

UGANDA / JUDGMENT

Naloda v Attorney General (Constitutional Petition No. 28 of 2014) [2021] UGCC 23 (23 August 2021) [2021] UGCC 23

COURT

Constitutional Court of Uganda

BEFORE

Cheborion, JCC, Kibeedi Mutangula, JCC, Musoke,
JCC, Mulyagonja, JCC, Egonda-Ntende, JCC

CASE / FILE NUMBER

Constitutional Petition No. 28 of 2014

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THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[*Coram: Egonda-Ntende, Musoke, Barishaki Cheborion, Muzamiru Kibeedi, Mulyagonja JJCC*]

CONSTITUTIONAL PETITION NO. 28 OF 2014

BETWEEN

Naloda Peter Petitioner

AND

Attorney General of Uganda \$=\$ Respondent

JUDGMENT OF FREDRICK EGONDA-NTENDE, JCC

Introduction

- \$\\lceil\$ 1 \\rceil\$ This court in *Oloka Onyango & 9 others v Attorney General* [2014] UGCC 14. nullified the Anti-Homosexuality Act on the ground that on the day it was passed by Parliament, the August House did not have the requisite quorum for transacting such business. This court ordered the Attorney General to pay 50% of the petitioners' costs. The petitioner, Peter Naloda, an electronics engineer and a crime preventer, is outraged that this burden of costs will fall on the people of this country, while the members of Parliament, that absented themselves from the 9th Parliament on the relevant day or days, will

go scot free.

- \$[2]\$ Mr Peter Naloda has therefore brought this petition, supported by his own affidavits, under articles 137 (1), (3) (a) & (b) and 137 (4) of the Constitution. The petition contends:

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'(a) THAT the act of members of the 9th Parliament to absent themselves from the Parliamentary sitting on 20th December 2013 during the voting on the Anti-Homosexuality bill was in contravention of Articles 1 (2) & (3), 79, 91 (1) and 94 (1) of the Constitution of the Republic of Uganda and Rule 101(1) of the Parliamentary Rules of Procedure:

- (b) THAT it's against the spirit of the Constitution for members of Parliament to be the ones to choose on which parliamentary sitting to attend or absent themselves from the functions assigned to them by Articles 85 (1) & (2) and 94 of the Constitution of the Republic of Uganda, 1995 and Rule 101 (1) of the Parliamentary Rules of Procedure:
- c) THAT if we left the act of members of Parliament of absenting themselves from parliamentary sittings to stand we would have not given respect to articles 1 (2) & (3) and 2 (1) & (2) of the Constitution of the Republic of Uganda;
- (d) THAT the act of members of the 9th Parliament to absent themselves on 20th December 2013 was in contravention of the oath of Allegiance & oath of Member of Parliament and calls for the use of sections 11 (1) and 20 (1) of the Anti-Corruption Act, 2009:
- (e) THAT the act of members of 9th Parliament to absent themselves calls for articles 3 (2) and 164 (2) and XXVI National Objectives and Directives Principles of State Policy;

\$[3]\$ The petitioner seeks the following declarations and orders:

I. DECLARATIONS THAT:

- (a) The act of the members of 9th Parliament to absent themselves during the voting on **Anti-Homosexuality Bill** on 20 December 2013 is inconsistent with and in contravention of Articles 1 (2) & (3), 79, 91 (1) and 94 (1) and oath of allegiance & and oath of Member of Parliament of the Constitution of the Republic of Uganda and Rule 101 (1) of the Parliamentary Rules of Procedure and thus they suspended the Constitution of the Republic of Uganda hence they committed offence of treason and should be punished according to the law.
- (b) The act of members of 9th Parliament to absent themselves calls for the use of Article 164 (2) and XXVI National Objectives and Directives Principles of State Policy

and thus they are accountable for the consequences of their act of absenteeism in other words members of Parliament should pay the court costs which has come as a result of \$20th December 2013.

- (c) The act of the members of \$9th Parliament to absent themselves is inconsistent with and in contravention of Articles 79, 91 and 94 (1) thus abuse of office and causing financial loss.
- (d) The members of \$9th Parliament be given the biggest punishment as each of them was given the Constitution and the Rules of procedure as the instruments of their work.

