adversely affected. Clearly this would prejudice and undermines the proper functioning of the political parties, and the healthy growth of multi-partism.

The Supreme Court of New Zealand in **SC CUV 9/2004 between Richard William Prebble, Ken Shirely, Rodney Hide & Muriel Newman and Donna Awatere Huata,** handled a case with facts as set out below:-

Donna Awatere Huata was elected as a Member of Parliament for ACT New Zealand Political Party in 1999 general elections. Mrs Awatere Huata's subscription as a member of ACT Party was not renewed by her when it
5 became due in February 2003. She tried to renew her membership on 6th November 2003 but the party refused to accept her subscription. On 10th November 2003, the leader of the ACT Parliamentary Party gave notice to the Speaker that she was no longer a member of the ACT
10 Caucus. Mrs Awatere Huata denied the allegations against her and contended, she continued to represent ACT political party interests. She said *"I have not left the ACT party at all, rather the ACT party has chosen to suspend and ostracise me."* The leader of ACT Parliamentary Party
15 initiated the process for her seat to become vacant. In handling this case the New Zealand Supreme Court held:-

> **"The language of "cessation" is neutral as to cause. Such neutrality does not suggest that a member ceases to belong to**
> 20 **the party only where he has resigned formally or by unequivocal conduct. Reciprocity in freedom of association is of**

the nature of voluntary groups, and is secured for ACT New Zealand and its parliamentary caucus by their rules. Just as members are free to move on from the party, the party is free to leave members behind, if it acts in accordance with its rules of association and if it is willing to wear the political risk of such action with the electorate. Whether the change in affiliation is a result of the party acting to exclude the member of Parliament from its caucus or whether it is a result of the member of Parliament resigning or becoming independent, distortion of the proportionality of political party representation in Parliament as determined by electors equally results if the member continues to remain as a member of Parliament."

The above decision is not binding on this Court but New Zealand is a Commonwealth country and the case is persuasive. We also find the reasoning persuasive as the

factual situation the court was handling is, in a way, similar to that in the instant petitions.

In Uganda, during a Multiparty political dispensation, the electorate in their various electoral constituencies delegate 5 some of their disciplinary powers over their Members of Parliament to their respective political parties. This is why, during the time when the Multiparty Political System of governance is in operation, the electorate in their constituencies cannot exercise their disciplinary powers of 10 recalling any errant Member of Parliament under Article **83(1)(f)** of the Constitution. That is left to the political parties represented in Parliament to be exercised through their various organs.

In conclusion to these issues, we do find that the 2nd, 3rd 4th 15 to 5th respondents were expelled from the[NRM] party for which they stood as candidates for election to Parliament, a fact they do not deny. Upon their expulsion they left the Party. We follow the binding decision of this Court in the **Gorge Owor case** (supra) and hold that they vacated their 20 seats in terms of **Article 83(1)(g)** of the Constitution. Vacation of their seats was by operation of that constitutional Article.

They remained in Parliament as *de-facto* independent members of Parliament with an unconstitutional status. We therefore answer issues 1,4,5 and 6 in the affirmative.

Issues Nos 2,3 and 8

Alleged unconstitutional acts of the Right Hon. Speaker of Parliament.

We shall handle issues No.2 and No.3 together. The two issues are related and were submitted upon together.

Counsel for the petitioners, save for Counsel for the Petitioner in Constitutional Petition No. 25 of 2013, argued that the Rt. Hon. Speaker of Parliament acted unconstitutionally when by her ruling of 2nd May 2013 she declined to declare vacant the seats in Parliament of the 2nd, 3rd, 4th and 5th respondents and retained them in Parliament after their expulsion from their party. That they had *left* the Party and therefore, under **Article 83(1)(g)**, had vacated their seats in Parliament.

Counsel for the said petitioners submitted that the 2nd, 3rd, 4th and 5th respondents upon expulsion, from the NRM party, left the party and thus lost their seats in Parliament.

That the Speaker created a special category in Parliament when she allocated them seats of a category not envisaged by the Constitution.

It was submitted for the 2nd 3rd 4th and 5th respondents that
5 they were elected to Parliament by their constituencies. That the Speaker of Parliament had powers to allocate them seats as members of Parliament. That when she allocated them seats in Parliament that was in exercise of her powers. She did not thereby create a special category
10 of members of Parliament.

Article 81(4) provides that every Member of Parliament shall take the subscribed oath of allegiance and that of a member of Parliament. The members of Parliament then qualify to sit in the House under **Article 81(5).**

15 The Speaker of Parliament has power then to allocate seats to them in accordance with Rule 9 of the Rules of Procedure of Parliament. The rule directs the Speaker on how the seats are to be allocated.

The seats to the right hand side of the Rt. Hon. Speaker are
20 reserved for members of the political party in power.

Currently in the 9th Parliament, the NRM political party is the party in power.

The Leader of the Opposition and members of the opposition parties sit on the left hand side of the Rt. Hon. Speaker.

After their election, the 2nd, 3rd, 4th and 5th respondents took the prescribed oath, and occupied seats allocated to them on the right hand side of the Rt. Hon. Speaker because they belonged and subscribed to the NRM ruling party.

In our considered view, the Rt. Hon. Speaker is, under the Constitution and the rules of procedure of Parliament, empowered to allocate seats in accordance with the said rules made under **Article 94** of the Constitution.

When the 2nd, 3rd, 4th and 5th respondents were expelled from the NRM party, the Speaker was informed.

