

UGANDA / JUDGMENT

Odoi v NRM & Another (Constitutional Petition 37 of 2015) [2021] UGCC 43 (27 April 2021)

[2021] UGCC 43

COURT

Constitutional Court of Uganda

BEFORE

Buteera, DCJ, Kakuru, JCC, Bamugemereire, JCC,
Madrama, JCC, Mulyagonja, JCC

CASE / FILE NUMBER

Constitutional Petition 37 of 2015

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THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT KAMPALA CONSTITUTIONAL PETITION NO. 0037 OF 2015

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FOX ODOI - OYWELOWO.....

VERSUS

NRM & ANOTHER..... 10

CORAM:

HON. Justice Richard Buteera, DCJ HON. Justice Kenneth Kakuru, JCC HON. Justice Catherine Bamugemereire, JCC HON. Justice Christopher Madrama, JCC HON. Justice Irene Mulyagonja, JCC

JUDGMENT OF CATHERINE BAMUGEMEREIRE JCC 20

At the time he lodged this Petition, the Petitioner was a Member of Parliament (MP) representing West Budama North County in Tororo District. He participated in the National Resistance Movement (NRM) Party \$25\$ Primaries in order to secure himself a seat as the NRM Party Flag Bearer. Indeed, at the close of the voting, he was declared the NRM Party Flag Bearer for West Budama North Constituency. His opponent, Richard Okoth Othieno is said to have petitioned the NRM electoral body also referred to as the NRM Electoral Commission or the NRM Elections

Tribunal. The latter 30 body sitting as a tribunal pronounced Richard Okoth Othieno as the NRM Flag bearer. The Petitioner was aggrieved and therefore filed this Constitutional Petition.

This petition broadly seeks the interpretation of Art. 28 (1) and Art 44 (c) of the Constitution. It makes several allegations against specific Regulations particularly Regulation 20 (21) of the Regulations for the NRM Primary S Elections seeking a declaration that this regulation is unconstitutional. The petition equally makes numerous contentions against the acts of the 1^{st} Respondent constituting himself into a tribunal and sitting to hear an election petition emanating from the elections it organised, superintended and conducted based on a Regulation 20(21) of the NRM Primary Election 10^{th} Regulations, which section is itself impugned.

The grounds most relevant to the resolution of this petition are found in grounds 7 and $9(a)$, (b), (c) and (d): -

- 7. The Petitioner was a victim of an unconstitutional Provision when the 1^{st} Respondent without summoning him, notifying him or serving him of any Petition and requiring him to put (up sic) any defence whatsoever or according him any hearing, entertained a Petition filed by a one Okoth Othieno with whom the contested and successfully won against in the NRM Primaries and made a decision affecting his elected position of NRM Flag bearer.
- 8. XXXXXX
- 9. (a) The Act of the 1^{st} Respondent Constituting itself into a Tribunal and sitting to hear an election Petition emanating from the elections it organised, superintended and conducted based on an unconstitutional Regulation 20 (21) of the Regulations of the NRM Primary Elections and without summoning the Petitioner and without notifying or

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him any hearing and making a decision affecting his elected position of NRM Flag bearer in partial and inconsistent with or in contravention of Act 28 (1) and Article 44 (c) of the Constitution of the Republic of Uganda, 1995 as amended.

- Regulation 20 (21) of the Regulations of the NRM Primary Election (b) is a derogation of the right to a fair hearing and is inconsistent with and or in contravention of Articles $28(1)$ and $44(c)$ of the Constitution.

- The Act of the NRM Electoral Commission receiving, hearing and \$(c)\$ \$10\$ determination or petitions arising out of elections conducted by the same Commission whose conduct is complained of and the subject of the dispute and is partial is a derogation of the rights to a fair hearing guaranteed by Art. 28 (1) and specifically prohibited by Article 44 (c) of the Constitution. \$\Box\$
- The Act of using the authority of Regulations \$20(21)\$ by the NRM \$(d)\$ Electoral Commission to receive Petitions and determine disputes arising from its own actions is inconsistent with and /or in contravention of Articles \$28(1)\$ & 44 (c) of the Constitution.
- Based on the above grounds of Petition Counsel for both sides raised the \$20\$ following issues for determination:
 - 1. Whether the Petitioner does not raise matters requiring Constitutional Interpretation.
 - 2. Whether the respondents could pass regulations or act in a manner that breaches the law the effect of which amends an Act of Parliament which is the sole preserve of parliament.