II. ORDERS

- (a) The permanent injunction doth issue against the respondent and any other agencies of Government from withdrawing any public funds to pay for the court costs of constitutional petition no. 8 of 2014 and other petitions that come or will come as result of their act of absenteeism on \$20th December 2013 (settle the consequences of the absenteeism of members of Parliament on 20th December \$2013)\$
- (b) The permanent constitutional order be restored in the Parliament of the Republic of Uganda.
- (c) The members of Parliament pay the court costs of all cases that have come as result of their act of absenteeism on \$20th December 2013.
- (d) Costs of this Petition be borne by the respondent.
- (e) Any other reliefs that this honourable court may deem fit

\$[4]\$ The respondent filed an answer to the petition that was supported by the affidavit of Charity Nabaasa, a State Attorney in the Attorney General's Chambers. The respondent contends that the absence of some members of Parliament from the parliamentary sitting of 20th December 2013 during the voting on the Anti-Homosexuality Bill was not in contravention of articles 1 (2) & (3), 79, 91 (1), 85 (1) & (2) and 94 (1) of the Constitution and Rule 101(1) of the parliamentary rules of procedure. The respondent also contended that the members of Parliament that were absent during the parliamentary sitting did not contravene the oath of allegiance and the oath of the members of Parliament and therefore does not call for the use of sections 11 (1) and 20 (1) of the Anti- Corruption Act, 2009.

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- \$[5]\$ Further, the respondent averred that the absence of some members of Parliament during the voting on the bill does not in any way contravene the provisions of Article 3 (2) and 164 (2) of the Constitution and Objective XXVI of the National Objectives and Directives Principles of State Policy. The respondent contends that the petition does not disclose a cause of action against the respondent as the petitioner seeks to challenge the actions of

individual members of Parliament who are not parties to the petition. The respondent further averred that the petition does not disclose a question for constitutional interpretation and should be dismissed.

- §[6] The following issues were agreed by the parties for determination by this court:

'1. Whether the petition raises issues for constitutional interpretation:

2. Whether the absence of the members of Parliament from House sitting on 20th December during the Voting upon the Anti Homosexuality Bill was unlawful and was in a manner that was inconsistent with and or in contravention of the Articles 1 (2) & (3), 3(2), 21(1), 63 (1), 79, 85, 91 (1), 94 (1), 164, XXVI of the National Objectives and oath of allegiance and oath of member of Parliament of the Republic of Uganda, 1995 and Rule 101 (1) of the Rules of procedure of the 9th Parliament of the Republic of Uganda;
3. Whether the petitioners are entitled to the remedies sought.

Submissions of Counsel

- §[7] At the hearing, the petitioner appeared in person, without representation. The respondent was represented by Ms. Maureen Ijang, State Attorney in the Attorney General's Chambers. The parties opted to adopt their conferencing notes on record as their submissions.
- §[8] With regard to issue 1, the petitioner submitted that the petition raises issues for constitutional interpretation in as much as it challenges the absence of members of

the 9th Parliament from the Parliamentary sitting of 20th December 2013 as being inconsistent with and in contravention of articles of the Constitution. The petitioner referred to National Council for Higher Education Vs Kawooya [2015] UGSC 9 where this court held that a petition brought under Article 137 (3) of the Constitution sufficiently discloses a cause of action if it describes the act or omission complained of and shows the provision of the Constitution which the act or omission is alleged to be inconsistent with or which is alleged to have been contravened by the act or omission and prays for a declaration to that effect. The petitioner was of the view that the petition satisfies the criteria.

- With regard to issue 2, the petitioner stated that rule 101 (1) of the Parliamentary §[9] Rules of Procedure makes it illegal for a member of Parliament to absent himself or herself from the House without seeking permission from the Speaker of Parliament. The petitioner referred to Oloka Onyango & 9 others v Attorney General (supra) where it was held that failure to obey the Rules rendered the whole process of enactment a nullity. The petitioner submitted that members of Parliament are obliged to protect and uphold the Constitution and that it is impossible to do so if they do not obey the law. The petitioner was of the view that the outcome in Oloka Onyango & 9 others v Attorney General (supra) would have been avoided had the members of Parliament who were absent attended the Parliamentary sitting. The petitioner submitted that the Speaker ought to have called off the sitting upon

realising that the biggest number of the members of Parliament were granted leave or were absent.