For members of Parliament elected on the sponsorship of a political party that is in government, their seats under the rules of procedure of Parliament can only be on the right hand side of the Speaker of Parliament. Those are the seats

they had earned when they came to Parliament and lost upon expulsion.

According to the evidence on record, the Rt. Hon. Speaker reallocated them seats not on her right hand side but in front of the clerk's table facing the Speaker.

Clearly this was in breach of the rules of procedure of Parliament made under **Article 94** of the Constitution and was therefore unconstitutional.

Earlier, in this judgment, while dealing with issue Nos. 1,4, 5 and 6, we in effect, also disposed of issue No. 2 above. We followed our earlier decision in the case of **George Owor vs Attorney General** (supra) and held that the said four members of Parliament vacated their seats in accordance with **Article 83(1)(g)** of the Constitution. The Rt. Hon. Speaker, therefore had no power to reallocate them seats since they were not members of Parliament any more. The ruling of the Rt. Hon. Speaker of 2nd May 2013 to the effect that the four members of Parliament should retain their seats in Parliament is therefore, inconsistent with and in contravention of the named constitutional provisions.

In result, we answer issue Nos. 2 and 3 in the affirmative.

We shall deal with issue No.7 later in the course of this Judgment.

Issue No. 8

The Rt. Hon Speaker of Parliament received a letter from the Secretary General of the NRM party informing her of the party's decision and requesting her to direct the Clerk to Parliament to declare the seats of the four respondents vacant. The Secretary General of NRM was asking her to exercise her jurisdiction. The Rt. Hon. Speaker has power under rules 7 and 9 of the rules of procedure of Parliament to preside over the sittings of the house, to preserve order and decorum and to allocate seats in the house.

It was in exercise of her jurisdiction under the said rules that she responded to the request of the Secretary General of NRM political party and also made her ruling on 2nd may 2013.

Our holding in the disposal of issues No.1, 4, 5 and 6 cleared the position of the seats of the 2nd, 3rd, 4th, and 5th respondents in Parliament.

We find, therefore, that the pronouncement by of the Rt. Hon. Speaker of Parliament of retaining the 2nd, 3r, 4th, and 5th respondents in Parliament and allocating them new seats was unconstitutional, though she was acting within her powers as Speaker of Parliament to pronounce herself on the matter. We therefore answer issue No. 8 in the negative.

Issues no. 9,10,11,12 and 13.

These issues concern certain acts of the Attorney General which were challenged as being unconstitutional in Constitutional Petition No.25 of 2013. We shall handle these issues together as they were argued together in the submissions of Counsel for the respective parties.

Counsel Peter.M.Walubiri for the Petitioner in Constitutional Petition No 25/2013 submitted, *inter alia,* that the Attorney General is the Principal legal advisor to Government, but his advice is generally required in respect of contracts and agreements under **Article 119(5**) of the Constitution. According to him, the Attorney General's advice is also required in respect of Government defined in

a narrow sense which covers ministers and civil servants working under them as part of the Executive. He was supported on this by counsel for the 2nd, 3rd, 4th and 5th respondents.

5 Counsel for the Petitioners in Constitutional Petition Nos.16, 19, and 21 and counsel for the Attorney General/cross Petitioner in Constitutional Petition No. 25 of 2013, submitted that the Attorney General rightly advised the Rt. Hon Speaker of Parliament in exercise of 10 his Constitutional mandate under **Article 119** of the Constitution. That the Legislature is one of the organs of Government that the Attorney General is constitutionally mandated to advise.

15

Resolution of Issue Nos. 9,10,11,12 and 13

The Attorney General (AG)'s office is a creature of **Article 119** of the Constitution and his/her role is defined in **clause (3)** which provides:-

20 **119 (1)...**

(2)…

(3)… "the Attorney General shall be the principal legal advisor of the Government".

Article 119(4) lays out the functions of the Attorney
5 General.

The Supreme Court Considered the role of the Attorney General in **Bank of Uganda vs Banco Arabe Espanol, Civil Appeal No.1 of 2001**.

It was analysing a situation where the Attorney General
10 had given an opinion in respect of a contract between the Bank of Uganda and a third party. The Supreme Court, in the judgment of Justice G.W.Kanyeihamba JSC, (as he then was), with which the other Justices concurred, held;

> **"In my view, the opinion of the Attorney**
> 15 **General as authenticated by his own hand and signature regarding the laws of Uganda and their effect or binding nature on any agreement, contract or other legal transaction should be accorded the**
> 20 **highest respect by government and public institutions and their agents. Unless there**

are other agreed conditions, third parties are entitled to believe and act on that opinion without further enquires or verifications. It is also my view, that it is improper and untenable for the Government the Bank of Uganda or any other public institution or body in which the Government of Uganda has an interest to question the correctness or validity of that opinion in so far as it affects the rights and interests of third parties."

At this stage, it is worth noting the contents of **Article 162(2)** of the Constitution.

"In performing its functions, the Bank of Uganda shall conform to this Constitution but shall not be subject to the direction or control of any person or Authority."