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- 3. Whether Regulation 20 (21) of the Regulation of the Primary Elections is inconsistent with Art. \$28(1)\$ and \$44(c)\$ of the Constitution?
- 4. Whether the Respondents' acts of removing the Petition from his position of winner for NRM Primary Elections without giving him a hearing is inconsistent with Art. 28(1) & 44(c).
- 5. What are the remedies?

Representations

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Dr. James Akampumuza represented the Petitioner while Mr. Anthony Bazira of Byenkya, Kihika and Co Advocates Represented 1st Respondent. 10 Mr. Geoffrey Wangolo Madete, Principal State Attorney represented the 2nd respondent.

Submitting on issue No.1

1. Whether the petition does not raise a matter requiring Constitutional Interpretation: -

Learned Counsel for the Petitioner invited this court to answer this question in the affirmative. His submitted that the petition raises serious questions calling for this courts interpretation and falls in the four walls of Art. 137 (3) (b) and (4) of the Constitution.

Dr Akampumuza referred us to the case of Raphael Baku v AG. Supreme \$20\$ **Court Constitutional Appeal No. 2 of 2003** and specifically to the holding of Mulenga JSC, in which the case of **Ismail Serugo** was cited with approval for the proposition that: -

'A cause of action is sufficiently disclosed if it described the act or omission complained of and shows the provision of the Constitution with which the act or omission is alleged to be inconsistent or which is alleged to have been contravened by the act or omission and pray (s) for a declaration to that effect.'

Counsel further submitted that the provisions of the Constitution concerned with the same subject should as much as possible be read as an integrated whole. In this regard, he relied on the case of **Smith Dakota** v North Carolina 192 US 268 cited in the case of Paul. K. Ssemogerere Zachary Olum & Juliet Rainer Kafire v A. G. Supreme Court Constitutional Appeal No. 1 of 2002 for the proposition that: -

'It is an elementary rule of Constitutional construction that no provision of the Constitution is to be segregated from the others and to be considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument.'

Regarding the question of purpose and effect Counsel referred to the case of Fox Odoi Oywelowo & James Ampumuza v AG. Constitutional Petition

No. 8 of 2003 and submitted that the purpose and effect of the impugned 20 relation and acts of the respondents is that they amended an act of parliament in a manner inconsistent with the Constitution.

Counsel submitted that the 2nd Respondent, acting under the Political Parties and Organisations Act enacted party regulations to govern NRM Party

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Primary elections and unlawfully made regulations about irregularities which are inconsistent with the Constitution of Uganda.

He further submitted that the 2nd Respondent had a Constitutional duty to ensure that all its political party activities were conducted in accordance S with the constitution. He opined that the NRM Elections Tribunal sitting to hear election disputes arising from the very election it organised was incompetent since it contravened Art. 28 (1) & 44 (c) of the Constitution.

He cited the case of John Ken Lukyamuzi v AG & EC Supreme Court

Constitutional Appeal No. 2 of 2007 for the proposition that the NRM 10 Elections Tribunal was incompetent and therefore its trials were a nullity *ab initio*.

Counsel further submitted that the process of revoking the candidature of the Petitioner who had been declared flag bearer, initially lacked due process. There was no evidence of a petition, no service of a petition and 15 hearing. There was no fair hearing before an impartial tribunal. His submission was that act of the NRM Electoral Commission removing the petitioner from his elected position of NRM Flag bearer without any hearing, was inconsistent with and or in contravention of Art. 28 (1) & 44(c) of the 20 Constitution.

Finally he argued that Regulation 20 (21) of the Regulations for NRM Primary Elections which mandates the NRM Electoral Commission to hear election disputes which the same party had organised and superintended over was a derogation from the right to a fair hearing and is inconsistent

with and in contravention of Articles 28(1) and 44 (c) of the Constitution. He sought a declaration to that effect.