- [10] In reference to articles 1 (2) and (3) of the Constitution, the petitioner submitted that the citizens of Uganda never consented to be represented selectively or at the whim of members of Parliament. He argued that the failure to attend the House on 20th December 2013 during voting on the Anti-Homosexuality Bill was an arbitrary act that was prejudicial to the will and consent of Ugandans under Articles 1 (2) and (3) of the Constitution. The petitioner stated that the members of Parliament ought to do the work that they are paid for. Further, the petitioner submitted that members of Parliament are called to be accountable under Article 164 (2) and Objective XXVI of the National Objectives and Directive Principles of State Policy and that the citizens should not be made to pay the 50% taxed costs that were awarded to the petitioners in *Oloka Onyango & 9 others v Attorney General* (supra) due to the negligence of the members of Parliament. The petitioner was also of the view that the failure to attend the parliamentary sitting was an abuse or misuse of power and a failure of the members of Parliament to protect the Constitution as they are enjoined under Article 3 (2) of the Constitution.
- [11] With regard issue 3, the petitioner submitted that he is entitled to the reliefs sought because the actions of the members of Parliament caused the loss of the Anti-Homosexuality Act, 2014 and financial loss to Ugandans.
- [12] In reply, Ms Ijang submitted that there are no issues raised by the petition that require interpretation of the Constitution. Counsel for the respondent submitted that Article 137 of the Constitution confers jurisdiction on the Constitutional Court to entertain matters for constitutional interpretation only. Counsel for the respondent referred to *Attorney General v Major General David Tinyefunza* Constitutional Appeal No.1 of 1997 (unreported) and *Serugo v Kampala City Council & Another* [1999] UGSC 23 where it was held that the Constitutional Court should normally be involved only in matters requiring interpretation of the Constitution under Article 137 of the Constitution. Counsel for the respondent concluded that nothing can be read from the petition that requires interpretation by this court as the petitioner merely alleges that certain articles of the Constitution were contravened by the actions of members of Parliament.
- [13] In reply to issue 2, Ms Ijang submitted that the actions of the members of Parliament were not illegal because article 94 (1) of the Constitution grants the Parliament power to make rules to regulate its procedures and Rule 101 provides for leave of absence of members of Parliament for sufficient cause. Counsel argued that the allegation that the absence of the members of Parliament was illegal was not proved by any evidence and that the petitioner ought to have provided evidence to show that the members of Parliament were absent without leave. Counsel for the respondent argued that the burden of proof is on the petitioner which he failed to discharge.

- [14] In reply to issue 3, Ms Ijang, submitted that the petitioner is not entitled to any of the remedies and declarations sought in the petition. Counsel was of the view that the petitioner is attempting to appeal against the judgement of this court in Oloka Onyango & 9 others v Attorney General (supra) which is not within the jurisdiction of this court. Counsel for the respondent prayed that this petition be dismissed.

Analysis

[15] Article 137 of the Constitution provides for the jurisdiction of this court. It states:

'137. Questions as to the interpretation of the **Constitution**.

Any question as to the interpretation of this \$(1)\$ Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.

When sitting as a Constitutional Court, the Court of \$(2)\$ Appeal shall consist of a bench of five members of that court.

A person who alleges that— \$(3)\$

> an Act of Parliament or any other law or \$(a)\$ anything in or done under the authority of any law; \$\alpha\$ r

> any act or omission by any person or authority, \$(b)\$ 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.

Where upon determination of the petition under clause \$(4)\$ (3) of this article the Constitutional Court considers that there is need for redress in addition to the declaration sought, the Constitutional Court may—

> grant an order of redress; or \$(a)\$

refer the matter to the High Court to \$(b)\$ investigate and determine the appropriate redress.

Where any question as to the interpretation of this \$(5)\$ Constitution arises in any proceedings in a court of law other than a field court martial, the court—

> may, if it is of the opinion that the question \$(a)\$ involves a substantial question of law; and

> shall, if any party to the proceedings requests \$(b)\$ it to do so,

refer the question to the Constitutional Court for decision in accordance with clause (1) of this article.

\$(6)\$ Where any question is referred to the Constitutional Court under clause (5) of this article, the Constitutional Court shall give its decision on the question, and the court in which the question arises shall dispose of the case in accordance with that decision.

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

[16] The first issue we must determine is whether or not this court is seized with jurisdiction to entertain the petition before us. In *Attorney General v Maj. Gen. David Tinyefuza* Supreme Court Constitutional Appeal No. 1 of 1997 (unreported) Wambuzi C. J (as he then was) held that:

> 'In my view, jurisdiction of the Constitutional Court is limited in article 137(1) of the Constitution to interpretation of the Constitution. Put in a different way no other jurisdiction apart from interpretation of the Constitution is given. In these circumstances I would hold that unless the question before the Constitutional Court depends for its determination on the interpretation or construction of a provision of the Constitution. the Constitutional Court has no jurisdiction.'