The Bank of Uganda is an independent institution but according to the Supreme Court, the Attorney General has the duty and mandate to advise the Bank as an institution of Government. The court held that the Attorney General's opinion

> **“should be accorded the highest respect by such a public institution.”**

We note that this is

> **“in so far as that opinion affects the rights and interests of third parties,”**

It would be

> **“improper and untenable for the Bank or any other government institution to question the correctness or validity of that opinion.”**

The Supreme Court had occasion again to consider and pronounce itself on the mandate of the Attorney General in **Civil Appeal No. 06 of 2008 Gordon Sentiba and 2 others and the Inspectorate of Government(supra)** and later in **Constitutional Application No.53 of 2011 Parliamentary Commission and Twinobusingye Severino and the Attorney General (supra)**. The Court held:-

> **“All legal proceedings by or against the Government are instituted by or against the Attorney General.”**

The Court quoted its decision in **Gordon Sentiba and Others vs IGG**, (Supra) in which it held:

> **"It is trite law that the Attorney General is the principal legal advisor to Government as provided for in Article 119(3) of the Constitution and that the legal opinion of the Attorney General is generally binding on government and public institutions like the respondent (IGG). Therefore, the respondent is not correct in submitting that it can intervene or take over a case where the Attorney General has decided not to take action in order to prevent the Government from losing colossal sums of money. The respondent is a creature of the Constitution and statute and its functions and powers are clearly laid down in those legal instruments..."**
>
> **We therefore find and hold that Articles 119 and 250 of the Constitution and the above decisions set out the correct legal**

> **position regarding the function of the office of the Attorney General**."(sic)

This Court also, had occasion to consider the powers and role of the Attorney General. On the issue of whether the Attorney General could advise the Electoral Commission and whether such advice was binding, this Court in **Constitutional Petition No.1 of 2006 Kabagambe Asol and 2 Others versus The Electoral Commission and Dr. Kiiza Besigye**(supra) held:-

> **"First, we do not accept that the Electoral Commission is subject to the "direction or control" of the Attorney General or any other authority. It is an independent public institution subject to some other provisions of the Constitution. Article 119 of the Constitution is not one of them. There are other provisions, for example relating to powers of the judiciary and the legislature to which Article 62 of the Constitution is subject. The 1995 Constitution created many other independent institutions e.g. the Human**

Rights Commission, the Judicial Service Commission, the Public Service Commission e.t.c which can be advised by the Attorney General but are not bound to follow his advice. It would indeed be absurd if Article 119 of the Constitution was construed to mean that the courts of law of this country, which are the third arm of the state, are bound by the advice of the Attorney General. Article 128 (1) of the Constitution is very clear and instructive.

...In the instant case, we are dealing with the powers of the Attorney General under Article 119 of the Constitution visa àvis Article 62 of the Constitution which vests the Electoral Commission with independence.

Lastly, there is no doubt that the Attorney General is the principal legal advisor to government. The English meaning of the words "advise, advice and advisor" are

common knowledge to anyone with some knowledge of the English language. No advice can be binding on the entity being advised. In the judgement of the court, we stated;

"Though the Attorney General is the principal advisor of Government, the Constitution does not provide anywhere that such advice amounts to a directive that must be obeyed. In case of the Electoral Commission, it can seek, receive and accept or reject the advice of the Attorney General."

What is clear from the cases above quoted is that the Attorney General as principal legal advisor to government is mandated to advise all government institutions including independent institutions like the Bank of Uganda. The Attorney General's advice should be accorded the highest respect by public institutions including the constitutionally independent ones like the Bank of Uganda, and the IGG.

According to **Kabagambe Asol and another vs The Electoral Commission** (supra) the advice of the Attorney

General to independent institutions of Government may be sought and may be given by the Attorney-General but such advice does not constitute commands from the Attorney General. Independent institutions could receive the advise and study the same and after due consideration, accept the advice or respectfully disagree with the advice.

We wish to clarify that this Court, in **Kabagambe Asol and another vs the Electoral Commission**(Supra), was handling a case specifically in respect of advice given by the Attorney General to an independent institution which is constitutionally insulated and declared to be independent by the Constitution. The advice being considered was in respect of performance of functions of the constitutionally independent institution.

This Court made it clear, and held:-

> **"...in the instant case, we are dealing with the power of the Attorney General under Article 119 of the Constitution visa vis article 62 of the Constitution which vests**

the Electoral Commission with independence."

In the petitions before us we have not found a provision the equivalent of **Article 62** in reference to Parliament. This distinguishes this case from that of **Kabagambe Asol and another versus The Electoral Commission** (Supra)

In **Gordon Sentiba and 2 others and Inspectorate of Government** (supra) and the **Parliamentary Commission and Twinobusingye Severino and the Attorney General** (supra), the Supreme court was considering the advice of the Attorney General in relation to organs of Government Generally, and in a situation similar to the one in these Petitions. We find that we are bound to follow the Supreme Court holding in the quoted cases.

Therefore, the Attorney General as principal legal Advisor of Government is mandated to advise Government and all Government organs and public institutions including the Legislature and the Rt.Hon.Speaker of Parliament his advise is generally binding.

In exercise of that mandate, the Attorney General would not be acting unconstitutionally when he/she offers legal advice to the Rt. Hon. Speaker of Parliament.

Should this Court intervene in such a case and determine
5 the propriety of the Attorney General's exercise of powers given to him by the Constitution? The Supreme Court considered such an issue and offered guidance in **Attorney General versus Major General Tinyefuza Constitutional Appeal No.1 of 1997**. on page 11 G.W.Kanyeihamba, JSC
10 (as he then was), held:

> "**Finally, I wish to comment on another principle which often crops up in adjudicating petitions of this kind. That principle concerns the extent to which**
> 15 **Courts should go in interpreting and concerning themselves with matters which are, by the Constitution and law, assigned to the jurisdictions and powers of Parliament and the Executive… the rule**
> 20 **appears to be that Courts have no jurisdiction over matters which are within the Constitutional and legal powers of the**

legislature or the executive. Even in cases, where Courts feel obliged to intervene and review legislative measures of the legislature or administrative decisions of the executive when challenged on the grounds that the rights or freedoms of individuals are clearly infringed or threatened, they do so sparingly and with the greatest of reluctance.