In conclusion he added that when the NRM Electoral Commission declared election results under Reg 20 (20), it became *functus officio* and therefore $\$S$ could no longer receive, hear and determine disputes arising out of elections it had conducted. He invited this court to find that the above actions offend the right to a fair hearing guaranteed by Articles 28(1) and 44 (c) of the Constitution.

In reply Counsel for the Respondent framed the first issue as a preliminary $\$10$ objection since it had the capacity to determine the petition as a whole. He responded that not every alleged violation of a right gives rise to Constitutional Interpretation. He relied on **Blacks' Law Dictionary** to define 'interpretation,' as the process of determining what the Law or Legal document means; the ascertainment of meaning to be given to words other 15 manifestations of intention (see 8th Edition at page 2399). He further relied on the cases of **Engineer Edward Turyomurugyendo and 2 others v Attorney General and Others**, Constitutional Petition No. 25 of 2009 and

Mbabaali Jude v Hon. Edward Kiwanuka Ssekandi, Constitutional Petition No. 0028 of 2012 for the proposition that, $\$20$

> '..... this court has jurisdiction only under Article 137 of the **Constitution to interpret the Constitution. It is not concerned with** and has no jurisdiction to entertain matters relating to violation of rights under the Constitution for which parties seek redress alone. Such matter ought to be brought before a competent Court under Article 50.'

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The above proposition had earlier been set out in the case of **Serugo v KCC and Attorney General** (Supra) which cited with approval **Attorney General v Major General David Tinyenfuza**. Counsel invited the court to follow this decision which states thus:

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"..... when it comes to Court's view of the jurisdiction of the Court of Appeal as a Constitutional Court, its decision in that case is that the Constitutional *Court had no original jurisdiction merely to enforce rights and freedoms* enshrined in the Constitution in isolation to interpreting the constitution and *resolving any dispute as to the meaning of its provisions. The judgement of* the majority in that case (Wambuzi, C. J, Tsekooko JSC, Karokora JSC, and Kanyeihamba JSC), is that to be clothed with jurisdiction at all, the *Constitutional Court must be petitioned to determine the meaning of any part of the Constitution..."*

It was the Respondent's case that what the Petitioner seeks from this court is not an interpretation of any provision of the Constitution, but rather redress in respect of unjust and unfair treatment including denial of basic rights to a fair hearing. Counsel invited this Court to find that the instant Constitutional Petition by the Petitioner does not raise matters requiring Constitutional Interpretation. This Petition is misconceived in as much as it does not call for the interpretation of any article of the Constitution.

In reply to grounds 2,3,4 and 5, the Learned Counsel for the **Respondent submitted** that the above grounds solely raised matters of fact that required no constitutional interpretation. He responded that a complaint was lodged against the decision of the election official who had declared the Petitioner a winner. Further that when the NRM Electoral

Commission conducted an investigation based on the complaint, they found that the results upon which the Petitioner had not been declared winner were not fully tallied. According to the Respondents, a re-count and re-tally was carried out and the result was that the petitioner had lost the election and Mr. Othieno was the winner

Counsel observed that Article 39 (7) of the National Resistance Movement **Constitution**, establishes the Electoral Commission whose duty is to,

- *a)* Organize and conduct elections within the organs of NRM.
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- *b) Liaise with the National Electoral Commission on electoral matters.*
- c) Be fully conversant with the National laws and regulations relating to *elections and to ensure that NRM complies with them.*

- d) With the approval of CEC make regulations for all elections under this Constitution.
- *e) Carry out all elections on the basis of secret ballot and decentralized voting.*

Regulation 20(21) of the Regulations for NRM Primary Elections provides that 'Any election petition arising from the results of the poll shall immediately be filed with NRM Electoral Commission which shall expeditiously handle it and *pronounce itself on the matter.'*

Counsel submitted that the 1st Respondent is a political party established 20 under the Political Party and Organizations Act, 2005 and in accordance with the principles set out in Article 71 of the Constitution of the Republic of Uganda. He opined that process of becoming a member of the NRM Party was by choice. He added that no person was under compulsion to join, to leave or to remain in the party as provided for in Article 71 of the \$25\$

Constitution of the Republic of Uganda. Further that the NRM Party is governed by its own Constitution with regulations and guidelines for the conduct of its operations and activities which were adopted by its membership. Counsel observed that the Political Organizations Act did not oust the independence of political parties to run and resolve internal matters including but not limited to election disputes.