[17] In *Serugo v Kampala City Council & Another* [1999] UGSC 23 Wambuzi, CJ (as he then was) stated:

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

> If therefore any rights have been violated as claimed, these are enforceable under Article 50 of the Constitution by another competent Court.'

[18] The petitioner's submissions did not address the question of whether or not the petition in this case raised a question for constitutional interpretation. He concentrated on whether the petition disclosed a cause of action which is a separate matter from the question of interpretation. The question of constitutional interpretation relates to jurisdiction. It is possible for a court to have jurisdiction over a matter and no cause of action is made out on the pleadings. Similarly, a cause of action can be made out on the pleadings while the court has no jurisdiction. These are two separate matters with different rules applying to each one of them.

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- [19] The petitioner contends that the members of Parliament that absented themselves from attending Parliament on the material day leading to nullification of the Anti-Homosexuality Act and ordering the Attorney General to pay 50% of the Petitioners' costs should be held accountable for the costs ordered by this court and should pay the same, rather than the Government of Uganda. At the same time the said acts of the members of Parliament amounted to treason against the Republic of Uganda for which they should be punished according to law. This would call for institution of criminal charges without more rather than institution of proceedings in the Constitutional Court.

- [20] The petitioner further contends that the members of Parliament that absented themselves from the sitting on the material day, violated sections 11 \$(1)\$ and 20 \$(1)\$ of the Anti-Corruption Act, committing abuse of office and causing financial loss. This would also call for institution of criminal charges rather than interpretation of the Constitution.
- [21] There is no indication that the impugned actions of the members of Parliament or the Speaker that permitted the proceedings to continue in the absence of a quorum, raise a question for interpretation of the Constitution in these proceedings. It is not enough simply to allege in the pleadings that a matter contravenes or violates the Constitution. The petition should offer, on its face, matters that give rise to a question for constitutional interpretation.
- [22] The impugned actions of the members of Parliament do not fall under article 137 (3) (a). The impugned actions would fall under article 137 (3) (b) of the Constitution. Notwithstanding that for this court to have jurisdiction under the said provisions, those provisions must be read together with the other relevant provisions in this regard including article 137 (1) of the Constitution. It is not enough simply to seek a declaration. The impugned actions and omissions by any

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person or authority must involve a question for constitutional interpretation. There must be some controversy involving the interpretation of a provision of the Constitution for jurisdiction to be established. This is not the case in the instant case.

- [23] Article 1 (2) & (3) deal with the sovereignty of the people of Uganda affirming that all authority and power of government is derived from both the Constitution and the people of Uganda. Article 79 deals with the functions of Parliament. Article 94 relates to the rules of procedure of Parliament. Article 164 deals with accountability of holders of political or public offices including requiring them to make good the loss of public funds expended contrary to existing instructions. Hard as I have tried, I am unable to decipher any question for constitutional interpretation in the matters raised above by the petitioner.
- [24] It appears to me that the petitioner is at liberty to commence an action in a competent court, including the High Court of Uganda, a court of unlimited original jurisdiction in all matters, seeking the reimbursement of public funds, if the costs order has already been paid by the Attorney General, or the contribution to or the payment of the costs order, in case it has not as yet been settled, by the impugned members of Parliament, on account of the actions and or omissions of the impugned members of Parliament. Whether such an action can be brought by the petitioner would be for the competent court to decide. No question of interpretation of any of the foregoing provisions arises in the present petition..
- [25] For the foregoing reasons, I would answer issue 1 in the negative. As the petition does not raise any question for interpretation of the Constitution, this court lacks the jurisdiction to entertain the same.

- [26] Lastly and before I take leave of this matter, I must point out, for the benefit of the petitioner, that neither the members of Parliament nor the Speaker, or other officer of the August House is named as a party to these proceedings. It is not clear whether the Attorney General is sued in a representative capacity for the actions of either the members of Parliament or the Speaker, and if so, whether such liability is by way of direct or vicarious liability on the part of the Attorney General. I shall assume that is not the case as the petition does not contend so.
- [27] The Attorney General is sued on behalf of Government, and its servants, by virtue of section 10 of the Government Proceedings Act. The impugned actions in this

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matter are not acts of Government. There are acts of individual members of Parliament. It is therefore debatable if an action can lie against the Attorney General for these impugned actions.