...The province of the Court is solely to decide on the rights of individuals, not to inquire how the executive, or executive officer, perform duties in which they have discretion. Questions (which are) in their nature political or which are by the Constitution and Laws, submitted to the executive can never be made in this Court.

...Courts, and especially the Supreme Court, are not the only actors on the Constitutional stage is equally applicable to Uganda. The Constitution provides that

the Constitutional platform is to be shared between the three institutional organs of Government whose functions and powers I have already described (supra). The Uganda Constitution recognises these organs as the Parliament, the Executive and the Judiciary. It was not by accident either that it created, described and empowered them in that order of enumeration. Each has its own field of operation with different characteristics and exclusivity and meant by the Constitution to exercise it powers independently. The doctrine of separation of powers demands and ought to require that unless there is the clearest of cases calling for intervention for the purpose of determining constitutionality and legality of action or the protection of the liberty of the individual which is presently denied or imminently threatened, the Courts must refrain from entering arenas not assigned to them either by the Constitution or laws

> **of Uganda. It cannot be over-emphasised that it is necessary in a democracy that Courts refrain from entering into areas of disputes best suited for resolution by other government agents. The Courts should only intervene when those agents have exceed their powers or acted unjustly causing injury thereby."**

In the instant case we do not find any cause to fault the Attorney General in the exercise of his constitutional powers.

The Attorney General was acting within his powers under **Article 119** of the Constitution. It was neither contrary nor in contravention of the Constitution. We therefore, answer issue Nos. 10 and 12 in the negative.

Issue No.9 arises from the act of the Attorney General giving advice to the Rt. Hon. Speaker of Parliament to the effect that the only persons who could sit in Parliament under a multi-party political system are members of political parties and representatives of the army and this was challenged for being inconsistent with and in contravention of **Article 78** of the Constitution.

Article 78 defines the composition of Parliament.

The enlisted members in **Article 78(1) (a)(b)(c)** and **(d)** are more than what was covered in the relevant Attorney General's advice to the Rt. Hon. Speaker.

5 The Attorney General's representative Mr. Chebroin Barishaki, submitted that the advice was in reference to the respondent Members of Parliament and thus in the context of the expulsion of directly elected Members of Parliament. Further, that as such there was no need for

10 the Attorney General to refer to the other category of Ex-officio members under **Article 78(1) (d).** The Attorney General's letter did not refer to all the categories of the members of Parliament as contained in **Article 78** of the Constitution.

15 Our appreciation of the Attorney General's advice to the Rt. Hon. Speaker is that it was not comprehensive on the content of **Article 78** of the Constitution. Whether the Attorney General's explanation that he did not have to refer to the whole article is satisfactory to this Court or not, is in

20 our considered view, not an issue for constitutional interpretation. The Attorney General was giving advice in the exercise of his constitutional powers.

We therefore answer issue No.9 in the negative.

Issue No.11

We have already found that the Attorney General has the Constitutional mandate to the advise the Rt. Hon. Speaker. The advice to the Rt.Hon.Speaker was in respect of the Attorney General's understanding of **Article 83(1)(g)** of the Constitution. His opinion was that the 2nd, 3rd, 4th and to 5th respondents stay in Parliament after their expulsion from their Party was inconsistent with and in contravention of **Article 83(1)(g)** of the Constitution.

He restricted his opinion on the matter to the interpretation of **Article 83(1)(g)**. The Attorney General did not extend his opinion to cover **Article 86(1)(a)** of the Constitution. We find **Article 86(1)(a)** of the Constitution inapplicable to the situation pertaining to the instant consolidated constitutional petitions.

Article 86(1)(a) provides:

> **"The High Court shall have jurisdiction to hear and determine any question whether (a) a person has been validly elected a**

member of Parliament or the seat of a member of Parliament has become vacant."

This article provides for, *inter alia*, the jurisdiction of the
5 High Court.

The Article is primarily concerned with the validity of an election process that leads to a person being elected to Parliament.

The Supreme court had occasion to consider the provisions
10 of **Article 86** of the Constitution in **Baku Raphael Obudra and another and the Attorney General. Constitutional Appeal No. 1 of 2005** Justice Tsekooko, JSC held:-

"Article 86 is concerned with
15 **consequences of elections.**

...thus in clause (1) the Article confers on the High Court jurisdiction to hear and determine disputes arising from the election of the members of Parliament, the
20 **Speaker and the Deputy Speaker of Parliament."**

Justice Katureebe JSC explained that using **Article 86**

> **"the framers of the Constitution decided to provide for how questions arising from a Parliamentary election are to be handled and who handles them."**

Justice Mulenga JSC held:-

> **"The clear objective of Article 86 is to vest jurisdiction by stating the fora by which disputes arising from parliamentary elections are to be resolved. The Article clearly states it is to be by the High Court, and in case of a party aggrieved by its decision by the court of Appeal."**

This is neither the issue upon which the Attorney General was giving advice nor is it an issue with which the Petitions before us are concerned.

The instant consolidated constitutional Petitions and the interlocutory applications arising therefrom are concerned with different circumstances. They are in respect of validly elected members of Parliament vacating/losing their seats

in Parliament in circumstances that differ from those covered by **Article 86(1)(a)** of the Constitution.