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Regarding the issue whether the election body was incompetent, Counsel submitted that Electoral Commission of the NRM conducts elections in accordance with its **Regulations for NRM Elections**. He responded that the regulations empower the 1st Respondent to organize elections as an internal matter including choice of a flag bearer for NRM Party Elections.

In addition he submitted that **Regulation 20(21)** of the **Regulations for NRM Primary Elections** is not a derogation from the right to a fair hearing under

the Constitution of Uganda and is not inconsistent with and/or in \$15\$ contravention of **Articles 28(1)** and \$44(c)\$ of the Constitution as alleged by the Petitioner. That on the contrary, the Regulations enable the NRM Electoral Commission to review the conduct of its elections and determine any resultant disputes. It was his submission that the regulations do not in \$20\$ any way prevent the Electoral Commission of the 1st Respondent from acting in an independent and an impartial manner in the conduct of its duties. Counsel pointed to the fact that Regulation 20 (21) provided for an internal mechanism embodied in the NRM Elections Disputes Tribunal, to resolve matters regarding election disputes between members of the 1st Respondent \$\overline{25}\$ and a party who is not satisfied with the decision of the Elections Tribunal. He noted that dissatisfied persons were free to seek redress from the High

Court as the case has been. Counsel noted that Regulation 20 (21) was not inconsistent or in contravention of Articles 28(1) and 44(c) of the Constitution of Uganda, and as such these issues should be answered in the negative. Finally, Counsel contended that this is a matter that ought to have been referred to the High Court for Judicial Review.

Determination of the grounds of the Petition

I will proceed to resolve this Petition based only on the basis of submissions of the Petitioner and the NRM Party. I shall rely on the affidavit of an officer of the AG, in reply, since the AG did not file their written submission, in spite of the fact that this court extended time within which they could file their submissions. Under the Rules of this Court, Parties were enjoined to proceed by way of written arguments. In this case all parties were present on the 2nd of February 2021 and directions to file submissions by the 9th of February. The Respondent failed to comply with the directions.

Issue No.1

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Whether the Petition Raises Grounds for Constitutional Interpretation

The first issue raised by the Petitioner pertains to whether this petition raises matters of Constitutional Interpretation and therefore whether it is properly before this Court. The doorway to the Constitutional Court as a Court of 1st instance in Constitutional matters is Art. 137 of the Constitution. A matter must fall within Art. 137 in order to catch the due attention of this court. Article 137 of the Constitution states, and I quote: -

"137 Questions as to the interpretation of the Constitution."

- Any question as to the interpretation of this Constitution (1) 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 five members of the court.
- (3) A person who alleges that: -
- An Act of Parliament or any other law or anything (a) in and done under the authority of any law, or

- Any Act or omission by a person or authority is inconsistent with or in contravention of a provision of this Constitution. May petition the Constitutional court for a declaration to that effect and for redress where appropriate.
- It is clearly stipulated under Art. 137(1) that the Court of Appeal sitting as a Constitutional Court shall determine issues of interpreting the Constitution. It is further specified that for the jurisdiction of this court to be invoked a law or an act or omission done under the authority of such a law must be inconsistent or in contravention of the 1995 Constitution. There have been several Constitutional Petitions that have explained Article 137. Below is 20 what several judges held regarding matters that were to be taken to the Constitutional Court. In *Jude Mbabali v Edward Kiwanuka Sekandi* Constitutional Petition No. 28 of 2012, Kasule JCC of the Constitutional Court referred to the case of *Hassan Ali Joho and Another v Suleiman Shahbal and 2 others* (2013) eKLR (Court of Appeal, Kenya where it was held as follows:

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"The issue that calls for interpretation of the Constitution by the Constitutional Court must involve and show that there is an apparent conflict with the constitution by an Act of Parliament or some other law, or an act or omission done or failed to be done by some person or authority. Further, the dispute where the apparent conflict exists must be such that its resolution must be only when and after the Constitutional Court has interpreted the Constitution. The constitutionality of statute or same law, or the act or omission of a person or **authority must be brought forth for determination.**"

In other words not every contestation meets the threshold required for Constitutional interpretation.