- [28] It would appear to me that for a cause of action to be made out, apart from establishing the existence of a right that has been infringed, the respondent must be the person against whom a remedy can be ordered for the impugned actions. In that regard as this action seeks to prevent the payment of public monies as costs the Attorney General may be properly joined in such action, on behalf of Government. However, at the very minimum the members of Parliament who are alleged to have absented themselves on the material day from Parliament ought to be parties for a cause of action to be made out in an action seeking to hold them accountable.
- [29] Even if this court had been seized with jurisdiction the question of a cause of action or the lack thereof, may still have obstructed the petitioner from continuing with this matter in its present form.
- [30] I would therefore strike out the petition. I would make no order as regards costs.

Decision

[31] As Musoke, Barishaki Cheborion, Mutangula Kibeedi and Mulyagonja, JJCC, agree, this petition is struck out for lack of jurisdiction with no order as to costs.

Signed, dated and delivered at Kampala this 23rd day of $\frac{1}{2}$ 2021

Fredrick Egonda-Ntende **Justice of the Constitutional Court**

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

[Coram: Egonda-Ntende, Elizabeth Musoke, Cheborion Barishaki, Muzamiru Kibeedi, Irene Mulyagonja JJCC

CONSTITUTIONAL PETITION NO. 28 OF 2014**BETWEEN**

Naloda Peter $\overline{}$ Petitioner

AND

Attorney General of Uganda Respondent

JUDGMENT OF MUZAMIRU M. KIBEEDI, JCC

I have had the advantage of reading in draft the Judgment prepared by my Lord Egonda-Ntende, JCC. I agree with the reasoning and the Orders he has proposed.

Dated at Kampala this 25 day of Ang 2021

Muzamiru Mutangula Kibeedi JUSTICE OF THE CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

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IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Elizabeth Musoke, Cheborion Barishaki, Muzamiru Kibeedi & Irene Mulyagonja, JJCC)

CONSTITUTIONAL PETITION NO.28 OF 2014**BETWEEN**

<table>

Nalonda Peter:

Petitioner

AND

The Attorney of Uganda::::::::::::::::::::::::::::

JUDGMENT OF CHEBORION BARISHAKI, JA/JCC

I have had the benefit of reading in draft the judgment of my learned brother Fredrick Egonda-Ntende, JA/JCC and I agree with the analysis and conclusion that this Petition ought to be struck out for lack of jurisdiction with no order as to costs.

| Dated at Kampala this | 2021 |

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Cheborion Barishaki

JUSTICE OF APPEAL/ CONSTITUTIONAL COURT

**THE REPUBLIC OF UGANDA IN THE CONSTITUTIONAL COURT OF UGANDA AT
KAMPALA CONSTITUTIONAL PETITION NO. 0028 OF 2014**

NALODA PETER:::::::::::::::::::::::::::: VERSUS

ATTORNEY GENERAL::::::::::::::::::::::::::::

CORAM: HON. MR. JUSTICE FREDRICK EGONDA-NTENDE, JCC HON. LADY JUSTICE ELIZABETH MUSOKE, JCC HON. MR. JUSTICE CHEBORION BARISHAKI, JCC HON. MR. JUSTICE MUZAMIRU KIBEEDI, JCC HON. LADY JUSTICE IRENE MULYAGONJA, JCC

JUDGMENT OF ELIZABETH MUSOKE, JCC

I have had the advantage of reading in draft the lead Judgment of my learned brother Egonda-Ntende, JCC. I agree. For the reasons he gives, I too, would strike out the Petition but make no order as to costs.

Dated at Kampala this

Elizabeth Musoke Justice of the Constitutional Court

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

(Coram: Egonda-Ntende, Musoke, Cheborion, Kibeedi and Muluagonja, JJCC)

CONSTITUTIONAL PETITION NO.28 OF 2014

<table>

NALODA PETER.....

VERSUS

ATTORNEY GENERAL.....

JUDGMENT OF IRENE MULYAGONJA, JCC

I have had the benefit of reading in draft the judgment of my brother, Egonda-Ntende, JCC.

I agree that the petition be struck out with costs for the reasons that he has set out in his judgment.

Dated at Kampala this

Kormyge

Irene Mulyagonja JUSTICE OF APPEAL/CONSTITUTIONAL COURT

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Prepared on 14 October 2026 · Esheria