It was submitted that it was only the High Court which had the power to declare a seat of a member of Parliament
5 vacant under **Article 86(1)(a).**

We disagree. A matter necessitating the interpretation of **Article 86(1)(a)** could appropriately be placed before the Constitutional Court. During the resolution of the controversy between the parties, the Constitutional Court
10 may find it appropriate to grant a remedy under **Article 137(4)** of the Constitution. The remedy or remedies this Court may grant might include declaring the seats of the concerned MPs vacant. The Jurisdiction in **Article 86** of the Constitution, therefore, is not exclusively the preserve
15 of the High Court.

This Court will not condemn the Attorney General as having unconstitutionally given advice to the Hon. Rt. Speaker contrary to a Constitutional provision on which the Attorney General, never gave his advice to the Rt. Hon
20 Speaker. The advice the Attorney General gave to The Rt. Hon. Speaker of Parliament was not contrary to and did not

contravene the provisions of **Article 86(1)(a)** of the Constitution.

We therefore answer issue No.11 in the negative.

5 **Issue No.13.**

It was submitted by Counsel Peter. M. Walubiri that once Constitutional Petition No. 16 of 2013 in which the Attorney General was the 1st Respondent was in court, the act of the Attorney General advising the Speaker of 10 Parliament to reverse her ruling on whether the seats of the expelled Members of Parliament are vacant when the said ruling is subject to Courts interpretation is inconsistent with and in contravention of **Article 137** of the Constitution. **Article 137** of The constitution creates the 15 Constitutional Court. The Article defines the jurisdiction, the composition, powers, processes, procedures and a number of other matters that affect that Court.

The advice the Attorney General gave to the Rt. Hon. Speaker of Parliament was in exercise of his constitutional 20 powers under **Article 119** of the Constitution. In offering

advice to Government, the Attorney General would study and interpret the laws and the Constitution.

The Attorney General as the Principal legal advisor to Government is competent to advise Government, before and after, suits are filed in courts of law. The power of the Attorney General to Advise Government on legal matters under **Article 119** of the Constitution is not limited to any specific areas or time. The situation is not different in respect of matters that arise under **Article 137** of the Constitution. The advice would not interfere with or in any way take away the powers of the Constitutional Court guaranteed by **Article 137.** We, therefore, answer issue No.13 in the negative.

Issue No. 7

We shall now deal with issue No. 7 which was framed by court in the following terms:-

Whether the court should grant a temporary injunction stopping the said members of Parliament from sitting in the House pending the determination of these Constitutional Petitions.

5 On the 6th September 2013, by a majority of four, (4) to one (1), this court granted the Petitioner /Applicants a mandatory injunction in the above Constitutional Petitions and Applications under this issue.

We reserved our full reasons for that grant until the Court 10 would deliver its judgment in the said Petitions and Applications. We shall now give those reasons after a recap of the submissions of counsel for the respective parties.

Submissions by counsel for the Petitioner/Applicants

15 Counsel for the Petitioner /Applicants submitted that the application for the mandatory injunction they prayed court to grant was grounded in **Sections 64 and 98 of the Civil Procedure Act, Rule 2(2)** of the **Judicature (Court of Appeal Rules, S.I 13-10, Rule 23 of the Constitutional** 20 **(Petitions and Reference) Rules, S.I No.91 of 2005** and **Article 126(2)** of the Constitution.

They emphasized that there was urgent need for court to bar the 2nd, 3rd, 4th and 5th respondents from continued stay in Parliament and from participation in the proceedings of the House unconstitutionally.

5 Counsel submitted that the Rt. Hon. Speaker of Parliament, having previously participated in the proceedings of the NRM Central Executive Committee, (CEC), as its member, which party organ determined the fate of the Respondents, acted in contravention of the
10 principles of natural justice when she went ahead and ruled on 2nd May 2013 over the matter of the 2nd, 3rd 4th and 5th respondents having vacated their seats in Parliament. It was counsel's further submission that the said ruling of the Rt. Hon. Speaker undermined the
15 sovereignty of the people and the supremacy of the Constitution of the Republic of Uganda in contravention of **Articles 1, 2** of the same.

They contended that the Rt. Hon. Speaker's ruling and the continued stay of the 2nd, 3rd, 4th and 5th respondents in
20 Parliament resulted in irreparable and, grave damage and harm to the Petitioner/Applicants which could not be compensated by way of damages. Counsel contended

further that according to the Petitioner/Applicant's pleadings and the evidence on record, they had raised serious issues for constitutional interpretation. They strongly argued that the case for the Petitioner/Applicants established a status quo that warranted the grant of a mandatory injunction. To them, the balance of convenience lay in favour of the Petitioner/Applicants to whom a greater risk of injustice, if the remedy applied for was not granted, lay as opposed to the 2nd, 3rd 4th and 5th respondents.

In conclusion, counsel submitted that the Petitioner/Applicants had satisfied all the necessary conditions for the grant to them of the mandatory injunction they had prayed for.

Submissions for counsel for the 2nd, 3rd, 4th and 5th respondents in Constitutional Application14 and 21 of 2013 and counsel for the Petitioner in Constitutional Petition No. 25 of 2013

Counsel for the 2nd, 3rd, 4th and 5th respondents, with whose submissions counsel for the Petitioner in Constitutional Petition No. 25 of 2013 associated himself, vehemently opposed the application. They contended that mandatory injunctions were unknown in the constitutional jurisprudence of this country. Counsel submitted that if granted, the mandatory injunction would wholly settle the matters in controversy between the parties in the instant Petitions and Applications yet, all that was left was for the court to come out with its judgment in the matter. They contended further that the Petitioner/Applicants had not pleaded the mandatory injunction they prayed for. To them, there was no status quo for the court to preserve.