In Attorney general Vs Major General David Tinyefunza Wambuzi CJ had this to say, 15

> "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."

It would appear from the above holding that a constitutional question that has to be interpreted by the Constitutional Court arises when there is an

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It would appear from the above holding that a constitutional question that has to be interpreted by the Constitutional Court arises when there is an issue, legal or otherwise, requiring an interpretation of the Constitution for the resolution of the cause out of which that issue arises from.

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There must be a question for the interpretation or construction of the Constitution. In the case of *Ismail Serugo v AG Kampala Capital City and the AG Supreme Court Constitutional Appeal No. 2 of 1998 Wambuzi CJ* held that:

"the petition (read reference) must show on the face of it, that $\$10$ interpretation of a provision of the constitution is required. It is not enough to allege merely that a constitutional provision has been violated. The applicant must go further to show *prima facie*, the violation alleged and its effect before a question could be referred to the constitutional court." $\$15$

Simply put, it is not enough to declare that a constitutional provision has been violated. A petitioner must demonstrate that there is a justiciable matter requiring the interpretation or construction of the Constitutional Court. In order to resolve this issue I have cautiously examined the grounds of the Petition. I observed that it raises factual issues regarding the grievance the Petitioner had against the officers of the NRM Electoral Petition. These issues could have been resolved through a process of Judicial Review. I find that this matter does not raise a question for interpretation under Article 137 of the Constitution. This ground therefore fails.

Issues No. $\$2,3$ and $\$4$

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The Petitioner makes a three-pronged approach in justifying his decision to come to the Constitutional Court.

- 1. The first is that the 2nd Respondent, as a custodian of the law and the over-arching body in regard to observance of the rule of law during elections, superintended over an illegal regulation by sanctioning the creation of Rule 20(21) which gave rise to the impugned actions. That the 2nd Respondent had a Constitutional duty to ensure that all its action in the conduct of elections were consistent with the constitution
- 2. The second is that Regulation 20 (21) of the Regulations of the NRM Primary Election is a derogation of the right to a fair hearing and is inconsistent with and or in contravention of Articles 28(1) and 44 (c) of the Constitution.
- 3. The third is that the Act of the 1st Respondent Constituting itself into a Tribunal and sitting to hear an election Petition emanating from the elections it organised, superintended and conducted based on an unconstitutional Regulation 20 (21) of the Regulations of the NRM Primary Elections was per se unconstitutional.

Although the NRM can be traced as far back as the post-independence political activities of its founders, over time it has evolved into the current ruling party with a majority membership in the Uganda Parliament. The historical context within which the Political Parties and Organisations Act was promulgated was from an umbrella government which had been

formed between 1986 and 2005. Under the umbrella government, political activities of parties were suspended. Political leaders were elected on personal merit and not through a political party. The promulgation of the Political Parties and Organisations Act came on the heels of much agitation S and lobbying. Currently, all political parties including all those created before independence are regulated under s.3 of the Political Parties and Organisations Act of 2005. Since Political Parties are regulated under PPO Act of 2005, the NRM party is no exception. The submission of the Petitioner is that the Attorney General should be faulted for superintending over the formation of Rule 20(21) of the NRM Primary Elections Regulations. On its part the 2nd Respondent, in an affidavit sworn by Learned Principal State Attorney Patricia Mutesi denied all responsibility and stated in paragraph 3 and 4 as follows as follows:

3."In reply to... the 2nd Respondent states that his mandate as the legal adviser of Government does not extend to advising the 1st Respondent. Further that its mandate to ensure that all legislation conforms to the Constitution does not extend to the constitutions or legislations of political parties which govern their internal affairs/activities.

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- 4. That the 2nd Respondent contends that the allegations against it is misconceived. "

I cautiously considered regulation 20(21) of the NRM Primary Elections regulations and found that the Regulations state as follows:

20.0 Voting and Voting Procedures

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- (21) That any election petition arising from the results of the poll shall immediately be filed with NRM Electoral Commission which shall expeditiously handle it and pronounce itself on the matter.