It was counsel for the 2nd, 3rd 4th and 5th respondents' further submission that the said respondents are accountable to Parliament and not to the NRM party and it would be wrong to require them to temporarily vacate their seats in Parliament.

To counsel, the Petitioner/Applicants had failed to establish any of the required conditions that would justify court in granting them the injunction they prayed for.

They prayed court to dismiss the Applications.

The Court's further reasons

The following are the further reasons for our decision.

We were satisfied that the remedy of a mandatory injunction was no stranger to the law of this land. We found that **Sections 64** and **98 the Civil Procedure Act, Cap 71 of the laws of Uganda** and **Rule 2 (2) of the Judicature (Court of Appeal Rules directions)** S.I.13-10 are a sufficient legal basis for the entertaining by court, of the applications which were also properly brought before Court.

We were then, as we are now, acutely aware that this court in **Constitutional Application No.29 of 2011 Nasser Kiingi Vs Kampala Capital City Authority and the Attorney General** had given a mandatory injunction to the applicant to restore the peaceable status quo that existed before it had been ousted by the respondents and their agents. But even if the remedy of the mandatory injunction the respondents prayed court for was to be granted by court for the first time in the history of the constitutional jurisprudence in this jurisdiction, that

should be no reason for court to refrain from granting the remedy if court considered it appropriate to do so. There is, in our view, always a first time and that is how precedents are set and how jurisprudence evolves.

We were, therefore, satisfied, that there was then need to bar the 2nd, 3rd, 4th and 5th respondents from their continued unconstitutional acts of stay in Parliament and participation in its activities given the clear provisions of **Article 83 (1) (g)** of the Constitution. The said continued stay and participation undermined then, as it still undermines to-day, the peoples' sovereignty and the supremacy of the Constitution contrary to the provisions of **Articles 1** and **2** thereof.

We accepted the Petitioner/Applicant's counsel's contention that the Rt. Hon. Speaker of Parliament, having participated in the proceedings of the National Executive Committee, NEC, of the NRM party which determined the fate of the 2nd, 3rd, 4th and 5th respondents by dismissing them from the party, should have disqualified herself from presiding over the proceedings in Parliament where she eventually ruled as she did on the 2nd day of May 2013.

The Rt. Hon Speaker of Parliament by so presiding over the matter the subject of the instant Constitutional Petitions/ Applications was in effect, a judge in her own cause, contrary to the principles of natural justice. This offended
5 **Articles 28** and **42** of the Constitution.

We were satisfied, therefore, that the Petitioner/Applicants had, even only that far, established a strong primafacie case with a high probability of success. See **Humphrey Nzeyi v Bank of Uganda & others Constitutional**
10 **Application No.39 of 2012** and the decision of Supreme Court of Canada in **R.J Macdonald Inc Vs Canada Attorney General) R.J.R** which cases are binding and highly persuasive respectively. The decision that the Rt. Hon Speaker of Parliament reached and pronounced in the
15 matter in those circumstances could be successfully challenged as being no decisions at law. See **De Souza Vs Tanga Town Council, Civil Appeal No. 89 of 1960** reported in**1961 EA 377** at page **388** where the East African Court of Appeal held;

20 > **"If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the**

same decision would have been arrived at in the absence of the departure from the essential principles of justice. That decision must be declared to be no decision."

The controversy between the parties to the consolidated Constitutional Petitions and the two application Nos. 14 and 23 of 2013 have raised serious issues of constitutional interpretation as to whether, when the 2nd, 3rd, 4th and 5th respondents were expelled from the NRM political party, the party for which they stood as candidates for and for which they were elected as members of Parliament, or when they ceased to be members thereof, they left Parliament and therefore vacated their seats. The constitutionality of the acts of the Rt. Hon. Speaker of Parliament is also questioned. These, together with other matters involved in the instant Petitions and Applications before the court, we found to be serious matters and that the applications were neither frivolous nor vexatious.

Whether the injunction granted is classified as prohibitive or mandatory, we find arguments in that direction barren. What matters is of what practical consequence the

injunction is likely to be. See **Films Rover International Ltd Vs Cannon Films Sales Ltd 1987 I WLR 670.**

The principle to guide court in whatever course to take was what is likely to cause the least irremediable prejudice to one party or the other. See **National Commercial Bank Vs Orient Co-operation Ltd Jamaica of 2009 UKPC.** See also **American Cynamid [1975] AC 396.** The most important consideration for court to bear in mind in cases of this nature is as to which of the parties bore the greater risk of suffering injustice if the remedy sought was to be withheld by court.