The Petitioner suggests that the regulation had the effect of contravening the Constitution. In determining the Constitutionality of a legislation, its 10 purpose and effect must be taken into consideration. I have taken a careful look at the impugned Regulations and I find that on the face of it there is nothing to suggest that the NRM Party Election Regulations were not in conformity with the principles laid down in the constitution. Unless applied in a discriminatory manner or in such other manner as to be found 15 unconstitutional or in a manner not envisaged in a free and democratic I do not see that the NRM Party regulations were per se society, unconstitutional. find that the import of the NRM Party Election $\mathbb{I}$ Regulations are neither offensive nor in contravention of the Constitution.

2. The next question was whether $\mathbb{S}$ Regulation 20 (21) of the Regulations of the NRM Party Primary Election is a derogation of the right to a fair hearing and is inconsistent with and or in contravention of Articles 28(1) and 44 (c) of the Constitution.

I earlier on reproduced Regulation 20(21) of the NRM Party Election Regulations which is to the effect that after conduction NRM Party $\mathbb{S}$

Primaries, any person aggrieved can file an election petition. It follows therefore is that any election petition arising from the results of the poll shall immediately be filed with NRM Party Electoral Commission which shall expeditiously handle it and pronounce itself on the matter.

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Learned Counsel for the Petitioner submitted that the NRM Electoral Commission contravened Article 28(1) and 44 (c) because there was no fair trial within the meaning of Article 28(1) of the Constitution. Counsel concluded that the NRM Electoral Commission could not be a competent tribunal when it was the body that organised and superintended over the election. He argued that a trial by an incompetent body is null and void. Counsel further attacked the said body for procedural unfairness.

Regarding the unfair trial, Learned Counsel for the Petitioner relied on the fact that after the Petitioner had won the NRM Party Primaries, his main

opponent, Othieno Okoth, petitioned the NRM Electoral Commission and \$15\$ prayed that the Petitioner's win be set aside and Othieno Okoth be declared the winner. It was the submission for the Petitioner that there was no formal service of a copy of the petition but that on the day of hearing one of the supporters of Othieno Okoth availed the Petitioner with a photocopy of the Petition and that in spite of formally requesting to be served, he was never \$20\$ availed any documents for the alleged election hearing. He further argued that the NRM Electoral Commission was functus officio after a declaration of the results and could not be engaged in revisiting the results. The Petitioner further noted that the hearing took place before a partial and incompetent tribunal and as had been threatened, Okoth was declared the \$25\$ NRM Flag bearer in a manner that was inconsistent with Article 28(1) and

44 (c) of the Constitution. Learned Counsel contended that the act of the NRM Electoral Commission removing the Petitioner from his elected position of NRM Flag bearer and without determining the Petition in accordance with known conventional cardinal Constitutional principles was inconsistent with and in contravention of Article 28(1) and Article 44 (c) of the Constitution of Uganda 1995. Counsel relied on the case of John Ken Lukyamuzi v AG and EC Supreme Court Constitutional Appeal No. 2 of

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2007 in which it the Supreme Court found that the Inspectorate of

Government was not a tribunal as envisaged under Art \$83(1)(e)\$. It provides \$10\$ that a member of Parliament shall vacate his or her seat in Parliament if that person is found guilty by the appropriate tribunal of violation of the **Leadership Code Act**.

Counsel therefore attacked the lack of a right to a fair hearing by suggesting that like the IGG, the NRM Electoral Commission was not the body envisaged under the regulations to be a tribunal. Counsel for the 2nd \$15\$ Respondent submitted that Regulation 20(1) of the NRM Primary Elections Regulations empower the 1st Respondent to organise elections which are an internal matter of the 1st Respondent. They further submitted that Regulation 20(21) is not a derogation from the right to a fair hearing. They noted that the Regulation enables the Election Commission to review the \$20\$ conduct of its elections and determine any complaints, irregularities or Petitions by any aggrieved candidate in a quick, efficient and well-organised manner. It was the submission of Learned Counsel for the 1st Respondent that Reg 20(21) did not in any way prevent the NRM Electoral Commission from acting in an independent and impartial manner in the conduct of its \$25\$

duties and as a result whenever irregularities were brought to the attention

of the NRM Electoral Commission it would annul and repeat such elections but that it also often upheld several elections. Counsel submitted that the concept of *functus officio* is only applicable to the courts of law which this body is not.

In resolving the question whether the right to a fair hearing was abrogated I shall start by reproducing Article 28 (1) of the Constitution of Uganda. It stated as follows:

28. Right to a fair hearing.

- In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.
- In terms of administrative justice, as might have been in this case, a right to a fair hearing is a right to natural justice which includes the right to be treated justly and fairly and shall have recourse in a court of law for administrative review in case of any grievance. A person ought to be informed about the case against them and be allowed time to prepare his or her defence. The trial should not be too delayed. Reasonable steps should be taken to ensure that everyone in the trial is impartial see *Ridge v Baldwin and Others* (1963) 20\$

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The right to a fair hearing is termed as a non-derogable right. Rights may also be characterised as derogable or non-derogable. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) provides for a

derogation power, which allows governments to temporarily suspend the

application of some rights in the exceptional circumstance of a 'state of emergency' and subject to certain conditions, including official notification. Certain rights, however, are non-derogable, that is, they cannot be suspended even in a state of emergency. Article 4(2) of the ICCPR S provides that no derogation is permitted for certain rights. While the right to a fair hearing is not yet a *jus cogens* under international law, in Uganda it is considered non-derogable. Bringing it closer home Article 44 (c) of the Constitution of Uganda creates a cluster of rights which the people of Uganda regard as non-derogable. When the Constitution stipulates that a right is non-derogable does not guarantee that such rights never be suspended. What it creates is a right of recourse to the law to ensure that a person who violates such a right can face the law.

The Constitution of Uganda stipulates as follows:

44. Prohibition of derogation from particular human rights and freedoms.

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

- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
- (b) freedom from slavery or servitude;
- (c) the right to fair hearing;
- (d) the right to an order of habeas corpus

During emergencies it is not uncommon to restrict movement, restrict meetings of groups of persons and even forbidding family members to meet. The rights named above including the freedom from torture, cruel inhuman

- or degrading treatment or punishment, freedom from slavery, the right to a fair hearing and the right to habeas corpus are singled out by our Constitution as rights which must never be suspended or restricted during an emergency. Accordingly, the right to a fair hearing under Article 44 (c) is considered a non-derogable right. Having explained in detail what a non-
- derogable right is the question to be answered in issues 3 and 4 is whether the NRM Electoral Commission violated a right to a fair hearing and were in breach of the constitution.

I cautiously studied the affidavit of the Petitioner and noted that he detailed what he found to be erroneous conduct on the part of the NRM Electoral Commission Chairperson and his Commission. He clearly was not satisfied with the manner in which the NRM Electoral Commission conducted the hearing which overturned his election as the NRM Part Flag bearer. However, this being a Constitutional Petition the alleged facts could not be interrogated in the same manner a Court of first instance would do under Article 50. This appeared to be a fact-sensitive matter and which would call for

for both sides to adduce evidence upon which an independent tribunal would, on the preponderance of evidence find fault and award damages or dismiss altogether.

Article 50 of the Constitution stipulates as follows:.

50. Enforcement of rights and freedoms by courts.

- (1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.

The Petitioner claimed that his right to be heard was violated by the Respondents. He prayed for specific redress for the wrongs he had suffered. Given the above facts, he could clearly file a suit in a court of law. In the case of Charled Kabagambe v Uganda Electricity Board Constitutional Petition

No. 2 of 1999 it was held that ... the petitioner alleges that his rights were violated and claims declaration and redress. On the facts available one cannot rule out wrongful dismissal. This is a matter dealt with by specific laws. They can be enforced by a competent court and should a question of

interpretation of the Constitution arises, that question can always be referred to this court.

I found that this Petition raised factual issues regarding the grievance the Petitioner had against the officers of the NRM Electoral Commission. All in all, the facts of this Petition appear to lend themselves to the type of redress envisaged under Article 50. The options available include, but are not necessarily limited to the possibility that this matter could have been heard through judicial review so that the process by which the NRM Electoral commission conducted its hearing could be reviewed by a competent court. 10

In the result, I agree that this matter does not raise a question for interpretation under Article 137 of the Constitution. The Petitioner cannot enforce his right through Constitutional interpretation.