We gave full attention to the question of whether there was a status quo that the issuing of a mandatory injunction would preserve. At the time of the granting of the injunctive order, we held that view. The peaceable status quo immediately prevailing before the situation giving raise to the dispute among the parties herein was that the 2nd, 3rd, 4th and 5th respondents had vacated their seats in Parliament by operation of the law. Since the said vacation of seats, the 2nd, 3rd, 4th and 5th respondents had remained in Parliament in highly constitutionally questionable circumstances. We found it necessary to grant a

mandatory injunction to restore the said peaceable status quo as at the said material time. See **Shepherd Homes Ltd vs Sandham [1971]CH 340** at **404.** We went ahead and did exactly that on the 6th September 2013. It is, in
5 our considered view, and we so hold, that it is immaterial that the mandatory injunction we granted substantially addressed the matter in controversy between the parties. This is permissible in law. In proper cases, mandatory injunctions do that. In the case of **Woodford & Anor v**
10 **Smith & Anor [1970] 1 All ER1091** Megarry J held:

> **"I do not think that there is anything to prevent the court in a proper case from granting on motion substantially all the relief claimed in the action. It is true that**
> 15 **in Dodd v Amalgamated Marine Workers' Union(1923)93 LJCh at 66,129 LT at 402 it was said in the Court of Appeal that it was not the 'usual practice' or the 'general rule of practice' to grant on motion all the**
> 20 **relief claimed in the action. But this language is general rather than absolute, the judgments are very brief, no reasons**

are given, and there have been later decisions. Thus in Bailey (Malta) Ltd v Bailey [1963] 1 Lloyd's Rep 595 at 598, Lord Denning MR flatly said that it seemed to him that there was 'no such rule'. In this, he based what I may call a reasoned demolition of the supposed rule, the basis of which seems to have been an objection to trying the same point over. In the Bailey case Harman LJ referred to the supposed rule as a theory which had in his view 'long been exploded'...Plainly in the present case the objection which counsel for the defendants raised but did not press is no obstacle to granting the injunction sought. In my judgment, looking at the case as a whole, there are no grounds on which the court should refuse to grant an injunction."

Also, in the case of **Despina Pontikos [1975]1 E.A 38**,the Court of Appeal of Kenya cited the case of **Bailey (Malta) v Bailey [1963]1 Lloyd Rep.595**,holding that a mandatory

interlocutory relief can be granted even if it is in substance a settlement of the whole relief claimed in the main action.

We felt sufficiently fortified by the above authorities in our deliberate demolition of the general restrictive rule on injunctions as a theory that had been long exploded and had no place in the instant Constitutional Petitions and Applications. We, therefore saw no ground on which the court should have refrained from granting the mandatory injunction prayed for.

We were persuaded by the submissions of counsel for the Applicant/Petitioners and that of the Petitioner in Constitutional Petition No. 19 of 2013 that the acts and the conduct of the 2nd, 3rd,4th and 5th Respondents and the acts, of the Rt. Hon. Speaker of Parliament complained of, those of the 2nd, 3rd, 4th and 5th respondents and their conduct would set a wrong precedent and promote indiscipline, mayhem, impunity, hypocrisy, opportunism, lack of accountability to the people, all of which amount to an affront on the sovereignty of the people and supremacy of the Constitution as provided for in **Articles 1** and **2** of the Constitution.

The voting pattern of the NRM party in Parliament was also distorted. We found it immaterial that the distortion was due to a mere 4 errant members of that party in Parliament. In a multiparty political dispensation, even a distortion caused by a single vote is grave harm to the affected political party. The New Zealand case of **SC CUV 9/2004; Richard William Prebble, Ken Shirley, Rodney Hide & Muriel Newman & Donna Awatere Huata** is very pertinent and instructive. The cumulative effect of all this, we were satisfied, was more than harm and irreparable damage to the NRM party.

Another most compelling reason that persuaded us to grant the Petitioner/Applicant's the rare remedy of a mandatory injunction they prayed for even when all that was left was for Court to pronounce its final judgment in the Constitutional Petitions before it, was the glaring illegality of an unconstitutional nature that was so clearly exhibited in the impugned acts and omissions of the Rt. Hon. Speaker of Parliament, those of the 2nd, 3rd, 4th and 5th respondents and their conduct directed against the sovereignty of the people and the supremacy of the Constitution. The impugned acts, omissions and conduct

signified to court a possible beginning of a most dangerous and highly undesirable development that could lead to an effective overthrow of the constitutional order that the people of Uganda established for themselves and their posterity through the promulgation of the 1995 Constitution. A constitutional order established by the people recalling their history that had been characterized by grave political and constitutional instability. A people that recognized their bitter struggles against the forces of tyranny, oppression and exploitation in their society. A people who ordained for themselves the duty, at all times, to defend their Constitution. In our very considered opinion, this court would not sanction such an illegality once it was brought to its attention, see **Makula International Vs Cardinal Nsubuga Wamala [1982] HCB 11**. For each day that would go by without court curbing that illegality would, in our view, be a day too many. The situation , in our very considered opinion called for immediate containment in the most cost effective manner through appropriate judicial orders, if only to forestall, even the mere contemplation by anybody, of exploring other possible ways of defending the mutually agreed upon constitutional order of this country as envisaged in **Article**

3(4) of Constitution. We found it necessary to instantly stop that illegality which to us signaled a possible return to anarchy, impunity and lack of accountability by the leaders in our society to the people. This prompted us to grant the rare remedy of a mandatory injunction, even though in the interim.

The above are our full reasons for the orders of the 6th September 2013. We find those reasons valid today and sufficient to warrant our answering issue No.7 in the affirmative, as we indeed hereby do.

Following our findings, on the above 13 issues, and since our sister Lady Justice Faith Mwondha JA/CC agrees, with only our brother Justice Remmy Kasule dissenting, we, by a majority of four to one grant Constitutional Petition Numbers 16, 19, 21 and the Cross Petition in Constitutional Petition No. 25 of 2013. Constitutional Petition No. 25 of 2013 is dismissed.

On the 6th September 2013 we granted Constitutional Applications No. 14 and 25 of 2013 for which we have given our full reasons above.

In the result, we declare that:

1. **The expulsion from a political party is a ground for a member of Parliament to lose his/her seat in Parliament under Article 83(1)(g) of the Constitution.**

2. **The act of the Rt. Hon. Speaker in the ruling made on the 2nd of May 2013, to the effect that the four Members of Parliament who were expelled from the National Resistance Movement (NRM), the party for which they stood as candidates for election to Parliament should retain their respective seats in Parliament is inconsistent with and in contravention of Articles 1(1)(2)(4), 2(1) 20(1)(2), 69, 71, 72, 74, 78(1), 79(3), 81(2), 83(1)(g),83(3) of the Constitution of the Republic of Uganda.**

3. **The Rt. Hon. Speaker of Parliament in her communication to the House on the 2nd day of May 2013, created a peculiar category of Members of Parliament unknown to the Constitution and**

contrary to Articles 1(1)(2)(4), 2(1)(2), 20(1)(2), 21, 43(1)(2)(c), 4, 69, 7, 73, 77(1)(2), 78(1), 79(3), 80, 81(2), 83(1)(g)(h), 83(3) of the Constitution.

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4. The continued stay in Parliament of the 2nd, 3rd, 4th and 5th respondents as Members of Parliament after their expulsion from the NRM party on whose ticket they were elected is contrary to and inconsistent with Articles 1(1), 2(1), (2)(4), 29(1)(e), 69(1), 72(1), 72(4), 78(1)(a) and 79(3) of the Constitution.

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5. The said expelled Members of Parliament who left and or ceased being members of the Petitioner (Constitutional Petition No. 21/2013) vacated their respective seats in Parliament and are no longer members of Parliament as contemplated by the Constitution.

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6. The Rt. Hon. Speaker had Jurisdiction and a duty to make a ruling on the matter before the House but she discharged the said duty

unconstitutionally in contravention of the Constitution notably Articles 28 and 42 thereof.

7. **The act of the Attorney General of advising on persons who can sit in Parliament under a multiparty political system, in the context and peculiar circumstances of the instant Constitutional Petitions was not inconsistent with nor in contravention of Article 78 of the Constitution.**

8. **The act of the Attorney General of advising that after their expulsion from the NRM party, Hon. Theodore Ssekikubo, Hon. Wilfred Niwagaba, Hon. Mohammed Nsereko and Hon. Barnabas Tinkasimire are no longer members of Parliament, is neither inconsistent with nor in contravention of Article 83(1) (g) of the Constitution.**

9. **The act of the Attorney General of advising the Right Honourable Speaker of Parliament to declare the seats of Hon. Theodore Ssekikubo, Hon. Wilfred**

Niwagaba, Hon. Mohammed Nsereko and Hon. Barnabas Tinkansimire in Parliament, became vacant on their expulsion from the NRM party was neither inconsistent with nor in contravention of Article 86 (1) of the Constitution.

10. The act of the Attorney General of advising the Right Honourable Speaker of Parliament to reverse her ruling regarding the seats of Hon. Theodore Ssekikubo, Hon. Wilfred Niwagaba, Hon. Hon. Mohammed Nsereko and Hon. Barnabas Tinkansimire in Parliament was neither inconsistent with nor in contravention of Article 119 of the Constitution.

11. The act of the Attorney General of advising the Rt. Hon. Speaker of Parliament to reverse her ruling on whether the seats of Hon. Theodore Ssekikubo, Hon. Wilfred Niwagaba, Hon. Mohammed Nsereko, and Hon. Barnabas Tinkansimire, are vacant when the said ruling was the subject of the court's interpretation in Constitutional Petition No. 16 of 2013, where the

Attorney General is the first respondent was neither inconsistent with nor in contravention of Article 137 of the Constitution.

Court Orders

The court orders as follows:

1. **The 2nd, 3rd, 4th and 5th respondents are hereby ordered to vacate their seats in Parliament forthwith.**

2. **The Electoral Commission is directed following the service to it of a copy of this judgment by the 1st respondent to conduct by elections in the constituencies hitherto represented by Hon. Theodore Ssekikubo, Hon. Wilfred Niwagaba, Hon. Mohammed Nsereko, and Hon. Barnabas**

Tinkansimire in accordance with the electoral laws of this Country.

3. **A Permanent Injunction is hereby issued restraining the Rt. Hon. Speaker and the Rt. Hon. Deputy Speaker of Parliament from allowing the 2nd , 3rd, 4th and 5th respondents to continue sitting in Parliament or to take part in any parliamentary activity or any of its committees and to stop payment to the 2nd, 3rd, 4th, and 5th respondents of any salaries, allowances, other emoluments and entitlements, save those that may have accrued to them immediately before the issuance of these orders.**

4. **The mandatory injunction issued by this court on 10th September 2013 is hereby vacated.**

5. **We grant costs to the successful parties in the consolidated Constitutional Petitions and applications with a Certificate for two Counsel.**

   We so order.

Dated at Kampala this **21st** day of **February 2014**.

5 **Hon. S.B.K Kavuma**
AG. DEPUTY CHIEF JUSTICE/PCC,

Hon. A.S Nshimye
10 **JUSTICE OF APPEAL/JCC,**

Hon. Remmy Kasule
15 **JUSTICE OF APPEAL/JCC,**

Hon. Faith Mwondha
20 **JUSTICE OF APPEAL/JCC,**

Hon. Richard Buteera
JUSTICE OF APPEAL/JCC,