In conclusion I find that this Court has no jurisdiction and the petition and declaration sought cannot be granted by this Court.

The Petition is hereby struck out.

No order is made as to costs.

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Catherine Bamugemereire Justice of the Constitutional Court

**THE REPUBLIC OF UGANDA IN THE CONSTITUTIONAL COURT OF UGANDA AT
KAMPALA CONSTITUTIONAL PETITION NO.37 OF 2015**

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VERSUS

1. NATIONAL RESISTANCE MOVEMENT

2. ATTORNEY GENERAL.....

CORAM: Hon. Mr. Justice Richard Buteera, DCJ Hon. Mr. Justice Kenneth Kakuru, JA/JCC Hon. Lady Justice Catherine Bamugemereire B. K, JA/JCC. Hon. Mr. Justice Christopher Madrama Izama, JA/ICC Hon. Lady Justice Irene Esther Mulyagonja, JA/JCC

JUDGMENT OF JUSTICE KENNETH KAKURU, JA/JCC

I have had the opportunity of reading in draft the Judgment of my learned sister Bamugemereire B. K, JCC. I agree with her that this petition has no merit.

This Court has no jurisdiction to determine it as it raises no questions for Constitutional Interpretation under Article 137 of the Constitution. The questions raised in the petition relate to the internal management of a political party registered under Political Parties Organization Act 2005.

A person aggrieved by acts of any political party or organization, that he or she belongs is at liberty to seek redress from a competent Court of law under the Political Parties Organization Act or any other law. This may be by way of judicial review or any other appropriate procedure. See:- Okori James vs Attorney General and 7 Ors, Constitutional Petition No. 06 of 2020 and Hon. Ssekikubo Theodore and 10 Ors vs National Resistance Movement, Constitutional Petition No. 09 of 2019.

I would on that account alone strike out this petition with no orders as to costs. Having done so, I would decline to adjudicate on the rest of the issues as they have fallen by the way side. They are now moot.

I have nothing else useful to add.

Dated at Kampala this

Marin

Kenneth Kakuru JUSTICE OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA [Coram: Buteera, DCJ; Kakuru, Bamugemereire, Madrama, Mulyagonja; JJA/JJCC] CONSTITUTIONAL PETITION NO. 37 OF 2015

FOX ODOI OYWELOWO

VERSUS

**1. NATIONAL RESISTANCE MOVEMENT 2. ATTORNEY
GENEREAL :::::RESPONDENTS**

JUDGMENT OF RICHARD BUTEERA, DCJ

I have had the benefit of reading in draft the Judgment of my learned sister, Catherine Bamugemereire, JA/JCC and I agree with her that this petition fails and should be struck out for the reasons she has set out in her Judgment. I also concur with the orders she has proposed.

As Kakuru, Madrama and Mulyagonja, JJA/JJCC also agree, this petition is hereby struck out with no orders as to costs.

Dated at Kampala this.....

RICHARD BUTEERA DEPUTY CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

Coram: Buteera, DCJ; Kakuru, Bamugemereire, Madrama & Mulyagonja, JJCC

CONSTITUTIONAL PETITION NO. 0037 OF 2016

FOX ODOI OYWELWO

.....

VERSUS

1. NATIONAL RESISTANCE MOVEMENT :.....RESPONDENTS 2. ATTORNEY GENERAL

JUDGMENT OF IRENE MULYAGONJA, JCC

I have had the benefit of reading in draft the judgment of my learned sister Lady Justice Catherine Bamugemereire. I agree with her finding that the petition did not raise any question as to the interpretation of the Constitution within the meaning of Article 137 (3) (a) of the Constitution.

Having found so, I agree that there was no need to consider the other issues that were raised by the petitioner. The petition therefore ought to be struck out with no order as to costs.

\$27 - 04 - 2021\$

JUSTICE OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA.

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO 0037 OF 2015

FOX ODOI OYWELWO}

VERSUS

- 1. THE NATIONAL RESISTANCE MOVEMENT

Justice of the Constitutional Court

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